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VIF II/JMC Riverview Commons Investment Partners, LLC v. Andover Zoning Board of Appeals (Decision On Cross Motions for Summary Decision), 8 MHACR 1 (2013)

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In This Issue

LANDLAW LEGAL PUBLISHERS

Cumulative Decisions Reported–January-December 2013

Alphabetical Listing by Plaintiff

Cumulative Decisions Reported–January-December 2013

Alphabetical Listing by Defendant

Cumulative Decisions Reported–January-December 2013

Alphabetical Listing by Municipality

Cumulative Subject Matter Digests–January-December 2013

Appeals to HAC

Authority to Act

– Enforcement Appeal

Agency and Board Approvals

Acting as Presiding Officer, HAC Chairman Werner Lohe issued enforcement orders to directly implement the Committee's decision approving a comprehensive permit for a Middleborough residential project after being faced with a ZBA that refused to follow HAC's enforcement orders. The decision requires the Developer to submit a comprehensive permit plan to the Committee in a form suitable for registry recording. In addition, the Presiding Officer required the developer to submit construction documents and other local documentation in preparation for the issuance by the Committee of building and other necessary permits. *Delphic Associates, LLC* v. *Middleborough Zoning Board of Appeals*, 8 MHACR 18 (2013).

Building Permit

HAC ruled that its Presiding Officer has full authority, without further consultation with the full Committee, to issue enforcement orders; this would include the endorsing of plans for recording and issuing building permits. *Delphic Associates, LLC* v. *Middleborough Zoning Board of Appeals*, 8 MHACR 17 (2013).

– Scope of Review

Constitutional and Jurisdictional Issues

HAC would not have jurisdiction to resolve the Hanover ZBA's claim that the Developer lacked site control because of easement issues since HAC cannot resolve title disputes and the Developer had shown at least a colorable claim to title. *Hanover Woods, LLC* v. *Hanover Zoning Board of Appeals*, 8 MHACR 30 (2013)

Chairman Werner Lohe ruled that HAC continued to have jurisdiction over a 1988 Andover rental-apartment project whose affordability restrictions had expired in 2005. *VIF II/JMC Riverview Commons Investment Partners, LLC* v. *Andover Zoning Board of Appeals*, 8 MHACR 1 (2013).

Permit Modification

Where a developer sought to convert a 2011 for-sale project (previously issued a comprehensive permit) to a denser rental project, HAC found the proposal respresented a wholly new project and the developer would not have to prove that the denial of the project changes would have rendered the original project uneconomic. *Hanover Woods, LLC* v. *Hanover Zoning Board of Appeals*, 8 MHACR 30 (2013)

Chairman Werner Lohe held that two proposed parking garages for this now market-rate rental-unit development would constitute a "substantial" project change requiring ZBA review under Chapter 40B. The changes proposed would increase lot coverage by 26.7%, introduce a new building type, reduce open space, and decrease the number of parking spaces. *VIF II/JMC Riverview Commons Investment Partners, LLC* v. *Andover Zoning Board of Appeals*, 8 MHACR 1 (2013).

Water/Sewer Connection Fees

HAC rejected a sewer-connection fee of $1,760 per unit for a 136-unit project that also imposed extra charges for units with more than three bedrooms, where the fee policy relied on was in conflict with the Town's own connection regulations and failed to meet the *Castle Estates* standard for regulatory specificity. *Hollis Hills, LLC* v. *Lunenburg Zoning Board of Appeals*, 8 MHACR 10 (2013).

A sewer-assessment "bylaw" that was not even found to constitute a policy could not validly underpin extravagant per unit sewer fees without any evidence that this "bylaw" was ever validly enacted by the Town of Lunenburg pursuant to statutory requirements. *Hollis Hills, LLC* v. *Lunenburg Zoning Board of Appeals*, 8 MHACR 10 (2013).

Practice and Procedure

– Jurisdiction

Without clear guidance in the statute, the regulations, or the case law, Chairman Werner Lohe ruled that HAC continued to have jurisdiction over a 1988 Andover rental-apartment project whose affordability restrictions had expired in 2005, finding that the comprehensive permit was still effective. *VIF II/JMC Riverview Commons Investment Partners, LLC* v. *Andover Zoning Board of Appeals*, 8 MHACR 1 (2013).

HAC declined to treat the legal status of a Chapter 40B project whose affordability restrictions had expired by analogy to the zoning treatment of nonconforming uses, where the Committee has no jurisdiction to interpret the Zoning Act. *VIF II/JMC Riverview Commons Investment Partners, LLC* v. *Andover Zoning Board of Appeals*, 8 MHACR 1 (2013).

– Oral Argument

The Committee declined a request by the Town of Middleborough to hear oral argument relating to an interlocutory appeal, noting that it relies on the discretion of the Presiding Officer to bring matters to its attention when consideration by the Full Committee is warranted. *Delphic Associates, LLC* v. *Middleborough Zoning Board of Appeals*, 8 MHACR 17 (2013).

– Plan Changes

Project changes requested by a Kingston developer that reduced density from 40 to 20 units but redesigned the project from attached two-family dwellings to single-family units, along with different wastewater systems and driveway designs, would require a remand to the ZBA because the changes were substantial. *One Baker Avenue, LLC* v. *Kingston Zoning Board of Appeals*, 8 MHACR 38 (2013).

Chairman Werner Lohe held that two proposed parking garages for this now market-rate rental-unit development would constitute a "substantial" project change requiring ZBA review under Chapter 40B. The changes proposed would increase lot coverage by 26.7%, introduce a new building type, reduce open space, and decrease the number of parking spaces. *VIF II/JMC Riverview Commons Investment Partners, LLC* v. *Andover Zoning Board of Appeals*, 8 MHACR 1 (2013).

– Presiding Officer

HAC ruled that its Presiding Officer has full authority without further consultation with the full Committee to issue enforcement orders, giving due deference to local procedures. This authority would extend to issuing building permits and signing enforcement orders. *Delphic Associates, LLC* v. *Middleborough Zoning Board of Appeals*, 8 MHACR 17 (2013).

– Remanded Cases

Remands by HAC to Board

Project changes requested by a Kingston developer that reduced density from 40 to 20 units but redesigned the project from attached two-family dwellings to single-family units, along with different wastewater systems and driveway designs, would require a remand to the ZBA because the changes were substantial. *One Baker Avenue, LLC* v. *Kingston Zoning Board of Appeals*, 8 MHACR 38 (2013).

Regulations

– Validity

HAC rejected a sewer-connection fee of $1,760 per unit for a 136-unit project that also imposed extra charges for units with more than three bedrooms, where the fee policy relied on was in conflict with the Town's own connection regulations and failed to meet the *Castle Estates* standard for regulatory specificity. *Hollis Hills, LLC* v. *Lunenburg Zoning Board of Appeals*, 8 MHACR 10 (2013).

Compliance with Other Laws

MEPA

A Developer would not have to show compliance with MEPA prior to receiving a comprehensive permit where HAC regulations specify that a Committee decision may issue before the issuance of a final MEPA certificate. *Hanover Woods, LLC* v. *Hanover Zoning Board of Appeals*, 8 MHACR 30 (2013)

Conditions Making Project Uneconomic

Appealability and Review

While the developer of a Hanover project that had been transformed from a "for-sale" project to a denser rental project would not need to show that the denial of the plan changes would render the first project uneconomic, the developer had in fact done so with evidence that was wholly uncontraverted by the ZBA. *Hanover Woods, LLC* v. *Hanover Zoning Board of Appeals*, 8 MHACR 30 (2013)

Specific Conditions

– Sewer Connection

HAC voided $1,809,150 in sewer-connection and privilege fees imposed by the Town of Lunenburg on a 136-unit project after finding that none of the fees were underpinned by validly adopted sewer regulations. It did allow the Town to levy a $125 per unit fee based on 2005 regulations validly in force as of the date the comprehensive-permit application was filed. *Hollis Hills, LLC* v. *Lunenburg Zoning Board of Appeals*, 8 MHACR 10 (2013).

Unequally Applied Requirements

– Sewer Connection Limitations

HAC found that the Town of Lunenburg had unevenly applied sewer-privilege fees when seeking to exact fees from all of the units in a 136-unit affordable-housing project, having previously only charged fees on 45 of 240 units in a market-rate development. *Hollis Hills, LLC* v. *Lunenburg Zoning Board of Appeals*, 8 MHACR 10 (2013).

Local Needs Consistency Determination

Test II - Local Needs Balancing

– Planning Factors

Economic Development

The planning interest in economic development asserted as a justification for denying a 248-unit apartment rental project did not outweigh the need for regional-housing production where the ZBA had argued that the locus under development was vital for economic development and tax revenue. *Hanover Woods, LLC* v. *Hanover Zoning Board of Appeals*, 8 MHACR 30 (2013)

Undermining the ZBA's argument that a Hanover locus should not be used for housing but was critical for a "hoped-for" hotel and conference center was the fact that no infrastructure improvements had yet been made to facilitate the center and that the project remained a hypothetical one. In fact, HAC accused the Town of wanting to "set aside land for speculative commercial uses that may or may not someday be proposed." *Hanover Woods, LLC* v. *Hanover Zoning Board of Appeals*, 8 MHACR 30 (2013)

Ruling that the need for regional housing overwhelmed Hanover's local planning concerns, HAC pointed out that the Town had not yet implemented some of the more important reforms called for in its Housing Production Plan, that it was still a community essentially zoned for large-lot single-family homes, and that it fell short of the 10% goal set out in the Comprehensive Permit Law. *Hanover Woods, LLC* v. *Hanover Zoning Board of Appeals*, 8 MHACR 30 (2013)

A 248-unit rerntal-apartment project was improperly denied a comprehensive permit on the grounds that a commercial or industrial project would generate 400-800 new jobs because the value and spccificity of those potential jobs was hard to quantify and the notion that such a business would necessarily locate to the parcel in question was speculative. *Hanover R.S. Limited Partnership* v. *Andover Zoning Board of Appeals,* 8 MHACR 21 (2013).

Local Land Use

Andover's claim that a multifamily project on land zoned for industrial and commercial use would conflict with existing commercial uses was found to be speculative and lacking specificity. *Hanover R.S. Limited Partnership* v. *Andover Zoning Board of Appeals,* 8 MHACR 21 (2013).

Master Plan

The Hanover ZBA established that the Town's 2008 Master Plan and Housing Production Plan together were *bona fide* and had been implemented in a way to contribute a significant number of new housing units. *Hanover Woods, LLC* v. *Hanover Zoning Board of Appeals*, 8 MHACR 30 (2013)

Although master planning had a lengthy history of professionalism and support for multifamily housing, the vast majority of the Town was zoned for single-family uses and multifamily projects are permitted by right nowhere in Andover. *Hanover R.S. Limited Partnership* v. *Andover Zoning Board of Appeals,* 8 MHACR 21 (2013).

Andover's municipal master-planning concerns were not sufficient to override the regional need for affordable housing, although HAC took note of the "moderate" quality of its master-planning activities and the fact that the Town had generally implemented its master plan. *Hanover R.S. Limited Partnership* v. *Andover Zoning Board of Appeals,* 8 MHACR 21 (2013).

Tax-Related Impacts

The Andover ZBA's claim that a 248-unit multifamily rental-housing project would negatively impact municipal tax revenues was rejected by HAC in finding that the evidence submitted as to commercial tax revenues was inconclusive and difficult to quantify because the Town also provided tax benefits to businesses. *Hanover R.S. Limited Partnership* v. *Andover Zoning Board of Appeals,* 8 MHACR 21 (2013).

– Zoning Requirements

HAC found speculative an intervener's argument that a multifamily project would render his lot nonconforming and exposed to the common-law concept of "infectious invalidity" since the intervener's lot was already fully built out and issues relating to the potential redevelopment of the site could hardly trump the need for regional housing. *Hanover R.S. Limited Partnership* v. *Andover Zoning Board of Appeals,* 8 MHACR 21 (2013).

Permit Eligibility

Property Interest/Site Control

HAC would not have jurisdiction to resolve the Hanover ZBA's claim that the Developer lacked site control because of easement issues since HAC cannot resolve title disputes and the Developer had shown at least a colorable claim to title. *Hanover Woods, LLC* v. *Hanover Zoning Board of Appeals*, 8 MHACR 30 (2013).

Permit Modification

Generally

Chairman Werner Lohe held that two proposed parking garages for this now market-rate rental-unit development would constitute a "substantial" project change requiring ZBA review under Chapter 40B. The changes proposed would increase lot coverage by 26.7%, introduce a new building type, reduce open space, and decrease the number of parking spaces. *VIF II/JMC Riverview Commons Investment Partners, LLC* v. *Andover Zoning Board of Appeals*, 8 MHACR 1 (2013).

VIF II/JMC RIVERVIEW COMMONS INVESTMENT PARTNERS, LLC

v.

ANDOVER ZONING BOARD OF APPEALS

No. 12-02

February 27, 2013
Werner Lohe, Chairman

Jonathan M. Cosco, Counsel and Hearing Officer

Appeals to HAC
Authority to Act
Scope of Review
— Constitutional and Jurisdictional Issues
Practice and Procedure
Jurisdiction

Permit Modification
Generally

Project Modification-Substantial Changes-Expiration of Affordability Restrictions-Committee Jurisdiction Over 40B Projects Following Expiration of Affordability Requirements—Chairman Werner Lohe ruled that HAC continued to have jurisdiction over a 1988 Andover rental-apartment project whose affordability restrictions had expired in 2005, and that two proposed parking garages for this now market-rate development would constitute a "substantial" project change requiring ZBA review under Chapter 40B.

