MHACR Commentary—Developer Counsel 2023 Review

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***Marion Village Estates, LLC* v. *Marion Zoning Board of Appeals*, Case No. 2022-01, 18 MHACR 1 (2023)**

The case of Marion Village Estates versus the Marion ZBA offers a lesson to local boards and municipal counsel that minor project details (here: the metering of utilities) should be reviewed as conceptual and preliminary in nature at the time of permitting, and that post-approval changes to project details are a routine part of the Chapter 40B review process. The case concludes with another important lesson, that "fiscal impact" is not a valid Local Concern and therefore cannot be taken into consideration by local boards.

Chapter 40B regulations provide both a procedure for post-approval project changes and specific guidance to local boards for their review of such changes. The procedure is outlined in 760 CMR 56.05(11), which requires the applicant to give notice of the proposed change to the local board, following which the board has twenty days to review the notice. This brief window means that an in-depth review of the change may not be possible, and depending on the board's meeting schedule, the board may not even be able to take up the issue at a public meeting. In any event, if the board finds the change to be insubstantial—or does not take action with in the 20-day window—the change is deemed approved, and the permit is automatically deemed amended to include the change. (For developers and their counsel, a written decision acknowledging the insubstantial nature of the change is preferred, as this creates a paper trail and may help to avoid confusion down the road when building inspectors and other reviewers are assessing the project's compliance with the requirements of the permit.) If the board finds the change to be substantial, they must notify the applicant, and a full public hearing with notice to interested parties is required. This determination by the board is immediately appealable by the applicant, who also has the option to proceed with the public hearing on the project change and see how they fare.

The guidance to local boards for their review of project changes is outlined in 760 CMR 56(7)(4)(c & d), which, respectively, contain examples of what "generally" should be found to be substantial and insubstantial changes. The HAC in this decision was quick to point out that these examples and recommendations are non-binding; although true, boards and their counsel would do well to treat these examples as effectively mandatory unless extraordinary circumstances are present.

The examples of substantial changes are more instructive than the examples of insubstantial changes, as they are illustrative of the fact that project changes must be significant, project-altering changes in order to rise to the level of being deemed "substantial". These include increases in building height or unit count greater than 10%, reductions in the size of the site more than 10% without a corresponding decrease in unit count, changes in the building type, or changes to the project tenure (rental or ownership). A change in unit count is a particularly instructive example, as a project's unit count is typically thought of as fundamental to the nature of the project, and comprehensive permit decisions almost always state specifically that the project cannot contain more than a specified number of units. This section provides otherwise: a project's unit count ***can*** theoretically be increased—by less than 10%—without need for the board's approval or a public hearing. For larger projects, this could be an increase of 20+ units.

The specific examples of insubstantial changes include reductions in unit count, decreases in floor area of units or changes in bedroom count less than 10%, changes in the color or style of materials, and changes to the project's financing/subsidy program. However, because the threshold for a finding of substantial change is so high, boards and their counsel should treat all changes that do not clearly live in the same area code as the examples outlined above as insubstantial.

In this instance, the choice should have been an obvious one. The developer here decided to change how water was metered: instead of one meter per 10 units, the developer wanted to have each unit individually metered. The reason for this change came down to dollars and cents: the group metering would have kicked the project into a higher pricing tier based on consumption, and changing to individual metering avoided this. Although the HAC did not agree with the developer that this change fell under 760 CMR 56.07(4)(d)(4) (style or color of materials), it nonetheless found the change to be insubstantial by comparing it to the project as a whole, taking into consideration adverse impacts on residents and the surrounding area.

