MHACR Commentary

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Theodore C. Regnante, Esq.
Paul J. Haverty, Esq.
Regnante Sterio & Osborne LLP

Failure to timely file request for extension of comprehensive permit proves fatal

In *Forestview Estates Associates, Inc.* v. *Douglas Board of Appeals*, 2 MHACR 1 (2007), the recipient of a comprehensive permit was unable to proceed with construction of the units allowed by the issuance of the comprehensive permit, due mainly to the need to obtain permits from the Natural Heritage and Endangered Species Program. The comprehensive permit did not include a specific expiration date; therefore, pursuant to 780 CMR 31.08(4), the permit expired three years from the date of issuance (on August 28, 2005). The developer filed a request for an extension of the comprehensive permit with the Douglas Board of Appeals on September 9, 2005. The Douglas Board of Appeals denied the request to extend the (expired) comprehensive permit.

On appeal, the HAC first considered the claim of the Board of Appeals that the Committee lacked jurisdiction to hear the appeal. The HAC disagreed with this argument, noting that the provisions of 780 CMR 31.08(4) specifically grant to the HAC the power to "extend any expiration date." The HAC also held that the presiding officer may hear and resolve disputes arising after the grant of a comprehensive permit without consulting the full Committee. The HAC noted that 760 CMR 30.09(5)(b) provides the presiding officer the authority to enforce "decisions of the Committee."

While the HAC ruled against the municipality on the procedural question, the decision upheld the Douglas Board of Appeals' decision to deny the extension requested by the developer. The HAC rejected the argument made by the developer that the time for exercising the rights pursuant to the grant of the comprehensive permit should have been tolled during the time that construction on the project was prevented due to the necessity of obtaining other permits (in this case the permit from Natural Heritage). The HAC held that since the regulations specifically provide for the extension of comprehensive permits, case law pertaining to extension of special permits and variances is not applicable. The HAC ruled that the equitable considerations raised by the developer "do not overcome the clear provision of law in 760 CMR 31.08(4) that a comprehensive permit expires in three years unless extended." The developer in this case did not take steps to extend the comprehensive permit prior to its expiration, and was not allowed to revive the expired comprehensive permit by a late request for an extension of the permit.

It is quite common for developers to be required to undergo significant additional permitting once a comprehensive permit has been issued, including Natural Heritage review, MEPA review, and wetlands approvals from the local conservation commission or the Department of Environmental Protection. Such additional permitting can be very time-consuming, particularly if litigation is required. In order to maintain the validity of a comprehensive permit, the *Forestview* case instructs developers to make sure that they remain cognizant of the expiration date of the comprehensive permit and such appropriate timely extensions if commencement of construction is delayed due to the need to obtain additional permits.

A reduction in density of a proposed rental project from 24 units to 16 units did not constitute a *de facto* denial, but a projected profit between 5.5% and 6% did render the project uneconomic

In *8 Grant Street, LLC* v. *Natick Board of Appeals*, 2 MHACR 5, the HAC once again addressed the subject of whether a condition reducing the density of a project resulted in a *de facto* denial of the project. The issue of whether a reduction in density constitutes a *de facto* denial is significant due to the burden of proof required in appealing an approval with conditions versus an unconditional denial. Pursuant to G. L. c. 40B, § 23, the applicant has the initial burden of proof to show that the conditions imposed by the board render the project uneconomic *before* the HAC considers whether the decision of the board was consistent with local needs. This burden is clearly not necessary in the case of a denial, and in order to avoid this burden, developers frequently seek to establish that approvals with conditions are in fact denials masquerading as approvals with conditions. In the *8 Grant Street* case, the HAC determined that the reduction from 24 units to 16 units did not constitute a *de facto* denial. Accordingly, the developer was required to establish that the conditions issued by the board rendered the project uneconomic.

In reviewing the economic impact of the conditions imposed by the board, the HAC was presented with testimony from the developer establishing both estimated costs and projected sales revenues for the project. The board sought to challenge the projections provided by the developer. In particular, the board challenged the site-acquisition cost submitted by the developer, which was based upon an appraisal of the market value of the site. The Board claimed that the purchase price for the site should have been used, but the HAC held that "[i]t has long been the case that subsidizing agencies have permitted owners to include normal appreciation as part of the 'acquisition value' or 'acquisition cost[.]'" The HAC stated that "the figure that is properly

used in the *pro forma* is the appraised 'as-is' market value, that is, the fair market value of the site excluding any value relating to the possible issuance of a comprehensive permit."

