COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
NO. 2006-P-0547

SUPREME JUDICIAL COURT
NO. SJC-09896

HAMPSHIRE COUNTY

JOHN BOOTHROYD, WILLIAM CHASE, THADDEUS DABROWSKI, ATHEA DABROWSKI, KONNIE FOX, WILLIAM CHASE, PETER GERATY, DAPHNE GERATY, ZAHVA KOREN, ISRAEL KOREN, STEPHEN LOCKE, GINA FUSCO, DOUGLAS LOWING, KAREN LOWING, JENNY MARSHALL, SUSAN PYNCHON, ROBERT QUINN, NANCY DIMATTIO, IRVIN RHODES, PENNY RHODES, DANA TOUTANT, STEPHEN TOUTANT, SUDHAKAR VAMATHEVAN, LYNN VENNELL, STEPHEN WALKOWICZ, KELLY KEANE WALKOWICZ, AND SEAN WERLE

Plaintiffs-Appellants,

v.

ZONING BOARD OF APPEALS OF AMHERST, consisting of the following persons named solely in their official capacity: Marc Cohen, Keri Heitner, Thomas Simpson, Earl Smith, Sonya Sofield, Brenna Kucinski, J.Edward Sunderland, and Zina Tillona; the TOWN OF AMHERST; HAP, INC.; and RICHARD S. BOGARTZ

Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS

ON APPEAL FROM A DECISION
OF THE LAND COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....................................iii

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW..........1

II. STATEMENT OF THE CASE...............................1

III. STATEMENT OF FACTS.................................4

IV. STANDARD OF REVIEW..................................8

Summary of Argument 10

V. ARGUMENT...11

A. The ZBA and the Trial Court Erred in Using Ch. 40B's "Regional Need" Test When the 10% Statutory Minimum Had Been Met. 11

1. The Act Should be Reasonably Construed to Require Application of Existing Zoning Laws Where the Statutory Minima are Met..............12

2. Applying The "Regional Need" Test Where A Town Meets the 10% Threshold Would Render Section 20's Minimum Criteria Meaningless Surplusage...............................19

3. The Purpose of the Act Would Be Frustrated By Imposing the "Regional Need" Test Where the Statutory Minimum Has Been Met..............21

4. Application of the "Regional Need" Test, Where the Minimum Housing Criteria Have Been Met, Needlessly Infringes on the Settled Property Rights of Abutters.....................23

5. The Act's Regulatory Scheme Confirms That Usual Standards Should Be Used Where the Minimum Criteria Have Been Met..................26

6. The Isolated Case References Relied on by the Trial Court Do Not Support Use of the "Regional Need" Standard When the Statutory Minima Are Met.................................28

B. The Racial Quotas Set Forth in the Comprehensive Permit Render the Permit Illegal and Subject to Reversal and Remand. 33

1. The Plaintiffs Have Proper Standing to Challenge the Illegal Racial Quota..............37

2. Reversal and Remand Are Appropriate.............40

VI. CONCLUSION..41

ADDENDUM...A1

Decision by Sands, J. on Motions for Summary Judgment, dated August 14, 2003 ....A1

Decision by Sands, J. on trial, dated June 1, 2005 ....A17

Massachusetts General Laws, chapter 40B, §§20-23 ......A37

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)... 35

Bartlett v. Greyhound Real Estate Fin. Co., 41 Mass. App. Ct. 282 (1996)...................................... 19

Board of Appeals of Dedham v. Corporation Tifereth Israel, 7 Mass. App. Ct. 876 (1979)...................... 40

Board of Appeals of Hanover v. Housing Appeals Committee in the Department of Community Affairs, 363 Mass. 339 (1973)................................... passim

Board of Educ. v. Assessor of Worcester, 368 Mass. 511 (1975)... 12

City of Richmond v. J.A. Croson Co. 488 U.S. 469 (1989)... 35

Commonwealth v. Diaz, 326 Mass. 525 (1950)............... 26

Commonwealth v. Galvin, 388 Mass. 326 (1983)............. 12

Cullen Enters, Inc. v. Massachusetts Prop. Ins. Underwriting Assn., 399 Mass. 886 (1987).................. 9

Finkelstein v. Board of Registration in Optometry, 370 Mass. 476 (1976).. 26

Gratz v. Bollinger, 539 U.S. 244 (2003).............. 35, 39

Jaimes v. Lucas Metropolitan Housing Authority, 833 F.2d 1203 (6th Cir. 1987)................................ 36

Jordan v. Khan, 969 F. Supp. 29 (N.D. Ill. 1997)......... 36

Lovaco v. Zoning Board of Appeals of Attleboro, 23 Mass. App. Ct. 239 (1986)................................ 40

MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635 (1970).. 9

Northeastern Fla. Chapter Associated Gen. Contractors of America v. Jacksonville, 508 U.S. 656 (1993).......... 39

Planning Board of Hingham v. Hingham Campus, LLC, 438 Mass. 364 (2003).. 38

Ploski v. Zoning Bd. Of Appeals of Somerset, 7 Mass. App. Ct. 874 (1979)...................................... 40

Roberts v. Southwestern Bell Mobile Sys., Inc., 429 Mass. 478 (1999)... 9

S. Worcester County Reg'l Vocational Sch. Dist. v. Labor Relations Comm'n, 386 Mass. 414 (1982).............. 9

Saugus v. Voutour, 474 U.S. 1100 (1986)................... 9

She Enterprises, Inc. v. State Bldg. Code App. Bd., 20 Mass. App. Ct. 271 (1985)............................... 9

Standerwick v. Zoning Board of Appeals of Andover, 64 Mass. App. Ct. 337 (2005)............................... 38

Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985)........... 9

Zoning Board of Appeals of Greenfield v. Housing Appeals Committee, 15 Mass. App. Ct. 553 (1983)...... 31, 32

Zoning Board of Appeals of Wellesley v. Ardemore Apartments Lt. Partnership, 436 Mass. 811 (2002)......... 32

