



WRITTEN BY MARK A. KABLACK

## OVERCOMING THE BURDEN OF LOCAL BYLAWS AND ORDINANCES

The HBAM has vigorously defended the Massachusetts Comprehensive Permit statute as a result of the law's positive influence on housing production in Massachusetts. Most of the multi-family housing produced in the Commonwealth, and a significant amount of single-family housing, is directly attributable to the Comprehensive Permit statute. The Comprehensive Permit statute overrides local zoning requirements and allows for residential development to occur in different styles and densities than would otherwise be permitted under local zoning.

There are numerous other benefits afforded by this law, however, including the impact of a Comprehensive Permit on other permits and approvals required by local bylaws or ordinances outside of the strict zoning context. Often, a municipality will have additional regulations governing wetlands, stormwater, septic system design, and other review criteria that exceed standards imposed by state law and state agencies, or are otherwise unique to the municipality. Development professionals are often flustered by these localized standards. Inevitably the standards will vary from municipality to municipality, complicating the permit and approval process, and the empirical evidence to warrant such additional protective measures is often lacking. The Comprehensive Permit allows a developer to overcome these local burdens as proven by the recent Massachusetts Appellate Court decision entitled: "*Zoning Board of Appeals of Holliston v. Housing and Appeals Committee*," 80 Mass. App.Ct. 406 (2011).

In the *Holliston* case, the Holliston Zoning Board of Appeals (ZBA) denied the applicant's plan for a 200-unit condominium project on property formerly consisting of a landfill. The ZBA based its denial on concerns regarding hazardous waste, wetlands protection, and stormwater management. Despite the

applicant's stated compliance with all state requirements regarding such matters, the ZBA pointed to local bylaw provisions that were more rigorous in their regulatory scope. The ZBA claimed that the applicant failed to state a prima facie case that it would comply with state requirements, and, moreover, the local bylaw provisions constituted legitimate protective measures for health, safety, and the environment that overrode any regional housing need. The applicant's appeal to the Housing Appeals Committee (HAC) overturned the ZBA denial, and further appeals to the Land Court were ruled in favor of the applicant as well.

The Appeals Court ruling reaffirmed the lower court proceedings in favor of the applicant and provided much needed limitations on local bylaws and ordinances that impose additional regulations on matters otherwise governed under state law.

The Appeals Court found that the applicant had met its prima facie case of complying with state law. The court cited the voluminous regulatory regime provided by the MassDEP with respect to hazardous waste, wetlands protection, and stormwater control. The court was also sufficiently impressed with the applicant's consultants regarding stated compliance or conditioned compliance with state standards.

Once the applicant's prima facie case had been met, the burden then shifted to the ZBA. The ZBA needed to articulate and substantiate i) how local bylaw provisions were not satisfied; ii) how compliance with local bylaw provisions was necessary to protect local concerns; and iii) how local concerns outweighed regional housing needs.

After examining the ZBA's arguments and judging them in accordance with this three-prong test, the court ruled that the ZBA had failed to meet its burden of proof. The ZBA could not point to any specific local bylaw

provision that regulated hazardous waste cleanup. Furthermore, the court recognized that MassDEP and the MA Contingency Plan are the primary and exclusive means of policing hazardous waste sites in Massachusetts. The court did not believe that the Town of Holliston had any regulatory oversight applicable to this field. The court found the town's arguments vague in light of overwhelming documentation by the applicant regarding wetland protection, remediation, and replication. Also, the court was unconvinced by the town's generalized concerns. The town failed to demonstrate how additional restrictions regarding the volume of stormwater runoff or the slope of retention pond walls were necessary to protect legitimate local needs.

When a municipality wishes to impose additional regulations on land development, whether such regulations regard wetlands, stormwater, building code provisions, fire code provisions, septic system design, etc., it should be required to demonstrate clearly and objectively why such additional regulations are necessary. Such regulations can impose heavy time and expense burdens on any project involving land development, building construction, or renovation. Safeguards should be put in place to ensure these additional regulations are more than just veiled efforts to control or stop growth.

Fortunately, the Comprehensive Permit process levels the playing field between a sound development project and a municipality's effort to impose local development regulations. The *Holliston* decision reaffirms the rules of engagement. This decision should be beneficial to any applicant under the Comprehensive Permit statute and should provide goals and objectives for development under other permitting regimes as well. ■



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