

HOUSING APPEALS COMMITTEE
Auburndale Gardens, Inc.

Decision # **74-05**
Appellant: **Auburndale Gardens, Inc.**
Appellee: **Zoning Board of Appeals of the City of Newton**
Date: **January 23, 1975**
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I. STATEMENT OF PRIOR PROCEEDINGS

Auburndale Gardens, [1] a limited dividend partnership, on March 4, 1974 filed an application with the Zoning Board of Appeals of the City of Newton [2] for a comprehensive permit under the provisions of Chapter 774 of the Acts of 1969 (now G.L. c. 40B, s. 20-23). [3]

The application was for a comprehensive permit to construct 140 units of residential housing, 32 of which would be town houses, and 108 of which would be garden apartments on two contiguous parcels in Auburndale, located between Staniford Street and the Charles River, one parcel of approximately 425,552 square feet, 9.8 acres, and a contiguous parcel of approximately 14,100 square feet fronting on

[1] Hereinafter variously referred to as the Applicant, the Petitioner, the Developer or the Appellant.

[2] Hereinafter variously referred to as the Board or the

Appellee.

[3] Hereinafter referred to as "Chapter 774". References to sections 20, 21, 22, or 23, hereafter, will refer to G.L. c. 40B.

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Staniford Street, making a site of approximately 439,652 square feet on approximately 10 acres. Subsidy financing was to come from MHFA (see Exhibit 19, Board Decision p. 5; Tr. IV: 10-13).

After due notice, the Board conducted a formal hearing on March 26, 1974, and informal hearings on April 2, 24, 30 and May 5, 1974. By agreement of the parties the date of the decision was extended. On May 31, 1974 the Board filed with the City Clerk its decision denying the comprehensive permit.

From that denial the petitioner appealed to the Housing Appeals Committee.[4] The Committee conducted a site visit on August 31, 1974, which was attended by members of the Committee, the parties, and their counsel. Thereafter the Committee conducted hearings on September 5, December 10th, and 17th of 1974 and January 23, February 18, February 27, March 11, March 13, March 18, and May 15 of 1975. On May 15, 1976, on Motion of the Board, assented to by the Petitioner, the hearing was reopened for the taking of further evidence from witnesses for the Board.

The hearings were conducted as adjudicatory hearings as required by Chapter 774. Witnesses were sworn, and full right of cross examination was allowed.

At the first hearing an informal motion to intervene was presented by Robert Cohen, Esquire on behalf of several neighborhood residents. The motion was formally presented and extensively argued at the third hearing. At the fourth hearing, on January 23, 1975, the hearings officer announced that the motion had been allowed

[4] Hereinafter referred to as HAC, or "the Committee"

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as to Robert Cunningham, a direct abutter.[5] Mr. Cohen was present at this hearing, but did not participate thereafter nor did the intervenor or any one on his behalf appear further to press any claim.[6]

The Applicant and the Board have filed briefs. In addition the Applicant has filed one hundred and twenty-five requests for findings of fact, to which the Committee has responded. The requests for findings of fact in each instance contain references to the portion of the transcripts or record on which the request is based. The requests, and the Committee's responses thereto blanket the essential issues in this case, indicate clearly the facts on which the Committee's decision is based.

II. ISSUES

A. STANDING

There is no dispute between the parties as to the standing of the Petitioner as a limited dividend organization and thus eligible under section 21 as a proper party to submit an application to the Board for a comprehensive permit.[6a]

B. STATUTORY MATHEMATICAL CRITERIA

Certain other threshold issues are disposed of on the basis of stipulations by the Appellee. In its decision (Board decision pp. 5-6) and by stipulation of

[5] See Transcript Vol. IV p. 4 (Hereafter transcript references will show as (IV-4). By stipulation of counsel the motion to intervene was withdrawn as to the other parties seeking to intervene. A memorandum accompanying the order on the motion to intervene is in the record.

[6] See (V-3)

[6A] The status of the Applicant as a limited dividend organization is stated in the first sentence of the Board's decision (p. 2) attached to its answer as Exhibit A and is nowhere contested. (See (11-33))

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its counsel and testimony of its city planner (IX:83) the Appellee agrees that the three mathematical criteria of the statute have not been met.[7]

It was argued by counsel for the intervenor in pressing for the allowance of his motion to intervene, that units assisted under Newton's code enforcement program, should be counted as "low and moderate income housing" in computing the ten per cent under the

statutory formula in section 20. There was no evidence as to whether any units were so assisted. In any event the Committee rules against this contention as a matter of law. The Committee perceives that it was the intention of the legislature that only units created with the help of federal or state subsidies should count in crediting municipalities toward the fulfillment of the 10% requirement of "consistent with local needs." Existing units which receive assistance in bringing them up to code adds nothing additional to the stock of units for low and moderate income persons. To count them as in fulfilling the 10% criterion would in effect thwart the intent of the legislature.

THE HANOVER CASE [8]

We disagree with the Appellee's interpretation of the Hanover

Case. We have stated our understanding of the holdings in the Hanover case in our first decision thereafter, [8a] and have repeated that interpretation over and over again in our thirty or so decisions thereafter. In every instance of appeal to the Superior Court or the Appeals Court or SJC, we have been upheld.