The proposed change here pertained only to how water was metered. It would not have been visible to neighbors. That being the case, the best argument the board could muster was that the change would have an effect on town finances, since the town's revenue from selling water to the project would be reduced, and the board felt a public hearing to address that issue was warranted. The HAC disagreed, reminding the board that "negative impact on a town's finances" does not constitute a Local Concern, and therefore "is not relevant under G.L. c. 40B." This was an important lesson for all local boards—and one that can be applied outside of the realm of Chapter 40B—to avoid the temptation to engage in the (usually speculative) analysis of fiscal impacts because how a

town or city finances the services it is obligated by law to provide to its residents is simply not relevant in this context.[1]

***Walpole Zoning Board of Appeals* v. *Wall Street Development Corp.*, Case No. 2022-08 (Darwin Commons) and 2022-09 (Pinnacle Point), 18 MHACR 5 (2023)**

These parallel cases pertaining to two projects filed by the same developer at approximately the same time both pertain to the local board's claim of safe harbor based on EOHLC's certification of compliance with the town's housing production plan.

760 CMR 56.03(4) provides a procedure for municipalities to enact housing production plans ("HPP"s)—and an incentive for engaging in such responsible municipal planning. This section requires HPPs to contain a comprehensive assessment of the local housing needs in the municipality, an outline of the municipality's affordable housing goals, and a description of how the municipality will implement the HPP to create affordable housing. If approved by EOHLC, the municipality's HPP and the fact of its approval will be posted on EOHLC's website—signaling to potential 40B developers that they will need to determine whether the municipality is in compliance with that HPP before considering whether to file a Chapter 40B development application. This list of "certified communities" is also maintained and publicly posted by EOHLC. At any given time, only a handful of communities are listed as certified.

A certification of HPP compliance is valid for either 1 or 2 years for municipalities who approve SHI-eligible housing units equal to at least 0.5% or 1.0%, respectively, of the total year-round housing units in a calendar year. Local boards and their counsel should be aware that EOHLC requires applications for certification of HPP compliance to be filed in the same calendar year in which the SHI-eligible housing units were approved. This presents a potential challenge in instances where a project is approved near the end of a calendar year. Boards should also be aware that the certification of compliance cannot be "saved up" for use at some future date. Use it or lose it.

If certified by EOHLC, 40B developers may be discouraged from filing new projects in that municipality, as they know when they walk in the door that the local board may be entitled to invoke "safe harbor" to deny (or impose conditions upon) a Chapter 40B development. This threat of safe harbor represents the incentive to municipalities to undertake the effort of creating a HPP.

At issue in these cases is what happens if a community is certified by EOHLC as in compliance with its HPP, but while that certification is effective, the SHI-eligible units lose their SHI-eligibility. Lapses in SHI-eligibility occur for various reasons; here, and in most cases, the lapse occurred due to the duration of time between the project's approval and the issuance of building permits. If more than 1 year of time passes between these events, the units lapse; the same occurs if certificates of occupancy are not issued within 18 months after the issuance of building permits. These lapses create thorny situations where, as here, there is an abutter appeal of a project. In this situation, the abutter's actions have the potential to undermine municipal planning (in addition to exacerbating the statewide housing crisis), as the delay created by the litigation can result in the appealed project's units lapsing in their eligibility for the SHI, as occurred here.

Here, the local board approved a 40B project in April 2021 and based on that, the town obtained a 2-year certification of compliance with its HPP, through April 2023. Parallel to this, however, an abutter appealed the same project. In this situation, the developer understandably opted not to proceed with the construction of the project "at risk" while the appeal was pending. Because of this, one year and one day after the prior project had been approved, building permits for the prior project had not yet issued; as such, the developer in this case filed its comprehensive permit applications even though the town was still listed by EOHLC as a certified community. Shortly after the project applications were filed, EOHLC requested that the town provide proof of building permit issuance for the prior project; when the town did not respond, EOHLC rescinded its HPP certification.

On appeal of EOHLC's denial of the board's invocation of safe harbor, the board argued that EOHLC was not entitled to rescind its certification of compliance with the town's HPP even though the SHI-eligibility of the units serving as the basis for such compliance had lapsed. In other words, the town felt it should be entitled to the full benefit of the safe harbor even though its actions had not (yet) resulted in the creation of affordable housing. Alternatively, the board argued that the HPP safe harbor should be tolled (indefinitely, apparently) while appeals of the project that gave the basis for the safe harbor are resolved.

