COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

In the Matter of

HANOVER ZONING BOARD OF APPEALS

and

HANOVER WOODS, LLC

No. 10-02

INTERLOCUTORY DECISION
REGARDING SAFE HARBOR

June 21, 2010

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I. INTRODUCTION

This is an interlocutory appeal pursuant to 760 CMR 56.03(8)(c) challenging the assertion of a "safe harbor" under the Comprehensive Permit Law, G.L. c. 40B, §§ 20-23. On October 22, 2009, the developer, Hanover Woods, LLC, filed an application for a comprehensive permit Board to build 152 units of affordable mixed-income condominium housing off Woodland Avenue in Hanover. After the application was filed, the Board notified the developer that the town had achieved the safe harbor available to municipalities that obtain certification of compliance with an approved Housing Production Plan pursuant to 760 CMR 56.03(4)(f). The developer, in turn, challenged that assertion by filing an appeal with DHCD. DHCD upheld the Board's position, although it explicitly declined to consider the developer's claims that the filing fee required by the Board was excessive, instead, leaving that to this Committee. See Exh 19. The developer appealed to this Committee, which, pursuant to its regulations, has conducted an expedited hearing. Like all of the Committee's proceedings that hearing was *de novo*. G.L. c. 40B, § 22; also see *In the Matter of Bourne Zoning Board of*

Appeals and Chase Developers, Inc., No. 08-11 (Mass. Housing Appeals Committee Jun. 8, 2009). Pursuant to 760 CMR 56.03(8)(a), the Board has "the burden of proving satisfaction of the grounds for asserting [the safe harbor]."

II. FACTS

The developer, Hanover Woods, LLC, proposes to build 152 townhouse condominium units on a 24-acre parcel of land; 96 of the units will be in four three-story, 24-unit buildings, and the remainder in two-, three-, and four-unit townhouse clusters. Exh. 14, sheet 4; 16. The proposal also includes 150,000 square feet of commercial space. Tr. 101.

On October 1, 2009, prior to Hanover Woods' application, the Board received an application for comprehensive permit project called Barstow Village, a 66-unit senior housing development undertaken in cooperation with the Hanover Housing Authority and a non-profit developer. Exh. 11; Tr. 89-90; Exh. 12, p. 3; cf. Exh. 12, p. 5. The Board waived the filing fee with regard to this application because it was a proposal initiated by the town. Tr. 89, 97; also see Exh. 11; also see n.3, below.

On October 22, 2009, the developer, Hanover Woods, submitted its 152-unit comprehensive permit application to the Board. Stipulated,[1] also see Exh. 1. The application included a check payable to the Town of Hanover in the amount of $8,500. Stipulated, also see Exh. 3. The developer took the position that the filing fee required by the Board was unreasonably high, and that a proper fee would be the Hanover Planning Board's special permit fee of $500 and site plan review fee of $2,000 plus a deposit of $6,000 toward consultant review fees which might be assessed. Exh. 3.

On October 29, 2009, the Board issued a comprehensive permit for Bartow Village, a 66-unit affordable housing development, which brought the town into compliance with its Housing Production Plan pursuant to 760 CMR 56.03(4)(f). Exh. 6, 12, 19.

By letter of November 3, 2009, the Board informed the Applicant that its application was incomplete. Stipulated, also see Exh. 5. The basis for the Board's

1. The parties stipulated to a number of facts in a joint Conference of Counsel Statement filed with the Committee on March 25, 2010.

position was (and continues to be) that the application was not accompanied by a filing fee of $250 per housing unit, or a total of $38,000. Exh. 5. The Board indicated that it was not accepting the application, and that only when the developer paid the full fee would a hearing be scheduled. Exh. 5.

On December 1, 2009, the state Department of Housing and Community Development (DHCD) certified that Hanover was in compliance, effective October 29, 2009, with its Housing Production Plan pursuant to 760 CMR 56.03(4)(f). Stipulated, also see Exh. 19.[2]

By letter dated December 3, 2009, the Board informed Hanover Woods of that certification. Stipulated, also see Exh. 6. It noted that this certification represented a safe harbor for the town of Hanover: that if the developer should choose to complete its application, any decision by the Board would—as a matter of law—be consistent with local needs, that is, not subject to appeal, Exh. 6; see 760 CMR 56.03(1)(b), 56.03(4)(f), 56.07(3)(a).

