COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

HD/MW RANDOLPH AVENUE, LLC, Appellant, v. MILTON BOARD OF APPEALS, Appellee.	No. 2015-03

RULING ON MOTIONS TO INTERVENE

HD/HW Randolph Avenue, LLC (Randolph) has appealed under G.L. c. 40B, § 22 a decision of the Milton Board of Appeals (Board) dated July 30, 2015, which granted Randolph a comprehensive permit with conditions. On November 4, 2014, Randolph submitted an application to the Board for a comprehensive permit to build 90 rental units on a 7.81 parcel of land off 711 Randolph Avenue in Milton (Project) under the New England Fund Program of the Federal Home Loan Bank of Boston.

The Carlins. Jacob W. Carlin and Christina M. Carlin (the Carlins), abutting title holders to a parcel of land known as 11 Reed Street, move to intervene in this appeal. The Carlins' property abuts part of the southern boundary of the subject property. The Carlins argue that the Project substantially and specifically affects their interest in their property as immediate abutters. The Carlins also seek to intervene as a matter of right under 760 CMR 56.06(2)(b). Motion to Intervene (Motion) at ¶ 5.

Joseph Mullins and Charlene Mullins. Joseph Mullins and Charlene Mullins move to intervene in this proceeding in a single motion, although each has a separate property interest.[1] Joseph Mullins holds title to 298 Highland Street which is an unimproved lot that

1. The Mullins have filed a Supplemental Motion to Intervene upon the request of the presiding officer.

abuts the subject property on its westerly boundary. Mr. Mullins also claims to hold title to part of Randolph's property by adverse possession for more than 20 years, and that issue is currently being litigated in Land Court in a case entitled, *Mullins v. HD/MW Randolph Avenue, LLC*, Land Court, Case No. 15 MISC 000094 (HPS). Ms. Mullins holds title to 300 Highland Street which is an improved lot that does not abut the subject property but would be considered a "party in interest" under G.L. c. 40A, § 11.[2]

Mr. Mullins and Ms. Mullins argue that they may intervene in this matter as a matter of right under 760 CMR 56.06 (2)(b), stating that they do not have to identify any impact on their respective properties. The Mullins also put forth some issues that they claim substantially and specifically affect their respective property interests. Mr. Mullins also claims to be specifically affected based on his title interest in the subject property.

I. Intervention in Appeals to the Committee

The Committee has broad discretion under 760 CMR 56.06(2)(b) to grant or deny intervention. *Taylor v. Board of Appeals of Lexington*, 451 Mass. 270, 275 (2008) (holding abutter or other aggrieved party may intervene in appeal before the Committee with permission of presiding officer); *see also* G.L. c. 30A, § 10 (authorizing hearing officer in adjudicatory hearing to allow interveners to participate upon showing that intervener is "substantially and specifically affected by ... proceeding"); *Tofias v. Energy Siting Facilities Bd.*, 435 Mass. 340, 346-47 (2001) (holding that intervention and scope of intervention by an aggrieved party is at discretion of hearing officer of adjudicatory hearing). The Committee may deny intervention to petitioners who have not demonstrated a sufficient interest in the proceedings. *Taylor*, 451 Mass. at 275.

To intervene in a Chapter 40B appeal, a person must show that he or she "may be substantially and specifically affected by the proceedings...." 760 CMR 56.06(2)(b). The presiding officer thus "shall consider only those interests and concerns of that person [seeking intervention] which are germane to the issues of whether the Local Requirement

2. "Parties in interest" as used in [Chapter 40A] shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and *abutters to the abutters within three hundred feet of the property line of the petitioner* as they appear on the most recent applicable tax list .... G.L. c. 40A, § 11 (emphasis added).

and Regulations make the Project Uneconomic or whether the Project is Consistent with Local Needs." 760 CMR 56.06(2)(b). Intervention is granted only to "those who can plausibly demonstrate that a proposed project will injure their own personal legal interests *and* that the injury is to a specific interest that the applicable zoning statute, ordinance, or bylaw at issue is intended to protect." (Emphasis in original). *Standerwick v. Zoning Board of Appeals of Andover*, 447 Mass. 20, 30 (2006) (denying standing under c. 40B for claim of diminution of property value). "Assertions of harm that confer standing as a 'person aggrieved' under G.L. c. 40A are not necessarily cognizable as a basis for "aggrievement" under G.L. c. 40B." *Id.* At 26. In other words, an abutter's alleged injury must relate to a legitimate issue before the Committee.

