SJC-13221

ZONING BOARD OF APPEALS OF MILTON vs. HD/MW RANDOLPH AVENUE, LLC, & another.[1]

Suffolk. April 6, 2022. - July 14, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Housing. Zoning, Housing appeals committee, Comprehensive permit, Low and moderate income housing, Conditions. Waiver. Practice, Civil, Waiver.

Civil action commenced in the Land Court Department on January 18, 2019.

The case was heard by Robert B. Foster, J., on motions for judgment on the pleadings.

The Supreme Judicial Court granted an application for direct appellate review.

M. Patrick Moore, Jr. (Donna A. Mizrahi also present) for the plaintiff.

Andrew E. Goloboy for HD/HW Randolph Avenue, LLC.

Samuel M. Furgang, Assistant Attorney General, for housing appeals committee.

[1] Housing appeals committee.

KAFKER, J. The Massachusetts Comprehensive Permit Act, G. L. c. 40B, §§ 20-23 (act), provides qualifying developers of low or moderate income housing with access to a single comprehensive streamlined permitting process and expedited appeal before the housing appeals committee (HAC). The act also empowers HAC to safeguard against local zoning boards of appeals that would constructively deny a comprehensive permit application by granting it subject to overly onerous conditions. Specifically, during its appellate review, HAC is authorized by statute to strike or modify any conditions that would make it "uneconomic" to proceed with a project. At issue in this case is whether HAC also has jurisdiction over, and the power to reject, conditions in instances where (1) a project has been declared economically feasible by, and received a funding commitment from, a public subsidizing agency; (2) the developer then seeks and receives a comprehensive permit subject to conditions; (3) when a rate of return for the original proposal absent the conditions is subsequently calculated, the project as originally proposed is found to be "uneconomic" according to certain metrics established in regulatory guidelines; and (4) HAC determines that the conditions imposed make the project "significantly more uneconomic" and for those reasons rejects them.

We conclude that HAC has jurisdiction over such projects and the power to remove or modify conditions that make such projects significantly more uneconomic. When public agencies are prepared to fund a project, and developers are prepared to proceed with less return on their investment from the outset than set forth in HAC's guidelines, HAC is authorized to eliminate conditions that effectively prevent such projects by rendering them significantly more uneconomic. Indeed, such action fulfills the statutory purpose of preventing municipalities from hampering the construction of low income housing. We also discern no error in HAC's development of its "significantly more uneconomic" standard through adjudication rather than regulation. Finally, we conclude that the standard is not so vague as to be arbitrary and that its application here was supported by substantial evidence, as described in HAC's decision. We therefore affirm.

Background. 1. The act and regulatory framework. The purpose of the act, now into its sixth decade of operation, is well established. "We have long recognized that the Legislature's intent in enacting [the act] is 'to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing' in the Commonwealth." Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm., 464 Mass. 38, 40 (2013), quoting

Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 28-29 (2006). A qualified developer of such housing can "circumvent the often arduous process of applying to multiple local boards for individual permits and, instead, . . . apply to the local board of appeals for issuance of a single comprehensive permit." Lunenberg, supra, quoting Board of Appeals of Woburn v. Housing Appeals Comm., 451 Mass. 581, 583 (2008) (Woburn). If the local board of appeals denies the permit application, or approves it with "such conditions and requirements as to make the building or operation of such housing uneconomic," the developer can appeal from that decision to HAC.[2] G. L. c. 40B, § 22. In the case of an approval with conditions, if the developer can prove that the imposed conditions render the project uneconomic, then the burden shifts to the local board of appeals to demonstrate that the conditions "are consistent with local needs"; if the board cannot do so, then HAC may strike or modify the conditions "so as to make the proposal no longer uneconomic." G. L. c. 40B, § 23. See 760 Code Mass. Regs. § 56.07(2) (2018) (establishing burden-shifting framework).

[2] HAC sits within the Department of Housing and Community Development (DHCD) and is obligated to act "in accordance with rules and regulations established by the [DHCD] director." G. L. c. 23B, § 5A.