Also by letter of December 3, 2009, the developer responded to the Board's November 3 letter; so that the local hearing could move forward, it perfected its application by paying the Board an additional $29,500, which, together with the amount paid previously, constituted the full filing fee, and preserved its right to challenge the filing fee. Exh. 7.

III. DISCUSSION

A. The filing fee assessed by the Board is reasonable.

As noted above, the developer paid a filing fee totaling $2,500 with its application, challenging the fee required by the Board of $250 per unit, or in this case, $38,000. Exh. 4.

The developer argues that multi-family housing permitted under the Hanover Zoning Bylaw, specifically Planned Residential Developments for Seniors (PRDS) and Village Planned Unit Developments (VPUD), require only special permit fees and site plan review fees, for a total of $2,500, and that review of such developments may be as

2. Exhibit 19, a February 2, 2010 letter form DHCD, indicates that its notification letter was issued on November 24, 2009, not December 1, as stipulated. The exact date is immaterial.

complicated and costly as review of a comprehensive permit application.[3] Developer's Brief, p. 10. The Board responds that the town of Hanover has set the filing fee for subdivision applications at $1,000 per unit. Exh. 2.

Our regulations permit local filing fees "consistent with subdivision, cluster zoning, and other fees reasonably assessed by the municipality."[4] 760 CMR 56.05(2). While the comprehensive permit fee is much higher than the PRDS and VPUD fees, it is not only consistent with, but actually only 25% of the amount required for a subdivision application. Although the current proposal in some respects is more similar to a planned unit development than to a subdivision, we do not interpret our regulation to require comparison of comprehensive permit fees to those of the most similar type of housing found in the town's bylaws. To do so would result in the anomalous conclusion that for two architecturally indistinguishable developments, a higher fee would be acceptable for the one in which the developer chose to sell the units as single-family homes on individual lots rather than as condominium units. We conclude that the Board has established with regard to the current proposal that the filing fee of $38,000 is consistent with subdivision filing fees and therefore reasonable.

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3. The developer also argues that the filing fee charge in this case is unreasonable in comparison to the Barstow Village development, for which the entire fee was waived. Board's Brief, p. 8. That proposal, however, for 100% affordable senior housing, was undertaken by a private development company in partnership with the Hanover Housing Authority and a non-profit entity, the Planning Office for Urban Affairs of the Archdiocese of Boston. Exh. 11; 13, p. 2, 7. More significant, the Board' s policy is to require no filing fee for publically initiated proposals. Tr. 63-64. This practice is consistent with that of this Committee, which requires a filing fees from non-profit organizations that are only one third those assessed to for-profit developers, and no fee at all from public agencies See Standing Order No. 08-01 (Mass. Housing Appeals Committee Feb. 25, 2008); 760 CMR 56.06(4)(f).

4. The developer draws our attention to the case of *Lever Development, LLC v. West Boylston*, No. 04-10, slip op. at 38-39 (Mass. Housing Appeals Committee Dec. 10, 2007). That case, in which the board of appeals was ordered to refund a filing fee, has little precedential value since in it the Board presented no argument in defense of its fee. Also see *Messenger St. Plainville Senior Housing Dev. Partnership v. Plainville*, No. 99-02 (Mass. Housing Appeals Committee Oct. 18, 1999) (rejecting developer's claim that $40,000 water connection fee constituted unequal application of local requirements under G.L. c. 40B, § 20).

B. The Board may not invoke safe harbor protections since the developer filed its comprehensive permit application on October 22, 2009.

The town of Hanover was certified as in compliance with its approved Housing Production Plan, effective October 29, 2009. See above; Stipulated; also see Exh. 19. But for the Board to invoke safe harbor protections with regard to the developer's application, that compliance must have been established "as of the date of the Project's application." 760 CMR 56.03(1). Thus, the question is whether or not the developer's October 22 submission to the Board of its application without the full filing fee constitutes an application for the purposes of § 56.03(1).[5] We agree with the developer that its October 22 submission constitutes an application for such purposes.

