COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

BREWSTER COMMONS, LLC, Appellant v. DUXBURY ZONING BOARD OF APPEALS, Appellee	No. 10-08

RULING AND ORDER EXTENDING COMPREHENSIVE PERMIT

I. INTRODUCTION

This case involves the Duxbury Zoning Board of Appeals' denial of an extension of a comprehensive permit it had issued pursuant to G.L. c. 40B, §§ 20-23. In 2004, the Board granted a permit to the developer, Brewster Commons, LLC, to build 40 units of housing on about 14 acres of land near the intersection of Woodridge Road and Tremont Street in Duxbury, and included a provision that the permit would lapse if construction did not begin within two years. After several extensions of the permit, the Board denied a further extension in August 2010. On September 3, 2010, the developer appealed to this Committee. A Conference of Counsel pursuant to 760 CMR 56.06(7)(d)(1) was held on September 30, and afterwards the parties considered both the possibility of settlement and of joining the issues on cross-motions for summary decision.[1] Ultimately, however, a one-day evidentiary hearing was held on March 22, 2011, and briefs were filed by June 10, 2011. Based upon the record presented, we overrule the Board's denial of an extension.

1. Questions concerning extension of a permit are commonly addressed by cross-motions for summary decision. See, e.g., *Delphic Assoc., LLC v. Duxbury*, No 03-08 (Mass. Housing Appeals Committee Ruling and Order Extending Comprehensive Permit Jan. 12, 2010).

II. JURISDICTION

The Committee's power to address issues such as the extension of permits is implicit in the Comprehensive Permit Law. The law itself provides little specific guidance with regard to the handling of disputes that arise after a permit has been issued. G.L. c. 40B, § 23 indicates that the hearing in chief "shall be limited to the issue of whether... the decision of the board of appeals was... consistent with local needs [or,] in the case of an approval,... whether [conditions rendered the proposal] uneconomic...," and goes on to provide that the Committee may "vacate" the local decision, "direct" the local board to issue a permit, and "order [the] board modify or remove" conditions, provided it does not "issue any order" that would permit unsafe housing. G.L. c. 40B, § 23 (paragraph two) states that the "orders of the committee" may be enforced in the Superior Court. But beyond this, it is axiomatic that "[a]n agency's powers are shaped by its organic statute taken as a whole and need not necessarily be traced to specific words." *Commonwealth v. Cerveny,* 373 Mass. 345, 354 (1977). "Powers granted include those necessarily or reasonably implied." *Grocery Mfrs. of America, Inc. v. Department of Pub. Health,* 379 Mass. 70, 75 (1979). Where there is "a gap in the statute, 'the details of legislative policy are to be spelled out "in the first instance by [the] agency charged with administration of the statute."'" *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 759 (2010). "The discretion granted to an administrative agency is 'particularly broad when [the] agency is concerned with fashioning remedies and setting enforcement policy.'" See *Boston Preservation Alliance, Inc. v. Secretary of Environmental Affairs & others*, 396 Mass. 489. 498 (1986)(quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 857 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)).

The Committee's broad power is reflected in its regulations with regard to extension of permits, specifically in 706 CMR 56.05(12)(c), which states, "The Board or the Committee... may extend any [expiration] date." We have routinely exercised that power. See *Commons at Westwood, Inc. v. Westwood*, No. 89-47 (Mass. Housing Appeals Committee Jun. 20, 1990)(extension of construction deadline held an insubstantial change which should be approved under 760 CMR 31.03(3)); *Red Gate Road Realty Tr. v. Tyngsborough*, No. 93-01 (Mass. Housing Appeals Committee Dec. 8, 1993)(denial of

extension is not consistent with local needs); *Albro/Southborough Limited Partnership v. Southborough*, No. 92-06 (Mass. Housing Appeals Committee Dec. 8, 1993)(denial of extension is not consistent with local needs); also see *Forestview Estates Assoc., Inc. v. Douglas*, No. 05-13, (Mass. Housing Appeals Committee ruling Mar. 25, 2007)(permit expired when request for extension filed late).

