COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

THE FIELDS AT SHERBORN, LLC, Appellant, v. SHERBORN ZONING BOARD OF APPEALS, Appellee.	No. 2016-04

RULING ON MOTION TO INTERVENE – EUGENE HAM

The Fields at Sherborn, LLC (Developer) is appealing a May 5, 2016 decision of the Sherborn Zoning Board of Appeals (Board), pursuant to G.L. c. 40B, § 22. The Board granted the Developer a comprehensive permit with various town bylaw and regulation waivers and a number of conditions. The Developer submitted an application for a comprehensive permit to build 36 condominium units, which it modified to 32 units during the permitting process. The project consists of ownership units on 17.55 acres of land at 247A Washington Street (Route 16) in Sherborn, and at least 25% of the units (8) will be affordable units.

Abutting neighbor Eugene Ham has filed a motion to intervene based on two grounds. First, Mr. Ham claims that he has a right to intervene based solely on his status as an abutting landowner who is considered a "person aggrieved" under G.L. c. 40A, § 17. Second, Mr. Ham maintains to have a right to intervene based on a substantive ground: the location of the project's proposed septic system because it substantially and significantly would impinge on his property interest by contaminating his well water.

The Developer filed an opposition dated June 15, 2016 to Mr. Ham's motion to intervene. The Board remains neutral on this issue. It has not filed any response to Mr. Ham's motion to intervene.

Prior to the Developer filing an opposition to Mr. Ham's motion to intervene, counsel for Mr. Ham and the Developer made oral arguments to the Presiding Officer at the Conference of Counsel on June 8, 2016. At the Conference of Counsel, Mr. Ham's counsel suggested that the Developer's challenge to the Board's denial of a waiver of the Town's Wetlands Bylaw that delineates a fifty (50') foot no alteration zone around wetlands would be an additional ground to

support Mr. Ham's intervention in this case.[1] Mr. Ham's written motion however failed to articulate any ground based on a "[l]ocal [r]equirement or [r]egulation" imposed by the Board and challenged by the Developer that would allow him to intervene. See 760 CMR 56.06(2)(b). The Presiding Officer thus in a letter to counsel dated August 26, 2016, gave Mr. Ham a second chance to articulate grounds for intervention that (1) corresponded with the objections to the comprehensive permit raised by the Developer and (2) were based on the application of local standards not state standards. The Presiding Officer also asked Mr. Ham to describe the nexus between the Developer's challenge to the comprehensive permit and the significant and substantial injury potentially suffered by Mr. Ham. Mr. Ham filed a memorandum dated August 31, 2016 in response to the August 26th letter, and the Developer filed a response to Mr. Ham's August 31st memorandum.

As explained below, Mr. Ham has not shown that he is a "person aggrieved" entitled to intervene in this Chapter 40B appeal.

I. Intervention as an abutting property title holder

Mr. Ham argues that the language of 760 CMR 56.06(2)(b)[2] requires that the Committee allow him to intervene based solely on his status as an abutting property holder because as an abutter he would be allowed to participate in a zoning appeal under G.L. c. 40A, § 17. Motion to Intervene of Eugene Ham, p. 2. (Motion, p. 2). But this Committee has rejected the premise that standing under G.L. c. 40A, § 17 automatically permits a party to intervene in a Chapter 40B appeal. See *Lifetime Green Homes v. Carlisle*, No. 2015-04, slip op. at 2 (Mass. Housing Appeals Comm. Ruling on Motion to Intervene March 3, 2016); *HD/MW Randolph Avenue, LLC v. Milton*, No. 2015-03, slip op. at 3 (Mass. Housing Appeals Comm. Ruling on Motion to Intervene Dec. 9, 2015) (*Milton*).

Subsection 56.06(2)(b) was adopted in 2008, but it does not override existing statutory or case law that pre-dates promulgation of 760 CMR 56.00. *Milton* at 2. Under the State Administrative Procedures Act, G.L. c. 30A, a hearing officer still has discretion to determine whether the prospective intervener has a legitimate interest in the proceeding before an

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1 The Developer responded to this suggested ground in its opposition to Mr. Ham's motion to intervene.