After examining the testimony submitted by the parties, the HAC, using the Return On Total Cost (ROTC) method of determining profit, concluded that the profit for the project as approved by the board would be between 5.5% and 6%. The developer argued that any return less than 10% would render the project uneconomic. While noting that acceptable rate of return is a factual issue to be determined on a case-by-case basis, the HAC determined, consistent with previous decisions on rental projects, that the minimum acceptable rate of return for the project was 7.5%. Therefore, the project was found to be uneconomic.

Once the burden shifted to the board to show that its decision was consistent with local needs, the board noted concerns regarding open space, lack of recreation areas and play areas, and insufficient landscape buffering in support of its decision. The HAC found that none of the purported issues of local concern raised by the board were significant enough to outweigh the regional need for affordable housing. The HAC thus issued a decision ordering the board to approve the 24-unit apartment project initially proposed by the developer.

Failure to timely act upon a request for project change will result in a constructive approval of the request

In two recent decisions issued on the same day, the HAC addressed the issue of whether the failure to act upon a request to modify a previously issued comprehensive permit within the time period prescribed by the regulations resulted in a constructive approval. In both instances, the HAC determined that the failure to act within the timeframe provided in 760 CMR 31.03 resulted in the constructive approval of the request for the modification.

In *Rosewood Realty Trust* v. *Mansfield Board of Appeals*, 2 MHACR 34 (2007), the developer submitted a request for a modification of a previously issued comprehensive permit, seeking to remove a condition in the comprehensive permit prohibiting the conversion of the units in the project (which were permitted as apartment units) to condominium units. The developer submitted its request to the Mansfield Board of Appeals on December 9, 2005. The Board of Appeals denied the request by issuing a written decision dated March 7, 2006. On appeal, the HAC noted that the Board of Appeals did not issue its decision within the 20-day period prescribed by 760 CMR 31.03(a). The HAC also found that the remedy for failure to act within the 20-day time period is the constructive grant of the modification requested by the developer. The HAC further found that the constructive grant of the modification was nondiscretionary.

In *Maritime Housing Fund, LLC* v. *Medway Board of Appeals*, 2 MHACR 37 (2007), the HAC was again faced with a claim that a request for a modification of a previously granted comprehensive permit was not acted upon within the 20-day period required by 760 CMR 31.03(a). However, in this instance, the developer did not immediately appeal the Medway Board of Appeals' failure to act. The developer in this case sought to amend a comprehensive permit to allow the construction of an additional 30 units, of which eight were to be affordable units. The Medway Board of Appeals did not act within the 20-day time period, but the developer did not immediately appeal to the HAC, instead waiting for the Board to issue its decision. The Board issued a decision approving the additional units requested by the developer, but included a condition requiring that 25 of the units be designated as affordable units. On appeal, the HAC held that the developer was not required to file its appeal within 20 days of the Board's failure to act, stating: "[w]hen after the passage of forty days . . . the Board had not yet rendered its decision, any prudent developer might well choose not to assert its claim of a constructive grant in the hope of still receiving a late, but favorable decision from the Board." The HAC thus held that the appeal filed by the developer was timely filed, and that the requested modification of the comprehensive permit had been constructively granted.

The *Rosewood* and *Maritime* cases illustrate the need for both boards of appeals and developers to be aware of the time limits contained in both Chapter 40B and the regulations promulgated thereunder. Furthermore, the *Maritime* case suggests that a developer may wait until after the board of appeals has acted upon a project-change request before asserting its rights to a constructive approval of that request. Thus the developer and the municipality are not subjected to the unnecessary expense of litigation at the HAC unless the board of appeals ultimately fails to grant the developer's requested project change.

HAC reiterates long-standing standard for determining whether insufficient municipal services can justify a comprehensive-permit denial

The HAC, in *Oceanside Village, LLC* v. *Scituate Zoning Board of Appeals*, 2 MHACR 49 (2007), has occasion once again to set forth the standard a municipality must meet in order to sustain a denial of a comprehensive permit due to insufficient municipal services. While the decision of the board of appeals in this case had actually approved the issuance of a comprehensive permit with conditions, the HAC ruled that the conditions imposed by the board, which included a reduction in density from 250 units to 150 units, resulted in a *de facto* denial of the comprehensive permit. The board was then required to establish the existence of local concerns sufficient to outweigh the regional need for affordable housing.

The board of appeals made several claims regarding the project, including density and open-space claims, that were rejected by the HAC. Additionally, the board claimed that the height of the proposed structure exceeded local height restrictions. The HAC held that "we find that the Board has not established a local concern with respect to the height of the proposed garden apartments that outweighs the need for affordable housing."