In any case involving a comprehensive permit that was issued by the Committee or in compliance with an order of the Committee, a ruling with regard to the extension or lapse of the permit may properly be made by the presiding officer without consultation with the full Committee. See *Forestview Estates Assoc., Inc. v. Douglas*, No. 05-23, slip op. at 4 (Mass. Housing Appeals Committee Mar. 5, 2007)(discussing precedents in detail). But in cases involving locally issued permits, absent exigent circumstances the normal practice is for the presiding officer to bring the matter before the full Committee, as he has done here.

III. FACTS

The original comprehensive permit issued in this case was filed with the town clerk on October 8, 2004. Exh. 1. It included a provision that the permit would lapse if construction did not begin within 24 months of the date on which it became final.[2] Exh. 1, p.7.

In July 2006, the developer first requested that the permit be extended. See Exh. 2.

By letter of August 1, 2006, the Board informed the developer that this request was an insubstantial change, and extended the permit "until October 2007," noting that a further extension might be requested if the allotted time "prove[d] insufficient." Exh. 2.

In 2007, in response to a timely request by the developer, the Board again extended the permit, to October 28, 2008, this time noting that the change was substantial and that the developer had agreed that no further extensions would be approved. Exh. 6, p.2

On July 22, 2008, the developer again made a written request for extension "for an additional two months," that is, until December 28, 2008.[3] Exh. 7-A.

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2. Such a provision was proper since, even though the regulations in effect at that time provided for a three-year expiration period, at that time they also permitted the Board to set an earlier date. 760 CMR 31.08(4).

3. Earlier, by letter dated June 5, 2008, the developer had requested substantive changes in the permit, which were approved July 24, 2008. Exh. 8-A.

On August 4, 2008, the Board approved the extension to December 28, 2008 as an insubstantial change. Exh. 7-B.

On August 25, 2008, an appeal of the Board's action was filed in Superior Court by an abutter.[4] Exh. 9; Tr. II, 56.

On September 4, 2008, the developer, asserting that the abutters' appeal was filed 126 days prior to the expiration of the permit, requested an extension for 126 days beyond any date on which the appeal might be disposed of.[5] Exh. 10.

On September 25, 2008, the Board voted "to extend the comprehensive permit for 126 days beyond the date the appeal is finally concluded."[6] Exh. 11-B.

On January 14, 2010, a stipulation of dismissal of the abutter's appeal was filed with the court. Exh. 12-B, 13; Tr. II, 58.

On May 11, 2010 the developer's request for further extension was received by the Board. Exh. 14; 14-A; Tr. II, 58.

The Board determined that the May 11 request was for a substantial change, and scheduled a hearing. Tr. II, 34, 59.

The Board scheduled and conducted a hearing on June 24, 2010, and completed that hearing on July 8, 2010. Exh. 19, pp. 2-3; Tr. II, 34, 60-61.

At the hearing on June 24, 2010, the developer was notified that a filing fee was required and it paid three fees: a filing fee of $400, a publication fee of $70, and an abutter-notification fee of $30.[7] Tr. II, 35, 41, 66, 84; Exh. 15.

On July 8, 2010, at a public hearing, the Board voted to deny the request to extend the permit. Exh. 19, pp. 1, 3.

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4. It appears that the appeal was not of the extension of the permit, but rather of certain substantive changes to the permit that the Board had approved on July 24, 2008. See n.3, above.

5. The Board later asserted that "As of August 25, 2008… there were… (124days) remaining on the permit." Exh. 19, p. 2. By the calendar, August 25 is, in fact, 125 days prior to December 28 (and December 28 is 125 days after August 25). It might even be argued that there were 126 days "remaining on the permit" since December 28 fell on a Sunday in 2008. None of these discrepancies is significant, however, since by the explicit terms of its own decision, the Board approved an extension of 126 days.

6. Presumably the Board considered this change insubstantial since it approved the request in an "administrative meeting," rather than after a hearing. Exh. 11-B.

7. As the result of an oversight, an additional amount of $60 was paid on July 12, 2010. Tr. II, 84; Exh. 18.

On August 17, 2010, the Board issued the decision memorializing the denial (which stated several alternate grounds for the denial), and filed it with the town clerk. Exh. 19.