The HAC did not have sympathy for these arguments, noting that the entire purpose of the HPP safe harbor was "to give a municipality an incentive to plan for and construct affordable housing." Therefore, the language of 760 CMR 56.03(4) creating this safe harbor was subject to and limited by the requirements of 760 CMR 56.03(2)(b) with respect to SHI eligibility. As such, where the SHI-eligibility of units giving rise to the HPP certification had lapsed, so too did the town's entitlement to invoke this safe harbor.

These cases offer lessons for all sides. For boards and municipalities, the lesson is that creation of affordable housing is an ongoing endeavor, and projects, once approved, cannot be relied upon to invoke safe harbor unless and until they are built and occupied. For abutters, they would do well to be mindful that parochial actions to block affordable housing may have ramifications beyond the bounds of their own backyards. For developers, one might question the prudence of applying for a comprehensive permit on the same day the town's HPP certification had lapsed (followed by another application roughly a week later). This provocative move predictably led to litigation that took more time to resolve (to say nothing of legal fees) than it would have taken to simply wait the 364 days for the certification to expire on its own terms.

1. In full disclosure, this author represented the developer and project at an earlier stage in its development, prior to the project's review by the local board at issue in this case.

(Experienced practitioners will also not be surprised if this project appears at the HAC again in the future.)

***104 Stony Brook, LLC* v. *Weston Zoning Board of Appeals*, Case No. 2017-14, 18 MHACR 11 (2023)**

In this case, the local board took up a familiar hobby horse: whether a project can/will comply—as it must—with applicable federal and state laws that are not within the purview of the local board. Here, the HAC notes that the board approached this issue with "an unusual focus", devoting its entire case in support of its denial of the project based on alleged non-compliance with federal and state requirements. In the process, the board largely seems to have ignored the standard of review it was charged with a statutory duty to apply—i.e., whether "there are valid local concerns that outweigh the regional need for affordable housing." On this point, the HAC noted with obvious disapproval that the issue of state and federal law compliance "overshadowed" any analysis of Local Needs—a matter that was apparently exacerbated by "vitriol between counsel". In overturning the board's denial, the HAC was emphatic that both it—and the board—had no authority or jurisdiction "to hear a dispute as to whether a developer is adhering to state or federal law".

The primary issue in this case was the project's proximity to a state-regulated public water supply (in regulatory parlance, a Class A Outstanding Resource Water (ORW)) and state-regulated wetlands. The requirements applicable to these matters are, as the HAC understandably described them, "both technical and complex". Because of their complexity and the time that it takes to resolve them, these highly technical issues of environmental law have become an appealing proxy for opponents of affordable housing.

For largely tactical reasons, outright denials of comprehensive permits are relatively rare in 2024, as the developer, in order to meet its prima facie burden of proof, needs only make the "minimal showing" that the project will comply with applicable federal and state law. Moreover, the HAC noted, judicial precedent has established that a denial of a project is unreasonable "when [the board] could condition approval on the tendering of a suitable plan that would comply with State standards." Meeting this standard does not require the developer to offer "overly technical" proof of compliance with each and every applicable state or federal law, nor to obtain actual federal or state approvals. Rather, all that is required is for the developer to make a "preliminary prima facie showing [of] general compliance with state or federal requirements", which are to be applied in a "common sense, rather than an overly technical manner". Additionally, the HAC stressed that the developer's prima facie case is considered only based on "evidence supplied by the developer". As such, the board in this situation will not be allowed to wage a battle of the experts in an attempt to undermine the developer's prima facie case—as the board attempted to do here.

In this case, the local board (and an intervenor) for the most part did not even attempt to argue that there were valid Local Concerns regulated by local bylaws or ordinances that outweighed the housing need. Instead, the entire basis of the board's case was that the project "cannot" comply with various MassDEP and EPA regulations pertaining to stormwater management and the project's proposed wastewater treatment facility, and that such alleged non-compliance constituted a Local Concern. Finding for the developer on this issue, the HAC rejected the board's attempt to explore "the details of every state and federal requirement they consider applicable", as this would "take[ ] the Committee proceedings into an area beyond the purpose of the prima facie case." Relatedly, the HAC also reminded boards and abutters that the 40B review process cannot be used to "ultimately determine whether a project will comply with state or federal requirements".

