COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

In the Matter of

BOURNE ZONING BOARD OF APPEALS

and

CHASE DEVELOPERS, INC.

No. 2008-11

DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR

June 8, 2009

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

This case is an interlocutory appeal brought by the Bourne Zoning Board of Appeals (Board) pursuant to 760 CMR 56.00, the revised comprehensive permit regulations promulgated effective February 22, 2008. Under 760 CMR 56.03(8)(a), a board seeking to rely on one of several enumerated safe harbors precluding appeals by developers of adverse decisions under G.L. c. 40B now must notify the developer within 15 days of the opening of the Board's hearing on the comprehensive permit application. If the developer wishes to challenge the board's assertion of one of these statutory and regulatory protections, it must provide written notice to the Department of Housing and Community Development (DHCD), within 15 days.[1] DHCD "shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials." *Id.* Either party may file an interlocutory appeal of an adverse decision by DHCD to the Housing Appeals Committee, but must do so within 20 days of receipt of DHCD's decision. The interlocutory appeal to DHCD

1. Under the former regulations, municipal zoning boards raised the applicability of a safe harbor as an affirmative defense during the appeal to the Committee in the ordinary course. See 760 CMR 31.06(5), 31.07(1), 31.07(1)(d) and 31.07(1)(i). Also see *West Wrentham Village, LLC v. Wrentham,* No. 05-04, slip op. at 2 (Mass. Housing Appeals Committee July 13, 2005 Ruling on Motion to Dismiss), *aff'd* 451 Mass. 511 (2008).

is conducted on an expedited basis, as the proceeding before the board is stayed pending the Committee's determination. 760 CMR 56.03(8)(c). The Committee's hearing on the issue, like all of its proceedings, is *de novo*. G.L. c. 40B, § 22. Section 56.03(8)(a) provides that the Board has "the burden of proving satisfaction of the grounds for asserting [the safe harbor]."[2]

In accordance with this regulatory scheme, after Chase Developers, Inc. (Chase) filed its application for a comprehensive permit with the Board, the Board notified Chase that it invoked the calendar year housing production safe harbor. Chase notified the Board and DHCD of its objection to the Board's assertion. DHCD, through its chief counsel, rendered a decision from which the Board appealed to the Committee.

The presiding officer scheduled a hearing and conducted one day of oral testimony on October 16, 2008. The hearing was then suspended to permit the Board to seek the testimony of DHCD's chief counsel. Ultimately, a subpoena was issued and subsequently quashed by the Committee. *Matter of Bourne and Chase Developers, Inc.,* No. 08-11 (Mass. Housing Appeals Committee Apr. 13, 2009 Ruling on Motion to Quash Subpoena....). The presiding officer then set a schedule for post-hearing briefs, which the parties have filed.

II. FACTS

On April 28, 2008, a comprehensive permit decision approving 300 dwelling units was filed with the Bourne town clerk in the matter of Canalside Comprehensive Housing, LLC for a project at the Bourne Rotary. Joint Stipulation, ¶ 1; Exh. 1. The Board's approval of that permit designated 75 units as affordable. Tr. I, 17; Exh. 1.

On June 3, 2008, Chase filed an application for a comprehensive permit for a development called "230 Sandwich Road" with the Bourne town clerk. Joint Stipulation, ¶ 2; Exh. 7. The Town's Housing Needs Assessment and Action Plan (Plan) had been approved by DHCD on January 18, 2006. Exh. 8. As of June 3, 2008, the Town of Bourne had not yet requested certification of compliance with its Plan for the time period applicable to the Chase comprehensive permit application. See Exh. 8.

