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

**HAC upholds denial of requested modification, but clarifies that comprehensive permit projects may be modified even after the affordability period has expired.**

In a case featuring unusual circumstances, the HAC has upheld a denial of a requested modification of a comprehensive permit, finding the modification constituted a "substantial change", and that the proposed change could not make the project more economic. The unusual circumstances of *VIF II/JMC Riverview Commons Investment Partners, LLC* v. *Andover Bd. of Appeals*, 8 MHACR 1, was that the 220 unit rental project that was the subject of the comprehensive permit no longer contained any affordable units. The project affordability had been set in the original comprehensive permit for a period of fifteen years after the initial occupancy of the project. At the time of the requested modification, no affordable units remained in the project. Thus, the first question the HAC was faced with was whether it had jurisdiction to hear an appeal of a requested modification for a project which was no longer subject to an affordability restriction.

The HAC began its analysis by examining its authority to review appeals of requests for modification made pursuant to 760 CMR 56.05(11). The HAC noted its long history of reviewing such appeals, before finding that "the Committee has the authority to resolve a post-permit dispute involving a proposed project change." Next, the HAC reviewed the decision in *Zoning Bd. of Appeals of Wellesley* v. *Ardemore Apts. Limited Partnership*, 436 Mass. 811 (2002), which addresses the issue of expiration of affordability restrictions. The HAC noted that the *Ardemore* case stands for the proposition that even when the term of an affordability restriction expires, the project must remain affordable in perpetuity as long as the project does not comply with zoning, unless the comprehensive permit specifically allows a lesser term of affordability. The HAC observed that the comprehensive permit in this case specifically provided for a term of affordability only for as "long as such units remain subject to and have the advantage of the housing subsidy programs providing financial assistance under the Act." Thus the HAC found that since the project was no longer subject to the subsidy program, the affordability requirement had expired under the terms of the comprehensive permit.

Having determined that the project was not subject to the affordability restriction, the HAC then examined whether the comprehensive permit remains valid once the affordability requirement has expired. The HAC stated that it sees "no basis in the statutory scheme to infer that a comprehensive permit becomes null and void when a project outlives a single, time-limited condition, which by its express terms expires after a set period of time." Accordingly, the HAC found that the comprehensive permit was still valid, even without the continued benefit of the affordability restriction. Because the HAC found that the permit was still valid, it also found that it had jurisdiction to hear the Applicant's appeal of the Board's denial.

Turning to the merits of the requested modification, the HAC determined that the requested change (which sought to add two additional parking garages, reducing the overall number of parking spaces) constituted a "substantial change" pursuant to 760 CMR 56.05(11). The HAC noted that it applies a different standard for determining whether a proposed change is "substantial" depending on whether the project remains in the hearing process, where such determination only influences whether the matter will be remanded back to the board for further proceedings, or whether it is a post-construction modification. The HAC noted that it "generally has not approved post-construction changes as 'insubstantial' except in the unusual circumstance of when the local board has missed the regulatory deadlines for responding to the applicant." As a result, the HAC found that the proposed modification in this matter was "substantial", even though it would not create or exacerbate "any adverse impact on the neighborhood." The HAC noted that the proposed modification would increase the lot coverage and intensity of the use of the site, and that such impacts "are significant enough to conclude that the proposed parking modifications constitute a substantial change to the original project."

**Practice Tip**: This case shows that a comprehensive permit remains valid and enforceable even after an affordability restriction expires pursuant to the express terms of the comprehensive permit. However, this case also cautions owners of any completed comprehensive permit project (irrespective of whether the affordability restriction is in place or not) seeking a modification of such project to appeal a denial of such modification only if it can show that the denial renders the project uneconomic. This case makes it clear that the HAC is not likely to find requested modifications of completed and occupied projects to constitute an insubstantial change.

The HAC found that once a determination has been made that the modification is substantial, typically the next step would be to determine whether the denial of the modification renders the project uneconomic. However, in this instance, where the apartment complex has long-since been constructed and occupied, the applicant did not bother to introduce any evidence regarding project economics. The HAC pointed out that "[t]his approach may be unavoidable, since it would be difficult to convincingly argue

that an existing apartment community, constructed long ago and profitably leased for many years, is made uneconomic by the absence of a new parking amenity." The HAC thus determined that because the owner had not met its initial burden of showing that the denial rendered the project uneconomic, the decision of the Board was consistent with local needs.

**Sewer connection and sewer privilege fee schedule adopted after a comprehensive permit is filed is held by HAC to be inapplicable.**

A recent decision of the HAC had a lot riding on it for the Town of Lunenburg, which was seeking to impose upon a 136 unit condominium development sewer privilege fees totaling $1,571,000, and sewer connection fees of $238,150. Unfortunately for the Town, the HAC found in *Hollis Hills, LLC* v. *Lunenburg Zoning Bd. of Appeals*, 8 MHACR 10, that the applicable sewer privilege fees and sewer connection fees the Board sought to impose were not adopted until after the Applicant filed its comprehensive permit application.

