COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 2181CV00818

TOWN OF STONEHAM BOARD OF APPEALS,

Plaintiff,

v.

HOUSING APPEALS COMMITTEE OF THE MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, and WEISS FARM APARTMENTS, LLC,

Defendants.

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION, PROCEDURAL BACKGROUND AND FACTUAL BACKGROUND

The plaintiff, Stoneham Zoning Board of Appeals (the "Board") hereby incorporates by reference the Introduction, Procedural Background and Factual Background contained in its original Memorandum of Law in Support of its Motion for Judgment on the Pleadings. By way of procedural supplementation, the Board states that it served its Cross-Motion for Judgment on the Pleadings on the Defendants' counsel on November 11, 2021. Counsel agreed that the Defendants, the Housing Appeals Committee (the "Committee") and Weiss Farm Apartments, LLC ("Weiss Farm"), would serve their respective Oppositions and Cross-Motions on or before January 28, 2022.

On behalf of the Committee, the counsel for the Committee asked for a two-week extension of the briefing schedule for personal reasons which was agreed to by all counsel and the time frame for responding was extended by two weeks until February 8, 2022. Counsel for the Board requested that the time frame for its Reply Memorandum be extended from February 28, 2022 until March 4, 2022 which was also assented to by all counsel. This Reply Memorandum is intended to address certain counter arguments of the Weiss Farm and the Committee.

I. THE PORTIONS OF WEISS FARM'S BRIEF CHARACTERIZING ASPECTS OF THE PROCEDURAL HISTORY OF THIS PROJECT ARE LEGALLY IRRELEVANT, MOTIVATED BY A DESIRE TO ENGENDER SYMPATHY, AND SHOULD BE STRICKEN.

In this appeal, the Board elected to focus squarely on a single central legal issue[1] – whether the Committee acted beyond the scope of its authority and in contravention of the comprehensive permit act and regulations when it found that a proposed project which is the subject of the underlying appeal was "uneconomic as proposed" and then determined that since the project was "significantly more uneconomic" as conditioned it was the legal equivalent for the purposes of statutory burden shifting of a proposed project that is "economic as proposed" and rendered "uneconomic" by conditions imposed by a Board under Gen. L. c. 40B. In response, Weiss Farm expended the first several pages of its Memorandum purporting to reviewing the procedural background leading up to the decision of the Committee, but in reality, simply used that history to

[1] To be sure, there were numerous other potential legal issues; however, the Board elected to focus this appeal on the legal issue it felt was most compellingly wrong. If this Court were to review the Board's post-hearing brief, prior counsel details numerous potential legal issues.

disparage the Board for exercising its rights to claim that the Town of Stoneham had met "safe harbor," to criticize the town's Conservation Commission's denial of a Notice of Intent and related appeals of the subsequent DEP decision[2], and for advocating to the Committee in favor of the conditions it imposed. None of this is legally relevant to the argument of the Board on this appeal. All of it was offered to engender sympathy with the Court or influence the Court to believe that the Board and Town of Stoneham were disingenuous as Weiss Farm stated repeatedly or opponents of affordable housing, which they are not. In fact, the Board actually approved 124 units on the 14 upland acres of the site; a very substantial project with conditions that it contended in good faith did not render the project uneconomic and were consistent with local needs. Accordingly, those portions of Weiss Farm's Memorandum that do not concern the issue on appeal should be disregarded and/or stricken.

II. AS A MATTER OF LAW, THE COMMITTEE ACTED BEYOND THE SCOPE OF ITS AUTHORITY BY CONCLUDING THAT THE BOARD'S APPROVAL WITH CONDITIONS MADE THE PROJECT UNECONOMIC AND SUBSTANTIALLY MORE UNECONOMIC THAN AS PROPOSED.

Weiss Farm's Memorandum, after placing its spin on the procedural history, next mischaracterizes the Board's claim in this case as seeking the ability to condition and modify the proposed project "with impunity" because it, as the developer, chose to accept less of a profit than the Department of Housing and Community Development ("DHCD")

[2] Stoneham's Conservation Commission has even agreed to stay a pending appeal in the Middlesex Superior Court involving enforcement action against the actual property owner for alleged wetlands violations on the same project site as the proposed work, if approved, would result in those violations being allegedly cured. See Weiss Farm, Inc. v. Stoneham Conservation Commission, Middlesex Superior Court, Docket No. 1581CV05342.