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- [7] I.E. (1) Subsidized housing in Newton does not equal ten per cent of its total units, as reported in the latest (1970) decennial census; (2) nor does it occupy 1 1/2% of its available building sites; (3) nor will the allowance of this petition result in the commencement of construction on more than three tenths of one per cent of the total of such land area or 10 acres, whichever is larger, in any one calendar year (see section 20)
 - [8] Board of Appeals of Hanover, and Board of Appeals of Concord vs. Housing Appeals Committee [363 Mass. 339](#) (1973) hereinafter referred to as the "Hanover" case. See also section 20 under definition of "Consistent with Local Needs".
 - [8A] Dartmouth West Housing v. Dartmouth ZBA HAC Decision Aug. 27, 1973

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The Hanover case clearly interprets the statute as presenting to the HAC, in the case of a denial of a comprehensive permit, a single issue: Was the decision of the Board reasonable and consistent with local needs? By express language the Court said that the term "reasonable" was subsumed in "consistency with local needs" and so was in effect surplurage. [8B]

The first step in determining "consistency with local needs" was to determine whether the municipality had met any one of the three mathematical criteria set out in the statute: 10% subsidized units, 1 1/2% of its available sites devoted to subsidized units, or the fact that the proposed development would result in construction on sites comprising more than 3/10% of one per cent of such land area or 10 acres, whichever is larger, in any one calendar year (section 20).

If the municipality met any one of these three mathematical criteria, the denial of the permit was deemed to be consistent with local needs and could not be overturned by HAC.

If the municipality did not meet any of the mathematical criteria, this fact, said the court, constituted "compelling evidence" that the denial was not consistent with local needs.

Nevertheless, the allowance of the comprehensive permit did not automatically follow. It was still open to the Board which had denied the permit to prove to the Housing Appeals Committee that there existed, or would be created by the development, a condition adversely affecting health or safety, or which did not promote better site and building design, or the need to preserve open

spaces,

[8B] See Hanover Decision, 366 Mass. 339, fn #17 at p. 366.

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and that this adverse condition or factor was of gravity sufficient to outweigh regional need for low and moderate income housing, together with the number of low income persons in the municipality, in which case then the denial was still consistent with local needs.

This imposed a "balancing" requirement on the Committee, which is described in the decision. (363 Mass. at page 365).

But if no such significant condition could be shown to the Committee and the town had not met any one of the three mathematical criteria, then the denial by the Board was, under the statute as interpreted in the Hanover case not consistent with local needs and the Committee was required to overturn the denial and order the issuance of a comprehensive permit.

Nowhere in the Hanover Case is there an indication that motive or good or bad intent on the part of the municipality is an element in the determination of "consistency with local needs".

This is the formula that has been consistently followed by HAC in all its [8C] decisions. In our last decision, we commented on what a fine job Melrose had been doing in attempting to meet its low and moderate income housing need. Nevertheless, their denial was not consistent with local needs and was overturned by HAC. In Northampton [8D] a denial of a comprehensive permit for a fine development by a reputable non-profit group was upheld because we found that Northampton had met one of the three mathematical criteria. In Woburn [8E] none of the mathematical

[8C] Pond View Glen vs. Melrose ZBA HAC Decision, Aug. 23, 1976

[8D] Pioneer Homes v. Northampton ZBA HAC Decision, April 1, 1975

[8E] Glen Realty Trust v. Woburn ZBA HAC Decision, February 13, 1974

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had been met, nevertheless we upheld the denial as "consistent with local needs" because there was proved to us a flooding condition that in our judgment outweighed the need for the housing (more about the Woburn case later).

Whenever in the literature, there is mention of municipalities which do or do not engage in exclusionary zoning practices, or are "guilty" of exclusionary zoning practices, the only significance, under our statute, as interpreted by the Hanover Case, is that in

fact an exclusionary zoning practice exists, whether or not it is intentionally brought about, and even if the municipality conclusively can prove that it has taken every conceivable step to avoid it.

Thus the standard under our statute, as interpreted by the Hanover case, is the opposite of that set up in the recent U.S. Supreme Court decision in Arlington Heights vs. Metropolitan Hsg., [8F] where in effect the court held that to prove an exclusionary zoning practice, one had to prove that the municipality intended to bring about the result. Under the Hanover case, intent is not a factor in determining whether or not a denial by a local board is "consistent with local needs".

[8F] 45 U.S. Law Week 4073 (Jan. 11, 1977)

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C. REGIONAL NEED

With regard to the regional need for low and moderate income housing, no evidence was introduced to challenge the Department's determination calculated pursuant to Part II Section 1 (1) of the Regulations:

"The Department shall calculate such need for each region, and may calculate such need in terms of varying family sizes, incomes and ages of household head.

The

Department's calculations shall be presumed conclusive on the Committee unless a party introduces authoritative data to the contrary. For purposes of part (i) of this subsection, authoritative data means any statistically valid, random sample or survey of household income conducted in the region since the latest available U.S. Census."

D. NUMBER OF LOW INCOME PERSONS IN NEWTON

The number of low income persons in Newton is indicated in the testimony of the City Planner that the need for low and moderate housing in Newton is great (VI 11-51-52). The numbers are indicated in Exhibit #55 which was introduced by the Board. This exhibit shows 5748 low income families in Newton, with a need for approximately 5500 units of low and moderate housing. (Exhibit 55, attachment D).

Exhibit 8, the memorandum of the City Planner, shows total housing units in Newton as 27,422, so that the 5,500 low and moderate needed units amounts to approximately 20% of the existing units. The memorandum also shows that in fact there are only 446 units of low income housing, owned by the Newton Housing Authority, 1.5%

of the total, which if updated according the City Planner's testimony (IX:101-102) would still come to only 515 units or 1.9% of the total. Of the 18 cities and towns in the MAPC planning district with a population over 40,000, all have at least double Newton's percentage, and of the 37 municipalities with a population over 25,000 only two have a lower percentage of low and moderate income housing than Newton's.[9A]

E. HEALTH, SAFETY AND PLANNING FACTORS

Against this regional need for low and moderate income housing considered with the number of low income persons in Newton the Board has asked the Committee to balance the following factors which, it is alleged, relate to the need to protect the health or safety of the occupants of the proposed housing, or of the residents of Newton, to promote better site design in relation to the surroundings, or to preserve open spaces:

- (1) Deficiencies in access
- (2) Presence of flood plain
- (3) Differences in the site plan
- (4) Newton's need for open space

The facts relating to each of these factors are set out in a separate discussion of each as follows:

1. Deficiencies in Access

The total parcel, 439,652 square feet, or approximately ten acres, contains 215 feet of frontage on Staniford Street and runs back westerly from that street to the Charles River. The existing topography of the site varies from low wetland toward the flat, high ground. The high ground is separated into two areas by the flood plain.