As relevant to the developer in the case at bar, the act defines "uneconomic" as "any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for . . . [the developer] to proceed and still realize a reasonable return in building or operating such housing."[3] G. L. c. 40B, § 20. The act itself does not define "reasonable return," but the Department of Housing and Community Development (DHCD), the agency administering the act, has promulgated regulations that do so in part. See 760 Code Mass. Regs. § 56.02 (2018). Those regulations provide methods for calculating a reasonable return in certain scenarios,[4] and also state that "reasonable return" is "calculated according to guidelines issued by the [DHCD]." Id.

The referenced DHCD guidelines describe themselves as "a compilation of guidelines, generally applicable housing program requirements and policy document[s]." They provide the method to calculate a project's return on total cost (ROTC) and also define the minimum ROTC "necessary to realize a reasonable

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[3] The developer is a limited dividend organization. The act provides a different definition of "uneconomic" for developers that are public agencies or nonprofits. G. L. c. 40B, § 20.

[4] For example, part (a) of the definition of "reasonable return" in 760 Code Mass. Regs. § 56.02 specifies that, for a project that is "an ownership project or continuing care retirement community," a reasonable return is a profit of between fifteen and twenty percent of the total development costs.

return from the operation of a Project for purposes of determining whether a condition imposed by a Zoning Board in its approval of a Comprehensive Permit results in a Project being Uneconomic."[5] Thus, according to the guidelines, a local zoning board's conditions make a project uneconomic if the ROTC of the project as proposed was greater than the minimum ROTC, but the ROTC of the project subject to the conditions falls below that threshold.

The guidelines do not address the scenario where the ROTC of the development as originally proposed subsequently is found to be below the minimum ROTC economic threshold. Rather, HAC, in prior adjudications, has required the developer to show in such cases that the local board's conditions render the project "significantly more uneconomic" than the project originally proposed in the developer's comprehensive permit application. This is precisely what occurred in the instant case.

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[5] Per the guidelines, ROTC is expressed as a percentage and calculated as the "projected [net operating income] of a Project, divided by the projected total development cost (including development fees and overhead)." The minimum ROTC is defined as "the sum of the ROTC Threshold Increment," a number set annually by DHCD, "and the Applicable Ten-Year U.S. Treasury Rate." The definition for the latter specifies that, "on appeal to the [HAC]," the applicable Treasury rate is the one in effect on "the date of the Pre-Hearing Order." In the instant case, HAC's prehearing order issued on December 6, 2016, more than two years after the developer first applied for a comprehensive permit.

2. Facts and procedural history. The relevant facts are not in dispute. In 2014, the Massachusetts Housing Finance Agency (MassHousing), an independent, quasi public agency charged with providing financing for affordable housing in Massachusetts, issued HD/MW Randolph Avenue, LLC (developer), a project eligibility letter for a proposed two-building residential development of ninety rental units (project), twenty-three of which were to be low or moderate income housing. Such a letter is a prerequisite to applying for a comprehensive permit and may only be issued after a subsidizing agency determines, among other things, "that the proposed [p]roject appears financially feasible within the housing market in which it will be situated." 760 Code Mass. Regs. § 56.04(4)(d) (2018). The letter did not include any explicit calculation or analysis of the developer's projected return on investment.

The developer then applied to the zoning board of appeals of Milton (board) for a comprehensive permit. Following eleven days of public hearings, in July of 2015 the board granted a permit for the construction of a thirty-five unit development that was subject to over sixty conditions. The developer appealed to HAC pursuant to G. L. c. 40B, § 22, arguing that the conditions imposed made the project uneconomic and were not justified by local needs, and requesting that HAC modify or remove them. Prior to the hearing, the parties submitted

prefiled testimony from experts, including an ROTC analysis (by the developer) and a critique of that analysis (by the board). In their posthearing briefs, both parties cited the "significantly more uneconomic" standard and argued over whether it had been met.

