

MHACR Commentary

First and Second Quarter 2009

Theodore C. Regnante, Esq.

Paul J. Haverty, Esq.

Regnante Sterio & Osborne LLP

HAC overturns denial of comprehensive permit application for redevelopment of brownfield site

In *Green View Realty, LLC v. Holliston Board of Appeals*, 4 MHACR 1, the Holliston Zoning Board of Appeals denied a comprehensive permit application seeking the construction of two hundred (200) affordable and mixed income condominium units on a fifty-three (53) acre site in Holliston. The primary controversy regarding the site was its status as a brownfield site, the clean-up of which included the removal of “more than three hundred drums containing tar and other contaminants, two hundred thousand tires, construction debris and other solid waste, and seventy tons of contaminated soil[.]” However, the HAC also examined additional issues such as site control and fundability.

The site control issue raised by the Board (which was the subject of two previous rulings issued by the HAC) involved a claim that because there was a DEP lien on the property (in the amount of \$1.75 million), the developer could not establish control of the property pursuant to the requirements of 760 CMR 31.01. The HAC upheld the rulings of the presiding officers by stating that “the purchase and sale agreement clearly contemplates the DEP liens, and is not invalidated by their existence.” The HAC then reiterated its oft-held position that “a valid purchase and sale agreement is sufficient to establish site control.”

In addition to claiming that the DEP liens prevented the developer from showing site control, the Board also claimed that the liens were so large that they rendered the project financially unfeasible, and therefore not fundable. The HAC stated that the issue of financial feasibility is within the jurisdiction of the subsidizing agency, stating “because fundability is a technical administrative matter within the expertise of the subsidizing agency, it is inappropriate for us to hear evidence ‘as to the status of the project before the subsidizing agency.’”

The HAC then examined the substantive issues regarding the environmental concerns raised by the Board in support of its denial. The Board raised concerns regarding the consolidation of the landfill, remediation and groundwater protection. The HAC noted that all of these issues were within the jurisdiction of the DEP, and that because the town did not have any local regulations more stringent than the state regulations under which the DEP would be operating, the concerns raised by the Board were

not properly before the HAC. As the HAC noted, “since these issues will be fully reviewed by state environmental authorities, there is no need for us to consider making an exception to our general rule of not considering unregulated matters.” The position of the HAC with regard to matters which have not been regulated locally is consistent with the text of the statute, which states that regulations are consistent with local needs “if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing.” G. L. c. 40B, § 20.

After reviewing the issues that were not properly before it, the HAC then reviewed the conditions which were properly raised. These issues included wetlands protection (based upon the local wetlands bylaw and regulations), and stormwater management (based upon local board of health stormwater regulations). With regard to the wetlands concerns, the HAC ruled that the developer met its *prima facie* case by indicating that it would comply with state wetlands requirements. The burden was thus shifted to the Board to show that local concerns regarding the wetlands outweighed the regional need for affordable housing. The HAC

held that the Board failed to meet its burden. The same was true for the stormwater concerns raised by the Board, as the HAC noted that the developer’s expert “by and large chose not to respond to the specific allegations, but simply elaborated briefly on the developer’s commitment to complying with state standards.” The HAC accepted this position even though the developer’s stormwater expert acknowledged that changes to the stormwater design would be needed to bring it into compliance

with state standards. In making its decision, the HAC properly acknowledged that the project will have to comply with DEP standards for both wetlands protection and stormwater, therefore compliance with these requirements can be presumed, and can be required by condition (as the HAC did in this case). Once compliance with DEP standards was presumed, the burden shifted to the Board to show local concerns regarding these issues. Although waivers of local requirements were needed, the Board failed to show that the grant of such waivers would cause “harm which might outweigh the regional need for affordable housing.”

In its decision in the *Green View Realty* case, the HAC has simply reaffirmed a position it has consistently taken over the years, that it will not substitute its judgment for that of a state or federal agency with jurisdiction over a particular matter absent a show-

PRACTICE TIP—Developers should take care to ensure that any proposed development has the ability to comply with state and federal environmental requirements, and should be prepared to rebut any claims made by the board (or abutters) that the current plans won’t meet state and federal requirements with evidence that appropriate modifications can be made to satisfy such requirements. It should not be presumed that the HAC will rely upon the later review by the DEP if the developer does not put forth at least some evidence that the plan could be modified to comply with DEP regulations.

ing that there are local rules more restrictive than state or federal rules. While the environmental concerns raised in the *Green View Realty* case are more dramatic than most other cases, in the end the HAC determined that compliance with DEP regulations was properly determined by the DEP, and not the HAC. Therefore, in the absence of local rules more stringent than state requirements, the HAC will rely upon required compliance with state law, and will not infringe upon the jurisdiction of the state agency charged with determining compliance with state law.

