

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

VALLEY COMMUNITY DEVELOPMENT CORPORATION

v.

HADLEY ZONING BOARD OF APPEALS

No. 2023-03

SUMMARY DECISION

November 22, 2023

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safe harbor. The Board reconvened the hearing on March 20, 2023, heard testimony from Valley and thereafter deliberated and voted to close the hearing and deny the comprehensive permit application. It issued a written decision denying a comprehensive permit that was filed with the Town Clerk on April 5, 2023. Exh. 2; Baker Affidavit, ¶ 20.

Valley appealed the Board's decision to the Committee on April 25, 2023. The initial conference of counsel was postponed twice to allow the parties to address litigation strategy and possible resolution of this matter. Thereafter, on June 6, 2023, an initial conference of counsel was held with counsel for the developer and the Board. At that conference, Board counsel stated his intent to file a motion to dismiss asserting the 10 percent housing unit minimum statutory safe harbor. G.L. c. 40B, § 20. By letter dated June 14, 2023, counsel for the Board reported that the Town's Select Board had instructed the Board to no longer defend its decision. At a further conference held on July 10, 2023, he represented to the Committee that the Hadley Select Board is not authorizing further defense of this appeal by the Board or further payment for defense of the appeal. He agreed to remain as counsel of record, but reported he would not submit further filings in this case on the Board's behalf, and he would only participate in future conferences or hearings at the presiding officer's order.

Valley filed a motion for summary decision on September 1, 2023. In support of its motion, Valley submitted nine exhibits, including, among others, the project site plans, affidavits of Laura Baker, Valley's Real Estate Development Director, and Thomas Chalmers, AIA, the project's architect, and transcripts of excerpts of the video recordings of the Board's hearings on the application. As Board counsel had advised, the Board filed no opposition to the motion by the deadline of October 1, 2023, or indeed, at any time thereafter. *See* 760 CMR 56.06(5)(d).

II. UNDISPUTED FACTS

The following undisputed facts are based upon the exhibits submitted with the motion for summary decision. The affidavit of Ms. Baker described the project and the process to obtain municipal approval for the application. Ms. Baker stated that the former Econo Lodge, located at 329 Russell Street, Hadley (state highway Route 9), is to be repurposed as a 40B affordable housing project. Affidavit of Laura Baker, ¶ 10. She stated further, that:

That section of [Route 9] is already densely developed, and the hotel is located immediately in front of the Mountain Farms Mall and next to the Hampshire Mall. These malls are home to several "big box" stores, including Walmart, Whole

Foods, L.L. Bean, Barnes & Noble and Panera Bakery. Behind the malls is an 11 mile multi-use rail trail that runs from Amherst, through Hadley, to Northampton and beyond. A bus stop is located across the street from the Econo Lodge and a second one on the same side of the street, about 200 feet away. The bus route along this portion of Route 9 is the most heavily travelled in our region. Other businesses located across the street include an Aldi grocery store, the Stables café, a Salvation Army store, and a veterinarian practice. The proximity of these businesses and amenities is desirable since many of the individuals we serve will not own automobiles. There are also hundreds of low entry jobs available within walking distance of the Econo Lodge.

Id. The property is located in an industrial zoning district in which multifamily dwellings are not permitted. Ms. Baker also noted that under the zoning bylaw, general multifamily dwellings are not permitted in any district, with the exception of two-family homes and senior housing. She stated that the only zoning waiver Valley would need to request related to the prohibition on multifamily dwellings in the industrial district. *Id.*, ¶ 12.

The proposed project would convert the existing 63 hotel rooms into 51 studio and one-bedroom apartments, with one designated for fulltime resident staff to provide supportive services. It would decrease the occupancy density of the property from 126 to 63 maximum occupants, which Ms. Baker stated would “translate[] into fewer cars, less traffic, and less strain on public utilities.” *Id.*, ¶ 13. Since the property is served by existing utilities, no new infrastructure is required. Ms. Baker reported that Valley engaged a civil engineering firm, Stonefield Engineering and Design, LLC, to analyze utility and traffic impacts of Valley’s proposed redevelopment of the property. She reported that Stonefield concluded that there were no concerns regarding the adequacy of the existing utilities (sanitary sewer, water, stormwater, or electricity) serving the site. *Id.*, ¶ 14; *See* Exh. 7.