[9A] See Appendices A and B attached to Appellant's Brief, taken from Exhibits 51 and 50.

The site, as proposed, contains a single access road which runs from Staniford Street, at an elevation of 60 feet, to the rear of the site where it loops and returns through the same access road. Part of the units are located on high ground at the front of the site, but most (107 of the 140 units) are located on high ground at the rear of the site. In between the access road dips to an elevation of 45 feet.

Flooding over the Charles River over the last forty years has increased. Major storms in 1936, 1955, 1962 and 1968 have caused flooding which have increasingly approached and may have in some cases exceeded the 45 foot elevation, which is the lowest portion of the roadway. After each major storm, the Army Corps of Engineers has increased the high water mark of its flood predictions. After the 1968 flood, the Army Corps of Engineers has projected a new potential flood water high in excess of the 45 foot elevation, to 46 feet, for that portion of the Charles River which includes the subject parcel. That portion of the road at the 45 foot level runs through the flood plain.[10]

The Board's concerns are:

- (a) that in case of flooding of the road, the rear 107 units will be cut off from Staniford Street;
- (b) that in such an emergency, the occupants at the rear would not be accessible to emergency vehicles;
- (c) that in case of a disabled vehicle on the access road, which is 25 feet wide, four feet less than the paved portion of a public road

[10] This description of the site and the access road is taken from the Board's Decision at pp. 2, 3 and 7. See also Appellant's Request for Finding of fact #2, and Exhibit B pp. 2-4.

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under the Regulations of the Planning Board, an additional hazard would be created for access by Emergency vehicles.

- (d) The lack of a secondary access presented a real safety hazard to the rear, densest portion of the development.

The evidence showed that at its very lowest point, the access road was at 44.5 grade, 18 inches below the 100 year flood plain grade set by the army engineers. (V-18) The Newton Flood Plain ordinance permits roadways and parking spaces at a contour level below 46 feet (V-45; Exhibit 37, 38, Section 25-18A(b)(3)). The City Engineer was of the opinion that the City's emergency vehicles, and even private cars can travel readily through a foot and a half of water (VI-97).

We should also realistically appraise the actual danger of flooding of the access road. The 46 foot flood level grade is based on a 100 year storm, i.e., the eventuality of water rising to 46 feet is statistically, one per cent in any one year, apart from man-made interference with water storage capacity up-river. The highest level reached by the Charles River in this area is 43.2 feet (V-60). The highest recorded water level, and the flood contour level used by the Mass. Department of Natural Resources is 43.22 feet (IV-26), over a foot below the lowest point in the

access road. The City Engineer has never seen flood waters in the vicinity rise higher than the 42.5 foot contour (XI 95). As late as October 3, 1972 the Army Corps of Engineers had recommended that developments on this site be restricted "at least" to elevations above 43.7 feet (Exhibit 29B) In fact all the buildings in the proposed development will be erected with their bases above the 46 foot contour. (See Petitioner's Exhibit B p. 5 and Plans, Ex. 26, 38; IV-25, VIII-48). There is an adequate margin of safety.

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The 25 foot road width is standard size for a residential street in Newton (VIII-29); many are only 24 feet wide (X-107). Despite a recitation in the Board's decision (p. 8) that the Fire Chief was concerned about access, the fire chief's letter recommended a 25 foot roadway as proposed, and that the secondary means of egress from the parking lot (of which more later) likewise be 25 feet (Exhibit II). The police chief expressed no reservations about the adequacy of the site's access, specifying only that egresses from parking facilities not be obstructed by bushes or fencing (Exhibit 10). The possibility of a disabled vehicle swinging crosswise and blocking the road, which would happen to any road, was pointed out, but the City Engineer agreed that such a vehicle could be pushed off the road (V-58) and the petitioner offered to accept a condition for providing a grassy berm boarder instead of a roadside curb, to facilitate such removal. (See petitioner's brief at p. 13).

The City Engineer agreed that a secondary emergency vehicle access was available to the site over the contiguous City Parking Lot. Such an access would have the additional advantage of providing emergency access to West Pine Road which is a dead end street (Tr. IV-46). The City's objection to this proposed solution was that such secondary access would intercept the access road below the rear loop (Board Decision p. 7-8, VIII-25-26). The City Planner indicated that dividing the proposed access road into two lanes would satisfy his concerns as to safety (VIII-25).

It is significant that in October 1971, the then Planning Director of the City recommended approval of a proposal for 40 town houses and 60 garden units on this site (Exhibit 6, p. 8). He found that "a second access point for emergency only could probably be developed from the rear of the abutting City-owned parking lot" (Exhibit 6, p. 6). In his opinion, housing was needed for less affluent families (P.7) and that the development would have insignificant impact upon flood storage (p. 8).

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In 1971 the then planning director described a proposal for 120 units on this site as an "Imaginative attempt at providing moderate income housing at a relatively low density" (Exhibit 5 p. 8 See also p. 4 and Exhibit 4 p. 4).

We find and rule that adequate access alternatives exist so

that the question of access does not present safety hazards of gravity sufficient to outweigh the regional housing need together with the number of low income persons in Newton.

