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H O U S I N G A P P E A L S C O M M I T T E E

SLV SCHOOL STREET, LLC, Appellant, v. MANCHESTER-BY-THE-SEA ZONING BOARD OF APPEALS, Appellee.	)	No. 2022-14

RULING ON MANCHESTER ESSEX CONSERVATION TRUST'S MOTION TO INTERVENE

I. Introduction

SLV School Street, LLC (SLV) appeals a decision of the Manchester-By-the-Sea Zoning Board of Appeals (Board) denying its application for a comprehensive permit to construct a development of 136 rental units. Following the initial conference of counsel, the Manchester Essex Conservation Trust (MECT) moved to intervene pursuant to 760 CMR 56.06(2)(b).[1] MECT argues that the proposed project will have "impacts to natural resources and wildlife habitat [that] threatens to degrade the 1,500 Wilderness Conservation Area (WCA) managed by MECT in the neighborhood of the Project Site." Motion to Intervene, p. 2. It therefore requests intervention "either by permission or by right as it stands to be substantially and specifically aggrieved by its outcome." *Id.* In support, MECT relies on affidavits of the following individuals: Patrice Murphy, MECT's Executive Director; Scott Horsley, MECT's hydrologist;

[1] The motion also included a request for intervention pursuant to G.L. c. 30A, § 10A on behalf of a group of ten or more citizens (Group) on the ground that damage to the environment, as defined in G.L. c. 214, § 7A, is at issue in these proceedings. The Committee issued a ruling granting that motion to intervene on July 13, 2023.

Patrick Garner, wetlands scientist; and Sean Reardon, P.E.[2] The developer filed a memorandum in opposition to intervention while the Board did not file any opposition.

II. Discussion

The proposed intervener argues it is entitled to intervene based on 760 CMR 56.06(2)(b), which states, "[n]otwithstanding the foregoing, any person shall be allowed to intervene to the extent that he or she would have standing as a person aggrieved to appeal the grant of a special permit in accordance with M.G.L. c. 40A, § 17."[3] Motion, p. 6. This sentence does not allow proposed interveners who are parties in interest under G.L. c. 40A § 11,[4] to participate as of right in an appeal to the Committee based solely on that status, meaning without demonstrating aggrievement.[5] Nor does it override statutory and case law. *Essex Pastures, LLC v. Ipswich,* No. 2021-03 slip op. at 2-3 (Mass. Housing Appeals Comm. Ruling on Motion to Intervene Nov. 22, 2021) and cases cited. For the Committee to determine whether any proposed intervener may participate, the proposed intervener must show that they would be aggrieved by the proposed project. In addition to making this necessary showing of specific harm to them, the proposed

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[2] Although the motion does not distinguish to which motions the affidavits apply—the motion of the Group or the motion of MECT—I have reviewed all affidavits in connection with this motion.

[3] Under the Zoning Act, G.L. c. 40A, § 17, a judicial challenge of a decision of a board of appeals is limited to an "aggrieved person." *See Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996) (plaintiff is "aggrieved person" if that person suffers some infringement of their legal rights, *and* their "injury must be more than speculative"); *Standerwick v. Zoning Bd. of Appeals of Andover,* 447 Mass. 20, 30 (2006) (person appealing zoning board's decision pursuant to G.L. c. 40B, § 21, must "plausibly demonstrate that a proposed project will injure their own personal legal interests *and* that the injury is to a specific interest that the applicable zoning statute, ordinance, or bylaw at issue is intended to protect").

[4] Section 11 of chapter 40A defines "parties in interest" as "the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list…." A proposed intervener seeking to assert this status must demonstrate that status with specific facts by affidavit.

[5] 760 CMR 56.06(2)(b) does not incorporate the presumption applicable to judicial appeals under G.L. c. 40A, § 17. *Essex Pastures, LLC v. Ipswich,* No. 2021-03 slip op. at 2-3 n.2 (Mass. Housing Appeals Comm. Ruling on Motion to Intervene Nov. 22, 2021) and cases cited. Such a presumption, while appropriate for court, is not consistent with the jurisdiction of the Committee for the reasons discussed here. The reference to G.L. c. 40A, § 17, solely refers to the meaning of the term "aggrieved" subject to the limitations of G.L. c. 40B. *Id.*

intervener must demonstrate their aggrievement is related to issues within the Committee's jurisdiction and within the scope of the specific appeal, as discussed below.