The August 17, 2010 decision contained several errors. It stated incorrectly that when the abutter appeal was filed in 2008, there were 44 days remaining before the developer's then current extension expired; it *calculated* the length of the permit extension by adding 60 days to 44 days for a total of 124 days beyond disposition of the appeal (that is, its result was neither the approved extension of 126 days nor the proper calculation of 104 days); and it indicated that the appeal had been disposed of on December 21, 2009, concluding that the permit had expired April 24, 2010, two weeks before the developer requested its next extension. Exh. 19, p. 3.

On August 23, 2010, the error in the calculation of dates in the decision (not a scrivener's error) was discovered by a resident of Duxbury. Tr. II, 69; Exh. 20.

On August 24, 2010, the Board amended the August 17 decision, and filed it with the town clerk on August 25, 2010. Exh. 21. The amendment corrected the calculation error and indicated (incorrectly) that the extension period was 104 days, but changed neither the reasoning nor result of the decision in any other way. See Exh. 21.

On September 3, 2010, the developer appealed to this Committee.

IV. DISCUSSION

1. Alleged Procedural Irregularities

The first section of the argument portion of the Board's brief concerns the Committee's partial waiver of the filing fee assessed to the developer—as authorized by 760 CMR 56.06(4)(f)—and an alleged failure of the developer to notify the Committee under 760 CMR 56.06(4)(h)(1) of its compliance with the Massachusetts Environmental Policy Act (MEPA).[8] Both of these involve administrative requirements imposed on an appellant by the Committee, neither of which is intended to confer rights upon the Board. The Board

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8. Before its argument, in the introduction to its brief, the Board notes that that certain documents were admitted at the hearing when a subpoena was quashed. Board's Brief, p. 2. Because this is not presented as an argument, much less an adequate argument, since it contains no citation to the record, we need not address it. *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995); *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958); *Hollis Hills, LLC v. Lunenburg*, No. 07-13, slip op. at 35, Mass. Housing Appeals Committee Dec. 4, 2009); *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994); also see Tr. II, 6, 18, 25, 46-50.

lacks standing to raise such issues. See *Lynch v. Board of Appeals of Boston*, 1 Mass. App. Ct. 353, 357 (1973).

Further, the Board asserts that the presiding officer "pressed" the parties, moving this matter forward on a "truncated schedule." Board's Brief, p. 4. After the normal Conference of Counsel on September 30, 2010, a second Conference of Counsel was scheduled on December 13, 2010, in an attempt to resolve the impasse between the parties, and a schedule was then established that resulted in an evidentiary hearing session on March 22, 2011—over six months after the appeal was filed. The Board's argument lacks merit; if anything, given the remedial purpose of the Comprehensive Permit Law, this matter should have moved forward more expeditiously. Also see Tr. I, 15-18; 760 CMR 56.06(7)(e)(11). Similarly, the Board's scattershot claims of procedural irregularities in the admission of evidence lack support and merit. See Board's Brief, p. 5.

2. Statutory Minima

The Board next argues that Duxbury has "exceeded at least one" or perhaps two of the statutory minima set forth in 760 CMR 56.03 that establish "safe harbors" for towns within the Comprehensive Permit Law. Board's Brief, pp. 6-7. This argument fails for three reasons. First, any claim that the town has reached one of the statutory minima must be raised initially during proceedings before the Board, and not after the fact on appeal to this Committee. 760 CMR 56.03(1), 56.03(8)(a). Second, the assertion of achieving a statutory minimum has always been in the nature of an affirmative defense, and revision of our regulations in 2008 has made it even clearer that the "Board shall have the burden of proving satisfaction of the grounds...." 760 CMR 56.03(8); see *In the Matter of Bourne and Chase Developers, Inc.*, No. 08-11, slip op. at 1, n. 1 (Mass. Housing Appeals Committee Ruling on Motion to Quash Subpoena Apr. 13, 2009); *West Wrentham Village, LLC v. Wrentham*, No. 05-04 (Mass. Housing Appeals Committee Ruling on Motion to Dismiss Jul. 13, 2005). Thus, obviously, such a claim must be supported by proof of facts. But the Board simply argues alleged facts in its brief with no citation to the record, and in fact it introduced no evidence to support its argument.[9] Third, extension of a permit may not be "denied due to other projects built or approved in the interim." 760 CMR 56.05(12)(c).