Guidelines considers Minimum Return on Total Cost (MRTC). Weiss Farm, and to a certain extent, the Committee, further contends that the Board's argument is a direct assault on the emphatic and clear legislative mandates that created DHCD and the Committee and that the Board's claims violate G. L. c. 40B and its implementing regulations. Lastly, Weiss Farm contends that the Board ignored several Committee (agency) decisions in which the Committee actually ruled after hearings at the Committee that developers whose projects did not meet the MRTC necessary to render a project economic had still meet their burden of proof to prove a Board's conditions or denials of waivers rendered their projects uneconomic by proving that various Boards' conditions or denials of waivers were "significantly more uneconomic," whatever this phrase means. Of course, none of this again is true.

In this case, where the matter was fully briefed to the Committee by the Board and again raised as the central issue in the Board's current Complaint under G. L. c. 30A, §14, the Board is requesting judicial review in the Superior Court of the limits of the Committee's authority and which has not heretofore been fully litigated in any trial court or addressed by any appellate court decision in Massachusetts.

Weiss Farm and the Committee both claim that the SJC's decision in Board of Appeals of Woburn v. Housing Appeals Committee, 451 Mass. 581, 590-91 (2008) ("Woburn") supports the Committee's decision, is otherwise distinguishable, or unavailing. The Board anticipated these arguments in its Memorandum, addressed it previously, and remains unpersuaded by the counter arguments advanced in the memoranda by Weiss Farm or the Committee.

For its part, Weiss Farm contends Woburn is fact specific and stands for the limited rule that the Committee may not apply a clearly different standard of review to the Board's decision by recasting an "approval with conditions" as a "de facto denial" and since that was not the precise issue in these proceedings, this Court must conclude herein that the Committee "clearly applied the correct standard of review". *See Weiss Farm Memorandum of Law at p. 13-14*. The Woburn case unequivocally stands for significantly more than what Weiss Farm is willing to concede.

In actuality, in Woburn, the SJC held more broadly that the Committee exceeded its authority and could not, consistent with the Comprehensive Permit Act (the "Act") or DHCD regulations, expand its powers by adjudication and order the Board of Appeals in Woburn to modify or remove a condition or requirement by recasting as a denial an approval with conditions that did not render the project uneconomic. Woburn, 451 Mass. at 581 and 596. The effect of the Committee's decision making impermissibly and by artifice altered the burden of proof established by the Act and DHCD regulations. The Board submits that although the precise issue before the Committee in the current case and in the prior Committee decisions is not precisely the same as it was in Woburn, the conduct of the Committee here again conflicts with plain language of the statute because, stated simply, it should be self-evident that a project that is "uneconomic" as proposed under the Act, DHCD Regulations and Guidance cannot be fairly or reasonably said to have been made "uneconomic" by Board conditions thereby gain the benefit of the Act's or DHCD Regulation's burden shifting provisions. *See* G. L. c. 40B, §§22 and 23; and 760 CMR 56.07(2)(a)(3).

As stated before, Section 22 of the Act allows the Committee to review an approval only when it "is granted with such conditions and requirements as to make the building or operation of such housing uneconomic." Id. at 581, quoting G. L. c. 40B, § 22 (emphasis supplied). "Section 23 [of the Act] empowers the [C]ommittee to "order [the] board to modify or remove any such condition or requirement" only when the board's approval with conditions "makes the building or operation of such housing uneconomic and is not consistent with local needs." Id., quoting G. L. c. 40B, § 23 (emphasis supplied). According to the SJC, "[t]he structure of the act 'reflects the Legislature's careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements . . . while foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons of low income." Id., quoting Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811, 822-23 (2002). These fundamental provisions of the Act, also cited in Woburn, function as a matter of law to preclude DHCD from engaging in inconsistent rule-making or the Committee from determining by adjudication that a Board's decision that does not render a project "uneconomic" is reviewable.