STATUTES

M.G.L. c. 30A, § 14(5).................................. 9

M.G.L. c. 30A, § 14(7).................................. 8

M.G.L. c. 30A, § 14(7)(a).............................. 38

M.G.L. c. 40A, § 10.................................... 24

M.G.L. c. 40A, § 17................................... 8, 9

M.G.L. c. 40B, §§ 20-23................................. 1

M.G.L. c. 40B, § 20................................ passim

M.G.L. c. 40B, § 21................................ 12, 37

M.G.L. c. 40B, § 22.................................... 13

M.G.L. c. 40B, § 23.................................... 13

REGULATIONS

760 CMR §§ 30.00 et seq.................................. 26

760 CMR §§ 31.01 et seq.................................. 26

760 CMR § 31.04... 26

760 CMR § 31.04(1).. 27

760 CMR § 31.04(2).. 27

760 CMR § 31.06(5).. 27

760 CMR § 31.06(5), (6)................................... 18

760 CMR § 31.06(6).. 27

760 CMR § 31.07(1)(e)..................................... 28

760 CMR § 45.04(5).. 34

760 CMR § 45.04(9).. 34

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether it was error for the Amherst ZBA and trial court below to use Ch. 40B's "regional need" test, when Amherst at all times exceeded Ch. 40B's statutory threshold of 10% affordable housing?

B. Whether the racial quotas set forth in the HAP, Inc. comprehensive permit render the permit illegal, requiring reversal and remand?

II. STATEMENT OF THE CASE

By its written decision dated February 22, 2002, the Town of Amherst granted a comprehensive permit to HAP, Inc. ("HAP") and Richard S. Bogartz ("Bogartz") concerning a low and moderate income housing project to be built on a 4.1-acre parcel of land in Amherst, Massachusetts. A. 2031-44.[1]

The comprehensive permit was originally challenged in the Land Court by the plaintiff abutters' February 1, 2002 Complaint, which sought a declaration and judicial determination that the Amherst Zoning Bylaws ("Bylaws") were not superseded by M.G.L. c. 40B, §§ 20-23, known as the Low and Moderate Income Housing Act (hereafter, the "Act" or "Ch. 40B")[2]; that the decision of the ZBA was beyond the bounds of their

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[1] In this brief, references to the five-volume Appendix will be in the form "A__."

[2] Reference to the Addendum will be made in the form "Add.__." A copy of the Act, in effect in 2001-2002, is attached to this Brief at Add. A37-40.

authority; and that the process was tainted by prejudgment of town officials and conflict of interest. A. 55.

The original complaint was filed before the ZBA decision was officially filed with the Amherst Town Clerk; a second complaint was filed afterwards, and subsequently consolidated with the first action. A. 1, 11.

Plaintiffs and all Defendants filed cross-motions for summary judgment on March 7, 2003, addressing the issue of what effect Ch. 40B had, if any, once the 10% threshold described in the second sentence of Section 20 of the statute has been met. A. 21. The Land Court concluded that the statute continued in full effect, even after the 10% threshold had been met.[3] A. 32. At the same time, the court denied Plaintiffs' cross-motion for summary judgment. Id.

The parties filed joint pre-trial memoranda and joint stipulations prior to trial and trial was held in successive sessions on September 29 and 30, 2003, on November 5, 2003, and on December 10, 2003. A. 36. On the first day of trial, a site view was held by the

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[3] Copies of the trial court's summary judgment ruling and decision after trial are attached hereto in the Addendum.

court. Id. The trial court identified two issues for trial: a claim of prejudicial conflict of interest of a former HAP officer, who participated as an Amherst employee in evaluating and presenting the HAP project to responsible Amherst decision-makers, including the ZBA[4]; and whether the ZBA decision met the general administrative standard of review. A. 42, 445.

On April 6, 2004, the ZBA and Town filed a post-trial memorandum, HAP and Bogartz filed a joint post-trial memorandum, and Plaintiffs filed their trial memorandum. A. 9, 18. On April 20, 2004, all parties filed replies, and the matter was taken under advisement. Id.; A. 36.

The Land Court (Sands, J.) issued its Decision on June 1, 2005 and entered judgment in favor of HAP and Bogartz, affirming the ZBA decision as having substantial support in the evidence and not being based on error of law. Add. A35; A. 9, 18, 53.

On June 9, 2005, Plaintiffs filed a Motion Pursuant to Mass. R. Civ. P. 52(b) and 59(e) to Amend Decision and Judgment, arguing that the court erred by not finding them to have standing to challenge the racial quota, to which Defendants filed a joint Opposition on

[4] This issue is not being appealed.

June 28, 2005. A. 341-49, 345-47. The Land Court (Sands, J.) denied the motion on July 19, 2005 following a hearing on July 18, 2005. A. 349, 361. Thereafter, Plaintiffs filed a Notice of Appeal on August 12, 2005. A. 361.

III. STATEMENT OF FACTS

Plaintiffs are neighbors in a large, dense neighborhood of over 250 homes in an area in Amherst known as Orchard Valley. A. 1793. A combination of zoning ordinances maintains the character of the neighborhood, including a lot size restriction, a maximum of 2 1/2 stories for any building's height, a percentage lot coverage limit, and parking space requirements. A. 1695, 1697.

On October 27, 2000, HAP and Bogartz entered into an option agreement giving HAP an option to purchase Bogartz's 4.1 acre parcel of land in the Orchard Valley area. A. 1828-30. The parcel contained only a single farmhouse residence, and was located near the intersection of Route 116 (also known as West Street) and Longmeadow Drive in Amherst, Massachusetts (the "Site"). A. 1818.

HAP, Inc. is a non-profit organization dedicated to affordable housing. A. 39-40. HAP provides a rental

assistance program, and serves as administrator of the federal Section 8 housing subsidy program in Hampshire, Hampden and Franklin counties. Id.

