COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

HANOVER WOODS, LLC

v.

HANOVER ZONING BOARD OF APPEALS

No. 11-04

DECISION

December 17, 2013

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

HANOVER WOODS, LLC, Appellant	)	
v.	)	No. 11-04
HANOVER ZONING BOARD OF APPEALS, Appellee	)	

DECISION

I. OVERVIEW

This case involves an appeal by Hanover Woods, LLC ("Developer") of a decision by the Hanover Zoning Board of Appeals ("Board") to deny a comprehensive permit for a 200-unit rental development. The Board previously had approved, with conditions, a 152-unit for-sale project at the same site. The Board argues that the denial is justified because the larger, rental project undermines longstanding and legitimate planning objectives, and these planning concerns outweigh the regional need for affordable housing. For the reasons stated below, the Committee determines that the Board's denial must be vacated.

II. PROCEDURAL HISTORY

The relevant procedural history of this case is as follows:

1. The Developer began the permitting process for the project by requesting a project eligibility determination from MassHousing. MassHousing issued a project eligibility letter on August 27, 2009. Exh. 22.

2. On October 22, 2009, the Developer filed a comprehensive permit application for a project consisting of 152 for-sale dwelling units together with ancillary parking spaces, utilities and other site improvements (the "For-Sale Project"). Exh. 43.

3. After the Developer field its application, the Board asserted that it was

entitled to deny the application because it had achieved a regulatory "safe harbor." In an Interlocutory Decision Regarding Safe Harbor, dated June 21, 2010, the Committee found that the safe harbor did not apply to the Developer's application.

4. The Board continued its public hearing on the application over fourteen separate hearing sessions. During the course of the public hearing, the Developer presented at least one alternative project design, including a proposal for a higher-density 252-unit rental project.

5. The Board closed the public hearing on July 18, 2011. By a decision filed with the Hanover Town Clerk on September 28, 2011, the Board granted a comprehensive permit for the For-Sale Project, subject to a number of conditions. Exh. 23.

6. On October 18, 2011, the Developer filed its appeal with the Committee, contesting certain conditions relating to site access and wetlands, as well as certain other conditions that the Developer argued are not within the Board's purview to regulate.

7. On December 9, 2011, while the appeal was pending, Developer filed with the Committee a Notice of Project Change requesting, among other changes, that the number of units be increased from 152 units to 200 units, and that they all be rental apartments, instead of for-sale condominium units (the "Rental Project").

8. In a ruling dated March 12, 2012, the presiding officer found that the proposed changes were substantial changes, and remanded the matter to the Board for further review. Because the Board was familiar with the site, and previously had seen plans for a 252-unit rental project, the presiding officer's ruling required the Board to complete its review and issue a decision on an expedited basis.

9. By written decision filed with the Hanover Town Clerk on June 28, 2012 (the "Denial Decision"), the Board denied the proposed changes, characterizing its decision as a denial of a comprehensive permit for the Rental Project. Exh. 24.

10. The Developer appealed the Board's Denial Decision on July 18, 2012.

III. FACTUAL OVERVIEW

A. Overview of the Site and the Project

The For-Sale Project was proposed, and the Rental Project is proposed, to be located on an approximately 24-acre site near, but not directly abutting, the layouts of Route 3 and Route 53. Certain roadways and wastewater facilities serving the proposed Rental Project are located on adjacent parcels of land presumptively controlled by the Developer.[1] The land between the site and the Route 3 highway layout is shown on certain of the project plans as a single, separate parcel of approximately 46 acres; and on some of these plans a future commercial development is shown on that adjacent parcel. See Exh. 30.[2]

Route 3 is a restricted access, state highway with multiple lanes travelling in each direction. This highway connects south shore communities from Cape Cod to Boston. Route 53 is a suburban arterial roadway with significant commercial developments along much of its length, including in the general vicinity of the site. Exh. 62-B.

The site is located within the Residence A Zoning District. The site also falls within the Interchange Zoning District, an overlay district adopted in 2008. An existing residential neighborhood abuts the site to the south. The site is in relatively close to proximity to the commercial development along the Route 53 corridor, although the site does not abut, and the Rental Project will not have direct access to, the Route 53 corridor. Exh. 30.

The Rental Project includes a total of 200 rental apartment units, located in six separate 3-story buildings, together with a clubhouse, pool, surface parking spaces (some of which are covered) and appurtenant utilities and landscaping improvements. Exh. 25. The wastewater for the project will be collected and treated at a facility located on a separate nearby parcel. Exh. 30. Primary access to the Rental Project is by residential

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1. The record contains conflicting information about the size of the site. A plan showing the Rental Project indicates the site is closer to 24.4 acres, not including the area of roadway providing access to the site. See Exh. 30. The exact area of the site is not relevant to the analysis or conclusions that follow. The Board disputes whether the Developer controls the entire site, as discussed later in this decision.