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9. In testimony, there was passing reference to the other affordable housing development—Island Creek—that the Board discusses in its brief. Tr. II, 73-74. But there is no evidence relating to the

3. Lapse of the Permit

The Board next argues that the "permit expired before Brewster [Commons, LLC] requested an extension and once it had lapsed the Board properly declined to reinstate it." Board's Brief, pp. 7-10 (heading). This argument, however, is based upon a number of false assumptions or misunderstandings of the facts. For instance, it argues, "There were 44 days between August 25, 2008 when [the abutter] filed suit and October 8, 2008 when the permit was due to expire." Board's Brief, p. 8. But in fact, the Board had already—on August 4, 2008—extended the permit to December 28, 2008. Exh. 7-B. More important, the Board states that it "had also granted a third extension for 60 days." Board's Brief, p. 8 (inexplicably citing to "Ex. 4."). In fact, the documentary evidence shows very clearly that on September 4, 2008, the developer requested a 126-day extension beyond the conclusion of the abutter appeal, and that the Board "extended the comprehensive permit for 126 days beyond the date when the appeal is finally concluded." Exh. 10, 11-B. In light of both the written request for 126-day extension, and the clear statement of approval in the Board's minutes, the Board chairman's disavowal of the minutes on cross examination lacks credibility. See Tr. 80-81. It is also quite clear that the abutter appeal was concluded with the filing of a stipulation of dismissal on January 14, 2010. Exh. 12-B, 13. And, the developer's request for a further extension was filed on May 11, 2010. Exh. 14, 14-A. This was well within 126 days of the dismissal, and therefore it was timely.

4. Extension of the Permit

The Board's final argument is that the developer "failed to proceed diligently" in seeking final approval of the development from the subsidizing agency and in meeting certain of the requirements in the permit. Board's Brief, p. 11. Unfortunately, however, throughout this hearing and in its written decision the Board has focused on the procedural justifications for its denial of an extension, and has not carefully addressed substantive

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statutory minima in the twenty-three primary exhibits relied upon by the parties. Nor does there appear to be any evidence with regard to this issue in the much more extensive set of documents (Exhibits S-1 to S-106) that was introduced by the developer in place of testimony from a subpoenaed witness from MassHousing (Massachusetts Housing Finance Agency). (Since neither party has made any reference to these documents, we have not reviewed them in detail, but they appear to consist nearly entirely of correspondence between the developer and MassHousing.) In any case, once again the Board's argument with regard to this issue contains no citation to the record. See Board's Brief, pp. 6-7; also n. 8, above.

concerns that may relate to the delay in moving toward construction. In its decision, the Board did note that the developer "offered no good cause to grant a fifth extension of a six-year-old permit," and this question is also addressed in a section of its brief. Exh. 19, p.4; Board's Brief, pp. 10-12. But even this argument is difficult to evaluate, not only because, as noted above, the Board has failed to brief it with clear citations to the record, but also because it was given virtually no attention during the presentation of evidence. See Tr. II, 66; also see n. 8, above. That is, on the record and briefs before us, it is difficult to evaluate whether the delays are a result of inaction on the part of the developer or of factors beyond its control.

But what is more important—even assuming the developer bears some culpability for the delay—is that, as detailed below, the Board has not presented a sufficient case under our regulations. That is, it has not pointed to changed circumstances or circumstances which heighten the need for closure.

Our regulation with regard to extensions is liberal. It states:

> If construction authorized by a comprehensive permit has not begun within three years of the date on which the permit becomes final except for good cause, the permit shall lapse.... The Board or the Committee may set a later date for lapse of the permit, and it may extend any such date. An extension may not be unreasonably denied....

