C O M M O N W E A L T H O F M A S S A C H U S E T T S

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

In the Matter of OAK BLUFFS ZONING BOARD OF APPEALS Appellant, and MV GREEN VILLA, LLC, AND ATWOOD GV, LLC, Appellee.	)	No. 2024-08

AMENDED SUMMARY DECISION ON INTERLOCUTORY APPEAL

I. INTRODUCTION AND PROCEDURAL HISTORY

This case is an interlocutory appeal brought by the Oak Bluffs Zoning Board of Appeals (Board) pursuant to 760 CMR 56.03(8)(c) in connection with a comprehensive permit application to the Board by MV Green Villa, LLC, and Atwood GV, LLC (Green Villa or developer) for a mixed-use development in Oak Bluffs. The Board appeals the determination by the Executive Office of Housing and Livable Communities (EOHLC), dated July 24, 2024, that the Board had not established a safe harbor under 760 CMR 56.03(1)(b), (4)(c) and (4)(f) for its housing production plan (HPP) because certification of the Town's HPP as of the date of the comprehensive permit application had been suspended.

The Board appealed the EOHLC determination to the Housing Appeals Committee on August 12, 2024.[1] Following an initial conference of counsel, it moved for summary decision on September 30, 2024. It does not challenge the status of the Town's HPP certification.[2] Instead, it

[1] "Since this interlocutory decision does not 'finally determine the proceedings,' the presiding officer may decide the matter or bring it before the full Committee.'" *Matter of Hingham and River Stone, LLC,* No. 2016-05, slip op. at 2 n.2 (Mass. Housing Appeals Comm. Interlocutory Decision Oct. 31, 2017), quoting 760 CMR 56.06(7)(e)2. *See also Matter of Norwood and Davis Marcus Ptrs,* No. 2015-06, slip op. at 2 n.1 (Mass. Housing Appeals Comm. Interlocutory Decision Dec 8, 2016).

[2] The Board does not dispute that certification of the Town's HPP was suspended as of the date on which the developer filed its comprehensive permit application and remains suspended.

contends that "the date of a Project's application," as that term is used in 760 CMR 56.03(8)(b), should be deemed, for projects proposed on Martha's Vineyard, to be the date of any forthcoming action of a project by the Martha's Vineyard Commission (MVC) pursuant to Chapter 831 of the Acts of 1977, as amended (MVC Act) with respect to the comprehensive permit application.[3] The Board's motion is supported by a memorandum of law with Exhibits A-O, including affidavits of Deborah Potter, Town Administrator for Oak Bluffs, Adam Turner, Executive Director of MVC, and Matthew Rossi, Building Inspector and Zoning Official for Oak Bluffs. Green Villa filed an opposition and cross-motion for summary decision, and the Affidavit of William Cumming, the principal of the developer and the Board filed a reply memorandum.

On November 8, 2024, MVC filed a motion to intervene, for the limited purpose of responding to the issues raised in the parties' motion for summary decision, or, in the alternative, to stay these proceedings pending a related superior court action. MVC sought to intervene on the basis that the project is subject to MVC review under the MVC Act. The developer opposed the motion to intervene, but did not oppose MVC participating as an Interested Person pursuant to 760 CMR 56.06(2)(c), provided that MVC's participation would be limited in scope. By order dated December 18, 2024, MVC was granted participation as an Interested Person limited to responding to the arguments raised in the cross-motions for summary decision regarding whether MVC is a "local board" for purposes of Chapter 40B. On December 23, 2024, MVC submitted a memorandum in support of its argument that it should not be considered a local board under Chapter 40B, and the developer filed a response thereto on January 7, 2025.

For the reasons discussed below, the Board's motion for summary decision is denied, and the developer's cross-motion for summary decision is granted.[4]

II. UNDISPUTED FACTS

The Legislature established the MVC as a regional planning commission in 1974 "to protect the health, safety and general welfare of Island residents and visitors by preserving and

[3] St. 1977, c. 831 established the MVC as a regional planning agency for Martha's Vineyard. The MVC Act is cited as St. 1977, c. 831, as amended. The Legislature enacted an earlier version in Chapter 637 of the Acts of 1974. Board memorandum, Exh. J.