The Act also defines "uneconomic" as follows:

> "Uneconomic", any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, *or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government on the size or character of the development or on the amount or nature of the subsidy or on the tenants, rentals and income permissible, and without substantially changing the rent levels and units sizes proposed by the public, nonprofit or limited dividend organizations.*

G. L. c. 40B, §20 (emphasis supplied).[3]

While there is no dispute that the Legislature does not specifically provide any particular way of measuring "uneconomic," the Legislature established and authorized, empowered and directed the Department of Housing and Community Development (DHCD) to create regulations designed to implement the statutory scheme and create comprehensive standards and procedures to govern the course of project review, from the initial determination of eligibility by the federal or state agency providing the subsidy, through appeals to the Housing Appeals Committee, as well as post-permitting procedures. *See* G. L. c. 23B, §§1-3, and 5A (HAC empowered to conduct hearings in accordance with rules and regulations by the director); *see also* 760 CMR 56.01 (background and purpose).

The DHCD's regulations basically incorporate the statutory definition of "uneconomic" in 760 CMR 56.02 and also further go on to define "reasonable return" as follows:

> Reasonable Return - means, as calculated according to guidelines issued by the department, and with respect to
>
> (a) building an ownership project or continuing care retirement community, that profit to the Developer is not more than 20% and not less than 15% of the total development costs; (b) building a rental project:
>
> 1. that payment of development fees from the initial construction of the Project is not more than a reasonable fee as determined by the Subsidizing Agency's program limitations and not less than 10% of the total development costs; and
>
> 2. that commencing upon the Project's initial occupancy, distributions of profit funded by operating revenues shall not exceed a reasonable rate relative to the Developer's equity in the Project as determined by the Subsidizing Agency's program requirements;

[3] The Massachusetts Housing Financing Agency (MassHousing) is a public instrumentality within DHCD and over which DHCD is directed by law to provide general policy guidance. *See* G. L. c. 23B, §2.

> (c) building an ownership project, continuing care retirement community or rental project, for the purpose of determining whether the Project is Uneconomic, that profit to the Developer or payment of development fees from the initial construction of the Project, if an amount lower than the minimum set forth 760 CMR 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; or
>
> (d) building an ownership project, continuing care retirement community or rental project, for the purpose of determining whether the Project is Uneconomic, when one or more conditions imposed by the Board decrease the total number of units in a Project, if those conditions do not address a valid health, safety, environmental, design, open space or other Local Concern, then the amount as calculated prior to the imposition of such conditions shall be the minimum, provided that such amount does not exceed the maximum return set forth in 760 CMR 56.02: Reasonable Return(a), or fall below the minimum set forth in 760 CMR 56.02: Reasonable Return(a), (b) or (c), as applicable.

760 CMR 56.02 (emphasis supplied).

Read literally, and excluding the direction to calculate the meaning by DHCD Guidelines, this DHCD Regulation defining "reasonable return" means any profit to the Developer **or** any development fees from the initial construction of the Project payable to the Developer determined to be feasible as set forth in the Project Eligibility Letter. *See* 760 CMR 56.02(c). This language that leaves open the possibility that no profit is necessary or no development fees may be paid and the project could still have a reasonable return which is entirely wrong.

Although DHCD has issued DHCD Guidelines that were in force and effect at the time of the permitting of this project explaining a methodology to determine whether a project is "economic" by defining a Return on Total Cost (ROTC) and establishing a Minimum Return on Total Cost (MRTC) utilizing a formula as of the date of the Pre-Hearing Order, DHCD has never issued any DHCD Guidelines as required by the express terms of the DHCD Regulations where the ROTC is below the MRTC. *See* RA, Vol. 15 at pp. 3472, 3479 (defining Minimum Return on Total Costs) (Ex.112).

