

COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

_____	)	
HERRING BROOK MEADOW, LLC,	)	
	)	
Appellant	)	
	)	
v.	)	No. 07-15
	)	
SCITUATE ZONING BOARD OF	)	
APPEALS,	)	
	)	
Appellee	)	
_____	)	

**RULING AND ORDER ON APPELLANT’S MOTION TO QUASH  
BOARD’S AMENDED DECISION**

Appellant Herring Brook Meadow, LLC (Herring Brook) has moved to quash the “Amended Findings and Decision on Comprehensive Permit Application” (Amended Decision) issued by the Appellee Scituate Zoning Board of Appeals (Board) and filed on September 21, 2010. In support, Herring Brook contends that the Amended Decision is both procedurally and substantively invalid because it was issued more than four months after the Committee’s Decision on its comprehensive permit appeal and it disregarded the limitations imposed within the Committee’s Decision, both in violation of G.L. c. 40B, § 23. The Board and Intervener argue that the Amended Decision was not untimely and is a proper exercise of the Board’s authority.

For the reasons set forth below, the motion to quash is hereby granted and the May 26, 2010 Decision of the Housing Appeals Committee (Decision) in this matter shall, for all purposes, be deemed to be the action of the Board pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), as set forth in our Order below.

## **I. Background**

On November 8, 2006, Herring Brook submitted an application to the Board for a comprehensive permit for a condominium project in Scituate. By decision filed with the Town Clerk on November 9, 2007, the Board denied Herring Brook's application for a comprehensive permit. On appeal to the Committee, a hearing was held and in our Decision issued on May 26, 2010, we overturned the Board's decision and ordered a comprehensive permit to issue with specified conditions set out in the Decision. As of June 25, 2010, the expiration of 30 days following the entry of the Decision on May 26, 2010, the Board had not acted to comply with the Decision, as specified in G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a).

On June 24, 2010, 29 days after the Committee's Decision, the Board appealed the Decision to the Land Court. In its complaint, the Board "request[ed] that [the] Court ... Continue the Stay the [sic] HAC's Decisions while these proceedings are pending...." Board's Opposition to Motion to Quash, Exh. 1. On June 30, 2010, 35 days after the Committee's Decision, the Board filed a Motion to Stay the Committee's Decision with the Land Court. The Land Court denied the Board's motion to stay on August 31, 2010. Appellant's Motion to Quash, Tab 2. On September 21, 2010, the Board held an executive session regarding this comprehensive permit and issued the Amended Decision. Board Opposition, Exhs. C, D.

The Intervener also appealed the Decision, but to the Superior Court, on July 15, 2010. See Intervener's Opposition to So-Called "Motion to Quash"; Herring Brook's opposition thereto.

On October 8, 2010, Herring Brook moved to quash the Amended Decision. The presiding officer held a conference with counsel and ordered the submission of written argument. The parties have all submitted written memoranda.

## II. Discussion

### A. **The Board's Action was Untimely**

General Laws, chapter 40B, section 23 states:

The board of appeals shall carry out the order of the hearing appeals committee within thirty days of its entry and, upon failure to do so, the order of said committee shall, for all purposes be deemed to be the action of said board, unless the petitioner consents to a different decision or order by such board.

Also see 760 CMR 56.07(6)(a) (“The Board shall carry out an order of the Committee within 30 days of its entry, and, upon failure to do so, the order of the Committee shall for all purposes be deemed the action of the Board”).

Herring Brook argues that the Board failed to carry out the Committee’s Decision within 30 days, resulting in the deeming of the Decision to be the action of the Board. The Board contends that its filing of the complaint and motion to stay tolled the 30-day period in § 23 and that its September 21 Amended Decision complies with the time requirements of § 23 since it was issued within 30 days of the Land Court’s August 31 order denying the stay.

The Board’s arguments fail for several reasons. The provisions for appeal of the Committee’s decision do not avoid the requirement that the Board must act to implement the Committee’s decision within the statutory time frame. The Board offered a number of cases for the proposition that its pending stay request tolled the action required by § 23. None of them provides the support for tolling that the Board advances. Furthermore, as the developer points out, the language in § 23 is mandatory, both for the action of the Board and the deeming of the Decision to be the action of the Board. Indeed, once the 30-day period expires, the decision is deemed the action of the Board by operation of law. Chapter 40B requires that parties proceed expeditiously in the course of a comprehensive permit proceeding. See e.g., *Taylor v. Lexington*, 451 Mass. 270, 279 (2008). Thus, the mandatory language in the statute affords no room for the Board to delay “carrying out” the Committee’s order, i.e., issuing a compliant permit.

