

MHACR Commentary

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Theodore C. Regnante, Esq.

Paul J. Haverty, Esq.

Regnante Sterio & Osborne LLP

Denial of request to eliminate age-restriction condition overturned by HAC

In *511 Washington Street, LLC v. Hanover Board of Appeals*, 3 MHACR 1 (2008), a developer had obtained a comprehensive permit from the Hanover Board of Appeals that contained a condition, imposed at the suggestion of the developer, restricting the units to households with at least one person over the age of 55. When construction was complete, the developer filed a notice of project change seeking to lift the age-restriction. The Board of Appeals denied the request, claiming the developer should not be able to have the age-restriction removed because it had been his own proposal, not a condition imposed by the Board. The HAC, noting that changed circumstances are common during the period of time between the issuance of a comprehensive permit and the beginning of construction, stated that “our regulations clearly permit the developer to petition for changes without regard to whether the permit conditions or design parameters were imposed by the Board, negotiated, or proposed by the developer.” The HAC also reviewed the issue of whether mistakes made by the developer were at least partly responsible for its difficulties in renting the units. While the HAC found that the developer was partly responsible for its own predicament, it went on to state that “the purpose of the Comprehensive Permit Law is not to guarantee an economic return to the developer.” However, the HAC then stated that “where there is no allegation of fraud or other misconduct, neither should a developer be prevented from making a change in a development that has become uneconomic unless the Board has established that there are countervailing local concerns.”

After determining that the developer had the right to request the removal of the age-restriction condition, the HAC then reviewed whether the decision of the Board denying the request to eliminate the condition rendered the project uneconomic. After conducting its analysis of the project finances, the HAC determined that the refusal to remove the age-restriction rendered the project uneconomic. Because the Board had also failed to introduce sufficient evidence of local concerns to support of the retention of the age restriction even though it rendered the project uneconomic, the HAC ultimately overturned the decision of the Board and issued a decision removing the age restriction from the project.

Developer successfully challenges presumption of accuracy of DHCD’s Subsidized Housing Inventory

In *South Center Realty, LLC v. Bellingham Zoning Board of Appeals*, 3 MHACR 10 (2008), the Bellingham Board of Appeals

had denied a comprehensive permit application in reliance upon the Subsidized Housing Inventory (“SHI”) maintained by the Department of Housing and Community Development (“DHCD”). The developer appealed the Board’s decision to the HAC, challenging the inclusion of certain units on the SHI.

The Board argued that the HAC lacked jurisdiction to hear the developer’s appeal because the town had exceeded its 10-percent affordable-housing requirement. The HAC rejected this claim, noting that SHI figures enjoy a presumption of accuracy but that parties have the right to rebut that presumption. The HAC’s position has since been buttressed by the SJC in *Town of Hingham v. Department of Housing and Community Development*, 451 Mass. 501, 506 (2008). The HAC then examined which party had the burden of proof regarding the issue of whether the town had met its 10-percent affordable-housing requirement. The HAC held that the Board had the burden of proof, as it was the party that filed the Motion to Dismiss.

The HAC rejected an argument made by the developer to include in its calculations the number of year-round housing units built since the 2000 Census. The HAC stated that its regulations (which reflect the statutory language of G.L. c.40B, s.20) require that “[t]he total number of housing units shall be that total number of units enumerated for the city or town in the *latest* available United States Census.” (Emphasis added in HAC decision.) The HAC then conducted an extensive review of the inclusion of 36 CDBG units on Bellingham’s SHI, and held that these units were improperly included because they were not subject to a use restriction limiting the use of the units to low or moderate income persons. As a result, the HAC denied the Board’s Motion to Dismiss.

