COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

TAYLOR COVE DEVELOPMENT, LLC, Appellant	)	
v.	)	No. 09-01
ANDOVER BOARD OF APPEALS, Appellee	)	

RULING ON MOTION FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

On July 14, 2008, Taylor Cove Development, LLC submitted an application to the Andover Zoning Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build 32 affordable, mixed-income residential condominium units on a twelve-acre site off of River Street in Andover. The housing is to be financed under the Massachusetts Housing Finance Agency (MassHousing) Housing Starts Program or the Federal Home Loan Bank of Boston New England Fund. The Board denied the permit by decision filed with the town clerk on February 13, 2009. On March 2, 2009, the developer appealed to this Committee. The hearing was opened with a conference of counsel on March 19. On May 5, 2009, the developer filed a Motion for Summary Decision pursuant to 760 CMR 56.06(5)(d), which the Board opposed.[1] Both parties filed affidavits, exhibits, and memoranda of law in

1. Because of the Committee's relatively informal, administrative hearing procedures, the issues raised by both sides can be fully joined without any technical requirement that the Board file a cross-motion for summary decision. See 760 CMR 56.06(5)(d) ("Summary decision may be made against the moving party, if appropriate.").

support of their positions.[2] The issue presented on this motion concerns whether a comprehensive permit may properly be granted for a site that includes an undeveloped lot of an existing subdivision. For the reasons discussed below, I rule that on the facts presented here, the subdivision lot may be properly included as part of the proposed development, and I grant the developer's motion and remand the matter to the Board for further review of the merits of the application.

II. FACTS

Taylor Cove Condominiums, the development that is the subject of this appeal, is proposed on a site adjacent to an existing subdivision of about the same size, the Charlotte Circle Subdivision. The twelve-acre Taylor Cove development site has been assembled from more than one lot. Most notably, about half of the 32 proposed housing units are to be built on a 2.86-acre lot[3] that was designated as "Parcel A" in the Charlotte Circle Subdivision in 1984. Affidavit of Applicant's Counsel, Exh. 3, 9, 11 (filed May 5, 2009)(hereafter, "AAC"). That is, Parcel A was designated when the Andover Planning Board approved a definitive subdivision plan and a "Special Permit to Cluster" under the town's cluster development bylaw on January 10, 1984. AAC, Exh. 6, ¶ 16; 7; 9.

More specifically, the Charlotte Circle Subdivision consists of seven lots totaling 10.88 acres. AAC, Exh. 9. Five buildable lots, which are roughly an acre in size, are clustered around the Charlotte Circle *cul de sac*, and are labeled "Lot 1" through "Lot 5." AAC, Exh. 9. Behind Lots 1 and 2, to the northwest of the circle, is a lot that is set aside and labeled "Parcel B - Open Space." AAC, Exh. 9. At a little over three acres, Parcel B provides the open space required by the cluster development bylaw—30% of the total

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2. The Board requested the opportunity to present oral testimony by a hostile witness, the surveyor who laid out the subdivision described below. Motion to Present Oral Argument [sic] (filed May 1, 2009). No arguments concerning factual difference about the subdivision layout, however, were pursued in the briefs of the parties. Further, our regulations provide that "a hearing maybe held at the discretion of the presiding officer." 760 CMR 56.06(5)(a)(1). I find that there is no genuine issue as to any material fact with regard to the issues presented, that the motion for summary decision can be decided on the record presented without the need for a hearing, and therefore the motion for oral testimony is denied.

3. As noted in the Board's decision, Parcel A was originally 2.6 acres, but by an amendment in 1985, it was increased to 2.86 acres, and Lot 5 was reduced in size. See ACC, Exh. 2, p. 4, n."a."

subdivision. See ACC, Exh. 4, p. 45, ¶ 3. Parcel A, also a large, nearly three-acre lot, is a sixth buildable lot set off some distance from the circle to the south behind Lots 4 and 5; its access was not to be from the north at Charlotte Circle, but rather from the southwest (the far end) from River Street—by right of way that was confirmed by a variance approved in 1983.[4] ACC, Exh. 5, 9.