2. Flood Plain Concerns

The City's flood plain objection to the proposed development is that the proposed cutting and filling on the site involved in this development, together with existing permeability of the land, would "constitute a severe safety hazard, both for the residents within the proposed development and for those citizens residing along the downstream portions of the Charles River" (Board Decision p. 9).

Testimony on this issue was given by the City's Planner, the City Engineer, the hydrologist who testified as an expert for the city, the developer's architect and the developer's engineer.

The only witness who seriously supported the argument that the development would reduce the water-storage capacity of the site so as measurably to increase flood hazard was the City Planner (VIII-16-20). The developer's architect (IV-24); his engineer (V-54) and the City's Engineer all agreed that the water storage capacity of the site before and after the development would be roughly the same. The City Planner had disagreed with the opinion of the City Engineer because he claimed at first that data showing where the cuts and fills would take place were not at first available to the City Engineer (VIII-19). He later conceded that such data were in fact available (IX-95-96).

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The hydrologist who testified as an expert for the City stated that the total water storage capacity below the 46 foot contour after development would be .49 acre feet less than before development (Exhibit 52, Table 2, page 3). In a 100 year flood situation which is the basis for the 46 foot flood plain elevation (VIII-21) this could result in as much as a 1/16 inch rise in the Charles River (X-71). The hydrologist further testified, however, that in his opinion it would not take any material reshaping of contours to make flood compensation identical at all stages before and after development (X-29; 85-86), and that in any event the impact on flooding of the proposed development is so insignificant as to be difficult to measure (X-92). The City Planner, too, testified that there is a point where differences in flood storage capacity become trivial (VIII-20).

In the hydrologist's opinion even the 1/16 inch difference in the Charles River during a 100 year flood is subject to a 25% margin of error (X-71).

The material testimony thus far is that: (1) the record high point for the Charles River was 43.22 feet; (2) the lowest point in the access road is 44.5 feet; (3) the elevation for a 100 year flood is set at 46 feet by the Army Engineers; (4) the Mass.

Department of Natural Resources sets this 100 year elevation at 43.22 feet; (5) the development of this parcel would raise the level of the Charles River 1/16 of an inch in a 100 year flood, plus or minus 25%, and even this rise can be eliminated. We do not

find that the proposed development presents flood hazards of gravity sufficient to outweigh the need for this housing.

More dramatic testimony on this point was, however, presented at the special hearing on May 11, 1976, sought by the counsel of the Board, and agreed to by counsel for the developer. The purpose of the hearing was to place on record

[11] Transcript references for all these points have already been indicated supra

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the facts of the so called ice flood that occurred on February 2, 3 and 4 of 1976.

The facts are not in dispute. Beginning in the afternoon of February 2 the weather changed very quickly, with a drop in temperature of 41 degree (XI-46). Ice started to pile up at the Moody Street Dam, about two miles downstream from the site. Freezing spray cemented the ice together to form an ice dam that started to jam about 9 pm. and eventually built up to five feet above the dam. By midnight there was practically no outflow at the dam, the water was rising sharply, forming a level lake back to Commonwealth Avenue, about 1.3 miles upstream of the site. Flooding on the site as measured by water marks on the trees, rose to a level of 44 feet, according to the city surveyor who measured the observations, at another spot on the site to a level of 45.3 feet.[12] At eleven a.m. on February 3, the next morning, a contractor's crane was brought to the Moody Street Bridge, and with a cable and steel ball, broke up the ice jam in about fifteen minutes, releasing the water, so that the water upstream of the dam, and on the site, subsided. The surge of water over the dam caused even more serious flooding downstream.

At midnight on February 2, the river had reached forty-three feet. Had the ice been broken up at this point, the hydrologist, Mr. Child, agreed, there would have been no flood (XI-70). At this time there was only a security police officer on duty at the M.D.C. station. There are four eight inch vertical flash boards at the dam. Apparently at one am. on February 3rd somebody from M.D.C. tried to walk out on the walkway over the dam, but the way was barred by wire to keep out youngsters, and the lock on the gate was frozen, so the employee gave up.

[12] The account relating to the February 2nd and 3rd (1976) ice flood is derived from the testimony of Ms. Heyn, the conservationist, Ms. Quinn, the surveyor and Mr. Childs,

the Hydrologist, all contained in volume 11 of the Transcript. See also Exhibits 57 and 58.

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Mr. Childs testified that removal of the flashboards would have

reduced the flood level by eight inches per flashboard.

As dramatic as was this event, and even if we agree that the flood would have raised the water level on the site to 44 feet, and the "surge" account for a rise at one observation point to 45.3 feet, our judgment relating to possible flooding concerns does not change. As the testimony clearly pointed out, the last instance of a freak weather change that caused such an ice jam was in 1886, almost a hundred years ago. Even by the admission of the city's hydrological expert, the surveillance by the M.D.C. was atrocious and their methods Neanderthal compared to the highly sophisticated flood control dam management of the Army Engineers. A freak flood, that happens once in a hundred years, and could have been prevented by removing a few flash boards, or bringing a crane to the site earlier is not an inevitable event to which we must sacrifice the need for this housing. We do not agree with the argument of the City's Counsel that inevitable poor management by the M.D.C. is a fact of life to which we must bow and the possible reoccurrence of which we must assume in balancing the need against potential future flood danger.[12A] At most, even this freak flood would not have wet any cellar floors, all above the 46 foot level, or rendered the access road impassable.

We do not find that the potential impact of the development upon water storage capacity, or the potential of flooding on the site to represent hazards sufficiently realistic, or of sufficient gravity to outweigh the housing need.