DECISION ON CROSS MOTIONS FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

The Appellant VIF II/JMC Riverview Commons Investment Partners, LLC is the owner of 220 rental apartments and appurtenant improvements located off River Road in an industrial subdivision. The apartment community is known generally as "Andover Place." On February 12, 2012, the owner of Andover Place submitted a Notice of Project Change to the Andover Zoning Board of Appeals, requesting permission to modify the original project by constructing two new, single-story parking garages within the original project's existing paved parking area. In the course of public meetings on the Notice of Project Change, the Board determined that the proposed parking modifications constitute a "substantial" change to the original project. The Board then conducted a public hearing, at the conclusion of which it denied the owner's application. The owner preserved its right to appeal the Board's preliminary determination that the parking modifications are a "substantial" change, and now asks this Committee to find that the proposed change is not, in fact, substantial.

The parties have submitted a Joint Statement of Facts and related exhibits ("Joint Statement") in support of cross motions for summary decision. In its motion for summary decision, the Board has asserted that this Committee has no jurisdiction to hear the owner's appeal. It has argued in the alternative that the proposed parking modifications are "substantial" changes that were properly denied. For the reasons set forth below, this Committee concludes that (1) the record shows no genuine issue as to any material fact; (2) the Committee has jurisdiction to hear this appeal; (3) the proposed parking modifications are a substantial change to the original project; and (4) the Board's decision to deny the parking modifications was lawful and consistent with local needs.

II. FACTUAL OVERVIEW

The relevant facts in this case are set forth in the Joint Statement. These include the following undisputed facts:

1. The original project consists of 220 rental apartment units and 352 paved parking spaces, together with appurtenant landscaping, utilities and related improvements.

2. The original project was constructed in 1988 pursuant to a comprehensive permit dated August 4, 1987, as amended by Settlement Agreement between the owner and the Board dated December 17, 1987.

3. For the first fifteen years after initial occupancy of the project, twenty-five percent of the units at Andover Place were rented to tenants at or below 80% of the area median income. In 2005 and 2006, pursuant to the terms of the comprehensive permit and applicable subsidy agreements, the affordability requirement for the project expired, and the units originally designated as affordable were rented at market rates. Currently there are no affordable units at Andover Place.

4. On February 3, 2012 the owner filed with the Board a Notice of Project Change describing and seeking permission for the proposed parking modifications. The parking modifications include the construction of two one-story parking garages with a total footprint of approximately 10,442 square feet. The changes proposed by the owner will reduce the total number of parking spaces on site from 352 spaces (all exterior surface spaces) to 340 total spaces (304 surface spaces and 36 garage spaces).

5. The Board convened, and the owner attended, public meetings on the Notice of Project Change on February 15 and February 27, 2012.

6. At its February 27 meeting, the Board determined the proposed parking changes to be "substantial" and opened a public hearing on the Notice of Project Change.

7. The owner elected to continue with the local proceedings before the Board while timely reserving its right to object to the Board's determination that the proposed changes are "substantial."

8. The owner attended the Board's public hearing sessions on April 5 and May 3, 2012. During the public hearing, the Board suggested that the owner offer to restrict some of the units in the project as affordable units. The owner declined to do so.

9. By written decision dated June 14, 2012 and filed with the town clerk on that same date, the Board denied the owner's request for permission to make the proposed parking modifications.

III. JURISDICTION

A. The Committee's Jurisdiction to Resolve Post-Permit Disputes

The dispute in this case involves a proposal to modify a housing project that was constructed and first occupied more than twenty years ago—long after the issuance of the original comprehensive permit. As a preliminary matter, we address the Committee's jurisdiction to hear and resolve disputes between a developer and a local board arising after the original issuance of a comprehensive permit. We then consider the Board's argument that the Committee lacks jurisdiction to hear this appeal or grant the relief requested by the appellant because the project no longer includes any affordable units.

In any analysis of the Committee's jurisdiction, we start, as we must, with the express language of the statute. The Committee's subject matter jurisdiction, like that of all administrative agencies, is "both conferred and limited by statute." *Town of Middleborough* v. *Housing Appeals Comm.*, 449 Mass. 514, 521 (2007) (quoting *Edgar* v. *Edgar*, 403 Mass. 616, 619 (1988)). The Comprehensive Permit Law expressly authorizes the Committee to review a decision of a local board of appeals to deny or condition a comprehensive permit. G.L. c. 40B, § 22. Where the local zoning board has denied the permit, the Committee's task is to determine if the board's decision was "consistent with local needs." G.L. c. 40B, § 23. In the case of an approval with disputed conditions, the Committee must determine whether the conditions make the project "uneconomic." *Id.* The Act authorizes the Committee to "vacate" the local decision, "direct" the local board to issue a permit, and "order [the] board modify or remove" conditions. *Id.* Pursuant to these statutory provisions, there can be no doubt that the Committee has express statutory authority to issue comprehensive permits in the first instance.

The Comprehensive Permit Law does not say whether, or to what extent, the Committee may resolve disputes arising *after* a comprehensive permit has been issued. However, the regulations implementing the Comprehensive Permit Law have long recognized the Committee's authority to hear and resolve disputes pertaining to project changes proposed after the issuance of a comprehensive permit by a local board of appeals. *See* 760 CMR 56.05(11) (current appeal process applicable to project changes); *see also* 760 CMR 31.03(3) (superseded regulations governing the Committee's review of project changes proposed after the issuance of the comprehensive permit) (effective from 1986 to 2008); Rules and Regulations of the Housing Appeals Committee, § 17.02 (same) (effective June 1974 to 1986). The Committee has, in some cases, exercised this authority to resolve disputes about project changes even after initial construction of a project has been completed. *See, e.g.*, *511 Washington Street, LLC* v. *Hanover Zoning Bd. of Appeals*, No. 06-05 (Mass. Housing Appeals Comm. Jan. 22, 2008) (allowing post-construction removal of permit condition restricting occupancy to tenants at least 55 years old, where market conditions caused the age-restricted project to become uneconomic), *aff'd Board of Appeals of the Town of Hanover* v. *Housing Appeals Comm.*, 2009 WL 867124 (Mass. Land Ct. Apr. 2, 2009); *Rosewood Realty Trust* v. *Mansfield Bd. of Appeals*, No. 06-03 [2 MHACR 34] (Mass. Housing Appeals Comm. Apr. 25, 2007) (allowing developer to convert rental units to condominium units after construction was substantially complete).

This view of the scope of the Committee's authority is consistent with bedrock principles of statutory interpretation and administrative law. First among these principles is that "[a] statute must be interpreted in such a way as to effectuate the legislative intent underlying its enactment." *Entergy Nuclear Generation Co.* v. *Department of Envtl. Protection*, 459 Mass. 319, 329 (2011) (citing *Water Dep't of Fairhaven* v. *Department of Envtl. Protection*, 455 Mass. 740, 744 (2010)). Moreover, the scope of an administrative agency's authority includes both "the powers and duties expressly conferred upon it by statute and such as are reasonably necessary to carry out its mission." *Entergy Nuclear*, 459 Mass. at 331 (quoting *Morey* v. *Martha's Vineyard Comm'n*, 409 Mass. 813, 818 (1991)). As a result, an agency's authority to act in furtherance of statutory goals can, and often does, extend beyond the powers expressly mentioned in the statute; broader agency authority is implied when reasonably necessary to give effect to the overall legislative intent. *See, e.g.*, *Entergy Nuclear*, 459 Mass. at 328-32 (holding that the state Department of Environmental Protection has implied authority to regulate the industrial intake or withdrawal of water, even though the authorizing statute regulates the discharge of pollutants and does not mention water withdrawals).

The Supreme Judicial Court has consistently applied these principles in affirming the Committee's interpretation of various ambiguous provisions in the Comprehensive Permit Law. *See, e.g.*, *Hanover* v. *Housing Appeals Comm.,* 363 Mass. 339, 346-55 (1973) (upholding the Committee's interpretation of the Act as permitting it to override local zoning requirements, even though such authority is not expressly stated in the Act); *Zoning Bd. of Appeals of Wellesley* v. *Housing Appeals Comm.,* 385 Mass 651, 654 (1982) (affirming the Committee's decision that a project with some market-rate units can qualify for a comprehensive permit); *Middleborough*, 449 Mass. at 523 (2007) (upholding the Committee's decision that funding through the New England Fund program of the Federal Home Loan Bank of Boston is a valid subsidy under the Act); *Zoning Bd. of Appeals of Lunenburg* v. *Housing Appeals Comm.*, 464 Mass. 38, 44-48 (2013) (deferring to the Committee's definition of the pertinent "region" by which to measure the regional need for low and moderate income housing). In so doing, the Court has acknowledged, many times, the Committee's wide latitude to interpret and enforce of the Act in a manner consistent with the overall legislative intent to "streamline and accelerate the permitting process ... in order to meet the pressing need for affordable housing." *Middleborough*, 449 Mass. at 521 (internal quotations omitted). The Court has made it clear that a broad reading of the Act by the Committee is especially appropriate given the Act's remedial purpose: "'[w]here the focus of a statutory enactment is

reform,' as is true of [the Comprehensive Permit Law], … 'the administrative agency charged with its implementation should construe it broadly so as to further the goals of such reform.'" *Middleborough*, 449 Mass. at 524 (quoting *Massachusetts Fed'n of Teachers, AFT, AFL-CIO* v. *Board of Educ.*, 436 Mass. 763, 774 (2002)).

The Comprehensive Permit Law's mandate to facilitate the construction of affordable housing, coupled with the Committee's express statutory authority to issue a comprehensive permit in the first instance, clearly and necessarily implies the authority of the Committee to modify a comprehensive permit, if necessary, to permit a project change that is consistent with local needs. Disputes over project changes are fairly common, and the prompt resolution of such disputes is necessary to achieve the intent of the Act. The Act's implementing regulations establish a process for the Committee to resolve this kind of dispute in an expedited fashion. *See* 760 CMR 56.05(11) (procedures for seeking local approval of an "insubstantial" project change after issuance of a comprehensive permit includes a right of appeal to the Committee); *see also* 760 CMR 31.03(3)(c)-(d) (similar but superseded procedures for Committee review of post-permit changes). The Committee has from time to time exercised that authority in cases like this one, where project changes are proposed after construction has been completed. *See, e.g.*, *511 Washington Street, LLC* v. *Hanover Zoning Bd. of Appeals*, No. 06-05 (Mass. Housing Appeals Comm. Jan. 22, 2008) (allowing removal of age restriction where market conditions caused the project to become uneconomic), *aff'd Board of Appeals of the Town of Hanover* v. *Housing Appeals Comm.*, 2009 WL 867124 (Mass. Land Ct. Apr. 2, 2009); *Rosewood Realty Trust* v. *Mansfield Bd. of Appeals*, No. 06-03 (Mass. Housing Appeals Comm. Apr. 25, 2007) (allowing post-construction conversion of rental units to condominium units).

For all of these reasons, the Committee has the authority to resolve a post-permit dispute involving a proposed project change. A central issue in this appeal is whether that general authority extends to a project, like Andover Place, with no affordable units. Neither the Comprehensive Permit Law nor its implementing regulations address that issue squarely. The Board relies heavily on the Supreme Judicial Court's decision in *Zoning Bd. of Appeals of Wellesley* v. *Ardemore Apts. Limited Partnership,* 436 Mass. 811 (2002) in arguing that the Committee has no jurisdiction to hear the appeal. *See* Board Motion, at p. 1-3.[1] The Board's position is that "the benefits accruing to a developer" under the Comprehensive Permit Law—including the right of appeal to the Committee—"do not continue once a project no longer provides affordable housing." Board Motion at p. 2. According to the Board's reasoning, the Committee has no jurisdiction to approve changes to a project with all market-rate units, because such a project does not contribute to the statutory purpose of increasing the supply of affordable housing.

B. Analysis of the Supreme Judicial Court's *Ardemore* Decision

To evaluate the Board's argument, we first need to look closely at the facts and holding in *Ardemore*. In that case, the owner of an apartment building constructed pursuant to a comprehensive permit had entered into a collection of financing agreements with the project's subsidizing agencies.[2] These financing agreements stipulated that the owner would rent 25 percent of the units to low or moderate income persons for a term of 15 years. The comprehensive permit did not specify for how long those units had to remain affordable. The Court was asked to decide whether the project owner had a continuing obligation to make some of the apartments available at below market rents, even after the "expiration" date set forth in the subsidy agreements. The owner argued that the affordable units could be converted to market-rate units upon the expiration of the 15-year term of affordability specified in those agreements. The local board contended that the affordable units must be preserved as affordable for as long as the project needed the zoning relief provided by the comprehensive permit. *See Ardemore*, 436 Mass. at 812-13.

