

*MHACR Commentary**Third and Fourth Quarter 2008**Theodore C. Regnante, Esq.**Paul J. Haverty, Esq.***Regnante Sterio & Osborne LLP****Board's challenge to project fundability fails, project denial overturned by HAC**

In *Brierneck Realty, LLC v. Gloucester Zoning Board of Appeals*, 3 MHACR 51 (2008), the Gloucester ZBA denied a comprehensive-permit application seeking the construction of 12 condominium units in a single structure across from Good Harbor Beach in Gloucester. The Board based its denial, in part, upon a claim that the project was not fundable because of state and/or federal rules regarding work within floodplains that would have prohibited funding for the project. The Applicant argued that the project was indeed fundable, and that the Board had failed to meet its burden of showing that valid health, safety, environmental, design, open-space, or other local concerns outweighed the regional need for affordable housing.

The HAC reviewed the fundability claims raised by the Board, ultimately ruling that these claims were not valid. First, the HAC reviewed a claim by the Board that MassHousing was prohibited from providing funding pursuant to its Housing Starts Program because of a purported violation with Executive Order No. 149 (regarding state funding of projects located within floodplain). The HAC reviewed the Executive Order cited by the Board and determined that it does not prohibit funding for the proposed project. Furthermore, the HAC noted that even if the Executive Order cited by the Board did bar any state funding of projects located in a floodplain, the Applicant has provided evidence that the site in question was not located within a FEMA–designated floodplain (although the site had previously been so designated).

In addition to the claim regarding the Housing Starts funding, the Board also claimed that the project could not be funded under any federal program (such as the New England Fund Program overseen by the Federal Home Loan Bank of Boston) because the project site is located within a Coastal Barrier Resource System. The Applicant argued that the Federal Home Loan Bank of Boston was not subject to the Coastal Barrier provisions, but the HAC ruled that since it had determined that the project was fundable under the Housing Starts Program, it did not need to rule on the federal-funding issue.

Once the HAC had determined that the project was fundable under a state subsidy program, it then turned its attention to the local concerns raised by the Board in support of the denial of the Applicant's proposal. The Board claimed that the construction of the project posed a significant health and safety concern due to the potential for flooding. The HAC found that the Board had not proven that the project site was located within a floodplain

(pointing out that FEMA determined that the site was not located within a floodplain). The HAC then made the specific finding that “there is no local concern with regard to on-site flooding that outweighs the need for affordable housing.”

After determining that no on-site flooding concerns supported the Board's denial, the HAC then reviewed the off-site flooding concerns raised by the Board relating to emergency access. The HAC noted that while the Board pointed to local street-flooding issues that it suggested could impact the ability of emergency vehicles to access the project site, the City had allowed the recent construction of several single-family houses in the area. The HAC found that the permission granted to allow the construction of the single-family homes undermines the claim that emergency access to this area of the City was inadequate.

The HAC also addressed stormwater concerns raised by the Board, notably pointing out the fact that the City had no locally adopted stormwater requirements exceeding the state standards contained in the Department of Environmental Protection's Stormwater Management Policy. The HAC stated that the DEP had already confirmed the compliance of the project with applicable stormwater standards, via the issuance of a Superseding Order of Conditions. The HAC went on to state that “where no local requirement forms the basis for the Board's dispute with the proposal, the matter may be resolved by the imposition of a condition mandating compliance with state requirements.”

In addition to the health and safety concerns it raised, the Board also argued that its denial should be upheld because the project was not consistent with local planning efforts. The HAC reviewed the City's Economic Development Plan according to its long-held standard for reviewing consistency with municipal plans. The HAC reviewed first whether the plan being relied upon was “bona fide” (whether it is a functioning planning tool in the municipality), then whether the plan “promote[s] affordable housing” and, finally, whether the plan has “been implemented in the area of the site.” After a thorough review of the municipal plan and the City's efforts to implement the plan, the HAC ruled that “[w]e find that the Board has not demonstrated that the proposal is inconsistent with or would undermine the plan.” Accordingly, the HAC ruled that “[w]e therefore conclude that the Board has not demonstrated a valid local concern with regard to the city's plan that outweighs the need for affordable housing.”

This case again demonstrates the difficult if not nearly impossible evidentiary burden a community faces under the statute in de-

nying a project. The HAC stated that “[t]he municipality’s failure to meet statutory minimum housing obligation will provide compelling evidence that the regional need for housing does in fact outweigh the objection to the proposal.” Since the burden of

proof shifts to the developer where the Board issues an approval with conditions, a community is better served in taking that approach in its attempt to gain greater control over a Ch.40B project. ■

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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.