

MHACR Commentary

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Theodore C. Regnante, Esq.

Paul J. Haverty, Esq.

Regnante Sterio & Osborne LLP

Over the past several years there have been numerous issues which have repeatedly been features in the decisions of the Housing Appeals Committee. These trends are important to identify, as they will continue to be of significant importance to the development of affordable housing pursuant to Chapter 40B, until such time as they are definitively addressed, either by a statutory or regulatory change, or by appellate decision from either the Appeals Court or the Supreme Judicial Court.

SUBSIDIZING-AGENCY ISSUES

The biggest issue arising out of the recent HAC case law is the issue of the validity of the New England Fund of the Federal Home Loan Bank of Boston as a project-subsidy source. The HAC first held that the NEF is a valid subsidy source in *Stuborn v. Barnstable Bd. of Appeals*, 1 MHACR 599 (1999). This decision was never accepted by the municipalities, and was frequently challenged in HAC appeals. The Appeals Court finally upheld the validity of the NEF, a decision which was recently upheld by the SJC. *Town of Middleborough v. Housing Appeals Comm.*, 66 Mass. App. Ct. 39 (2006); *Town of Middleborough v. Housing Appeals Comm.*, 449 Mass. 514 (2007). In its decision, the Appeals Court had upheld the ultimate holding of the *Stuborn* case, that the NEF was a valid subsidy source, but had disagreed with the reasoning of the HAC, ultimately calling into question the validity of various other subsidy sources that did not feature a monetary subsidy (such as the Local Initiative Program). The decision of the SJC agreed with the conclusions of the HAC in the *Stuborn* decision, thus eliminating the concerns regarding the validity of other subsidy programs.

Once the *Stuborn* decision opened the door for the NEF to be used as a subsidy source, its popularity led to significant local concerns, mainly due to the lack of oversight. These concerns led to the promulgation of 760 CMR 31.02(g), which requires a Project Administrator to oversee projects funded by a non-governmental agency. However, municipalities, which had become accustomed to questioning programmatic issues such as project finances, as allowed under the *Stuborn* decision, were unwilling to cede their ability to continue to review such issues. The rule prior to *Stuborn* was that Chapter 40B “assign[s] to [the] HAC the duty to determine issues of health, safety and planning in determining whether or not to grant a comprehensive permit, and assigns to the subsidizing agency the job of evaluating costs, estimates, marketability and other economic and financial aspects of the project that bear on its decision, as a banker, to grant or not grant the mortgage (subsidy financing).” *Capital Site Management Assoc. Ltd. Partnership v. Wellesley Board of Appeals*, 1

MHACR 487 (1992). Developers have begun to object to the intrusion by local boards of appeal into the regulatory process, and the HAC has issued rulings limiting the involvement of local boards in the regulatory process. *Groton Residential Gardens, LLC v. Groton Board of Appeals*, 1 MHACR 907 (2006) (“the final terms of the regulatory documents are within the regulatory discretion of MassHousing”); *9 North Walker Street Dev., Inc. v. Rehoboth Board of Appeals*, 1 MHACR 913 (2006) (stating “[t]he Regulatory Agreement, Deed Rider, Monitoring Services Agreement and any related documents shall be reviewed pursuant to the final project approval procedures in 760 CMR 31.09(3), and not by the Board or other town officials or representatives”). This issue is one that remains the subject of great debate, and practitioners should keep a close eye on upcoming HAC decisions for potential resolution.

CONSTRUCTIVE DENIALS

Several recent HAC decisions have tackled the issue of whether a decision of a local board of appeals purporting to grant a comprehensive permit, with conditions, was a *de facto* denial of the comprehensive permit application. The issue of whether a project has been approved with conditions or constructively denied is a very important one, due to the shift of the burden of proof. For an approval with conditions, the burden of proof is initially on the applicant to show that “the conditions make the building or operation of the housing uneconomic.” 760 CMR 31.06(3). However, if the appeal is treated as a constructive denial, “the board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other local concern which supports such denial, and then, that such concern outweighs the regional housing need.” 760 CMR 31.06(6). The importance of this determination is evident in the much litigated case of *9 North Walker Street Dev. Inc. v. Rehoboth Bd. of Appeals (Decision)*, 1 MHACR 690 (2003); *9 North Walker Street Dev. Inc. v. Rehoboth Bd. of Appeals (Decision on Remand)*, 1 MHACR 828 (2005); *9 North Walker Street Dev. Inc. v. Rehoboth Bd. of Appeals (Decision of the Committee on Remand)*, 1 MHACR 913 (2006), where the Rehoboth Board of Appeals issued a decision issuing a comprehensive permit, but reducing the number of units from 37 to 16. The HAC initially upheld the Board’s decision, finding that the project was not rendered uneconomic. However, after the Superior Court overturned the HAC’s decision, and remanded the case back, the HAC was forced to consider whether the Board’s decision rendered the project uneconomic. The HAC examined the lack of local concerns necessitating the reduction, and concluded that the reduction was made arbitrarily and was not related to local needs.