The Court agreed with the local board, concluding that the special zoning relief afforded by a comprehensive permit is intended "to serve the general welfare by providing affordable housing in those cities and towns with an insufficient affordable housing stock." *Ardemore*, 436 Mass. at 825 (*citing Board of Appeals of Hanover* v. *Housing Appeals Comm*., 363 Mass. 339, 363 (1973)). The legislature intended for this "special treatment" to apply "'only when it serves the public interest,' or the 'general welfare.'" *Id.* The Court found "[t]hat public interest is no longer served when affordable units are converted to market rents." *Id.* It therefore concluded, that "unless otherwise expressly agreed to by a town, so long as the project is not in compliance with local zoning ordinances, it must continue to serve the public interest for which it was authorized."[3] *Id.*

Ardemore established that when the affordability restrictions in a comprehensive permit project's subsidy agreements expire, the owner must nonetheless keep some units affordable in order to continue to benefit from the zoning protections provided by the comprehensive permit, "unless otherwise expressly agreed to by a town …." [4] A city or town's agreement to a shorter affordability term can be found, or not, in the comprehensive permit itself:

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1. The Board also suggests that the owner lacks standing to maintain this appeal, and that the appeal does not satisfy a "jurisdictional prerequisite" as defined in the regulations. *See* Board Motion at p. 3-4. The "jurisdiction" "standing" and "jurisdictional prerequisite" arguments all of are based on the fact that Andover Place no longer has any affordable units. In our view, the Board has not made a cogent standing argument separate from its jurisdictional argument. In any event our analysis disposes of all of these arguments, regardless of how they are framed.

2. To be eligible for a comprehensive permit, a project must consist of "housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing …." G.L. c. 40B, § 20.

3. Appellant argues that the project continues to serve a "public purpose" even when rented at market rates, because it provides "multi-family rental housing in an affluent market dominated by costly single-family homes." Applicant's Motion at p. 13. We agree that the Comprehensive Permit Law helps to ensure diversity of housing types, but that is an ancillary benefit of the statute, not its primary public purpose, and *Ardemore* suggests it is not enough to justify the special zoning relief provided by a comprehensive permit.

4. *Ardemore* leaves a number of practical corollary questions unanswered, such as: How many units must remain affordable? At what level of affordability? And, who will monitor an owner's compliance with these ongoing requirements after the original subsidizing agency is out of the picture? We do not have occasion to

"*where a comprehensive permit itself does not specify for how long housing units must remain below market*, the Act requires the owner to maintain the units as affordable for so long as the apartment building is not in compliance with [applicable] zoning requirements." *Ardemore*, 436 Mass. at 813 (emphasis added).

The *Ardemore* decision raises a number of questions with respect to the Andover Place project and our jurisdiction to hear the owner's appeal. We address these in turn.

1. Does Ardemore Require the Owner of Andover Place to Maintain Some Affordable Units in Perpetuity?

In this case, the Board contends that when the owner of Andover Place converted its affordable units to market-rate units, it effectively lost all of the benefits of its comprehensive permit—as the Board puts it, "the benefits accruing to [the owner] … do not continue." Board Motion at p. 2. In the context of this appeal, the Board relies on *Ardemore* not as a lever to force the owner to convert some market rate units back to affordable units,[5] but as support for the proposition that this Committee lacks jurisdiction to hear the owner's appeal. To resolve the jurisdictional issue, it is helpful first to consider what *Ardemor*e says about continuing affordability at a project like Andover Place.

As noted above, continuing affordability is required only "where a comprehensive permit itself does not specify for how long housing units must remain below market." *Ardemore*, 436 Mass. at 813. When the comprehensive permit specifies the term of affordability, a comprehensive permit project's affordability restrictions will simply expire on the agreed-upon date. This case appears to fall neatly within that exception. The appellant's comprehensive permit includes the following Condition Q: "The total number of housing units in the Project, market value and low/moderate income housing, shall be no more than 165, of which 25% shall be low and moderate income housing units. This ratio shall remain the same *so long as such units remain subject to and have the advantage of the housing subsidy programs providing financial assistance under the Act.*" Joint Statement, Exh. 3, at p. 17 (emphasis added).[6] This condition indicates that when the comprehensive permit was issued, the Board "expressly agreed" that the number or ratio of affordable units would remain unchanged only for "so long as" the applicable subsidies remained in place. Accordingly, the *Ardemore* decision's exception to the perpetual affordability rule applies to Andover Place. Our analysis of the jurisdictional limits imposed on the Committee by *Ardemore* will be informed by our view that the owner of Andover Place is not required to maintain a percentage of affordable units in perpetuity because a shorter term was "expressly agreed to by [the] town."

2. Does the comprehensive permit remain effective after the conversion of affordable units to market-rate units?

The parties appear to dispute the status of the comprehensive permit granted by the Board. Citing to *Ardemore*, the Board at various points in its motion argues that the "benefits accruing to a developer pursuant to ch. 40B … do not continue once a project no longer provides affordable housing." Board Motion, at p. 2. The Board appears to suggest that the project's lack of affordable units "disqualif[ies] the Developer from the benefits of the comprehensive permit." Board Motion at p. 3-4. The owner frames the question as whether "the [comprehensive] permit … remain[s] in effect." Appellant Motion, at p. 12. We are uncertain if the status of the comprehensive permit issue truly is in dispute, as elsewhere in its motion, the Board concedes that "[t]he Owner continues to enjoy the benefits of the Comprehensive Permit." Board Motion at p. 4; *see also* Board Decision, Joint Statement, Exh. 10, ¶ 5, at p. 4 ("Petitioners continue to enjoy the benefits of the comprehensive permit"). But because the issue appears to have been raised, and because it arguably bears on the jurisdictional issue now before us, we briefly address the question of whether Andover Place's comprehensive permit remains "in effect."

A comprehensive permit, like a special permit or a variance issued under the Zoning Act, is an entitlement affecting the use of land. In many cases, the comprehensive permit gives lawful status to a type of use, and the construction of improvements, that otherwise would be unlawful under the local zoning bylaws. Like a special permit and a variance issued under the Zoning Act, the rights granted by a comprehensive permit must be exercised within a specified period of time, or the rights expire.[7] But neither the Zoning Act nor the Comprehensive Permit Law provide for the expiration of a permit once the construction or the use commences. Upon the recording at the applicable registry of deeds, the entitlement goes into effect, and thereafter it runs with the land,[8] providing lawful status indefinitely.[9] *See Killoran* v. *Zoning Bd. of Appeals of Andover*, 80 Mass. App. Ct. 655 (2011) (holding that special permit rights and conditions imposed

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answer these questions in this decision, but we note that the Committee previously has held that a project is eligible for a comprehensive permit only if at least 25% of the units are affordable to tenants earning no more than 80% of area median income; or alternatively if 20% of the units are affordable to tenants earning no more than 50% of the area median income. *See Stuborn Limited Partnership* v. *Barnstable Bd. of Appeals*, No. 98-01 [1 MHACR 599], slip op. at 9 (Mass. Housing Appeals Comm. Mar. 5, 1999); *see also Town of Middleborough* v. *Housing Appeals Comm.*, 449 Mass. 514, 517 n.7 (2007) (citing to this provision of *Stuborn*). We expect that a project that must maintain its affordability restrictions after the termination of its subsidy agreements would meet one these criteria.

5. The record does not indicate whether this issue arose in 2005 and 2006, when the affordable units were first rented at market rates. If the owner is required by *Ardemore* to maintain some percentage of affordable units and fails to do so, the owner could be subject to enforcement action for zoning noncompliance pursuant to the applicable provisions of Chapter 40A. This Committee has no jurisdiction to hear zoning enforcement actions under Chapter 40A.

6. A later settlement agreement between the owner and the Board changed the number of units from 165 to 220, but otherwise Condition Q was unchanged. *See* Joint Statement, Exh. 4, at p. 3.

7. *See* G.L. c. 40A, § 9, ¶ 14 (special permit will lapse if substantial use has not commenced or construction has not begun, except for good cause, within two years); *id*, § 10, ¶ 3 (rights granted by variance will lapse if not exercised within one year); 760 CMR 56.05(12)(c) (comprehensive permit will lapse if construction is not commenced within three years).

8. Special permits and variances are required by statute to be recorded in the chain of title of the affected land. See G.L. c. 40A, § 11, ¶ 4. Comprehensive permits need not be recorded in order to be effective, but as a matter of practice they often are recorded. Upon the completion of construction, a comprehensive permit is "deemed to run with the land." 760 CMR 56.05(12)(b).

9. While special permits do not typically expire, the permit issuer can by express condition make the permit effective for a limited time, or may require that a per-

thereon do not expire or become unenforceable due to the passage of time).[10]

Land use entitlements often are granted subject to conditions regulating the permitted project. Such conditions can regulate the construction or dimensions of structures—for example, a condition limiting the height of a building or the maximum lot coverage. Other conditions might regulate the ongoing use. Examples include a condition limiting the volume of traffic, or limiting the discharge of wastewater or its method of treatment and disposal, or requiring the periodic inspection and ongoing maintenance of utility systems. In either case, the conditions in the permit generally are intended to stay in effect for as long as the rights conveyed by the permit. *See Killoran*, 80 Mass. App. Ct. at 660 ("it would be anomalous and unjust if the [plaintiff was] permitted to retain the benefit of the special permit … while discarding the accompanying conditions …."). The permit granting authority, of course, has the discretion to make a condition temporary, as the Board did in the comprehensive permit for Andover Place. We are not aware of any case finding that the expiration of a single time-limited permit condition, by its express terms, triggers the expiration of the entire permit, including its other conditions.[11] And we see 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. That logic does not change despite the singular importance of the expired condition in this case. For these reasons, we conclude that Andover Place continues to be subject to, and have the benefit of, the original comprehensive permit.

3. Does Ardemore limit the Committee's jurisdiction to hear this appeal?

The analysis above leads us to conclude that Andover Place is not required by *Ardemore* to maintain affordable units, and that the project's comprehensive permit remains in effect. The real issue disputed by the parties, though, is whether *Ardemore*'s holding, or the rationale that led to it, limits this Committee's jurisdiction to hear a post-permit, post-construction appeal brought by the owner of the project with no affordable units. In our view, *Ardemore* does not much illuminate this question. That case did not involve an appeal to the Committee, and it says nothing about the scope of our jurisdiction. *Ardemore* clearly says that a project is required to maintain some affordable units for so long as it needs the zoning relief provided by a comprehensive permit. It does not say, or even suggest, that the Committee's jurisdiction is curtailed when affordability restrictions lawfully expire as expressly agreed to by the city or town, as is the case here.

The Board also cites to *Town of Middleborough* v. *Housing Appeals Comm*., 66 Mass. App. Ct. 39 (2006) for the proposition that the Committee may only act on applications where a developer is proposing to construct or renovate low or moderate income housing. In *Middleborough*, the Court of Appeals stated that "the comprehensive permit procedure governs applications to build 'low or moderate income housing.' … It is not otherwise available." *Middleborough*, 66 Mass. App. Ct. at 43. But that case was about a disputed subsidy program; the court was saying that a housing development must include low or moderate income housing in order to be eligible for the grant of the comprehensive permit. *Middleborough* did not involve a change to a project that used to have affordable units, and it does not speak at all to the issues at play in this case.

C. Decision on Jurisdiction

Based on the preceding analysis, the Committee is required to decide the scope of its own jurisdiction without clear guidance in the statute, the regulations, or the case law. In the past, and as discussed in detail above, the Committee has interpreted its own jurisdiction broadly when needed to assure that the legislative intent of the Act is carried out. We also have recognized the limits to our jurisdiction where appropriate. *See, e.g*., *White Barn LLC* v. *Norwell Zoning Bd. of Appeal,* No. 2008-05 [7 MHACR 1], slip op. at 3 (Mass. Housing Appeals Comm. June 12, 2012) (the Committee does not have jurisdiction to interpret or enforce the subdivision control law); *Meadowbrook Estate Ventures, LLC* v. *Amesbury Zoning Bd. of Appeals*, No. 02-21 [not published], slip op. at 17 (Mass. Housing Appeals Comm. Dec. 12, 2006) (the Committee does not have authority to resolve land title disputes). In a case like the one before us, involving a construction project that will not create any affordable housing, we see no compelling reason to take a broad view of our jurisdiction, and we are inclined to allow the greatest degree of local control over the proposal. At the same time, we recognize our duty to comply with the letter of 760 CMR 56.05(11) and other regulations implementing the Comprehensive Permit Law.

In considering whether to take a broad or a narrow view of our jurisdiction, we have considered whether some other existing regulatory process might better apply to changes to comprehensive permit projects with no affordable units. We specifically considered whether and to what extent such projects are akin to a "pre-existing nonconforming" uses and structures as defined in Section 6 of the Zoning Act; and whether the most appropriate procedure in these circumstances is for the owner to seek permission from the local zoning board of appeals to modify the project

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mit be renewed periodically. *See, e.g.*, *Hopengarten* v. *Board of Appeals of Lincoln*, 17 Mass. App. Ct. 1006 (1984) (upholding a permit condition requiring renewal of the permit every three years); *Milton Legion Post No. 114* v. *Alves*, 19 Mass Land Ct. Rptr. 311 (Mass. Land Ct. June 6, 2011) (by express condition, a special permit may expire after five years). Those cases support the principle that a land use entitlement without such a condition is valid for as long as the approved uses and structures exist.