A. Intervention in Appeals to the Committee Pursuant to 760 CMR 56.06(2)(b)

The Committee has discretion under 760 CMR 56.06(2)(b) to grant or deny intervention and may deny intervention to those who have not demonstrated a sufficient interest in the proceedings. *See Taylor v. Board of Appeals of Lexington*, 451 Mass. 270, 275 (2008) (abutter or other aggrieved party may intervene in appeal before the Committee with permission of presiding officer); *see also* G.L. c. 30A, § 10 (authorizing hearing officer in adjudicatory hearing to allow interveners to participate upon showing that intervener "may be substantially and specifically affected by … proceeding"); *Tofias v. Energy Facilities Siting Bd.*, 435 Mass. 340, 346-347 (2001) (intervention and scope of intervention by an aggrieved party in adjudicatory proceeding is at discretion of hearing officer).

1. Intervention is Limited to Matters Within Committee's Jurisdiction

An intervener may not raise issues in proceedings before the Committee that are outside the scope of an appeal under G.L. c. 40B, §§ 22-23. "[A]ssertions of harm that confer standing as a 'person aggrieved' under G.L. c. 40A are not necessarily cognizable as a basis for 'aggrievement' under G.L. c. 40B." *Standerwick v. Zoning Bd. of Appeals of Andover,* 447 Mass. 20, 26 (2006) (denying standing under c. 40B for claim of diminution of property value); *Taylor,* 451 Mass. 270, 277 n.10 (requirements for standing in Chapter 40B cases are significantly stricter than in ordinary zoning appeals). "Even if an abutter is allowed to intervene or otherwise to participate in an applicant's appeal pursuant to the regulations governing the [Committee], '[t]he legal issues properly before the [Committee] are circumscribed….'" *Id.* at 275, quoting *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 370 (1973).

Under 760 CMR 56.06(2)(b), a presiding officer has the discretion to limit an abutter's intervention if it is inconsistent with the limited scope of the Committee's review under G.L. c. 40B, § 23, which is focused on consistency with local needs. *See* 760 CMR 56.07(1)(a). Case law makes clear that the Committee's jurisdiction is limited to matters of local, not state or federal, law because the Committee has no authority to hear disputes as to whether a developer is adhering to state or federal law. *See, e.g., 104 Stony Brook, LLC v. Weston,* No. 2017-14, slip op. at 16 (Mass. Housing Appeals Comm. June 22, 2023); *Green View Realty, LLC v. Holliston,* No. 2006-16, slip op. at 10 (Mass. Housing Appeals Comm. Jan. 12, 2009), *aff'd sub nom.*

Holliston v. Housing Appeals Comm., 80 Mass. App. Ct. 406 (2011), *F.A.R. den.,* 460 Mass. 1116 (2011); *O.I.B. Corp. v. Braintree*, No. 2003-15, slip op. at 7 (Mass. Housing Appeals Comm. Mar. 27, 2006), *aff'd,* No. 2006-1704 (Suffolk Super. Ct. July 16, 2007). And 760 CMR 56.06(2)(b) states the presiding officer "shall consider only those interests and concerns of that person [seeking intervention] which are germane to the issues of whether the Local Requirement and Regulations make the Project Uneconomic or whether the Project is Consistent with Local Needs." *Cf. Standerwick,* 447 Mass. 20, 30.