2. That future commercial development is not part of the Rental Project nor was it proposed as part of the For-Sale Project.

roads to the south of the site. A secondary access roadway, unpaved for much of its length, will connect the residential units to the wastewater treatment facility and provide a secondary means of egress onto Route 123. Exh. 30.

B. Municipal Planning and Zoning

1. Relevant Zoning Bylaws

The record does not indicate when the Town of Hanover first adopted a zoning bylaw. However, zoning bylaws were in effect as of 1976, and from that time until 1991, the site was zoned for commercial use. Exh. 60, Hoffman Testimony, ¶ 9. In 1991 the site was rezoned and placed in the Residence A zoning use district. The site's present underlying zoning is Residence A. Exh. 60, Hoffman Testimony, ¶ 9.

In September, 2008 the Town of Hanover amended its zoning bylaws to adopt a new zoning overlay district called the Interchange Zoning District, so named because it includes land—including the site—at the southwest quadrant of the Route 3/Route 53 interchange. Board Brief at 5. The Interchange Zoning District was adopted consistent with recommendations in a Master Planning process described below. The Interchange Zoning District was and is intended to promote commercial development along the Route 53 corridor, especially commercial uses that are regional in nature and that require or benefit from direct, or nearly direct, highway access. Exh. 21, Zoning Bylaw, § 6.12.0; Exh. 60, Hoffman Testimony, ¶¶ 5, 10-12. The Interchange Zoning District was also intended to help contain the traffic and other impacts that might result from such commercial development. Exh. 60, Hoffman Testimony, ¶ 11. Uses permitted in the Interchange Zoning District include hotels; convention or conference centers developed in conjunction with a hotel; office parks; restaurants; retail stores and certain service establishments. Residential uses are prohibited in the Interchange Zoning District, even if they are allowed by the underlying zoning. Exh. 21, Zoning Bylaw, § 6.12.50.

Prior to adopting the Interchange Zoning District, the Town of Hanover took other actions to promote new commercial development along the Route 53 corridor. Specifically, the Town amended its zoning bylaw to expand the boundaries of the commercial district along Route 53 just south of the Hanover Mall. Since that change to

the zoning bylaw, some 180,000 square feet of new commercial and retail uses were added in the rezoned area along the Route 53 corridor. Exh. 60, Hoffman Testimony, ¶ 5.

2. Relevant Planning Documents

The earliest relevant planning document appearing in the record is a 1997 Comprehensive Plan prepared by Beals and Thomas, Inc. under the auspices of the Hanover Planning Board. Exh. 60-32. The 1997 Comprehensive Plan included sections on land use and housing development. The "overall goals" of the 1997 Comprehensive Plan were to guide the town's growth in ways that would achieve balanced land use, preserve historic and small-town character and protect the town's natural resources. Exh. 32 at pp. 1-2.

In November 2006, the Planning Board began the process of updating the 1997 Comprehensive Plan. Exh. 60, ¶ 10. Following a series of public meetings and gathering of input by other means, the Hanover Planning Department prepared a document entitled "Master Plan, Town of Hanover Massachusetts, 2008" (the "2008 Master Plan"). The 2008 Master Plan presumably was adopted by the town at some point in 2008, although the record on that point is not entirely clear.[3] The record contains what appears to be a portion of the 2008 Master Plan, consisting of 25 pages each with the words "Executive Summary" and "Key Recommendations" next to the page numbers in the footer. Exh. 60-7.

The key recommendations in the 2008 Master Plan included a recommendation to review and revise the Zoning Bylaw to include a proposed "Interchange Zoning District" adjacent to the Route 3 and Route 53 interchange, and to "encourage in this district the development of a hotel and/or conference center in addition to office buildings and associated retail and restaurants, in order to spur growth and vitality of businesses along Route 53 and generate additional revenue for the Town's budget." Exh. 60-7, at p. 6. As

3. Margaret Hoffman's testimony states that "[t]he Master Plan was formally adopted in 2008," Exh. 60, ¶ 10, and elsewhere it refers to the "the adopted Plan," Exh. 60, ¶ 4. Aside from this testimony, there is no other evidence in the record showing how or when the 2008 Master Plan was adopted by the Town. For purposes of this decision, and in light of the fact that the Developer has not contested the point, the Committee accepts Ms. Hoffman's testimony that the 2008 Master Plan was formally adopted by the Town.

noted above, the adoption of the Interchange Zoning District was inspired by this recommendation in the 2008 Master Plan. Exh. 60, Hoffman Testimony, ¶ 10.

The 2008 Master Plan also includes a section on "Housing," with several key recommendations and goals, including a goal "[t]o increase housing options, particularly for young families and retired persons, … [and to] meet or exceed the state mandate of 10% affordable housing stock." Exh. 60-7, p. 8.

While the 2008 Master Plan was being developed, other planning initiatives related to housing were underway in the Town of Hanover. In 2007 the Housing Authority hired consultants to draft a Housing Production Plan. The Housing Production Plan was completed in early 2008 and approved by the Department of Housing and Community Development ("DHCD") in April 2008. Exh. 49, 60-13.