[4] The original decision in this case was issued on April 24, 2025. On May 2, 2025, the developer filed a Motion for Clarification/Correction, which was unopposed. The Motion for Clarification/Correction was allowed on June 18, 2025. That ruling does not alter the outcome of this Decision.

conserving … the unique natural, historical, ecological, scientific, and cultural values" of the island. Board, Exh. J, MVC Act, § 1. The MVC Act grants the MVC the authority to review "all applications for development permits for developments of regional impact" (DRI). *Id.*, § 14. When reviewing DRIs, the MVC administers Standards and Criteria adopted pursuant to § 12 of the MVC Act. *Id.,* § 12. The MVC Act also tasks the MVC with considering the regional need for affordable housing on Martha's Vineyard. *Id.*, § 15(d). Section 16 of the MVC Act provides that "[n]o referring [town board] shall grant a development permit for a [DRI] except with the permission of the [MVC]." *Id.*, § 16. Section 10.1 of the MVC's DRI Procedures provides that "[s]tatutory or regulatory time limits and those established by regulation or bylaw applicable to Municipal Authority review of an application for a Development Permit (e.g., building permits, subdivision approvals, variances, decisions, etc.) are tolled by the referral of the proposed project to the [MVC]." Board memorandum, Exh. M, § 10.1.

On May 18, 2023, the Board approved a comprehensive permit for an unrelated development, Southern Tier, LLC (Southern Tier), to construct 60 affordable rental units, with conditions. Board, Exh. G. On August 9, 2023, EOHLC issued an HPP Certification Letter to the Town, based upon the approval of the Southern Tier project, stating that the Town's HPP certification period was effective from May 18, 2023, to May 17, 2025. *Id.*, Exh. H. The Southern Tier project had not secured a building permit for its project as of May 19, 2024. Cumming Aff., ¶ 5.

On May 20, 2024, the developer filed an application for a comprehensive permit with the Board for the development of the project at issue in this appeal. The Board opened its public hearing on June 12, 2024. At that hearing, pursuant to 760 CMR 56.03(8)(a), the Board voted to invoke safe harbor status for its review of the project and stated the Project was being referred to MVC as a DRI. Cumming Aff., ¶¶ 7, 8. By email dated June 13, 2024, the Board's Administrator referred the project to the MVC. Board Exh. C. On June 13, 2024,[5] the Board gave notice to the developer that the Board believed that a safe harbor applied based upon:

> …the recent approval of the Southern Tier Comprehensive Permit, including sixty (60) units counting toward our Subsidized Housing Inventory (SHI), which represents over 2% of the total housing stock within Oak Bluffs. The approved Housing Production Plan allows Oak Bluffs to be certified compliant providing two years of 'safe harbor' protection.

[5] The Board's letter to the developer is dated June 13, 2023; this appears to be a scrivener's error.

Board, Exh. B; Cumming Aff., ¶ 9. On June 25, 2024, the developer filed with EOHLC a notice of challenge to the Board's safe harbor claim. On July 9, 2024, EOHLC issued a letter to the Town suspending its safe harbor status as of May 17, 2024, because the Southern Tier project had not secured a building permit within one year of the issuance of its comprehensive permit. Board, Exh. E. On July 24, 2024, EOHLC issued a determination denying the safe harbor claim of the Board with respect to the project. The Board appealed the decision of EOHLC to the Housing Appeals Committee on August 12, 2024.

III. STANDARD OF REVIEW

When the Board files an interlocutory appeal of an adverse decision of EOHLC to the Committee, it carries the burden of proving satisfaction of the grounds for asserting that a denial of a comprehensive permit is consistent with local needs, in this case, recent progress toward its housing minimum. *See* 760 CMR 56.03(5). Like all appeals to the Committee, an interlocutory appeal is de novo. G. L. c. 40B, § 22; *Board of Appeals of Hanover v. Housing Appeals Comm*., 363 Mass. 339, 369-371 (1973); *Matter of Pembroke and River Marsh LLC*, No. 2019-04, slip op. at 2 (Mass. Housing Appeals Comm. Summary Decision July 20, 2020) and cases cited. The appeal is not restricted to evidence submitted to EOHLC and EOHLC's decision carries no evidentiary weight. *Id.*, citing *Kirkwood v. Board of Appeals of Rockport*, 17 Mass. App. Ct. 423, 426-427 (1984).