Contrary to the assertions of the Intervenors, there is no intervention of an abutter as an "aggrieved person" as a "matter of right" under 760 CMR 56.06(2)(b), meaning without showing they have a substantial and specifically affected potential interest that is related to a requested waiver of local rules or bylaws. While § 56.06(2)(b) provides that "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," this language does not override existing statutory and case law. Nor does it grant an abutter the right to raise issues in proceedings before the Committee that are outside the scope of an appeal under G.L. c. 40B, § 22. And under G.L. c. 30A, § 10, a presiding officer still has the discretion to limit an abutter's intervention if it is inconsistent with the limited scope of the Committee's review under G.L. c. 40B, § 23. *See Mountain St., LLC v. Town of Sharon Bd. of Appeals*, No. 04-01, slip op. 3 n. 3 (Mass. Housing Appeals Comm. Oct. 20, 2004).[3]

Even under the Zoning Act, G.L. c. 40A, § 17, judicial review of a decision of a board of appeals is limited to an "aggrieved person." *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996) (collecting cases). A plaintiff is an "aggrieved person" if that person suffers some infringement of his legal rights. *Id.* And the injury must be more than speculative. *Id.* As the Supreme Judicial Court has stated, "our long-standing

3. The Committee's grant of intervener status does not constitute a finding that the intervener has proved aggrievement; rather it simply allows the intervener to demonstrate in proceedings before the Committee, the intervener's substantial and specific aggrievement by waivers of local regulation and requirements that represent legitimate local concerns.

jurisprudence that standing to challenge a zoning decision is conferred only on those who can plausibly demonstrate that a proposed project will injure their own personal legal interests *and* that the injury is to a specific interest that the applicable zoning statute, ordinance, or bylaw at issue is intended to protect. *Standerwick, supra,* at 30. For an appeal under Chapter 40B, the court stated we must "look to the interest protected by G.L. c. 40B, namely, the expansion of affordable housing throughout the Commonwealth" and the "statutorily authorized interests in the protection of the safety and health of the town's residents, development of improved site and building design, and preservation of open space" to decide the question of intervention. *Id.* Moreover, "[t]he discretion to limit intervention [in adjudicatory hearings] was obviously intended to permit the department to control the extent of participation by persons not sufficiently and specifically interested to warrant full participation, which might interfere with complicated regulatory processes." *Newton v. Department of Pub. Utils.*, 339 Mass. 535, 543 n. 6 (1959). See *Standerwick, supra*, at 36-37.

The presumption in judicial appeals under G.L. c. 40A, § 17 that an abutter is an "aggrieved person" is not appropriate for proceedings before the Committee under the Comprehensive Permit Law.[4] There must be a showing that the abutter has a potentially affected interest within the jurisdiction of this proceeding for two reasons.

First, this proceeding is limited jurisdictionally and procedurally and cannot be open to all issues and concerns that an abutter may wish to pursue. Jurisdictionally, as discussed above, allowing an abutter to intervene without vetting the abutter's potential harm may open the proceeding to issues not necessarily within the Committee's jurisdiction. Procedurally, only a developer who has been denied a comprehensive permit or has been issued a permit with conditions that make "the building or operation of such housing uneconomic" may appeal a decision of a board of appeals to the Committee. G.L. c. 40B, § 22. An abutter does not have that right to appeal. *Taylor,* 451 Mass. at 275. Moreover, an appeal to the Committee "does not necessarily fully protect the interests of all persons who may be aggrieved by the issuance of a comprehensive permit." *Id.* And "[e]ven if an abutter

4. The reference to G.L. c. 40A, § 17 in 760 CMR 56.06(b)(2) does not incorporate the judicial presumption standards. It solely refers to the meaning of the term "aggrieved" subject to the limitations of G.L. c. 40B.

is allowed to intervene or otherwise to participate in an applicant's appeal pursuant to the regulations governing the Committee, '[t]he legal issues properly before the [Committee] are circumscribed....'" *Taylor*, 451 Mass. at 275, quoting *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 370 (1973). Thus, requiring a showing of a specific and substantial potential injury and a relationship of that injury to a local rule or bylaw before intervening in an appeal to the Committee is necessary due to the limited nature of the appeal.[5]