3. The Site Plan

The City's objections to the site plan were not based on design, except insofar as the design involved placing most of the units at the rear of the site which resulted in their argument that vehicular access was deficient. We have

[12A] All these facts are taken from Mr. Childs' testimony in volume XI of the transcripts at pp. 41-93: Also see argument of Board Counsel at page 95.

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already dealt with the issue of vehicular access.

The City Planner's objections to the site plan clustered around his contention that the proposed density was too great for the site. He conceded it was not a matter of space (VIII-84). He based his density objections on such arguments as the fact that the

surrounding land use is single family (VIII-85). The multi-family Caposso development, a quarter to a half mile away, he did not consider part of the community.

Other site plan objections he labeled as configuration of the land (VIII 92-93). By that he meant the cutting and filling and the potential interference with water storage capacity, and damage to vegetation in the flood plain.

The Appellant site plan was developed in consultation with MHFA's chief architect and planner who visited the site (IV-10-13).

The MHFA has given approval to that plan (Exhibit 19). The scale, location, design and materials planned for the buildings were all selected to achieve a character in keeping with the surrounding neighborhood (Tr IV-42-43, V-36-67).

The matter of flood storage capacity of the site has already been considered.

Beyond a general concern about disturbance of flood plain foliage by any cutting or filling on the site, the planner was vague as to exact anticipated damage (VIII-98-100). The developer designed the site so as to minimize disturbance of plant growth (IV-37). Exhibit 36, plan SP is a landscape plan showing vegetation after development. In the opinion of the Newton Conservation Commission vegetation will quickly crowd back into cut areas in a location such as this site (Exhibit 29D. p. 2).

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As indicated, previous development proposals for this site of comparable or even greater density have been looked upon favorably by previous city planning directors: 240 units in 1970 (Exhibit 4, p. 7); 120 units in 1971 (Exhibit 5, p. 8); 120 units (Exhibit 6, p. 6,7,8).

The density of the proposed development compares most favorably in land area per unit with any other multi-unit development in Newton.

And, finally, it should be pointed out that the planner did not consider economic feasibility factors important in evaluating density (VIII-51). The purpose of Chapter 774 is to increase the available supply of subsidized housing. A more intensive use of a site may be requested, within the bounds of good design and health and safety considerations, in order to bring the rents down to low and moderate income levels, so that the project can "fly" economically.

The brief argued at some lend that HAC had power to impose conditions that involved plan changes. In fact we agree with this contention and have actually imposed conditions elsewhere that went as far as reducing the number of proposed units.

But we are asked here to impose a condition on a possible comprehensive permit that in effect throws out the submitted site plan, and substitutes either Mr. Thomas's "ideal site plan" or a second choice that involves 100 units.

We do not express any opinion as to whether such radical surgery reasonably falls into the category of "condition

The short answer is that in a financially tight proposition (and all subsidy housing is tight) cutting out 40 units would raise the land and overhead cost per unit to an extent that it is doubtful if the rents could be brought down to low and moderate income levels.

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Another, and more compelling factor is that we had other expert opinion on the proposed site plan beside Mr. Thomas. The developer's architect and engineer obviously felt it was a good plan. But, most important, in our opinion, in working out the plan with MHFA, they had taken adequate precautions with respect to preserving the water storage capacity of the site, access, protection of the units against flooding by placing all units above the 100 year flood plain level, and otherwise conformed to good design. At the same time they had created an economically feasible project, as they had to since MHFA was the funding agency.

And the final result responded to the proved housing needs by 40 units more than the two alternative plans proposed, while at the same time providing a better area to unit density.

In fact this development has been developed with remarkably low density. Its land area per unit (2600 ft) has been exceeded in Newton by only two developments since 1914: one for 14 units, one for 16.[13]

We find no problems with relation to the site plan or the proposed density which outweigh the housing need.

4. Balancing Open Space Against Housing Need

The Board based its denial in part on its decision that Newton's need for this parcel for open space outweighs the need for low and moderate income housing.

The Board's decision is based on the site's inclusion in the 1969 Recreation/Open

[13] See data in Appellants Requests for Findings of Fact number 37 to 45 inclusive, and HAC's responses thereto.

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Space Program and the importance of the site to the Charles River Pathway, and Cheesecake Brook Pathway (Board Decision p. 11).

The City Planner helped to author this plan (VII-65). He testified that this parcel was not identified for acquisition in the 1969 plan (VII-84; VIII-109) and in fact the only identification of the parcel in that plan is for housing (Exhibit 48, Sheet 1 of 8 following p. 110).

The Zoning Board of Appeals also stated that this site is

important for open space, because the shortage of open space in Newton "is most severe in the North Side of the City" (Board Decision, page 12). In fact the 1969 Plan demonstrates that Planning District 1A, in which this site lies, has over 47 acres of publicly owned open space for every 1000 population (IX-20) and only one other planning district in the City has a greater percentage of publicly owned open space (IX-18)

Compared to other cities and towns in the MAPC area, only six of the 101 cities and towns have a greater percentage of publicly owned open space than Newton [14] and 71 have a less favorable ratio of population to publicly owned open space.[15]

Thus, the subject locus lies in one of the most generously endowed districts of one of the most generously endowed municipalities, in

terms of public open space, in the MAPC region.

The Board's major open space argument was that this site is needed for linkage and pathway purposes (IX-33). For pathway purposes the Planner needed a right of way about twenty feet wide which would contain a physical pathway of six to eight feet

[14] See Appendix C attached to Appellant's Brief

[15] See Appendix D attached to Appellant's Brief

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wide (IX-35). He said that four or five acres could satisfy the "linkage" purpose (IX-39), and agreed that in terms of pure area the availability of the dump for open space purposes would eliminate the need for the subject locus (VIII-15).