The HAC also examined the board's claims that the project should be rejected due to the inadequacy of municipal services. Specifically, the board claimed that both the municipal water and sewer services were inadequate to serve the project. The HAC, citing 760 CMR 31.06(8), noted that in order to use insufficient

municipal services as the basis for denying a comprehensive permit, the municipality must show that "due to unusual practical circumstances the installation of adequate services is not technically or financially feasible." This is a difficult burden for a municipality to meet; in fact, the HAC noted that in only one previous case was a municipality able to meet its burden regarding the adequacy of municipal services. In this case the board was also unable to meet its burden. However, the HAC did reiterate that "[w]hat may properly be required of the developer is that it provide limited off-site water or sewer services or mitigate specific problems if necessitated by the new development itself."

Denial of developer's request to tie into municipal sewer system upheld by HAC

In *Avalon Cohasset, Inc.* v. *Cohasset Zoning Board of Appeals*, 2 MHACR 65 (2007), the HAC upheld a decision of the Cohasset Board of Appeals denying a request for project changes submitted by the developer pursuant to 760 CMR 31.03 seeking to amend the comprehensive permit to allow a connection to the municipal sewer system. The HAC noted that the burden of proof was on the developer to show that the failure to grant the requested modification would render the project uneconomic. In this case, the developer had the burden of proving that the project would be economic with the sewer connection, but would not be economic without it. In this case, the Cohasset Board of Appeals did not disagree that the project would be uneconomic as originally approved (with the on-site wastewater treatment plant). Instead, the Board argued that the project would be uneconomic even if the sewer connection had been granted. The Board also argued that any condition imposed upon an already uneconomic project must be allowed to stand. The HAC rejected this notion, but stated that "we rule that to sustain its burden the developer is required to establish not only that [Return on Total Cost] for the development is uneconomic, but also that the ROTC for that development is significantly *more* uneconomic than the development it proposes to build." After reviewing the project costs for the development both with and without the sewer connection, the HAC determined that the failure to allow the sewer connection did not make the development significantly more uneconomic. Accordingly, the decision of the Cohasset Board of Appeals was upheld.

The decision of the HAC in the *Avalon Cohasset* case seems to apply only in those instances where there is a claim that the project as originally approved should be considered uneconomic; it does not appear to be applicable where the original project is agreed to be economic. However, since most disputed project-change requests are made because the project as approved turned out to be uneconomic, this application of the *Avalon Cohasset* ruling is significant.

Return on Total Cost for homeownership project of 14.5% held to be uneconomic

In *Webster Street Green, LLC* v. *Needham Board of Appeals*, 2 MHACR 86 (2007), the HAC reviewed a decision of the Needham Board of Appeals granting a comprehensive permit which eliminated two units from a proposed 10-unit home-ownership project. The developer appealed to the HAC, which reviewed the financial projections presented by both the developer and the board. After its review, the HAC determined that the projected profit for the project would be 14.5 percent, slightly under the 15 percent benchmark contained in the "Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to M.G.L. Chapter 40B" (Massachusetts Housing Partnership and Netter, Edith M., November 2005) (the MHP Guidelines). The experts for both the developer and the board testified with reference to the MHP Guidelines. As the HAC noted in its decision, the MHP Guidelines state that "[a] for-sale project should be considered uneconomic if the Return on Total Cost is less than 15%." The HAC applied this benchmark literally, ruling that a project having a projected ROTC of 14.5 percent is uneconomic.

This decision by the HAC is very significant for developers, as it indicates that a developer may rely upon the 15 percent benchmark contained in the MHP Guidelines as a bright-line standard, and any project falling below that threshold will likely be considered to be uneconomic by the HAC.

HAC issued important decision on programmatic details of Chapter 40B.

The issue of the proper role of local boards of appeal in issues such as cost certification, monitoring, and other programmatic issues regarding comprehensive permits is currently an issue of great contention. In *Attitash Views, LLC* v. *Amesbury Zoning Board of Appeals*, 2 MHACR 91 (2007)[1], the HAC had occasion to address some of these significant issues.

The developer did not base its appeal on the claim that the substantive conditions imposed in the Board's decision rendered the project uneconomic; rather, the developer argued that the Board had included numerous conditions (at least 30 separate conditions were challenged) which were beyond the authority of the Board to impose. Several of the challenged conditions constituted an attempt by the Amesbury Board of Appeals to insert itself into the regulatory and cost-certification role normally undertaken by the subsidizing agency. The Department of Housing and Community Development submitted a brief supporting the developer's position with regard to these programmatic issues. MassHousing chose not to participate as an interested person, but instead directed the attention of the HAC to an *amicus* brief it filed in another case, which also supported the developer's position.