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 Reg. of Architects*, 414 Mass. 1, 7 (1992); *Warren Place, LLC v. Quincy,* No. 2017-10, slip op. at 4 (Mass. Housing Appeals Comm. Aug. 17, 2018), *aff'd sub nom. Haugh v. Housing Appeals Comm*., Norfolk Super. Ct. No. 1882CV01167, Aug. 7, 2019; *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). For a determination on summary decision, the Committee must "examine whether the undisputed evidence, when considered in the light most favorable to the nonmoving party … is legally sufficient to support a decision in favor of the movant." *Matter*

of Oxford and 722 Main Street, No. 2021-11, slip op. at 3 (Mass. Housing Appeals Comm. Nov. 16, 2022), citing *Warren Place, supra*, No. 2017-10, slip op. at 12; *Litchfield Heights, LLC v. Peabody*, No. 2004-20, slip op. at 4 (Mass. Housing Appeals Committee Jan. 23, 2006). *See Commercial Wharf East Condominium Assoc. v. Department of Env'l. Protection*, 93 Mass. App. Ct. 425, 427 n.2 (2018), citing *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748, 763 (2010) (motion for summary decision "is the administrative equivalent of a motion for summary judgment"). "Summary decision may be made against the moving party, if appropriate." 760 CMR 56.06(5)(d); *Delphic Assocs., LLC v. Duxbury*, No. 2003-08, slip op. at 11, n.7 (Mass. Housing Appeals Comm. Ruling and Order Extending Comprehensive Permit Jan. 12, 2010); *Taylor Cove Dev., LLC v. Andover*, No. 2009-01, slip op. at 1, n.1 (Mass. Housing Appeals Comm. Ruling on Motion for Summary Decision July 7, 2009).

A review of the papers submitted by the parties in support of their motion and cross motions for summary decision demonstrates that no genuine issue exists regarding the facts that are material to the issues raised. No affidavits or documents attesting to a factual dispute were filed. Thus, the material facts presented for summary decision are undisputed.

IV. DISCUSSION

A. The Project Application Date

The parties' dispute whether the phrase "the date of a Project's application," as it is used in 760 CMR 56.03(8)(b), should be the date on which the MVC approves the project or the date on which the developer filed its comprehensive permit application with the Board. Pursuant to 760 CMR 56.03(1)(b), a comprehensive permit decision of a board of appeals is deemed consistent with local needs as a matter of law, if, as of the date of the project's application for the comprehensive permit, EOHLC has certified the municipality's compliance with the goals of its approved housing production plan, in accordance with 760 CMR 56.03(4). Therefore, the question raised by the Board is whether the applicable (or operative) date for determining the Town's safe harbor status is the date on which the developer's comprehensive permit application was filed with the Oak Bluffs Town Clerk, or whether the MVC Act requires that the application date be construed as the date on which the MVC review is

complete.[6] [7]

The Board and MVC argue that, because the project has been deemed by the Board a "development of regional impact," the special legislation creating the MVC "provides that the Board has *no power* to act on the Project until the MVC has completed its mandatory review."[8] Board memorandum, pp. 2; MVC memorandum, pp. 2-4. Further, they argue that the MVC Act explicitly tolls applicable statutory time periods for municipal actions while a project is undergoing MVC review, including those under Chapter 40B. Board memorandum, pp. 10-11. The Board argues that the Committee "should harmonize the MVC's enabling act with c. 40B (and its regulations) under governing principles of statutory interpretation and conclude that that the Board's assertion of safe harbor is an open, unresolved question until the point in time when the MVC returns the Project to the Town and authorizes it to issue development permits." *Id.*, p. 2. The MVC agrees, contending that "[t]his is how every Chapter 40B project on Martha's Vineyard has been handled in the nearly 50 years since the MVC was established." MVC memorandum, p. 4.

The Board supports its argument that the MVC Act does not exempt comprehensive permit applications by enumerating several examples within the MVC Act where the Legislature specifically circumscribed the MVC's authority. Board memorandum, p. 11. MVC makes a similar argument—that the MVC Act "reflects a comprehensive regulatory scheme with explicit legislative standards regarding the [MVC's] jurisdiction and operation," which is not overridden by Chapter 40B. MVC memorandum, pp. 11-12.

Green Villa argues that the Board and MVC are asking the "Committee to invent a new standard for determining a comprehensive permit application's filing date—one that has no

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[6] The parties' memoranda focus largely on the issue of whether the MVC is a "local board" for the purposes of Chapter 40B. The Board and MVC contend that, because MVC cannot be considered a "local board" for purposes of Chapter 40B, the Board has no authority in the comprehensive permit hearing to act for MVC, and, therefore, the application date for the project must be the date on which the Board has the power to review the Application—after MVC's review has been completed. Board memorandum, pp. 16-17; MVC memorandum, p. 5. It is not necessary to reach the issue of whether MVC is a local board within the meaning of G.L. c. 40B, § 20, even though the parties focused primarily on this issue.