For purposes of connecting publicly owned open space, the City Engineer testified that he could drive or walk on Forest Grove Road from Auburndale Playground to Rumford Avenue without traversing the subject locus (Tr. VII-46-47). The City Planner agreed that this was possible, but considered it less desirable than traversing the site (Tr. VII-77).

In any event, the, Appellant is willing to grant the city an easement for pathway purposes over its land (IV-49, 50; IV-37).

Despite Mr. Thomas's obvious expertise, and dedication to achieving for Newton the best in planning objectives and planning programs, there was no tangible evidence that the city fathers were ready to back him up. Plans for the use of this site in city-wide and region-wide open space programs had been on the books as far back as 1966 and 1969 up to the present. Meanwhile the owner went on paying taxes year after year, and submitting plan after plan for developing the site, all of which were regularly turned down, in spite of what appears to be a fairly favorable attitude on the part of Mr. Thomas' predecessor City Planners.

Had the City really been that concerned about the need to preserve this site for open space, it could have acquired it by negotiated purchase, or eminent domain, and implemented its ten year old open-space plans. In spite of Mr. Thomas eloquent

presentation, and the thorough analysis in the brief, the City's attitude toward the need for open space as far as this site was concerned did not impress the Committee to the extent that they felt impelled to escalate its significance to a level where it outweighed the proved need for the housing.

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We find that the City's need for open space, with respect to this site, does not outweigh the need for low and moderate income housing.

F. ENVIRONMENTAL CONCERNS

As a preliminary step in making the environmental findings required under G.L. c. 30, s. 61, HAC submitted an environmental assessment form (EAF) to the Executive Office of Environmental Affairs (EOEA) as required under G.L. c. 30 section 62 and the appropriate regulations of the Secretary of Environmental Affairs (SEA) thereunder. As an application for a chapter 131 section 40 Wetlands Permit on this parcel was pending simultaneously, the Environmental Assessment form was submitted jointly by the Housing Appeals Committee and the Department of Environmental Quality Engineering (DEQE).

On October 27, 1976 the Secretary of Environmental Affairs issued her finding on the EAF, requiring the submission of an environmental impact report jointly by DEQE, HAC, and the Division of Conservation Service.

Further conferences took place between the petitioner, representatives of HAC, DEQE, and staff members of EOEA, wherein the petitioner sought permission to have the name of his own engineer, added to EOEA's list of engineers approved to prepare environmental impact reports. Since this engineer, Mr. Frank Carroll, was thoroughly familiar with the environmental data concerning this site, had testified concerning it in the hearings before the Board and HAC, enabling the petitioner to employ Mr. Carroll to prepare HAC's portion of the required environmental report would result in considerable savings to the petitioner. The employment of Mr. Carroll for this purpose was approved.

To date the joint submission has not been completed. The delays imposed on the Petitioner have been interminable. There have been indications that while HAC is waiting for SEA's determinations on the environmental impact report so that

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it can make its findings under c. 30 section 61 as is required by the statute before issuing its decision, SEA is waiting for HAC's decision which apparently will be helpful to SEA in making determinations on other applications involving this site.

To break this impasse, HAC is issuing this decision, relying on a section of its own Environmental Regulations which permit HAC to issue the decision without the environmental findings, subject to a condition which retains jurisdiction to amend the decision, and postpones implementation of the decision until HAC has made the environmental findings and otherwise fully complied with G.L. c. 30 section 61. The validity of this regulation and this procedure has recently been affirmed by the Supreme Judicial Court in the Board of Appeals of Maynard vs. Housing Appeals Committee, (1976 Mass. Adv. Sh. 902, at p. 904-5).[16]

G. THE INTERVENOR

As we have previously indicated, at the fourth session of the hearing, the allowance of the Motion to intervene on behalf of Robert Cunningham, an abutter, was read into the transcript (IV-4). His counsel sat through that hearing, but never appeared again, although all routine notices were regularly sent to him. In

the pleadings, and arguments on the Motion to Intervene, a number of issues

16. We quote from the decision at page 904-5

"3. Massachusetts Environmental Policy Act The HAC decision called for a comprehensive permit subject to ten conditions, including the following: '1. The comprehensive permit shall not be implemented until the Housing Appeals Committee has fully complied with Mass. G.L. c. 30, s. 61-62 and the Housing Appeals Committee shall retain authority to modify this decision based upon findings of forms or reports prepared in connection therewith, all in accordance with its Regulations Under the Massachusetts Environmental Policy Act, Section 5.1.A.1. The board sought review of the cited regulations, but a single justice of this court dismissed the board's petition for declaratory judgment, without prejudice to review in the present proceeding. The Superior Court judge noted the board's contention that HAC had failed to comply with 61 and 62, but did not discuss it. The action taken complies with the cited regulation, and we are unable to follow the board's argument that the regulation is unauthorized."

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were raised. No evidence or argument was presented on the merits of these issues by or on behalf of the intervenor. We conclude that the intervenor has abandoned any interest in this case, and do not deem that the issues raised on behalf of the intervenor are before us for decision.

H. COMMENT

The Committee at this point wishes to acknowledge the thoroughness and professional brilliance that characterized the presentation by both counsel in this case, which measurably aided the Committee in the analysis of the many and complex issues involved.

III. FINDINGS AND RULINGS ON CONSISTENCY WITH LOCAL NEEDS

1. We find that the City of Newton has not met any of the three statutory mathematical criteria under the definition of "consistent with local needs" set out in section 20 of G.L. chapter 40B.
2. We find that a regional need for subsidized low and moderate income housing exists, and that numbers of low income persons exist in the City of Newton, sufficient to meet the requirements of said section 20.
3. We find that no health, safety, building, planning design or open space problems exist of gravity sufficient to outweigh the regional need for such housing, considered together with the number of low-income persons in the City of Newton.
4. In view of the subsidiary findings and rulings and upon a review of the whole record, under the provisions of G.L. c. 40, s. 23, the Housing Appeals Committee rules that the denial by the Board of Appeals of the appellant's application for a comprehensive permit is unreasonable and not consistent with local needs.

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IV. ORDER

The decision of the Board of Appeals of the City of Newton is hereby vacated and the Board is directed to issue a comprehensive permit to the Appellant, Auburndale Gardens.

Said comprehensive permit shall provide for a housing development on the locus which is the subject of this appeal in the approximate number of units and design as presented before the Housing Appeals Committee. To the extent to which such housing development is not in compliance with Newton ordinances, requirements or portions thereof, we rule that the application of such ordinances, requirements or portions thereof is restrictive and not consistent with local needs under G.L. c. 40B, s. 20.

Said comprehensive permit shall include all permissions necessary to complete the construction of said housing development which would otherwise be required from local boards, departments, or agencies of the City of Newton.

Said comprehensive permit shall be subject to the following

conditions:

1. Construction shall comply with the provisions of the Massachusetts State Building Code.
2. No construction shall commence until detailed construction plans and specifications, substantially in accordance with the preliminary plans submitted to the Housing Appeals Committee, shall have been approved by the Massachusetts Housing Finance Agency and/or the U.S. Department of Housing and Urban Development (H.U.D.) and until said Agency or H.U.D. has granted a construction mortgage loan or mortgage insurance for the construction of the project.
3. Compliance inspection shall be carried out by local officials in the usual manner. Any dispute or grievance arising out of any interpretation, order, requirement, direction, or failure to act shall be referred by either party

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to the State Building Code Appeals Board as provided for

in G.L. c. 23B, s. 23 and Section 126.1 of the State Building Code.

4. Said comprehensive permit shall allow changes in the design of the housing development, as shown on the preliminary plans submitted to the Housing Appeals Committee, if such changes are required by the Massachusetts Housing Finance Agency or HUD in connection with the granting by such agencies of a construction loan for the construction of this project or mortgage insurance on such construction loans. Said comprehensive permit shall allow changes in the design of the housing development if jointly consented to by Auburndale Gardens and the Board of Appeals of the City of Newton provided such changes are approved by the Housing Appeals Committee and the applicable subsidizing agency--MHFA or HUD.
5. If anything in this decision would seem to permit the building or operation of the project in accordance with standards less safe than the applicable building and site plan requirements of the agencies financially assisting the project (either MHFA or HUD) the standards of such agencies shall control.
6. The comprehensive permit shall not be implemented until the Housing Appeals Committee has fully complied with Mass. G.L. c. 30, s. 61-62 and the Housing Appeals Committee shall retain authority to modify this decision based upon findings of forms or reports prepared in connection therewith, all in accordance with its Regulations Under the Massachusetts Environmental Policy

- Act, Section 5.1.A.1.).
7. There shall be a grassy berm on each side of the access road, instead of a roadside curb.
 8. Upon the request of the City of Newton the petitioner shall cause to be delivered to the City a deed granting an easement over an area on the site

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twenty feet wide for the purpose of providing a connecting pathway for the Charles River Pathway.

HOUSING APPEALS COMMITTEE

Maurice Corman, Chairman

Dorothy Altman

Date: April 8, 1977

C. Wesley Dingman

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COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

AUBURNDALE GARDENS

vs.

NEWTON BOARD APPEALS

MEMORANDUM TO ACCOMPANY ORDER ON MOTION TO INTERVENE

By this motion to intervene, four persons, represented by the same counsel seek to intervene in these proceedings. The motion has been extensively argued before the committee by counsel for the movants, counsel for the Newton Board of Appeals, and counsel for the developer.

Further, all three counsels submitted memoranda. The Housing Appeals Committee devoted an entire executive session to a consideration of the issues and arguments presented on these motions.

Counsel for the developer, the appellant, is understandably concerned because he recognized that allowance of this motion may mean a more protracted hearing, with the intrusion of a new party or parties who have a right to appeal from HAC's decision in this case, with attendant delays, even if the City of Newton were satisfied with an adverse decision, and even if the appellant and the city arrived at an agreed stipulation,

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if said stipulation were not satisfactory to the intervenor.

He points to our regulations, particularly the section which indicates that even an abutter does not have an absolute right to intervene unless he can show that he has interests which will not be adequately presented by the appellee. He points also to authorities which emphasize the discretionary power of an administrative tribunal such as HAC in considering the question of intervention.

Further, he argues that due process and a day in court is not denied the movant by denying intervention in that (1) he had an opportunity to present his case in the hearing before the Board, and (2) he still has a right to appeal from a damaging decision by HAC to the Superior Court, with rights, as defined in the statute, to present evidence there.

Finally, he points out that avenues exist for testing the constitutional question of whether the regulations of HAC deny due process to the movant, without the risk of delay in these proceedings by allowing the motion to intervene.

Counsel for the movants argues that allowance of his motion indeed complies with our regulations in that his clients have a number of interests and concerns most of which will not be diligently represented by the appellee, and some not at all, even if he does not rely on the argument, which he presses, that our regulations are restrictive to the point where they deny due process.

Counsel for the appellee supports the motion to intervene, agreeing with counsel for the movants that there are some interests alleged by the movants, where the city is not concerned, and which it does not intend

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to press; and as to others where there is an apparent community of interest, counsel for the appellee is concerned only as these matters affect the broad public interest of all the inhabitants of the city, which is not the same as the particular concern of the man next door to the proposed development.