The only local bylaws cited by the board in support of its Local Concerns argument were, as the board acknowledged, enacted locally in accordance with federal or state mandates (e.g., a local stormwater management bylaw enacted in order to comply with MS4/NPDES requirements). However, as is typical, these bylaws merely re-stated state and federal requirements, and did not create new, local regulatory requirements that the board might have been able to cite as a valid Local Concern that outweighed the housing need.

In sum, the HAC held that the board's citation of federal and state regulations with which it claimed the project could not comply was not a proper basis for the denial of the project—and that the board's attempt to re-litigate these same issues before the HAC was also improper: "it is not for the Committee to determine state and federal requirements are deficient and step in to interpret those requirements or to impose additional ones on our own as part of our role to evaluate local concerns." The HAC thus annulled the denial of the project and directed the board to issue a comprehensive permit containing only a handful of conditions—one of which forbade the board from including in its permit any "new, additional conditions".

The takeaway from this case is that boards should not concern themselves with matters outside of their purview—specifically, in this instance, matters of state or federal law. Instead, local boards must defer to the state and federal authorities who have the expertise and jurisdiction to apply and enforce these requirements. Moreover, because local boards lack the authority to waive state or federal legal requirements, boards should be mindful that Chapter 40B developments must comply with applicable state and federal requirements regardless of whatever else the board may require of the project. In other words, boards may take heart that if a project doesn't comply, it won't get built, full stop.

***SLV School Street, LLC* v. *Manchester-By-The-Sea Zoning Board of Appeals*, Case No. 2022-14 (Rulings on Two Motions to Intervene), 18 MHACR 31 and 34 (2023)**

This pair of decisions pertains to two motions to intervene in a developer's appeal from the local board's denial of a Chapter 40B development. The motions were filed jointly by a local conservation trust and a group of abutters opposed to the project, many of whom are (as of this writing) identified on the trust's website as members of the trust's board of trustees.

Opponents of Chapter 40B projects frequently seek to intervene in HAC appeals for the purpose of continuing their opposition to the project. Pursuant to 760 CMR 56.05(6)(2)(b), the HAC has discre-

tion to allow such intervention upon a showing that the intervenor would be "substantially and specifically affected by the proceedings". However, due to the HAC's limited jurisdiction, intervenors may not raise issues that are outside the scope of the developer's appeal. Moreover, the would-be "intervenor must demonstrate that they [would be] aggrieved by the action sought by the developer in the appeal." Aggrievement in this context tracks case law under Chapter 40A, Section 17 with respect to zoning appeals: the intervenor must demonstrate a particularized injury by direct facts. However, unlike in Chapter 40A appeals, there is no presumption of standing for parties in interest (i.e., direct abutters, owners of land across the street, or direct abutters to the direct abutters within 300 feet), and thus no "as of right" intervention based on party in interest status. Additionally, the intervenor must demonstrate that its interests would not be adequately protected but for its intervention.

In the first decision, the conservation trust sought to intervene on the basis of reasons similar to those discussed in a 2021 ruling of the Nantucket County Superior Court, *Nantucket Land Council, Inc.* v. *Housing Appeals Committee*, Mass. Super. Ct., Nantucket Cty. (Case No.: 2075-0021) (June 22, 2021), which overturned a ruling of the Committee denying intervention to a local nonprofit based on vague concerns about development and its supposed interest in protecting "open space". Similarly here, the conservation trust cited only its "role in managing hundreds of acres of conservation land and trails in the vicinity of the project site" and "interest in the advancement of ecological conservation" as its supposed basis for aggrievement.

Under these circumstances, the HAC found that the conservation trust had made none of the required showings for intervention: to wit, the trust had not demonstrated aggrievement, had not shown it would be affected by the proceedings, and had not established that its interests would not be adequately protected but for its intervention. As such, the HAC denied the trust's motion to intervene. However, apparently once bitten, twice shy after its 2021 reversal in the Nantucket case, the HAC nonetheless allowed the trust to participate as an interested person.