HAC issued its sixty-seven page decision on December 20, 2018. Applying the guidelines, HAC calculated that the project had a projected ROTC of 5.88 percent as originally proposed, below the guidelines' minimum ROTC threshold of 6.84 percent. HAC further found that the imposition of the board's conditions lowered the expected ROTC of the project from 5.88 percent to 4.26 percent. This 1.62 percent decrease -- or, comparatively, a 27.5 percent reduction in expected return -- was substantial enough for HAC to conclude that the board's conditions had rendered the project "significantly more uneconomic" than as proposed. HAC went on to find that the board had failed to show that many of its conditions were "consistent with local needs," G. L. c. 40B, § 23, and ordered them struck or modified.

The board sought judicial review under G. L. c. 30A, § 14, in the Land Court, and on cross motions for judgment on the pleadings, the motion judge affirmed nearly the entirety of the

HAC decision.[6] We granted the developer's subsequent application for direct appellate review.

Discussion. Our review is governed by the familiar standards of G. L. c. 30A, § 14. We may disturb HAC's decision if we conclude it is, as relevant to the board's arguments, "[i]n excess of the statutory authority or jurisdiction of the agency," "[u]nsupported by substantial evidence," or "[a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." Id. In particular, "[w]hen determining the validity of an agency's decision, we first determine whether the Legislature has spoken with certainty on the topic in question . . . . [If not,] we determine whether the agency's resolution of that issue may be reconciled with the governing legislation" (quotations and citations omitted). Woburn, 451 Mass. at 593. Although we review questions of law de novo, Craft Beer Guild, LLC v. Alcoholic Beverages Control Comm'n, 481 Mass. 506, 512 (2019), we are required to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it," G. L. c. 30A, § 14, and "apply all rational presumptions in favor of the validity of the

[6] The motion judge reversed HAC's striking of two conditions related to long-term affordability and remanded to HAC for further proceedings regarding them. That specific portion of the judgment is not contested in the appeal before us.

administrative action," Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm., 457 Mass. 748, 759 (2010) (Amesbury), quoting Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm., 385 Mass. 651, 654 (1982).

The board challenges HAC's authority to hear cases where, because a project's as-proposed ROTC falls below the guidelines' minimum ROTC threshold, HAC applies the "significantly more uneconomic" standard, as well as the specifics of the standard itself. Additionally, the board argues that certain of HAC's modifications of conditions were not accompanied by requisite subsidiary findings. We consider each argument in turn, addressing first the threshold question of waiver.

1. Waiver. HAC insists that the board's failure to challenge HAC's authority to apply the "significantly more uneconomic" standard during the underlying HAC proceedings means that the board's arguments on the subject are waived.[7] See Albert v. Municipal Court of Boston, 388 Mass. 491, 493 (1983) ("A party is not entitled to raise arguments on appeal that he could have raised, but did not raise, before the administrative agency . . ."). The board responds that the question whether a condition renders a project uneconomic is a jurisdictional prerequisite to HAC hearing the case and therefore not subject

[7] Except where noted, HAC's arguments should be understood as also having been made by the developer.

to waiver.[8] See Doe, Sex Offender Registry Bd. No. 3974 v. Sex Offender Registry Bd., 457 Mass. 53, 56 (2010) (Doe), quoting Commonwealth v. DeJesus, 440 Mass. 147, 151 (2003) ("questions of subject matter jurisdiction 'may be raised at any time' . . . and are not waived even when not argued below"). More specifically, the board contends that where "a project is uneconomic as proposed," HAC has no jurisdiction whatsoever, and the board is free to impose whatever conditions it so desires.