In planning the project, Ms. Baker consulted with various boards in Hadley, which decided to support the project. The Hadley Select Board voted to support the project and notified DHCD of this in a letter of support regarding Valley’s application for a determination of project eligibility. Ms. Baker stated the project would not have been pursued nor would the property have been acquired without the Select Board’s support. *Id.*, ¶ 15. The Hadley Planning Board recommended that Valley apply to the Board for a “friendly” comprehensive permit, and it made recommendations to the Board for conditions to consider in such a permit. Ms. Baker noted the Hadley Committee on Housing and Economic Development, the Hadley Council on Aging and the Committee on Diversity, Equity and Inclusion supported the

project. She also stated the Council on Aging was interested in the potential for affordable housing units for Hadley seniors, a population the Hadley Housing Production Plan identified as being in need of new affordable housing units. *Id.*, ¶ 16.

Ms. Baker testified that she met with the Hadley chief of police, fire chief, building inspector and director of the highway division regarding any safety concerns, and testified that “[n]one of these town officials expressed any significant safety concerns.” She noted that the chair of the Board and a representative of the planning board were present and neither raised any safety or local concerns. *Id.*, ¶ 17. She also noted that she and the fire chief discussed education and outreach measures to reduce emergency calls, stating Valley is open to that type of engagement. *Id.*

Mr. Chalmers, a senior architect with Austin Design Cooperative, is experienced with design, project management, construction oversight, building and zoning code review, and all aspects of building construction and design. Affidavit of Thomas Chalmers, ¶ 1. He was engaged by Valley to assist with this project. He stated that since the Econo Lodge was previously built as a hotel, little structural change is required to convert the building to permanent supportive housing, stating that the occupancy use will change from R1 to R2 use, but these have the same hazard index with regard to life safety issues and no new building systems such as HVAC, electrical or plumbing are required. The property is already equipped with sprinklers and a fire alarm system and meets federal and state requirements for accessibility. He noted that in December 2022, the hotel was leased to provide overflow housing for students at the University of Massachusetts, Amherst, and the town granted a certificate of occupancy for this use without major changes to the property. *Id.*, ¶¶ 5-6, 8.

The principal interior work required for the repurposing of the building for affordable housing includes filling in an indoor pool; combining 24 rooms into 12 one-bedroom apartments, including adding kitchenettes; adding kitchenettes to other apartments to create studio apartments; modifications to the fire alarm system and sprinkler system if required; upgrading emergency lighting and signage; and upgrading the laundry room. *Id.*, ¶¶ 7, 9.

Mr. Chalmers reviewed all federal and state codes and regulations applicable to the project. He testified that in his professional opinion the project, as completed, will comply with, or exceed all the applicable federal and state codes he identified, and that the project

“will comply with applicable federal or state statutes or regulations as to matters of health, safety, the environment, design, open space, or other matters of local concern.” *Id.*, ¶¶ 10, 11.

Valley applied for and received a project eligibility letter issued by DHCD on January 12, 2023. Baker Affidavit, ¶ 18; Exh. 1.

III. SUMMARY DECISION

Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee if “the record before the Committee, together with the affidavits (if any) shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law.” 760 CMR 56.06(5)(d). *See Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992); *Delphic Assocs., LLC v. Duxbury*, No. 2003-08, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 14, 2010); *Grandview Realty, Inc. v. Lexington*, No. 2005-11, slip op. at 4 (Mass. Housing Appeals Comm. July 10, 2006).

Valley seeks summary decision regarding its obligations as the appellant to: 1) to meet the project eligibility requirements of 760 CMR 56.04(1), 760 CMR 56.07(2)(a)1; and 2) to establish “a *prima facie* case by proving, with respect to only those aspects of the Project which are in dispute ... that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern.” 760 CMR 56.07(2)(a)2. It also seeks summary decision on the grounds that the Board has no valid health, safety, environmental, design, open space, or other local concern regarding the project. *See id.*; Valley memorandum, pp. 1-2.