In the second decision, a 10-residents group (many of whom appear to be trustees of the trust) sought to intervene pursuant to MGL c. 30A, § 10A in order to assert claims arising under MGL c. 214, § 7A relating to "damage to the environment"—a tactic du jour by anti-development groups seeking to hamstring the development of affordable housing that they wish not to have in their proverbial backyards. Intervention under this statute is reviewed based on the same standard discussed above, with the exception of the issue of aggrievement. In this context, rather than demonstrating personal aggrievement, the resident group instead must merely substantiate its damage to the environment claim. As with aggrievement, doing so requires direct facts and a showing that the claim is not conjectural or speculative. If allowed to intervene, "such intervention shall be limited to the issue of damage to the environment and the elimination or reduction thereof in order that any decision in such proceeding shall include the disposition of such issue." In the context of a denial of a project, this meant that the resident group had to identify local interests protected by local requirements that the developer was seeking to waive.

In support of their request to intervene, the group largely relied on state law requirements. However, "compliance with the state requirements cited by the proposed interveners is not within the Committee's jurisdiction and cannot form the basis for intervention." However, the group also cited alleged harm from impacts on vernal pools, which, the HAC found, were subject to regulation by a local bylaw that was stricter than applicable state laws. As to this issue alone, the HAC allowed the group to intervene.

This decision presents a potentially troubling situation, as the attempt to intervene in the case was quite obviously a coordinated, tactical effort by the conservation trust and a 10-residents group composed of many of the trust's trustees. By doing so, although the trust did not even attempt to establish aggrievement itself, the resident group was able to sidestep this requirement, effectively enabling the trust to intervene in the case through its trustees (and others) as proxies. Additionally, the participation in the case by the trust (a 501(c)(3) tax-exempt organization) would appear to make it possible for project opponents to fund litigation aimed at blocking affordable housing *and* to receive tax deductions for doing so.

***Patricia A. Klauer* v. *Falmouth Zoning Board of Appeals*, Case No. 2022-02, 18 MHACR 39 (2023)**

The case of Patricia Klauer versus Falmouth presents a curious and unlikely case—one of such triviality that one wonders how it possibly could have made its way all the way to the HAC without settling somewhere along the garden path. Instead, Ms. Klauer's name will be forever noted for posterity in the annals of the HAC for her struggle to find somewhere to store her wheelbarrow.

In this case, a developer had permitted and built a 12-unit Chapter 40B single-family subdivision. Ms. Klauer purchased one of these homes, and she soon found herself with 99 problems, all of which involved not having enough storage for her lawn tools. Ms. Klauer therefore found herself in the market for a garden shed. Perhaps understandably, she went into this endeavor unaware that placing a prefabricated garden shed on cinder blocks in her backyard—something that did not even require a building permit—would, in the view of local zoning authorities, require amending the comprehensive permit.

After checking with the local building department and getting permission from her homeowners' association, Ms. Klauer's dream of backyard garden tool storage soon became a reality, albeit briefly. Her well-appointed horticultural bliss was to be short lived, however, as her audacity in placing a shed in her backyard soon (somehow) drew the attention of local officials and eventually a zoning enforcement order, which argued that the shed was not authorized by the comprehensive permit. On appeal to the local board to modify the comprehensive permit to allow her single-story, 164 square foot megastructure, Ms. Klauer was refused, with the board citing her obstinate failure to obtain "advance permission" for her shed in its order demanding the removal of the shed.

Nevertheless, Ms. Klauer persisted, but so too did her tormentors. On appeal to the HAC, the board did not relent or retreat—instead it defended its decision and moved to dismiss the case for lack of standing, arguing that only the original developer (now long gone) could seek to modify the comprehensive permit. The board—ap-

parently unaware of the unique pleasure associated with the smell of a freshly cut lawn—also argued that Ms. Klauer's interest in agricultural equipment storage was "purely economic".