The board is incorrect on the jurisdiction issue. "The question at the heart of subject matter jurisdiction is, 'Has the Legislature empowered the [agency] to hear cases of a certain genre?'" Doe, 457 Mass. at 56, quoting Wachovia Bank, Nat'l Ass'n v. Schmidt, 546 U.S. 303, 316 (2006). The genre of cases HAC is empowered to hear is developer appeals from adverse comprehensive permit decisions by local zoning boards of appeals that will impede or prevent the development of low income housing. See Middleborough v. Housing Appeals Comm., 449 Mass. 514, 521 (2007) (warning that characterizing statutory requirements regarding fundability as unwaivable jurisdictional matters would "severely hamper[]" the "intent of the act -- to streamline and accelerate the permitting process for developers of low or moderate income housing in order to meet the pressing

[8] The board concedes that it "did not challenge HAC's jurisdiction before HAC itself."

need for affordable housing"). The question whether conditions render a project uneconomic or, in this case, significantly more uneconomic is not jurisdictional but, rather, as we have held in a similar context, "a necessary element of the developer's prima facie case for relief." Woburn, 451 Mass. at 591, quoting Middleborough, 449 Mass. at 520-521 ("though department denominates 'fundability' as 'a "jurisdictional requirement" [it] is more properly viewed as a substantive aspect of the successful applicant's prima facie case for . . . a comprehensive permit'"). See Doe, 457 Mass. at 57 ("The 'nature of the case' assigned to the board is distinguishable from the elements of a prima facie case before the board").

Although we could conclude that waiver dooms the board's arguments on the applicability of the significantly more uneconomic standard, we decide that there is nevertheless good cause to "address the substantive question before us: it has been fully briefed and argued, and public policy would benefit from the elimination of any uncertainty" regarding HAC's application of the "significantly more uneconomic" standard. Middleborough, 449 Mass. at 522, citing Andrews v. Civil Serv. Comm'n, 446 Mass. 611, 618 (2006). We therefore proceed to the merits.

2. HAC's authority. In evaluating whether HAC has the authority to develop and employ the "significantly more

uneconomic" standard, we begin with the statutory language itself. Under the act, "uneconomic" is defined broadly to mean "any condition brought about by any single factor or combination of factors to the extent that it makes it impossible . . . for a limited dividend organization to proceed and still realize a reasonable return in building or operating [affordable] housing within the limitations set by the subsidizing agency." G. L. c. 40B, § 20.

In interpreting this provision, the agency responsible for its administration has provided more specific guidance through regulations, guidelines, and adjudicatory decisions, as is its right. Such interpretation is also entitled to substantial deference, so long as it is not inconsistent with the statutory language or purpose. See Alves's Case, 451 Mass. 171, 177 (2008) ("We will not substitute our judgment for that of an administrative agency if its interpretation of a statute is reasonable"); Goldberg v. Board of Health of Granby, 444 Mass. 627, 636 (2005) ("we accord special deference to an agency's interpretation of its own regulation").

To guide the inquiry into whether the imposed conditions have made it impossible for a developer to proceed and still realize a reasonable return, the agency, DHCD, has promulgated regulations and guidelines containing some situational rules for calculating a reasonable return. Not surprisingly, although the

regulations and guidelines provide for different reasonable rates of return in a variety of different circumstances, they have not considered every possibility or eventuality.

The regulations do in particular define as a minimum reasonable return lower amounts that are "determined to be feasible as set forth in the Project Eligibility Letter."[9] 760 Code Mass. Regs. § 56.02 (part [c] of "reasonable return" definition). Had such an amount been calculated in the funding letter commitment in the instant case, it would have established the minimum reasonable return, notwithstanding that it was lower than the returns set out elsewhere in the regulations. See id. As explained in HAC's brief, however: "Generally, as in this case, . . . the Project Eligibility letter does not include a specific figure reflecting the profit deemed to make the project 'financially feasible.'"[10]

Consequently, neither the regulations nor the guidelines address the specific scenario presented in this case, that is,

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[9] Specifically, the regulations provide that "for the purpose of determining whether the Project is Uneconomic, . . . if an amount lower than the minimum set forth [in] 760 [Code Mass. Regs. §] 56.02: Reasonable Return(a) or (b), as applicable, has been determined to be feasible as set forth in the Project Eligibility Letter, then such lower amount shall be the minimum" reasonable return. 760 Code Mass. Regs. § 56.02 (part [c] of "reasonable return" definition).

