COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

GRANDVIEW REALTY, INC Appellant	)	
v.	)	No. 05-11
LEXINGTON ZONING BOARD OF APPEALS, Appellee	)	

RULING ON MOTION TO INTERVENE

Appellant Grandview Realty, Inc. (Grandview) has appealed, pursuant to G.L. c. 40B, § 22, and 760 CMR 30.00 and 31.00, a decision of Appellee Lexington Zoning Board of Appeals denying a comprehensive permit with respect to property in Lexington, Massachusetts.

On November 2, 2006, through counsel, eighteen individuals who own and live in homes that abut or are near the land proposed for development by Grandview (the Abutters), moved to intervene in the appeal pursuant to 760 CMR 30.04.

An administrative agency has broad discretion to grant or deny intervention. *Tofias v. Energy Facilities Siting Board,* 435 Mass. 340, 346, 757 N.E. 2d 1104 (2001). It is not required to allow intervention by petitioners who have not demonstrated a sufficient interest in the proceedings. See *Newton v. Department of Public Utilities,* 339 Mass. 535, 543 n.6, 160 N.E. 2d 108 (1959). The Committee's standards for intervention are set out in 760 CMR 30.04. The presiding officer may allow intervention by "any person showing that he or she may be substantially and specifically affected by the proceedings...."[1] As is clear from the

1. Our standards are similar to and reflect the requirements of the Massachusetts Administrative Procedures Act, G.L. c. 30A, § 10. They are also resemble the standing requirements applied by the courts. Although as an administrative agency, our discretion is presumably sufficiently wide that we could apply our intervention standards more liberally than the courts do standing requirements, we have

commentary in the regulation, "the mere status of an abutter, even immediate abutter, does not confer the right to intervene." 760 CMR 30.04(3). To intervene as a party in the whole or in any portion of the proceedings before the Committee, the Abutters must show that: (1) they will be substantially and specifically affected by the outcome of the proceedings before the Committee and specifically that their harm would be related to the granting of relief from local regulation as requested by the developer in this appeal; (2) their harm is not a common harm shared by all the residents of the town; and (3) no other party will diligently represent those interests. 760 CMR 30.04(2). See *Weston Development Group v. Hopkinton,* No. 00-05, slip op. at 6-7 (Mass. Housing Appeals Committee May 26, 2004). The harm stated by the proposed interveners must not be speculative. See *Tofias,* 435 Mass. 340, 348-49.

The proposed interveners seek to participate to demonstrate that the developer's proposal does not meet the jurisdictional requirements of 760 CMR 31.01 and 31.02 and that the project is inconsistent with local needs. They further allege that "several perceived deficiencies in the site design, including the proposed water and sewer systems, storm water system, drainage calculations, emergency vehicle access, and layout of the road, as it impacts sight distance… directly affect the Abutters' properties and interests" and that "the need to park on the roadway, … given the narrow available right of way, will block access by emergency vehicles to abutting houses." Grandview opposes the motion on the ground that it is untimely, that the Abutter's challenge should be brought in the Superior Court rather than before the

---

always – largely for the sake of consistency and clarity – attempted to apply our standards to be identical to the courts' standing requirements. (The same standing requirements apply to both zoning appeals under G.L. c. 40A and comprehensive permit appeals under G.L. c. 40B. *Bell v. Zoning Board of Appeals of Gloucester,* 429 Mass. 551, 553, 709 N.E. 2d 815 (1999).) Although in court, abutters have the benefit of the rebuttable presumption established under G.L. c. 40A, § 11, this is not available to them under our regulations.

In cases in which abutters do not satisfy our standards for intervention, we will typically allow them to participate in our hearings on a limited basis as "interested persons." See 760 CMR 30.04(4). Although participation by interested persons has been permitted by the Committee's regulations for many years, in the past such persons were generally designated as "*amici*" and allowed to participate fully in the proceedings, with review of their actual interests in the controversy deferred to the final decision in the matter. In amending § 30.04 and other procedural portions of its regulations effective July 2, 2004, the Committee defined more precisely the rights of interveners and interested persons during the early stages of the hearing process. Persons granted status as interveners will participate as full parties, but solely regarding those issues that affect them specifically. Participation by interested persons will be limited further.

