COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

SUDBURY STATION, LLC, Appellant, v. SUDBURY ZONING BOARD OF APPEALS, Appellee.	)	No. 2016-06

RULING ON MOTIONS TO INTERVENE OF THE TOWN OF SUDBURY AND KEVIN TIGHE

Sudbury Station, LLC appeals a September 21, 2016 decision of the Sudbury Board of Appeals on a request for a comprehensive permit to construct a development of 250 units of rental housing. In its decision, the Board listed numerous conditions, including a required reduction in the size of the project to 30 units, and denied various requested waivers of local requirements. The property to be developed is located in Sudbury near its historical district.

Motions to intervene were filed by the Town of Sudbury, Kevin Tighe and Erica Andrews.[1] The Town seeks to intervene as a separate party from the Board on the ground that it owns abutting parcels of land, the Mt. Pleasant Cemetery and the Old and New Town Cemeteries, as well as Parkinson Field, an athletic field abutting an abandoned railroad right of way that abuts the project site. It claims that the proposed project will disturb the quiet of the cemeteries, and cause stormwater runoff on Parkinson Field, which is downgradient from the project site. Mr. Tighe states that he owns a parcel of land at 36 Hudson Road that is also downgradient from the project site. He argues that his property abuts the project site although a railroad right of way held by the Commonwealth separates the parcels. Alternatively, he argues

[1] Ms. Andrews has withdrawn her motion to intervene.

that he is an "abutter[] to the abutters within three hundred feet of the property line of the [developer]" under G.L. c. 40A, § 11.[2] Each claims to be a "person aggrieved" as defined under G.L. c. 40A, § 17.

I. Intervention in Appeals to the Committee

The Committee has broad discretion under 760 CMR 56.06(2)(b) to grant or deny intervention. *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 Siting Facilities Bd.*, 435 Mass. 340, 346-47 (2001) (intervention and scope of intervention by an aggrieved party in adjudicatory proceeding is at discretion of hearing officer). The Committee may deny intervention to petitioners who have not demonstrated a sufficient interest in the proceedings. *Taylor*, 451 Mass. 270, 275.

Contrary to the assertions of the proposed interveners, the Committee's regulation does not allow proposed interveners to participate as of right in an appeal based solely on their status as parties in interest under G.L. c. 40A § 11, meaning without showing they may be substantially and specifically affected by challenged conditions and determinations on waivers of local rules or bylaws at issue in the appeal. 760 CMR 56.06(2)(b). While § 56.06(2)(b) provides that "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 G.L. c. 40A, § 17," this language does not override existing statutory and case law.[3] *HD/MW Randolph Avenue, LLC v. Milton,* No. 2015-03, slip op. at 3 (Mass. Housing Appeals Committee Ruling on Motion to Intervene Dec. 9, 2015).

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[2] "Parties in interest" as used in [Chapter 40A] shall mean 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 …." G.L. c. 40A, § 11.

[3] Nor does the presumption in judicial appeals under G.L. c. 40A, § 17 apply in proceedings before the Committee. *Milton, supra* at 4. The reference to G.L. c. 40A, § 17 in 760 CMR 56.06(b)(2) does not incorporate the judicial presumption. It solely refers to the meaning of the term "aggrieved" subject to the limitations of G.L. c. 40B.

First, an intervener does not have the right to raise issues in proceedings before the Committee that are outside the scope of an appeal under G.L. c. 40B, § 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 Board 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 case are significantly stricter than in ordinary zoning appeal). An abutter's alleged injury must relate to a legitimate issue before the Committee. Under G.L. c. 30A, § 10, and 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.

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." *Marashlian v. Zoning Board of Appeals of Newburyport*, 421 Mass. 719, 721 (1996). A plaintiff is an "aggrieved person" if that person suffers some infringement of his legal rights, *and* their "injury must be more than speculative." *Id.* Thus, they 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," which in this appeal is the "interest protected by G.L. c. 40B, namely, the expansion of affordable housing throughout the Commonwealth" and the "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." *Standerwick,* 447 Mass. 20, 30. Even if "aggrievement" under c. 40A, § 17 is broader than the requirement to show one may be substantially and specifically affected by the proceedings under 760 CMR 56.06(2)(b), it remains subject to the limits of the Committee's jurisdiction under Chapter 40B. *See Standerwick,* 447 Mass. 20, 30; *Taylor,* 451 Mass. 270, 277 n.10.