**Practice tip**: The developer in this case was able to reduce the sewer privilege and connection fees from a total of $1,809,150 down to $17,000. This decision emphasizes the need for an applicant to make sure it ascertains all applicable rules, regulations and fees in place at the time of its comprehensive permit application, as these are the only fees which may be imposed the project.

The HAC noted that the Applicant filed its application for its comprehensive permit on February 13, 2006. The sewer assessment bylaw in effect in Lunenburg at that time did not specify a privilege fee for properties. Testimony was given during the hearing which stated that the Town adopted its betterment assessment of $11,551 per unit on June 24, 2008. Further evidence was introduced to show that a "Sewer Assessment By-law" was enacted by the Town on May 5, 2007. There was also evidence introduced regarding an earlier, undated version of the Sewer Assessment By-law, which the Board claimed had been adopted as a regulation as early as 2001. However, the HAC noted that there was no evidence introduced indicating that the Sewer Assessment By-law was properly promulgated as a regulation pursuant to the requirements of G. L. c. 83, § 10. The HAC found that the earlier version of the Sewer Assessment By-law (containing the betterment/privilege fees) was at best a policy, and thus not enforceable as a regulation, consistent with the holding of *Fieldstone Meadows Dev. Corp.* v. *Conservation Com'n of Andover*, 62 Mass. App. Ct. 265 (2004). Furthermore, the HAC noted that even if the Sewer Assessment By-law had been adopted as a policy (a presumption which it did not credit), it had not been applied consistently to other projects in Lunenburg. Because the Board could not show that the betterment/privilege fees were in place prior to the filing of the comprehensive permit application, the Board was not permitted to impose the $1,571,000 sewer privilege fee.

**Practice tip**: From a developer's perspective, these cases stand for the proposition that the HAC may actually sign plans and issue building permits, if it is demonstrated that the municipality has refused to take such actions even after all appeal routes have been exhausted. It is unlikely that the HAC will have the occasion to exercise this power very often, as it is quite rare for municipal opposition to a comprehensive permit project to extend as far as it has done in the Middleborough case.

The HAC also reviewed the fees for the sewer connection, finding that the applicable fee schedule was the one in place on May 7, 2005, which required a sewer permit fee of $125 per unit for multi-family projects. In its decision, the HAC noted that while the Lunenburg Board of Selectmen, acting as the Lunenburg Sewer Commissioners, had voted to amend "the Sewer Connection Charge Policy of the Lunenburg Sewer District" to increase the sewer connection fee to a minimum of $1,760, plus $550 for each bedroom beyond three bedrooms. The Board argued that the while the Sewer Use Regulations did not specify the $1,760 connection fee until December, 2008, the Sewer Commission was allowed by the regulation to impose charges and fees beyond the $125 connection fee. The HAC stated that since this testimony was "contradicted by the text of the Sewer Use Regulations, we accord this testimony no weight."

Because the Sewer Assessment By-law was not adopted prior to the filing of the comprehensive permit application, the HAC found that the Board could not impose a sewer privilege fee, and that the sewer connection fee could only set at $125 per unit (for a total fee of $17,000).

**HAC steps in for recalcitrant board and endorses plans for recording**

In two related decisions, the HAC was pressed by a developer to take the extraordinary measure of endorsing plans so they may be recorded at the appropriate registry of deeds, and also to issue building permits for the project. In *Delphic Associates, LLC* v. *Middleborough Zoning Bd. of Appeals* 8 MHACR 17, the HAC stated that "this is the first time in the forty-three-year history of the Comprehensive Permit Law that the developer, after unsuccessful negotiations with local officials and appearances before the local board of appeals, has applied to the Committee asking it to actually endorse plans for recording and issue building permits." The matter was referred to the full Committee, to confirm the authority of the Presiding Officer to act on the developer's request. The HAC ruled that "in this matter, and similar enforcement matters that may arise in the future, the presiding officer has full authority, without further consultation with the full Committee, to issue such orders, take such actions, and execute such documents on behalf of the Committee and any and all local officials as may be necessary to enforce the decision of the Committee."

Subsequently, in *Delphic Associates, LLC* v. *Middleborough Zoning Bd. of Appeals* 8 MHACR 18, the Presiding Officer issued a Supplemental Enforcement Order and Endorsement for Registry Recording. This ruling reviews 760 CMR 56.007(6)(b) and (d), noting that "if a party fails to comply with an order is-

sued by the Committee, it may impose sanctions[.]" Thus, the Presiding Officer stated that he would require the developer to submit the plans for endorsement, and then he would require the developer to submit "construction documents and other documentation in preparation for issuance of building permits and other necessary permits." ■

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