On or about May 29, 2001, HAP and Bogartz filed with the Amherst Town Clerk their application (docketed as number ABA 2001-0004) requesting a Comprehensive Permit pursuant to Chapter 40B to allow them to proceed with the development of 26 dwelling units on the Site (hereafter, the "Project"). A. 1809-1934.

Generally, the Project was proposed to consist of (1) the construction of three new detached buildings, each containing eight units of townhouse style housing; (2) renovations to the existing farmhouse to create two new units of housing; and (3) the creation of an apartment for the resident manager. A. 1820. Apparently, in the Application, two of these buildings were proposed to be three stories in height and two to be four stories.[5] Id. Of the 26 proposed units, three are to be one-bedroom units, fourteen are

[5] There is some conflict on this point between the Decision, the Application and the Plans submitted with the Application. See A. 1820; 2038.

to be two-bedroom units, and nine are to be three-bedroom units.[6] A. 1819.

HAP originally proposed 56 parking spaces with two parking spaces to be specifically provided for each housing unit. A. 1820. However, after meeting with the Planning Board and the ZBA over various space concerns, HAP apparently reduced the number of proposed spaces to 41 (which would provide approximately 1.5 spaces per housing unit), plus allowing for an unpaved overflow parking area for several additional vehicles. A. 2038.

The Project as outlined by HAP violates four provisions of the Amherst Zoning By-Laws applicable to the relevant Outlying Residence Zoning District:

- the Project exceeds the Minimum Lot Area by-law which requires 30,000 s/f per single-family home versus the proposed 26 units plus manager's apartment on 179,162 s/f of land;
- the Project exceeds the Maximum Lot Coverage by-law which requires a maximum of 25% versus total proposed lot coverage of 31.08%;
- the Project exceeds the Maximum Floors by-law which requires a maximum of 2.5 floors versus proposal of four buildings each with three floors above grade; and

[6] The Comprehensive Permit Decision describes 27 units in contrast to the Application. See A. 1819; 2033, 2044.

- the Project fails to meet the parking by-law requirement of two spaces per unit versus the proposed 1.5 spaces per unit plus five overflow spaces.

A. 1820, 2037-38.

During the summer of 2001, Amherst's relevant boards and committees took formal votes on whether or not to recommend that the ZBA grant the Comprehensive Permit for the project. A. 2034-35.

In November 2001, HAP submitted a revised site plan showing certain changes in the design of the project, including the reduction in the number of parking spaces sought by the ZBA, a reconfiguration of the driveway to accommodate a larger storm-water infiltration area, and movement of a dumpster and recycling area to a more remote part of the Site. A. 2038, 2040, 2042.

On February 22, 2002, the ZBA issued the Comprehensive Permit subject to 16 express conditions set forth in its 12 page Decision. A. 2031-32.

The ZBA's Decision concerning the Comprehensive Permit describes the Project and summarized the public review process undertaken by the Town. A. 2033-2044. The Decision noted that Amherst exceeded the 10% statutory minimum threshold set in Section 20 of the

Act. A. 2042. The Decision also reflects the ZBA's belief that the "regional need" test of Section 20 of Ch. 40B applied to provide the legal standard for evaluating the permit. A. 2041. This is evident by, among other recitations, the Decision recounting evidence as to the local need for low and moderate income housing as balanced against zoning concerns. A. 2038, 2041-43.

IV. STANDARD OF REVIEW

In reviewing a final agency decision, Massachusetts law provides that a court may set aside an agency decision:

> if it determines that the substantial rights of any party may have been prejudiced because the agency decision is (a) In violation of constitutional provisions; or (b) In excess of the statutory authority or jurisdiction of the agency; or (c) Based upon an error of law; or (d) Made upon unlawful procedure; or (e) Unsupported by substantial evidence; or . . . (g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

M.G.L. c. 30A, § 14(7).

Chapter 40A section 17 provides for judicial review of decisions of boards of appeals. M.G.L. c. 40A, § 17. Review under Section 17 is de novo, and the court's task is to decide whether, on the evidence presented at trial, the board's decision was based on

a legally untenable ground or was unreasonable, whimsical, arbitrary and capricious. Id.; see Roberts v. Southwestern Bell Mobile Sys., Inc., 429 Mass. 478, 486 (1999), citing MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 639 (1970).

The court's review concerning the final decision is limited to the record. See M.G.L. c. 30A, § 14(5); She Enterprises, Inc. v. State Bldg. Code App. Bd., 20 Mass. App. Ct. 271, 273 (1985). The court may not substitute its judgment for that of the administrative agency. S. Worcester County Reg'l Vocational Sch. Dist. v. Labor Relations Comm'n, 386 Mass. 414, 420 (1982).

Similarly, in reviewing a motion for summary judgment, the Appeals Court is "confined to an examination of the materials before the court at the time the rulings were made. Neither the evidence offered subsequently at the trial nor the verdict is relevant." Cullen Enters, Inc. v. Massachusetts Prop. Ins. Underwriting Assn., 399 Mass. 886, 889 n.9 (1987), quoting Voutour v. Vitale, 761 F.2d 812, 817 (1st Cir. 1985), cert. denied sub nom., Saugus v. Voutour, 474 U.S. 1100 (1986).

Summary of Argument

Under Ch. 40B, in the case of a proposed low and moderate income housing project, local zoning requirements may be overridden by use of a "regional need" test (contained in M.G.L. c. 40B, § 20, first sentence). (infra at pp.11-14). This test, by legislative design, is heavily slanted in favor of granting the permit for the project. (infra at pp.22-25). The "regional need" standard does not, and should not, apply when the minimum thresholds of local affordable housing are met, as set by M.G.L. c. 40B – where affordable housing comprises 10% of housing stock, or 1½% of area. M.G.L. c. 40B, § 20. (infra at pp.11-33). Below, both the ZBA and the trial court erred in using the "regional need" standard to approve HAP's permit, because it was undisputed that Amherst met the 10% threshold. (infra at pp.11-33)

This result is required by a reasonable reading of the statute. (infra at pp. 11-20). A contrary construction of Ch. 40B would read the minimum thresholds completely out of the statute, and also defeat the explicit legislative purpose in continuing to deny local autonomy, even where the minimum affordable housing criteria are met. (infra at pp.18-

22). This reading of Ch. 40B is also confirmed by the regulatory scheme promulgated by the responsible Massachusetts agency. (infra at pp.25-28). This reading of the Act fairly protects settled property rights of abutters (infra at pp.28-33), and is consistent with caselaw to date (infra at pp.28-33). Remand for hearing under the appropriate standard is necessary.

