

MHACR Commentary

Third and Fourth Quarter 2009

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HAC upholds the denial of a comprehensive permit for a large apartment complex based upon local planning concerns, despite failure of Town to achieve planned-production safe harbor

In a case that is sure to be of interest to the development community, the HAC recently held that a comprehensive-permit denial could be upheld based upon municipal planning concerns regarding the development of a commercially zoned area in Middleborough, despite the fact that the Town explicitly failed to achieve planned-production protection, and despite the fact that residential housing was an allowed use in the applicable zoning district.

In *28 Clay Street Middleborough, LLC v. Middleborough Zoning Board of Appeals*, 4 MHACR 29 (2009), the Middleborough Board of Appeals denied a comprehensive-permit application seeking the construction of a 250-unit rental project on a 12.5-acre site in Middleborough. The Board claimed as part of a motion for summary decision that its decision should be upheld based upon the safe-harbor provisions contained in 760 CMR 56.03(4) (housing-production plans) and 56.03(5) (recent progress). The HAC found, however, that neither safe-harbor provision applied, because building permits had not issued within one year of a previously approved comprehensive permit, thereby removing such units from the Town's subsidized-housing inventory.

Despite the fact that the Board could not rely upon a safe harbor, it persisted in raising its planning concerns as part of the hearing process. The Board raised three distinct planning concerns, two of which involved traffic planning and were rejected by the HAC. The third concern involved the long-term planning efforts of the Town to develop the area in which the project site is located as an industrial park.

In reviewing the Board's planning claim, the HAC noted its long-time approach to determine whether a Town's master-planning efforts will be considered. First, the HAC looks to see if the

planning efforts are *bona fide* (rather than a ruse to prevent the development of affordable housing). Second, it determines whether the plan (or plans) promote affordable housing, and finally, whether the plan has been implemented in the area of the site. The Board was able to provide ample evidence that the planning efforts were *bona fide*, as the Town had been working on creating an industrial park in the area since at least 1981. The Town did change the zoning in 1982 to create a Development Opportunities District, for the purpose of providing "opportunities for economic expansion." However, parts of the zoning district continued to allow residential housing "including part of the proposed housing site," although the Town did claim to be "concerned about the 'disjointed appearance' of unplanned development." The HAC ultimately found that "although residential uses were not formally excluded, not only were existing residences to be carefully protected from detrimental uses, but, more important, commercial uses were clearly to be favored "and 'co-mingling of residential and industrial uses' was not contemplated." The HAC also reviewed the various planning documents prepared on behalf of the Town, including an Affordable Housing Policy Statement prepared as part of the Town's Master Plan, as

well as the Housing Production Plan the Board attempted to use to obtain safe-harbor status.

After reviewing the Town's planning efforts, the HAC determined that the Town had met the three-step test to have its planning efforts considered as a local concern. The HAC made this determination despite acknowledging that "in most cases we expect to see a complete, fully integrated master plan, and that such a plan has not been adopted in Middleborough." The HAC found that the various planning efforts, taken in conjunction with ongoing attempts to complete an integrated master plan, were sufficient evidence of *bona fide* local planning. The HAC further found that the planning promotes affordable hous-

ing, as the Affordable Housing Plan identifies five "priority areas" in the Town for the development of affordable housing. The HAC also found that actual progress had been made in developing affordable housing in the Town, with at least nine separate permitted developments, five of which had been built at the time

Practice tip: It is always a good idea to review a Town's master plan before filing a comprehensive permit application, particularly if the project is located in a district zoned commercial or industrial. Municipalities are often extremely sensitive to the loss of potential areas of economic development, and the HAC has frequently upheld denials on this basis. This decision also suggests that even if a municipality does not qualify for a regulatory "safe harbor," a municipality's Housing Production Plan should also be closely reviewed. Unfortunately, this decision does inject additional uncertainty into the process of developing affordable housing, as developers will not be able to rely upon the lack of certification of a municipality's Housing Production Plan, nor will they be able to presume that the lack of a cohesive master plan will be sufficient to prevent a municipality from relying upon planning efforts to sustain a comprehensive-permit denial.

of the hearing. Finally, the HAC found that the plan (or in this case plans) had been implemented in the area of the site.

It is the finding of the HAC that the plan had been implemented in the area of the project site that is of great potential concern to the development community. The HAC found that “there is no question that the proposed residential development is inconsistent with the Town’s master planning, which for years has envisioned commercial developments in the area[.]” The HAC went on to find that while “[t]he immediate impact of this development might not be great . . . it would set a precedent. It might well encourage further residential development in the DO District—either by comprehensive permit or as of right, since single family homes are permitted in the underlying Residential A district.” So, from simply reviewing the HAC’s decision (and admittedly without the benefit of hearing the testimony or reviewing the exhibits), it appears that the HAC has allowed a community to declare that a particular area is suitable for either single-family residential development or commercial/industrial development, but not multifamily development. While the Board may have made a convincing case that the Town had a decided preference for commercial/industrial development in this district, it is hard to overlook the fact that the Town has engaged in nearly 30 years of planning and has never seen fit to eliminate single-family housing as an allowed use. Absent the fact that this zoning district allows the development of single-family houses as of right, this case would be unremarkable and essentially indistinguishable from prior HAC decisions upholding comprehensive-permit denials based upon municipal planning concerns. *See, Stuborn Ltd. Partnership v. Barnstable Board of Appeals*, 1 MHACR 665 (2002). Hopefully, this situation will prove to be very unique, where a Town can show strong evidence of planning for a particular use, while still allowing another disfavored use as-of-right, so that it will not result in a significant chill to developers seeking to file comprehensive-permit applications.