On July 2, 2008, the Board opened a public hearing on Chase's application. Joint Stipulation, ¶ 3. According to testimony by the Board's chairman in this matter, at the initial

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2. The Board argues that this assignment of a burden to the Board violates G.L. c. 40B, §§ 20-23. Since we find that the Board is entitled to rely on a safe harbor here, we need not address this contention.

hearing the Board discussed whether to notify Chase that the Town intended to invoke the safe harbor protection. Tr. I, 18. He stated:

> We determined basically that we had met the – all of the requirements in the sense that basically what it is is the Town of Bourne has 7,787 year-round units according to the last census and .5 percent of that comes out to 38 and change, so we needed 38 or 39 units within a 12-month period in order to have the Safe Harbor protection.
>
> April 28th is the date we filed the decision with Canalside and this comes to us in June so we thought we had within the 12-month period from April 28th forward.

Tr. I, 18-19. By letter dated June 27, 2008 addressed to DHCD, the Town requested that DHCD certify the Town's compliance with its Plan based on the Canalside permit approval. Exh. 8. Thereafter, by letter dated July 7, 2008, and consistent with 760 CMR 56.03(8)(a), the Board notified Chase, with a copy to DHCD, that the Board "considers a denial of the permit or the imposition of conditions or requirements would be consistent with local needs." Exh. 2; Joint Stipulation, ¶ 4.

By letter dated July 8, 2008, DHCD issued to Bourne a certification of compliance with the Town's Plan. Exh. 9. That letter stated that DHCD:

> … certifies that the Town of Bourne is in compliance with its Affordable Housing Plan (AHP) in accordance with 760 CMR 31.07(1)(i)5. This certification is effective for a one-year period beginning on June 27, 2008 and ending June 26, 2009.
>
> This Certification of Municipal Compliance is based on the following findings:
> 1. Bourne has provided evidence that the required number of units described in its June 27, 2008 request is eligible to be counted towards certification.
> 2. The 75 Subsidized Housing Inventory (SHI) eligible units in this project (Canal Side Commons SHI ID # 8984) meet the number necessary to satisfy a one year certification threshold of 0.75% (58 units) of total year-round housing units specified in 760 CMR 31.07(1)[.]
> 3. The housing development is consistent with the production goals outlined in the Bourne Affordable Housing Plan.

Exh. 9.[3]

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3. The certification letter issued by DHCD applied the former comprehensive permit regulation, 760 CMR 31.07(1), which contains a more stringent standard than that of the current regulation: under 760 CMR 56.03(4)(c)2., the calendar-year threshold is at least 0.50% of a municipality's total units, or 39 units in Bourne's case, rather than .75% (or 58 units) under the former regulation. Pursuant to the transition rules of 760 CMR 56.08(3)(b), the revised regulation, 760 CMR 56.00, applies to the

By letter dated July 21, 2008, Chase submitted to DHCD an opposition to the Board's July 7, 2008 letter, claiming that Bourne had not produced the necessary affordable units for entitlement to the safe harbor for calendar year 2008. Specifically it argued that the Canalside project would be unable to obtain a building permit for the Canalside units within one year of their approval by the Board and therefore those units would "become ineligible for SHI inclusion until the date the building permit is issued." Exh. 3A; Joint Stipulation, ¶ 5.

In a letter dated August 1, 2008, DHCD's chief counsel stated that:

> The Department's regulations, at 760 CMR 56.03(1)(b), create a safe harbor for municipalities that are certified as being in compliance with an approved Housing Production Plan (see 760 CMR 56.03(4)). The Department approved the Town of Bourne's Housing Production Plan in January of 2006. In order to be certified, the Town must create a minimum of 39 SHI Eligible Housing Units in a calendar year (760 CMR 56.03(4)(f). In June 2008, the Board granted a comprehensive permit to CanalSide Comprehensive Housing LLC for 300 residential units, 75 of which will be eligible for inclusion in the Subsidized Housing Inventory (SHI). The regulations, at 760 CMR 56.03(4)(f), provide that these units count for the purpose of certification in the same manner as they do for inclusion in the SHI. Therefore, as of the date that the approval for CanalSide was filed with the municipal clerk, these units were eligible for inclusion in the SHI and the Town was eligible for certification (see 760 CMR 56.03(2)(b)), subject to the lapse provisions at 760 CMR 56.03(2)(c), which, at this point, do not apply to this matter.
>
> DHCD certified the Town's compliance with the goals of its Housing Production Plan as of June 27, 2008. Therefore, the Town has met the requirements of 56.03(1)(c), and for the period of the year ending June 26, 2009, a decision by the Board to deny a comprehensive permit, or grant … such a permit with conditions, would be consistent with local needs.