Conditions relating to issues within the exclusive jurisdiction of the subsidizing agency stricken by HAC

Once again the HAC has addressed the propriety of conditions imposed by a Board of Appeals seeking to infringe upon the limited-dividend oversight that the HAC has stated is within the exclusive jurisdiction of the subsidizing agency. In *Whitcomb Ridge, LLC v. Boxborough Board of Appeals*, 3 MHACR 6 (2008), the HAC again stated unequivocally that “issues ‘such as the financing arrangements, the profit projections, the developer’s qualifications, and marketability’ are solely within the province of the subsidizing agency.” *Whitcomb Ridge*, 3 MHACR at 8 (quoting *Attitash Views, LLC v. Board of Appeals of Amesbury*, 2 MHACR 91 (2007)). Because the HAC determined that many of the conditions imposed by the Boxborough

Board of Appeals in this case impermissibly infringed upon the authority of the subsidizing agency, the decision of the Board imposing such conditions was overturned.

In this case, the developer objected to the conditions imposed by the Board only to the extent that such conditions prevented it from obtaining final approval from the subsidizing agency and/or project administrator. The developer argued that the inability to obtain final approval conclusively rendered the project uneconomic. However, the HAC held that a review of the economic impact of the inability to obtain final approval was not necessary, since “the requirement that the developer prove that the conditions imposed render the project uneconomic is not applicable since the challenge is to the legality of the conditions.” It will likely be argued by municipalities that this determination is invalid based upon the recent decision of the Supreme Judicial Court in *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581 (2008). In the *Woburn* case, the SJC held that the HAC does not have the authority to treat an approval with conditions as a constructive denial. *Id.* at 590. Unfortunately, in making its determination regarding this discrete issue, the SJC employed broad language, holding that “the Committee is empowered to ‘order [the] board to modify or remove . . . [a] condition or requirement’ only when the board’s decision ‘makes the building or operation of such housing uneconomic and is not consistent with local needs.’” *Id.* at 593 (emphasis in original). However, the SJC was not faced in the *Woburn* case with a circumstance in which the Board had imposed conditions clearly beyond its authority to impose, so it is not clear that the language from this decision will be applicable to illegal conditions that do not render a project uneconomic. Until this issue is clarified, the HAC should consider addressing the economic issues in all cases where Boards have improperly sought to infringe upon the regulatory authority of the subsidizing agencies. It would also help if the DHCD would promulgate a regulation clearly articulating that conditions resulting in the developer’s inability to obtain final approval create an irrebuttable presumption that the conditions render the project uneconomic.

HAC dismisses developers’ late-filed appeals

Two recent cases decided by the HAC strongly illustrate the need for comprehensive-permit applicants to ensure that appeals of comprehensive-permit decisions are timely filed. In *Natick Hunter’s Hill, LLC v. Natick Board of Appeals*, 3 MHACR 22 (2008), the HAC dismissed an appeal filed by a developer 21 days after the decision of the Board was filed with the town clerk. The developer did not deny missing the 20-day filing deadline contained in G.L. c.40B, §22, but claimed that the HAC had the authority to waive this requirement. The HAC disagreed, noting that while it has the authority to waive its own regulations in proper circumstances, it does not have the power to waive statutory requirements. Additionally, the HAC noted that the developer failed to meet the requirement of establishing substantial hardship that would have been applicable if a regulatory waiver could have been granted. Accordingly, the decision of the Natick Board of Appeals was upheld.

The HAC also granted a motion to dismiss in a similar set of circumstances in *Triangle Land Development Corp., Inc. v. Northbridge Zoning Board of Appeals*, 3 MHACR 36 (2008). In the *Triangle Land* case, the Board of Appeals closed its hearing on June 7, held a deliberative session on July 10 (for which the developer claimed it did not receive notice), and filed its decision with the town clerk on July 11. The developer filed its appeal on August 31, well after the expiration of the 20-day appeal period. The developer claimed that the reason its appeal was not timely filed was because it had not received proper notice of the Board’s decision (even though its engineer had received an e-mail notification the day after the decision was issued. The HAC relied upon 760 CMR 56.06(4)(g), which states that “[a]n appeal shall be taken within 20 days after the written decision of the Board has been filed in the office of the city or town clerk,” in support of its position that there is no requirement that the developer be notified of the issuance of the Board’s decision. Furthermore, the HAC held that the Board was not required to provide notice of the deliberative session to the developer, since the public hearing had been closed at that point of the proceedings.