2. Intervention is Limited to Matters Within Scope of Appeal

The Supreme Judicial Court has explained that the nature of appeals to the Committee under G.L. c. 40B, §§ 22-23, "does not necessarily fully protect the interests of all persons who may be aggrieved by the issuance of a comprehensive permit." *Taylor,* 451 Mass. 270, 275. Procedurally, only a developer who has been denied a comprehensive permit or has been issued a permit with conditions has the right to appeal a decision of a board of appeals to the Committee. G.L. c. 40B, § 22. An abutter is not permitted to commence an appeal to the Committee or to raise before the Committee an issue that was not raised by the developer. *See Taylor,* 451 Mass. 270, 275.[6] Instead, 760 CMR 56.06(2)(b) states, "[t]he presiding officer may allow any person showing that he or she may be *substantially and specifically affected by the proceedings* to intervene as a party in the whole or in any portion of the proceedings." (Emphasis added). Therefore, any applicable aggrievement is circumscribed by the scope of a developer's appeal; it is limited to only those "statutorily authorized interests in the protection of the safety and health of the town's residents, development of improved site and building design, and preservation of open space" that are at issue in the specific appeal. *See Standerwick,* 447 Mass. 20, 31; *Taylor*, 451 Mass. 270, 277 n.10. Requiring a proposed intervener's demonstration of the connection between an issue raised in the appeal and its asserted aggrievement is consistent with the limited nature of the appeal.[7] *See Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm*., 457

[6] By contrast, the Legislature has provided that "aggrieved persons," including abutters, may participate in judicial review of a permit issued pursuant to the Committee's decision, provided that the abutter suffers harm to an interest protected by Chapter 40B. G.L. c. 40B, § 21. "From an abutter's point of view, the applicant's appeal to the [Committee] is no substitute for the full judicial review provided in the last sentence of G.L. c. 40B, § 21, and G.L. c. 40A, § 17." *Taylor,* 451 Mass. 270, 276.

[7] In an appeal of a comprehensive permit grant with conditions, the alleged aggrievement must relate to conditions and determinations on waivers of local requirements or regulations challenged in the appeal;

Mass. 748, 755-756 (2010) (scope of issues boards may address through conditions is necessarily limited to the types of concerns and powers of local boards); *Weston, supra,* No. 2017-14, slip op. at 37-38 (boards and interveners must "identify a local interest protected by a local requirement or regulation that is more restrictive than state and federal requirements, and to demonstrate that safeguards provided by the local requirement with respect to that local interest afford greater protection of the interest against the asserted harms of the project than those afforded by state or federal regulation"), citing *Holliston, supra,* 80 Mass. App. Ct. 406, 420.

3. Intervention Requires Demonstration of Aggrievement

Importantly, a proposed intervener must demonstrate they are aggrieved by the action sought by the developer in the appeal. The incorporation of aggrievement under G.L. c. 40A, § 17, into 760 CMR 56.06(2)(b) includes the mandate to provide credible evidence of a proposed intervener's status as a party in interest and of the specific harm asserted to result from the proposed appeal. Under § 56.06(2)(b), the scope of aggrievement in the reference to c. 40A, § 17 is consistent with the examination of whether a proposed intervener "may be substantially and specifically affected by the Committee proceedings" and allowed to intervene in the presiding officer's discretion. 760 CMR 56.06(2)(b).

A proposed intervener must "establish—by direct facts and not by speculative personal opinion—that [their] injury is special and different from the concerns of the rest of the community." *Standerwick,* 447 Mass. 20, 33, quoting *Barvenik v. Aldermen of Newton,* 33 Mass. App. Ct. 129, 132 (1992).[8] *See Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 122 (2011) (analysis is whether plaintiffs have put forth credible evidence to show that they will be injured or harmed by proposed changes to abutting property, not whether they simply will be impacted by such changes), and cases cited. *See also Picard v. Zoning Bd. of Appeals of Westminster*, 474 Mass. 570, 573 (2016) (aggrievement requires a showing of more than minimal or slightly appreciable harm); *Marashlian,* 421 Mass. 719, 721 (injury asserted "must be more than speculative"); *Tofias*, 435 Mass. 340, 348-49 (upholding denial of intervention by party in

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for an appeal of a permit denial, the alleged aggrievement must relate to local concerns supported by local requirements and regulations that the developer seeks to waive.

