C O M M O N W E A L T H O F M A S S A C H U S E T T S

H O U S I N G A P P E A L S C O M M I T T E E

In the Matter of METHUEN ZONING BOARD OF APPEALS, Appellant, and THE HOMES AT MURPHY'S FARM, LLC, Appellee.	)	No. 2023-08

RULING AND ORDER DENYING
APPELLEE'S MOTION FOR SUMMARY DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

This is an interlocutory appeal brought by the Methuen Zoning Board of Appeals (Board) pursuant to 760 CMR 56.03(8)(c) asserting a "safe harbor" under the Comprehensive Permit Law, G.L. c. 40B, §§ 20-23. On August 18, 2023, The Homes at Murphy's Farm, LLC (developer) filed an application for a comprehensive permit with the Board for an affordable housing development known as the Homes at Murphy's Farm on the Methuen boundary line with units in both Methuen and Dracut. The hearing on the application opened on September 27, 2023. Pursuant to 760 CMR 56.03(8)(a), on October 11, 2023, the Board notified the Executive Office of Housing and Livable Communities (EOHLC) and the developer that it asserted that a denial of the comprehensive permit was consistent with local needs on the grounds that the City of Methuen (City) had achieved two safe harbors, or statutory minima, available to a municipality that: 1) has met the housing unit minimum by having low or moderate income housing comprising more than 10 percent of its total housing stock as defined in G.L. c. 40B, § 20 and 760 CMR 56.03(1) and 56.03(3)(a); and 2) has low or moderate income housing on sites comprising 1.5 percent or more of all land zoned for residential, commercial, or industrial use, pursuant to 760 CMR 56.03(3)(b). The developer challenged this assertion on October 23, 2023. On November 21,

2023, EOHLC issued a decision stating that the Board had not met its burden of proving the City had achieved either safe harbor.

The Board appealed EOHLC's decision to the Committee on December 8, 2023. Following the initial conference of counsel, the developer filed a motion for summary decision on January 26, 2024, arguing that the Board failed to timely offer sufficient evidence to support its claims of safe harbor and therefore the appeal should be dismissed, and the matter should be remanded to the Board for a hearing on the application. The Board filed an opposition to the developer's motion on February 27, 2024, asserting the City has met the statutory minima and further claiming it has raised an open question of law and fact that should be resolved in a hearing regarding whether certain asserted housing units at a Days Inn motel should count toward the City's Subsidized Housing Inventory (SHI), which identifies units considered for determining whether Methuen has met one of the above statutory safe harbors. The developer filed a reply on March 11, 2024. For the reasons discussed below, the developer's motion for summary decision is denied, without prejudice.

II. STANDARD OF REVIEW

Either party may file an interlocutory appeal of an adverse decision by EOHLC on a zoning board's claim of safe harbor to the Committee. 760 CMR 56.03(8)(c). The Board carries the burden of proving satisfaction of the grounds for asserting the safe harbor, in this case, either the 10 percent housing unit minimum or the 1.5 percent general land area minimum. *See* 760 CMR 56.03(8)(a).

Summary decision is appropriate if "the record before the Committee, together with the affidavits (if any) shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 56.06(5)(d); *see also Matter of Pembroke and River Marsh*, No. 2019-04, slip op. at 2 (Mass. Housing Appeals Comm. Interlocutory Summary Decision July 20, 2020); *Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992); *Warren Place, LLC v. Quincy*, No. 2017-10, slip op. at 4 (Mass. Housing Appeals Comm. Summary Decision and Directed Decision) Aug. 17, 2018), *aff'd sub nom Haugh v. Housing Appeals Comm*., Norfolk Super. Ct. No. 1882CV01167, Aug. 7, 2019; *Delphic Assocs., LLC v. Duxbury*, No. 2003-08, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 14, 2010); *Grandview Realty, Inc. v. Lexington*, No. 2005-11, slip op. at 4 (Mass. Housing Appeals Comm. July 10, 2006). The Committee must

"examine whether the undisputed evidence, when considered in the light most favorable to the nonmoving party … is legally sufficient to support a decision in favor of the movant." *Matter of Oxford and 722 Main Street, LLC,* No. 2021-11, slip op. at 3 (Mass. Housing Appeals Comm. Nov. 16, 2022), citing *Warren Place*, *supra*, No. 2017-10, slip op. at 12; *Litchfield Heights, LLC v. Peabody*, No. 2004-20, slip op. at 4 (Mass. Housing Appeals Comm. Jan. 23, 2006), citing *Donaldson v. Farrakhan*, 436 Mass. 94, 96 (2002) (comparing standard to summary judgment standard).