A. Board’s Concession of Material Facts in Valley’s Motion

The Board failed to file any response to the motion for summary decision. As the Board’s counsel stated would occur, not only did the Board not oppose or otherwise respond to the motion, but it has also submitted no evidence for consideration of the motion. Consistent with the representations of the Board’s counsel at the July 10, 2023, conference, this failure to respond constitutes an admission of all material facts asserted in the motion for summary decision. *See, e.g., U.S. Bank, National Assoc. v. Bianco*, 97 Mass. App. Ct. 1109 (2020) (Rule 1:28 Decision) (effect of defendant’s failure to controvert appellant’s statement of undisputed material facts is that facts are deemed admitted); *Warren Place, LLC v. Quincy*, No. 2017-10, slip op. at 5 (Mass. Housing Appeals Comm. Aug. 17, 2018) (board elected not to submit

evidence or oppose summary decision motion because “it had no good faith basis to do so”); *Lexington Woods, LLC v. Waltham*, No. 2002-36, slip op. at 7 (Mass. Housing Appeals Comm. Feb. 1, 2005) (board conceded issue by failing to introduce evidence); *Hilltop Preserve LTD Partnership v. Walpole*, No. 2000-11, slip op. at 2 n.1 (Mass. Housing Appeals Comm. Apr. 10, 2002) (board conceded issue not briefed); *see also Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85-86 (1995); *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 3 (Mass. Housing Appeals Comm. June 21, 2010) (board waived issue not briefed), citing *An-Co, Inc. v. Haverhill*, No. 1990-11, slip op. at 19 (Mass. Housing Appeals Comm. June 28, 1994) and *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

Even though the motion was unopposed, we review Valley’s submission to determine whether the undisputed facts in the record on summary decision support a decision in its favor. *See U.S. Bank, National Assoc.*, 97 Mass. App. Ct. 1109; *Johnson v. Zoning Bd. of Appeals of Worcester*, 96 Mass. App. Ct. 1109 (2019) (Rule 1:28 Decision) (“even when a motion for summary judgment is unopposed, the moving party still must demonstrate that it is entitled to judgment as a matter of law”), citing *Stop & Shop Supermarket Co. v. Loomer*, 65 Mass. App. Ct. 169, 171-172 (2005).

B. Appellant’s Required Showing—760 CMR 56.07(2)(a)1 and 2(a)2

This is an appeal of a denial of a comprehensive permit. With its motion for summary decision, Valley submitted a copy of the January 12, 2023, letter from DHCD advising the developer that its application for project eligibility determination was approved. Exh. 1. Therefore, Valley has complied with the requirement of 760 CMR 56.07(2)(a)1 that it meet the project eligibility requirements of 760 CMR 56.04(1). The project eligibility letter included in the record provides conclusive proof of these requirements. 760 CMR 56.04(6).

With respect to the prima facie case, Valley submitted the project plans as well as testimony of the project’s architect, Mr. Chalmers, that he had reviewed all applicable federal and state codes and regulations, and that the project, as completed, will comply with, or exceed all of these federal and state codes. He further stated that the project “will comply with applicable federal or state statutes or regulations as to matters of health, safety, the environment, design, open space, or other matters of local concern. Chalmers Affidavit, ¶¶ 10, 11.

Accordingly, with the undisputed facts it has submitted, Valley has satisfied the provisions of 760 CMR 56.07(2)(a)2 to establish “a *prima facie* case by proving, with respect to only those aspects of the Project which are in dispute ... that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern.” *104 Stony Brook, LLC v. Weston*, No. 2017-14, slip op. at 13-17 (Mass. Housing Appeals Comm. June 22, 2023) (longstanding requirement of minimum showing serves the purpose of having developer provide sufficient information to allow Board to make local concerns case), and cases cited.

