# MHACR Commentary—Developer Counsel 2018 Review

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*Sudbury Station, LLC* v. *Sudbury Zoning Board of Appeals*, 13 MHACR 17 (2018) involves a Motion to Intervene filed by the Town of Sudbury and a commercial abutter in connection with a developer appeal from the denial by the Sudbury ZBA of a comprehensive permit for 250 units of rental housing was denied.

The Town lacked standing to intervene since its interests were substantially similar to those of the ZBA and its concerns with wastewater and stormwater flow were speculative and unbuttressed by expert testimony.

Proposed intervenors cannot intervene as a matter of right based solely on their status as a party in interest under under G.L. c. 40A § 11. Intervention and scope of intervention by an aggrieved party is at the discretion of the hearings officer. A proposed intervenor must show they are aggrieved and establish by direct facts and not by speculative personal opinion that their injury is special and different from the concerns of the rest of the community. The injury must be related to a local rule or bylaw under review by the Committee.

The Town's assertions of visual impacts and general effects on tranquility are concerns excluded from review in appeals under Chapter 40B. Subjective and unspecific fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling or the loss of open or natural space are all considered insufficient basis for aggrievement under Massachusetts law.

The reasoning applied as well to the claim for the commercial abutter whose status as intervenor was denied but who was allowed to participate as an "interested person" under which he may attend but not participate in all hearings and conferences, except teleconferences with counsel. The interested party may request leave to make an unsworn opening statement at the evidentiary hearing and to submit a written post hearing memorandum.

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**PRACTICE TIP**—As developer's counsel, strong objection should be made on an intervenor's Motion to Intervene on the basis that the intervention is inconsistent with the limited scope of the Committee's review under Chapter 40B § 23 in that the proposed intervenor has not been substantially and specifically affected. Counsel should show that issues raised by the proposed intervenor are not of substantial and specific concern to an intervenor, i.e. in this case, Mepa, project economics and site control.

*HD/MW Randolph Ave., LLC* v. *Milton Bd. of Appeals*, 13 MHACR 31 (2018) involves an appeal by a developer of a comprehensive permit granted by the Milton Board of Appeals with an extensive list of conditions that the developer argued rendered the project uneconomic—including, most notably, a significant reduction in the number of dwelling units from ninety to thirty-five. After concluding that the board's conditions did render the project uneconomic, the HAC proceeded to strike most of the conditions that the board's decision would have imposed. This case not only restates the standard by which a determination that a project has been rendered uneconomic is to be made, it also provides guidance regarding whether specific conditions are properly considered to promote valid local concerns that override the need for local affordable housing.

In considering the issue of whether the board's conditions rendered the project uneconomic, the HAC reiterated that the developer has the initial burden of proof to establish both that the project, as conditioned, will be both (1) uneconomic, and (2) "significantly more uneconomic than the project proposed in the developer's application for a comprehensive permit." *Cirsan Realty Trust* v. *Woburn*, No. 2001-22, 10 MHACR 5, slip op. at 3 (Mass. Housing Appeals Comm. Apr. 23, 2015).

As to the first question, the HAC applied the Return on Total Cost (ROTC) standard, whereby net operating income (NOI) is divided by total development cost (TDC) to determine the ROTC. Pursuant to DHCD guidance and prior HAC precedent, the ROTC must be greater than the sum of the applicable 10-year Treasury rate plus 450 basis points in order to be deemed a "reasonable return", and thus "economic". Based on that formula, the reasonable rate of return for this project was determined to be not less than 6.84%. However, the HAC determined that the project, as conditioned, would have an ROTC of only 4.26%—well below the required minimum economic threshold. Thus, the HAC concluded that the developer had satisfied its burden of proof on this issue.