Accordingly, the HAC overturned the decision of the Board, even though the project would still have been economic at 16 units.

As in the *Rehoboth* case, the applicant in *Rising Tide Development, LLC v. Lexington Board of Appeals*, 1 MHACR 818 (2005), sought to have the HAC rule that the Lexington Board of Appeals' decision downsizing the project constituted a *de facto* denial. The reduction the HAC was presented with in this case was much less significant than in the *Rehoboth* case, involving a downsizing from 36 units to 28 units. HAC did not rule on the issue, since it found the burden of proof had shifted to the municipality in any event because the developer had shown the conditions imposed by the zoning board to be uneconomic. In *Paragon Residential Props., LLC v. Brookline Board of Appeals*, 2 MHACR 11 (2007), the HAC denied a motion to treat a decision of the Brookline Board of Appeals as a *de facto* denial where the Board has imposed a condition limiting the size of the structure to eight stories rather than the 12 requested by the applicant. Another HAC case determined that a decision limiting a project to 10 new rental units rather than the 18 requested by the developer did not constitute a *de facto* denial; *8 Grant Street, LLC v. Natick Board of Appeals*, 2 MHACR 5 (2007). While these cases provide no clear standard on when an approval with conditions crosses the line and becomes a *de facto* denial, applicants should be prepared to raise this issue in any appeal of a decision imposing a condition significantly reducing the number of units in a project.

JURISDICTIONAL ISSUES

In order to file a comprehensive permit application, the applicant must meet the jurisdictional requirements set forth in the statute and the regulations, which include showing that the project is fundable by a qualified subsidizing agency, showing that the project is a "limited dividend organization," and showing that the applicant "controls the site." As noted above, the issue of fundability is a significant issue. However, even if an applicant is held to fail to comply with the jurisdictional requirements, it must be given the opportunity to correct the deficiency. *Bay Watch Realty Trust v. Marion Board of Appeals*, 1 MHACR 776 (2004). More often than not, however, the inquiry into the project subsidy will be held to be outside of the legitimate scope of review. *Farmview Affordable Homes, LLC v. Sandwich Board of Appeals*, 1 MHACR 751 (2004). However, in rare circumstances, the HAC will review project-subsidy issues, although such review is limited.

Unlike fundability, the issue of site control is one that the Board may legitimately consider under all circumstances. The issue is frequently raised, although it is seldom successful. *Princeton Development, Inc. v. Bedford Board of Appeals*, 1 MHACR 846 (2005), (holding that "the developer is only required to 'control the site', not to have resolved all questions of access to the site"). The HAC has stated on numerous occasions that the "adjudication of complex title disputes or similar matters between private parties are best left to the expertise of the courts." *Bay Watch Realty Trust v. Marion Board of Appeals*, 1 MHACR 866 (2005). The cases are clear that the HAC will not act beyond the scope of

its authority and issue declarations of rights that are properly determined in the courts. Instead, the HAC has indicated that it will follow the regulations, and simply require the applicant to show that it controls the site.

Recently, the Superior Court issued a decision that if upheld, could have significant impact upon the jurisdiction of the Housing Appeals Committee (as well as the courts) to hear appeals of comprehensive permit decisions. According to the decision of the Superior Court in *Zoning Board of Appeals of Canton v. Housing Appeals Committee*, Superior Court Civ. 2005-01868 (Norfolk, November 10, 2006), the HAC loses jurisdiction to hear comprehensive permit appeals once a municipality exceeds its ten percent (10%) affordable-housing minimum, even if the municipality was not over ten percent (10%) at the time of the board's decision. In doing so, the Superior Court invalidated the provision of 760 CMR 31.04(1)(a), which states that the time for determining consistency with local needs is at the time the board's decision is filed with the town clerk. The decision of the Superior Court in the *Canton* case was expressly rejected by the Suffolk Superior Court in *Taylor v. Housing Appeals Comm.*, Superior Court Civ. 05-2910-B (Suffolk, April 10, 2007), creating a split of Superior Court authority. A more recent Suffolk Superior Court case also disagreed with the holding in the *Canton* case, stating that "this court is persuaded that it should defer to the agency's [the Department of Housing and Community Development] interpretation of the statute." *O.I.B., Corp. v. Housing Appeals Comm.*, Superior Court Civ. 2006-1704 (Suffolk, July 16, 2007). The HAC has stated that until this matter has been addressed by the appellate courts, it intends to continue to follow the provisions of 760 CMR 31.04(1)(a). *Meadowbrook Estates Ventures, LLC v. Amesbury Board of Appeals*, 1 MHACR 917 (2006). This issue may also be impacted by the decision of the Supreme Judicial Court in *Boothroyd v. Zoning Board of Appeals of Amherst*, 449 Mass. 333, 340 (2007), which held that a zoning board of appeals does not lose jurisdiction to grant comprehensive permits even after a municipality has exceeded its ten percent (10%) affordable-housing requirement. The SJC held that "[n]othing in the definition of 'consistent with local needs' in [G. L. c. 40B] § 20, nor in other provisions of the Act, divests a local board of appeals of its authority to grant a comprehensive permit once a municipality satisfies its minimum affordable housing obligation." *Id.* at 340. This decision may provide insight on how the appellate courts will rule on the issue of the jurisdiction of the HAC when a municipality exceeds its minimum affordable-housing obligation after an appeal has been filed with the HAC.

