MHACR Commentary—Municipal Counsel *2018 Review*

Paul J. Haverty, Esq.
Blatman, Bobrowski & Haverty, LLC

In *Sudbury Station, LLC* v. *Sudbury Zoning Board of Appeals*, 13 MHACR 17 (2018), the Presiding Officer Shelagh Ellman-Pearl issued a Ruling on Motions to Intervene brought by the Town of Sudbury and an abutter. The Town sought to intervene based upon purported impacts to two town-owned cemeteries abutting the project, as well as a town athletic field that abuts an abandoned railroad right of way (which abuts the project site). The abutter claimed to be a direct abutter, although the railroad right of way separated his property from the project site.

The Presiding Officer noted that parties seeking to intervene into a matter before the Housing Appeals Committee are not allowed to participate as-of-right simply because they are parties in interest pursuant to G. L. c. 40A, § 11. Parties seeking to intervene must show that "they may be substantially and specifically affected by challenged conditions and determinations on waivers of local rules or bylaws at issue in the appeal." The Presiding Officer also noted that "an intervenor does not have the right to raise issues in proceedings before the Committee that are outside the scope of an appeal under G. L. c. 40B, § 23." In order to be allowed to intervene, a party must be able to show "a substantial and specific potential injury and a relationship of that injury to a local rule or bylaw at issue in the proceeding before . . . intervention in an appeal before the Committee[.]" Finally, a proposed intervenor will not be allowed to intervene "if his or her interests are substantially similar to those of any party and no showing is made that one or more of the parties will not diligently represent those interests."

The Presiding Officer in this matter noted that the Town was asserting rights based upon its status as an abutting property owner, thus it was not "disqualified from seeking intervention." However, the Town did not provide sufficient evidence of how waivers of local requirements (mainly relating to stormwater) would materially impact their interests as an abutting property owner. Significantly, the Presiding Officer found that "the Town's interests are substantially similar to those of the Board, but it has not demonstrated that the Board will not adequately represent its interests, particularly where it is relying upon the same counsel as the Board." Accordingly, the Town's Motion to Intervene was denied.

The other abutter seeking to intervene in this matter did not identify any local rules or requirements pertaining to his stormwater runoff claims that supported his claim of harm. Given an opportunity to provide a supplemental filing to address these issues, the abutter instead raised new issues regarding traffic and subdivision rules and regulations. Since the abutter failed to identify any issues supporting his Motion to Intervene, that motion was denied.

PRACTICE TIP: Towns should think twice before seeking to intervene in an appeal to the Housing Appeals Committee. As noted in this case, one of the standards that must be met before a party is allowed to intervene is to show that the Board of Appeals will not adequately represent that party's interests. That potentially sets up an adversarial relationship between the Town and its Board of Appeals, which should be avoided when possible. At a minimum, the Board should be provided with separate counsel from the Town, because it is hard to conceive of a situation where the Town's rights would be adequately represented by the same counsel that would not adequately represent that Town's rights as counsel for the Board.

The full Housing Appeals Committee issued a decision in the matter of *HD/MW Randolph Ave., LLC* v. *Milton Bd. of Appeals*, 13 MHACR 31 (2018), involving a ninety (90) unit rental development in Milton. The Board approved only thirty-five (35) units, and subjecting the development to numerous additional conditions. The developer challenged the decision of the Board, claiming it rendered the project uneconomic, and/or beyond the scope of the Board to impose (or were otherwise unlawful).

The Committee began its lengthy decision by reviewing the applicable standard for determining whether a project is uneconomic. The Committee discussed the application of the Return on Total Cost ("ROTC") standard, which is set in the DHCD Guidelines as 4.5 points above the 10-year Treasury Yield. The Committee announced a new standard in this decision, however, as it noted that "[i]f the ROTC of the development as proposed is below the ROTC economic threshold . . . the developer must also show that the Board's conditions render the project significantly more uneconomic than the project proposed in the developer's application for a comprehensive permit."

The Committee then reviewed the economic impacts of the conditions and waiver decisions from the Board, and found that the uneconomic threshold was an ROTC of 6.84%. The Committee also found that the ROTC for the project as proposed was 5.88%, and the ROTC for the project as approved as 4.26%. Because the ROTC for the project as proposed was below the uneconomic threshold, the Applicant was required to show that the reduction in ROTC of 1.62% resulted in a project that was significantly less economic than the one proposed. The Committee readily found that this reduction resulted in a project significantly less economic than what was proposed.