10. In *Killoran*, the plaintiff challenged the validity of certain conditions in a 60-year-old special permit, alleging that the conditions expired after 30 years by operation of G.L. c. 184, § 23. The court disagreed. Although *Killoran* focused on the ongoing validity of the permit conditions, not the ongoing validity permit itself (which was not in dispute) the court's analysis presumes that the rights granted by the special permit remain in effect for as long as the landowner needs them.

11. The Andover Place comprehensive permit itself includes certain conditions intended to survive indefinitely. Examples are Condition E.3 ("No on-site parking shall be shared with occupants of premises located off the project Site") and Condition X ("Applicant shall provide … a right along the banks of the River … [for] recreational and park use for the benefit of the general public"). No one could sensibly suggest that the expiration of Condition Q by its own express terms has the effect of nullifying these other conditions.

as an expansion or alteration of a nonconforming use pursuant to the Zoning Act.[12] We conclude that the answer is no, for two reasons.

First, the Zoning Act defines a pre-existing nonconforming use or structure as a use or structure "in existence … or begun" in compliance with then-applicable zoning requirements. G.L. c. 40A, § 6, ¶ 1. For purposes of deciding whether a use is nonconforming within the meaning of the Zoning Act, "the question is not merely whether the use is lawful, but *how and when* it became lawful." *Mendes* v. *Board of Appeals of Barnstable*, 28 Mass. App. Ct. 527, 531 (1990) (emphasis added). To be deemed "nonconforming," the use or structure must have become noncompliant as a result of action by the city or town to change its zoning. *See Mendes*, 28 Mass. at 529-30 ("a use achieves the status of nonconformity for statutory purposes if it precedes the coming into being of the zoning regulation which prohibits it"). Uses and structures which achieve lawful status some other way generally do not benefit from the protections granted to pre-existing nonconforming uses and structures. *See, e.g., Mendes*, 28 Mass. App. Ct. at 531 (a use authorized by a variance is not a nonconforming use and cannot be expanded according to the standards applicable to a nonconforming use); *McHugh* v. *Grossman*, Misc. Case No. 256987 [10 LCR 45] (Mass. Land Ct. 2002) (an office use authorized by special permit, then prohibited by a subsequent zoning amendment, is not afforded the protections applicable to a nonconforming use). Unlike a nonconforming use, the typical comprehensive permit project is lawfully noncompliant with zoning from the day it is constructed; the comprehensive permit overrides the local zoning requirements that are inconsistent with the need for low and moderate income housing.

Second, and as importantly, the Committee has no jurisdiction to interpret or apply the Zoning Act. There is no statutory or other basis for the Committee to declare that a project permitted and constructed pursuant to a comprehensive permit might someday, under some circumstances, ripen into a nonconforming use governed by Section 6 of the Zoning Act. The zoning status provided by a comprehensive permit is a unique kind of zoning relief authorized by a wholly separate statutory scheme, to advance a wholly separate legislative goal, and subject to a wholly separate process of administrative and judicial review. If a comprehensive permit project is to be deemed equivalent to a pre-existing, nonconforming use we think that decision must come from a court with jurisdiction to interpret the Zoning Act.

Nor do we see any other clear, alternative means for an owner like the appellant to seek municipal permission for the construction it wants to undertake consistent with the Comprehensive Permit Law, other than the process set forth at 760 CMR 56.05(11). That being so, we are compelled to conclude that the parking modifications at issue in this case must be evaluated within the framework established by that regulation. Under that regulation the local board gets to decide in the first instance whether a proposed change is substantial; if it is, then the local board then gets first crack at determining if the change is consistent with local needs. But the regulation also allows the owner to appeal to this Committee. We cannot apply only a portion of the applicable regulation and ignore the rest—so, for example, we cannot say that the proper procedure is for the owner to approach the Board for approval as set forth in 760 CMR 56.05(11)(a), (b) and (c), and then disregard the parts of the regulation ((c) and (d)) that deal with appeal to the Committee. Accordingly, we conclude that the Committee has jurisdiction to hear this appeal and to determine if the proposed parking changes are "substantial" pursuant to 760 CMR 56.05(11).

IV. DECISION ON WHETHER THE PROPOSED CHANGES ARE SUBSTANTIAL OR INSUBSTANTIAL

A. The Standard for a "Substantial" Change

Under 760 CMR 56.05(11), the first step in this case is for the Committee to determine if the Board was correct in concluding that the parking modifications proposed for Andover Place constitute a "substantial" change to the original project. The regulations do not define the terms "substantial" or "insubstantial." Instead, they provide guidance on the kinds of changes that "generally" should be deemed substantial, as well as the kinds of changes that ordinarily should be deemed insubstantial. 760 CMR 56.07(4). The list of examples in the regulations is by no means an exhaustive list. Moreover, the listed examples apply only "generally" and may not apply to a particular project set in a specific context.[13] None of the examples listed in the regulations are similar enough to the proposed parking modifications to compel a result one way or another.

Where the regulatory examples are not determinative, the issue of whether proposed project modifications are "substantial" is one that requires a careful factual analysis. The specific changes proposed must be examined in relation to the original project, taking into consideration the adverse impacts, if any, the changes could have on residents or on the surrounding area. *See Lever*

12. The relevant section of the Zoning Act provides a process and standards for altering or expanding pre-existing, nonconforming uses and structures. It first provides that a new zoning ordinance or bylaw will not apply "to any change or substantial extension of such use … to any reconstruction, extension or structural change of such structure and to any alteration of a structure … to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent." G.L. c. 40A, § 6, ¶ 1. It then provides that pre-existing nonconforming uses and structures may be extended or altered upon a finding by a local permitting authority that "such change, extension or alteration [is not] substantially more detrimental" to the neighborhood. *Id*. The interplay between these provisions has generated much case law about how and when a nonconforming use or structure may be altered or enlarged. *See generally*, Bobrowski, Handbook of Massachusetts Land Use and Planning Law (3d ed. 2011 and 2012 Supp.) at pp. 183-202. We note that the Board has taken the position that "it is not necessary … to determine the hypothetical issue of whether the proposed construction is subject to the nonconforming structure/use provisions of G.L. ch. 40A," Board Motion at p. 3, n.3. Neither party to this appeal addressed the issue of nonconforming uses and structures, or potential applicability of Section 6 of the Zoning Act.

13. By way of example, the regulations state that "a reduction in the number of housing units proposed" generally is not a substantial change. 760 CMR 56.07(4)(d)1. That general rule does not foreclose the possibility that a project with fewer units nevertheless will be configured on the site in a way raises a valid local concern.

Development, LLC v. *West Boylston Zoning Bd. of Appeals*, No. 04-10 [1 MHACR 875], Rulings on Notice of Change, slip op. at 2 (Mass. Housing Appeals Comm. Dec. 16, 2005) ("the effect of the proposed changes on local concerns is important"). Changes that lessen the impact of a project will not be considered substantial, or reason to remand a case to the local board. *Id.* (*citing Cloverleaf Apts.* v. *Natick*, No. 01-21 [1 MHACR 674], slip op. at 5 (Mass. Housing Appeals Comm. Dec. 23, 2002).

Before applying this standard to the facts of this case, we note that Committee precedent has applied the "substantial" change standard in two distinct contexts. Many of our cases deal with project changes that are proposed before construction has commenced—that is, after the issuance of a permit by the local board, but while an appeal is pending before the Committee. *See, e.g.*, *Lever Development*, No. 04-10 [1 MHACR 458], Rulings on Notice of Change, slip op. at 2-6; *Cloverleaf Apts.*, No. 01-21, slip op. at 5; *CMA, Inc.* v. *Westborough Zoning Bd. of Appeals*, No. 89-25, slip op at 19-20 (Mass. Housing Appeals Comm. June 25, 1992). In such a case, the issue of whether a project change is substantial or not determines only whether a proposed change is remanded to the local board for review before the Committee holds its own *de novo* hearing. Whether a proposed change is deemed "substantial" or "insubstantial" is of only limited importance in this context, because even if a proposed change is deemed to be insubstantial—and therefore deemed approved by the local board— the modified project still has to be evaluated by the Committee to ensure it is consistent with local needs. Accordingly, in this first context, the Committee has been more amenable to determining that proposed changes are insubstantial. For example, in *Lever Development*, the Committee found that project changes were insubstantial where they involved, among other changes, a reduction in the number of buildings from 5 to 4, the relocation of one of those buildings; an increase in the number of bedrooms from 190 to 209; reconfiguration of the access roadway for two-way rather than one-way travel; a small increase in building footprint; and a slight reduction of impervious area. *See Lever Development,* slip op. at 2-3. That holding meant simply that there would be no remand of the proceedings, and the developer would not be required to present the changes to the local board before the Committee proceedings went forward. *Id*. at 6.

In very few cases have we applied this same regulatory framework to cases like this one, where a change is proposed after construction has been completed. In that context, a determination that a change is "insubstantial" has more practical importance—hanging in the balance is not simply whether or not the developer will avoid a remand to the local board and save some time, but whether the change will be deemed approved on its merits. Yet, our few precedents show that the issue of whether a proposed change is substantial often is not contested in this context. *See, e.g.*, *Mattbob, Inc.* v. *Groton Zoning Bd. of Appeals*, No. 09-10 [5 MHACR 67], slip op. at 2-3 (Mass. Housing Appeals Comm. Dec. 13, 2010) (removal of age restriction and potential, ancillary changes to the wastewater system and roadway characterized by the local board and analyzed by the Committee as "substantial" changes, without objection by the owner); *511 Washington Street, LLC* v. *Hanover Zoning Bd. of Appeals*, No. 06-05 [3 MHACR 1] (Mass. Housing Appeals Comm. Jan. 22, 2008) (assuming, without addressing, that the removal of an age-restriction on tenants is a substantial change); *Drumlin Development, LLC* v. *Sudbury Bd. of Appeals*, No. 01-03 [1 MHACR 631] (Mass. Housing Appeals Comm. Sep. 27, 2001) (post-construction approval of a change in the design and location of signage analyzed as a substantial change, even though the changes caused little, if any, adverse impact). The Committee 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. *See Rosewood Realty Trust* v. *Mansfield Bd. of Appeals*, No. 06-03 [2 MHACR 34], slip op. at 5 (Mass. Housing Appeals Comm. Apr. 25, 2007) (finding that constructive approval is non-discretionary where the regulatory deadline is missed).

This precedent supports the principle that the Committee will avoid an interpretation of 760 CMR 56.05(11) that allows an owner an expedited way to secure approval of post-construction changes without a thorough vetting of whether the proposed change is consistent with local needs. That is, at the end of the day, the relevant statutory standard. This Committee will exercise its discretion in making decisions about "substantial" changes accordingly.

B. Application of the Facts to the "Substantial" Standard

In this case, the parties have made cross motions for summary decision based on the pleadings, the Joint Statement and the various documents attached thereto. A motion for summary decision "shall be made if the record before the Committee, together with the affidavits (if any), shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 56.06(5)(d).

In this case there are no disputed facts. The record shows that the owner has proposed the construction of two new single-story parking garages within the original project's existing paved parking area. Joint Statement, ¶ 6, at p. 2. One of the garages will have a footprint of approximately 5,382 square feet and the other will have a footprint of approximately 5,060 square feet. Joint Statement, Exh. 5, Exh. 2 (site plan showing dimensions of proposed garages). The original project's parking area comprises 352 surface spaces. The new parking configuration would provide 304 surface spaces and 36 new garage spaces, for a net loss of 12 parking spaces. Joint Statement, ¶ 6, at p. 2.

The record also includes a good deal of information bearing on the question of whether the parking modifications will adversely affect residents, abutters or the surrounding neighborhood. Most, if not all, of this information supports the conclusion that the parking modifications will provide a welcome amenity for some of the residents of Andover Place without creating or exacerbating any adverse impact on the neighborhood. For example, it seems clear that there is more than enough parking capacity on site now, and that there will continue to be sufficient parking capacity if the garages are constructed.[14] There is no evidence on

14. [See next page.]

record to suggest that the proposed net loss of 12 parking spaces will cause a parking shortage on the project site or otherwise cause a hardship for the residents of the project, or any abutters. Similarly, the parking modifications will not increase the impervious area on the site, and will not increase storm water runoff or adversely affect storm water management. See Joint Statement, Exh. 6. There is no reason to believe that abutting properties or wetlands will be impacted any differently from storm water runoff. And finally, it is undisputed that after the parking garages are constructed, the structures on the site will continue to comply in all respects with the applicable dimensional requirements in the zoning bylaws, including height, setback, and lot coverage limitations. *See* Joint Statement, Exh. 6. Accordingly, abutters will not contend with any impacts related to building height, massing or setback that they would not expect from an allowed industrial use on this site.