As discussed below, we find that Valley is entitled to summary decision that it met the requirements assigned to it as the appellant in this matter under 760 CMR 56.07(2)(a)1 and (2)(a)2.

C. Board’s Required Showing

Valley argues that since it has demonstrated its *prima facie* case, the focus of the inquiry then turns to whether the Board’s action is consistent with local needs. Valley also seeks a summary decision determining that the Board’s decision is not consistent with local needs. G.L. c. 40B, §20.² In the case of a denial, as exists here, if the Committee finds that the Board’s decision is unreasonable and not consistent with local needs, “it shall vacate such decision and shall direct the board to issue a comprehensive permit or approval to the applicant.” G.L. c. 40B, § 23. The comprehensive permit regulations specify that “[i]n 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 Local Concern outweighs the Housing Need.” 760 CMR 56.07(2)(b)2.

Valley argues that *104 Stony Brook, supra*, No. 2017-14, controls here. Valley memorandum, p. 10. In that decision, we stated: “If the Board has not articulated the local concern, nor shown its relationship to a specific applicable local requirement, nor demonstrated the relevant harm [from] the proposed development, the Board has failed to

² “‘Consistent with local needs’, 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 or safety of the occupants of the proposed housing or of 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.” G.L. c. 40B, § 20.

demonstrate a valid local concern applicable to the project, much less that such a concern outweighs the need for affordable housing.” *Id.* at 17. Accordingly, where no evidence with respect to this burden was forthcoming from the Board, it has failed to meet the burden required by 760 CMR 56.07(2)(b)2.

Valley itself submitted evidence that in meeting with Hadley representatives, the Town fire chief, police chief, building inspector and director of the highway division, all agreed there were no significant safety concerns arising from the proposed development, and the Board chairman and a representative of the planning board raised no safety or other local concerns. Baker Affidavit, ¶ 17. The developer also points to transcript excerpts from the Board’s hearing on the application in which the Board chairman noted that the plan was not a bad one and seemed “very well thought out.” Exh. 9, pp. 4-5. He nevertheless suggested at that hearing that the permit should be denied because Hadley has prohibited multifamily housing for over 60 years, the Town has never altered the zoning bylaw, and a change of this sort should be decided by town meeting. *Id.*

We agree with Valley that the position that a bylaw should be modified in town meeting, rather than waived to grant a comprehensive permit, is inconsistent with the purpose of Chapter 40B to provide a path to develop affordable housing in light of the history of exclusionary zoning that has prevented such development. *See* Valley memorandum, pp. 11-12. The developer correctly noted that “[i]n *Board of Appeals of Hanover v. Housing Appeals Comm.*, [363 Mass. 339, 347-54 (1973)], the Supreme Judicial Court undertook an exhaustive analysis of the legislative history of G.L. c. 40B (prior to codification referred to c. 774) and concluded that ‘the Legislature’s intent in passing c. 774 was to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing.’ *Id.* at 353.” Valley memorandum, p. 11. Zoning prohibitions on multifamily housing are the type of zoning barrier Chapter 40B was intended to address through waivers by zoning boards.

Finally, with respect to the question of whether the Board had achieved the statutory minimum, the subject on which it had suggested it might file a motion to dismiss, Valley argues that “[t]o the extent that the Board seeks to rely on achievement of the statutory *minima* that its subsidized housing inventory of eligible housing units exceeds 10% of its total housing units as reported in the most recent federal decennial census for the Town of Hadley, 760

CMR 56.03, the Board has the burden of proof.” Valley memorandum, p. 11, n.3, citing 760 CMR 56.03(8), 56.07(2)(b)1. As shown above, the Board elected not to introduce this theory in opposition to summary decision, and therefore has not met that burden.³

Although the Board has the burden of proof to show that local concerns that outweigh the need for affordable housing support denial of the comprehensive permit, it has not submitted any evidence to establish a valid local concern, much less one that outweighs the need for affordable housing. Rather, the evidence submitted by Valley demonstrates that the redevelopment of the Econo Lodge for an affordable housing development does not raise valid local concerns and is therefore inconsistent with local needs. Nor has the Board submitted a defense regarding the statutory minima. *See* G.L. c.40B, § 20. It therefore has not shown that its decision was consistent with local needs. *See 104 Stony Brook, supra*, No. 2017-14, slip op. at 17; *Sandwich Housing Partners, II v. Sandwich*, No. 2007-02, slip op. at 5, 7 (Mass. Housing Appeals Comm. Summary Decision June 13, 2011) (granting developer's motion for summary decision where board failed to allege any local concern that might outweigh regional need for affordable housing).