[7] According to the Board, while the project undergoes review at the MVC level, other projects may provide a basis for EOHLC to reinstate the Town's safe harbor status. Board memorandum, p. 2, n.1.

[8] Under § 12 of the MVC Act, the MVC adopts and maintains standards and criteria for a local board "to determine whether a proposed development is a DRI." Board memorandum, Exhs. J, K. Here, the Board identified five DRI criteria to designate the project as a DRI. Board Exh. C.

foundation in Chapter 40B or its implementing Regulations…." Developer opposition, pp. 2-3. The developer disputes the Board's reading of the MVC Act, stating that it "misinterprets the requirement that MVC review certain projects before local boards may grant permits as a prohibition against local permitting boards from taking any action whatsoever with respect to projects." *Id.*, p. 3 (emphasis removed). Green Villa argues that the Board's interpretation—that the filing date is the date on which the MVC completes its review of the project—"flies in the face of the ordinary meaning and understanding of the very concept of a filing date." *Id.* Such a reading, the developer argues, would be at odds with the duties of municipal clerks to acknowledge and certify receipt of such filings, would delay the requirement for the Board to take action to invoke a safe harbor claim,[9] and would provide the "MVC and its participating municipalities' zoning boards broad powers to thwart the development of affordable housing." *Id.*, pp. 3-4. The developer urges that the Committee should not create a double standard for determining when a comprehensive permit application has been filed that applies only to the six MVC member communities. *Id.*, p. 4.

In further support of its argument, the developer cites numerous examples in 760 CMR 56.00 where the date on which a comprehensive permit application is filed is the operative date for certain actions or applications of rules: 760 CMR 56.03(3)(b) (calculating general land area minimum "as of the date of the Applicant's initial submission to the Board"); 760 CMR 56.03(3)(c) (calculating annual land area minimum); 760 CMR 56.03(5) (calculating recent progress toward housing unit minimum); 760 CMR 56.03(7) (time period to determine "related projects" is within 12 months prior to application date); 760 CMR 56.03(8)(b) (counting previously approved projects in litigation as of application date). Other procedural regulations make similar references. *See* 760 CMR 56.05(2) ("The Applicant shall submit to the Board an application and a complete description of the proposed Project"); 760 CMR 56.05(3) (tying multiple deadlines to Board's "receipt of a complete application"); 760 CMR 56.07(4)(a) (defining project changes with reference to project's "content at the time [the Applicant] made application to the Board"). Developer opposition, p. 13. As the developer notes, these are all

[9] As an example, the developer argues that, "if an application date were, in some circumstances, some date other than that on which a comprehensive permit application was filed with the local zoning board, this would alter not only the procedural aspects of when a Safe Harbor claim must be made, it would also completely change the substance of those claims and how they are analyzed." Developer opposition, pp. 16-17 (emphasis removed).

examples that dictate the application filing date as an established date, one, moreover, that has been relied upon by municipalities, developers, zoning boards and other interested parties across the Commonwealth in comprehensive permit procedures for decades. *Id.* The choice of the comprehensive permit application date in all of these instances, the developer argues, was not "accidental" or unintentional but rather "a policy specifically enacted by a regulatory amendment in 2008…." Developer opposition, p. 12, n.7. As Green Villa points out, the 2008 amendment to the comprehensive permit regulations and subsequent Committee decisions provide that the relevant date for determining whether a municipality is eligible for a safe harbor is the date of the project's application.[10] 760 CMR 56.03(1); s*ee Matter of Hingham and AvalonBay Communities, Inc., supra,* No. 2012-03, slip op. at 6 n.8 (noting that regulatory change promulgated February 22, 2008 to make application date operative date overturned prior rule established in *Casaletto Estates, LLC v. Georgetown*, No. 2001-12 (Mass. Housing Appeals Comm. May 19, 2003). *See also Matter of Hingham and River Stone, LLC*, No. 2016-05, slip op. at 6 n.7 (Mass. Housing Appeals Comm. Oct. 31, 2017) (SHI is fixed as of date of application not date of Committee hearing); *Eisai, Inc. v. Hous. Appeals Comm*., 89 Mass. App. Ct. 604, 609 (2016) (town's stock of affordable housing determined at time of comprehensive permit application); *Zoning Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 90 Mass. App. Ct 111, 116 (2016) (date of application fixes date for determining whether town had met statutory minimum). It is well established that the importance of having an operative date established by regulation is necessary to provide consistency, reliability and notice to parties involved in the comprehensive permit process. "A reasonable regulation of an administrative agency which is clear and unambiguous on its face must, like a comparable statute, be applied according to its terms." *Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm*., 15 Mass. App. Ct. 553, 559 (1983).