2 "The participation of an intervener may be limited to the extent and under terms determined in the discretion of the Presiding Officer. Notwithstanding the foregoing, any person shall be allowed to intervene to the extent that he or she would have standing as a person aggrieved to appeal the grant of a special permit in accordance with G.L. c. 40A, § 17." 760 CMR 56.06(2)(b).

administrative body. *Milton* at 3. And that discretion is broad when deciding whether to grant or deny intervention:

> [A]gencies *may* ... allow any person showing that he may be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding, and allow any other interested person to participate by presentation of argument orally or in writing, or for any other limited purpose, as the agency may order. (emphasis added)

G.L. c. 30A, § 10; see *Tofias v. Energy Siting Facilities Bd.*, 435 Mass. 340, 346-47 (2001) (collecting cases) (opining courts have repeatedly recognized an agency's broad discretion to grant or deny intervention based on word "may" in G.L. c. 30A, § 10).

Along with the presiding officer's broad discretion, a prospective intervener still may be required to demonstrate that he or she "may be substantially and specifically affected by the proceeding...." G.L. c. 30A, § 10; accord *Milton*, at 3; see 760 CMR 56.06(2)(b) ("presiding officer may allow any person showing that he or she may be substantially and specifically affected by the proceedings to intervene as a party in the whole or in any portion of the proceedings").

Here, a showing of a legitimate interest, which is one within the scope of the proceeding before the Committee, remains necessary because an appeal's scope is limited procedurally and jurisdictionally. *Milton* at 4. While 760 CMR 56.06(2)(b) permits "any person ... to intervene to the extent he or she would have standing as a person aggrieved to appeal the grant of a special permit in accordance with G.L. c. 40A, § 17," nowhere in the regulation is an abutter granted the right to raise issues that are outside of the scope of an appeal under G.L. c. 40B, § 22. *Milton* at 3. Consequently, "[i]n determining whether to permit a person to intervene, the presiding officer shall consider only those interests and concerns of that person which are germane to the issues of whether the Local Requirement and Regulations make the Project Uneconomic or whether the Project is Consistent with Local Needs." 760 CMR 56.06(2)(b).

A Chapter 40B appeal is limited procedurally because only a developer has a right to appeal a zoning board of appeal's decision. G.L. c. 40B, § 22; accord *Taylor v. Board of Appeals of Lexington*, 451 Mass. 270, 275 (2008) (explaining an abutter or other third party has no right to appeal to Committee).[3] As the court has recognized, an appeal before the Committee "does not

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3 While the Supreme Judicial Court decided *Taylor, supra*, before the adoption of 760 CMR 56.06 with its pertinent language, the statute referenced here and throughout this ruling, G.L. c 40B, §§ 21-23, has not been amended since the *Taylor* ruling, and the decision remains recognized precedent for Chapter 40B.

necessarily fully protect the interests of all persons who may be aggrieved by the issuance of a comprehensive permit." *Taylor*, 451 Mass. at 275 (refusing to interpret appeal under G.L. c. 40B, § 22 as protecting interest of all aggrieved persons). Indeed, G.L. c. 40B, § 21 authorizes "any person aggrieved," such as abutters, to appeal the granting of a comprehensive permit pursuant to G.L. c. 40A, § 17.

An appeal before the Committee is limited jurisdictionally by G.L. c. 40B, § 23 where, "legal issues properly before the [Committee] are circumscribed...." *Milton* at 5, quoting *Taylor*, 451 Mass. at 275 (internal quote omitted). After a zoning board of appeals has denied or granted a comprehensive permit, the developer raises issues before the Committee based on its objections to the board's decision. The issues raised are relevant to the developer's *prima facie* case that either (1) the denial of a comprehensive permit is unreasonable and inconsistent with local needs or, as in this case, (2) the approval of a comprehensive permit with conditions is inconsistent with local needs and results in an uneconomic project. G.L. c. 40B, § 23.