[10] Why this is "generally" the case, however, is not explained.

where a developer has received a project eligibility letter that does not include a calculation of the expected return, and then seeks and receives a comprehensive permit subject to conditions, and, subsequently, when a rate of return for the original proposal absent the conditions is calculated, the proposal does not meet the minimum reasonable return set out elsewhere in the guidelines and regulations.[11]

This scenario has, however, been specifically and consistently addressed in prior administrative adjudications by HAC.[12] Woburn, 451 Mass. at 593, quoting Hastings v. Commissioner of Correction, 424 Mass. 46, 49 (1997) ("'It is a recognized principle of administrative law that an agency may adopt policies through adjudication as well as through rulemaking,' . . . and 'the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency'"). In these circumstances, for over a decade, the

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[11] We note that a developer that has decided to proceed with a project, and has dedicated the energy and resources to getting it permitted, has presumably done its own calculations and made its own decision that it is not impossible to proceed and receive, in its view, a reasonable rate of return.

[12] We have previously recognized that "[p]olicies announced in [HAC] adjudicatory proceedings may serve as precedents for future cases." See Amesbury, 457 Mass. at 759 n.17, quoting Arthurs v. Board of Registration in Med., 383 Mass. 299, 313 (1981).

agency responsible for interpreting the statute and its own regulations has applied the "significantly more uneconomic" test to determine whether the conditions imposed have made it impossible for the developer who is still willing to proceed to receive a reasonable return on its investment. This adjudicative interpretation fills in a gap in the statutory and regulatory regime, and absent a clear directive from the Legislature to the contrary, regulatory agencies are entitled to fill such gaps. See Amesbury, 457 Mass. at 759, 760-762 (adopting HAC's interpretation, developed through adjudication, to address "ambiguity or a gap in the [act]"); Goldberg, 444 Mass. at 633-634 ("That the Legislature . . . did not anticipate the exact factual scenario presented here does not make the administrative regulations and rulings that did anticipate such situations invalid"). Such a consistent administrative adjudicatory interpretation of statutory and regulatory language is also entitled to deference. See, e.g., DeCosmo v. Blue Tarp Redev., LLC, 487 Mass. 690, 703 (2021), quoting Mullally v. Waste Mgt. of Mass., Inc., 452 Mass. 526, 533 n.13 (2008) ("administrative interpretation developed during, or shortly before, the litigation in question is entitled to less weight than that of a long-standing administrative interpretation of administrative rules"); Beverly Port Marina, Inc. v. Commissioner of the Dep't of Envtl. Protection, 84 Mass. App.

Ct. 612, 620-621 (2013), quoting United States Gypsum Co. v. Executive Office of Envtl. Affairs, 69 Mass. App. Ct. 243, 249 n.16 (2007) ("our judicial deference 'may be tempered' when . . . the agency interpretation at issue is not one of long-standing or consistent application").

Moreover, "'where the focus of a statutory enactment is reform,' as is true of the act, 'the administrative agency charged with its implementation should construe it broadly so as to further the goals of such reform'" (citation omitted). Middleborough, 449 Mass. at 524, quoting Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Board of Educ., 436 Mass. 763, 774 (2002). HAC's application of the "significantly more uneconomic" standard is plainly in accord with its legislative mandate, as it allows developers willing to pursue less lucrative projects to avail themselves of the act's streamlined processes, paving the way for development of more affordable housing. Cf. Dennis Hous. Corp. v. Zoning Bd. of Appeals of Dennis, 439 Mass. 71, 82 (2003) (rejecting interpretation that "would leave in place the very form of local impediment to the development of affordable housing that the comprehensive permit act sought to eliminate").

In light of the above, we conclude that HAC's construction of the act and attendant regulatory scheme is "reasonable, consistent with the statutory language and purposes, and

appropriate."[13] Amesbury, 457 Mass. at 762. We therefore agree that HAC has authority to apply the "significantly more uneconomic" standard in cases like this one, where developers are willing to proceed despite lower initial rates of return as calculated by the guidelines' minimum ROTC.

3. Vagueness. The board argues in the alternative that, even if HAC had authority to review the project, the "significantly more uneconomic" standard that it applied is so vague as to be arbitrary. We disagree.