In the end, Ms. Klauer's tenacity paid off. Perhaps recognizing that "to plant a garden is to dream of tomorrow", the HAC held in favor of Ms. Klauer, recognizing her standing to seek modification of the comprehensive permit as the successor in interest to the original developer, finding her request to install her shed to be insubstantial in nature, and ordering the comprehensive permit modified to allow Ms. Klauer's shed to remain. This victory was not hers alone, as reaching this point required the services of an attorney and engineer, and took more than two years to accomplish. Reasonable minds may differ as to whether Ms. Klauer's victory was pyrrhic. Local anti-gardening activists may be disappointed in this result, but surely they will be happy that taxpayer funds were dispensed in the service of waging such an important battle, even if it ultimately proved unsuccessful at stopping Ms. Klauer in her relentless pursuit of storage for her lawnmower.

***Medford Zoning Board of Appeals* v. *DIV Fellsway, LLC*, Case No. 2020-07, 18 MHACR 44 (2023) and *North Reading Zoning Board of Appeals* v. *NY Ventures, LLC*, Case No. 2019-11, 18 MHACR 62 (2023)**

These cases, both decided the same day, are interlocutory appeals by local boards from denials by EOHLC of their invocations of the General Land Area Minimum (GLAM) safe harbor.[2]

At issue in GLAM safe harbor appeals is whether—despite having less than the bare minimum of 10% of its housing stock as affordable units—a municipality's decision to deny or condition a Chapter 40B project is consistent with local needs because "the land area in the municipality dedicated for use as housing for low or moderate income households is 1.5 percent or more of all land zoned for residential, commercial, or industrial use, subject to certain exclusions."

The specifics of the GLAM safe harbor have been addressed elsewhere many times and at great length, including by this author in commentary in previous volumes of this publication, to which the reader—and anyone suffering from sleepless nights—may refer. In summary, GLAM is calculated by dividing the town's SHI-eligible land area (the numerator) by the town's total land area zoned for residential, commercial, or industrial uses, subject to certain specific exclusions (the denominator). The calculation of this acreage also requires determining what land area is "directly associated" with affordable housing—which entails a site-by-site analysis based on Global Information System (GIS) mapping and satellite imagery that—despite the not insignificant margins of error associated with GIS mapping and debatable reliability of satellite images—frequently leads to calculation of acreage down to the thousandth of an acre.

If the result of dividing the numerator by the denominator is 1.5% or above, the town is eligible to claim the GLAM safe harbor, and as such a decision to deny or condition a project is deemed to be consistent with local needs. A board must invoke this safe harbor within 15 days of opening its public hearing, following which the developer has 15 days to object. An objection triggers review by EOHLC and frequently—as it did in both of these cases—an appeal to the HAC.

The methodology for calculating the numerator and denominator is fully explained in DHCD's *Guidelines for Calculating General Land Area Minimum*. However, as other boards represented by the same legal counsel have unsuccessfully attempted to do in countless prior cases, the boards in both of these cases objected to the HAC's use of these Guidelines. As noted previously by this author the last time this tactic was tried, "the meritlessness of this argument is so well established by now that discussion of it in this decision was reduced to a footnote containing an ever-lengthening string cite. It merits no further attention here."

As to the substance of the safe harbor claim in the Medford case, it turned out that the board had improperly excluded from the denominator land that it deemed "unbuildable" and various rights of way whose ownership was not established. With respect to the numerator, the board failed to prorate eligible acreage based on SHI eligibility ratios, failed to cap land area based on applicable per-unit area requirements of the local zoning code, and unsuccessfully attempted to count unmaintained wooded areas as "directly associated" land area.

The HAC's detailed, thorough analysis of the calculation of GLAM in the Medford case spans thirteen pages in this volume, and interested practitioners are encouraged to review it in detail. The specifics raise no new issues of interest and will not be repeated here. In the end, the HAC held that the board's claim of 1.83% GLAM was inaccurate and found that the developer's case that GLAM constituted only 1.25% was more credible. On that basis, the HAC denied the board's safe harbor claim and ordered the case to be remanded for further proceedings.