Another limit to the Committee's jurisdiction is its narrow ability to grant relief. *Taylor*, 451 Mass. at 275. The Committee may only grant relief in favor of the developer and not in favor of a third party who opposes construction of the project. *Id.*

Central to this matter is the reality that a cognizable aggrievement that gives one standing under G.L. c. 40A, § 17 is not necessarily one that supports intervention under Chapter 40B. *Milton* at 3, citing *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 26 (2006).[4] "The interests protected by G.L. c. 40B differ from, and in some respects are inconsistent with, those protected by G.L. c. 40A." *Standerwick*, 447 Mass. at 28. Under Chapter 40B, the Legislature intentionally limited the class of parties with standing to challenge comprehensive permits. *Planning Bd. of Hingham v. Hingham Campus, LLC*, 438 Mass. 364, 370 (2003). In contrast, case law has created a broad definition for a "person aggrieved" under G.L. c. 40A, § 17. *81 Spooner Road, LLC v. Zoning Bd. of Appeals*, 461 Mass. 692, 700 (2012) (citations omitted) ("We do not define aggrievement narrowly....").

Specifically, the developer bears the burden of proof. So, the goal of a developer, with a comprehensive permit, is to prove that local rules or regulations imposed by a board make the project uneconomic and are not consistent with local needs. G.L. c. 40B, § 23. Any issue raised by an abutter that is outside of the Developer's case is irrelevant to whether the imposition of a

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4 *Standerwick, supra*, offers the same recognized precedent regarding G.L. c. 40B as *Taylor, supra*. See, note 3.

local requirement renders the project is uneconomic and is inconsistent with local needs. A potential intervener therefore cannot be a "person aggrieved" in a Chapter 40B appeal, regardless of 760 CMR 56.06(2)(b) and his status as a "person aggrieved" under G.L. c. 40A, § 17, if the concern that is claimed to make the abutter a "person aggrieved" is not before the Committee. *Milton* at 3.

Intervention by an abutter also must be weighed against the intent of the Legislature when it adopted Chapter 40B. *Goldberg v. Board of Health of Granby*, 444 Mass. 627, 632-33 (2005) (holding regulations are to be interpreted in harmony with legislative mandate); accord *Milton* at 5. Allowing an abutter to raise issues upon intervention based solely on his or her status as an abutter would conflict with the purpose of Chapter 40B – "to streamline and accelerate the permitting process for *developers* of low or moderate income housing in order to meet the pressing need for affordable housing...." *Town of Middleborough v. Housing Appeals Comm.*, 448 Mass. 514, 521 (2007) (emphasis added). The process cannot be determined streamlined and accelerated if the abutter were allowed to raise issues immaterial to the developer's case. *Milton* at 5.

Mr. Ham thus cannot intervene solely due to his status as an abutting landowner. Instead, there must be an examination of Mr. Ham's claim of right to intervene based on a substantive issue before the Committee.

II. Right to intervene based on substantive issues

Mr. Ham was given a second opportunity to justify his intervention in this appeal by identifying the local rule or regulation that the Developer challenged which would result in his injury. To that end, Mr. Ham responded in his August 31st memorandum that his only substantive basis for intervention is the Developer's conditional objection to the non-waiver of Sherborn Board of Health Regulation, Chapter I, § 7.1, "Leaching Area Size." (§ 7.1). The Developer stated in its initial pleading that it did not object to the non-waiver of § 7.1, but if the project units were to be treated as single-family homes, the Developer would object to the application of § 7.1.

Mr. Ham countered that the Sherborn Board of Health has already determined that the project's condominium units will be treated as single-family homes, thus triggering the conditional objection. Mr. Ham further states that treating the condominium units as single-family homes requires a larger septic system under § 7.1, beyond that which the Board has approved.

The project's proposed septic system, including leaching fields, will be 125 feet from Mr. Ham's well, and Mr. Ham claims that he will suffer substantial and specific harm because sewage from the proposed septic system will infiltrate the ground water near his well. The infiltration of the project's sewerage will adversely affect his well water by raising ground water nitrogen levels three times greater than allowable levels under state standards found in the Massachusetts Clean Water Act, G.L. c. 21, §§ 21-53 and Title 5 of the State Environmental Code, 310 CMR 15.00 (Title 5), which regulates septic systems. Motion, p. 3.