Exh. 4; Joint Stipulation, ¶ 6. By letter dated August 15, 2008, Chase submitted to DHCD an "amendment" to its July 21 challenge and objection to the Board's position. Exh. 3B; Joint Stipulation, ¶ 5. Specifically, Chase argued that it had filed its application for a comprehensive permit "on June 3, 2008, preceding the approval of the Canalside Comprehensive Permit and well in advance of DHCD's certification of the Town of Bourne's compliance with the goals of its housing production plan of June 27, 2008, as indicated in your letter," and that "Bourne is not entitled to retroactive protection for comprehensive permit applications filed prior to

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certification of the Town's compliance with its Plan in this case. However, the number of affordable units in the Canalside project would meet the standard for certification under either regulation. See 760 CMR 56.03(4)(c)2.; 760 CMR 31.07(1)(i)5.

production of the eligible units for inclusion in the SHI and prior to certification by DHCD of the Town's compliance with the goals of its housing production plan." Exh. 3B. Subsequently, on August 21, 2008, DHCD's chief counsel reversed the August 1, 2008 opinion, stating that at the time Chase's application was filed with the Board, DHCD "had not certified, nor yet received a request to certify, the Town of Bourne's compliance with its HPP. Therefore, the ZBA has not met the prerequisite for asserting the HPP safe harbor provided at 760 CMR 56.03(1)(b)." Exh. 5; Joint Stipulation, ¶ 7. The Board appealed DHCD's August 21 determination to the Committee on September 8, 2008.

Chase also introduced evidence concerning the status of the Canalside project seeking to show that it would affect the validity of the certification. According to the Board's chairman, the Canalside comprehensive permit included multiple conditions, including the installation of a traffic light; he also stated that construction of a bypass road was essential to both the Canalside Chapter 40B development and a related commercial development, Tr. I, 29-30, and that the developer of Canalside would also need an easement to build a bypass road. Tr. I, 31-32. Chase's president, a professional builder, testified that from conducting internet research he learned that Bourne had not achieved the threshold of 10 percent of its housing stock designated as affordable and he believed "there might be room for development." Tr. I, 42, 49-50. He was not aware of any particular statutory or regulatory provision other than the 10 percent threshold that would allow the Town to deny or approve a comprehensive permit with conditions. Tr. I, 50.

Chase's president also testified concerning the status of the Canalside project regarding the easement and traffic light, and stated that Canalside's developer had told him "everything is up in the air." Tr. I, 44.

III. DISCUSSION

This expedited appeal is the first to reach the Committee for decision since the procedure for determining the existence of a safe harbor at the outset of a zoning board hearing was adopted in 760 CMR 56.03(8). Pursuant to 760 CMR 56.03(8)(c), the Board's hearing is stayed until the conclusion of this appeal. Based on our authority under the Comprehensive Permit Law, we review this matter *de novo*. Such a review is required by Chapter 40B. See G.L. c. 40B, § 22 (requiring Committee to keep stenographic record of proceedings and to state its findings of fact).

Pursuant to its transition rules, 760 CMR 56.00, the revised comprehensive permit regulation applies to the certification of Bourne's compliance with its Plan in this case. 760 CMR 56.08(3). Both parties acknowledge and rely on the applicability of 760 CMR 56.00. The issue for appeal is whether, in connection with Chase's June 3, 2008 application to the Board for a comprehensive permit, the Town of Bourne may rely on a certification that it is in compliance with its housing production plan to establish that a decision denying or granting Chase's comprehensive permit with conditions is consistent with local needs. Such a "safe harbor" determination would establish an irrebuttable presumption and therefore be conclusive of the ultimate issue of whether the Board's action on the comprehensive permit application is consistent with local needs. 760 CMR 56.07(3)(a); 56.03(1); 56.03(8).