First, we note that there is nothing inherently improper with the standard's use of the term "significantly." The act does not forbid its use, and courts and fact finders routinely apply standards phrased in the same or similar terms. See, e.g., Nierman v. Hyatt Corp., 441 Mass. 693, 695-696 (2004) (statute of limitations choice of law analysis requires determination of which jurisdiction has more significant relationship to parties and occurrence); Blixt v. Blixt, 437 Mass. 649, 658 (2002), cert. denied, 537 U.S. 1189 (2003) (grandparents must prove that failure to grant visitation will cause child significant harm).

[13] As such, this case is readily distinguishable from Woburn, 451 Mass. at 590, where we rejected an HAC interpretation that "brushed aside the language of the governing statute and the regulations of the department."

The heart of the analysis is routine ROTC calculations. The board engaged with the standard during the HAC proceedings and cited HAC decisions applying the standard in its posthearing brief. HAC's determination that, by lowering the ROTC by 1.62 percent (a 27.5 percent decrease, comparatively), the conditions made the project "significantly more uneconomic" is contrary to neither HAC precedent nor the plain meaning of the term "significantly." We discern no error in HAC's use of the "significantly more uneconomic" standard here.

Finally, there can be no suggestion in the instant case that the board was blindsided by a thereto-undefined rule. See Boston Gas Co. v. Department of Pub. Utils., 405 Mass. 115, 120-121 (1989) ("It is generally unacceptable for an agency to announce a new standard in its final decision in an adjudicatory proceeding and then rule, often not surprisingly, that a party who had no notice of that standard failed to meet it"). By the time of the HAC hearings, the "significantly more uneconomic" standard had existed for approximately a decade.[14]

[14] Because we find no error in HAC's conclusion that, applying the "significantly more uneconomic" standard, the board's conditions made the project uneconomic, we need not examine the developer's alternative argument that a board-imposed condition banned three-bedroom units, and that such condition also was sufficient to render the project uneconomic. Additionally, this issue appears moot, as the board has conceded that it did not intend to, and did not in fact, impose a ban on three-bedroom units.

4. Modified conditions. Finally, the board contests HAC's modification of conditions requiring a looped roadway through the project. As grounds, it cites G. L. c. 30A, § 11 (8), which mandates that an agency decision shall include "a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision." To meet that requirement, an agency must make sufficient subsidiary findings that a reviewing court can assess whether its conclusions were supported by substantial evidence. See NSTAR Elec. Co. v. Department of Pub. Utils., 462 Mass. 381, 387-390 (2012). The board contends that HAC's decision fails to include sufficient subsidiary findings regarding the financial impact and feasibility of the looped road, on the one hand, and the HAC-imposed replacements -- turnaround space and a new paved area for emergency vehicles -- on the other.

HAC's decision considers the evidence from both sides at some length. The board's looped roadway would necessitate splitting the two proposed apartment buildings up into several smaller structures, a fact the board does not dispute. There is no question that HAC's alternative conditions would be less financially burdensome than such a radical redesign. Moreover, HAC chose these particular substitute conditions to satisfy State fire safety standards. Overall, HAC's decision is sufficiently robust for us to undertake a meaningful review and

conclude that it was supported by substantial evidence. Compare NSTAR, 462 Mass. at 390-391 ("The department offers no explanation . . . [,] leav[ing] us without the tools to evaluate, on the record as a whole, the reasonableness of the department's apparent conclusion").

Conclusion. HAC has jurisdiction over developer appeals from adverse comprehensive permit decisions by local zoning boards of appeals that impede or prevent the development of low or moderate income housing. Where such projects have received project eligibility commitment letters, HAC also has the authority to review and reject local zoning board conditions that render such projects significantly more uneconomic, notwithstanding that the project's ROTC as originally proposed subsequently is found to fall below the minimum ROTC set out elsewhere in the guidelines. Finally, the "significantly more uneconomic" standard is not so vague as to be arbitrary, and HAC's application of the standard in the instant case was sufficiently documented in its decision and supported by substantial evidence.

Judgment affirmed.