The Committee's solution to this obvious omission some years ago was to invent the phrase "significantly more uneconomic" and to claim a right to do so by adjudication to resuscitate a proposed project that was already "uneconomic" and to claim that phrase is consistent with the Act and/or the DHCD Regulations definition of "reasonable return." Although courts engaged in review of decisions of an Administrative Agency are obligated 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," *see* G. L. c. 30, §14(7); *see* Woburn, 451 Mass. at 590, quoting Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 376 (1973), as the Board has already stated and the SJC has already ruled, judicial deference to agency decisions is not without limits. Id., citing Taylor v. Housing Appeals Comm., 451 Mass 149, 154-55 (2008); also Leopoldstadt, Inc. v. Commissioner of the Div of Health Care Fin. & Policy, 436 Mass. 80, 91 (2002), quoting Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 618 (1997) (principle "one of deference, not abdication").

In this case, as it did in Woburn, the Committee "brushed aside" the language of the governing statute and the regulations of the department that expressly required a finding that the Board's conditions rendered a proposed project "uneconomic" before shifting any burden to the Board, and invented the terms and phrases "uneconomic as proposed" and "significantly more uneconomic," concepts that the Committee now conveniently call a subset of "uneconomic." These terms are undefined, arbitrary, and capricious, incapable of being understood by developers or municipalities with any reasonable precision, and are subject to the Committee finding a project significantly more uneconomic on a whim. Accordingly, the Committee clearly exceeded its

authority. Id., at 593, citing Hastings v. Commissioner of Correction, 424 Mass. 46, 49 (1997) (other citations omitted).

The Committee's decision in this case, and likely in the earlier cases cited above, and cited by Weiss Farm and the Committee, where the improper standard was applied, resulted in the Committee having unlimited and/or undefined discretion to determine what was "significantly more uneconomic" obligating Weiss Farm, as the developer, or Board to speculate what quantitative or qualitative evidence it would be required to proffer to rebut the developer's contentions on economic impacts since the developer was functionally relieved of any obligation to prove the project was "economic as proposed." The Board contends that this exceptional discretion rather resulted in the developer, Weiss Farm, proposing an overly dense affordable housing project that was deliberately uneconomic as proposed such that the Board could not reasonably condition the proposed project because any condition it proposed necessarily added more than a de minimis expense, and according to the precedent at the Committee, rendered the project significantly more uneconomic. If the Committee is allowed to proceed with this self-serving burden shifting scheme it has invented, the Committee is effectively guaranteeing that developers can design projects that a local board, like the Board in Stoneham, could never limit, condition, or challenge in any way.

If at all, DHCD should use its extensive rule-making authority to promulgate appropriate regulations to specifically address this repeating circumstance to provide much needed guidance to developers and municipalities as recommended many years ago by the SJC's Chief Justice Marshall. *See* Woburn, 451 Mass. at 593. Without such a regulation in place that defines the Committee's processes and authority, the Committee

cannot create and enforce on its own the burden shifting scheme it has applied in this case (and others).

III. SINCE AS A MATTER OF LAW, THE COMMITTEE RECEIVED NO EVIDENCE AS TO WHAT PROFIT WAS DETERMINED TO BE FEASIBLE AS SET FORTH IN THE PROJECT ELIGIBILITY LETTER THE DECISION OF THE COMMITTEE MUST BE REVERSED OR, IN THE ALTERNATIVE, THE MATTER MUST REMANDED TO THE COMMITTEE FOR FURTHER PROCEEDINGS CONSISTENT WITH THE APPROPRIATE STANDARD.

In its Memoranda in support of their Cross-Motions for Judgment on the Pleadings, Committee and Weiss Farm suggest that the Committee's interpretation of G. L. c. 40B in this case is consistent with the regulations promulgated by DHCD. The Committee, in particular contends that under the definition of "reasonable return" in the DHCD regulations, where the profit to the proposed developer falls below the so-called Minimum Return on Total Cost (MRTC) under the DHCD Guidelines, the profit determined to be feasible by the subsidizing agency shall be the minimum profit, *see* 760 CMR 56.02(c); also *Committee's Memorandum of Law in Opposition and in Support of Cross-Motion for Judgment on the Pleadings at p. 16*, and then assumes that the Return on Total Costs (ROTC) of the proposed project as of the date of the Committee's Pre-Hearing Order is the same as the profit determined to be feasible by the subsidizing agency for the purposes of determining whether the project as permitted has been made "significantly more uneconomic." This is clear error as Mr. Engler's opinion was not based on the profit the profit determined to be feasible by the subsidizing agency.