Additionally, the Town of Amherst imposed a flat 20% minority set-aside quota in its permit. This condition is illegal under Massachusetts law and federal law. (infra at pp.33-36). Plaintiffs have standing to challenge the illegal condition. (infra at pp.36-39). The appropriate remedy for the illegal condition is reversal and remand. (infra at pp.39-40).

V. ARGUMENT

A. The ZBA and the Trial Court Erred in Using Ch. 40B's "Regional Need" Test When the 10% Statutory Minimum Had Been Met.

Both the ZBA and the trial court erred in construing the Act to require use of the "regional need" test where the 10% statutory minimum had been met.

1. The Act Should be Reasonably Construed to Require Application of Existing Zoning Laws Where the Statutory Minima are Met.

A statute is to be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Commonwealth v. Galvin, 388 Mass. 326, 328 (1983), quoting Board of Educ. v. Assessor of Worcester, 368 Mass. 511, 513 (1975).

Section 21 authorizes an agency or non-profit organization proposing to build low or moderate income housing to submit a single application to the local zoning authority, which must be acted on promptly in accordance with the section. If approved, the application is granted in the form of a "comprehensive permit." M.G.L. c. 40B, § 21. Nothing in Section 21 indicates what standard should be employed in evaluating the application.

Section 22 provides that, in the event of a denial of an application under Section 21, or an approval with conditions rendering the project uneconomic,

appeal may be taken to the Housing Appeals Committee in the Department of Housing and Community Development. M.G.L. c. 40B, § 22.

Section 23 provides:

> The hearing by the housing appeals committee. . . shall be limited to the issue of whether, in the case of a denial of an application, the decision of the board of appeals was reasonable and consistent with local needs, and in the case of an approval of an application with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs.

M.G.L. c. 40B, § 23. Rejecting a vagueness claim, in _Board of Appeals of Hanover v. Housing Appeals Committee in the Department of Community Affairs_, 363 Mass. 339 (1973), the Supreme Judicial Court held that the "consistent with local needs" standard of Section 23 (defined in Section 20) is the standard to be employed before the local zoning authority in proceedings for a comprehensive permit. _Id._ at 365. According to the Court, this is followed by "necessary implication." _Id._ Thus, whether application of local zoning law is "consistent with local needs" is the standard which determines the fate of any application for a low or moderate income housing permit in the Commonwealth.

Section 20 defines the circumstances in which local zoning laws will be considered "consistent with local needs”:

> [local zoning] requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health and safety of the occupants of the proposed housing or the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing.

M.G.L. c. 40B, § 20 (hereafter, the “regional need test” or “regional need factors”).

Where a city or town already has more than 10% low and moderate income housing, this is a circumstance in which application of the local zoning laws is defined by Section 20 to be “consistent with local needs:”

> Requirements or regulations [local zoning laws] shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of ten percent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and a half percent or more of the total land area zoned for residential, commercial or industrial use . . .

M.G.L. c. 40B, § 20. Thus, if local zoning laws are "consistent with local needs," they may be "imposed" under Section 20. See M.G.L. c. 40B, § 20.

The statutory strategy of the Act is to provide the circumstances (defined in Section 20) under which local zoning laws ("requirements and regulations") may be bypassed. See M.G.L. c. 40B, § 20. Such laws cannot be bypassed if their application is "consistent with local needs." Section 20 offers two circumstances in which local zoning laws are "consistent with local needs" and therefore cannot be bypassed: (1) in the first sentence of the Section, if the regional need test is passed; and (2) in the second sentence, in a town or city with 10% affordable housing units or 1½% land area devoted to such housing. M.G.L. c. 40B, § 20.

Nowhere does the Act provide for an alternative standard to the "consistent with local needs" formulation mandated in Section 23 and defined in Section 21. Thus, according to Section 20, where the town or city has at least 10% affordable housing, the local zoning laws may not be bypassed. There is no test or set of factors to measure whether application of those laws would conflict with affordable housing

needs, beyond the minimum criteria. The regional needs test of the first sentence does not apply. The local laws must then be "imposed." M.G.L. c. 40B, § 20.

This reading is confirmed by the way the "consistent with local needs" standard is handled. The first sentence of Section 20's definition says that local zoning laws will be "considered" consistent with local needs where indicated after application of the "regional need" factors. The second sentence of Section 20, which sets out the statutory minima (including the 10% threshold), says local zoning laws "shall <u>be</u> consistent" - not "shall be <u>considered</u> consistent" — where the town or city has more than 10% affordable housing.

The "shall be" language announces an absolute equation and no room for discretion; the "shall be considered" suggests a presumption of equality where none is actually present. This suggests that the definition of zoning laws "consistent with local needs" is actually the existing zoning law of a town which meets or exceeds the statutory minima (including the 10% threshold). If the minima are not met, then the town laws may, nevertheless, be "considered"

consistent with local needs, but only if so indicated by application of the regional need test.

Retention of the phrase "comprehensive permit" in the second sentence of the Section 20 definition suggests that, even in a town which meets the 10% threshold, like Amherst, Section 21's streamlined procedures and prompt time-lines for administrative action remain intact for the processing of an application to build affordable housing. However, by virtue of the threshold having been met, the town zoning laws may be "imposed" in considering the application, without regard to the regional need test, because the 10% threshold provides the explicit basis for satisfying the controlling "consistent with local needs" standard.

Because the regional need test is designed to favor approval of an affordable housing project, the imposition of this standard will likely be dispositive. If, as was the case here, the project involves significant departures from local requirements (e.g., set-back, lot size, use, etc.) and the Act's "regional need" test is used, the developer will probably win – as happened here. If the existing laws are used, in lieu of the "regional needs" test,

in the absence of unusual circumstances, the developer will probably lose.

Based on the foregoing, the best reading of the Section 20 definitions of "consistent with local needs," the statutory minima, and the Act as a whole, is for the "regional need" test to drop out of the picture when the minimum criteria are met. The power to override the local zoning laws, of course, remains with the local board or authority. It can only do so, however, under the well-settled methods for doing so apart from the Act, such as through a special permit or variance.

By this reading of the Act, when application is made under Section 21 for a comprehensive permit in a town exceeding the 10% threshold, the Act has no further application. The usual zoning laws are imposed in the usual way. The regional need test and its factors have no application.[7]

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[7] Conceivably, appeal of a denial of such an application could be made to the Housing Appeals Committee ("HAC"), under the provisions of Section 22. The only issue before the HAC would be whether the 10% threshold was met. The applicable regulations bear this reading out, as discussed below, infra at p. 27. See 760 CMR § 31.06(5),(6).

2. Applying The "Regional Need" Test Where A Town Meets the 10% Threshold Would Render Section 20's Minimum Criteria Meaningless Surplusage

If the "regional need" test of the first sentence of Section 20 were to be used when the minimum housing criteria in the second sentence are met, there would be no point at all to the entire second sentence, and no point in defining the minimum criteria. Under such a reading, all low and moderate income housing projects would be funneled through the "regional need" test, no matter how much affordable housing a town had. The criteria would have no purpose or function whatsoever. This was what happened in the case below. The minimum criteria are rendered pointless if meeting them nonetheless resulted in imposition of the regional need test.

The familiar rule is that a statute should not be read in a way so as to render any of its language meaningless or surplusage. See Bartlett v. Greyhound Real Estate Fin. Co., 41 Mass. App. Ct. 282, 289 (1996). If, as the lower court ruled here, the meeting of the 10% minimum were not to result in a different standard from the "regional need" standard, the entire second sentence, including the statutory minima, is rendered surplusage.

The scheme of the statute (discussed above at pp.11-18) is to define the circumstances where the local zoning laws (the "requirements and regulations") should be overridden, and, in other cases, where they should be left in place to control the fate of the building application. Local zoning laws which are "consistent with local needs" are not bypassed under the Act. The 10% minimum appears only once in the Act, in the second sentence of Section 20, as one of the two circumstances which are defined to be "consistent with local needs."

If the "regional need" standard of the first sentence of Section 20 applies to determine whether the application of local zoning laws are "consistent with local needs," even where a town exceeds the 10% threshold, the 10% minimum criteria has no function at all in the statutory scheme. It makes no difference whether a town meets it or not.

For this reason, in a case such as this one, where the town exceeds the 10% threshold, the local zoning laws should be applied in the usual way, and the regional need test should not apply.

3. The Purpose of the Act Would Be Frustrated By Imposing the "Regional Need" Test Where the Statutory Minimum Has Been Met.

Imposition of the regional need test, where the Act's affordable housing minimum has been met, cuts directly against the purpose of the Act, which is to advance affordable housing but preserve local autonomy where minimum housing thresholds are met.

The purpose and legislative history of the Act is discussed at length by the Supreme Judicial Court in Hanover:

> The legislative history of c. 774 begins with a 1967 Senate Order, No. 933, which directed the Legislative Research Council ("council") to "undertake a study and investigation relative to feasibility and implications of restricting the zoning power to cities and county governments with particular emphasis on the possibility that smaller communities are utilizing the zoning power in an unjust manner with respect to minority groups."

363 Mass. at 347-48. The resulting Report of the Council concluded that certain types of zoning restrictions, such as minimum lot size and building height limits, had a "negative impact" on the construction of low and moderate income housing.

> The Report concluded with the dire prediction that if existing exclusionary zoning practices by municipalities were left unregulated, the supply of vacant land would be eliminated by the 1990's [] because the communities were unwilling to act on their own to alleviate the problem [] and the

> courts were unwilling to intervene as long as the discrimination involved in the exclusionary zoning practices was economic. The Council recommended a plan which would leave with cities and towns the general power to direct their own development but would permit, in appropriate cases, the circumvention of the exclusionary zoning by-laws where their enforcement would frustrate the State's need for more low and moderate income housing.

363 Mass. at 349-50 (citations omitted). As described in Hanover, the Act retained this basic purpose: "to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing." 363 Mass. at 353-54.

The design of the heavily weighted "regional need" test is to circumvent local zoning laws in favor of low and moderate income housing projects. According to the Court in Hanover, "local autonomy" was to re-assert itself once the Section 20 minima, including the 10% minima, were met. 363 Mass. at 367. This obviously cannot happen if the "regional need" test is used anyway, because the sole purpose of the "regional need" test is to defeat local autonomy.

The Act's purposes are advanced by interpreting it so as not to impose a standard – the "regional need" standard – which is weighted toward approval of an

affordable housing project, in towns or cities where there is already more than 10% affordable housing.

4. Application of the "Regional Need" Test, Where the Minimum Housing Criteria Have Been Met, Needlessly Infringes on the Settled Property Rights of Abutters

To construe the Act to make the regional need test inapplicable, where the minimum criteria are met, is to respect the settled property rights of people in Plaintiffs' position: living in single family communities and neighborhoods, with the settled and reasonable expectation that their local zoning laws will be enforced. The enforcement of such rights preserves the character of the neighborhood as a single-family home community, which attracted the Plaintiffs in the first place, and in which they made a substantial investment in buying a home there.

A comparison of the rights of abutters under the usual analysis (without regard to the Act) and under the "regional need" analysis of the first sentence of Section 20, reveals that the outcome under the "regional need" test is heavily weighted in favor of the developer. This is by design, obviously, to further the purpose of the Act, and override application of local zoning law to ensure approval of

low and moderate income housing projects, where necessary to do so. (See, discussion of purpose of the Act, <u>infra</u> at pp.20-22).

When the usual principles of zoning law were to be applied in the usual manner, without regard to the Act, the builder of a project like the one proposed here would have to obtain special permits or variances for the lot-size and height requirements, among other issues. Generally, to obtain a variance or special permit, the developer would bear the burden of persuading the zoning board (or local authority) to disregard the local requirements, which is generally a heavy burden.

With respect to variances, for example, the local board is required to find that enforcement of zoning ordinances "would involve substantial hardship," and that "desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose" of the zoning ordinance or law. M.G.L. c. 40A, § 10. This usual approach serves to protect the settled rights of property owners, and to ensure the continuing character of their neighborhoods.

In contrast, under the "regional need" test, the regional need for affordable housing must be balanced against these factors:

> the need to protect the health and safety of occupants of the proposed housing or the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing.

M.G.L. c. 40B, § 20.

The traditional rights of abutters to rely on strict enforcement of zoning law are, by design, not part of this analysis. Abutters' interests are reduced to recognition of two skeletal interests: first, the protection of their "health and safety" as "residents;" and second, to the extent they would be protected by "better site and building design in relation to the surroundings." These are very much watered-down zoning rights, as compared to strict enforcement in the usual manner.

In light of the foregoing, to read the Act in such a way as to dispense with the heavily weighted "regional need" standard in towns meeting the 10% threshold, is properly to recognize the countervailing force of the

settled rights and expectations of abutters, such as the Plaintiffs.

5. The Act's Regulatory Scheme Confirms That Usual Standards Should Be Used Where the Minimum Criteria Have Been Met.

The interpretation of a statute by the administrative agency charged with its enforcement is traditionally accorded deference by the courts. See Finkelstein v. Board of Registration in Optometry, 370 Mass. 476, 478 (1976); Commonwealth v. Diaz, 326 Mass. 525, 527 (1950) ("Legislature may delegate . . . the working out of the details of a policy adopted by the Legislature."). The Commonwealth agency responsible for the Act is the Department of Housing and Community Development ("DHCD"). See 760 CMR §§ 30.00 et seq. Review of the ensuing regulatory scheme confirms that ordinary zoning analysis should be used, and the Act's "regional need" test dispensed with, where application to build low and moderate income housing is made in a municipality meeting the 10% threshold set out in Section 20 of the Act. See 760 CMR §§ 31.01 et seq.

"Computation of Statutory Minima" is addressed in Section 31.04. 760 CMR § 31.04. Section 31.04(1) provides the formula for "calculating whether the city or town's low and moderate income housing units exceed

10% of its total housing units, pursuant to M.G.L. c. 40B, § 20." 760 CMR § 31.04(1). The "General Land Area Minimum" calculation is set out in 760 CMR § 31.04(2).

Section 31.06 addresses burdens of proof. Under the heading of "Board's Case," the effect of the statutory minima is described:

> (5) In any case, the Board may show conclusively that its decision was consistent with local needs by proving that one of the statutory minima described in 760 CMR 31.04 has been satisfied. The Board shall have the burden of proving satisfaction of such statutory minima.

760 CMR § 31.06(5) (emphasis added). This section immediately precedes the provision containing the substantive standard for cases where the statutory minima are not met:

> (6) In the case of denial, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other local concern which supports such denial, and then, that such concern outweighs the regional housing need.

760 CMR § 31.06(6). This latter regulation amounts to a summary of the factors in the first sentence of Section 20, the "regional need" test. These two sections manifest the appropriate reading of the Act: that ordinary zoning laws apply in the ordinary way where the "statutory minima" – including the 10%

threshold – are met. This is further confirmed in Section 31.07, which provides:

> (e) Regional Housing Need/Statutory Minima. Proof that a town has failed to satisfy one of the statutory minima described in 760 CMR 31.04(1) and (2) shall create a presumption that there is a substantial regional housing need which outweighs local concerns.

760 CMR § 31.07(1)(e).

These regulations, taken together, unmistakably illustrate the proper construction of the Act: that ordinary zoning laws are applied in the usual way where a town has met the 10% threshold, and the balancing test described in the first sentence of Section 20 – the regional need test — has no application in such a case.

6. <u>The Isolated Case References Relied on by the Trial Court Do Not Support Use of the "Regional Need" Standard When the Statutory Minima Are Met</u>

In their summary judgment papers on the effect of Amherst's meeting of the 10% threshold, Plaintiffs agreed that the comprehensive permit procedure was available, but argued that the issue "at the heart of the case" was "what standards are to be applied by a local zoning board after the municipality crosses the 10% threshold." A144. Plaintiffs argued that, under the Act, the "zoning override provisions apply only

until the standards set forth in G.L. c. 40B, § 20's definition of 'consistent with local needs' are achieved." A.64.

In its decision on summary judgment, the trial court noted the stipulation among the parties that "at all relevant times, the Town had more than 10% affordable housing within the meaning of the statute." Add. A3; A. 21. The court identified the issue as:

> whether, pursuant to 40B, §§ 20-23 [sic], a local zoning board can bypass a local zoning bylaw and issue a comprehensive permit where low and moderate income housing exists in excess of 10% of the housing units reported in the latest federal decennial census of a municipality.

Add. A3; A. 21.

The court answered this question in the affirmative. Add. A14; A. 32. The court also rejected Plaintiffs' argument that, where the 10% threshold is met, even if the local authority had the authority to issue a comprehensive permit, it could not override local zoning bylaws to do so. Id. On this latter point, the trial court erred.

The trial court considered isolated language from cases as controlling on the issue. The main focus was pages 366 and 367 of the Hanover decision, where the

Court reviewed the 10% threshold of Section 20 of the Act:

> These precise guidelines set forth in § 20 place a ceiling to the extent to which a local board must override local requirements and regulations, including exclusionary zoning laws, where the board decides that the application is reasonable and consistent with local needs. Our construction of [the Act] does not mean that the board must automatically grant comprehensive permits in all cases where the community has not met its minimum housing obligation as it is specifically defined in § 20. The statute merely prevents the board from relying on local requirements or regulations, including applicable zoning bylaws and ordinances which prevent the use of the site for low and moderate income housing, as the reason for the board's denial of the permit or its grant with uneconomic conditions.