While not strictly a jurisdictional issue, several other HAC cases have addressed the regulatory provisions for determining consistency with local needs. In *114 Sylvan Street, LLC v. Danvers Board of Appeals*, 1 MHACR 680 (2003), the HAC held that the "recent progress" exemption contained in 760 CMR 31.07(1)(d) supported the decision of the board to deny the applicant's comprehensive permit application. Similarly, in *Alexander Estates, LLC v. Billerica Board of Appeals*, 1 MHACR 886 (2006), the HAC held that the "planned production" exemption contained in 760 CMR 31.07(1)(i) required the Committee to uphold a decision of the Billerica Board of Appeals granting a comprehensive

permit with conditions that the applicant believed rendered the project uneconomic. Finally, in *Grandview Realty Inc. v. Lexington Board of Appeals*,¹ MHACR 904 (2006), the HAC held that a decision of the Lexington Board of Appeals denying a comprehensive permit must be upheld based upon the “related application” provisions of 760 CMR 31.07(1)(h). In this case, the property owner had an approved subdivision under appeal, and decided to sell the property rather than wait for the completion of the appellate process. The developer who was purchasing the property went forward on the comprehensive permit application without requiring the property owner to dismiss the subdivision appeal. The HAC held that the “related application” provisions applied, even though the appeal of the subdivision was filed by an abutter challenging the approval of the subdivision. Read in conjunction, these cases indicate that the HAC has taken an expansive view of the municipality-friendly exemptions contained in 760 CMR 31.07. Developers must carefully review these exemptions prior to filing comprehensive permit applications, to ensure that they will not spend tens of thousands of dollars pursuing an approval that the local board will have complete discretion to deny.

Given the recent slowdown of the housing market, another jurisdictional case must be given close scrutiny by developers. In *Forestview Estates Associates, Inc. v. Douglas Board of Appeals*, 2 MHACR 1 (2007), the HAC held that a request for an extension of an expired comprehensive permit was properly denied by the Board. The HAC noted that even though the delay in construction was due to attempts to obtain approvals from the Natural Heritage and Endangered Species Program, such delay did not toll the time for exercising the rights under the comprehensive permit. Developers must take this decision into consideration if additional approvals are required beyond the comprehensive permit (such as approval pursuant to the Wetlands Protection Act, Title V, or other regulatory approvals).

EMERGENCY ACCESS AND CUL-DE-SAC LENGTH LIMITS

Every developer intending to file a comprehensive permit application should be cognizant of the sort of substantive issues that will likely be upheld if used by the municipality as a basis for de-

nying the project. The most important such issue from recent HAC decisions is the issue of adequate emergency access. The HAC has upheld denials of comprehensive permit applications multiple times in the past few years based solely upon claims of inadequate emergency access. *Lexington Woods, LLC v. Waltham Zoning Board of Appeals*, 1 MHACR 799 (2005); *O.I.B. Corp. v. Braintree Board of Appeals*, 1 MHACR 889 (2006). In cases where emergency access has been provided, the HAC has indicated that without such emergency access, the denial of the project likely would have been upheld. *Meadowbrook Estates Ventures, LLC v. Amesbury Board of Appeals*, 1 MHACR 917 (2006). While the HAC has noted that each issue of adequacy of emergency access needs to be determined on a case-by-case basis, a good rule of thumb for developers is to review local cul-de-sac length limitations. If the project proposes a single-access road exceeding the local length limit on cul-de-sacs, the applicant should take whatever steps are necessary to provide a fully engineered emergency-access route.

While municipalities have had success regarding single-access projects, developers have had recent success at the HAC arguing that the board of appeals may take actions normally reserved for the local town meeting. In one case, the HAC ordered the granting of a sight-line easement by the municipal light department to a developer, in order to ensure that the developer’s project would have sufficient sight distance at the intersection of the project driveway and the public way. *Washington Green Dev., LLC v. Groton Board of Appeals*, 1 MHACR 853 (2005). This case was upheld by the Superior Court on appeal.

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Because the Chapter 40B statutory scheme provides limited direction on how the statute is to be implemented, and because the regulations promulgated thereto have not filled in all of the many gaps in the statutory scheme, there continue to be numerous issues that are left to be determined by the HAC. Therefore, every practitioner representing developers of Chapter 40B developments must ensure that they remain up to date with the latest decisions of the HAC. Failure to do so could result in the denial of the developer’s project. ■

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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.