Furthermore, the Comprehensive Permit regulations provide that a developer may proceed with the development at its own risk pending an appeal. 760 CMR 56.05(12)(a) (“if

a Comprehensive Permit is issued by the Board or the Committee and is subsequently subject to legal appeal, an Applicant may elect to proceed at risk with construction of the Project”). The Board’s suggestion that the delay contemplated by a stay is appropriate contravenes the allowance for the developer to proceed at risk pending the appeal. Indeed the Land Court acknowledged this in denying the Board’s request for a stay. Therefore, the arguments of the Board and the Intervener that the stay request should have tolled the time for acting are without merit.<sup>1</sup>

In any event, even if filing a request for a stay were to toll the 30 days to act on the Decision, the Board’s actions in this instance were still untimely. The Board argues that it made a timely request for a stay because it did so in the complaint filed within 30 days of the issuance of the Committee’s Decision. Herring Brook disputes that the language in the complaint, which refers generally to a vague “continuation” of a stay, was sufficient to constitute a request for a stay. Assuming that the language in the complaint was insufficient, the filing of the motion to stay 35 days after the Decision would have been after the 30-day period had expired, and the Decision would have been deemed to be the action of the Board. Even if, however, the complaint filing constituted a legitimate request to stay, and tolled the 30-day period, the Amended Decision was still untimely. Since the Board’s complaint was filed on the 29<sup>th</sup> day after the issuance of the Committee’s decision, only one day of the original 30-day period remained for the Board to act once the Land Court issued its order denying the stay on August 31. The Amended Decision was issued on September 21, well after the 30-day period, even if tolled, had expired.<sup>2</sup>

Therefore, since the Board’s action was untimely, the Committee’s Decision is deemed the action of the Board.

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1. The Amended Decision contains a proviso that should the Board’s appeal prevail, the permit becomes void. Such a condition could have been included in the permit issued by the Board within the 30-day period following the Committee’s Decision.

2. The Board assumes that by requesting a stay, it reset the 30-day clock, but offers no legal support for that idea, which contradicts the entire concept of tolling to stop a running time period.

**B. The Board's Amended Decision Did Not Carry Out the Order of the Housing Appeals Committee**

Even if the Board had issued its Amended Decision in a timely fashion, that Amended Decision does not carry out our Decision as required by the statute. The Amended Decision is a 16-page document containing numerous conditions that add new requirements to those imposed by our Decision in violation of § 23. The Board argues that the Committee's Decision does not prohibit the imposition of additional conditions that are necessary to guide the construction and management of the project. It contends that our decision was insufficient and therefore the additional conditions set out in the Amended Permit "were imposed to address vital local concerns." Board opposition, p. 2. However, the Board misinterprets the requirements of Chapter 40B and our Decision.

First, our Decision contained the conditions we determined to be appropriate pursuant to Chapter 40B, based on the evidence in the record of the hearing before the Committee. When the Committee issues a decision overturning a board's decision and orders the issuance of a comprehensive permit, we specify the necessary parameters for the permit. In addition to the specified conditions, as our decisions state, developers are also required to comply with all unwaived applicable local requirements, as well as all state and federal requirements applicable to the project, and to undergo review by the subsidizing agency. It is error on the Board's part to suggest that because we did not include the many conditions it added in the Amended Decision, that we left the door open for it to design its own conditions.

In addition, adding new conditions does not "carry out the order of" the Committee as required by § 23. This obligation is not an opportunity to consider whether to impose other additional conditions. The mechanism to address the Board's local concerns was previously afforded to the Board in its review of the initial permit application and the evidentiary hearing before the Committee. To the extent the Board desired the imposition of specific conditions based on legitimate local concerns, it was incumbent upon it to bring its request to the Committee's attention as part of the *de novo* proceeding.

The position advocated by the Board actually attempts to set the stage for a second *de novo* appeal to the Committee, wholly in conflict with the language and public purpose of



Chapter 40B to streamline and expedite the process of reviewing affordable housing projects. The statute allows a town zoning board one opportunity to review a comprehensive permit application, and to deny the application or grant it with specified conditions, subject to review by the Committee. The scenario envisioned by the Board would allow it to take a second opportunity to impose conditions that would have to be appealed once again to the Committee, for review of whether they render the project uneconomic. It is disingenuous to suggest that Chapter 40B, a statute intended to provide for an expeditious review of comprehensive permit applications, contemplates such a two-step process.

