

Memorandum of Law
Alphen Review of Attorney Hill Letter dated July 11, 2024

Introduction

Attorney Hill submitted a letter dated July 11, 2024, to the Zoning Board of Appeals on behalf of the Select Board. It is important to note that Attorney Hill does not represent the ZBA. Under Chapter 40B, the ZBA has authority to grant all of the approvals that would otherwise trigger separate applications under local bylaws or ordinances. The ZBA also has authority to grant waivers of local requirements if requested by the developer and necessary to construct the proposed project. Accordingly, the ZBA does not require the Select Board's support in order to grant a comprehensive permit. Select Board will sometimes oppose affordable projects. It is within the sole purview of the ZBA to determine whether a project should be approved or not.

Legal Standard

If a project is denied, the Housing Appeal Committee will determine whether "the decision of the board of appeals was reasonable and consistent with local needs." Zoning Bd. of Appeals of Holliston v. Housing Appeals Committee, 80 Mass.App.Ct. (2011); citing G.L. c. 40B, § 23, amended by St.1998, c. 161, § 261. "[R]equirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces." G.L. c. 40B, § 20, amended by St.2003, c. 26, § 181. "There exists a rebuttable presumption that the regional affordable housing need outweighs local concerns where the town's stock of low and moderate income housing is less than ten percent." Id. citing Zoning Bd. of Appeals of Canton v. Housing Appeals Comm., 76 Mass.App.Ct. 467, 469–470, 923 N.E.2d 114 (2010).

The Town of Upton's stock of affordable housing was under 10% at the time of the Applicant's filing. Accordingly, there is a presumption that the need for regional affordable housing outweighs local concerns. Id. The Committee could only uphold the Board's denial of the comprehensive permit if it found the community's need for such housing is "outweighed by valid planning objections to the proposal based on considerations such as health, site design, and the need to preserve open space." Town of Hingham v. Dep't of Hous. & Community Dev., 451 Mass. 501, 504, n.6 (2008) [emphasis added], quoting Zoning Bd. of Appeals of Greenfield v. Hous. Appeals Comm., 15 Mass.App.Ct. 553, 557 (1983).

"It has long been held that it is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition approval on the tendering of a suitable plan that would comply with State standards." Board of Appeals of Holliston, at 416; citing Board of Appeals of Hanover, 363 Mass. at 381, 294 N.E.2d 393 ("Since the board could have issued a permit subject to the condition of tendering a suitable disposal plan and since these plans had to comply with State standards, whatever their particular design, the [HAC's] decision that the board had unreasonably rejected the applicant's original plans was warranted"). See Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm., 457 Mass. 748, 765 & n. 21, 933 N.E.2d 74 (2010) (board does not exceed authority by imposing condition of compliance with stormwater management requirements).

“The courts apply a substantial evidence standard of review of the administrative record ‘in light of the heavy burden borne by a local board that denies a comprehensive permit application’ to prove ‘a specific health or safety concern of sufficient gravity to outweigh the regional housing need.’” Zoning Bd. of Holliston, at 414-415; citing Zoning Bd. of Appeals of Canton, 76 Mass.App.Ct. at 473, 923 N.E.2d 114. The Board must show that there is an overriding local concern that exceeds the regional need for affordable housing. Id.

Concerns About Design and Density

Attorney Hill in his letter appears to assert that the proposed project’s density requires a finding that a lesser project would be uneconomic. That is not accurate.

Denying the Project or placing conditions that reduce the number of units because it is “too dense” is not a valid overriding local concern. Without a finding that the Project will cause adverse impacts so great as to rebut the presumption that they are outweighed by the regional need for affordable housing the Board should not deny or condition a lesser project. It is understood that the density of the Project is more than typical in Upton. However, other municipalities have similar multi-family projects.

Furthermore, Chapter 40B Regulations require the subsidizing agency to make specific findings in evaluating project eligibility, including findings regarding the appropriateness of the project site and the project design relative to the site. Pursuant to 760 CMR 56.04(1), “[c]ompliance with these project eligibility requirements shall be established by issuance of a written determination of Project Eligibility by the Subsidizing Agency that contains all the findings required under 760 CMR 56.04(4).” [Emphasis added]. In turn, 760 CMR 56.04(4) requires that the subsidizing agency to make certain findings about the proposed project including: “(b) that the site of the proposed Project is generally appropriate for residential development... [and] (c) that the conceptual project design is generally appropriate for the site on which it is located...” The Applicant received a written determination of Project Eligibility from MassHousing (MassHousing ID No. 1192), pursuant to the Federal Home Loan Bank of Boston New England Fund (“NEF”) Program where MassHousing serves as the Subsidizing Agency, dated August 11, 2023 (the “Site Approval Letter”), to develop sixty-eight (68) units of rental housing on the Property, and thus, satisfying the requirements of 760 CMR 56.04(1)(b).

I would also note that the issuance of the PEL is indicative of the determination of the Subsidizing Agency that the Project complies with the Design Guidelines. The Board may not second-guess this determination.

Chapter 40B Regulations specifically prohibit reviewing “a pro forma in order to see whether a Project would still be economic if the number of dwelling units were reduced, unless such reduction is justified by a valid health, safety, environmental, design, open space, planning, or other local concern that directly results from the size of a project on a particular site.” (760 CMR 56.05(6)(a)(4)) Reducing the density of a comprehensive permit development should be based on valid planning considerations, design deficiencies, or environmental impacts.

Grant of Waivers

Chapter 40B allows developers to request and ZBA to grant waivers from local bylaws or ordinances and regulations. If the decision is granted but denies certain waivers and the developer fails to sustain its initial burden to demonstrate that a certain condition or denial of waiver in the decision would render the project uneconomic, the burden never shifts to the ZBA to prove a local concern that justifies the condition. See Stoneham, *supra*, No. 2014-10, slip op. at 4 n.4, 30.