Because the Committee found that the Board's decision rendered the project uneconomic, the burden shifted to the Board to show

local concerns that outweighed the regional need for affordable housing. The Board raised multiple issues in support of its claim, including density/intensity, fire safety/emergency access, emergency access to buildings, stormwater and other issues of local concern. The Committee rejected all of the Board's claims. The portion of the decision concerning the fire code is the most notable portion of the decision. The Committee held that while waivers of the State Fire Code are not available under Chapter 40B, the Fire Code does provide discretion to local fire departments to make determinations regarding provisions of the Fire Code. The Committee then found that "the determinations made by the fire chief are actions of a local official and hence subject to determination by the Board and the Committee."

The Committee struck numerous conditions imposed by the Board relating to fire safety, snow storage, wetlands, stormwater and other issues raised by the Board. One issue that the Committee addressed was a condition that required the Applicant to provide a hydrological study to accurately reflect wetlands impacts from the proposed work. The Board claimed that the information that had been provided by the Applicant during the course of the hearing was insufficient/inaccurate. The Board also argued that the requirement for the study was supported by requirements in their local wetlands bylaw. However, the Committee noted that the Board approved the project, and that the Board can't "require another study to be conducted for a further substantive review of matters that the Board should have addressed before issuing its decision."

The Committee also addressed claims by the Applicant that certain conditions imposed by the Board violated the decision of the Supreme Judicial Court in *Zoning Bd. of Appeals of Amesbury* v. *Housing Appeals Comm.*, 457 Mass. 748 (2010). The Committee modified conditions which required peer review fees for review of final plans, allowing such fees only if done in compliance with municipal bylaws or regulations adopted and imposed on unsubsidized housing developments. The Committee also reviewed conditions requiring the Applicant to execute a springing regulatory agreement, which would come into effect if/when the regulatory agreement with the Subsidizing Agency expires. The Committee struck these conditions imposed by the Board, finding that they potentially interfere with the Subsidizing Agency's exclusive jurisdiction, and that potentially subjected the Applicant to an improper condition subsequent. The Committee found that the Board had not shown that requiring the springing regulatory agreement "is within the authority of the Board."

PRACTICE TIP: The most important issue to come out of the *HD/MW Randolph Avenue* case from the municipal perspective is that when a project is uneconomic as proposed, the Board may still impose conditions on the project, so long as those conditions do not render the project significantly more uneconomic than the project as proposed.

The Applicant in *Wayfinders, Inc.* v. *Ludlow Zoning Bd. of Appeals*, MHACR 59 (2018) filed a Motion for Determination of Constructive Grant, claiming that the Board failed to close the public hearing within one hundred and eighty (180) days, as required by 760 CMR 56.05(3). The Presiding Officer denied the Applicant's motion.[1]

The Applicant in this case filed an application for a comprehensive permit seeking the construction of forty-three (43) rental housing units in Ludlow. By agreement of the Applicant and the Board, the one hundred and eighty (180) day time-period to close the public hearing was extended to September 18, 2017. The Board provided the Applicant a copy of a draft decision while the public hearing remained open. The Board formally closed the public hearing on September 17, 2018. The Board held two deliberative sessions, on September 27, 2017 and October 5, 2017. During these deliberative sessions, counsel retained by the Ludlow Board of Selectmen spoke and offered input on conditions. The Board then issued its decision on October 12, 2017, within the forty-day period allowed for deliberations under G. L. c. 40B, § 21.

The Applicant argued that the Board's hearing was not closed within the 180-day period required by the regulations, as the result of the participation of the counsel for the Board of Selectmen during deliberations. The Board argued that no substantive information was provided during the deliberative sessions.

After reviewing the information provided by both parties, the Presiding Officer noted that "the Selectmen's counsel appears to have engaged in argument to persuade the Board members in their deliberations." The Presiding Officer also found the conduct of these sessions was more consistent with a continuations of the hearing[.]" However, the Presiding Officer also found that "the Board engaged in deliberations during these sessions, which progressed to the point that they reached a decision on October 5, and issued their decision on October 12." The Presiding Officer held that "[e]ven if the conduct of those sessions made them a continuation of the hearing, even in part, the Board's timing for these two sessions is consistent with the intent of the regulatory time frame." Because the Board issued its decision within the forty-day period after the official close of the public hearing, the Presiding Officer determined that "the conclusion of the process occurred within the time period required by Chapter 40B and our regulations." Accordingly, the Applicant's Motion for Determination of Constructive Grant was denied.

PRACTICE TIP: While it is unusual for a Board to have counsel for its own Board of Selectmen providing comments and suggestions regarding draft conditions during deliberative sessions, it is not unusual for such comments to come from developers during this process. Boards should be careful about allowing any comments or feedback after the close of the public hearing. To the extent that additional feedback on proposed conditions appears to be necessary, the Board should request an extension of the 180-period for closing the public hearing. If the Applicant is unwilling to grant such extension, the Board should be prepared to conduct its deliberations and issue its decision without additional feedback. ■

1. Attorney Haverty is counsel for the Ludlow Board of Appeals in this matter.