In addition to the foregoing, the HAC also noted that a condition impliedly forbidding three-bedroom units would render the project further uneconomic because it would violate the Interagency Agreement requiring 10% of units to be three-bedrooms—thus rendering it impossible to get final approval from the subsidizing agency. However, the HAC rejected the developer's claim that the board's refusal to grant a blanket waiver of the local wetlands bylaw also rendered the project uneconomic on the basis that the lack of this waiver would prevent the construction of the project's access road, which required a wetlands crossing. Rather, the HAC concluded that the denial of the waiver from the local wetlands bylaw was subject to and limited by other conditions in the board's decision pertaining to (and impliedly allowing) the construction of an access road, and thus that the decision did allow the construction of the project access road.

The HAC then turned to the question of whether the conditioned project would be significantly more uneconomic than the proposed project. Here, the evidence indicated that the 4.25% ROTC of the project, as conditioned, would be 1.62% less than the 5.88% ROTC of the developer's proposed project. Citing prior HAC precedent, the HAC concluded that this difference rendered the project, as conditioned, significantly more uneconomic than the proposed project.

In sum, the HAC found that the project, as conditioned, would be both (1) uneconomic, and (2) significantly more uneconomic than the proposed project, and thus that the developer had met both prongs of its initial burden of proof. As such, the burden of proof shifted to the board to establish that the conditions were properly based on protecting valid local concerns that outweighed the regional need for affordable housing.

The specific conditions considered by the HAC—and the HAC's rulings on the same—were as follows:

- Looped Roadway: The HAC modified a condition requiring a looped access road for emergency vehicles to require instead an emergency vehicle turnaround plan to demonstrate compliance with state building and fire codes.
- Emergency Fire Access: The HAC modified a condition requiring emergency fire access to all sides of the proposed buildings by requiring an additional paved area for fire apparatus placement during emergencies.
- Fire Hydrant Placement: The HAC modified a condition giving the fire chief discretion regarding the location of fire hydrants to require a maximum of two hydrants to be located per the fire chief's reasonable discretion.
- Elevators: The HAC struck a condition requiring all units to be located within 100 feet of an elevator.
- Turning Lane: The HAC struck a condition requiring a right-turn lane where the evidence did not show it would promote safety.
- Sidewalks: The HAC struck a condition requiring sidewalks along an access driveway and in parking areas.
- Pedestrian/Vehicle Waiting Area: The HAC modified a condition requiring a waiting area for schoolchildren and vehicles to require only a waiting area for schoolchildren.
- Stormwater Management Systems: The HAC struck two conditions prohibiting stormwater management systems from being located under or near buildings, foundations, or footings.
- Snow Storage/Removal: The HAC modified one condition and struck another pertaining to snow storage locations and removal of snow that exceeded the requirements of applicable state regulations.
- Local Wetlands Bylaw: The HAC struck two conditions refusing waivers from the local wetlands bylaw to require the observance of a no-disturb zone (which would have prevented a wetlands crossing) and the filing of a hydrological study. The HAC also modified a third condition pertaining to stormwater management to require the project plans to show how stormwater to a downgradient property would be managed.
- Setbacks/Buffers: The HAC struck a condition requiring a fifty-foot buffer to abutting properties. The HAC also modified a second condition requiring mature trees along property lines to be saved to require this to be done solely to the extent reasonably practical.
- Artificial Light: The HAC allowed a condition requiring exterior lighting to be installed so as not to create glare on abutting properties, and to reasonably ensure that vehicle headlights did not create such glare.
- Parking Area: The HAC struck a condition prohibiting a specific parking area based on fire access concerns and a deed restriction.
- Rooftop Equipment: The HAC struck a condition prohibiting rooftop equipment from being visible from neighbors' homes where no evidence suggested any rooftop equipment would be visible to neighbors.
- Unit Count & Building Locations: The HAC struck as improper project redesigns two conditions reducing the number of units from ninety, as proposed, to thirty-five, and requiring a building to be broken up into two buildings. A board must review the project submitted and may not redesign it from scratch.
- Project Parking: The HAC struck one condition refusing a waiver from the parking ratio requirements of the local zoning bylaw and modified another to require compact and handicapped parking spaces to be provided in proportion to the number of total parking spaces.
- Building Height: The HAC struck a condition refusing a waiver from the local zoning height requirement where other buildings of comparable height existed in the town, and no safety concerns were presented.
- Architectural Style: The HAC struck a condition requiring the building design to reflect a "mix of single family colonials, Victorians, and mid-century split levels", finding this requirement to be vague and ambiguous.
- Frontage: The HAC struck a condition refusing a waiver from the local zoning frontage requirement where no safety or access concerns were presented.
- Fees: The HAC modified two conditions to specify that consultancy and inspection fees could be imposed only to the extent already required by regulations and local bylaws.
- Local Regulatory Agreement: The HAC struck two conditions requiring the applicant to enter into a local regulatory agreement with the town (and specifying conditions of that agreement) since doing so could impinge on the regulatory responsibilities of the subsidizing agency.
- Site Plan Review: The HAC modified nine conditions requiring post-permitting review of project plans (including Site Plan Review) to clarify that post-permitting review would be required solely to the extent necessary to ensure consistency with the approved plans.
- Drain/Excavation Permit: The HAC struck a condition requiring a "new drain/excavation in the right of way" permit on the basis that this permit should be included in the comprehensive permit.
- Construction Effects: The HAC modified a condition pertaining to protection of neighbors from construction effects to require construction hour limits to be reasonable.
- Erosion: The HAC allowed a condition requiring best efforts to remedy erosion problems.
- Blasting: The HAC modified a condition pertaining to blasting to require the applicant to file and comply with a blasting plan.

