MASSACHUSETTS LAWYERS WEEKLY

Volume 45
Issue No. 28
July 11, 2016

HAC's approval of 40B project upheld

Affordable housing goals trump planning concerns

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The Housing Appeals Committee properly ordered the town of Andover to issue a comprehensive permit under Chapter 40B that would allow a mixed-income rental housing development within an existing commercial and industrial park, the Appeals Court has determined.

The town's zoning board of appeals had previously denied the permit, citing incompatibility with master planning needs.

Under the Supreme Judicial Court's 2013 decision in *Zoning Bd. of Appeals of Lunenberg v. Housing Appeals Comm.*, the HAC — in reviewing a zoning appeal board's rejection of a comprehensive permit — is charged with determining whether a town's master plan has "shown results" in reaching affordable housing goals and, if so, whether the proposed project would undermine the town's master planning interests.

The plaintiffs in the case before the Appeals Court, commercial abutters who opposed the project, argued that a four-part analysis that the HAC applied in reviewing the denial did not merely clarify the *Lunenberg* test, but impermissibly "moved the goalposts," creating an entirely new analytical scheme.

But the Appeals Court disagreed, affirming an earlier ruling in Superior Court.

"The four so-called 'new' factors delineated by the HAC are simply a more detailed explication of the two factors previously described in the Lunenberg decision," Judge Gregory I. Massing wrote for the court, adding that it is a recognized principle of administrative law that an agency may adopt policies through both adjudication and rulemaking.

The 23-page decision is *Eisai, Inc., et al. v. Housing Appeals Committee*, Lawyers Weekly No. 11-072-16. The full text of the ruling can be found at masslawyersweekly.com.

Confirmation of power

The defendant developer's attorney, Kevin P. O'Flaherty of Boston, said the decision does not change the law in any way. Instead, he said, it provides confirmation that the HAC has the administrative expertise and discretion to make the rulings it makes.

"The abutters argued that the HAC was changing the rules," O'Flaherty said. "But this wasn't the case. Here, the HAC just went further than it has in other cases to explain its thinking in reaching the conclusion it reached."

O'Flaherty also said the decision helps clarify for developers and municipalities that when affordable housing represents less than 10 percent of a town's housing stock, as is the case in Andover, opponents face a very heavy burden in demonstrating that local concerns outweigh the need for affordable housing.

Christopher Robertson, counsel for the abutters, said his clients have not decided whether to appeal to the SJC.

But if the decision holds, the Boston lawyer said, industrial and commercial developers will no longer be able to trust assurances from Massachusetts communities that there will not be residential developments in industrially zoned areas.

Robertson added that his clients, major companies that had options to locate elsewhere, including out of state, made the decision to set up shop where they did based on the understanding that there would be no residential development in the park, which has been zoned for industrial use since the 1950s.

Now, his clients, which operate 24/7 with a constant flow of traffic, face the prospect of residents complaining about trucks at 3 a.m., and of security concerns over children crossing the street, he said.

"These are significant issues for these businesses," he said. "[The developer] can try and say, 'Don't worry, this won't affect you. We'll confirm that our residents understand that they're moving into an industrial park.' But once the residents are there, if they're uncomfortable with the situation because of all the reasons we've identified as reasons why you shouldn't have a residential development there, the town will have to deal with that."

Boston lawyer Christopher R. Agostino, who was not involved in the case but has handled similar issues, said he found a portion of the decision addressing the standing of an abutter to appeal a decision by the HAC to be particularly significant.

Agostino said he was "skeptical" of the court's conclusion that the abutters had standing to appeal the HAC's decision to the Superior Court under Chapter 30A, which allows entities aggrieved by an agency decision to seek judicial review.

"The decision [does not] reference the other avenue of appeal available to abutters, which is Chapter 40A, Section 17," he said. "So now the Appeals Court is saying abutters also have the right to appeal under Chapter 30A, creating yet another forum for abutters to potentially delay projects just through appeals. That means the abutters in this case could continue this appeal under Chapter 30A, and then, if they're not satisfied, they might still claim a right to appeal under Chapter 40A, which has a different standard of review with completely different issues at play."

Robertson confirmed that his clients, in fact, currently have a 40A pending in Essex Superior Court over Andover's issuance of the permit following the HAC decision.