Committee, and that the Abutters have failed to meet the requirement that they show they are substantially and specifically affected.

The issues raised by the Abutters consist of general allegations.[2] The only issue the Abutters have raised that approaches sufficient detail to support a claim that they may be substantially and specifically affected relates to the potential threats to their health and safety that allegedly would occur from additional parking on a narrow roadway impeding the access of emergency vehicles. Here, however, they provide little specific factual detail to their allegations. They provide no information regarding the roadway width and layout or the nature, source and amount of additional parking. Furthermore, emergency access is generally a broad, neighborhood-wide issue with which a town typically would concern itself. The Abutters do not state the manner in which the additional parking and emergency access issue affects them specifically, rather than the neighborhood in general. See *Lever Development, LLC v. West Boylston,* No. 04-10, slip op. at 3-4 (Mass. Housing Appeals Committee Ruling on Motion to Intervene Sept. 20, 2004). Also see *Rugged Scott, LLC v. Nantucket,* No. 04-13, slip op. at 3 (Mass. Housing Appeals Committee Ruling on Motion to Intervene Sept. 27, 2004); *Id.,* slip op. at 1-2 (Revised Ruling on Motion to Intervene (Dias) Oct. 14, 2004). Moreover, the Abutters have not demonstrated that the Board will not diligently represent these interests.

Finally, the Abutters' claim that they should be allowed to participate on the question of site control is based on their arguments that they maintain a 50% ownership of the private way accessing the site for the proposed project. Evaluation of this issue is premature. However, assuming, *arguendo*, that the question of whether Grandview's access to that roadway is one of site control and appropriate to consider in this proceeding rather than in the Land Court or another forum, the Abutters' requested participation may fall outside the scope of permitted intervention. "In determining whether to permit a person to intervene, the presiding officer shall consider only those interests and concerns of that person which are germane to the issues of whether the requirement and regulations of the city or town make the proposal uneconomic or whether the proposal is consistent with local needs." 760 CMR 30.04(2). Jurisdictional issues and financial, programmatic and monitoring concerns are within the province of the

---

2. Even if specific facts are alleged, certain concerns such visual impact, noise and light trespass may be dismissed as aesthetic sensitivity insufficient to support intervention in the absence of an allegation that such matters are regulated under a town's zoning bylaw. Also see *Monks v. Zoning Board of Appeals of Plymouth,* 37 Mass. App. Ct. 685, 688, 642 N.E. 2d 314 (1994).

Board or subsidizing agency and therefore beyond the scope of an intervener's participation. See *Rugged Scott,* No. 04-13, slip op. at 3-4 (Ruling Sept. 27, 2004). Also see *Town of Norwell v. Massachusetts Housing Finance Agency,* No. 2003-00778, slip op. at 3 (Plymouth. Super. Ct. July 27, 2004) (MassHousing is not an adjudicatory agency and therefore its decisions are not subject to strictures of G.L. c. 30A).

At the conference with counsel on January 31, 2006, counsel for the Abutters indicated she had expected to present additional detail to support the Abutters' claim for intervention during the evidentiary hearing, as was the custom before the Committee's regulation change. Under our regulations, as revised, the Committee's practice is to rule on motions to intervene before the evidentiary hearing and to require proposed interveners to supply in their motions sufficient factual allegations to support intervention. See *Lever Development,* No. 04-10, slip op. at 2 n.1. Also see *Rugged Scott,* No. 04-13, slip op. at 2-3 n.1 (Ruling Sept. 27, 2004). The Abutters' motion to intervene is denied without prejudice. They may submit a renewed motion to intervene that sets out more specific factual allegations supporting their claim for intervention.

