MHACR Commentary—Municipal Counsel 2023 Review

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In *Marion Village Estates, LLC* v. *Marion Board of Appeals*, 18 MHACR 1 (2023), the Presiding Officer Lisa V. Whelan issued a Summary Decision determining that a proposal to replace six (6) two-inch water meters with sixty (60) individual 5/8th inch water meters constituted an insubstantial change, overturning a determination of the Marion Board of Appeals holding such modification to be a substantial change.

The Presiding Officer reviewed the impacts of the proposed modification, noting that it did not impact the physical layout of the project. Rather, the change would "cause a drop in consumption billed per meter, further resulting in a reduction in the tier-rate billed per meter, and consequently, a reduction in the amount of the developer's water bills and, therefore, in the amount of revenue to the Town." As the Presiding Officer noted in her decision, "the Committee has long held that negative impact on a town's finances is not relevant under G. L. c. 40B."

PRACTICE TIP: The Applicant in this appeal took advantage of the provision in 760 CMR 56.05(11)(d), which allows an applicant to either immediately appeal a determination that a proposed modification is substantial, or to elect to continue forward with a duly noticed public hearing and reserve the question of whether the Board's determination was proper until after the Board issues a decision on the proposed modification. In this instance the Applicant chose an immediate appeal to challenge the determination that the proposed modification was substantial.

The full Committee issued a decision in the consolidated cases of *In the Matter of Walpole Zoning Board of Appeals* v. *Wall Street Development Corp. (Darwin Commons)*, and *In the Matter of Walpole Zoning Board of Appeals* v. *Wall Street Development Corp. (Pinnacle Point)*, 18 MACR 5 (2023). These matters involved an interlocutory appeal of a decision by the Department of Housing and Community Development (DHCD). The Board had asserted a claim of a safe harbor under the Housing Production Plan regulation at 760 CMR 56.03(4). DHCD determined that the Board's safe harbor claim was not valid, because the units that served as the basis for the Housing Production Plan certification were no longer eligible for inclusion on the Town's Subsidized Housing Inventory ("SHI") because more than twelve (12) months had elapsed from the permit creating the units without the issuance of a building permit. The Committee held that even if a certification was issued for a two-year period, that certification remained dependent on the units remaining eligible for inclusion on the SHI.

PRACTICE TIP: Municipalities should take any steps necessary to ensure that units added to their SHI remain eligible by issuing building permits as quickly as possible. Ultimately, the timing of the issuance of building permits rests with the developer rather than the municipality, but removing any local hurdles preventing the issuance of building permits can help keep units on the town's SHI.

In *104 Stony Brook, LLC* v. *Weston Zoning Board of Appeals*, 18 MHACR 11 (2023), the developer appealed a denial of a comprehensive permit issued by the Weston Zoning Board of Appeals. The Applicant sought construction of a 154-unit rental development on a two-acre property in Weston. The Board denied the comprehensive permit, based upon purported concerns relating to claims that the Project could not comply with state and federal requirements relating to stormwater management and wastewater treatment. The Committee ruled that the Board, and the intervener City of Cambridge, failed to identify any local concerns that supported the denial of the comprehensive permit. The Committee further found that the Board's concerns relating to compliance with state and federal requirements could be ensured through the imposition of conditions requiring such compliance.

The Project site is located in close proximity to Stony Brook and the Stony Brook Reservoir, which are owned by the City of Cambridge. The City was allowed to intervene in this matter based upon the potential impacts to this water resource as it relates to the stormwater management and wastewater treatment for the Project.

As an initial matter, the Committee had to re-examine the standard for an applicant establishing its *prima facie* case. The Committee reviewed the regulations at 760 CMR 56.07(2)(a), which state that the developer may establish a *prima facie* case by showing compliance with federal or state standards or generally accepted standards. The Committee noted the use of the disjunctive "or" in this regulation. The Committee also noted that compliance with state or federal standards can be satisfied though the imposition of a condition requiring such compliance. The Committee noted that evidence supplied by the Board and the City of Cambridge challenging the Applicant's *prima facie* case was not relevant, as its determination was based solely on the evidence supplied by the Applicant. Ultimately, the Committee determined that the Applicant met its *prima facie* case.

The Committee next addressed the question of local concern, noting that neither the Board nor the City of Cambridge pointed to a local requirement more stringent than state or federal requirements

relating to stormwater or wastewater treatment. The Committee noted that even if a more restrictive local requirement were applicable, the Board failed to demonstrate how such local requirement "is necessary to provide protection against specific harms that could not be protected by the state and federal schemes."

The Committee noted that all of the Board's claims in support of the denial of the comprehensive permit was based upon a purported lack of compliance with state and federal requirements. Even where local concerns were alleged, their "sole argument was that compliance with them is required by federal and state law[.]" Accordingly, the Committee held that the Board failed to identify a local concern that supported its denial.

PRACTICE TIP: As always, a board should make certain to identify local requirements that are stricter than state and/or federal law in support of its decision. This case shows that simply pointing to local requirements that require compliance with state or federal standards is insufficient to support a denial (or approval with conditions). If a board is unable to point to a local rule or requirement that imposes standards more restrictive than state or federal requirements, then its decision is unlikely to be upheld on appeal to the Committee.

The Committee issued another decision on a 1.5% GLAM interlocutory appeal in the case of *In the Matter of Medford Zoning Board of Appeals and DIV Fellsway, LLC*, where the Committee upheld a decision of DHCD overturning a safe harbor claim made by the Medford Zoning Board of Appeals.