Additionally, the Board and MVC point to § 10.1 of the MVC Act which states that "[s]tatutory or regulatory time limits and those established by regulation or bylaw applicable to Municipal Authority review of an application for a Development Permit (e.g., building permits, subdivision approvals, variances, decision, etc.) are tolled by the referral of the

[10] As the developer notes, the 2008 regulation amendments overturned the previous rule established *Casaletto Estates, LLC v. Georgetown*, No. 2001-12, slip op. at 21 (Mass. Housing Appeals Comm. May 19, 2003) that the ten percent housing unit minimum safe harbor should be determined as of the date of the board of appeals decision. Developer memorandum, p. 12, n.7.

proposed project to the [MVC]…." Board memorandum, p. 6; Exh. M, § 10.1. They argue that the Board has no power to substantively act on the application until the MVC has completed its review, and therefore the Committee should interpret the "date of application" to be the date on which the Board has the power to review the application, i.e., the date MVC completes its review. Board memorandum, p. 19; MVC memorandum, p. 17.

The arguments put forth by the Board and MVC conflate the safe harbor determination date with the substantive review process for the comprehensive permit.[11] The specific date applicable to determining safe harbor eligibility is fixed by the action of filing the comprehensive permit application; it is not changed by subsequent referral of the project to MVC. After that initial filing, the application process progresses as it would in the normal course. In this case, the developer has objected to the Board's referral of the Project to the MVC but has voluntarily agreed to participate in the MVC's hearings without prejudice to its objection. The MVC Act does not provide a deadline for the Board to refer the project to MVC. Board Exhs. J, K. Such a referral, however, does not change the date on which the application was filed. If the application is not considered "filed" with the Board on the date it is actually filed with the Board, then what triggers the MVC review? In fact, in order to refer the project to the MVC, the Board must open the hearing on the application and "determine whether or not [the project], for which application for a development permit has been made, is one of regional impact…." MVC Act, § 13; Board Exh. C.

The MVC Act states that the Board can only grant a permit after MVC has granted "permission" but is silent on whether a board is prohibited from processing and hearing an application during MVC's review period. MVC Act, § 17; Board Exh. J.

For purposes of determining safe harbor eligibility, there can only be one operative date, uniformly applied to all 351 cities and towns of the Commonwealth, the determination of which is not dependent upon the MVC's review of the project. Therefore, the operative date for determining whether a municipality subject to the MVC Act has achieved a statutory or regulatory safe harbor is the date of the comprehensive permit application. Accordingly, the date for determining the Town's safe harbor status is the date on which the developer's

[11] *Cf. Matter of Wall Street Dev. Corp. and Walpole*, Nos. 2022-08, 2022-09, slip op. at 15 (Mass. Housing Appeals Comm. May 11, 2023) (finality of comprehensive permit and determination of eligibility for SHI are distinct provisions which should not be conflated).

comprehensive permit application was filed with the Board, May 20, 2024.

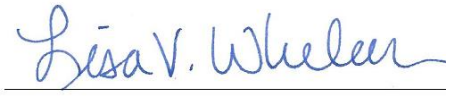
B. Oak Bluffs' HPP Status on May 20, 2024

There is no dispute that, on July 9, 2024, EOHLC issued a letter to the Town suspending its safe harbor status as of May 17, 2024, because the Southern Tier project had not secured a building permit within one year of the issuance of its comprehensive permit. Affidavit of Deborah Potter, ¶ 5; Board Exh. H. Having concluded that the operative date to determine Oak Bluffs' safe harbor status under 760 CMR 56.03(1)(b) and 56.03(4)(c) & (f), Certified Housing Production Plan, is May 20, 2024, and the Town's safe harbor status was suspended as of May 17, 2024, I conclude that the Board's claim of safe harbor based on certification of its HPP fails.

V. CONCLUSION AND ORDER

Based on the foregoing, the Board is not entitled to a safe harbor under 760 CMR 56.03(1)(b), (4)(c) and (4)(f). Accordingly, the Board's motion for summary decision is denied. The developer's cross-motion for summary decision is granted. This matter is remanded to the Board for continuation of proceedings on the comprehensive permit application.

HOUSING APPEALS COMMITTEE



June 18, 2025

Lisa V. Whelan
Presiding Officer