HAC overturns the denial of a comprehensive permit for a large condominium development, rejecting planning concerns raised by the Board

In *Hollis Hills, LLC v. Lunenburg Zoning Board of Appeals*, 4 MHACR 41 (2009), the HAC had the opportunity once again to review a claim that a comprehensive-permit denial should be upheld based upon local planning concerns. However, in this instance, unlike in the *Middleborough* case, the HAC determined that the planning concerns raised by the Board did not support the denial of a comprehensive permit.

In this case, Hollis Hills, LLC submitted an application to the Lunenburg Board of Appeals seeking a comprehensive permit for the construction of 146 condominium units on approximately 33.8 acres. Prior to the completion of the hearing process, the Applicant reduced the size of the proposed project to 136 units. The Board denied the comprehensive-permit application, and the Applicant appealed to the HAC. At the HAC, an abutting property owner moved to intervene, citing stormwater runoff, traffic and tree-buffer concerns, and concerns regarding the risk to potential residents of the project from golf balls hit at the driving range owned by the intervenor. The HAC allowed the abutter to intervene regarding stormwater, traffic, and tree-buffer issues.

The Board made the unusual claim that although it did not meet the requirement of having 10 percent of its housing stock deed-restricted as affordable, it still met the 10 percent affordable-housing requirement contained in G.L. c.40B, §20 because of the relatively low cost of market-rate housing in the Town. The HAC rejected this claim, noting that “without the use restriction, there is no guarantee that housing currently priced within the range targeted to income-eligible families will ultimately become occupied by them, or that it will remain affordable.” The HAC further found that “including market-rate housing in the definition of low and moderate income housing would likely dissuade developers from pursuing Chapter 40B projects.”

Having dismissed the Board’s claims regarding the affordability of market-rate housing in Lunenburg, the HAC next looked to issues of local concern. Foremost among those issues was whether concerns regarding local planning efforts could be used to sustain the Board’s denial of the Applicant’s comprehensive-permit application. The HAC once again reviewed its standards for reviewing local planning efforts when no safe-harbor protection is applicable, including the three-part test discussed in the *Middleborough* case above.

The Board looked first at Lunenburg’s planning documents, which consisted of a Master Plan, a Comprehensive Wastewater Management Plan, and an Affordable Housing Strategy approved (but not certified) by the Department of Housing and Community Development. The HAC found that the planning documents were *bona fide* and were adopted prior to the submission of the comprehensive-permit application. Next, the HAC found that the Affordable Housing Strategy promotes the development of affordable housing, as a comprehensive permit had already issued for one site identified on the plan, while a Chapter 40R district was approved for another site. However, the HAC also found that implementation of the Affordable Housing Strat-

Practice tip: While the HAC has set forth the three-part test to determine whether municipal planning efforts will be sufficient to uphold a comprehensive-permit denial, it also appears that another significant issue of concern is whether the proposed project is located in a district calling for a specific non-residential use. In situations such as the *Stuborn* case, where the municipality planned for a specific nonresidential use in the district (or at least where it has indicated a distinct preference for a nonresidential use such as in the *Middleborough* case), a comprehensive-permit denial may be upheld based upon municipal planning concerns. However, where the local planning simply seeks to pigeonhole low- and moderate-income housing into a few discreet locations, without substantial evidence as to why the proposed project would not be appropriate in the location it is proposed, the HAC is very unlikely to uphold a comprehensive-permit denial based upon municipal planning efforts. Developers should therefore pay close attention to municipal planning efforts specific to the district in which the proposed project site is located.

egy must be measured as of the date of the filing of the comprehensive-permit application, at which point very little implementation had occurred.

The HAC continued its review of municipal planning efforts by noting that “the Town has not set aside the area of the site for a particular purpose inconsistent with the project.” This is a crucial finding! In making this finding, the HAC held that “[t]he Board has not demonstrated that the proposal is inconsistent with or would undermine the Town’s master planning.” The Town argued that the proposal was inconsistent with the Town’s sewer master plan, but the HAC found that this claim simply highlighted the fact that the sewer master plan “may act to impede

multifamily housing.” Ultimately, the HAC rejected the Board’s claim that its denial should be upheld based upon local planning concerns.

The Board raised additional issues of local concern in support of its denial, including a claim of infectious invalidity (which was rejected by the HAC for the same reasons it rejected a similar claim in *Taylor Cove Development, LLC v. Andover Board of Appeals*, 4 MHACR 23 (2009), as well as traffic-safety and stormwater-drainage concerns. The HAC held that none of these concerns were sufficient to outweigh the regional need for affordable housing. ■

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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. Mr. Regnante has been a lecturer on numerous Chapter 40B seminars sponsored by DHCD, the Real Estate Bar Association, and Massachusetts Continuing Legal Education.

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