Accordingly, we rule that to carry out the order of the Committee pursuant to § 23, the Board is bound to comply with the parameters specified in the Committee's Decision.<sup>3</sup> It may not issue a permit with additional conditions, regardless of whether it considers them to be "consistent" with the Committee's Decision.

**C. The Board did not have the Authority to Issue a Separate Amended Decision that Contravened the Order of the Housing Appeals Committee**

The Board and Intervener also appear to suggest that the Board has inherent authority to modify its decision after it has been overturned by the Committee. However, no such authority exists, since it would violate § 23's explicit direction to implement the Committee's Decision. The Intervener even suggests that even though the Committee's decision was deemed the action of the Board under § 23 (Intervener Opposition, p. 2 n.1), the Board nonetheless had the authority to issue an amended decision thereafter, effectively modifying the Committee's permit. This is simply another way of seeking to add conditions to the permit. For the same reasons that a board may not add conditions to a permit ordered by the Committee, it may not cast the permit as an amended decision subject to a separate appeal. The Board had no jurisdiction to act on its own and modify the permit.

Also, this argument raises the same concerns as the addition of conditions by the Board and for the same reasons it flies in the face of the language and purpose of Chapter

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3. The ruling by the presiding officer, acting alone under different circumstances in *Canton Property Holding, LLC v. Canton*, No 03-17 (Mass. Housing Appeals Committee Sept 17, 2010 Order Modifying Comprehensive Permit), referred to by the Board, has no precedential value and is of no avail to the Board and Intervener.

40B. The statutory scheme of an expedited proceeding would be turned on its head if, as the Board advocates, it is entitled to decide *on its own* to issue an Amended Decision with new conditions that must be appealed under the uneconomic standard. Nowhere in the statute is such a procedure contemplated.

In denying the comprehensive permit application, the Board had made a choice. It could have granted a permit and set out the conditions it believed were supported by local concerns, but it did not do so when it had the opportunity. During the appeal before the Committee, the Board should have presented its local concerns and conditions to address them, either in the form of an alternative conditional decision in lieu of denial, or in a motion submitted to the Committee. This the Board did not do. It is too late now for the Board to amend its decision to set up a new appeal and concomitant delay.

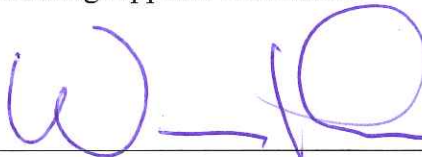
Therefore, the Board's Amended Decision cannot constitute a separate decision subject to appeal under G.L. c. 40B, § 22, and the arguments of the Board and Intervener that the Appellant did not file a timely appeal of the Amended Permit to the Committee and the Committee lacks jurisdiction to hear this matter are without merit. The Amended Decision is *ultra vires* and void. Accordingly the motion to quash is granted.

### **III. Conclusion and Order**

The motion to quash is granted. The Amended Permit is null and void. The Committee's Decision is deemed the action of the Board for all purposes relating to this comprehensive permit application. The Board is ordered forthwith to provide this Ruling

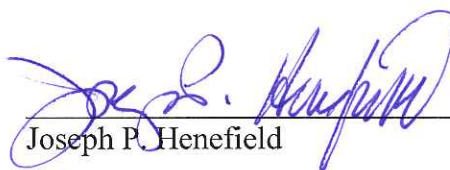
and Order to all local boards and individuals with authority over implementation of the comprehensive permit.

Housing Appeals Committee



Werner Lohe, Chairman

Dated: December 13, 2010



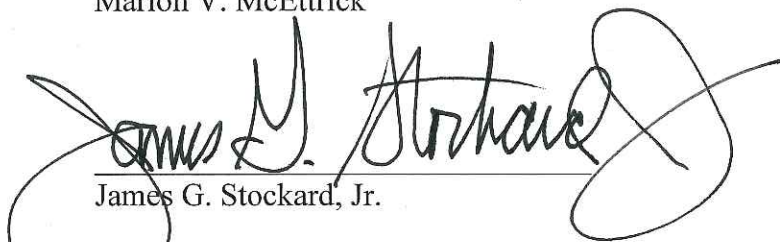
Joseph P. Henefield



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Marion V. McEttrick



James G. Stockard, Jr.



Shelagh A. Ellman-Pearl, Presiding Officer