[8] The Committee's grant of intervener status does not constitute a finding that the intervener has proved aggrievement; rather it simply allows the intervener to participate and demonstrate in proceedings before the Committee their substantial and specific aggrievement by the relief requested by the developer.

administrative proceeding whose injuries were speculative). This requires more than a general allegation of possible harm; it requires that the proposed intervener "put forth credible evidence to substantiate [their] allegations." *Marashlian,* 421 Mass. 719, 721. For these reasons, proposed interveners seeking to rely on c. 40A, § 17, must first demonstrate their status as parties in interest under G.L. c. 40A, § 11. They cannot intervene "as of right" based solely on that status. They must also show that their aggrievement is substantial, specific to them, and related to an issue before the Committee in the specific appeal. Additionally, "aggrievement is 'a matter of degree,' and 'the variety of circumstances which may arise seems to call for the exercise of discretion rather than the imposition of an inflexible rule.'" *Sherrill House, Inc. v. Board of Appeal of Boston*, 19 Mass. App. Ct. 274, 276 (1985), *F.A.R. den.* 394 Mass. 1103 (1985), quoting *Rafferty v. Sancta Maria Hosp*., 5 Mass. App. Ct. 624, 629 (1977).

Finally, a proposed intervener who does not meet the "aggrieved person status" may be refused intervention "if his or her interests are substantially similar to those of any party and no showing is made that one or more of the parties will not diligently represent those interests." 760 CMR 56.06(2)(b).[9] A presiding officer in their discretion, may allow people who are not substantially and specifically affected to participate in proceedings for limited purposes if there are special circumstances to provide justification. *See Boston Edison Co. v. Dept. of Public Utilities*, 375 Mass. 1, 45-46, *cert. den.,* 439 U.S. 921 (1978); *see also Tofias*, 435 Mass. 340, 347.

B. **MECT's Motion to Intervene**

MECT argues its interest in the proceeding stems from its active role in managing hundreds of acres of conservation land and trails in the vicinity of the project site. Motion, p. 4, citing Murphy Affidavit, ¶ 4. In her affidavit, Ms. Murphy stated that MECT is a "non-profit land trust organization whose mission is to preserve in perpetuity the natural beauty, wildlife habitat, and open space resources in our two towns and adjacent communities." Murphy Affidavit, ¶ 1. She stated that MECT has preserved approximately 1,634 acres of land in Manchester and Essex, of which 1,348 acres are held in fee and 286 acres are under conservation

[9] The Committee, in the exercise of its discretion, has allowed intervention without the submission of affidavits. However, a proposed intervener intending to rely on status as an aggrieved person under c.40A, § 17, must establish their aggrievement through affidavits.

restrictions. *Id.,* ¶ *2.* She further stated that the organization has conducted extensive surveys and certifications of vernal pools in Manchester and Essex, "including in the immediate area of Shingle Place Hill, the site of the 136-unit apartment project that is the subject of this appeal…." *Id.,* ¶ 3.

MECT claims an interest in this appeal based on its role as steward of the Manchester-Essex Wilderness Conservation Area (WCA), which it argues is in the neighborhood of the project site. Motion, p. 2. Ms. Murphy asserted that Shingle Place Hill is in the northern part of Manchester and "adjacent" to the WCA.[10] Murphy Affidavit, ¶ 4. She also testified that "Sawmill Brook, a "Class B" perennial stream under the state's Clean Water Act and surface water regulations (310 CMR 4.00, *et seq.*) that is also a Cold-Water Fish Resource ("CFR"), flows through the WCA, bordering the Project Site to the west and north." *Id.,* ¶ 5. She stated further that as steward, MECT maintains "an extensive trail network, conducting regular scientific studies and educational programs relating to the area's natural resources and wildlife habitat," as well as maintaining a kiosk and parking area just north of the project site as the trail entrance to the WCA." *Id.,* ¶ 4. Although her affidavit includes a map purporting to show the WCA is near the project site, *see* Murphy Affidavit, ¶ 4, Fig. 1, it does not directly state or demonstrate that the WCA directly abuts the project site, or that the WCA or MECT in any way meets the definition of a "person in interest" under c. 40A, § 11. Therefore, MECT may not avail itself of the sentence of § 56.06(2)(b) that incorporates the "aggrieved person" standard of c. 40A, § 17.