Based on the undisputed facts submitted in the record of this motion for summary decision, and the discussion above, the Board’s decision to deny the comprehensive permit application is unreasonable and inconsistent with local needs. Therefore, Valley is entitled to summary decision as a matter of law.

IV. CONCLUSION AND ORDER

Accordingly, the Housing Appeals Committee concludes that the decision of the Hadley Zoning Board of Appeals is unreasonable and inconsistent with local needs. Therefore, summary decision is granted in favor of Valley Community Development Corporation. The decision of the Board is vacated, and the Board is directed to issue a comprehensive permit that conforms to the application of Valley Community Development Corporation and as provided in the text of this decision and subject to the following conditions. 760 CMR 56.07(5)(a)1.

1. The comprehensive permit shall conform to the application submitted to the Board, as modified by the following conditions.

³ We note that this matter presents the unusual circumstance in which a party has deliberately decided not to oppose a motion for summary decision, or otherwise defend against the appeal before the Committee, and it should reasonably expect the resulting outcome of this motion.

- a. The development shall be constructed as shown on plans provided by Austin Design Cooperative for Valley Community Development Corporation with regard to the property at 329 Russell Street, Hadley, Massachusetts, now occupied by the Econo Lodge. *See Exhs. 3, 4.*
- b. The Board shall not include new, additional conditions.
- c. The developer shall comply with all applicable non-waived local requirements and regulations in effect on the date of Valley's submission of its comprehensive permit application to the Board, consistent with this decision pursuant to 760 CMR 56.02: *Local Requirements and Regulations.*
- d. The developer shall submit final construction plans regarding any buildings, roadways, stormwater management systems, and other infrastructure to Hadley town entities, staff, or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).
- e. Any specific reference to the submission of materials to Hadley officials or offices for their review or approval shall mean submission to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit. Such officials may consult with other officials or offices with relevant expertise as they deem necessary or appropriate.
- f. All Hadley town staff, officials, and boards shall promptly take whatever steps are necessary to permit construction of the proposed housing in conformity with the standard permitting practices applied to unsubsidized housing in Hadley. Submission of plans and materials to the Town for review or approval shall be to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit, such determination shall be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects, and approval shall not

to be unreasonably withheld. *See* 760 CMR 56.07(6).

2. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.

3. Because the Housing Appeals Committee has resolved only those issues germane to G.L. c. 40B, §§ 20-23, that were placed before it in this motion, the comprehensive permit shall be further subject to the following conditions:

- a. Construction in all particulars shall be in accordance with all applicable local requirements and regulations in effect on the date of Valley's submission of its comprehensive permit application to the Board, pursuant to 760 CMR 56.02: *Local Requirements and Regulations*, except those for specified for waiver in the developer's application to the Board, waived in prior proceedings in this case or waived by this decision.
- b. The subsidizing agency or project administrator may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by this decision.
- c. If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.
- d. No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.
- e. The Board and all other Hadley town staff, officials, and boards shall take whatever steps are necessary to ensure that a building permit and other permits are issued to Valley Community Development Corporation without undue delay, upon presentation of construction plans, pursuant to

760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

- f. Construction, and marketing in all particulars shall be in accordance with all applicable state and federal requirements, including without limitation, fair housing requirements.
- g. This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and guidelines issued pursuant thereto by the Executive Office of Housing and Livable Communities.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

HOUSING APPEALS COMMITTEE



November 22, 2023

S



Rosemary Connelly Smedile



James G. Stockard, Jr.