This subject is now moot. While the Developer initially made a conditional objection to the comprehensive permit if the project units were treated as single-family homes, it now has withdrawn its conditional objection. The Developer's withdrawal means the application or waiver of § 7.1 will not be a part of the Developer's case. Mr. Ham's sole substantive ground for intervening thus no longer exists. As a result, Mr. Ham fails to show that his "harm [is] related to the granting of relief from local regulation as requested by the developer in this appeal." *Enterprise Village, LLC v. Yarmouth*, No. 2005-07, slip op. at 4 (Mass. Housing Appeals Comm. Oct. 14, 2005).

Indeed, even if the Developer had challenged the non-waiver of § 7.1, the issue would not have been before the Committee because it is one of state concern and not one of local concern. The Board conceded that this was not a matter of local concern in its decision by observing that § 7.1 is "no more stringent than state requirements under Title 5." See *Green View Realty, LLC v. Holliston*, No. 2006-16, slip op. at 10-11 (Mass. Housing Comm. July 12, 2009) (explaining in order to be a matter of local concern municipal regulation must be stricter than parallel state law). Septic system compliance with Title 5 is a matter of applying state standards not local standards. *Tiffany Hill, Inc. v. Norwell*, Case No. 2004-05, slip op. 9-14 (Mass. Housing Appeals Comm. September 18, 2007) (holding Title 5 compliance does not raise local concern). The Committee does not adjudicate compliance with state or federal requirements. *Brierneck Realty, LLC v. Gloucester*, No. 2005-05, slip op. at 13 (Mass. Housing Appeals Comm. Aug. 11, 2008).[5] Thus, the non-waiver of § 7.1 never would have been an issue in this appeal with or without an objection.

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5 The Board of Health denied the Developer a Title 5 compliance certificate. The Developer has appealed to the Land Court, under G.L. c. 249, § 4 to determine whether it is entitled to a compliance certificate. Whether Mr. Ham is a party in this case has not been disclosed to the Presiding Officer.

III. Mr. Ham has a venue in which to seek relief

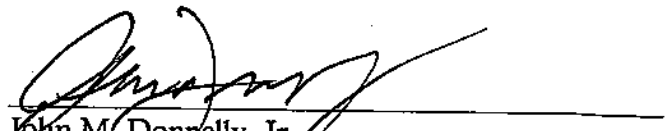
Mr. Ham is not left without a remedy. As stated above, Mr. Ham can file a lawsuit challenging the Board's decision as authorized by G.L. c. 40B, § 21, which allows "any person aggrieved" by a comprehensive permit to appeal to the court under G.L. c. 40A, § 17. See *Taylor*, 451 Mass. at 278 ("the Legislature clearly intended that persons aggrieved by the issuance of a comprehensive permit would have an opportunity to challenge it in court pursuant to G.L. c. 40B, § 21") As an abutter, Mr. Ham would benefit from a rebuttable presumption that he is a "person aggrieved" under G.L. c. 40A, § 17. *Standerwick*, 447 Mass. at 33, citing *Marashlian* v. *Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996).

In this particular case, it is possible that Mr. Ham may have another venue for seeking remedy under G.L. c. 249, § 4. See *Higby/Fulton Vineyard, LLC v. Board of Health of Tisbury*, 70 Mass.App.Ct. 848, 850 (2007) (holding abutting land owner may seek certiorari review of sewage system construction permit if abutter makes requisite showing of reasonable likelihood that he has suffered injury to protected legal right).

IV. Conclusion

For the reasons above, Eugene Ham's Motion to intervene is denied. Mr. Ham may seek to participate as an interested person pursuant to 760 CMR 56.06(2)(c).

Housing Appeals Committee



John M. Donnelly, Jr.
Presiding Officer

Dated: November 25, 2016

Certificate of Service

I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Ruling on Motion to Intervene – Eugene Ham in the case of The Fields at Sherborn, LLC v. Sherborn Zoning Board of Appeals, No. 2016-04, to:

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