On the other hand, it also is undisputed that the owner's proposal will add two wholly new structures to the site, increasing the cumulative building footprint from 39,170 square feet to 49,612 square feet—an increase in total lot coverage of approximately 26.7%. *See* Joint Statement, Exh. 6, at p. 5. Even though the lot coverage will remain well under the maximum allowed as of right in the Industrial zoning district (or in any district, for that matter), we agree with the Board that a significant increase in lot coverage—even without the addition of more units, and even if the new structures comply with current zoning requirements—could be deemed a more intensive use of the site. At the very least, the addition of building footprint increases the building density and reduces the open area on the site.[15]

Of course, the question presented originally to the Board and now to this Committee is not whether adding building footprint increases the intensity of use, or reduces open space, but whether that increase (or reduction) is "substantial." The developer has convincingly shown that the increase in building footprint has no *actual impact* on any matter of local concern. The Board has not introduced any evidence on the record to demonstrate an actual adverse impact. Rather, the Board has taken the position that the increase in building footprint, the introduction of a new building type, and the net loss of 12 parking spaces is enough to meet the "substantial change" standard, regardless of actual impact, or lack thereof. *See* Board Motion at p. 3 ("there is no justification to allow intensified residential use of the site in the form of more building footprint") and p. 7-8 (asserting without reference to any matter of local concern that a 26.7 percent in lot coverage is a substantial change); Joint Statement, Exh. 10, ¶ 9, p. 4 (Board's decision states that "[t]here is no justification to allow … more building footprint ... when there is no contribution whatsoever" to the Town's supply of affordable housing).

In evaluating these positions, we have looked first to our own precedent to see what kinds of changes we have deemed to be "substantial." In at least one prior decision, a project change that involved a modest increase in building footprint, among other changes, was deemed an insubstantial change. *See Lever Development, LLC* v. *West Boylston Zoning Bd. of Appeals*, No. 04-10 [1 MHACR 875], Rulings on Notice of Change (Mass. Housing Appeals Comm. Dec. 16, 2005). However, that case is distinguishable from this one in several respects. First, it appears that the owner here is proposing a significantly greater increase in lot coverage than was at issue in *Lever. See Lever*, No. 04-10, Rulings on Notice of Change, slip op. at 5 (describing the changed footprint as only "slightly larger"). Second, the increase in footprint at issue in *Lever* was but one of numerous changes proposed, including a reduction in the total number of buildings and a slight reduction in the total impervious area. *See id.* at 2. *Lever* also was a case in which the permit was still being appealed before the Committee, so the finding that the changes were insubstantial meant only that the changes would not be remanded for a hearing in front of the local board. The posture of this case is much different, since construction was completed long ago, and a finding that the changes are insubstantial would mean the changes are deemed approved, and consistent with local needs.

We also have looked for guidance to the case law pertaining to nonconforming uses, which although not applicable here, carries some weight by analogy due to the similarity between a pre-existing nonconforming use, and comprehensive permit project that has outlived its affordability restrictions. In that context, we note that the existence of a nonconforming use does not permit the addition of new buildings for the extension or enlargement of that use. *Powers* v. *Building Inspector of Barnstable*, 363 Mass. 648, 658 n.4 (1973) (citations omitted).[16] Courts also have held that a new free-standing structure cannot be added to a pre-existing, nonconforming lot. *See Boutin* v. *Brown*, 2012 WL 4858991 at *7 (citing *Schiffenhaus* v. *Kline*, 79 Mass. App. Ct. 600 (2011)).

Finally, we have looked to the policy goals underlying the Comprehensive Permit Law. The primary policy goal is "to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing …." *Zoning Bd. of Appeals of Sunderland* v. *Sugarbush Meadow*, LLC, 464 Mass. 166, 168 (2013) (internal quotations and citations omitted). The Comprehensive Permit Law plainly was intended to increase the supply of affordable housing units. It is not

14. The owner's property manager has attested that in the 22-year period since the original project was constructed, there has always been a surplus of parking spaces available to the residents, staff and visitors. Joint Statement, Exh. 5. In addition, the Joint Statement includes a Parking Demand and Utilization Study prepared for the owner which establishes that the proposed parking supply of 1.55 spaces per unit at full occupancy exceeds the actual peak parking demand of 1.36 spaces per unit. Joint Statement, Exh. 8. The traffic study further states that the proposed parking ratio is consistent with parking generation rates of the Institute of Transportation Engineers for low to midrise apartment communities. *Id.*

15. The record does not indicate what impact the new buildings might have on views or scenic vistas, so we do not include that issue in our analysis of potential impacts. By referring to the reduction in the site's "open area," we mean only the area left free of buildings, and do not imply that a parking lot is the equivalent of undisturbed or landscaped open space.

16. The cases cited in *Powers* are decisions interpreting a prior version of the Zoning Act, but there is no reason to doubt their continuing validity. *Powers* continues to be cited by courts working under the current Zoning Act. *See, e.g., Vokes* v. *Avery W. Lovell, Inc.*, 18 Mass. App. Ct. 471, 484 n.21 (1984).

at all clear that it was intended to enable the construction of accessory parking structures for those units long after they were constructed, occupied and converted to market-rate apartments. Moreover, "[t]he structure of the act itself reflects a 'careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements … while foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons of low income.'" *Sunderland*, 464 Mass. at 168 (internal citations omitted). That the Act is intended to balance local autonomy against the need for affordable housing suggests that the views of local officials should hold greater sway where no new affordable housing is at stake. We may properly take that legislative policy judgment into consideration when deciding whether to disturb the Board's decision in this case.

For all of these reasons, we find that under the circumstances of this case the construction of new accessory parking garages will increase the lot coverage and the intensity of use on the site, that these impacts are legitimate matters of local concern, and that these impacts are significant enough to conclude that the proposed parking modifications constitute a substantial change to the original project. Accordingly, we will now review whether the proposed parking changes are consistent with local needs.

V. IS THE BOARD'S DENIAL CONSISTENT WITH LOCAL NEEDS?

Under our precedents, the denial of a proposed change to an approved project is treated as an approval with conditions. The owner bears the initial burden of proving that the denial makes the proposal uneconomic. If the owner sustains its burden, the Board must show that there is a valid local concern that supports the denial of the change, and that this concern outweighs the regional need for affordable housing. *See 511 Washington Street, LLC* v. *Hanover Zoning Bd. of Appeals*, No. 06-05 [3 MHACR 1], slip op. at 9-10 (Mass. Housing Appeals Comm. Jan. 22, 2008); *Avalon Cohasset, Inc.* v. *Cohasset*, No. 05-09 [2 MHACR 65], slip op. at 8 (Mass. Housing Appeals Comm. Sep. 18, 2007). In this case, the owner has not attempted to show that denial renders the project uneconomic, instead staking its case on the threshold issue of whether or not the parking changes are "substantial." *See* Appellant's Memorandum in Opposition, at p. 5. This 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. We find in this case that the owner has not met its initial burden, and conclude that the Board's denial of the change is consistent with local needs.

VI. THE SETTLEMENT AGREEMENT

The Board also has argued that a settlement agreement entered into by the Board and the owner precludes this Committee from issuing a decision on the owner's appeal, ostensibly because the settlement agreement is "an enforceable document requiring a certain number of parking spaces on the property." Board's Motion for Summary Decision, at pp. 6-7. Because we have ruled in favor of the Board on the merits of the primary issue in dispute, we do not need to dispose of this argument, other than to say that we view the settlement agreement as a modification of the comprehensive permit mutually consented to by the owner and the Board. To the extent the Board desired to seek enforcement of the settlement agreement as a contract separate and apart from the comprehensive permit, it would have had to do so in a court of competent jurisdiction. This Committee does not have jurisdiction to resolve contract disputes.

VII. CONCLUSION AND ORDER

For the reasons stated herein, the Committee concludes that the parking modifications proposed by the owner constitute a substantial change as that term is used in 760 CMR 56.05(11) and that the Board's denial of that change was consistent with local needs. Accordingly, the owner's cross motion for summary decision is DENIED and the Board's cross motion for summary decision is ALLOWED. The Board's decision denying the proposed parking changes is affirmed.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

February 27, 2013; Housing Appeals Committee; Werner Lohe, Chairman, Carol A. Gloff, Theodore M. Hess-Mahan, James G. Stockard, Jr.

* * * * * *

HOLLIS HILLS, LLC

v.

LUNENBURG ZONING BOARD OF APPEALS

No. 07-13

March 25, 2013
Werner Lohe, Chairman

Shelagh A. Ellman-Pearl, Presiding Officer

Appeals to HAC
Authority to Act
Scope of Review
— Water/Sewer Connection Fees
Regulations
Validity

Conditions Making Project Uneconomic
Specific Conditions
Sewer Connection
Unequally Applied Requirements
Sewer Connection Limitations

Sewer Privilege Fee-Sewer Connection Charges-Unequally Applied Requirements-Failure To Properly Adopt Regulations—HAC voided $1,809,150 in sewer-connection and privilege fees imposed by the Town of Lunenburg on a 136-unit project after finding that none of the fees were underpinned by validly adopted sewer regulations. It did allow the Town to levy a $125 per unit fee based on 2005 regulations validly in force as of the date the comprehensive-permit application was filed.

POST-DECISION RULING AND ORDER REGARDING APPLICABLE SEWER FEES

This ruling addresses outstanding issues with respect to the existence, validity and applicability of certain Lunenburg town bylaws, regulations, policies and documents regarding sewer betterment, privilege and connection fees to the comprehensive permit project approved for Hollis Hills, LLC.

The Zoning Board of Appeals seeks an order upholding the Town's conditioning the issuance of a building permit on the payment of a sewer privilege fee of $11,551 per unit for the 136-unit project, totaling $1,571,000. It also seeks an order that the applicable sewer connection charge is $1,760 per building plus $550 for each bedroom in excess of three bedrooms, for a total of $238,150. For each of these fees, the Board relies upon documents that it contends were adopted by the Sewer Commission as regulations with the full force and effect of law. Hollis Hills disagrees, and contends that the only validly adopted sewer fees applicable to it are the sewer connection charges established pursuant to Section 147-5 of the Sewer Use Regulations dated May 2005, which provides for sewer permit and inspection fees of $125 per unit for multifamily units or a total of $17,000. Each party requests that the Committee issue an order establishing the applicable sewer fees.

The disparity in the total amount of the fees advocated by each party indicates the fervor with which the parties have argued their positions. It is well-settled in the Committee's cases that municipalities may only impose on a project approved under Chapter 40B those non-waived local requirements and regulations that were in effect at the time of its application to the Board. *Hollis Hills, LLC* v. *Lunenburg,* No. 07-13 [4 MHACR 41], slip op. at 40-41 (Mass. Housing Appeals Committee Dec. 4, 2009) and authorities cited. Also see 760 CMR 56.02. In our decision overturning the Board's denial of a comprehensive permit, we determined that, "barring any change in state law requirements no sewer privilege fee or sewer betterment fee may be applied to Hollis Hills if it is based on a local rule adopted subsequent to February 13, 2006, the date Hollis Hills' comprehensive permit application was submitted to the Board." *Hollis Hills, supra,* slip op. at 41. The parties disagree not only about what sewer fee rules were in effect at the time of the comprehensive permit application, but also whether the documents in question should apply to the developer under the circumstances of this case.

I. PROCEDURAL HISTORY AND BACKGROUND

The Committee's December 4, 2009 Decision [4 MHACR 41] overturning the Board's decision and ordering a comprehensive permit approved a development of 136 condominium units in attached townhouses on approximately 34 acres on Hollis and West Streets adjacent to Electric Avenue in Lunenburg. In the Decision, the Committee determined that the Board had not demonstrated the sewer fees applicable to the project site, but that since the only argument preserved by the developer in the Pre-Hearing Order and argument in its brief was that it should not be required to pay for fees greater than those lawfully charged for market rate housing as of the date of its application to the Board for a comprehensive permit, the Decision limited its evaluation of fees to addressing and granting the relief requested in the Pre-Hearing Order.

During the pendency of the Board's appeal of the Committee's decision, Hollis Hills submitted an application for a building permit to the Lunenburg building inspector,[1] who denied the request, in part on the ground that the developer had not paid the applicable sewer privilege fee. Exh. N25.[2]

Hollis Hills then filed a motion for an enforcement order with the Committee. In a ruling of September 27, 2010 [5 MHACR 57] denying Hollis Hills' motion, the Committee denied the motion without prejudice with respect to the issue of a sewer privilege fee and ordered an evidentiary hearing on the applicability of a

1. Pursuant to 760 CMR 56.05(12)(a), a developer may proceed at its own risk with construction of a project subject to a pending appeal.

2. The building inspector's letter stated: "It is a condition of any sewer connection permit that the applicable sewer privilege fee be paid. The Commission informed me that you have not tendered payment of that fee. The HAC Decision specifically referenced this requirement on pages 40-41 of its Decision, waiving any fee provision that was adopted subsequent to the date of the Hollis Hills application. The Town's Sewer Use Regulations have contained a sewer privilege fee provision since 2001; therefore it applies to this Project." Exh. N25, p. 2.

sewer fee in this case. The ruling rejected Hollis Hills' argument that it was too late for the Town to charge a sewer privilege fee for the development, since the Decision had expressly left open the possibility of the assessment of such a fee. *Hollis Hills, LLC* v. *Lunenburg,* No. 07-13 [5 MHACR 57], slip op. at 5-6 (Mass. Housing Appeals Committee Sept. 27, 2010 Ruling on Motion for Enforcement Order).