The North Reading case involved similar issues affecting the numerator and denominator, which resulted in a broad overcounting of affordable land area (the numerator) and undercounting of total land area (the denominator) by the board. However, this case presented a unique quandary for the HAC and the parties because the board's safe harbor claim turned on the acreage of a single site, which was the location of a state-operated group home—the details of which (including its address) are strictly confidential. Litigating this issue involved extensive motion practice, subpoenas to multiple state agencies, filing of documents under seal, and even occasioned an application by a local resident to intervene in the case due to concerns about the possibility that confidential group home information might be revealed.

Notably, the GLAM Guidelines provide a procedure for boards to obtain the acreage of these confidential sites. In this instance, when the board requested that calculation, it received a response indicating group home acreage of nearly 60 acres. However, testimony elicited based on subpoenas to the agencies who had

2. In full disclosure, this author was legal counsel of record for the developer in the North Reading appeal.

performed this calculation revealed that the calculation was vastly overinflated due to the fact that the state authorities had not adjusted the eligible acreage of this parcel based on the GLAM Guidelines—including, most critically, the exclusion of non-directly associated land area.[3] When the necessary adjustments were made, the prior group home acreage calculation of nearly 60 acres was reduced to just over 7 acres.

Once all the necessary adjustments to the GLAM calculation had been made, the percentage was reduced to just 0.657%—less than half of the required threshold to claim this safe harbor. As such, the HAC denied the board's safe harbor claim and ordered the case remanded for further proceedings.

These two highly technical cases, which occupy thirty pages of this volume, clearly indicate that the GLAM safe harbor is still very much a live issue, and one that developers' counsel should be keenly aware of in the lead up to Chapter 40B applications. These cases—which took 3 and 4 years, respectively, to litigate—are a testament to how costly and time-consuming it can be to defeat GLAM safe harbor claims.

One may reasonably question what, if anything, is accomplished by cases like these. Few GLAM claims have succeeded, and the trivial minutiae upon which the GLAM analysis turns quickly leaves one with a distinct feeling that the analysis bears little relation to Chapter 40B's goal of creating affordable housing. Moreover, even where the analysis has been performed correctly, determining whether a municipality has "enough" affordable housing based on land acreage invariably means that the vast majority of the "affordable" land area—especially in more rural communities—is occupied by sprawling parking lots, vast decorative lawns, and the like. Whether or not those areas are "directly associated" with affordable housing, or "actively maintained", one may question the wisdom of allowing them to be used to demonstrate a municipality's success in creating affordable housing.

Unfortunately, the GLAM safe harbor has foundations in the 40B statute, so eliminating it would require amending the statute itself—obviously, a political third rail that would be unpopular with municipalities. Unless and until that happens, however, the GLAM safe harbor issue, in this author's opinion, will continue to present a perennial impediment to the creation of affordable housing.

***Pond View Commons, LLC* v. *Lunenburg Zoning Board of Appeals*, Case No. 2023-01, 18 MHACR 75 (2023)**

This case involves an interesting question as to the limits of the local board's authority to waive local requirements in the context of Chapter 40B developments. Here, the developer sought to extend municipal water and sewer services, both of which would have required outside approvals. In its application, the developer asked the board to waive these approval requirements. Because they felt that the board's authority to do so was questionable, the developer and board took the unusual step of stipulating to stay proceedings for them to test this question at the HAC, essentially requesting an advisory opinion about the board's authority before it had issued a decision.

Here, the town's sewer commission was created by a special legislative act that prohibited new sewer connections or extensions to serve land outside of the designated service area but allowed for the service area to be amended by town meeting vote. Similarly, the town's water district was also created by special legislative act, and it provided that new connections to serve land outside of its coverage area required approval of the district's water commissioners. In response to the developer's application for such an expansion, the commissioners voted to disapprove that request. Apparently, no town meeting vote to expand the sewer service area was ever sought.

Before turning to the merits of the case, the HAC briefly questioned its jurisdiction to entertain it in the first place, since there was no final decision at issue, nor any specific action adverse to the developer that could be appealed. Ultimately, the HAC decided to proceed to the merits, but cautioned that its decision to do so was based on the specific facts presented—including the fact that all parties had stipulated to consent to the HAC's jurisdiction. However, because a lack of subject matter jurisdiction is an unwaivable issue that cannot be resolved by stipulation or consent, one may question whether this determination passes muster.