Second, intervention by an abutter must be weighed against the intent of the Legislature for 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). Allowing an abutter to intervene on any issue 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 Committee*, 449 Mass. 514, 521 (2007). Here, allowing abutters, like the Interveners, to intervene "as a matter of right" without requiring a showing they are substantially and specifically affected by a waiver of a local regulation or bylaw or by a condition imposed in the board's decision is contrary to the purpose of Chapter 40B of streamlining the process. Not vetting the putative intervener's issue opens the proceeding to: those persons without sufficient and specific interest to ultimately warrant intervention; those issues not necessarily within the purview of the Committee's jurisdiction; and repetitive or redundant evidentiary submissions and testimony.

The incorporation of G.L. c. 40A, § 17 into 760 CMR § 56.06(2)(b) thus is consistent with the requirement that the abutter show a reasonable likelihood of a substantial and specific injury to an interest protected by Chapter 40B that is related to a local rule or bylaw under review by the Committee.

---

5. Also, the Legislature has provided that as "aggrieved persons," including abutters, may participate in judicial review of a permit issued pursuant to the Committee's decision, provided that the abutter suffers harm to an interest protected by Chapter 40B. G.L. c. 40B, § 21; *Taylor*, 451 Mass. at 277 ("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").

II. The Carlins' Alleged Grounds for Intervention

The Carlins have raise a number of issues in their motion which are summarized as follows:

(1) The Carlins' property is downgradient from the project, causing potential issues related to storm water runoff, including runoff from a proposed snow storage area, and potential erosion of the Carlins' property;

(2) The Board has required a 50-foot vegetation barrier in Condition No. 5 of the Comprehensive Permit between the Project and the boundary with the Carlin property, and the Carlins have noted a conflict in proposed grading 10 feet near their northerly boundary and a proposed forested buffer;

(3) The density, height, scale, and parking areas of the Project affects the Carlins' interests in view, attendant light, noise, and neighborhood aesthetics; and

(4) The Carlins' engineering expert has raised issues related to wetlands on the subject property; grade, construction and width of road on subject property; and compliance with state fire codes.

The Carlins must show the following in order to be allowed to intervene: (1) they will be substantially and specifically affected by the outcome of these proceedings and that their harm would be related to the granting of relief from local regulation as requested by the developer; (2) their harm is not a common harm which is shared by the residents of the Town; and (3) the Board will not diligently represents the Carlins' interests. *Paragon Residential Properties, LLC v. Brookline Zoning Bd. of Appeals*, No. 04-16, slip op. at 36 (Mass. Housing Appeals Comm. Mar. 26, 2007).

Carlins' Property downgradient from Project. The Carlins argue that their property is downgradient of the subject property and they should be allowed to intervene to address issues related to storm water drainage, including snow runoff.[6] In particular, the Board addressed a concern of the Carlins in its Condition No. 12 which states that "the snow storage area proximate to the Carlin property at 11 Reed Street, Milton shall be relocated so

6. Bylaws, c. 21, § 2 (h) (2015), of the Town of Milton defines the term "storm water" as "Runoff from rain, *snowmelt*, or stream of water, including a river, brook or underground stream." (Emphasis added).

as to not drain on or be visible from the Carlin property." Decision of Milton Board of Appeals, Case No. 2446, at p. 15 (July 30, 2015) ("Decision"). The Carlins support their allegation with a report from their consultant Janet Carter Bernardo (Bernardo) at the Horsley Witten Group. The report recommends moving the proposed snow storage area away from the Carlin property. Bernardo concludes that the Carlin property will be significantly impacted by snow melt from the storage area near the Carlin property due to the difference in grade which slopes down from the proposed storage area towards the Carlin home.

Randolph argues that the Carlins have not demonstrated that their property is downgradient from the subject project and evidence shows that significant snow melt will flow easterly towards Randolph Avenue away from the Carlin property.

The Carlins are allowed to intervene on the issue of storm water and snow melt runoff as it may specifically affect their property, including location of the proposed snow storage area near the boundary of their land. The Carlins have successfully alleged that they may suffer a specific concrete injury related to a local concern. Also, certain relief sought by the Carlins is within the jurisdiction of this Committee. See, *e.g., Southbridge Housing Auth. v. Southbridge*, No. 91-09, slip op. at 2-7 (Mass. Housing Appeals Comm. Sept. 26, 1996) (addressing issue of storm water drainage).