The developer in the *Triangle Land* case clearly should have filed its appeal sooner, as G.L. c.40B, §21 requires the decision of the Board to be filed within 40 days after the close of the hearing. Thus, knowing the date of the close of the hearing, the developer had the burden of counting the 40 days the Board had to file its decision, and if it believed it did not file within that timeframe, it had the obligation to appeal within 20 days of the expiration of that time, pursuant to G.L. c.40B, §22. The developer did not file its appeal until more than 80 days after the close of the hearing, clearly outside a reasonable timeframe. However, the HAC’s decision could place developers in a difficult position in circumstances where a Board files its decision well within the 40-day statutory requirement, without giving notice to the developer. In such a situation, a developer might easily review the town clerk’s file at the end of the 40-day time-period, only to find that a decision issued much earlier and its 20-day appeal period has already expired. Hopefully, the DHCD can rectify this potential injustice through regulations requiring Boards to give notice to applicants upon the filing of comprehensive-permit decisions.

Density and massing concerns raised by Swampscott Board of Appeals not sufficient to support comprehensive-permit denial

In *100 Burrill Street, LLC v. Swampscott Zoning Board of Appeals*, 3 MHACR 39 (2008), the HAC overturned the Swampscott Board of Appeals’ denial of a comprehensive-permit application seeking to construct 12 condominium units on a quarter-acre site. In support of its denial, the Board had asserted several claims, including that the density and massing of the proposed three-and-one-half-story structure, which was proposed at a height of 47 feet at its highest element, posed a serious health and safety hazard. The HAC held that the applicant had met its *prima facie* case in showing that the building height, massing, and density did not pose a health and safety risk. The HAC then noted that the Board had provided only conclusory evidence regarding the purported harms that would be attributable to the

building size and massing, pointing out that the Board’s witness “provided little in the way of comparative dimensions or volumes, few generally accepted design standards, and no graphic illustrations to elucidate his testimony.” The HAC’s decision makes clear that a Board of Appeals seeking to deny a comprehensive-permit application based upon the height, massing, or density of a proposed building should make sure it can illustrate actual, significant health and safety concerns regarding the structure beyond merely claiming that it is out of character with the neighborhood. As the HAC stated in a footnote, “it is not enough to simply refer to the level of density in the abstract, but rather there must be proof with regard to the impact of the development on particular ‘factors’ in the surrounding neighborhood or the community at large.”

The HAC also reviewed traffic-safety and fire-safety concerns raised by the Board, ultimately concluding that these concerns, while legitimate, were not “sufficient evidence to prove the proposed development will create a hazard significant enough to outweigh the regional need for affordable housing.” Accordingly, the Board’s denial of the developer’s application was reversed.

Conclusion

The decisions issued by the HAC this quarter illustrate the Commission’s continued commitment to ensure that municipalities do not constrain the development of affordable housing by placing unreasonable burdens unrelated to local needs upon the development of such housing. Thus the HAC overturned a decision refusing to eliminate an age restriction (*511 Washington Street*), a decision seeking to impose conditions outside the authority of the Board to impose (*Whitcomb Ridge*), and a decision denying a comprehensive permit based upon density and massing concerns (*100 Burrill Street*). While the HAC also issued a decision affirming its jurisdiction to determine whether a municipality has reached its 10-percent affordable-housing requirement (*South Center Realty, LLC*), it also issued two decisions dismissing late-filed appeals (*Natick Hunters Hill, LLC*, and *Triangle Land Development Corp., Inc.*), affirming that the HAC will stringently follow the requirements of the statute, whether they benefit or harm the developer. ■

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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.