III. DISCUSSION

The question presented in this case is not answered in the text of the Comprehensive Permit Law nor in court precedents, and therefore the Board raises a number of new, complex, and interrelated arguments. It denied the developer's application for a comprehensive permit on the grounds that Parcel A cannot properly be included in the proposed development. "Parcel A would effectively be subtracted from the cluster subdivision," making it a size that would have prevented approval, and thus, "'double-counting' Parcel A's area—first as an essential component of satisfying the 10-acre requirement for the cluster subdivision and later as an essential part of the proposed 40B development—derogat[ing] from the cluster subdivision approval... and the Zoning Bylaw." ACC, Exh. 2, p. 9, ¶¶ 10, 12. The Board elaborates this position in its brief: "Removing

4. This description of the Charlotte Circle Subdivision is not readily apparent on the face of the 1984 plan and decision of the Andover Planning Board. The approved subdivision plan contains a number of ambiguities, and could be read as showing the subdivision as consisting of either seven lots or eleven lots. On the one hand, the plan shows eleven lots totaling 13.22 acres: Lots 1 through 5, and Parcels A through F. And, the plan notes, "Total site area = 13.22 Ac.; total number of buildable lots = 7 (Lots 1,2,3,4,5, Parcels A & D)." AAC, Exh. 9. Another note on the plan indicates that the five numbered lots and lots A and D are the buildable lots. AAC, Exh. 9. Parcel B is designated "open space," and was to be conveyed to the Andover Conservation Commission. ACC, Exh. 6, ¶ 12; 9. Parcels D and E are adjoining one-acre house lots on River Street, one of which contains an existing house. Parcels C and F are small lots, which are to be conveyed to abutting landowners. ACC, Exh. 9.

The November 9, 1983 Cluster Development Application, on the other hand, lists the "total area of parcel being subdivided" as 10.88 acres. Affidavit of Zoning Board of Appeals Counsel, Exh. 1, p. 2, ¶ 7 (filed May 29, 2009)(hereafter "AZBAC"). The approved subdivision plan has a notation of: "Total Site Area (excluding Parcels C, D, E, & F) = 10.88 A." Further indication that the subdivision is 10.88 acres is that the cluster development bylaw requires that 30% of the land within a cluster development be set aside as open space, and Parcel B, the open space that is set aside, is 3.27 acres, or exactly 30% of 10.88 acres. See ACC, Exh. 4, p. 45, ¶ 3. Thus, it is clear, and the parties do not dispute, that the intention of the planning board was to approve a seven-lot cluster subdivision of 10.88 acres.

[Parcel A] from the Charlotte Circle Subdivision would not only render the remaining Charlotte Circle lots non-conforming, but would result in those lots being in violation of the cluster subdivision approval." Board's Brief, p. 1 (filed May 29, 2009). This, in turn, "would put a cloud on the marketability of title of the remaining landowners in the Charlotte Circle cluster subdivision." Board's Brief, p. 3. Further, it argues that modification of the subdivision is required, but that neither the Board nor this Committee may do so under the standard in G.L. c. 41, § 81W, which requires the consent of the Charlotte Circle residents, who have not given consent. Board's Brief, pp. 5-12. Finally, the Board argues that granting a comprehensive permit runs afoul of the concept of "infectious invalidity." Board's Brief, pp. 12-13.

1. The foundation upon which all of the Board's arguments rests is this last concept of "infectious validity," a concept that has not been defined comprehensively by the courts, but is generally understood as occurring "when property is divided without regard to local zoning requirements." M. Bobrowski, Massachusetts Land Use and Planning Law § 12.07(E) (2d ed. 2002). The leading case is *Alley v. Building Inspector of Danvers*, which held that minimum lot-size requirements in the zoning bylaw "prohibited reducing existing house lots that conformed to that requirement to an area of less than 10,000 square feet." *Alley v. Building Inspector of Danvers*, 354 Mass. 6, 7 (1968). In 1983, in a case involving an attempt to place a building on the parking lot of a small, downtown movie theater, the Appeals Court, citing *Alley*, noted that an owner has "no right to create a non-conformity." *Planning Board of Nantucket v. Board of Appeals of Nantucket*, 15 Mass. App. Ct. 733, 737 (1983), *further appellate review denied*, 389 Mass. 1104 (1983). For several reasons, however, I am not convinced that the concept of infectious invalidity should be extended to the factual circumstances presented in the case at hand.[5]

First, each of the cases cited by the Board involves dividing or conveying lots to create a buildable lot and leaving behind non-conforming lots. See, e.g., *Pateuk v. Coppola,*