Grandview's motion for summary decision has raised the initial issue to be resolved in this matter -- whether Lexington has met the 10 percent statutory minimum as provided in 760 CMR 31.04 and 31.06(5). Should the Committee determine that Lexington has met the statutory minimum, this defense to the developer's appeal would be dispositive. If the Committee determines that Lexington has not met the 10% statutory minimum, the Abutters may file a renewed motion to intervene, no later than 30 days after the Committee's ruling on the motion for summary decision. Any renewed motion to intervene shall include specific detailed factual allegations demonstrating: (1) the manner in which the Abutters contend they are likely to be substantially and specifically affected by the proposal before the Committee; (2) that the alleged effects are not speculative; and (3) that no other party can adequately represent their interests. Consistent with the Committee's practice, these allegations may be pleaded upon information and belief and need not be in affidavit form.

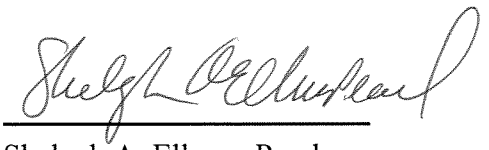
In filing a renewed motion to intervene, the Abutters shall be mindful of the Committee's rulings that any participation granted would be strictly limited to those matters by which they are substantially and specifically affected as they specifically allege, and would not include matters of concern to the residents of the neighborhood generally or matters of concern

to the town generally, which usually include jurisdictional issues. Nor would any participation include financial, programmatic, or monitoring concerns, which are within the province of the Board or the subsidizing agency. See *Rugged Scott,* No. 04-13, slip op. at 3-4 (Ruling Sept. 27, 2004); *Id.,* slip op. at 2 (Ruling Oct. 14, 2004); *Lever Development,* No. 04-10, slip op. at 3. Any renewed claim that the Abutters are entitled to participate on the question of site control must address the applicability of the issue to 760 CMR 30.04(2).

For the present, the Abutters are granted leave to participate as Interested Persons in accordance with 760 CMR 30.04(4). All papers filed with the Committee in this matter are required to be served on them as Interested Persons pursuant to 760 CMR 30.04(4), 30.08 and 30.09(2). Unless notice is given to the Committee otherwise, these papers shall be mailed to office of their counsel, Emily Sample, Esq. See Standing Order 05-01 (copy attached). As Interested Persons, the Abutters may attend, but may not participate in, all hearings and conferences. Unless otherwise ordered by the Presiding Officer, their counsel, Emily Sample, Esq., is granted leave to participate in conferences and teleconferences scheduled in this matter, but may not submit evidence on any issue. The Interested Persons may file a legal memorandum on the issues raised by the motion for summary decision, on the timetable set for the Board's submissions on that motion. In addition, if this matter proceeds to a hearing on the merits, they are permitted, through counsel, to make an opening statement and to file a post-hearing brief.

So Ordered.

Housing Appeals Committee



Date: February 10, 2006

Shelagh A. Ellman-Pearl
Presiding Officer

COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

STANDING ORDER NO. 05-01

SERVICE UPON PROPOSED INTERVENERS AND INTERESTED PERSONS

Applicable to All Appeals Filed with the Committee after April 1, 2005, and thereafter.

Effective April 1, 2005, it is hereby ORDERED that:

Upon filing of a motion to intervene or a request to participate as an interested person pursuant to 760 CMR 30.34, and prior to the presiding officer's ruling on such motion or request, the proposed intervener or proposed interested person shall be entitled to be served with all documents pursuant to 760 CMR 30.08 as if such motion or request had been granted. Proposed interveners shall also be entitled to participate in hearing sessions and teleconferences. Such persons do not have full rights of parties, and thus, their consent is not required for assented-to motions pursuant to 760 CMR 30.07(1)(b)(2), joint motions, stipulations, or similar matters.

Adopted April 1, 2005
Effective April 1, 2005.

Housing Appeals Committee

Werner Lohe
Chairman

LPc\1s