Following a prehearing conference, Hollis Hills submitted a motion in limine to exclude sewer evidence, which the presiding officer denied. After several requests for continuances in an attempt to resolve this matter, and the presiding officer's grant of a short-lived request to bifurcate the proceeding, the parties agreed to a post-decision Pre-Hearing Order setting out the issues for determination. The parties submitted prefiled testimony and the presiding officer deferred the Board's motion for directed decision and granted and denied in part the Board's motion to strike certain pre-filed testimony. A one-day evidentiary hearing was held, and the Board and Hollis Hills filed post hearing memoranda and reply memoranda.[3] We now deny the motion for directed decision.

II. ISSUES FOR CONSIDERATION

In its comprehensive permit application, Hollis Hills had requested an exemption "from all local filing, permit and construction related fees, other than the filing fee imposed and directly related to the Comprehensive Permit Application." Exhs. 4; N34-1. Subsequently by letter dated May 9, 2007 from Daniel J. McCarty, the developer's project manager, Hollis Hills requested a "Waiver for Betterment Charges as currently exist or as may be enacted by the Town." Exhs. 118; N34-2. In the Pre-Hearing Order for the original hearing, which limited the scope of issues for appeal, Hollis Hills set out the sewer fee issue as follows:

> If the Committee reverses the ZBA denial, Hollis Hills seeks a determination that the sewer connection fee imposed on the Project can be no greater than the fee, if any, lawfully charged to market-rate housing at the time Hollis Hills made its comprehensive permit application. As part of its *prima facie* case, Hollis Hills will introduce evidence that the ZBA threatened to impose on the Project a significant sewer connection or "betterment" fee, even though no Town by-law or regulation authorizes the imposition of a sewer connection fee, except for formal betterments assessed in compliance with state law.

Initial Pre-Hearing Order, § IV.C.3.

The post-decision Pre-Hearing Order set out the issues as the following:

> 1. Whether the Town had legally adopted a local bylaw or rule regarding the assessment of a sewer privilege fee that was in effect as of the date of Hollis Hills' application for a comprehensive permit.
>
> 2. Whether the local rule, by its terms, requires the payment of a sewer privilege fee by Hollis Hills, and if so, the amount of such a fee.
>
> 3. Whether the fee would render the project uneconomic.[4]
>
> 4. Whether the fee constitutes a valid local concern that outweighs the need for affordable housing.
>
> 5. Whether the Town has subjected Hollis Hills to unequal treatment in assessing the fee to Hollis Hills.

Post-Decision Pre-Hearing Order, § IV. Since we decide the first question in the negative, we do not need to reach the subsequent issues. However, an additional issue regarding the applicable sewer connection fee was addressed by the parties in the post-decision Pre-Hearing Order and their evidence, and briefed by them. See Post-Decision Pre-Hearing Order, § IV.A.3., § IV.B.7. Therefore we decide this issue here as well.

III. FACTUAL BACKGROUND

A. Sewer Construction and Town Betterment Assessment

In 1999, the Town developed a comprehensive wastewater management plan, approving appropriations for implementing Phase I of the plan at the May 8, 1999 Annual Town Meeting. Exhs. 175, ¶¶ 8-12; 63-66. At the May 12, 2001 Annual Town Meeting, the Town added a new Section 21 to its General Bylaw, Article IX, Miscellaneous Provisions, which stated:

> ARTICLE 12. VOTED UNANIMOUSLY to amend the General By-law of the Town, Article IX, Miscellaneous Provisions, by adding a new Section 21 as follows: "*Sewer Betterment Assessments - The Board of Selectmen, acting as Sewer Commissioners, shall assess sewer betterment assessments under MGL Chapter 83, §14 by a rate based upon the uniform unit method, as provided by MGL Chapter 83,§15, and shall assess one-hundred percent of the cost of sewer projects upon those who benefit from each project, unless another percentage is voted by Town Meeting*." and to see if the Town will further vote to amend its vote under Article 4 of the May 8, 1999 Annual Town Meeting to provide that assessments authorized by that vote under the fixed uniform rate be instead assessed under the uniform unit method provided by the By-law. [Sic] [Emphasis added.]

Exh. N1. This bylaw was the only sewer assessment bylaw in effect on February 13, 2006, the date on which Hollis Hills filed its application for a comprehensive permit with the Board. Exh. 172, ¶ 18.

On November 26, 2002, the Lunenburg Board of Selectmen, acting as the Sewer Commission, certified to the town Board of Assessors betterment assessments under G.L. c. 83 and the foregoing Article 12 of the Town Bylaws. Pursuant to this certification, Lunenburg assessed preliminary betterments to properties abutting the sewer line on Electric Avenue. Construction of Phase I sewers was completed in June 2006. Ms. Bertram, vice-chair of the Sewer Commission from May 2006 to at least 2009, testified in the original hearing that on June 24, 2008, the Sewer Commission approved a final betterment assessment to all properties to be served by the completed construction of the Phase I sewers. The final total residential betterment assessment was $11,551 per unit. Exhs. 175, ¶¶ 15-16, 20-21; 142-145.

B. The Project Site Connection to the Sewer System

Hollis Hills' project site includes four parcels totaling about 34 acres with frontage on West Street, Hollis Road and Electric Avenue, all public ways, and Carr Avenue, a private roadway. The

3. Intervener Mark S. Testa declined to participate in this post-decision issue.

4. Hollis Hills has waived the presentation of evidence on this issue.

parcel that fronts on Electric Avenue (the Electric Avenue Parcel) abuts a neighboring parcel at 321 Electric Avenue. Exhs. 3-6; 100; 172, ¶¶ 6-8; 173, ¶ 29. In our Decision, we found that "when Lunenburg assessed sewer betterment fees for Electric Avenue lots obtaining connections, it did not include the Electric Avenue Parcel." *Hollis Hills Decision, supra,* slip op. at 40. Exh. 175, ¶ 23; Tr. I, 49-53.

At the time of the original assessment, Hollis Hills, which acquired the site in 2005, did not own the project site. Sky Cycle, Inc., the owner of the Electric Avenue Parcel at the time of the preliminary betterment assessment, was not charged a betterment assessment. Exhs. 94-C; 125; 129;143; Post-Decision Transcript (PD Tr.) 56-62. In her testimony in the original hearing, Ms. Bertram stated that the preliminary betterment assessment did not include the project site. Initially she stated that Hollis Hill's project site was not among the properties assessed a betterment fee for the sewer construction project because the project site does not abut a public way served by the sewers, stating that:

> It has come to my attention that the developer of the proposed Hollis Hills project acquired a parcel of land abutting the project site in 2005 that has approximately 50 feet of frontage on Electric Avenue, which is sewered. That lot was not separately assessed a betterment, however, because the lot was not shown as having frontage on Electric Avenue on the Town's assessors' maps at the time of the betterment assessments. [Emphasis in original.]

Exh. 175, ¶ 23. However, Ms. Bertram acknowledged on cross-examination that the Sewer Commissioners were aware that Hollis Hills' parcel had frontage on Electric Avenue, but they nevertheless did not assess a betterment fee against Hollis Hills at the time of their final assessment in 2008. Tr. I, 53; See Tr. I, 49-53; Exh. 94.

In its preliminary sewer betterment assessment, by Order of Statement recorded November 17, 2004, the Board of Selectmen/Sewer Commission assessed Fred J. LaBerge, registered owner of the abutting parcel at 321 Electric Avenue, an initial amount of $10,000. Exhs. N7; 133; 142; 143. On June 24, 2008, the Sewer Commission approved the final betterment assessment of all properties served by the completed construction of the Phase I sewers in the amount of $11,551 per unit. Exh. N33, ¶ 19; Exh. 144. The Sewer Commission assessed 321 Electric Avenue the balance of the betterment, notifying the then owner of the lot, Central Mass. Motorcycles, Ltd., which had acquired the property from Mr. LaBerge by deed dated June 28, 2007. Exhs. 133A; 145. As Ms. Bertram testified, Hollis Hills, the owner of the project site, including the Electric Avenue Parcel, at the time of final assessment, was not assessed a betterment charge. Neither Hollis Hills, nor its predecessors in title to the project site were listed as owners of assessed properties on the betterment lists recorded with the town. Exh. 143, 144.[5] There is no evidence that the betterments were recorded in the chain of title for the project site. PD Tr. 221.

C. Communications During Board Hearing Regarding Sewer Fees

During the course of the Board's hearings on Hollis Hills' comprehensive permit application, the Sewer Commission requested, in letters dated December 13, 2006 and March 6, 2007, that the Board condition the approval of any permit to Hollis Hills on payment of betterment assessments equal to 100% of the betterment to be charged to all single family property owners for each of the units approved in the development "consistent with the provisions of the Lunenburg Assessment Bylaw," stating that if the project is approved prior to the assessment of the final Phase I betterment, it would be assessed "in accordance with Section 1 of the Sewer Betterment Policy…." Exh. 41. See Exh. 42. In its March 6, 2007 letter, the Sewer Commission also requested that the Board not waive the portion of the sewer connection fees that Lunenburg must pay over to Leominster. Exh. 42.

In a March 27, 2007 letter to the chair of the Board, Mr. McCarty noted that Hollis Hills had instructed its attorney to obtain certified copies of the Town's bylaws and regulations from the Town Clerk and individual commissions and Boards. Exh. 117. The Sewer Commission chair at that time, William J. Gustus, wrote to the Board regarding Hollis Hills' request, in another letter dated March 6, 2007, stating:

> I am writing at the request of the Sewer Commission for some clarification of a letter we received from attorneys representing the developer of the Hollis Hills 40B project. They have asked us to certify that a list of by-laws listed in the letter comprises all of the by-laws that may govern the Hollis Hills project. We as a Board do not believe that it is our responsibility to make that determination for the applicant. If you believe differently please advise.

Exh. 43.

By memorandum dated May 9, 2007 from Mr. McCarty to the Board, Hollis Hills requested "Waiver for Betterment Charges as currently exist or as may be enacted by the Town." Exh. 118; see Exh. N34, ¶¶ 3-6. Mr. McCarty credibly testified that in 2007 he was unaware of the betterment assessment order and unaware of the amount of the assessments. PD Tr. 221-222.

IV. SEWER PRIVILEGE FEE

A. History of the "Sewer Assessment Bylaw" Relied on by the Board

The Board seeks to impose a sewer privilege fee upon Hollis Hills' project based on an undated document entitled "Sewer Assessment By-law." This "Sewer Assessment By-law" was not enacted by the Town as a bylaw until the May 5, 2007 annual town meeting. Among other provisions, the 2007 bylaw addresses the assessment of privilege fees in the circumstance of a property previously assessed a betterment which increases its use of the sewer system (Section 2), as well as in the context of a property not previously assessed which obtains an extension to connect to the sewer system (Section 3(c)). However, this bylaw,

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5. The Board takes the position that 321 Electric Avenue includes a portion of the project site and it therefore was assessed a betterment. See Exh. N33, ¶ 23. Even if an assessor's map indicates a lot size that assumed inclusion of a portion of the project site, this does not demonstrate that the project site was assessed. See PD Tr. 220-221.

enacted after Hollis Hills filed its comprehensive permit application, does not apply.

The history of the *undated* document entitled "Sewer Assessment By-law" is less clear. The only version of the undated document entitled "Sewer Assessment By-Law," which was introduced into evidence in the original hearing before the Committee contained text indicating revisions on three dates: "5/6/06, 5/5/07 and 12/5/07," thus demonstrating that version to have been created after Hollis Hills filed its comprehensive permit application, and therefore to be inapplicable. Exh. 51. The post-hearing record now shows that these three dates - all subsequent to the submission of Hollis Hills' comprehensive permit application - coincide with the dates of annual town meetings in those respective years.[6] PD Tr. 43-44.

At the post-decision sewer fee hearing, the Board introduced both another undated version of the "bylaw" which did not contain the revision annotations, as well as the version adopted as a bylaw by the Town. Exhs. N3, N2. Robert Ebersole, Chair of the Sewer Commission, testified in this hearing that the undated "bylaw," which he called a regulation, was adopted by the board of selectmen acting as sewer commissioners in 2001, and later incorporated into the Town's General Bylaws in 2007. Exh. N33, ¶¶ 10-11. When asked how he knew the undated bylaw was the correct document, Mr. Ebersole, the only Town employee who offered testimony to identify it, provided no direct knowledge, but stated that he believed it was the bylaw adopted by the Sewer Commission based on how the exhibits were submitted.[7] PD Tr. 67. The Board also introduced into evidence a memorandum dated September 4, 2001, from the executive secretary for the selectmen to the town clerk stating that "In accordance with Article 12 of the May 12, 2001 Annual Town Meeting, this office is forwarding the Sewer Betterment Assessment By-Law for the Town," stating that "[t]he Board of Selectmen/Sewer Commissioners approved said by-law at their meeting of 8/28/01." Exh. N4. The memorandum has no attachments.

The record contains neither minutes of an August 28, 2001 meeting of the Sewer Commissioners which could explain action taken by them regarding the document, nor any other evidence of their purpose or intent regarding it. Nor does the record contain any evidence that further action was taken to formalize the "Sewer Assessment Bylaw" until the Annual Town meeting of May 5, 2007, when the Sewer Assessment Bylaw was added as a bylaw by the Town. Exh. N2. The text of the Sewer Assessment Bylaw adopted by Town Meeting in 2007 is identical to the text of the undated document entitled "Sewer Assessment Bylaw," except for typographical differences. Compare Exhs. N2 and N3. See Exh. 51.