Fifty-Foot Vegetation Boundary and Grading Issues. The Carlins ask to submit evidence for Condition No. 5 which requires, among other things, a 50-foot vegetation buffer on the southern and western boundaries of the project. Motion at ¶ 13. The Carlins also allege that there is a conflict between proposed grading within 10 feet of their property and Randolph's development plans showing a forested buffer will remain. Motion ¶ 9(1). They claim that they will be impacted by potential erosion, pollutant infiltration, runoff, and lack of screening from light and noise from the grading and possible loss of forested buffer. *Id.*

Randolph notes in its opposition that it has submitted a landscaping plan with a vegetation buffer. Randolph states that it is not asking to be relieved from a local zoning bylaw, i.e. Bylaws, § VII, H(7), of the Town of Milton (concerning design standards for parking for Residence AA, A, B, and C districts). Instead, Randolph requests that the Committee modify the 50-foot buffer condition that was imposed by the Board and not by any bylaw.

The Carlins' request to intervene on the 50-foot buffer and grading issues is allowed with respect to erosion, infiltration, runoff, and light and noise impacts on the Carlin property for reasons stated above.

Density, Height, and Scale. The Carlins also ask to intervene concerning the density, design, and scale of the Project, which they claim will result in impacts on their property from light and noise.[7] Aesthetic concerns and those regarding the character of the neighborhood are generally not issues that justify intervene in these proceedings. See *Denneny v. Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 211 (2003) (holding aesthetic concerns were not the kind of plausible claims of definite violations of private rights, private property interests, or private legal interests that are necessary to confer standing on a plaintiff to appeal under G.L. c. 40A, § 17); *Barvenik v. Board of Alderman of Newton*, 33 Mass. App. Ct. 129, 132-33 (1992), *abrogated on other grounds by Marashlian, supra* ("Subjective and unspecific fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the losses of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law").

Further, general allegations of the Carlins regarding design and density are merely speculative and do not support intervention. See *Tofias*, 435 Mass. at 348-49 (upholding denial of intervention by party in administrative proceeding whose injuries were speculative). The Board is likely to diligently defend its decision on those conditions related to these issues as the Carlins admit in their motion. Motion at ¶ 12. The Carlins' request to intervene on issues of density, height, and scale are therefore denied. However, they may intervene specifically with respect to the direct impacts on them of light and noise from the Project.

Engineering Issues. The Carlins' engineering expert raised a number of issue which are labeled here as "engineering issues" which include the following: (1) proposed wetlands crossings and wetlands impacts, (2) traffic impacts and interior road construction standards, and (3) state fire code compliance. Motion at ¶ 11. The Carlins fail to articulate any facts

7. While the Carlins have not expressly claimed that the density and scale of the project will diminish the value of their property, it should be noted that diminution of value of abutting property is not an issue for which abutting owners may be granted relief. *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 30 (2006).

that show that these issues will substantially and specifically affect their interests. The Carlins also admit that the Board will likely defend its decision on these issues. Motion at ¶ 12. For these reasons, these requests for intervention are denied.

Untimeliness of Carlins' Motion to Intervene. Randolph has challenged the Carlins motion to intervene as being untimely because it was filed more than six weeks after Randolph filed its initial pleading in this case. However, the Carlins explained that they had good cause for the delay, the hiring of new counsel. Also, as the Carlins' motion to intervene was filed 42 days after the filing of Randolph's petition, and there has been no showing of prejudice to Randolph, in the exercise of my discretion, their motion will not be denied on this basis.

III. The Mullins's Alleged Grounds for Intervention

The Mullins claim that they should be granted the right to intervene in these proceedings without a showing that their property interests will be negatively affected if Randolph is granted a comprehensive permit waiving local rules or bylaws. However, as discussed above, to allow the Mullins to intervene without a showing that they have interests protected by Chapter 40B that are substantially and specifically affected by the waiver of local rules and regulations sought by the developer, is contrary to the purpose of Chapter 40B. For this reason, the Mullins cannot intervene as a "matter of right."