Under our regulations and precedents, there is flexibility with regard to the contents of a local comprehensive permit application. Section 56.05(2) states, "Normally [certain designated items] will constitute a complete description. Failure to submit a particular item shall not necessarily invalidate an application." Also see, e.g., *Southbridge Housing Authority v. Southbridge*, No. 91-09, slip op. at 8 (Mass. Housing Appeals Committee Feb. 16, 1994) (application requirements "to be applied in a common-sense rather than an overly technical manner"). The same section of our regulations permits Boards to require filing fees. Although such a fee is in no sense optional, the regulatory language implies that where there is an honest mistake or good

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5. Our regulations do not specifically provide a mechanism for challenging a filing fees or review views assessed under 760 CMR 56.05(5). The present case arises under a unique set of circumstances, but even under more typical circumstances, our regulations provide only a little guidance. They do indicate that as a matter of procedure, the sufficiency of an application, which includes the filing fee, may be raised by motion on appeal to this Committee. 760 CMR 56.06(5)(b)(3). But the regulations are silent with regard to the mechanism for putting the issue before the Committee. One approach is for the developer to initially pay the full fee, or at least—as here—pay a partial fee at first, and then pay the remainder under protest if the Board refuses to proceed with the hearing. Whether the Board then grants or denies the comprehensive permit, this Committee would entertain an appeal and resolve the fee dispute. Alternatively, the developer may choose to file its application without the fee, and when the Board denies the application as incomplete, the developer may appeal to this Committee. The Committee would entertain such an appeal even if the Board declined to take any action on the application, but instead took the position that no application had been filed. As noted above, the fee dispute would be heard pursuant to 760 CMR 56.06(5)(b)(3), and no matter what the outcome, the matter would be remanded to the Board for further proceedings on the merits. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 17-18 (Mass. Housing Appeals Committee Jun. 25, 1992).

faith disagreement—if the filing fee is inadvertently omitted, submitted in an incorrect amount, or, as here, challenged by the developer—the application is not invalid. We conclude that on the facts presented here, the developer's failure to pay the full filing fee with the application did not invalidate the application.[6]

Further, we believe that our interpretation of our regulations is consistent with court precedents in similar areas of land-use law. For instance, in a complicated case involving both substantive and "easily corrected" deficiencies in an application for a building permit, the Appeals Court has recently noted that "failure to pay the full permit fee before publication of notice... is a minor detail that is irrelevant to determining when [the applicant's] 'unconditional' right to the building permit arose." *Albahari v. Zoning Board of Appeals of Brewster*, 76 Mass. App. Ct. 245, 252, n.6 (2010). This is consistent with that court's longstanding view that filing requirements should not be applied in an overly technical manner. See *Cullen v. Planning Board of Hadley*, 4 Mass. App. Ct. 842 (1976) (statutory purpose permits hand-delivery of subdivision application to town clerk's office even though not provided for in G.L. c. 41, ¶ 81O). Also see *Bernstein v. Town of Stockbridge Planning Board*, 14 LCR 266 (Land Court No. 288795, May 2, 2006) (definitive subdivision plan constructively approved where technical errors on the application form and missing information do not render the application incomplete); cf. *Peterson v. Cargill*, 14 LCR 403, 407 (Land Court No. 267044 July 17, 2006) (time period for issuing variance decision had not expired since application was not complete until building permit was formally denied); *Sackler v. Gore,* 16 LCR 820, 822-824 (Land Court No. 296356, Dec. 23, 2008) ("'constructive approval' clock... was never triggered" because subdivision plan application was not complete where the plan had not been filed, reviewed, or approved by the board of health).

Thus, we conclude that the date of the developer's application was October 22, 2009, and since Hanover was not certified as in compliance with its Housing Production

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6. That we conclude that an application was validly filed does not mean that the Board was required to convene a full hearing and issue a substantive decision; it might well have choose to deny an application filed with only a partial fee. See *Stanley Realty Holdings, LLC v. Watertown Zoning Board of Appeals*, 12 LCR 301 (Land Court No. 293271, Jul. 21, 2004); also see n. 6, *supra*.

Plan until October 29, the Board may not assert the safe harbor provisions of 760 CMR 56.03(1)(b).

IV. CONCLUSION

For the reasons stated above, the Board may not avail it itself of the safe harbor presumption resulting from having been certified in compliance with an approved Housing Production Plan. See 760 CMR 56.03(1)(b), 56.03(4)(f), 56.07(3)(a).

This matter is hereby remanded to the Board for further proceedings in accordance with 760 CMR 56.5. See 760 CMR 56.03(8)(c).

Housing Appeals Committee

Date: June 21, 2010

Werner Lohe, Chairman

Theodore M. Hess-Mahan

James G. Stockard, Jr.

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