760 CMR 56.05(12)(c).

We first clarified the procedures for implementing this regulation in the case of *Red Gate Road Realty Trust v. Tyngsborough*, No. 93-01, (Mass. Housing Appeals Committee Dec. 8, 1993).[10] After a lengthy discussion of the history of the Comprehensive Permit Law, the regulatory history, and the common law approach to establishing burdens of proof, we concluded that "once the [developer] has shown that it has properly requested an extension of the permit, the Board in order to prevail has the burden of proving that there are legitimate health, safety, environmental, or other local concerns with support its denial of further extension of the permit and that those concerns outweigh the need for housing." *Red Gate Road Realty Trust*, slip op. at 5; *Delphic Assoc., LLC v. Duxbury*, No. 03-08, slip op. at 16 (Mass. Housing Appeals Committee Sep. 14, 2010). To meet this burden, "[t]here are

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10. In their most salient features, the current regulation and the regulation referred to in *Red Gate Road Realty Trust*, 760 CMR 31.08(4) are the same. See *Red Gate Road Realty Trust*, slip op. at 3.

two approaches that a Board can take.... First, it can point to changed physical circumstances specific to the proposed housing development or the surrounding area." *Id.*, slip op. at 6. Second, it can prove that "fundamental concepts of fairness and the need for closure demand that it be allowed... to terminate the permit;... at some point the permit should terminate...." *Id.*, slip op. at 7, 9. With regard to the second approach, we normally consider unusual circumstances which heighten the need for closure, the conduct of the parties, and any action taken by the developer in reliance on the permit. *Id.*, slip op. at 10. In the present case, however, the Board has presented virtually no evidence to meet this burden of proof, and therefore we conclude that its denial of the extension of the comprehensive permit must be overruled. Therefore, we will extend the permit for twelve months. And, as in *Red Gate Road*, we will impose an intermediate deadline to ensure that there is smooth progress toward the beginning of construction. See section V, below.

V. RULING AND ORDER

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee overrules the denial of an extension of the comprehensive permit granted by the Duxbury Zoning Board of Appeals. The comprehensive permit as issued and modified by the Board shall be extended and remain valid as provided in the text of this decision, subject to the conditions below.

1. Within six months of the date of this decision (or of the date on which it becomes final, if it is appealed), the developer shall submit to the Board a copy of a final approval by the subsidizing agency issued pursuant to 760 CMR 56.04(7).

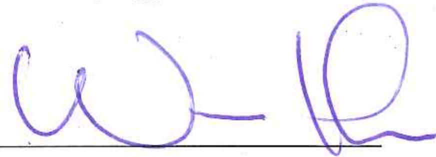
2. Within twelve months of the date of this decision (or of the date on which it becomes final, if it is appealed), the developer shall apply to the Duxbury Building Commissioner or Building Inspector for a building permit.

3. The developer shall commence construction within 30 days of issuance of a building permit, provided that the developer shall not be required to commence construction sooner than six months from the date of this decision (or of the date on which it becomes final, if it is appealed).

4. Failure of the developer to comply with any of the above conditions shall cause the comprehensive permit to lapse on the date specified.

This ruling may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the ruling.

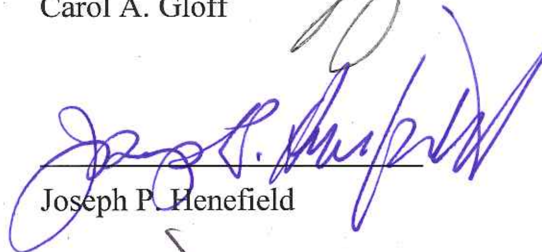
Housing Appeals Committee



Date: December 12, 2011

Werner Lohe, Chairman

Carol A. Gloff



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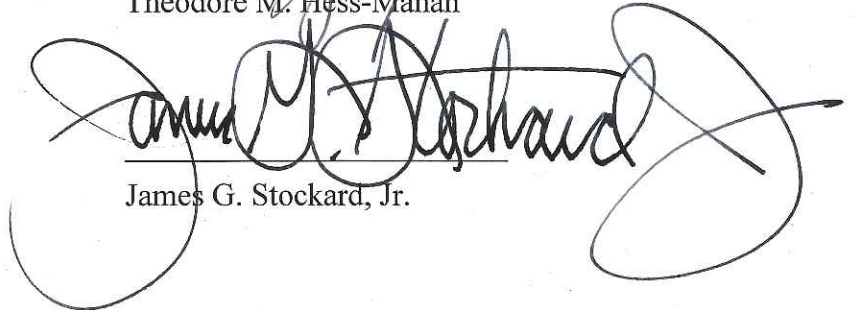

James G. Stockard, Jr.

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