Based on a review of the Administrative Record including, in particular, the Pre-Filed Testimony of Robert Engler (Ex. 119), the (prefiled) Rebuttal Testimony of Robert Engler (Ex. 120), and the Testimony of Robert Engler at the trial of this matter before the

Committee, Mr. Engler's analysis did not involve any project *pro formas* before the January 19, 2017 date. *See* RA, Vol. 25 at 6400 (Lines 20-21) and 6403 (Lines 13-14). Also, while the Project Eligibility Letter is included in the Administrative Record, RA at Vol. 3 at 340, the initial pro forma referenced in the Project Eligibility Letter and which would describe the proposed profit determined to be financially feasible by the subsidizing agency is not included in the Administrative Record. *See* id.

Absent this information and since Mr. Engler did not base his financial analysis on the correct standard emanating from the regulations, assuming the Committee and Weiss Farm were correct that the Committee's decision was based on its authority to interpret regulation by adjudication, the Committee's decision is not based on the correct legal standard and is consequentially based on an error of law.

IV. WHERE THE COMMITTEE ERRED AS A MATTER OF LAW IN APPLYING THE CORRECT LEGAL STANDARD, THE BURDEN NEVER SHIFTED TO THE BOARD TO MEET ITS BURDEN OF PROOF ON THE GROUNDS THAT THEIR CONCERNS WERE CONSISTENT WITH MATTERS OF LOCAL CONCERN THAT OUTWEIGHED THE REGIONAL NEED FOR AFFORDABLE HOUSING.

In its final argument, the Committee asserts that since the Board did not challenge any of the Committee's findings with respect to conditions that it struck or modified on the grounds that the Board failed to show consistency with local concerns that outweigh the regional need for affordable housing that there is no basis for any modification to the Committee's decision on individual conditions or waivers. *See Committee's Memorandum of Law at p. 20.* This argument is flawed where the developer never met its burden of proving that the conditions make the building or operation of the project uneconomic.

CONCLUSION

For the foregoing reasons, Weiss Farm failed to meet its statutory burden of proof to show the project as conditioned by the Board rendered the project "uneconomic" where it submitted a project that was "uneconomic as proposed" and contended the Board's conditions and denials of waivers rendered the proposed project "significantly more uneconomic." The Committee acted beyond the scope of its authority and inconsistent with the express terms of the Act by adjudging, as it had done erroneously in the past with other projects, that Weiss Farm met its burden of proof where the Board's conditions did not as a matter of undisputed fact render the project "uneconomic" but rather only "significantly more uneconomic. The Committee was not empowered or authorized as a part of its statutory charge to remedy this matter by adjudication, particularly, an adjudication that materially alters statutory burdens of proof and the rights of the Board. Even if the Committee were correct as to the extent of its authority, which it is not, the evidence in this case was insufficient as a matter of law to show that the developer's project met the minimum profit requirements of the subsidizing agency since the developer's financial expert did not utilize the correct miniumum profit as evidence in his comparison of the project as proposed to the project as conditioned. These fundamental flaws in the Committee's decision compel the conclusion that this Honorable Court should annul the Committee's decision and remand it to the Committee to proceed consistently with Committee's statutory and regulatory charge.

Request for Oral Argument

The Board respectfully requests oral argument before the Superior Court on a date convenient for the Court.

Respectfully submitted,

STONEHAM BOARD OF APPEALS,
by its Town Counsel,

Dated: March 4, 2022

/s/ Robert W. Galvin
_____
Robert W. Galvin, BBO # 561397
Anthony J. Riley, BBO # 698582
Galvin & Galvin, P.C.
10 Enterprise Street, Suite 3
Duxbury, MA 02332
(781) 934-5678
rwgalvin@comcast.net
anthonyriley123@comcast.net

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March 2022, I served a copy of the above Reply Memorandum of the Stoneham Board of Appeals on counsel for the Applicant electronically and by regular U.S. Mail, postage prepaid.

/s/ Robert W. Galvin
_____
Robert W. Galvin, Esq.

Date: March 4, 2022