- Duplicative Conditions: The HAC struck three conditions as duplicative of 40B regulations.
- Severability: The HAC allowed a condition allowing invalid provisions of the board's decision to be severable from valid ones.
- Jurisdiction: The HAC struck a condition providing for ongoing jurisdiction of the board over the project.

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**PRACTICE TIP**—Careful reading is suggested to the Committee's reasoning on the stricken conditions many of which appear typically in ZBA decisions. Conditions must be limited to the types of conditions that various local boards in whose stead the local zoning board acts might expose in those matters of building construction, and design siting zoning, health, safety, open space and the environment; matters such as project funding, regulatory documents, and financial documents are ultra vires to the board's authority and will be stricken by the Committee. Where a community has not achieved its statutory minimum there is a rebuttable presumption that a substantial housing need outweighs the local concerns.

In *Way Finder's, Inc. and Fuller Future LLC* v. *Ludlow Zoning Board of Appeals*, 13 MHACR 59 (2018) the Committee denied a developer's claim that it was entitled to the constructive grant of a comprehensive permit because the Ludlow ZBA extended the public hearing beyond the 180 days of opening the hearing (760 CMR 56.05 (3)).

The regulation (760 CMR 56.07 (5) (d)), provides that the Committee *may* (italics added) determine upon motion and hearing that the permit has been granted constructively due to the Board's failure to meet such deadline or one of the deadlines imposed by MGL c. 40 B, § 21.

Developer's counsel argued that the participation of counsel to the ZBA in two sessions beyond the 180 days that resulted in change to the permit constituted a continuation of the hearing.

The Committee rejected that argument, agreeing with the ZBA that the two sessions were deliberative and no new information was provided and as such weighed against the "heavy penalty of constructive grant." The Committee noted that a deliberative session is one where the right for interested parties to present information and argument is cut off thus lacking the minimal characteristics of a public hearing.

The Committee further noted that the Board proceeded diligently to conclude its deliberations and issued its decision within the statutorily mandated 40 days after the closing of the public hearing.

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**PRACTICE TIP**—To protect right of appeal to the HAC be careful to watch the 60 day clock i.e. 40 days after the closing of the public hearing for the Board to issue a decision and 20 days after filing the decision with the Town Clerk to lodge an appeal to the Committee. Constructive approvals by the Committee are disfavored. ■

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# *MHACR Commentary—Municipal Counsel* *2018 Review*

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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.