3. Municipal Actions to Promote Affordable Housing

Following the recommendations in the Master Plan and the 2008 Housing Production Plan, Hanover created the Town of Hanover Affordable Housing Trust Fund in 2009. Exh. 60-16. The purpose of the Trust is to provide for the creation and preservation of affordable housing in the Town of Hanover for low- and moderate-income households. *Id.* The Town has from time to time appropriated money to the Affordable Housing Trust. Exh. 60, Hoffman Testimony, ¶¶ 19, 21, 22, 25 and 29. The town has taken a variety of other actions to support the creation of affordable housing in Hanover. Exh. 60, Hoffman Testimony, ¶¶ 14-25 and 29-31. Perhaps most notably, in December 2009 the Affordable Housing Trust Fund contributed funds toward the construction of Barstow Village, a development with 66 units of affordable housing. The Board issued a "friendly" comprehensive permit for that project on October 29, 2009. The project was constructed on land leased by the Hanover Housing Authority. Its units were ready for occupancy in June 2012 and are now fully leased. Exh. 60, Hoffman Testimony, ¶¶ 21, 24 and 30. Based on the issuance of the permit for Barstow Village, DHCD certified that the Town was in compliance with its Housing Production Plan,

effective as of October 29, 2009. Exh. 50. That certification provided the Town with temporary relief from new comprehensive permit proposals.[4]

While the Board rightly touts the success of the Barstow Village project, we note that Hanover has yet to act on some of the more important recommendations in its Housing Production Plan. According to the Housing Production Plan, approximately 88 percent of Hanover's land area is zoned Residence A, a zoning use district in which single-family homes are the only residential use permitted by right. Exh. 49, at p. 102. The Housing Production Plan acknowledges frankly that the current bylaw "allows the construction of alternatives to large lot, single-family houses only under very limited conditions." *Id.* The Board introduced no evidence to indicate that the Town has even started to consider the kind of zoning reforms that would permit and encourage the construction of multifamily rental housing in appropriate areas, as recommended by the Housing Production Plan.

IV. EVALUATING A DENIAL OF PROPOSED CHANGES TO A PREVIOUSLY APPROVED PROJECT

This case involves a denial of a proposed change to a project that was granted a comprehensive permit with conditions. Although the Board approved the original For-Sale Project, with conditions, the Board argues that planning concerns justify the denial of the more recently proposed Rental Project.[5] Before we look at the Town's planning concerns, and weigh them against the regional need for affordable housing, we note that the parties dispute the legal standard that applies to this case. Therefore, we first will clarify the legal standards that apply to this case.

In some circumstances, the denial of a proposed project change is treated like a condition in a permit, rather than an outright denial. This rule is applied and explained in

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4. The effective date of DHCD's certification is one week after the date of the Developer's comprehensive permit application. For that reason, and in spite of the Developer's failure to timely pay the full filing fee, no "safe harbor" was available to the Board. For further elaboration on this point, see this Committee's earlier interlocutory decision dated June 21, 2010.

5. Except as discussed in Section VI of this decision, the Board has not raised any other local concerns to justify the denial of the project changes, either in the Denial Decision, or during the course of the appeal.

some detail in *Avalon Cohasset, Inc. v. Cohasset*, Ruling on Board's Motion to Dismiss, No. 05-09, slip op. at 7-8 (Mass. Housing Appeals Comm. Jan. 9, 2006). The premise of the *Cohasset* rule is that a post-permit request to modify a project might in some case be "equivalent to an appeal of a condition in a comprehensive permit." *Cohasset*, slip op. at 7. In *Cohasset* and other cases applying the same rule, the developer has been required to show that the denial of the proposed change makes the project uneconomic. Only if the developer makes that case successfully does the burden then shift to the local board to show, first, that there is a valid local concern that supports the denial of the change, and second, that this concern outweighs the regional need for affordable housing. See, e.g., *VIFII/JMC Riverview Commons Investment Partners, LLC v. Andover,* No. 12-02, slip op. at 21 (Mass. Housing Appeals Comm. Feb. 27, 2013); *511 Washington Street, LLC v. Hanover Zoning Bd. of Appeals*, No. 06-05, slip op. at 9-10 (Mass. Housing Appeals Comm. Jan. 22, 2008); *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at 8 (Mass. Housing Appeals Comm. Sep. 18, 2007).

An underlying, if unstated, premise for the approach adopted and applied in the *Cohasset* case is that a developer should not be able to avoid the "uneconomic" standard of review by holding back a controversial element of the project during the local permitting process, only to present it later as a post-permit change. That concern—that a developer will, in effect, try to "game the system"—is likely to be greatest when the developer seeks to make a relatively discrete post-permit change to its project. In the *Cohasset* case, for example, the developer was seeking permission, after a comprehensive permit was issued, to tie into the municipal wastewater system, instead of building a more expensive onsite wastewater disposal system. That change had potential economic consequences for the developer, but it did not involve any increase in the number of units, or change whether the units would be sold or rented, or potentially change the impact those units would have on surrounding properties. In no way could that change in infrastructure be deemed a "wholly different proposal" from the original project.

In this case, however, the differences between the For-Sale Project and the Rental Project are much more substantial. When presented with the Developer's Notice of Project Change, the presiding officer ruled that the proposed increase in the number of

units (from 152 units to 200 units) and the change in tenancy (from for-sale units to rental apartments) together were so substantial that the new proposal had to be remanded to the Board for reconsideration. See Ruling on Notice of Project Change, (Housing Appeals Comm. March 12, 2012) (finding the proposed changes amount to a "substantial change"). The Committee ordinarily will require such a remand when the proposed changes cumulatively "amount to a totally new or different proposal." *One Baker Avenue, LLC v. Kingston*, No. 07-09, Ruling on Notice of Project Change and Request for Remand, slip op. at 4 (Mass. Housing Appeals Comm. April 5, 2013) citing *Sherwood Estates v. Peabody*, No. 80-11, slip op. at 4 (Mass. Housing Appeals Comm. Apr. 30, 1982) and *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 20 (Mass. Housing Appeals Comm. June 25, 1992).

In the circumstances presented here, the rule in *Cohasset* is not necessarily applicable. Indeed, the Board has argued that the Denial Decision should be treated as a denial of the project in its entirety, and not as a permit condition. Board's Brief, pp. 16-17. Under the standard advocated by the Board, the economic impacts of the project changes would not be relevant to the outcome of this case. The Board introduced no evidence on economic impact during the hearing, nor did it address economic impacts in its post-hearing brief.

Although we are unwilling to discard the *Cohasset* framework, we think the Board's argument has merit in this case. We conclude that under the circumstances here—where the developer is proposing what amounts to a wholly new project—the litigants might agree, or the Committee might rule, that the *Cohasset* rule does not apply. In such a case, the developer would not be required to demonstrate that the denial of the project changes renders the original project uneconomic. We think this is such a case.

However, we also find that the uncontroverted evidence presented by the Developer does, in fact, demonstrate that it would be uneconomic to build the For-Sale Project. See Exh. 52 (appraisal report establishing land value), Exh. 54 (pre-filed testimony of John J. Sullivan with attachments addressing construction cost), and Exh. 55 (pre-filed testimony of Steven Kaye, MAI, CRE with attached market study and estimate of net operating income for each of the For-Sale Project and the Rental Project). The

Developer's evidence on this point is comprehensive and generally credible. As importantly, it is wholly uncontroverted by the Board. Accordingly, even if the *Cohasset* standard were applicable, the Developer would have met its burden of showing that it would be uneconomic to build the original For-Sale Project, without the proposed changes.[6]

V. PLANNING CONCERNS

A. The Standard for Evaluating a Denial Based on Municipal Planning Concerns

In this case, the Committee must decide whether local planning concerns justify the Board's denial of the Developer's proposal to proceed with the construction of the Rental Project. As in all appeals, the ultimate question before the Committee is whether the local board's decision is consistent with local needs. We answer that question in three steps. First, the developer must show that its proposal complies with state or federal requirements or other generally recognized standards. 760 CMR 56.07(2)(a)(2). Once the developer has made this "prima facie" case, the burden shifts to the local board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial. If it makes that first showing, the board then must prove that the local concern outweighs the regional need for housing. 760 CMR 56.07(2)(b)(2); see also *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365 (1973).

1. The Developer's *Prima Facie* Case

A developer establishes its required *prima facie* case simply by showing that its housing proposal conforms to "generally recognized standards." *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at. 4 (Mass Housing Appeals Committee Sep. 18, 2002). In this case, the Developer presented project plans drawn by a professional civil engineering firm. The presentation of professionally drawn plans and specifications, without more, often is enough to establish a prima facie case and shift the burden of proof to the local board. See *Tetiquet River Village, Inc. v. Raynham*, No. 88-

6. This analysis and conclusion do not affect the validity of the comprehensive permit granted by the Board for the For-Sale Project. That comprehensive permit remains in existence, and the Developer could, in theory, choose to exercise the rights granted thereby, subject to the conditions set forth therein.

31, slip. op. 9 (Mass. Housing Appeals Committee Mar. 20, 1991). In this case, the Developer presented additional evidence to support the premise that the Rental Project is a suitable and economically feasible use of the site. First, the manager of the project, an experienced real estate development professional, testified that multifamily housing is a more appropriate use for the site than the commercial uses permitted in the Interchange Zoning District. Exh. 54, ¶¶ 32-34. The licensed civil engineer who prepared the plans for the Rental Project testified that those plans, although preliminary, demonstrate full compliance with all relevant state and federal regulations; he also testified that final design and construction could be completed in full compliance with good engineering practice. Exh. 56, ¶ 10. The Developer also introduced testimony from a witness with extensive experience with zoning and planning matters, who opined that a multifamily project on the site would provide affordable live/work housing opportunities near one of the region's employment centers. See Exh. 61, ¶ 14. This evidence cumulatively is more than sufficient to establish the Developer's *prima facie* case. 760 CMR 56.07(2)(a)(2).

2. The Board's Case

With the Developer having made its prima facie case, the burden shifts to the Board to show that local planning concerns justify the denial of the proposed changes that comprise the Rental Project. Its first burden is to show that there is a "valid local [planning] concern" that could support the denial. To carry that threshold burden, the Board must produce the planning document or documents in effect at the time of the comprehensive permit application, and show:

1. First, that the plans are "bona fide," meaning that they were legitimately adopted, and continue to function as viable planning tools in the town;
2. Second, that the plans promote the creation of affordable housing; and
3. Third, that the plans have been implemented in the area of the site.

If the Board makes these three threshold showings, then we will conclude that there is a valid local planning concern, and proceed to balance that planning concern against the regional need for affordable housing. The factors that are relevant to this

balancing test are not spelled out in the Comprehensive Permit Law.[7] In *Hanover R.S. Limited Partnership v. Andover*, No. 12-04 (Mass. Housing Appeals Committee Dec. 17, 2013), we stated that the local planning concern includes both the specific planning interest asserted by the local board, and the town's overall interest in the integrity of its planning process. In weighing the local planning concern, we consider:

1. The importance of the planning interest to the town;
2. The extent to which the proposed housing undermines the local planning interest;
3. The overall quality of the master plan and extent to which it has been implemented; and
4. The amount of affordable housing that has resulted from the implementation of the town's planning efforts.

The Board need not introduce evidence with regard to all of these factors, but its evidence must cumulatively establish that the local planning concern is important enough to outweigh the regional need for affordable housing. As we consider the weight of the town's planning interest, we must keep in mind that its failure to meet its statutory minimum 10% housing obligation "provide[s] compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal." *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 367 (1973).

a. The Board Has Shown a Valid Local Planning Concern

In order to justify its denial of the Rental Project based on planning concerns, the Board first must show that the planning documents in effect at the time of the Developer's application—in this case, 2008 Master Plan and the Housing Production Plan—are bona fide, that they promote affordable housing, and that they have been

7. The regulation at 760 CMR 56.07(3)(g) provides some guidance on how the balancing test is conducted. That regulation states that the Committee may receive evidence of and shall consider the following matters:

1. a municipality's master plan, comprehensive plan, housing plan, Housing Production Plan, or community development plan;
2. the applicable regional policy plan; and
3. the results of the municipality's efforts to implement such plans.

implemented in the area of the site. The Board in this case has made all three showings.

First, the 2008 Master Plan is bona fide, meaning that it was legitimately adopted, and continues to function as a viable planning tool in the town. See Exh. n.4, below. The Housing Production Plan also is bona fide, as demonstrated by its approval by DHCD. Exh. 60-13.

Second, the 2008 Master Plan and the Housing Production Plan together are intended to promote the creation of new affordable housing. Indeed, that is the very purpose of the Housing Production Plan.

Third, the 2008 Master Plan and the Housing Production Plan have been implemented, in part, both in the vicinity of the site and throughout the Town generally. Consistent with its Housing Production Plan, and as discussed in more detail in Section III-B(3), above, the town of Hanover has established and funded an Affordable Housing Trust and successfully contributed to the development of a significant number of new housing units. Based on these actions, DHCD has certified the town's compliance with its Housing Production Plan. The town also has taken actions to implement certain recommendations in the 2008 Master Plan. The adoption of the Interchange Zoning District, in particular, was a significant step in the implementation of the 2008 Master Plan. On the other hand, the Board's subsequent grant of a comprehensive permit for the For-Sale Project is a significant deviation from a key recommendation of the 2008 Master Plan. And, as previously noted, the Housing Production Plan contains a number of recommendations that have not yet been implemented. Accordingly, we find that the relevant plans have been partially—but not fully—implemented in the vicinity of the site.

Based on all of the foregoing, we conclude that the Board has made a sufficient threshold showing. Accordingly, we now proceed to the second step of our analysis—whether the specific planning concerns raised by the Board outweigh the need for regional housing.

b. The Board's Planning Concerns Do Not Outweigh the Regional Need for Affordable Housing.

The Board bears the burden of proving that its asserted planning concern outweighs the need for affordable housing. Upon consideration of the relevant factors, we conclude that the Board has not carried this burden.

i. The importance of the planning interest

There are many kinds of interests a town may seek to advance in its municipal plans. By way of example, a city or town may plan for a diverse tax base, or to create local jobs, or to separate incompatible land uses, or to create a desirable mix of uses, or to preserve a site with some unique characteristic that makes it important for a particular use, or to provide necessary infrastructure for growth—or some combination of any or all of these. The specific planning concern at issue in this case can be simply stated: the Town has identified a land area it deems to be "vital for economic development and tax revenue," and wants to "dedicate [it] to commercial use." Board Brief at p. 20.[8] The Town of Hanover certainly has a legitimate interest in planning for orderly economic development. But for the reasons stated below, in the circumstances presented by this case, we find that the planning interested asserted by the Board is not sufficiently compelling to outweigh the regional need for affordable housing, and therefore these concerns do not justify the denial of the Rental Project.

In reaching this conclusion, we start by looking at precedents in which a local interest in planning for orderly commercial development was weighed against the regional need for affordable housing. In a number of past cases which presented this issue, the scale tipped in favor of the local planning interest. For example, in *28 Clay Street Middleborough, LLC v. Middleborough*, No. 08-06 (Mass. Housing Appeals Committee Sep. 28, 2009), this Committee upheld the denial of a comprehensive permit for a project proposed to be located in an existing partially-developed commercial

8. The Board's brief also mentions an interest in protecting residential areas from commercial encroachment. See Board Brief at p. 20. Buffering residences from commercial development can be a legitimate planning concern, but in this case the concern is not a compelling one, as the land the Town wants to set aside for commercial development directly abuts an existing residential neighborhood.

subdivision. We reached a similar conclusion in *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01 (Mass. Housing Appeals Committee Sept. 18, 2002). In that case, the Committee upheld a local board's denial of a comprehensive permit for a project to be located on one of the very limited number of sites with direct access to Barnstable Harbor.

We think this case is distinguishable in important ways from both *28 Clay Street* and *Stuborn*. In *28 Clay Street*, the new housing was proposed to be located in an existing industrial park, in close proximity to an existing multi-tenant office building, an existing office and light manufacturing building, and an existing food distribution warehouse and retail facility *28 Clay Street*, slip op. at p. 3. This commercial subdivision was across the street from a second, existing business park. The Town of Middleborough had expended considerable effort and money planning for roadway improvements needed to serve the industrial and commercial uses in that area. *28 Clay Street*, slip op. at pp. 14-16. By multiple town meeting votes, the town had taken consistent actions to promote commercial uses in these two business parks, including, in nearly a dozen instances, the adoption of tax increment financing under G.L. c. 40, § 59. *28 Clay Street*, slip op. at p. 19. The Town of Middleborough not only had identified this area as important for future commercial growth, it also took other specific steps to promote those uses. Significantly, the Town of Middleborough's planning and other actions had actually attracted businesses to the industrial park.

In this case, the Town of Hanover adopted the Interchange Zoning District, but it has not coupled that action with specific investments in infrastructure improvements, nor has it taken any other action to attract the hoped-for hotel and conference center. More importantly, it has not yet attracted the hoped-for commercial uses. Unlike *28 Clay Street*, the Rental Project at issue in this case is not proposed to be built within an existing commercial campus. The Town of Hanover simply wants to set aside land for speculative commercial uses that may or may not someday be proposed. Because the hoped-for commercial use is merely speculative, that planning concern is less important than the interests at play in *28 Clay Street*—namely, the Town of Middleborough's dual interests

in keeping sites in an existing business park available for commercial use, and protecting those existing businesses against encroachment from a new residential use.

This case is different from *Stuborn*, too. In that case, the Town of Barnstable's zoning board of appeals denied a comprehensive permit to a project proposed for one of the very limited number of sites with direct access to Barnstable Harbor. The harbor was and is an important and unique resource important for fishing, boating, and other water-dependent uses. Water-dependent marine uses obviously cannot be located on inland sites. For these reasons, we concluded that the town's longstanding interest in protecting and promoting its water-dependent uses was a local concern compelling enough to outweigh the addition to the town's housing stock of a relatively small number of affordable housing units. In this case, there is nothing unique about the site that makes it the only possible location for the hoped-for commercial uses. The site does have good visibility from, and access to, Route 3. These qualities make the site desirable for many commercial uses, including the hoped-for hotel and conference center. But the proliferation of commercial uses along the Route 53—some of it encouraged by the zoning amendments adopted by the town—demonstrates that there are other viable locations for commercial development in Hanover. In short, unlike in *Stuborn*, there is nothing unique about the site that makes it reasonable to set it aside for some other, non-housing use. So again, the planning interest asserted in this case is less compelling than the interest asserted by the Town of Barnstable.

We also are mindful of the analysis and holding in *Hanover R.S. Limited Partnership v. Andover*, No. 12-04 (Mass. Housing Appeals Comm. Dec. 17, 2013). The facts at issue in *Hanover R.S. Limited Partnership* are in many ways similar to the facts in *28 Clay Street*. In both of those cases, the comprehensive permit project was proposed for a site within an existing commercial subdivision. *Hanover R.S. Limited Partnership*, slip op. at 3-4. In both cases, the towns had not merely stated a desire to attract commercial uses; they actually attracted businesses and the jobs that come with them. *Hanover R.S. Limited Partnership*, slip op. at 11. *Hanover R.S. Limited Partnership*, slip op. at 15. After balancing all relevant factors, the Committee concluded that the planning interest at issue in *Hanover R.S. Limited Partnership* was not sufficient to outweigh the

regional need for housing. Here, the planning interest asserted is less compelling because the site is not within an established commercial park, and the prospects for future commercial development are even less certain.

ii. The extent to which the project conflicts with or undermines the planning interest

A second consideration in our balancing test is whether and to what extent the proposed housing actually conflicts with or would undermine the town's planning interests—that is, whether the provisions of the municipal plan are unnecessarily restrictive as applied specifically to the proposed project. In this case, we do not think the Rental Project would significantly undermine the planning interests articulated in the 2008 Master Plan, particularly when we consider the incremental increase in the impact of the Rental Project compared to the previously approved For-Sale Project. According to the 2008 Master Plan and the testimony of the Board's witness, the ideal use of land in the Interchange Zoning District is a hotel and related conference center. Regardless of whether a hotel is properly categorized as a commercial use or a residential use—a point the parties here disputed vigorously—there can be no question that a hotel and a multifamily apartment complex share some characteristics including that both uses involve human habitation. It is common for hotels and multifamily housing to be located in close proximity without detriment to either use. The site comprises some, but by no means all of the land in the Interchange Zoning District—the larger remaining parcel, which is closer to the Route 3 layout and presumably has equally good visibility from the highway, might be someday developed with a hotel, or another compatible commercial use. In short, we do not think it is reasonable to conclude that the Rental Project cannot co-exist with a hotel and conference center at some point in the future, if in fact someone, someday proposes to develop such as facility.[9] Allowing the Rental Project to proceed, therefore, does not significantly undermine the purpose and goal of the Interchange Planning District.

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9. A future commercial development on the remaining land would require some relief from the Interchange Zoning District's minimum lot size requirement of 75 acres.

iii. Factors Relating to the Overall Integrity of the Planning Process

The final factors in the balancing test all relate to the municipal interest in the overall integrity of its planning process, rather than a specific planning interest or goal. In that regard, the Committee considers the overall quality of the master plan; the extent to which the overall master plan has been implemented; and the amount of affordable housing that has resulted from the implementation of the plan. In general, we give more weight to a strong plan, that has been faithfully implemented, and that has resulted in the creation of affordable housing, or has provided opportunity for affordable housing. As noted above, we think the 2008 Master Plan is a bona fide planning document that was produced by qualified planning staff. The Housing Production Plan is a professional, high quality plan that has been approved by DHCD. Together, these plans have been partially implemented in the vicinity of the site and throughout the town. Some new affordable housing has been created as a result, and DHCD has certified the town to be in compliance with its Housing Production Plan. The town is close to achieving the 10% goal set out in the Comprehensive Permit Law. All of these factors put additional weight on the Board's side of the balancing scale.

On the other side of the scale's fulcrum, we are mindful that Hanover remains below the ten percent threshold on the Subsidized Housing Inventory. That fact, by itself, is compelling evidence that the regional need for housing outweighs local objections to the proposal. *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 413 (1973). The housing needs assessment in the Town's own planning documents acknowledge that "there are significant local needs for affordable housing that go beyond what is required to meet the 10% state goal." Exh. 49, Housing Production Plan, at p. 7. In particular, "more subsidized rental housing is necessary to make living in Hanover affordable." *Id.* The Rental Project would provide exactly this type of needed housing.

We also consider that the Town has not fully implemented, or even started to implement, some of the more important reforms called for in its Housing Production Plan. The Town's own planning documents acknowledge that the current zoning bylaw permits the construction of large lot, single-family homes, and not much else in terms of housing. It has long been, and today remains, nearly impossible to build multifamily

housing in Hanover without the relief provided by the Comprehensive Permit Law. The Town's success in creating 66 new affordable units at Barstow Village through a friendly comprehensive permitting process, while admirable, does not address these long-standing obstacles to building multifamily housing in Hanover. The implementation of a good municipal plan should create a regulatory environment that promotes—or at least, permits—the construction of diverse housing options. In Hanover, that goal has yet to be realized.

Based on all of the foregoing, we conclude that the local planning concern articulated by the Board, while legitimate, is not so compelling that it outweighs the regional need for affordable housing. Certainly the Town of Hanover has a legitimate interest in planning for commercial development and directing it to appropriate areas—sites that have good access, that are buffered from residential areas, and so on. But that is a general interest of all cities and towns, and it is in general not one that outweighs the Comprehensive Permit Law's mandate to accommodate the construction of affordable housing where there is a regional need. No special factors make the planning concern especially compelling in this case. The site has no unique characteristic that makes it important to preserve it for a specific kind of commercial uses. The proposed project will not interfere with existing business uses in an existing business park. Moreover, the construction of the project will not fully undermine the planning concern. There is enough land in the Interchange Zoning District to accommodate a hotel and conference center (if one is ever proposed) even after the Rental Project is constructed.

For all of these reasons, we conclude that the Board has not met its burden of proving that the local concern outweighs the regional need for housing. The Board's decision denying a comprehensive permit must therefore be vacated.

VI. ANCILLARY ISSUES

At the hearing and in its post-hearing brief, the Board has raised a number of issues that are beyond the jurisdiction of this Committee or beyond the scope of the issues to be resolved in this hearing. We touch on these briefly.

1. The Board claims that the Developer failed to establish the project eligibility requirement of site control. Board's Brief, pp. 17-19. Issues of site control, while important, are issues that are determined in the first instance by the subsidizing agency issuing the project eligibility letter. 760 CMR 56.04(4)(g). Issuance of a project eligibility determination is conclusive evidence that project eligibility requirements—including site control—have been met. 760 CMR 56.04(5). In the context of an appeal before this Committee, the Board is permitted to argue that the Developer has failed "to continue to fulfill any of the project eligibility requirements," but such an allegation must be based "solely on the grounds that there has been a substantial change affecting project eligibility requirements." 760 CMR 56.04(5). But the Board's arguments relating to site control focus not on an alleged change in circumstances, but on whether the Developer has (or ever had) sufficient easement rights to construct the utilities and secondary roadway serving the Rental Project. This Committee has no jurisdiction to resolve real property disputes, including disputes regarding the sufficiency of an easement. Where such a dispute surfaces in an appeal before this Committee, we require only that the developer show a colorable claim to title. We think the Developer has met that low burden here. We note that before the Rental Project is constructed, MassHousing must issue a final approval for the Rental Project, and in so doing it should reconsider site control issues. If and to the extent there remains any dispute about whether the Developer will infringe on the property rights of a third party, that dispute must be resolved in a court of competent jurisdiction, in a case between parties with legal standing.

2. The Board claims that it would be premature for the Committee to render a decision in this case before the project is fully reviewed under the Massachusetts Environmental Policy Act ("MEPA") and given clearance to proceed in the form of a final certificate from the Secretary of Energy and Environmental Affairs. Board's Brief, pp. 32-33. We do not agree that the MEPA process must be concluded before this

Committee issues a decision. Our regulations specify that a Committee decision may issue before the issuance of a final MEPA certificate, so long as the decision states that the Comprehensive Permit shall not be implemented until the Committee has fully complied with MEPA, and that the Committee shall retain authority to modify the decision based upon the findings or reports prepared in connection with MEPA. 760 CMR 56.07(5)(c). Those conditions hereby are incorporated into this decision.

3. The Board argues that the Committee should revisit its Interlocutory Decision Regarding Safe Harbor, dated June 21, 2010. In that earlier decision, the Committee found that the safe harbor did not apply to the Developer's application. As the Board did not provide any new information on this issue, the Committee declines the Board's invitation to revisit its Interlocutory Decision.

The Developer also has dedicated substantial attention in its brief to issues that have not yet been addressed in this decision. We take these up briefly.

1. The Developer has introduced evidence to show that the For-Sale Project is uneconomic. Developer's Brief, pp. 4-6. As explained in Section IV of this decision, we agree with the Board that the economics of the For-Sale project are not relevant to the final disposition of this case.

2. The Developer argues that certain of the conditions should be stricken from the comprehensive permit issued for the For-Sale Project, either because those conditions render the project uneconomic, or because the Board has no authority to impose them. Developer's Brief, pp. 14-18. These arguments need not be addressed in detail because this decision gives the Developer the right to proceed with the Rental Project, subject to the conditions set forth in Section VII, below.

3. The Developer argues that the Committee should reconsider its earlier ruling regarding the filing fee for the comprehensive permit application. Developer's Brief, pp. 18. As the Developer did not provide any new information on this issue, the Committee declines the Developer's invitation to revisit that decision.

VII. CONCLUSION AND ORDER

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Hanover Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit for the Rental Project subject to the following conditions, and no other conditions:

1. The Rental Project shall be constructed in accordance with the plans filed with the Notice of Project Change.

2. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.

3. Design and construction shall be in compliance with applicable state laws, including the state Wetland Protection Act, and Massachusetts Department of Environmental Protection stormwater management requirements, and MEPA.

3. Construction shall not commence until the completion of the MEPA review process as evidenced by the issuance of a final certificate of compliance, or other determination of compliance by the Secretary of Energy and Environmental Affairs. The Committee retains authority to modify this decision based upon the findings or reports prepared in connection with MEPA.

3. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those specified for waiver in the developer's application to the Board, waived in prior proceedings in this case, or waived by this decision.

(b) The subsidizing agency or project administrator may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) Construction and marketing in all particulars shall be in accordance with all presently applicable state and federal requirements, including, without limitation, fair housing requirements.

(e) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and DHCD guidelines issued pursuant thereto.

(f) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(g) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Issued: December 17, 2013

Werner Lohe, Chairman

Joseph P. Henefield

Theodore M. Hess-Mahan

Carol Gloff

James G. Stockard, Jr.

Jonathan M. Cosco, Hearing Officer

LPc/h