Turning to the merits, first, the HAC considered whether the sewer commission and water district were "local boards" within the meaning of 760 CMR 56.02, ultimately concluding that they were. This should be unsurprising, as the definition of "local board" specifically includes sewer and water commissions, as well as boards created by special act of the legislature.

Next, the HAC turned to the question of whether the board had the authority to waive the voting requirements creating by the special acts establishing the sewer commission and water district. This question seemingly had already been answered by *Board of Appeals of Maynard* v. *Housing Appeals Committee*, 370 Mass. 64 (1976) and *Wilmington Arboretum Apts. Associates Limited P'ship* v. *Wilmington*, 1 MHACR 378 (Mass. Housing Appeals Comm. June 20, 1990). However, after an analysis of *Maynard* and two cases analyzing it (i.e., *Zoning Bd. of Appeals of Groton* v. *Housing Appeals Comm.*, 451 Mass. 35 (2008) and *135 Wells Avenue v. Housing Appeals Comm.*, 478 Mass. 346 (2017)), in which the courts held that the local board (and HAC) lacked the authority to require the conveyance of easements, the HAC found that the *Maynard* case was distinguishable because it appeared not to have involved a situation where an approval of an expansion to a utility service area was required. Such a decision, the HAC found, constituted a legislative act, rather than a permitting function.

Although the HAC's debatable assertion of jurisdiction over this case suggests that this decision is likely dicta, this decision is nonetheless troubling, as it not only undermines decades-old wisdom as

3. Interestingly, the group home issue presented by this case was an impetus for EOHLC to amend its GLAM Guidelines while the appeal was pending to clarify how the group home acreage calculation was to be performed. The board argued that the HAC should not be allowed to take the amended Guidelines into account, but this argument was rejected.

to the board's expansive jurisdiction to waive local requirements and issue enforcement directives to local boards pursuant to 760 CMR 56.05(10), it also effectively creates a roadmap for anti-development municipalities to avoid 40B development by tying their own hands through regulations requiring town meeting and other similar votes—a concern raised by the developer in this case. Especially in rural areas, on Cape Cod, and on the Islands, public infrastructure is not only often extremely limited, but also on-site sewer treatment and/or installation of water wells may not be feasible due to other environmental regulations, which are often used as a means to indirectly control and manage growth and development. Time will tell whether this decision will have a chilling effect on the creation of affordable housing in such communities, where the need for affordable housing is still especially great.

***Valley Community Development Corporation* v. *Hadley Zoning Board of Appeals*, Case No. 2023-03, 18 MHACR 82 (2023)**

The final decision in this volume presents what appears to be a developer caught in the crossfire of an internecine political kerfuffle between local boards. The project at issue was a Local Initiative Project (LIP), sometimes referred to as a "friendly 40B", which would have converted an existing Econo Lodge motel into an all-affordable housing development with one unit for an on-site manager—a proposal that was supported by the local select board and other local officials.

The local zoning board, however, apparently did not get the memo about the town's support of the project, and it voted to invoke safe harbor on the basis that the town was above 10% on the Subsidized Housing Inventory (SHI). On appeal to the HAC, the select board, as the local authority with control over litigation, informed the HAC that the town's support for the board's decision was being withheld, that town counsel had been instructed not to defend that decision, and that town funding to continue the litigation had been cut off.

The developer then moved for summary decision that the board's denial of the project was not consistent with local needs. This motion was not opposed or responded to by the board. As noted above with respect to the *Weston* case, the developer's burden of proof in an appeal from an outright permit denial already requires a "minimal showing". Here, the HAC, without any opposition to the developer's case, found that burden to be easily met. As to the question of safe harbor, while the town clearly did qualify for that safe harbor (and today still would), the HAC deemed that issue to have been waived by the board through its failure to introduce any evidence in the case.

While this case may be a source of fascination for those with an interest in local Hadley politics, it does not present any issues of significance for practitioners. ■

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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. ■

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