HAC quashes subpoena *duces tecum* served on DHCD Chief Counsel

The decision of the HAC in *Chase Developers, Inc. v. Bourne Zoning Bd. of Appeals*, 4 MHACR 15, was a Ruling by the Presiding Officer on a Motion to Quash a subpoena *duces tecum* served upon the Chief Counsel of the Department of Housing and Community Development (the “DHCD”) by the counsel for the Zoning Bourne Board of Appeals. The case involved an interlocutory appeal pursuant to the revised regulations contained at 760 CMR 56.00.

In this case, the Board, acting pursuant to 760 CMR 56.03(8)(a), submitted a notice to the developer that it had determined it qualified for one of the safe harbor provisions (superficially the Housing Production Plan safe harbor) contained in the regulations. Pursuant to the regulations, the developer submitted an interlocutory appeal to the DHCD challenging the Board’s determination that it complied with the safe harbor provision. The Chief Counsel for the DHCD rendered a decision finding that the Board did not comply with the safe harbor requirements. Pursuant to the regulations, the Board filed an appeal with the HAC.

While the Board’s appeal was pending, the Board filed a motion to allow the issuance of a subpoena *duces tecum* upon DHCD Chief Legal Counsel Deborah Goddard, seeking to compel her testimony as a witness in the HAC hearing, and seeking to require her to provide certain documents as part of her testimony. The Board’s motion was opposed by the developer, but Ms. Goddard did not respond. The Presiding Officer then issued the requested subpoena, but noted that “if Ms. Goddard moved to quash the subpoena, the hearing would be suspended pending a determination on the motion.” Ms. Goddard subsequently filed a motion to quash.

In its decision, the HAC noted that the Board sought the testimony of Ms. Goddard “in her ‘decision making capacity’ to question the manner and reasons for the conduct of her decisions.” The HAC then noted that “the determination made at the preliminary review pursuant to [760 CMR] 56.03(8)(a) is not binding on the Committee in this *de novo* appeal and does not

constitute evidence of the underlying facts.” Relying upon the *de novo* nature of its review, the HAC concluded “it would be unreasonable and oppressive to require Ms. Goddard to appear and explain her reasoning.” Thus the HAC held that “it is proper to vacate the subpoena issued to compel Ms. Goddard’s appearance and production of documents.” Because the interlocutory appeal process for safe harbor eligibility is still very new, this decision is helpful, as it clearly sets forth the fact that the review by the HAC of the determination by the DHCD is *de novo*, and that the decision making process undertaken by the DHCD is irrelevant to the determination of the HAC whether or not the safe harbor protection has been achieved.

HAC overturns DHCD determination that town had not complied with safe harbor provision

After determining that the Bourne Zoning Board of Appeals could not compel the testimony of the Chief Counsel of the DHCD, the HAC subsequently issued a decision on the substantive issues in *Chase Developers, Inc. v. Bourne Zoning Bd. of Appeals*, 4 MHACR 17. In this decision, the HAC reviewed the procedural and substantive provisions of 760 CMR 56.03(8)(a), which requires a board to inform an applicant when one of the safe harbor provisions in the regulations has been met, and which

allows the developer to file an interlocutory appeal with the DHCD if it disagrees with the determination of the board. The DHCD is required to issue a decision within thirty (30) days of its receipt of all materials, and such decision may be appealed to the HAC for a *de novo* review.

The developer in this case submitted an application for a comprehensive permit just over one month after the Board had approved a three hundred (300) unit development elsewhere in the town. The Board, following the procedure set forth in 760 CMR 56.03(8)(a), notified the developer that it had received certification from the DHCD that it had achieved planned production safe harbor status.

The developer filed an interlocutory appeal with the DHCD, challenging the certification previously issued on the basis that the 300 unit development would not be able to obtain building permits within the one-year deadline. The DHCD responded by submitting a letter stating that the potential that the other project may not obtain building permits within the one-year period was not sufficient to remove the town from planned production certification.

The developer responded by filing an amendment to its original challenge, this time claiming that it filed its application prior to the date which the DHCD issued its certification of the town’s planned production plan. The Chief Counsel for the DHCD agreed with this argument, and issued a decision stating that at

PRACTICE TIP—While it would make it easier for developers to conduct their due diligence if planned production certification was required to be obtained prior to the submittal of a comprehensive permit application, in truth this decision is not overly onerous. When preparing a comprehensive permit application, developers must first check to see if a municipality has an approved housing production plan, and if so, whether it has obtained certification for such plan. If the town has not obtained certification of its housing production plan, the developer should then research what new affordable units have been created in the previous year. If sufficient units have been created, the developer should presume that the town will take the appropriate steps to have its plan certified, and that the board of appeals will assert a safe harbor defense upon the submission of any comprehensive permit application.

the time the developer filed its comprehensive permit application, the town had not yet submitted a request for certification to the DHCD, nor had the DHCD certified that the town was in compliance with the planned production safe harbor. Accordingly, the Chief Counsel decided that “the ZBA has not met the prerequisite for asserting the HPP safe harbor provided at 760 CMR 56.03(1)(b).

Upon appeal to the HAC, the Board argued that even though certification was issued subsequent to the date of the comprehensive permit filing, the effective date of such certification must be the date on which it reached its “numerical target” for the year. The HAC, after reviewing the relevant portions of the regulation, agreed with the Board.