Also, the nature of appeals to the Committee under G.L. c. 40B, § 22 "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 that make "the building or operation of such housing uneconomic" may appeal a decision of a board of appeals to the Committee. G.L. c. 40B, § 22. An abutter does not have that right to appeal to the

Committee. *Taylor,* 451 Mass. 270, 275.[4] Allowing an abutter to intervene without demonstrating their potential harm may open the proceeding to issues not necessarily within the Committee's jurisdiction. "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....'" *Taylor*, 451 Mass. 270, 275, quoting *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 370 (1973). Thus, requiring a showing of a substantial and specific potential injury and a relationship of that injury to a local rule or bylaw at issue in the proceeding before granting intervention in an appeal before the Committee is consistent with the limited nature of the appeal.

Furthermore, allowing abutters to intervene must also be weighed against broader criteria—the intent of the Legislature in enacting Chapter 40B. *Goldberg v. Board of Health of Granby*, 444 Mass. 627, 632-33 (2005) (regulations are to be interpreted in harmony with legislative intent and mandate). Allowing an abutter to intervene on any issue would conflict with the purpose of Chapter 40B "to streamline and accelerate the permitting process for developers of low or moderate income housing in order to meet the pressing need for affordable housing...." *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 521 (2007). Streamlining the process would be defeated if abutters were allow to intervene without a showing that their property interests may be substantially and specifically harmed or without limiting their participation to those issues on which they base their potential harm. Not scrutinizing the potential intervener's basis for aggrievement would open the proceeding to persons without sufficient and specific interest, issues potentially beyond the Committee's jurisdiction, and repetitive or redundant evidentiary submissions. *See Standerwick,* 447 Mass. 20, 36-37; *Newton v. Department of Public Utilities*, 339 Mass. 535, 543 n.6 (1959) (discretion to limit intervention intended to protect interference with complicated regulatory processes).

The incorporation of G.L. c. 40A, § 17 requirement of "aggrievement" into 760 CMR 56.06(2)(b) thus is consistent with the requirement that the abutter show a reasonable likelihood

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[4] 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, 276-277.

of a substantial and specific injury to an interest protected by Chapter 40B that is related to the issues on appeal to the Committee. For these reasons, the proposed interveners cannot intervene "as of right" based solely on their status as parties in interest under G.L. c. 40A, § 11. They may only participate if they have a legitimate concern before the Committee by sufficiently demonstrating that their interest may be substantially and specifically affected, in other words, that they are "aggrieved." Thus, they 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." *Jepson v. Zoning Bd. of Appeals of Ipswich*, 450 Mass. 81, 88–89 (2007), quoting *Barvenik,* 33 Mass. App. Ct. 129, 132.[5]

To determine whether intervention is appropriate, the presiding officer requires a potential intervener to show that he or she "may be substantially and specifically affected by the proceedings...." 760 CMR 56.06(2)(b). The presiding officer thus "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." 760 CMR 56.06(2)(b). Intervention is granted only to "those who can 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." (Emphasis in original). *Standerwick,* 447 Mass. 20, 30. Further, the injury must be "related to a local rule or bylaw under review by the Committee." *Milton, supra,* at 5. The proposed intervener must provide more than general allegations lacking specificity to show the concerns are serious enough to be more than mere speculation. *See Tofias*, 435 Mass. 340, 348-49 (upholding denial of intervention by party in administrative proceeding whose injuries were speculative). Finally, the proposed intervener will not be allowed to intervene "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).

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[5] 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 demonstrate in proceedings before the Committee, the intervener's substantial and specific aggrievement by waivers of local regulation and removal of requirements that represent legitimate local concerns.

II. The Town's Motion to Intervene

The Town argues that it is substantially and specifically affected by the Board's decision and this appeal, particularly if the Board's decision is annulled or if conditions protecting the Town's interests are struck from the comprehensive permit. Specifically, the Town alleges the following:

With respect to the Mt. Pleasant Cemetery and the Old and New Town Cemeteries (the cemeteries), the Board asserts that: 1) the buildings will be highly visible from the cemetery, which is still in active use for interments; and 2) the back yards and patios for the project's buildings will be open to the cemetery land so that the activities and noise from the use of these buildings will carry onto and impact the cemetery land. The motion relies on language from the Board's decision, p.12, to describe its potential injury. The Town asserts that buildings will be located less than 20 feet from the cemetery's edge, and the project's buildings will be highly visible from the cemetery. It also states that the proximity of the project's buildings will impact the integrity of the cemeteries, and intrude upon their long-standing and intentional peace and tranquility. The Town asserts that the Board's conditions limiting the number of units and requiring that any development on the site comply with the dimensional requirements of the zoning bylaw protect these interests of the Town.