Each Mullins was required to show the following in order to be allowed to intervene: (1) she/he will be substantially and specifically affected by the outcome of these proceedings and that his/her harm would be related to the granting of relief from local regulation as requested by the developer, (2) his/her harm is not a common harm which is shared by the residents of the Town, and (3) the Board will not diligently represents either Mullins's interests. *Paragon Residential Properties, LLC, supra.* They were invited to submit a supplemental motion to provide this demonstration.

The Mullins have raised some issues which they claim are specific to their property interests. These issues are summarized as follows:

(1) Mr. Mullins claims a special interest due to his claim of title for part of the subject property which he claims to have acquired through adverse possession;

(2) The Mullins's properties are higher in elevation than the Project, and the Mullins will see the Project from Ms. Mullins's home at 300 Highland Avenue;

(3) The Mullins object to the Project's density and the buildings' placement, typology, scale, height, and bulk because they are close to the Mullins's properties and are out of character for their neighborhood of single family homes. The Mullins also note that the siting of the Project is particularly close to their properties because of wetlands concerns, and that excavation of the hillside nearest to their properties could damage their properties. Mullins' Reply, p. 2 n.1.

Based on their alleged injuries, the Mullins ask to address the following in these proceedings: the height, bulk, and placement of the Project; the physical characteristics of the Project; the height, bulk, and placement of surrounding structures and improvements; the physical characteristics of the surrounding land; and the adequacy of open space, including recreational areas. Supplemental Motion at 9.

Mr. Mullins's Adverse Possession Claim. Mr. Mullins's claim of title to part of the subject property does not entitle him to intervene in these proceedings. The Committee does not have jurisdiction over land titles. *Hamilton Housing Auth. v. Hamilton*, No. 86-21, slip op. at 8-9, (Mass. Housing Appeals Comm. Dec. 15, 1988); *Bay Watch Realty Trust v. Marion*, No. 02-28, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 5, 2005). Land Court or Superior Court would be the proper forums for this dispute, *id.*, and as such Mr. Mullins has filed a lawsuit in the Land Court.

Loss of View. There is no right to an unobstructed view from one's property or right to be free of a view of neighboring buildings. And neither Mullins has referenced any deed, rule, regulation, or bylaw which confers that interest on either of them. See, *e.g., Barvenik v. Board of Alderman of Newton, supra,* at 132-33; *Ladd v. City of Boston*, 151 Mass. 585, 588 (1890) (holding right not to have land build upon for benefit of light and air can be made as an easement within reasonable limits). Therefore, the Mullins may not intervene on this issue.

Building Siting, Height, Bulk and Hillside Excavation. The Mullins allege that the plans to excavate the hillside nearest the Mullins's properties and install steep retaining walls on

the downslope of their properties may damage their properties. They may intervene with respect to the direct impacts on them of the hillside excavation and construction of the retaining walls. With respect to other building siting, design and density issues, the Mullins fail to demonstrate that either Mullins has a specific legal interest that is related to a rule or bylaw from which Randolph is asking for a waiver by the Committee. Without articulating any private right, property interest, or legal interest, they merely state that their interests are based on (1) the proximity of their properties to the Project, (2) the length of time they have lived at Ms. Mullins's property, and (3) the characteristic of Ms. Mullins's property as an improved parcel with a single family home similar to other properties in the neighborhood. Yet, these facts do not give rise to a specific interest that ought to be addressed in these proceedings. See *Denneny, supra; Barvenik, supra*. See also *Herring Brook Meadow, LLC v. Scituate,* No. 07-15, slip op. at 6-9 (Mass Housing Appeals. Comm. Oct 16, 2008 Ruling on Motion to Intervene).

IV. Conclusion and Order

For the foregoing reasons, the motions to intervene brought by the Carlins and by the Mullins are hereby allowed in part and denied in part:

The Carlins may participate with regard to: 1) the issue of storm water and snow melt runoff as it may specifically affect their property only, including location of the proposed snow storage area near the boundary of their land; 2) the 50-foot buffer and grading issues with respect to erosion, infiltration, runoff, and light and noise impacts on their property; and 3) other direct impacts of light and noise from the Project on their property.

The Mullins may participate with regard to the direct impacts of the hillside excavation and construction of the retaining walls on their properties.

HOUSING APPEALS COMMITTEE

Date: December 9, 2015

Shelagh A. Ellman-Pearl
Presiding Officer

John M. Donnelly, Hearing Officer