

RECENT DEVELOPMENTS IN COMPREHENSIVE PERMIT LAW

The development of low and moderate income housing, also referred to as “affordable housing”, under the comprehensive permit law, continues to be a hot topic with cities and towns, even with a cooling real estate market. General Laws chapter 40B sections 20 through 23, sets forth the framework under which developers proposing to build affordable housing, as defined by chapter 40B, may apply to the local board of appeals for a comprehensive permit. This Memorandum outlines some of the recent cases and regulatory changes that affect this ever-evolving area of municipal law.

Standerwick v. Andover Zoning Board of Appeals, 447 Mass. 20 (2006)

The Supreme Judicial Court considerably limited the ability of abutting landowners to appeal the grant of a comprehensive permit. Under the comprehensive permit statute, General Laws chapter 40B §21, a “person aggrieved” by the grant of a comprehensive permit may appeal to the court as provided in the Zoning Act, General Laws chapter 40A §17. In this case, certain abutters appealed a comprehensive permit granted for a 115 unit apartment building, asserting that the value of their properties would be diminished. The Court ruled that, although assertions of decreases in property value might be sufficient to render a person “aggrieved” under the Zoning Act, it did not confer standing under chapter 40B. The Court stated that protecting real estate values of surrounding properties is not one of the interests protected by chapter 40B, and therefore could not be used to establish that the plaintiffs were aggrieved by the grant of the comprehensive permit. Accordingly, the appeal was dismissed.

The Standerwick case followed another case that limited standing to appeal a comprehensive permit, Planning Board of Hingham v. Zoning Board of Appeals of Hingham, 438 Mass. 364 (2003). In that case, the Supreme Judicial Court ruled that the Hingham Planning Board did not have standing to appeal a comprehensive permit issued by the Hingham Board of Appeals. Although a planning board, as a municipal board with duties related to zoning, generally has standing under G.L. c. 40A §17 to appeal a decision by the board of appeals, the court found that the determination as to standing to appeal a comprehensive permit is made based upon G.L. c. 40B §21. That section limits the right to appeal to persons aggrieved by the issuance of the comprehensive permit, and does not allow an appeal by a municipal board. The combination of the Hingham and the Standerwick cases make it difficult to appeal the grant of a comprehensive permit.

Middleborough v. Housing Appeals Board, 66 Mass. App. Ct. 39 (2006).

In this case, the Appeals Court ruled that the New England Fund (NEF) qualifies as a federal or state subsidy program under chapter 40B. In order to apply for a comprehensive permit under G.L. c. 40B, the proposed development must be subsidized by the federal or state government

under a program to assist the construction of low or moderate income housing. Since the Housing Appeals Committee (HAC) first ruled that the New England Fund was an eligible federal subsidy program, a number of cities and towns have questioned whether the NEF is indeed a federal subsidy program. Although the Appeals Court disagreed with the HAC's reasoning as to the NEF's status as a federal subsidy program, the Court nevertheless found that the NEF did constitute an eligible program. Thus, projects using the New England Fund are eligible to apply for a comprehensive permit. Note that this case has been granted further appellate review by the Supreme Judicial Court, and therefore this ruling is subject to change. The SJC heard oral arguments in this case on March 8, 2007, and has taken the matter under advisement.

Marion v. Massachusetts Housing Finance Agency, Mass. App. Ct. (2007)

This involves a challenge to the Massachusetts Housing Finance Agency's (MHFA) determination of funding eligibility for a comprehensive permit project. In June of 2001, the developer (Well-Built Homes, Inc.) applied to the Fall River Five Cents Savings Bank for a written determination of project eligibility for a proposed 192 unit development. The project eligibility letter is a prerequisite to applying for a comprehensive permit. It received the letter, then filed its application with the town. The Board of Appeals granted a permit for only half the units, which Well-Built appealed to the HAC. The HAC invalidated the eligibility determination and ordered Well-Built to obtain a new one. Well-Built obtained a new letter from MHFA, and the town sought review from the HAC. While the matter was pending before the HAC, the town brought this action for declaratory relief, or alternatively as a request for a certiorari review of the MHFA determination. The Trial Court dismissed the appeal on the grounds that the town had not exhausted its administrative remedy before the HAC, and the Appeals Court affirmed. The Appeals Court further agreed that the MHFA eligibility determination was not reviewable under the certiorari statute as it was not a judicial or quasi-judicial action. The court noted in a footnote that the HAC has since issued its decision, which the town has appealed to the Superior Court.

Woburn Board of Appeals v. Housing Appeals Committee, 66 Mass. App. Ct. 1109 (Unpublished, 2006)

Although this is an unpublished Appeals Court opinion, and therefore does not have precedential value, it offers interesting insight into the HAC process. When a case is appealed to the HAC, the HAC holds a "conference of counsel", at which a draft pre-hearing order is discussed. Counsel for the parties are required to help draft and then sign off on the final draft order, which is then reviewed and issued by the Hearing Officer. In the Woburn case, the HAC vacated the Board of Appeals denial of a comprehensive permit, and ordered the Board to issue the permit. On appeal to the Superior Court, the Board raised a number of challenges to the HAC regulations, including burdens of proof. The court upheld the HAC, finding that the Board's failure to raise these objections in the pre-hearing memorandum constituted a waiver of the objections. Further, the court found that the HAC regulation placing the burden of refuting the need for regional housing on the Board was valid.

Zoning Board of Appeals of Canton v. Housing Appeals Committee, Norfolk Superior Court No. CV 2005-01868 (Grabau, J. 2006)

The Norfolk Superior Court determined that, once a municipality has reached the minimum affordable housing goal of 10% under chapter 40B, the Housing Appeals Committee (HAC) lacks authority to order the town to issue a comprehensive permit. The developer in this case had applied to the Board of Appeals for a comprehensive permit prior to the town reaching the 10% goal. When the Board denied the application, the developer appealed to the HAC. At the time of the appeal to the HAC, the town still had not reached its 10% goal. While the appeal was pending, the town granted other comprehensive permits which placed the town's affordable housing inventory at more than 10%. The HAC nevertheless found that the Board's decision was inconsistent with local needs, and ordered the issuance of a comprehensive permit. The Superior Court overturned the HAC, ruling that, once the town reached the 10% minimum affordable housing goal, the HAC no longer had jurisdiction over the developer's appeal. This case has been appealed by both the developer and the HAC.

Zoning Board of Appeals of Groton v. Housing Appeals Committee, Middlesex Superior Court Civil Action No. 05-3733L

The developer, Washington Green, LLC, submitted an application for 44 condominium units of mixed-income housing on property next to the Groton Electric Light Department power substation. The Board denied the permit on several grounds, including the noise from the substation, the fact that the substation would be an attractive nuisance to the children living in the development, and the inadequate sight lines for traffic. The HAC overturned the Board of Appeals and ordered it to issue the permit. To address the sight line deficiency, the HAC ordered the GELD to grant an easement to the developer over a ten foot strip of land, which the developer was required to keep cleared and mowed. The Board appealed, and the Superior Court upheld the HAC. The court deferred to the HAC's weighing of the evidence, and found that there was substantial evidence to support the HAC's findings on the issues such as whether the noise from the substation would create an undue disturbance to the residents. Most interestingly, the Superior Court upheld the HAC order that GELD grant an easement to the developer. The court acknowledged that the giving up of a property right by the town is not to be taken lightly. It found, however, that the easement "amounts to a minimal giving up of a property right." It therefore found that, under the circumstances, a vote of town meeting was not essential. This case has been appealed.

Chin v. Zoning Board of Appeals of Scituate, Land Court Misc. No. 287331 (2006)

A group of abutters and citizens appealed the grant of a comprehensive permit to Walden Woods, LLC. Walden Woods appealed the same comprehensive permit to the Housing Appeals Committee, claiming that certain conditions rendered the project uneconomic. Walden Woods and the Board of Appeals settled the HAC appeal by agreeing that the HAC could issue a comprehensive permit on the same terms and conditions imposed by the Board of Appeals, with one modification of a condition related to bonding. Walden Woods moved to dismiss the Land Court appeal for lack of jurisdiction. The court granted the motion, finding that the HAC decision granted a comprehensive permit to Walden Woods which superseded the one granted by the Board of Appeals. This case has been appealed. The result reached by the Land Court in this

case is similar to the result reached by the Superior Court in Taylor v. Board of Appeals of Lexington, Middlesex Sup. Ct. No. 03-0746, which has also been appealed to the Appeals Court.

OIB, Inc. v. Braintree Zoning Board of Appeals, HAC No. 03-15 (2006)

The Housing Appeals Committee upheld the Board of Appeals denial of a comprehensive permit for a proposed 118 unit townhouse condominium project. In the appeal, in which I represented the Braintree Zoning Board of Appeals, the HAC unanimously upheld the Board's decision, based on the fact that there was only one, forty foot wide roadway to provide access and egress for the development. The HAC agreed with the Board's finding that this posed a significant public safety risk which outweighed the need for affordable housing. The Town standard of 400 feet for the maximum length of a dead end street was a legitimate safety regulation, particularly to ensure access for emergency vehicles. The proposed development would have constructed over 100 homes beyond the 400 foot standard, with some homes as far as 1500 feet from the access point. During the course of the HAC hearing, the Town also moved to dismiss the appeal on the grounds that the Town had reached its 10% minimum housing unit goal under chapter 40B, as well as its 1.5% land area minimum goal. The HAC denied the motion on the grounds that the Town did not reach the housing goal prior to the Board's first decision on the application, similar to its ruling in the Canton case discussed above. This case was appealed to the Superior Court by OIB and is still pending.

New Fannie Mae Guidelines On Affordable Housing Restrictions

One of the most important recent changes in the chapter 40B landscape came not from a court, but from the Federal National Mortgage Association, better known as Fannie Mae. In 2002, the Supreme Judicial Court ruled in the case of Zoning Board of Appeals of Wellesley v. Ardmore Apartments Limited Partnership that affordable housing units granted under a comprehensive permit must remain affordable units for as long as the housing is not in compliance with the city or town's zoning bylaw or ordinance, unless the comprehensive permit explicitly provided otherwise. Nevertheless, the Mass. Housing Finance Agency ("MHFA") refused to approve affordability restrictions that continued in perpetuity except if the restriction would be eliminated in the event of foreclosure by the holder of the first mortgage on the property. This means that, if an affordable unit is foreclosed by the first mortgagee, the mortgagee can sell the unit free of any affordable housing restriction, and the affordable unit becomes a market rate unit. Although this seems to undermine the purpose of chapter 40B to provide affordable housing, and seemingly contradicts the holding in Ardmore, MHFA justified its position based on its observation that units with affordable housing restrictions were not marketable on the secondary market, because Fannie Mae would not accept an affordability restriction that survived foreclosure.

Fannie Mae finally issued new guidelines last year under which it purchases mortgages secured by properties subject to affordable housing restrictions that survive foreclosure, provided that a Fannie Mae approved form of deed rider is used. Cities and towns may now require that all affordable units granted under a comprehensive permit remain affordable in perpetuity, so long as the Fannie Mae deed rider is used, and be assured that MHFA will approve the deed

rider. In addition, as to affordable units approved during the time when MHFA would not allow the restrictions to survive foreclosure, cities and towns may encourage owners of affordable units to use the new deed rider when selling or re-financing their homes. Forms are available on the Mass. Housing website, www.masshousing.com.

Barbara J. Saint André is senior land use attorney at Petrini & Associates in Framingham. She has over 24 years of experience representing cities and towns across the state as town counsel, with particular emphasis on land use (including zoning, subdivision, planning, health, zoning enforcement, and wetlands), housing, and general municipal law. Petrini & Associates is a boutique law firm concentrating in the practice of municipal law, public construction, labor, and land use and zoning. The firm is town counsel to Framingham and Medway and special counsel to numerous other communities.

2006.12.29 comp permit memo (2700-07)