Hanover, 363 Mass. at 366 (emphasis in original).

Further:

> However, once the municipality has satisfied the minimum housing obligation, the statute deems local 'requirements and regulations,' including its restrictive zoning ordinances or bylaws, as 'consistent with local needs' and thereby enforceable by the board if it wants to apply them. In this situation, only the board retains the power to override these requirements and regulations in order to grant a comprehensive permit. This result reflects the Legislature's desire to preserve local autonomy once the community has satisfied its minimum obligation.

Hanover, 363 Mass. at 367 (emphasis in original).

The trial court erred in concluding that any of this language required the imposition of the "regional need" test. Undoubtedly, a municipality's zoning

authority has the power to override any local zoning requirements. Indeed, this is its essential function, in the case of requests for variances or special permits. There is no dispute that the local board may override local zoning laws, even when the minima are met; the issue is whether it may use the slanted "regional need" test to do so. Hanover does not address whether the "regional need" test applies where either of the minima is met.

In Zoning Board of Appeals of Greenfield v. Housing Appeals Committee, 15 Mass. App. Ct. 553 (1983), this Court addressed the application of the Act, where the project at issue would take a town over the 10% mark. Reviewing the language of Section 20, second sentence, this Court said:

> These words manifest a legislative intent that local requirements and regulations are conclusively presumed to be "consistent with local needs" only after a municipality has achieved ten percent low or moderate income housing.

Greenfield, 15 Mass. App. Ct. at 561 (emphasis in original). As part of addressing a hypothetical posited by the town in that case, that the Court's reading could require a municipality a few units short

of 10% to approve a project with hundreds of units, the Court stated:

> Compliance with the ten percent test relieves a municipality of the necessity of proving that its restrictions are "consistent with local [low income] housing needs," but the statute does not require that a non-complying city or town issue a permit in every case where the ten percent test has not been met.

15 Mass. App. Ct. at 562, fn.13. As this language suggests, if the 10% minimum is met, local zoning laws are by definition ("conclusively") "consistent with local needs," and so, presumably, may be applied without restriction or reference to affordable housing concerns. This is another indication that the "regional need" test should not be used.

More recently, the Supreme Judicial Court summarized the provisions of the Act in Zoning Board of Appeals of Wellesley v. Ardemore Apartments Lt. Partnership, 436 Mass. 811 (2002). Addressing the minimum criteria under Section 20, the Court said:

> But if a town has already met its share of low and moderate income housing [footnote omitted], the local zoning board may deny an application for a comprehensive permit, and the HAC has no authority to order a local board to issue one.

Ardemore, 436 Mass. at 816.

This language does not directly speak to whether the "regional need" test should apply when statutory

minima are met. However, if the local board "may deny" the comprehensive permit, the reasonable presumption is that the "regional need" test is not being applied. What makes this presumption reasonable is that the "regional need" test is intentionally weighted by the legislature in favor of approval of a permit.

For all of the foregoing reasons, the trial court's affirmation of the grant of the HAP comprehensive permit should be reversed as being based on an error of law, because the wrong standard of review was used. There is no good way to determine how the ZBA would have addressed HAP's application under the correct standard, except that, as discussed <u>infra</u> at pp.24-25, HAP would have faced a much more difficult task. Therefore, remand to the Amherst ZBA is appropriate, for hearing under the appropriate standard.

B. <u>The Racial Quotas Set Forth in the Comprehensive Permit Render the Permit Illegal and Subject to Reversal and Remand.</u>

The Comprehensive Permit exceeds the authority of the ZBA and is illegal because it contains an unconstitutional racial quota. <u>See</u> A. 2031. The Comprehensive Permit plainly states as a central condition that "20% of the units will be set aside for

minority households." Id. at Condition 4. This type of strict racial quota is illegal under both Massachusetts and federal law.

Under Massachusetts law governing Ch. 40B developments, the regulations demonstrating appropriate tenant selection practices require that:

> [t]he program shall establish a fair and reasonable procedure in compliance with fair housing laws for the selection of tenants for affordable rental units and for the selection of homeowners for affordable homeownership units.

760 CMR § 45.04(5). Likewise, section (9) of that same regulation provides:

> [t]here shall be a specific prohibition of discrimination on the basis of race, creed, color, sex, age, handicap, marital status, sexual preference, national origin or any other basis prohibited by law in the leasing or sale of units and in program administration.

760 CMR § 45.04(9).

Certainly, as it contains a bald and unqualified racial quota, the HAP permit runs afoul of these neutral requirements. Moreover, because the federal discrimination laws are deemed incorporated into the Massachusetts regulatory language quoted above, the HAP racial quota plainly violates the Constitution under recent federal precedent.

Under the federal standard, a strict scrutiny analysis remains the rule for any type of racial quota. This heightened standard of constitutional review requires that any race-conscious condition be narrowly drawn so as to have the least effect on innocent members of the majority, that the condition serve some articulated compelling state interest, and that the condition exists for a relatively short duration. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995).

In firmly implementing a strict scrutiny analysis, Supreme Court precedent has nearly eliminated the use of racial quotas in recent years. See Gratz v. Bollinger, 539 U.S. 244, 269-76 (2003) (racial preference applied in college admissions stricken as not narrowly tailored to compelling state interest); City of Richmond v. J.A. Croson Co. 488 U.S. 469, 498-99 (1989) (any type of racial quota must be supported by articulated "factual predicate").

As such, race-conscious public housing ratios favoring minorities, and similarly any provision of services and privileges to minority tenants which were not similarly provided to non-minority tenants, violate the Fourteenth Amendment's equal protection

clause. See Jaimes v. Lucas Metropolitan Housing Authority, 833 F.2d 1203 (6th Cir. 1987) (declaring strict racial quota illegal); Jordan v. Khan, 969 F. Supp. 29 (N.D. Ill. 1997) (stating federal Fair Housing claim where Asian-American landlord denied services to white tenants).