The Board claimed that the appeal filed by the developer was not valid, because it did not assert that any substantive conditions imposed by the Board rendered the project uneconomic. The HAC rejected the Board's argument that the developer was required to show that the conditions imposed by the Board, even if

1. The authors' firm represented the developer in this matter.

in excess of the Board's authority, rendered the project uneconomic. Instead, the HAC noted that it has "been a matter of routine for this Committee not only to review conditions imposed by local boards of appeals to ensure that they are consistent with the law, but also to remove from consideration matters improperly raised by the Board."

The HAC then reviewed the list of disputed conditions, the most significant of which included conditions purporting to dictate to the monitoring agent (in this case MassHousing) the specific details of the Deed Rider, Monitoring Agreement, and Regulatory Agreement, conditions seeking to set the standards for determining profit limitation, and conditions relating to the marketing and monitoring of the project. Regarding all of these conditions, the HAC definitively stated that these provisions were within the discretion of the subsidizing agency, therefore the conditions purporting to usurp or diminish the authority of the subsidizing agency were stricken.

Because the issue of the monitoring of comprehensive permit projects continues to be the single most controversial aspect of Chapter 40B, the clarification of the proper role of local boards of appeal (and of municipalities in general) with regard to this subject is of great importance to the development community. As was the case in the *Attitash* appeal, the developer is frequently caught between the regulatory and monitoring requirements of the subsidizing agencies and the desire of the municipalities to assert greater control over the Chapter 40B process. The *Attitash* case brings much-needed clarification to the proper role of each party in a comprehensive-permit project.

HAC denies Motion to Dismiss based upon claim that municipality had exceeded its 10 percent affordable-housing requirement

In *Woodbridge Crossing, Inc.* v. *Stoughton Board of Appeals*, 2 MHACR 97 (2007), the HAC denied a Motion to Dismiss filed by the Stoughton Board of Appeals. The basis for the Board's motion was the claim that the DHCD had certified that the town of Stoughton had exceeded its 10 percent affordable-housing minimum required by Chapter 40B. The municipality had previously issued a comprehensive permit to a different development, placing the town over the magic 10-percent mark. However, the developer appealed the comprehensive permit to the Superior Court, thereby preventing the units from being counted on the Subsidized Housing Inventory pursuant to 760 CMR 31.04(a) (which counts units allowed pursuant to the grant of a comprehensive permit only when such permit has become final) and 760 CMR 31.08(4) (which states that a comprehensive permit does not become final until the last appeal is decided or disposed of). The Town petitioned the DHCD for relief, and the DHCD responded by issuing a letter indicating that the provision requiring the comprehensive permit to become final was waived, thereby allowing the units to be immediately counted. The applicant of the competing project subsequently filed a Motion to Dismiss the complaint filed by the developer, but this Motion was denied by the Norfolk Superior Court. In its decision, the Court found that the developer's status as a competing development, coupled with the action of the Board in using the other application as a means of denying the developer's application, bestowed upon the developer aggrieved-person status. Accordingly, the Motion to Dismiss was denied.

After reviewing the decision of the Superior Court, the HAC noted that the issue of whether the actions of the DHCD in waiving the requirements of 760 CMR 31.04(1)(a) and 760 CMR 31.08(4) were proper remains pending in the Superior Court. The HAC stated that "since this legal question is already pending in the Superior Court, it should be resolved there." The HAC further determined that until the Superior Court has rendered its decision on the matter, dismissal of the HAC appeal would not be proper.

Comprehensive-permit filing fee ruled excessive

In a case that featured a host of significant issues that have been addressed in numerous other cases, including building design, roadway access, and adequacy of municipal services, the HAC also had opportunity to rule on an issue that, although significant, has not been previously addressed: the propriety of the comprehensive-permit application fee charged by the municipality. In *Lever Development, LLC* v. *West Boylston Zoning Board of Appeals*, 2 MHACR 99 (2007), the developer challenged the filing fee charged by the West Boylston Board of Appeals for the comprehensive permit application, which totaled $12,900. The HAC examined the filing fees for special permits and variances in West Boylston, which was $350, including the fee charged to a 118-unit non-subsidized housing project. The HAC held that the filing fee charged by the Board was not reasonable, and that "the differential in filing fees for Lever and market rate projects constitutes unequal treatment." The HAC thus ordered a refund to the developer of $12,550, equaling the excess filing fees above the standard $350 fee for non-subsidized developments. The *Lever* case may prove to have great significance, as our experience is that many municipalities are charging exorbitant comprehensive-permit application fees which now may be the subject of challenges by developers. In order to ensure that they are not required to pay fees in excess of what may be properly charged to a comprehensive-permit application, the developer must ensure that any fees it deems exorbitant be identified and objected to at the time payment is remitted, in order to preserve its right to challenge such fees in a subsequent proceeding at the HAC. ■