The question of whether Bourne may invoke the safe harbor rests on the interpretation of the relevant provisions of 760 CMR 56.00 using principles of construction that are well established by the courts: "A regulation is to read in the same manner as a statute" and a court "will give "words of a regulation their plain and ordinary meaning." *Ingalls v. Board of Registration in Medicine,* 445 Mass. 291, 294 (2005). We must apply the regulation consistently with its "plain terms." See *Finkelstein v. Board of Registration in Optometry,* 370 Mass. 476, 478 (1976) (court will overturn agency interpretation only if it is "arbitrary, unreasonable, or inconsistent with the plain terms of the rule itself."). In addition, we should seek to interpret the regulation to give effect to all of its provisions. *Bottomley v. Division of Admin. Law Appeals,* 22 Mass App. Ct. 652, 657 (1986) ("[w]here reasonably possible, no portion of the language of a regulation should be treated as surplusage"). Cf. *Thurdin v. SEI Boston, LLC,* 452 Mass 436, 454 (2008) ("None of the words of a statute is to be regarded as superfluous"), citing *Commonwealth v. Woods Hole, Martha's Vineyard and Nantucket S.S. Auth.,* 352 Mass. 617, 617 (1967) quoting *Bolster v. Commissioner of Corporations and Taxation,* 319 Mass 81, 84-85 (1946). These principles lead to the result that Bourne is entitled to rely on the safe harbor, as explained below.

Chase argues that because DHCD had not issued a certification of compliance with the Plan and the Town had not requested the certification before June 3, 2008, the filing date for Chase's comprehensive permit application, the Town had not met the "regulatory prerequisite" for asserting the housing production plan safe harbor under 760 CMR 56.03(1)(b). The Board argues that under 760 CMR 56.03(4)(f), even though the certification was requested and

granted after June 3, it actually became effective on April 28, 2008, the date on which the Town achieved its "numerical target" for the year. A careful examination of the relevant regulatory provisions and the facts shows that the effective date for the Board's safe harbor must be April 28, 2008.

The comprehensive permit regulation provides that the safe harbor must have been "met as of the date of the ... application" for a comprehensive permit of the project under review by a board:

> (1) A decision by a Board to deny a Comprehensive Permit, or (if the Statutory *Minima* defined at 760 CMR 56.03(3)(b) or (c) have been satisfied) grant a Comprehensive Permit with conditions, shall be upheld if one or more of the following grounds has been met *as of the date of the Project's application*:
>
> ...
>
> (b) the Department has certified the municipality's compliance with the goals of its approved Housing Production Plan, in accordance with 760 CMR 56.03(4)....

760 CMR 56.03(1). (Emphasis added.) The record is clear that Bourne had not submitted its request for certification before the Chase application was filed. However, § 56.03(4)(f), which addresses when certification takes effect, states that:

> If the Department determines the municipality is in compliance with its HPP, the certification *shall be deemed effective on the date upon which the municipality achieved its numerical target for the calendar year in question*, in accordance with the rules for counting units on the SHI set forth in 760 CMR 56.03(2).

(Emphasis added).[4] This section also provides that "[a] certification shall be in effect for a period of one year from its effective date."

The Canalside project provided for a sufficient number of affordable units to meet the housing production numerical target for the calendar year in question. 760 CMR 56.03(4)(c). The Canalside units were also permitted to be counted on the SHI as of the date the Canalside comprehensive permit was filed with the Bourne town clerk – April 28, 2008. 760 CMR 56.03(1) and 56.03(2)(b). Section 56.034)(f) provides that if DHCD determines Bourne is in compliance with its Plan, the certification "shall be deemed effective on the date upon which

4. By contrast, the former 760 CMR 31.07(1)(i)5. specified that if DHCD determined a town's compliance with its housing production plan, the certification was "retroactive to the date the certification was requested."

the municipality achieved its numerical target," the date the Canalside units were permitted to be counted, which is April 28, 2008.