Donald R. Pinto Jr. of Boston, who represented a former abutter at an earlier stage in the proceedings, said that if it was not already clear after *Lunenberg*, it is clear now that the so-called "municipal planning defense" for denying a comprehensive permit is a "dead letter."

"If the HAC is hearing the case in the first place, it means that a town hasn't reached the statutory threshold of 10 percent affordable housing," Pinto said. "And if the town hasn't reached the 10 percent threshold, the HAC will invariably find that the town's planning interests don't outweigh the local need for affordable housing."

Still, Pinto found it noteworthy that the Appeals Court called out the HAC on a statement in its own order that 10 percent

is a "relatively low goal" and that well more than 10 percent of most communities' housing stock would need to be low or moderate income to satisfy affordable housing needs.

"The court nipped in the bud any notion that the HAC itself could raise the 10 percent threshold, saying in no uncertain terms that once a town meets that requirement, it can deny a comprehensive permit and the HAC is compelled to affirm the decision," he said.

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— Donald R. Pinto Jr., Boston

Administrative order

On Aug. 19, 2011, defendant Hanover R.S. Limited Partnership filed an application for a comprehensive permit to build a mixed-income rental housing development within an existing office and industrial park in Andover.

The park consists of 10 large businesses and a vacant lot, which the developer purchased from the prior owner, who had unsuccessfully marketed the lot for commercial development.

The proposed development would consist of 248 rental units in four buildings, a pool and a clubhouse. A quarter of the units would be reserved for affordable housing.

When the developer filed the application, Andover's affordable housing percentage was 9.3 percent, which, under state law, creates a rebuttable presumption that the local need for affordable housing outweighs other local concerns.

Nonetheless, on Sept. 7, 2012, after a number of public hearings, the town's zoning board denied the application on grounds that the proposal was inconsistent with "decades" of municipal planning, economic development strategies, and planning with owners and tenants of the abutting commercial/industrial properties. The board also cited concerns that proximity to the commercial and industrial sites would threaten the health and safety of residents of the development.

The developer appealed to the HAC, which granted permission to the abutters to participate in the proceedings as interveners.

In reviewing the board's decision, the HAC applied a four-part test in which it considered the extent to which the proposed housing conflicted with local planning concerns; the importance of the specific planning concerns presented; the quality of the town's master plan, in particular the housing element of the plan and the extent to which it promotes affordable housing; and the amount and type of affordable housing that has resulted from the master plan.

Using the test, the HAC decided that the town's municipal planning needs did not, in fact, outweigh the need for affordable housing. Accordingly, on Feb. 10, 2014, the HAC ordered the board to issue a comprehensive permit.

The board did not appeal, but the abutters, as interveners, sought judicial review in Superior Court pursuant to G.L.c. 30A, §14.

In January 2015, Judge Edward P. Leibensperger affirmed the HAC's decision. The abutters then appealed to the Appeals Court.

Simple clarification

Before addressing the merits of the case, the Appeals Court found that, despite the developer's arguments to the contrary, the abutters did have standing to seek judicial review under Chapter 30A.

Specifically, the court found that the developer had failed to provide evidence to rebut the presumption that, as abutters, the plaintiffs were aggrieved parties.

Turning to substantive issues in the HAC's decision, the Appeals Court rejected the abutters' arguments that the HAC's four-part analysis represented an impermissible creation of a new standard of review.

Instead, the court said, the HAC was merely applying the *Lunenberg* analysis as to whether recognized municipal planning interests outweighed the need for affordable housing — and explaining in detail how it undertook the analysis.

"The first two factors in the restated test assist the HAC in identifying specific municipal planning interests and determining the extent to which the proposed plan interferes with those interests," Massing stated. "The third and fourth factors attempt to quantify the extent to which municipal planning has actually shown results in terms of promoting affordable housing."

Finally, the Appeals Court found that the HAC's decision was justifiable under the law.

"Balancing what it found to be relatively weak interests asserted by the board and the abutters against Andover's failure to meet the statutory minimum ten-percent affordable housing obligation the HAC concluded that the board 'has not sustained its burden of proof, but that, on the contrary, the local concerns it has asserted do not outweigh the regional need for affordable housing,'" Massing wrote.

Accordingly, giving appropriate deference to the HAC as an administrative agency, the Appeals Court concluded that requiring Andover to issue the comprehensive permit would not be arbitrary, capricious or against the law. MLW