With respect to Parkinson Field, the Board asserts that: 1) the buildings of the project will loom over Parkinson Field, a town-owned athletic and recreation field; 2) due to excessive density a large retaining wall will need to be constructed further impacting the visual impact on the field; and 3) Parkinson Field will also be subject to stormwater and wastewater flow. The motion relies on language from the Board's decision, pp. 10, 13, to describe its potential injury.

Sudbury Station argues that there is no authority for a town to intervene in an appeal of a decision of its own board and that the town cannot proceed with legal action other than through the board of selectmen or specific municipal departments, citing *Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 496 (1989). In *Jepson v. Zoning Board of Appeals of Ipswich*, 450 Mass. 81, 92-93 (2007), the Supreme Judicial Court determined that a municipal body owning land abutting a proposed development may qualify as a "person" under G.L. c. 40B, § 21. Since the Town is asserting its right to intervene based on its status as a property owner, under *Jepson,* it is not disqualified from seeking intervention.

Sudbury Station also argues that the Town's interests are fully represented by the Board in this appeal, and that the Town has failed to "plausibly demonstrate that [the proposed] project will injure [its] 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." *Milton, supra,* slip op. at 3, quoting *Standerwick,* 447 Mass. 20, 30.

The Town's assertions of visual impacts and general effects on tranquility are concerns that are excluded from review in appeals under Chapter 40B. The aesthetic concerns raised by the Town regarding the visual impact of the project on Parkinson Field and the cemeteries are not the kind of "plausible claims of a definite violation of a private right, property interest, or legal interest" for conferring standing under G.L. c. 40A, § 17. *See Denneny v. Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 211 (2003); *Harvard Square Defense Fund,* 27 Mass. App. Ct. 491, 493; *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. 129, 132-33 (1992), abrogated on other grounds by *Marashlian*, 421 Mass. 719, 724 ("Subjective and unspecific fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the losses of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law").

With respect to stormwater and wastewater, these assertions fall within the category of concerns that can be raised by a proposed intervener. Here, however, the Town has generally alleged "deleterious" impacts from the wastewater treatment facility and stormwater system on Parkinson Field, including potential flooding, because it is downgradient from the project site. The Town offered no specifics regarding the nature of the alleged injury. Nor did it respond to the submissions of the developer stating that peer review reports "made no claim whatsoever that Parkinson Field would be subject to wastewater or stormwater flow. Applicant's Opposition to Motion of the Town … to Intervene, p. 9. Given the developer's factual response to the motion, the Town was required to show more than a general allegation of harm. Therefore the Town's assertion lacks the specificity necessary to show the concerns are serious enough to be more than mere speculation. See *Tofias*, 435 Mass. at 348-49. Additionally, the Town only generally cited to stormwater regulations the developer sought to waive, as well as requested waivers of local requirements regarding dimensions, erosion controls, grades, slopes, and other matters, without showing how waivers of specific local stormwater requirements would substantially and

specifically affect its property. The Town's assertion regarding the effect of excavation and construction on the project on the field is also speculative.

Regarding potential noise coming from the project, the Town suggests that the cemeteries, as burial grounds, would incur a specific injury if the development's noise disturbs their peace and tranquility. The Town has not identified a local bylaw or regulation, or other legal authority, that treats the "tranquility" of these or other town cemeteries differently than property put to other uses. Nor has the Town shown how the cemeteries would be specifically harmed with the granting of relief from local requirements, other than a general statement regarding the effect of reducing the size of the project and maintenance of dimensional requirements.

Because the Town's references to local requirements were not sufficiently specific (and Mr. Tighe had failed to identify any local requirements in his motion), I allowed the proposed interveners to "file supplemental responses regarding their pending motions to intervene solely for the purpose of identifying the specific local requirements and regulations they rely on to argue they are substantially and specifically affected by this appeal, and addressing whether the Board's interests are substantially similar to their interests and whether the Board can diligently represent those interests."[6] February 9, 2018 Letter to Parties. Although, the Town listed various local bylaws and regulations, and cited various local stormwater provisions generally, its response did not demonstrate how these provisions related to its allegations with regard to stormwater and wastewater.

Finally, the Town's interests are substantially similar to those of the Board, but it has not demonstrated that that the Board will not adequately represent its interests, particularly where it is relying upon the same counsel as the Board. The Town's assertion that as a regulatory body the Board cannot represent interests of the Town is unpersuasive. I also note that the Town has not sought to include any issues in the draft pre-hearing order. Accordingly the Town's motion to intervene is denied.