As noted by the HAC, the provisions of 760 CMR 56.03(4)(f) state that Housing Production Plan certification “shall be deemed effective on the date upon which the municipality achieved its numerical target for the calendar year in question[.]” Because the HAC determined that a submittal for certification relates back to the date the units were approved, the certification can be applied to a comprehensive permit application even if issued after the date of the application, so long as the units were approved prior to the application.

Claim of infectious invalidity rejected by HAC

The most recent decision issued by the HAC is its ruling in *Taylor Cove Development, LLC v. Andover Bd. of Appeals*, 4 MHACR 23 (2009). In the *Taylor Cove* case, the HAC issued a ruling on a motion for summary decision overturning a decision of the Andover Board of Appeals denying a comprehensive permit application filed by the developer. The basis for the Board’s denial was a claim that a portion of the lot constituting the comprehensive permit locus was created by a prior cluster subdivision approval, and therefore could not properly be part of a comprehensive permit project.

As noted by the HAC, the main thrust of the Board’s argument was a claim that the inclusion of one lot of a previously approved cluster subdivision in a comprehensive permit project, would result in the infectious invalidity of the remaining lots in the cluster subdivision. The Board raised this claim even though the lot in question was always identified as a buildable lot, and its proposed inclusion in the comprehensive permit locus would have no impact upon the required open space of the cluster subdivision (which was completely satisfied by a separate open space lot created as part of the cluster subdivision). The HAC reviewed the

case law regarding infectious invalidity, and determined (irrespective of the application of the authority to waive local zoning requirements inherent in Chapter 40B) that the concept of infectious invalidity would not be applicable. The Presiding Officer noted that the further subdivision of the lot in question would have no impact upon the zoning compliance of the remaining lots, and he was unwilling to adopt the “novel idea that a subdivision is an entity distinct from the lots it contains, and can be rendered non-conforming even though the lots in it remain unchanged.”

In addition to finding that the concept of infectious invalidity was inapplicable, the HAC also determined that even if the inclusion of the lot in the comprehensive permit application would

render the remaining lots in the cluster subdivision nonconforming, “public policy as reflected in the Comprehensive Permit Law suggests that an affordable housing developer should be permitted to assemble a parcel in the manner employed here.” The Presiding Officer reasoned that “[a]ll of the legal impediments argued by the Board—whether in the zoning by law, cluster development bylaw, subdivision regulations, or elsewhere—are local requirements and restrictions that may be waived to facilitate the construction of affordable housing.”

The Presiding Officer also addressed the claim made by the Board that the development of the lot in question “would put a cloud on the marketability of the title

of the remaining landowners in the [cluster subdivision].” The Board was essentially arguing that allowing the inclusion of the disputed lot would call into question the zoning status of the remaining lots in the cluster subdivision, thereby creating a cloud on the title of such lots. The Presiding Officer dismissed this claim, noting first that there is no case law that supports a claim that a potential zoning violation creates a cloud on marketability. The Presiding Officer went on to state that the “very action of approving the permit, particularly if in response to this ruling of the Housing Appeals Committee, will establish the legality of the land-use configuration in this location.”

The Presiding Officer noted that his review in this matter was only preliminary, and that his decision “goes only so far as to say that the Board has the power under the Comprehensive Permit Law to approve this development proposal[.]” Because the matter was before the Presiding Officer for a threshold determination of whether the parcel could properly be part of the comprehensive permit application, the matter was remanded back to the Board to complete the hearing on the merits. ■

PRACTICE TIP—Frequently during hearings before local boards of appeal, claims will be raised that a particular comprehensive permit plan is improper because it impacts decisions previously made by other local boards or commissions. The *Taylor Cove* decision emphatically reaffirms that the board of appeals (or on appeal the HAC) has the power to act on behalf of any local board or commission, and that it has the authority to modify or revoke previously issued decisions made pursuant to local rules or regulations. Thus a lot previously identified as not buildable pursuant to a previously issued variance, special permit, subdivision approval, ANR endorsement, or other local approval may be modified as part of a comprehensive permit application. Whether or not it will be modified will be subject, of course, to whether such modification would be consistent with local needs.

Ted Regnante is a magna cum laude graduate of Tufts University and a graduate of Boston College Law School where he was a Presidential Scholar and Editor of the Boston College Commercial and Industrial Law Review. He also served as a Captain in the Judge Advocate General Corps.

Mr. Regnante concentrates his practice in real-estate development and land-use, zoning, wetlands and environmental issues, and in the last five years has been very active in the development of affordable housing under Chapter 40B representing developers throughout the Commonwealth before local zoning boards, the Housing Appeals Committee and the courts. He served as a member of the Department of Housing and Community Development Advisory Committee which was the catalyst for the implementation of revised regulations and procedures at the Housing Appeals Committee which were recently adopted. He has been a lecturer on numerous Chapter 40B seminars sponsored by DHCD, the Real Estate Bar Association, and Massachusetts Continuing Legal Education.