III. UNDISPUTED FACTS

The Board opened the public hearing on the developer's application for a comprehensive permit on September 27, 2023, and, on October 11, 2023, notified the developer that it claimed it met both the 10 percent housing unit minimum safe harbor and the general land area minimum safe harbor. The Board's notice claimed the City met the 10 percent housing unit minimum on the ground that 117 units at a former Days Inn motel that are being used to house migrant and other families and individuals in crisis, are subsidized with state funding. Appellee's Motion for Summary Decision (Developer Motion), Exh. C; Board's Opposition to Motion for Summary Decision (Board Opposition), p. 3. Specifically, the notice stated the SHI for the City listed 1,982 SHI units as of June 29, 2023, for a total percentage of 9.86 percent. The Board stated the SHI failed to include the 117 Days Inn units, which it argues should be included on the SHI and would result in an affordable housing percentage over the statutory minimum of 10 percent. The Board also asserted it met the general land area minimum safe harbor, even without the inclusion of the Days Inn units, stating a City analysis determined that it had achieved a 1.556% general land area minimum. Board Opposition, pp. 4-5; Exh. B; Developer Motion, Exh. A. There is no factual dispute between the developer and the Board regarding the contents of the notice. Board Opposition, p. 5; Developer Reply, p. 5.

IV. DISCUSSION

The primary legal issues raised by the developer are what standard of review the Committee should apply to this appeal of EOHLC's determination that the City had not achieved either of the safe harbors asserted, and whether the Board failed to timely offer sufficient evidence to support those safe harbor claims.

A. Appeals Before the Committee Require De Novo Review on Issues of Fact and Law

The developer acknowledges that an interlocutory appeal, like all appeals to the Committee, is *de novo*. However, it argues that the Committee's general *de novo* standard of review does not automatically mean *de novo* fact finding, and the Committee's review should be limited to *de novo* legal review with no new evidence presented. Developer Motion, p. 5, citing *Liberty Mut. Fire Ins. Co. v. Casey*, 91 Mass. App. Ct. 243, 245 (2018) (appellate courts' *de novo* review of trial court summary judgment decisions is restricted to all evidence before motion judge and reasonable inferences drawn therefrom); and comparing *Green v. Board of Appeals*, 26 Mass. App. Ct. 469, 473 n.6 (1988) (noting unique review of G.L. c. 40A, § 17, where courts review decision's legal sufficiency with *de novo* fact finding).

The developer characterizes the question before the Committee as "whether EOHLC 'wrongly concluded' that the [Board] had failed to satisfy its burden of proof…to support its safe harbor claims…." Motion, p. 7. It argues the soundness of EOHLC's determination must be based on whatever evidence the Board provided to EOHLC and cannot now be evaluated based on new evidence not originally supplied to EOHLC. Developer Motion, p. 7. In support, the developer relies on 760 CMR 56.03(1) and 56.03(8)(a) to argue that the Board was required to submit its entire factual record in the notification to EOHLC. Developer Motion, p. 6. Section 56.03(1) states that a denial by the Board of a comprehensive permit application based upon a safe harbor "shall be made solely in accordance with the procedure set forth in 760 CMR 56.03(8)," and § 56.03(8)(a) requires the Board to provide to EOHLC, within 15 days of the opening of the comprehensive permit hearing, "the grounds that it believes to have been met, and the factual basis for that position, including any necessary supportive documentation." The developer argues that the written notice provided by the Board should therefore constitute the entire record on which the Board's eligibility for a safe harbor should be considered. Developer Motion, p. 8.

The Board argues it is entitled to provide additional evidence to the Committee other than the notice with respect to satisfaction of the statutory minima. Board Opposition, p. 5. It argues that limiting the Committee's *de novo* review to a legal review only, and prohibiting the Board from submitting additional evidence to the Committee other than the notice to EOHLC contravenes the comprehensive permit regulations and longstanding Committee

precedent. Board Opposition, pp. 5-6. It notes that the comprehensive permit statute sets forth certain features for Committee appeals that indicate the intent for the Committee to find its own facts and conclusions. Board Opposition, p. 14, citing G.L. c. 40B, § 22. It argues that the Committee, as the agency charged with conducting these appeals, would improperly delegate its authority to EOHLC if it restricted the scope of its consideration. Board Opposition, p. 15.

The developer's argument misconstrues the nature of the appeal before the Committee. Although this appeal is characterized as an appeal from the EOHLC determination, it is not a record review of that agency's action. As the Board notes, Chapter 40B has established the Committee as the finder of fact on all appeals under the statute.[1] *See* Board Opposition, p. 14, citing G.L. c. 40B, § 22. The Committee has determined that in interlocutory safe harbor appeals, EOHLC's decision carries no evidentiary weight. *See Pembroke, supra,* No. 2019-04, slip op. at 2, citing *Kirkwood v. Board of Appeals of Rockport*, 17 Mass. App. Ct. 423, 426-427 (1984).