Counsel for the appellee also points out that a proper interpretation of our regulation 3.02 respecting intervention would properly exclude public interest groups such as conservation; housing and community groups, whose general public interest is adequately represented by the city, but recognize the cognizable and separable interest of landowners who are abutters, abutters to abutters, and those persons sufficiently "affected" by a land use proposal to be entitled to mailed notices under G.L. 40A, s. 17 (see 40B, s. 21) and who will be affected by a decision of a local board of appeal, by HAC, and by the courts.

Counsel for the Appellee also pointed out that the Supreme Judicial Court in the Hanover case [1] dwelt on the alternative methods of review provided for the developer (through HAC) if the comprehensive permit were denied by the local board, and for the

abutter (through the superior court) if the permit was granted. He indicated that to deny the abutter intervention in the HAC hearing, when the law permits the abutter to seek judicial review from an adverse HAC decision (G.L. c. 30A, s. 14) is an absurd interpretation of the law. He pointed out further that HAC is essentially a chapter 30A tribunal and that the provisions in c. 30A

[1] Board of Appeals of Hanover v. Housing Appeals Committee
294 N.E. 2nd 414-16 (1973)

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for intervention (section 10) may allow an interpretation of our regulation 3.02 which would keep out public interest groups, but would not permit an interpretation which would keep out abutters-
-persons "substantially and specifically affected by the proceeding." (c. 30A, s. 10, 55. 1(1).)

The Committee, in deciding this motion, is moved by the following considerations:

- (a) HAC is not convinced that all of the concerns of the movants, expressed in the motions, will be diligently presented by the appellee.
- (b) HAC is particularly concerned that an abutter may be caught on the horns of the following dilemma: If this were an action of ordinary variance from a zoning ordinance which was allowed, an abutter, under the statute, could appeal to the courts and thus get his day

in court. If the variance were denied, and the applicant appealed, the abutter could intervene as a matter of right and thus get his day in court. In a 774 hearing, however, if the comprehensive permit is allowed by the Board of Appeals, the abutter, to be sure, can appeal to the Superior Court. But if the comprehensive permit is denied by the Board, the applicant can appeal to the Housing Appeals Committee. If the abutter is denied the right to intervene, and HAC subsequently reverses the Board's decision and allows the comprehensive permit, the abutter has suffered defeat without ever having had his day in court, without having had the opportunity to present his side, or to cross examine

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and question the presentation of the applicants.

It is not enough to say to the abutter that he has had an opportunity to present before the Board of Appeals at the original hearing. The highly limited and restricted opportunity to present at the legislative non-adjudicatory type of hearing before a Board of Appeals is hardly a "day in court". Even if it could so be

construed, due process would require that the abutter continue to have the right to confront the applicant as a matter of right at every stage of the proceeding.

The appellant has argued that the abutter's "day in court" has been safeguarded by G.L. c. 30A, s. 14, which, states that any persons "aggrieved" by our final decision shall be entitled to a judicial review, and therefore, we should not risk delay in these proceedings by permitting him to intervene now. At the same time, the appellant argues that the movant did not sufficiently bestir himself to press his case before the Board of Appeal, and cites *Elgin Ry Company vs. Burley* [2], stating "it is a general rule that one cannot stand by with the knowledge or notice of what is going on with reference to his claim, allow matters to be thrashed out to a conclusion by one method or the other and then come in for the first time to assert individual rights." [3] If that doctrine is applicable in this instance, it could be well used by the Appellant against the abutter if the latter had not sought to intervene in this case.

[2] 327 U.S. 661, 666-667: 66 S. Ct. 721, 723-724 (1946)

[3] Appellants' memorandum page 6

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On the other hand, there is respectable authority for the proposition that a person who has standing to appeal as an aggrieved persons is entitled to intervene as a matter of right.[4]

Admittedly intervention by the abutter may cause some delay in these proceedings. But greater delay will be caused if we reverse the Board of Appeals, and the abutter establishes himself

under c. 30A, s. 14 as a person aggrieved by our decision, maintains a petition for judicial review in the Superior Court, and wishes either a hearing in Superior Court, or an order remanding the case back to us.

The abutter is before us now. It behooves us now to assess whether or not he may eventually establish himself as an aggrieved person in a poten-

[4] "An interesting question is whether a person who has standing as as an aggrieved party to appeal an agency determination to the courts is entitled as of right to intervene. In a well-reasoned opinion, the Court of Appeals for the Second Circuit held that the Federal Communications Commission could not deny intervention to a party who had the right to seek judicial review. The court pointed out that intervention might well be necessary in order to make the right to review effective--a point which will strike a sympathetic response from alllawyers who have had the experience of

taking an appeal on a record not of their own making, and which fails to develop adequately the particular points which counsel thinks would have been dispositive of the case had they been properly brought out at the hearing.

Hopefully, this decision would be followed by the state courts."

Citing American Communications Association v. United States 298 F 2nd (648 Cir. 1968); cf. National Cont. Ass'n. v. Federal Power Commission, 191 F 2nd 462 (App. D.C. 1951) From Cooper, "State Administrative Law" p. 327 attached as p. 3 of Exhibit A of Appellant's memorandum

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tial petition for review. If so, it seems to us that we would be in error not to admit him now, and let him fairly make his contribution to a record in which he has an interest, on which we must make our decision and on which the abutter, as well as other interested parties, must rely in any future appeals.

In his memorandum, counsel for the movants has stipulated that if one of the four movants is admitted, he will withdraw for the other three. The motions of Carey, Mahon, and Howley are considered withdrawn. The motion of Robert Cunningham, a direct abutter, is allowed.

Date: January 23, 1975

HOUSING APPEALS COMMITTEE

By: Maurice Corman, Chairman
Hearings Officer

End Of Decision