In Jaimes, 833 F.2d at 1206-09, the court confronted a defendant housing authority's imposition of a ratio of three black families to every white family who were to be allowed to live in certain designated public housing projects in an attempt to integrate those projects. Id. Because the housing authority's plan was "race-conscious" as opposed to "colorblind," the court declared it to be constitutionally suspect and to be evaluated under the two-prong "strict scrutiny" test. Id. As a strict racial quota, the provision failed to withstand strict scrutiny and was found unconstitutional. Id. at 1207. For the same reasons, the HAP permit racial quota fails strict scrutiny as not being narrowly tailored to any articulated interest and is illegal.[8]

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[8] The governing regulatory agency, the DHCD, also directs against attempting strict racial quotas in "Guidelines for Housing Programs in Which (footnote continued on next page)

1. The Plaintiffs Have Proper Standing to Challenge the Illegal Racial Quota

The trial court earlier concluded that Plaintiffs lacked standing to attack the permit's racial quota. Add. A35. Plaintiffs, however, are challenging an illegal condition in a permit which they have undisputed standing to challenge. Section 21 of Chapter 40B clearly states that "any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section seventeen of chapter forty A." M.G.L. c. 40B, § 21. Likewise, Section 6.01 of Amherst's "Comprehensive Permit Rules of the Zoning Board of Appeals" ("Comprehensive Permit Rules") gives standing to appeals by "aggrieved persons" and states that "[i]f the Board approves the comprehensive permit, any person aggrieved may appeal within the time period and

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Funding is Provided Through a Non-Governmental Entity", August 8, 2005, at http://www.mass.gov/dhcd/ToolKit/NEFguide.pdf (requiring preference pools and not racial quotas). Likewise, the DHCD April 27, 2006 Memorandum to Local Officials and Housing Colleagues re: "Monitoring of Chapter 40B Developments" further demonstrates that these types of residency conditions are outside of the ZBA's regulatory authority. See DHCD at http://www.mass.gov/dhcd/ToolKit/40B memo.pdf (subsidizing agency, not the ZBA, is responsible for fair housing compliance and ZBA may not impose conditions in comprehensive permit that impinge on these regulatory responsibilities).

to the court provided in M.G.L. c. 40A, § 17." A. 2049.

More generally, challenge to an agency decision is authorized where the "substantial rights of any party may have been prejudiced because the agency decision is (a) in violation of constitutional provisions. . ." M.G.L. c. 30A, § 14(7)(a).

Under Section 21 of the Act, standing requires an injury to property or legal interest, of a type protectable by zoning laws, which is special and different from the concerns of the rest of the community. Standerwick v. Zoning Board of Appeals of Andover, 64 Mass. App. Ct. 337, 340-41 (2005); see also, Planning Board of Hingham v. Hingham Campus, LLC, 438 Mass. 364, 368 (2003).

As abutters, Plaintiffs' standing is proper under Ch. 40B to challenge the HAP permit. Add. A19. They, apart from anyone else, will directly feel the effect of the aesthetic, infra-structural and financial consequences of the project. Their financial interests are at stake. They will live with the Project. This standing reasonably should include the challenge of an illegal condition, such as an illegal

racial quota, within the comprehensive permit they indisputably have standing to challenge.

Plaintiffs have standing under Massachusetts law. There is no need to resort to federal standing criteria. However, even under the federal standards, Plaintiffs have standing to challenge the HAP permit with its illegal quota.

In Gratz, cited by the trial court, the petitioner was held to have standing to challenge a university's racial preferences in admissions even though he was not a present applicant to the school. The Supreme Court held that "to establish standing. . . a party . . . need only demonstrate that it is able and ready [to perform] and a discriminatory policy prevents it from doing so on an equal basis." Gratz, 539 U.S. at 262 (quoting Northeastern Fla. Chapter Associated Gen. Contractors of America v. Jacksonville, 508 U.S. 656, 666 (1993)).

Plaintiffs live in the Orchard Valley neighborhood, in which the Project is proposed to be built. Should they need to move to more affordable housing, for whatever reason (retirement, loss of job, etc.), they would have the unique interest of a neighborhood

resident in living at the Project, and applying there to live.

Based on the foregoing, Plaintiffs' standing to challenge an illegal condition of the HAP comprehensive permit is proper under Massachusetts law, and, if necessary, federal law as well.

2. Reversal and Remand Are Appropriate

A court of its own accord cannot amend the permit by striking out the invalid condition. Board of Appeals of Dedham v. Corporation Tifereth Israel, 7 Mass. App. Ct. 876 (1979) ("[i]t is for the board alone to determine whether a permit should be granted with or without the condition.").

Based on the illegal racial quota condition in the HAP permit, the proper course would be to strike the permit and remand the matter for further proceedings in front of the ZBA. See Lovaco v. Zoning Board of Appeals of Attleboro, 23 Mass. App. Ct. 239, 243 (1986); citing Ploski v. Zoning Bd. Of Appeals of Somerset, 7 Mass. App. Ct. 874, 875 (1979).

The judgment of the Land Court affirming the grant of the HAP comprehensive permit should be reversed and remanded to allow for consideration anew by the ZBA.

VI. CONCLUSION

For all of the foregoing reasons, the Land Court's Decision and Judgment should be REVERSED.

THE PLAINTIFFS, JOHN
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k), Massachusetts Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including without limitation Mass. R. App. Pro. 16(a) (6), 16(e), 16(f), 16(h), 18 and 20.

____

John E. Garber, Esq.

Dated: June 13, 2006

CERTIFICATE OF SERVICE

I, John E. Garber, Esq., hereby certify that on this 13th day of June, 2006, I served two copies of the foregoing brief and one copy of the five-volume Appendix upon counsel of record by mailing, postage prepaid, to

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