During the course of the proceedings in this case, the document has been variously characterized by town employees, and by the Board and its counsel, as a bylaw, a policy, and, during this post-decision proceeding, as a regulation and an "extension" of the bylaw. In her testimony in the original hearing Ms. Bertram characterized it as a bylaw. Tr. I, 42-44, 53-54; Exh. 175, ¶ 25. Although no copy of the document predating December 2007 was entered into the record at that time, in correspondence with the Board during the hearing on Hollis Hills' application, the Sewer Commission quoted from it and referred to it as a "policy." Exhs. 41, 42.

During the post hearing proceedings, the difficulty in characterizing the document has continued. In its Opposition to Hollis Hills' Motion for Enforcement dated July 19, 2010, the Board took the position that the document was a duly adopted bylaw, adopted at town meeting in 2001. Board Opposition, p. 5. The Board changed that characterization in its supplemental opposition on July 27, 2010, which asserted that the title of the document "is probably a misnomer" and the Sewer Commission had adopted a regulation. Board Supplemental Opposition, p. 2 n.2. See PD Tr. 20. In his prefiled testimony and at the post-decision hearing, Mr. Ebersole testified that it was a regulation adopted by the Sewer Commissioners in 2001. Exh. N33, ¶¶ 10-11; PD Tr. 46. In his testimony, Mr. Gustus characterized it as "the regulation, the sewer betterment policy" and "an extension of the bylaw." PD Tr. 172. In light of the evidence contradicting their characterizations, we do not credit their testimony. Although the Board now argues that the "bylaw" is a regulation promulgated by the Sewer Commissioners, it has offered no evidence of any action the Town took to promulgate the document as a regulation pursuant to law.

B. Validity of the "Sewer Assessment By-Law"

Although entitled "bylaw," the "Sewer Assessment Bylaw" was not enacted by town meeting until May 2007 and was not a bylaw before then.[8] The dispute between the parties centers on the status of the document between 2001, when the secretary reported it as having been "approved" by the Sewer Commissioners, and May 5, 2007, when it was enacted as a bylaw at Town meeting. The Board argues it constitutes a regulation, while Hollis Hills contends it is at most a mere policy, and of no legal effect. See Exhs. N33, ¶¶ 10-11; N4; N3.

The Board contends that, notwithstanding its title as a bylaw, the document was in fact adopted as a regulation. The difficulty with

6. At the May 6, 2006 special town meeting, the Town voted to establish a separate sewer commission. Exhs. 175, ¶ 3; 141. The May 2007 town meeting added the sewer assessment bylaw, and the December 5, 2007 Lunenburg special town meeting, adopted a change unrelated to this proceeding. Exhs. N33-A; N27.

7. None of the witnesses proffered by the Board were members of the Lunenburg Sewer Commission in 2001 when the Board asserts the document took effect. Paula Bertram, who testified in the original hearing before the Committee, served as Vice-Chair of the Lunenburg Sewer Commission, and Vice-Chair of the Board of Selectmen from May 2006 until at least February 2009. Exh. 175, ¶ 1. Robert Ebersole, current Chairman of the Sewer Commission, has been a member of the Commission since November 3, 2009. Exh. N33, ¶ 1. William Gustus, former chief administrative finance officer in Lunenburg, served on the Lunenburg Sewer Commission from the summer of 2006 through the end of June 2009. PD Tr. 123-124.

8. As the Board acknowledges, only the legislative body of municipal government has the authority to adopt bylaws. Municipal boards and commissions may adopt regulations to carry out their statutory powers. Board reply brief, p. 5.

the Board's assertion is several fold. First, the Board has not demonstrated that it was ever promulgated as a regulation. The document does not appear in the Town's Sewer Use Regulations or in any other regulations. The record does not indicate that this document was published in a newspaper or made available for inspection by the public, pursuant to G.L. c. 83, § 10, which provides:

> A city, town or sewer district may, from time to time, prescribe rules and regulations regarding the use of common sewers to prevent the entrance or discharge therein of any substance which may tend to interfere with the flow of sewage or the proper operation of the sewerage system and the treatment and disposal works, for the connection of estates and buildings with sewers, for the construction, alteration, and use of all connections entering into such sewers, and for the inspection of all materials used therein;… *Such rules and regulations shall be published once in a newspaper published in the city or town, if there be any, and if not, then in a newspaper published in the county, and shall include a notice that said rules and regulations shall be available for inspection by the public, and shall not take effect until such publication has been made.* [Emphasis added.]

The requirements of publication and availability for inspection by the public are not inconsequential. The Supreme Judicial Court has explained why compliance with statutory requirements for promulgation is important - so that those regulated by the town "may know in advance what is or may be required of them and what standards and procedures will be applied to them." *Castle Estates, Inc.* v. *Park and Planning Bd. of Medfield,* 344 Mass. 329, 334 (1962). In *Castle Estates*, the applicable statute, G.L. c. 41, § 81M, required the town to adopt zoning rules and regulations under § 81Q. The court therefore ruled that to be effective, the town's imposition of water supply and drainage conditions must be found in a statute or duly adopted regulations. *Id.* at 332-333. The importance of public availability and advance knowledge is embodied in G.L. c. 83, § 10's requirements that the town publish and make the regulation available for inspection.

In *Fieldstone Meadows Dev. Corp.* v. *Conservation Com'n of Andover,* 62 Mass. App. Ct. 265 (2004), the court overturned denial of an application to perform work within 100 feet of a protected resource area because the denial was "impermissibly based … upon a policy … not otherwise found in the town by-law or any regulations promulgated thereunder," *id.* at 266, even though the town bylaw provided that the conservation commission shall promulgate regulations "after due notice and public hearing, 'requiring the maintenance of an undisturbed vegetated buffer of not more than 25 feet from the edge' of any areas protected by the town by-law." *Id.* at 266 n.3. However, although the commission had drafted such regulations, the record did not suggest that such a regulation was adopted and in effect at the time the commission acted on *Fieldstone's* application. *Id.* at 266. The court concluded that "a no-build zone 'policy' not lawfully adopted as a regulation, and containing no requirement of uniform application, could not form the basis of the commission's denial in this case." *Id.* at 268.

As in *Fieldstone*, the precise genesis of the "bylaw" is not apparent from the record. No minutes of the meeting of the Sewer Commission at which the document was approved were submitted to clarify the purpose of the Commission in approving it. However, we can infer from the language of the document, which ultimately was enacted as a bylaw, that it was more likely than not originally intended to be a bylaw, but for an unknown reason, was not adopted until 2007. First, it was titled "bylaw." The general introductory section sets out the powers of the Sewer Commission, as though those powers are prescribed by a superior authority, such as town meeting. See Section 1(a) General. The document itself refers to the Sewer Commissioner's powers to promulgate regulations. See § 3(a): "Any such connection as may be approved by the Sewer Commission shall be in accordance with all rules and regulations as may be from time to time promulgated by the Sewer Commission." Exh. N3. The memorandum of the Selectmen's executive secretary states that the Sewer Commissioners "approved" the "bylaw," not that they "adopted" it. Finally, the document was in fact ultimately adopted as a bylaw in 2007.

As the record shows, Hollis Hills sought to learn the regulations and bylaws in effect and the Sewer Commissioners chose not to confirm the correct information. The only bylaw on record was the "Sewer Betterment Assessments" bylaw enacted in 2001. The only sewer regulations on record were the Sewer Use Regulations. The Sewer Commission's letter to the Board which quoted portions of the "policy" does not meet the requirements of G.L. c. 83, § 10 and fails to establish the legitimacy of the provision in the "policy" cited by the Sewer Commission. Exhs. 41, 42. The Board has not demonstrated that it promulgated the "bylaw" as a regulation.

Without proof that the "bylaw" was promulgated by the Sewer Commissioners as a regulation, duly published as a regulation and made available for review by residents of the town, the "bylaw" is unenforceable as a regulation. Notably, the Town, the party in possession of evidence relevant to such proof, failed to provide it. The promulgation of the regulation, rather than its substantive content, does not benefit from a presumption in its favor. *Town of Brookfield* v. *Kruzewski,* [18 LCR 63] 2010 WL 282909 at 2 (Mass. Land Ct. 2010) (challenges to validity of alleged regulations on grounds they were never properly enacted pursuant to statutorily-mandated procedure are not subject to presumption of validity accorded regulations enacted pursuant to enabling statutes), citing *Springfield Preservation Trust, Inc.* v. *Springfield Library & Museums Ass'n, Inc.*, 447 Mass. 408, 418 (2006); *Beard* v. *Salisbury*, 378 Mass. 435, 439-40 (1979). Therefore the document fails to meet the statutory requirement. Since the document does not qualify as either a bylaw or a regulation, then at most it might have been a policy issued by a municipal agency, if the evidence had supported that. PD Tr. 172; Exhs. 41, 42. On the record, however, we do not find it to have been adopted as a policy, even though the Sewer Commission treated it as a policy. Even if it were an adopted policy, its adoption as a policy would still be insufficient for the reasons stated. See *Castle Estates, supra,* 344 Mass. at 333 (regulations "should be comprehensive … so that owners may know in advance what is or may be required of them and what standards and procedures will be applied to them."); *Fieldstone Meadows, supra,* 62 Mass.

App. Ct. at 266, 267, 270 (annulling action "improperly based on a policy existing outside of the regulatory framework"). The Town has failed to meet its burden of proof. Post-Decision Pre-Hearing Order, § IV.

Finally, evidence in the record suggests unevenness in the Town's application of the "bylaw." The record shows that Emerald Place, a market rate project located near the project site, which the Town either knew or had failed to determine would be accessing sewer use through Lunenburg and not directly from neighboring Leominster, was charged sewer privilege fees for only 45 of its 240 units. PD Tr. 36-37, 126-129, 185, 191, 194, 198-199; Exh. N38. Mr. Gustus testified that the Sewer Commissioners considered treating a Chapter 40R multifamily rental development as commercial and assigning units based on estimated water consumption, rather than according to the residential land provision, thus allowing the Sewer Commission discretion in the amount of the assessment. PD Tr. 143-149; See Exhs. N33, ¶¶ 5-6; N3; 80.

The Board argues that under Chapter 83 it has the authority to impose a sewer privilege fee. However, the Town has taken a position which suggests that the Town did not believe it had valid authority to charge sewer privilege fees. At the May 2, 2009 annual town meeting, the Town adopted a bylaw authorizing the selectmen to petition the Legislature to authorize Lunenburg to charge sewer privilege fees to landowners who had not been charged a betterment fee. Exh. 170; Tr. I, 46-49. On the evidence before us, we find and rule that the Town did not take the appropriate action to exercise any such statutory authority before the enactment of the bylaw on May 5, 2007.

For the foregoing reasons the Committee finds and rules that the "Sewer Assessment By-law" was not validly adopted before the date of Hollis Hills' application for a comprehensive permit was filed with the Board and does not apply to the Hollis Hills project.

V. SEWER CONNECTION FEE

A. Regulations Regarding Sewer Connection Fees

The Board seeks to impose a sewer connection fee of $1,760 per building plus $550 for each bedroom in excess of three bedrooms, for a total of $238,150. Exh. N35, ¶ 5. During the original hearing, Mr. McCarty testified that Hollis Hills was willing to pay "the sewer connection fee, if any, that is required pursuant to a duly adopted by-law and has been lawfully imposed on developers of market-rate housing." Exh. 172, ¶ 62. The May 7, 2005 version of the Lunenburg Sewer Use Regulations was in effect as of the date of Hollis Hills' application for a comprehensive permit on February 13, 2006. It provides for a sewer connection permit fee as well as an inspection fee in Section 147-5, which states:

> A. Connection permits: There shall be three (3) classes of building sewer permits: single-family residential, multifamily and commercial, and industrial. In each case, the owner or his agent shall make application on a special form furnished by the city. The permit application shall be supplemented by any plans, specifications or other information considered pertinent in the judgment of the Commissioners. There shall be a sewer permit fee of ten dollars ($10) for single-family class, twenty-five dollars ($25) for multifamily or commercial class and fifty dollars ($50) for industrial class. In addition, for each class, an inspection fee of one hundred dollars ($100) shall be paid, said fees to be remitted to the city with each application…. [Sic]

Exhs. 52; N29, Sewer Use Regulations, § 147-5.A, updated May 7, 2005.

Mr. Ebersole testified that the Sewer Use Regulations were initially adopted in 1996 and modeled on Fitchburg's regulations. He testified that the Board of Selectmen acting as Sewer Commissioners, adopted sewer connection fees on July 1, 2003. A memorandum issued by the Board of Selectmen dated July 21, 2003 lists sewer connection fees (including sewer connection charge, permit fee and inspection fee) based on the number of bedrooms, providing for $660 for a one-bedroom unit, with an increase of $550 for each additional bedroom up to five. Exhs. N33, ¶¶ 28-29, 32; N33-C.