Finally, and critically, 760 CMR 56.03(4)(f) states that "[r]equests for certification may be submitted *at any time*...." (Emphasis added.) This provision must mean that Bourne was permitted to make its request for certification after June 3, 2008. This is also consistent with the regulation's language that "the certification shall be *deemed* effective on the date ..." (emphasis added), which indicates that the certification is to relate back to the date "deemed" to be the effective date, in this case, April 28, 2008. Thus, the lack of a request before Chase's comprehensive permit was filed is immaterial. To require the request for certification to have preceded Chase's filing would contradict the plain meaning of "at any time" and make those words superfluous. Therefore, pursuant to 760 CMR 56.03(4)(f), even though the request for certification occurred after Chase filed its application, the certification, once granted, must relate back to the date on which the Town achieved its numerical target, which is April 28, 2008 -- the date on which the Canalside decision was filed with the town clerk and the units were eligible to be added to the SHI.[5]

This result, which is based on the language of the regulation and its plain meaning, is also consistent with a purpose of Chapter 40B to encourage towns to take positive measures toward the development of affordable housing. The fact that the developer may not have known about the potential status of the Plan is not dispositive. Indeed, one purpose of requiring the Board's notification of the safe harbor early in the hearing on a comprehensive permit application is to put a developer on notice before extensive proceedings are conducted, which was done in this case.

Chase raises a second argument against the validity of the safe harbor: that the conditions in the Canalside permit are impossible to meet within the twelve-month period of certification. Chase argues that the Canalside project would be unable to obtain a building permit within one year, and would become ineligible for SHI inclusion until the date the building permit is issued. 760 CMR 56.03(2)(c). Therefore, it argues, since the Town cannot produce the number of units it seeks to include in its Plan within the certification period, the safe harbor should not afford the Town relief under § 56.03(8)(a).

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5. Chase refers to the certification request and approval as a prerequisite. However the regulations do not explicitly provide for one. It is not necessary to reach the question whether a safe harbor could be found if no request for certification were made and no certificate of compliance were granted.

Chase's evidence on the ability of Canalside to meet the permit conditions was extremely thin, speculative and largely based on hearsay accompanied by no other indicia of credibility. Therefore, we credit none of this testimony. Based on the record we do not find that the Town is unable to produce the units for inclusion on the SHI by the end of the one-year period specified in § 56.03(2)(c). In any event, whether the units lose eligibility after one year is not relevant to the question of whether the safe harbor was in effect on June 3, 2008. Even if the Canalside units were to be removed from the SHI as of April 28, 2009, they are legitimately on the SHI from April 28, 2008 to the one-year anniversary, and the Town is entitled to rely on them in support of its Plan as of June 3, 2008. Therefore, this argument has no bearing on the outcome of this appeal.

We determine that Bourne's certification of compliance with its housing production plan establishes, in accordance with 760 CMR 56.07(3)(a) and 56.03(8), an irrebuttable presumption of the existence of the safe harbor on which Bourne may rely for the purposes of Chapter 40B for the period from April 28, 2008 through April 27, 2009.[6] We note that this certification period properly should end as of April 28, 2009. Whether or not those units remain eligible for inclusion on the SHI thereafter, the certification period will have ended and Chase would be free to reapply for approval of its comprehensive permit application without the constraint of the safe harbor for those particular units.

IV. CONCLUSION AND ORDER

For the reasons set forth above, the decision of DHCD denying the safe harbor to the Town of Bourne is hereby overturned. In accordance with 760 CMR 56.03(8), this matter is

6 We need not reach Bourne's argument that DHCD violated 760 CMR 56.03(8) by issuing a second determination in response to Chase's August 15 letter, since it has not been prejudiced in this instance. With regard to the Board's argument that the Committee has violated this provision, the Board identified no specific action the Committee has taken that violates § 56.03(8). We caution parties in the future to be mindful of the strict filing timelines specified in this section.

remanded to the Board for further proceedings consistent with this decision and in accordance with 760 CMR 56.05.

Housing Appeals Committee

Date: June 8, 2009

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer