COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

WESTON BPR, LLC, Appellant, V. WINIFRED I. LI, STEPHEN J. LAROQUE, and NATALIE B. SAWYER, as they are and constitute the TOWN OF WESTON BOARD OF APPEALS, Appellee.	)	No. 2020-10

RULING ON MOTION FOR LIMITED INTERVENTION AND INTERESTED PERSON STATUS

I. Background

On or about May 20, 2019, Weston BPR, LLC (BPR or the developer) applied to the Weston Zoning Board of Appeals (the Board) for a comprehensive permit to construct 180 multifamily rental units and related amenities on 61 acres of land located at 0, 751 and 761 Boston Post Road, Weston, Massachusetts. The Board issued a decision dated November 23, 2020 and filed with the Weston Town Clerk on November 24, 2020, approving a comprehensive permit, with conditions. On December 11, 2020, the developer filed this appeal requesting the Committee to overturn the decision of the Board and grant the comprehensive permit for which it had applied.

Following the initial Conference of Counsel held on December 22, 2020, the parties engaged in discussions to resolve all or some of the contested issues, which resulted in an agreement between them for the issuance of a revised comprehensive permit to construct a maximum of 180 rental units with a maximum of 316 bedrooms on amended. On January 29,

2021, Phillip and Mary Jane Sarocco filed a motion for limited intervention and interested person status.

On April 14, 2021, BPR submitted a Joint Motion for Stipulation and Stipulation, with a revised Comprehensive Permit. On April 20, 2021, Phillip and Mary Jane Sarocco filed a Response to Applicant and Respondent's Joint Motion for Decision on Stipulation, alleging, among other things, that the Board violated the Open Meeting Law in reaching the proposed revised Comprehensive Permit. On June 7, 2021, the Saroccos filed with the Committee a copy of the Open Meeting Law complaint they filed with the Office of the Attorney General on April 22, 2021. The Saroccos alleged that the Board violated the open meeting law in reaching the revised Comprehensive Permit and requested that the Board's vote to approve the revised Comprehensive Permit be nullified.

On November 3, 2021, the parties filed a Joint Report on Open Meeting Law Claim and Request for Action on Pending Motion for Decision on Stipulation, informing the Committee that the Attorney General had issued a determination on October 15, 2021 that the Board had not violated the open meeting in approving the revised Comprehensive Permit and that the Saroccos' open meeting law complaint was resolved. A copy of the Attorney General's determination was filed with the Joint Report. The Saroccos filed a response on November 5, 2021, arguing that the disposition of their open meeting law complaint has no bearing on their motion to intervene.

II. Intervention in Appeals to the Committee

There is no intervention of an abutter as an aggrieved person as a matter of right under 760 CMR 56.06(2)(b), without showing they are substantially and specifically affected by the proceeding, in particular with respect to challenged conditions and determinations on waivers of local rules or bylaws at issue in the appeal.[1] While 56.06(20(b) provides that "any person

[1] Nor does the presumption in judicial appeals under G.L. c. 40A, § 17 apply in proceedings before the Committee. *See Essex Pastures, LLC v. Ipswich,* No. 2021-03, slip op at 2, n.2 (Mass. Housing Appeals Comm. Ruling on Motion to Intervene, Nov. 22, 2021)*; Sudbury Station, LLC v. Sudbury,* No. 2016-06, slip op. at 2 n. 3 (Mass. Housing Appeals Comm. Ruling on Motions to Intervene…Apr. 24, 2018); *HD/MW Randolph Avenue, LLC v. Milton,* No. 2015-03, slip op. at 4 (Mass. Housing Appeals Comm. Ruling on Motion to Intervene, Dec. 9. 2015); *Mountain St., LLC v. Sharon,* No. 2004-01, slip op. at 3 n.3 (Mass. Housing Appeals Comm. Ruling on Motion to Intervene, Oct. 20, 2004). The reference to G.L. c. 40A, § 17 in 760 CMR 56.06(b)(2) does not incorporate the judicial presumption. It solely refers to the meaning of the term "aggrieved," subject to the limitations of Chapter 40B. *See Sudbury,*

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, §§ 22-23. Under G.L. c. 30A, § 10, a presiding officer has the discretion to limit an abutter's intervention if the subject matter of the proposed intervention is inconsistent with the limited scope of the Committee's review under G.L. c. 40B, § 23. *See Sudbury Station, LLC v. Sudbury*, No. 2016-06, slip op. at 3 (Mass. Housing Appeals Comm. Ruling on Motion to Intervene...Apr. 24, 2018); *HD/MW Randolph Avenue, LLC v. Milton*, No. 2015-03, slip op. at 3 (Mass. Housing Appeals Comm. Ruling on Motion to Intervene, Dec. 9, 2015).

The presiding officer "shall consider only those interests and concerns of that person [seeking intervention] which are germane to the issues of whether the Local Requirement and Regulations make the Project Uneconomic or whether the Project is Consistent with Local Needs," 760 CMR 56.06(2)(b), and 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 Bd. of Appeals of Andover*, 447 Mass. 20, 30 (2006). "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.

Moreover, the scope of issues available to interveners in appeals before the Committee is limited. "Even if an abutter is allowed to intervene or otherwise to participate in an applicant's appeal pursuant to the regulations governing the [Committee], the '[l]egal issues properly before the [Committee] are circumscribed...." *Taylor v. Bd. of Appeals of Lexington*, 451 Mass. 270, 275 (2008), quoting *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 370 (1973). *Taylor* makes clear that although the hearing before the Committee is *de novo*, the issues are not only limited to the scope of Chapter 40B, but the Committee "is authorized to grant relief only in favor of the applicant, after a local board has made it

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supra at 2 n.3; *Milton, supra*, at 4 n.4. *See generally Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 26-28 (2006).

impossible or uneconomic to construct or operate such housing, and not in favor of a third party who opposes the construction of such housing." *Taylor*, 451 Mass. at 275.

Thus, a proposed intervener must "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" in the developer's appeal.[2] *See Sudbury, supra* at 5; *Milton, supra*, at 3-5. In addition, a proposed intervener will not be allowed to intervene "if his or her interests are substantially similar to those of any party and no showing is made that one or more of the parties will not diligently represent those interests." 760 CMR 56.06(2)(b). Finally, allowing persons to intervene without requiring a showing they are substantially and specifically affected by challenged conditions and determinations on waivers of local rules or bylaws at issue in the appeal is contrary to 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).

III. The Saroccos' Motion to Intervene

The proposed interveners state that five conditions, those whose modification or elimination would create the most acute particularized impacts on the Saroccos and their abutting property, will impact their property due to the proximity of their home to the development. They allege that certain conditions relating to construction noise, soil disruption, lighting, and tree damage along their property boundary are challenged by the developer and the elimination or dilution of these conditions will specifically impact their property.

The proposed interveners assert that under Condition 36(f), related to construction noise mitigation activity, construction noise, if left unmitigated, will as a matter of course create high levels of noise radiating on to their directly-abutting property. The Saroccos will be living next door for these extended periods of disruptive construction, and given their close proximity, it is highly unlikely any direct abutter will be as directly affected by these impacts as they will. They argue that deletion of this condition will adversely affect their ability to enjoy peace and

[2] Also, as *Taylor* points out, "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." *Taylor, supra*, 451 Mass. at 277.

quiet in their own home. As the revised Comprehensive Permit retains Condition 36(f), the Saroccos' argument is now moot.

Second, the Saroccos argue that Condition 37(f), requiring that, prior to certificates of occupancy issuing, BPR provide the Board with a written risk assessment of "residual impacted soil to future residents," specifically impacts their property due to the health, safety and environmental risks of contaminated soil being disturbed so close to their property. They argue that they should be allowed to intervene to seek preservation of this condition to ensure a "minimum level of health, safety and environmental protection" to their property. As the revised Comprehensive Permit retains Condition 37(f), the Saroccos' argument is now moot.[3]

Third, the Saroccos point to Condition 49, which, if eliminated, will result in light glare coming into the side and back of their home, or illuminating a back yard that is currently quiet and peaceful. Elimination of this condition, the Saroccos allege, will free the developer to install fixtures with little or no concern about the light pollution they will suffer. As the revised Comprehensive Permit retains Condition 49, the Saroccos' argument is now moot.

Finally, the Saroccos argue that Condition 65 provides particular protection from noise and light impacts of the project by ensuring that trees "shall be protected from root and/or limb damage and the Applicant shall be responsible for any damage to trees owned by project abutters." Of the four conditions above on which the Saroccos initially sought to intervene, the only condition remaining that is relied upon by them for support for intervention under the revised Comprehensive Permit is Condition 65, which they allege has been "eliminated." The condition as contained in the original Comprehensive Permit states that:

> Trees along Site boundaries or on adjacent properties shall be protected from root and/or limb damage and the Applicant shall be responsible for any damage to trees owned by project abutters.

The condition, as contained in the revised Comprehensive Permit, states that:

> Applicant will comply with all applicable laws with respect to trees on adjacent properties, specifically agreeing that it is responsible for repairing any damage to portions of trees or replacing trees located on adjacent properties and damaged by Applicant.

The Saroccos allege that the "elimination" of the condition that protects their line of mature trees not only from root damage, but from any damage resulting from the project's massive excavation and other site work, substantially and specifically affects them. I find that

Condition 65 has not been eliminated but rather revised and that, as revised, it adequately addresses the Saroccos' interests. The original language placed responsibility for tree and limb damage upon BPR. The revised language achieves the same result but with more general language.

Even assuming the Saroccos were to suffer potential injury from the change to this condition, the Board and the developer have reached an agreement resulting in the revised Comprehensive Permit, and there is no longer an issue for the Committee to adjudicate. It would be improper to grant intervention at this stage for the purpose of litigating solely the Saroccos' arguments regarding Condition 65, particularly when they may pursue any challenge to the revised Comprehensive Permit issued by the Board pursuant to G.L. c. 40A, § 17. *See Taylor, supra,* 451 Mass. at 277. Accordingly, the Saroccos' motion is denied.[4]

HOUSING APPEALS COMMITTEE

Lisa V. Whelan

Lisa V. Whelan
Presiding Officer

November 23, 2021

[3] It is now numbered Condition 37(c)(ii).
[4] Since the matter has been concluded, the Saroccos' motion for interested person status is also denied.