III. The Motion to Intervene of Kevin Tighe

Mr. Tighe asserts that as trustee he is the record holder of 36 Hudson Road, which abuts the railroad right of way abutting the project site. He argues that he is a party in interest either by

[6] This information should have been included in the proposed interveners' original motion papers.

virtue of abutting a railroad right of way, which he asserts is the equivalent to a street for the purposes of being a direct abutter, or that he is an abutter of an abutter within 300 feet of the boundary of the project site. See G.L. c. 40A, § 11.[7]

Mr. Tighe asserts that his property lies downgradient from the project's stormwater management facilities, and that according to the Board's decision, p.10, the developer's hydrogeological information was lacking as it did not provide a full mounding analysis for the project's septic and stormwater systems, and the stormwater management system presents a significant engineering challenge. Mr. Tighe argues that peer reviewers retained by the Town to review the project's hydrology stated the stormwater system may be undersized, and that "an undersized stormwater collection system will fail during extreme wet weather events, and will cause downstream flooding on properties such as that owned by" Mr. Tighe. Tighe's Motion to Intervene, p. 3. Mr. Tighe's motion also noted that the Board's decision, p. 10, expressed concerns with the proposed stormwater management plan and the possibility of flooding in the southwest corner of the project site near where the Tighe property is located.

Sudbury Station disputes that Mr. Tighe is a direct abutter. It argues that Mr. Tighe's reliance on a report that the system "may" be undersized, and that, if undersized, it would cause downstream flooding on properties *such as* that owned by him fails to demonstrate that he will be substantially and specifically affected by the proposed project.

Mr. Tighe did not respond to the developer's submissions regarding peer review assessments that "the stormwater management system is technically feasible to construct in a manner that would meet the MassDEP requirements and serve to protect the residents on-site and abutting properties. *See* Applicant's Opposition to Motion of Kevin Tighe … to Intervene, p. 5 and Exh. A, p.4. Therefore, his motion lacks the specificity necessary to show the concerns are serious enough to be more than mere speculation. See *Tofias*, 435 Mass. at 348-49. Further, he has not identified any local rules or requirement related to his assertions regarding stormwater that are at issue in this appeal. He therefore has failed to demonstrate that he has a substantial and specific legal interest related to a local rule or bylaw that is at issue. As noted in § II, above, because Mr. Tighe had originally failed to include this information in his motion, I allowed him to file a supplemental response.

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[7] Since Mr. Tighe's motion to intervene is denied, it is not necessary to address the parties' arguments regarding whether he is authorized as trustee to seek to intervene in this appeal.

In response to my February 9 letter to the parties, Mr. Tighe did not identify the local rules and regulations on which he relied for his pending motion. Instead, contrary to the letter's instructions, he identified a new ground for intervention, that traffic will degrade access to his commercial facility, and he cited the Sudbury subdivision rules and regulations regarding layout of roads as the pertinent local regulations. However, he did not demonstrate that the developer sought any waiver from the Milton subdivision rules and regulations with regard to the Hudson Road access. Nor did he demonstrate that the Board cannot adequately represent his interests.

Finally, when afforded the opportunity to draft the part of a pre-hearing order that would address the issues he wished to raise, none of the issues identified in his draft related to the stormwater issue, but rather raised new issues concerning whether 1) the developer satisfied requirements of site control, 2) the Board's conditions rendered the project uneconomic, 3) local concerns justified reducing the size and scale of the project, and 4) the developer complied with MEPA requirements. None of these pertain to the stormwater issue he originally raised. Moreover, issues of site control, the economics of the project and MEPA requirements are not the sort of issues for which intervention is granted as they are not of substantial and specific concern to an intervener. Therefore, his motion to intervene is denied.

Mr. Tighe, however, is granted leave to participate as an Interested Person pursuant to 760 CMR 56.06(2)(c). In accordance with 760 CMR 56.06(6)(b) all papers filed by in this matter shall be served on his counsel. *See* Housing Appeals Committee Standing Order 2005-01, https://www.mass.gov/files/documents/2017/10/05/so0501.pdf. He may attend, but may not participate in, all hearings and conferences, except teleconferences with counsel. He may request leave to make an unsworn opening statement at the evidentiary hearing and to submit a written post-hearing memorandum.

IV. CONCLUSION

Accordingly, motions to intervene of the Town of Sudbury and Kevin Tighe are hereby denied.

Housing Appeals Committee

April 24, 2018

Shelagh A. Ellman-Pearl, Chair
Presiding Officer

Certificate of Service

I, Tanya J. Reynolds, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Ruling on Motions to Intervene of the Town of Sudbury and Kevin Tighe in the case of Sudbury Station, LLC v. Sudbury Zoning Board of Appeals, No. 2016-06, to:

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Tanya J. Reynolds, Clerk
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