In any event, MECT has failed to establish the kind of aggrievement, or substantial and specific harm, required by § 56.06(2)(b). MECT does not attest to any direct, specific aggrievement to it or to the WCA in the affidavits submitted with the motion. Ms. Murphy's affidavit relates solely to a generalized interest in protection of environmental resources, not any assertion of harm to MECT owned or managed property. Similarly, the affidavits of Mr. Horsley and Mr. Garner, regarding potential damage to vernal pools and Sawmill Brook, do not demonstrate any specific harm to property owned or managed by MECT. Finally, the affidavit of Mr. Reardon, addressing asserted insufficiency of the proposed wastewater system, fails to identify any particularized harm to MECT. MECT's generally allegation that the project

[10] This ruling need not decide whether MECT, as steward of the WCA, has shown it is the proper entity to represent WCA's interests here.

threatens to degrade the WCA, is in its motion, not an affidavit, and even so, is vague and no more than speculative. *See* Motion, p. 2. As the discussion in § II.A. makes clear, even an abutter or party in interest must demonstrate direct, specific aggrievement to be permitted to intervene, and it must show that any such aggrievement is not to be experienced by the community in general.

Instead, MECT suggests it has an "interest in the advancement of ecological conservation" that is within "the zone of interests protected by Chapter 40B" and therefore it is entitled to intervene. Motion, p. 7. Ms. Murphy's testimony that MECT actively participated in the Board's hearing, retained Mr. Horsley and Mr. Garner, who filed reports with the Board, and retained two civil engineers, including Mr. Reardon, to evaluate environmental impacts of the project's stormwater and wastewater management systems, does not show aggrievement. Murphy Affidavit, ¶ 8. Her concluding statement that MECT desires to intervene to provide evidence supporting the decision, suggesting its experts are available to assist the Committee, adds nothing to its argument.

Asserting an "interest" in the topics to be addressed in the Committee's proceeding does not demonstrate either aggrievement or being substantially and specifically affected; on the contrary, it suggests a broad general interest well outside the potential for substantial and specific harm to MECT arising from the construction of the project. Such a broad standard extends beyond the Committee's jurisdiction and the scope of these proceedings, as discussed above.[11] Moreover, it would allow extensive intervention in Committee proceedings that would be inconsistent with the statutory intent of providing focused and expedited hearings.

MECT has failed to show either that it is aggrieved or that it is substantially and specifically affected by the proceeding. Nor has MECT shown that its interest in protecting vernal pools is different than that of the Board or the Group. Indeed, the Group and MECT used the same affidavits to provide factual support for their requests to intervene. Finally, MECT has not shown that the Board and Group will not adequately represent the asserted interests of protecting the vernal pools, or that the Board will not adequately represent the other interests asserted by MECT. The fact that MECT may have expertise in this area is insufficient to confer

[11] In addition to local requirements and regulations, MECT cites state and federal requirements it asserts pertain to the project. However, as discussed above, MECT's assertions regarding federal and state law requirements provide no support to its request for intervention.

upon it the status of being "aggrieved" or "substantially and specifically affected." Such an interest suggests that MECT might more appropriately participate as an interested person under 760 CMR 56.06(2)(c). Therefore, the MECT has failed to demonstrate that it is entitled to intervene in this matter.[12]

III. CONCLUSION

Accordingly, MECT's motion to intervene is denied. MECT is, however, granted leave to participate as an interested person consistent with 760 CMR 56.06(2)(c) and Standing Order 2021-01 and the Housing Appeals Committee Rules of Electronic Filing. Through its counsel, it will be entitled to receive copies of all papers filed and issued by the Committee in this proceeding, and it may attend conferences and hearings. No later than 30 days before the scheduled first day of the evidentiary hearing, it may seek leave at the time of the filing of the draft pre-hearing order by the parties, to submit unsworn testimony at the hearing and to submit a post-hearing memorandum.

HOUSING APPEALS COMMITTEE

July 14, 2023

Shelagh A. Ellman-Pearl, Chair
Presiding Officer

[12] Since it filed a joint motion with the Group, using the same affidavits, MECT may be in a position to offer assistance to the Group, which has been granted intervention on a limited basis.