In this appeal, the Board challenged the application of DHCD's Guidelines for Calculating General Land Area Minimum issued on January 17, 2018, and revised January 31, 2020 (the "GLAM Guidelines"). The Committee noted that "while it is appropriate to give deference to a policy articulated by DHCD, the Committee would not be bound by such a policy if it were in violation of statutory provisions or statutory intent." However, the Committee found that "the Board has offered no valid basis for the Committee to declare any portion of 760 CMR 56.00 or the GLAM Guidelines invalid."

Upon review of the substantive claims, the Committee noted that the Board's calculation of total developable land excluded 1,065.99 acres of land zoned as Recreation Open Space. Uses allowed in this zoning district include bowling alleys, theaters, concert halls and private recreation clubs. The Committee determined that this zoning district did not prohibit all residential, commercial and industrial uses, and therefore may not be excluded from the total developable acreage calculation. The Committee also held that the exclusion of 11 rights of way that were not identified as public ways was also improper, thus adding an additional 26.656 acres of developable land.

The Committee also had to review the calculation of land where low- and moderate-income housing exists. The Board argued that it should get to count the entire property area associated with developments on which all of the units count on the SHI. The developer argued that the Board ignored the GLAM Guidelines and failed to apply the analysis for directly associated area for multiple sites. Ultimately, the Committee rejected the Board's claim that 1.83% of the City's land area was SHI eligible, holding instead that the correct calculation was 1.25%, thus falling below the 1.5% safe harbor.

PRACTICE TIP: Safe harbor appeals, particularly GLAM appeals, are a lengthy and expensive process. The Committee has consistently ruled against challenges to the validity of the GLAM Guidelines. Accordingly, a board should take care to ensure that the GLAM Guidelines are followed when determining whether to pursue a safe harbor appeal. Failure to do so will likely result in the safe harbor claim being rejected and the matter being remanded back to the Board for further proceedings.

In *Pond View Commons, LLC* v. *Lunenburg Zoning Bd. of Appeals*, 18 MHACR 75 (2023), the Committee ruled on an interlocutory appeal brought by the Applicant challenging a "Certificate of Partial Vote" issued by the Lunenburg Zoning Board of Appeals denying waivers to extend water and sewer services to the proposed project. Both the Board and the Applicant signed a stipulation to indefinitely suspend the local proceedings to allow the interlocutory appeal to proceed.

As an initial matter, the Committee was required to determine whether the Lunenburg Sewer Commission and the Lunenburg Water District are local boards subject to Chapter 40B. The Committee had no difficulty in determining that both the Water and Sewer Districts were local boards, consistent with a long line of Committee decisions. The Committee noted that "there is no state agency that has oversight of the workings of either the Sewer Commission or the Water District and both entities were created for the benefit of their respective districts, not for the state at large." Accordingly, both the Sewer Commission and Water District were determined to be local boards.

The next question the Committee had to answer was whether the Board had the authority to grant the waivers requested by the Applicant. The Committee reviewed the applicable decisional law, and held that the requirement for a Town Meeting vote to extend the sewer and water districts was a legislative function that required Town Meeting authorization, which could not be waived under Chapter 40B. The Committee thus held that neither the Sewer Commission nor the Water District could waive the requirement for Town Meeting approval to expand their districts, thus such waiver was not available under Chapter 40B.

PRACTICE TIP: Although a board may be a local board as that term is defined in the regulations, it will still be necessary to determine whether a requested waiver impacts a legislative function of that board, or whether it implicates a permitting function. If a legislative function is involved (such as a requirement for obtaining Town Meeting approval), then that legislative function may not be waived as part of a comprehensive permit application.

In another case with an unusual procedural history, the Committee overturned a denial of a comprehensive permit by the Hadley

Zoning Board of Appeals, in which the Board declined to defend its decision after the Hadley Select Board refused to pay for legal counsel to defend the Board's decision. In *Valley Community Development Corp.* v. *Hadley Zoning Board of Appeals*, 18 MHACR 82, the Committee overturned the Board's denial of a comprehensive permit application to convert an existing motel into fifty (50) affordable housing units.

The Applicant filed a motion for summary decision, which was not opposed by the Board, mainly because the Select Board (which supported the Project) refused to fund counsel for the Board in this appeal. The Committee noted that this failure to respond to the factual claims in the Applicant's Motion for Summary Decision constituted an admission to all facts asserted by the Applicant. However, the Committee noted that, even though the motion was unopposed, it still had to determine whether the undisputed facts supported summary decision.

The Committee was provided evidence of statements made by the Board during the course of the public hearing that the denial was based upon a claim that Hadley had prohibited multi-family housing for more than sixty (60) years, and any change of that policy should come from Town Meeting. The Committee noted that position is directly contrary to the statutory purpose of Chapter 40B. Given the fact that the Board did not submit any evidence of a local concern supporting its denial of the comprehensive permit, the Committee issued summary decision in favor of the Applicant.

PRACTICE TIP: It is difficult to identify practice tips for this case, as it is quite unusual for a select board to deny a board access to counsel to defend its decision in an appeal to the Committee. However, the reasons articulated in the Board's denial do not seem to be the sort that would have likely been upheld by the Committee even if counsel was available to defend the Board's decision. A board should take care to avoid denying a comprehensive permit application when any concerns it has can be addressed through the imposition of conditions. Once a board denies a comprehensive permit application, it loses any ability to impose conditions on the project. ■