The Committee has made clear in its interlocutory decisions that its review is not limited to a legal review. *See, e.g., Pembroke, supra,* 2019-04*; Matter of Arlington and Arlington Land Realty, LLC,* No. 2016-08 (Mass. Housing Appeals Comm. Interlocutory Decision Oct. 15, 2019). And it has been long established that hearings before the Committee are *de novo* and include original fact finding. *See Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 368-371 (1973); *Mapleleaf Dev. Assocs. v. Haverhill*, No. 1988-14, slip op. 3 n.7 (Mass. Housing Appeals Comm. Jan. 27, 1993); *Hayward Pond Park, Inc. v. Concord*, No. 1974-04, slip op. at 4 (Mass. Housing Appeals Comm. March 14, 1975). The statutory language of Chapter 40B itself contains specific requirements indicating a full *de novo* review is required, and it is not limited to legal conclusions. *See Hanover*, 363 Mass. 363, 369-371, citing G.L. c. 40B, § 22 (noting statute requires Committee to render a written decision, state findings of fact and maintain a stenographic record of the proceedings). All proceedings before the Committee are therefore *de novo*, including interlocutory appeals relating to claims of safe harbor. *See Pembroke, supra*, No. 2019-04,

[1] The Board also argues that the developer mistakenly relies on cases that analyze the standards of review of appellate and trial courts, entities with different structures and standards of review than the Committee, and such comparisons fail to take into account the fact that G.L. c. 40B, § 22 explicitly requires the Committee to find its own facts and conclusions. Board Opposition, p. 17.

slip op. at 2; *Matter of Bourne Zoning Board of Appeals and Chase Developers, Inc*., No. 2008-11, slip op. at 1-2 (Mass. Housing Appeals Comm. Interlocutory Decision June 8, 2009) (noting that interlocutory safe harbor appeals are *de novo*). Therefore, consistent with *Hanover,* and the Committee's decisions, the Committee's hearing on an interlocutory appeal, which is focused on one aspect of whether a zoning board's decision is consistent with local needs, is a *de novo* hearing on the facts and the law. G.L. c. 40B, §§ 20-23.

B. The Developer's Challenge to the Board's Notice of Safe Harbor Fails

The developer alternatively argues that even with a *de novo* review by the Committee of both fact and law, it is still entitled to summary decision in its favor. Developer Reply, p. 4. It argues the Board only provided a one-page conclusory and legally insufficient notice of its safe harbor claims, failing to carry its burden under 760 CMR 56.03(8)(a). Developer Motion, p. 7. It claims that the Board failed to provide any evidence in its notice claiming safe harbor showing how the Days Inn motel units qualify for inclusion toward the City's housing unit minimum. It also claims the Board also failed to provide any evidence relating to its general land area minimum calculation. *Id*. at 5-6. By allowing the Board to wait until the *de novo* hearing before the Committee to provide any evidence, outside of the notice, the developer argues, EOHLC's safe harbor determination is rendered "fundamentally meaningless." Developer Reply, p. 8.

The Board argues its safe harbor notice complied with 760 CMR 56.03(8)(a). Board Opposition, p. 17. It argues that it met § 56.03(8)(a)'s requirement to assert the safe harbor within 15 days of opening the public hearing and to provide the grounds for the safe harbor claim and the factual basis therefor, including any necessary supportive documentation. The Board argues its notice meets these requirements: it stated the two statutory minima it believed the City had achieved – the housing unit minimum and the general land area minimum – and the factual basis in support for both. For the housing unit minimum, the Board stated the inclusion of 117 additional Days Inn units placed the City over the 10 percent threshold, and stated for the general land area minimum that its analysis showed the City had achieved a 1.556 percent minimum. Board Opposition, pp.6-7; Exh. B. Therefore, the Board argues the notice fulfilled the regulatory requirements and provided sufficient notice to the developer and EOHLC of the grounds on which it intended to rely. *Id.,* p. 18.

There is no dispute that the Board's submission was made before the required 15-day notification deadline. The satisfaction of one of the statutory minima may be raised as an affirmative defense that denial of the comprehensive permit is consistent with local needs, and such defense is raised pursuant to 760 CMR 56.03(8)(a). *See Warren Place, supra,* No. 2017-10, slip op. at 2 n.2; *Brewster Commons, LLC v. Duxbury*, No. 2010-08, slip op. at 6 (Mass. Housing Appeals Comm. Ruling and Order Extending Comprehensive Permit Dec. 12, 2011) (stating "the assertion of achieving a statutory minimum has always been in the nature of an affirmative defense"). The notice requirement forces the Board to raise its claims of satisfaction of statutory minima at the outset, and not after an appeal has been initiated before the Committee. *See id.,* citing 760 CMR 56.03(1), 56.03(8)(a) (stating claim that municipality has reached statutory minimum must be raised initially during proceedings before Board). The comprehensive permit statute and regulations do not provide that a Board, after asserting satisfaction of the statutory minima, is limited solely to evidence contained within its initial notice or is prohibited from introducing additional evidence in front of the Committee during its appeal. Section 56.03(8)(a)'s allowance of only a 15-day period for the Board to give notice contradicts the assertion that a full case must be prepared and presented within that short timeframe. The notice provided by the Board in this case succeeded in raising the safe harbor defense and put the developer on notice in addition to stating the grounds for such assertion. Accordingly, I find that the Board provided sufficient and timely notice of its belief that two statutory minima had been met by the City.

V. CONCLUSION

Based on the foregoing, the developer's motion for summary decision is denied. Further proceedings in this matter will be discussed in the virtual status conference scheduled for March 19, 2024, at 2:00 PM.

Caitlin E. Loftus
Presiding Officer

March 18, 2024