On February 1, 2005, the Board of Selectmen, acting as Sewer Commissioners, voted to amend "the Sewer Connection Charge Policy of the Lunenburg Sewer District" to require assessment of a minimum connection charge of $1760 to any building connecting to the Lunenburg sewer system, plus, for residential dwellings, an additional $550 for each additional bedroom beyond three bedrooms. Exhs. N33, ¶ 30; N5.

Although the Sewer Commission voted to adopt these sewer connection charges in February 2005, they were not included in the actual Sewer Use Regulations updated May 7, 2005. Rather, the Sewer Commission did not note the need to amend the Sewer Use Regulations until its December 30, 2008 meeting, when it discussed and voted on revisions to § 147-5, to reflect "the addition of the connection fee policy."[9] Exh. N30. See Exhs. N31, N29, N11; PD Tr. 93-94.

Mr. Ebersole testified that the Sewer Use Regulations did not set specific connection fees until December 2008, but that the fees were always authorized under § 147-34 of the Sewer Use Regulations, which allows the Sewer Commission to adopt charges and fees for a variety of purposes including fees associated with the town's pretreatment program, monitoring, accidental discharge procedures and construction, permit applications, filing appeals, removal of pollutants, and other fees deemed necessary to carry out the requirements "contained herein." The provision states that "these fees relate solely to the matters covered by this chapter and are separate from all other fees chargeable by the town." Exh. 52. He stated that the purpose of the connection fees was to recoup the Town's own connection costs under its intermunicipal agreements with Leominster and Fitchburg, as those municipalities are recipients of sewage discharged into Lunenburg's sewer system. Exh. N33, ¶ 32. However, since his

9. The Sewer Commission has applied the $1,760 connection charge policy in practice. See Exh. N11.

testimony is contradicted by the text of the Sewer Use Regulations, we accord this testimony no weight.

B. Hollis Hills's Knowledge of the Sewer Connection Fee

The Board suggests that Hollis Hills has conceded the sewer connection fee, since Mr. McCarty submitted a response in the hearing before the Board that the developer was aware of the Board's proposed connection fee. In a September 6, 2006 memorandum to the Board, Mr. McCarty responded to peer review commentary:

> Item 97: The City of Leominster imposes substantial fees for connection to their wastewater collections and treatment systems and ongoing charges for discharges during occupancy of the property serviced. The applicant should document their proposal for payments to ensure that Lunenburg is held harmless with respect to financial liability.
>
> Response: The applicant must pay all fees to the Town of Lunenburg. All Fees are required to be paid prior to issuance of a building permit. …
>
> The applicant understands that the only specified fee charged by the Town of Lunenburg is the connection fee. Connection Fee indicated is $1,760 for up to three bedrooms and $550 for each additional bedroom. The applicant was advised that there is no specification for how to apply betterment fees nor the method of calculating betterment fees. The Applicant request that the ZBA obtain the current fee schedule from the Sewer Commissioners for connection, betterment and any other charges proposed.

The applicant advises that fees imposed may have a significant effect on project affordability.

Exh. 39. In the post-decision hearing, Mr. McCarty testified that he learned of this fee from a source outside Lunenburg town government and as a result asked the Board and Sewer Commission to confirm it and provide a source for the fee. He stated that at the time Hollis Hills filed its application, the sewer connection fee listed in the town's Sewer Use Regulations was $125 per unit. Therefore, Hollis Hills had requested that the Sewer Commission confirm a list of regulations and bylaws in effect. As noted above, the Sewer Commission did not do so. Exhs. 39, 41-43, 117; N34, ¶¶ 9-10; PD Tr. 204, 223-224.

The sewer connection fee policy on which the Board relies is in conflict with the regulatory provision in § 147-5. The Board cannot rely on a policy based on § 147-34 generally allowing fees to be set when a specific provision setting out the fees was already within the regulations at § 147-5. Having failed to comply with the statutory requirements to have updated, comprehensive municipal regulations so that those regulated by the town "may know in advance what is or may be required of them and what standards and procedures will be applied to them," see *Castle Estates, supra,* 344 Mass. at 332-333, the Sewer Commission cannot now claim that the policy overrides the regulation. Rather § 147-5.A. of the Sewer Use Regulations "updated 5/7/05" sets forth the applicable sewer connection and inspection fees of $125 per unit.

VI. CONCLUSION AND ORDER

Since we find that the "Sewer Assessment Bylaw" was not a valid bylaw until May 5, 2007, and was not a valid regulation at the time of Hollis Hills' application for a comprehensive permit to the Board, it does not provide the authority for assessment of a sewer privilege fee on Hollis Hills. Similarly we find that the sewer connection policy on which the Board relies was not the valid regulation when Hollis Hills applied for a comprehensive permit and it does not provide the authority for the imposition of the sewer connection charge on Hollis Hills. Accordingly the sewer connection charge applicable to Hollis Hills is the charge set forth in the 2005 Sewer Use Regulation, § 147-5.A., which provides for a total of $125 per unit for each of the units, or $17,000.

As a result of these findings of fact and rulings, the Committee need not reach the remaining issues.

This ruling and order may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the ruling.

March 25, 2013; Housing Appeals Committee; Werner Lohe, Chairman, Carol A. Gloff, Joseph P. Henefield, Theodore M. Hess-Mahan, James G. Stockard, Jr.

* * * * * *

MHACR Commentary: The Municipal Perspective January-June 2013

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ONCE GOVERNED BY A COMPREHENSIVE PERMIT, ALWAYS GOVERNED BY THE COMPREHENSIVE PERMIT

VIFII/JMC Riverview Commons Investment Partners, LLC v. *Andover Zoning Board of Appeals*, 8 MHACR 1, February 27, 2013

VIFII/JMC Riverview Commons, Appellant, is the owner of 220 apartment units and 352 paved parking spaces known as Andover Place, located in an industrial subdivision. The project was constructed in 1988. For the first 15 years, 25% of the units were rented to tenants at or below 80% of the area's medium income. In 2005-2006, per the terms of the comprehensive permit and applicable subsidy agreements, the affordability requirements expired and the units set aside for affordable housing were rented at market rates. There are currently no affordable units at Andover Place.

On February 3, 2012 the owner sought permission from the Andover ZBA to modify the parking for the development, including the construction of two one-story parking garages with a total of approximately 10,442 sq. ft. This proposal would decrease the number of available parking spaces from 352 (all surface spaces) to 340 (304 surface spaces and 36 garage spaces).

A public hearing was held on February 15, and February 27, 2012. At the meeting of February 27th the ZBA determined that the proposed changes were "substantial" and denied the motion.

The Committee affirmed. First, the Committee determined that the affordability restriction was, in fact, properly terminated. In *Zoning Board of Appeals of Wellesley* v. *Ardemore Apts. Limited Partnership*, 436 Mass. 811, 813 (2002), the Supreme Judicial Court ruled that when the affordability restrictions in a comprehensive permit's subsidy agreements expire, some units must remain affordable in order to continue the benefit of the zoning relief granted by the comprehensive permit, "unless otherwise expressly agreed to by a town." The 1988 comprehensive permit did not require the units to remain affordable.

The Committee then turned to the jurisdictional question—if the affordability restriction has expired, does the comprehensive permit still govern the property? The Committee properly analogized the situation to that of a variance or a special permit. *Citing Mendes* v. *Board of Appeals of Barnstable*, 28 Mass. App. Ct. 527 (1990) (use governed by variance is not a nonconforming use) and *McHugh* v. *Grossman*, 10 LCR 45 (Land Ct. 2002) (use governed by special permit then prohibited by later zoning amendment is not a nonconforming use), the Committee concluded that the ZBA retained jurisdiction to review proposed modifications.

Turning to the proposed change, the Committee agreed with the ZBA that the construction of the parking garages and the reduction in parking spaces constituted a substantial change. After weighing the arguments of both parties, its own precedent, and employing the test set forth in *Powers* v. *Building Inspector of Barnstable*, 363 Mass. 648 (1973), the Committee sided with the ZBA. The Committee concluded that the ZBA's decision to deny the substantial change was consistent with local needs, largely because the developer did not present any evidence regarding the financial impact of the denial.

This raises an obvious question. If the Committee retains jurisdiction of a development even after the subsidy agreements have expired and the Town has expressly permitted the affordability restrictions to expire, what test should be employed to measure any substantial change thereafter? In the usual case, the developer bears the burden of showing that denial makes the project uneconomic. If the restrictions have expired, is this even relevant? The Committee hinted at this result, stating "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 Committee might have used this rare opportunity to announce a better standard for such cases going forward.

FEES NOT VALIDLY ENACTED ARE NOT VALIDLY CHARGED

Hollis Hills LLC v. *Lunenburg Zoning Board of Appeals*, 8 MHACR 10, March 25, 2013

In 1999, Lunenburg developed a wastewater management plan. In May 2001, the Town added a new Section 21 to its General Bylaws, Article IX, Miscellaneous Provisions, for sewer betterment assessments which allowed the Town to assess 100% of the cost of sewer projects "upon those who benefit from each project." Section 21 states that

> The Board of selectmen, acting as sewer Commissioners, shall assess sewer betterment assessments under MGL Chapter 83, s. 14 by a rate based upon the uniform unit method, as provided in MGL Chapter 83, s. 15, and shall assess one-hundred percent of the cost of sewer projects upon those who benefit from each project, unless another percentage is voted by Town Meeting.

The Town claims that this "bylaw" has the full force and effect of law. Thereunder, the Town has assessed Hollis Hills a sewer privilege fee of $11,551 per unit for the project, for a total of $1,571,000. The sewer connection charge is $1,760 per building with an additional $550 for each unit over 3 bedrooms.

Hollis Hills, acquired the land in 2005 and applied for a comprehensive permit on February 13, 2006. The "bylaw" summarized above was the only sewer assessment bylaw in effect when Hollis Hills made its application for a comprehensive permit. Hollis Hills later received approval for the development of 136 condominium units in attached townhouses on approximately 34 acres. The Hollis Hills project consists of 4 parcels with frontage on West Street, Hollis Road, Electric Avenue (all public ways) and Carr Avenue (a private road).

Hollis Hills claims the fees should be based on Section 147-5 of the Town's Sewer Use Regulations, dated May 2005, which provide for a $125 per unit fee for permit and inspection, for a project total of $17,000. Hollis Hills asserts that this regulation was the only valid sewer assessment in effect on February 13, 2006, the date of the Hollis Hills application for a comprehensive permit. The matter turns on the effect of the Town's adoption of Section 21 in 2001, whether any other by-laws or regulations were in place before the Hollis Hills application in 2006, and whether, in fact, the Sewer Assessment by-law was properly adopted in 2007, *after* Hollis Hills submitted its application for a comprehensive permit.

The Committee examined that facts surrounding the adoption of the by-law. Various iterations of the by-law were traced. Other documents, characterized instead as regulations, were also explored. The Committee noted that sewer regulations shall be published, after adoption, in a newspaper of general circulation in order to be effective. No such publication took place in Lunenburg. The Committee concluded that, until 2007, the Town had in place nothing more than a generalized policy regarding sewer assessments. Such policy statements are not binding. In *Fieldstone Meadows Development Corp.* v. *Conservation Commission of Andover*, 62 Mass. App. 265 (2004), the Appeals Court ruled that statements of policy—not lawfully adopted as a rule or a regulation—could not form the basis for the denial by the commission.

Cities and towns are advised to examine their practices and procedures with regard to the holding in *Fieldstone Meadows*, not just for comprehensive permits, but for all aspects of land use regulation. Too often I encounter local customs that have worked their way into a board's decision making practices, without codification at all. If it's a de facto rule, make it de jure. Write it down and take the proper procedural steps to get it into the code.

COMMITTEE ORDERS "BUILDER'S REMEDY"

Delphic Associates LLC v. *Middleborough Zoning Board of Appeals*, 8 MHCAR 18, March 28, 2013

In 2000 Delphic Associates, the developer, applied to the Middleborough Zoning Board of Appeals to build 10 single family homes under a comprehensive permit. The ZBA denied the permit. After review, the Committee ordered the Board to issue the permit and "take whatever steps are necessary to insure that a building permit is issued to the applicant without undue delay." This decision was ultimately affirmed by the Supreme Judicial Court in 2007.

In 2010, and again in 2012, Delphic filed a motion to enforce the Committee's decision. No permits were locally issued. Now, for the first time in the 43-year history of the Comprehensive Permit Law, a developer is seeking enforcement of the Committee's orders in the form of a "builder's remedy" and the Committee has been asked to step into the shoes of the local officials to circumvent the obstruction of its orders. *See, e.g. Petrucci* v. *Board of Appeals of Westwood*, 45 Mass. App. 818 (1998). The Committee, after reviewing 760 CMR 56.06(7)(e)(2), so ruled:

> [I]n this matter, and similar enforcement orders 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. In doing so, he shall, in his discretion, give deference where possible to local procedures, and, if practical, to such local officials as cooperate in good faith in the permitting process.

Also, if either party fails to comply with the order, sanctions may be assessed, per 760 CMR 56.07(6)(b) and 56.07(6)(d). The Presiding Officer ordered the developer to file a "Comprehensive Permit Plan," security, and other documents that are in compliance with the Committee's decision.

The spike in comprehensive permit applications now being felt in some regions will undoubtedly inspire some local resistance. The Committee has added a new tool to its box. It remains to be seen whether such local resistance will bow to the Committee or take some other form. ■

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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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