5. Application of the idea of infectious invalidity is clearly fact-intensive. See *Murphy v. Kotlik*, 34 Mass. App. Ct. 410, 412-414 (1993). It is not a concept that has been elaborated upon in detail by the courts. For instance, there is no indication in the cases as to whether it might be applied less strictly when the party assembling a lot or parcel for development was not involved in the original

6 LCR 312 (Land Court No. 244530, Nov. 5, 1998)("'infectious invalidity' arising from the severance of the [another] property from its required frontage"). In the current case, Parcel A is already a conforming, buildable lot, will remain so, and will have additional land added to it. Similarly, Lots 1 through 5 in the Charlotte Circle Subdivision are conforming, and will remain so. The precedents are concerned with lots made non-conforming, not entire subdivisions. The Board proposes the novel idea that a subdivision is an entity distinct from the lots it contains, and can be rendered non-conforming even though the lots in it remain unchanged. I am reluctant to extend the precedents in such a manner.[6]

Second, in *Alley*, there is at least the suggestion the court was only reluctant to permit a new conforming lot to be created at the expense of leaving behind non-conforming lots because the creation was an "as-of-right" process, with no public review. The new lot was created by an approval-not-required endorsement by the planning board. The court noted that "proceedings [concerning granting of a building permit] before the board of appeals were in no sense an application for a variance." *Alley v. Building Inspector of Danvers*, 354 Mass. 6, 8 (1968). The court left open the possibility of engaging in a different analysis if, during a hearing concerning a variance, the new neighborhood configuration (two existing homes and one new one) had been subject to full public scrutiny—as the new configuration in this case will be during the comprehensive permit hearing.

Third, the case of *Sullivan v. Ferragamo* is instructive since it presents a factual scenario quite similar to the case at hand. That case also involved proposed further development of an earlier cluster subdivision. There, a 48-acre parcel had been subdivided to create 35 buildable lots. An additional 21-acre lot was labeled "Open Space" on the subdivision plan to satisfy the requirement of the cluster development bylaw that 35% of the land be set aside as open space. A later developer acquired the 21-acre parcel and attempted

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division of the lots—that is, "not involved in the vice at which the bylaw was aimed." *Murphy v. Kotlik*, 34 Mass. App. Ct. 410, 412 (1993).

6. Even if the facts here were identical to those in *Alley*, it could be argued that that precedent applies only to manipulation within the standard zoning framework, and that a Comprehensive Permit could allow the division of land proposed in *Alley*—assuming that it was consistent with local needs. I, of course, do not need to address those facts since here the lots will not change, and the Comprehensive Permit is needed only to allow an increase in density on the subdivision lot already designated as buildable.

to obtain approval to subdivide it into more than a dozen additional residential lots. On a motion for summary judgment, the court upheld the local board's denial of subdivision approval, noting that the purchaser of the open-space lot was "subject to its zoning." *Sullivan v. Ferragamo*, 6 LCR 21, 24, ¶ 30 (Land Court No. 222953, Jan. 13,1998). In the present case, it was Parcel B that was set aside in satisfaction of the cluster development open space requirement, and no limits were imposed on the use of Parcel A—it was buildable when the subdivision was approved, and remains so today. It, too, is "subject to its zoning" in that its development would normally be limited by the requirements of the zoning bylaw, but those zoning requirements may also be overridden by a comprehensive permit.

Fourth, public policy as reflected in the Comprehensive Permit Law suggests that an affordable housing developer should be permitted to assemble a parcel in the manner employed here. The Law is a remedial statute that is to be construed broadly to realize its purposes. See *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 530 (2007). All of the legal impediments argued by the Board—whether in the zoning by law, cluster development bylaw, subdivision regulations, or elsewhere—are local requirements and restrictions that may be waived to facilitate the construction of affordable housing. *Mahoney v. Board of Appeals of Winchester*, 366 Mass. 288, 232-233 (1974). Such waiver, of course, is not automatic. My ruling goes only so far as to say that the Board has the power under the Comprehensive Permit Law to approve this development proposal, which includes Parcel A. Though the Board has not even hinted in its briefs that there are specific, practical design or environmental concerns with the proposed development that might be grounds for denying or conditioning a permit, nevertheless, on remand, it should carefully review both the proposal and the surrounding neighborhood to ensure that any such concerns are addressed.

2. Further, a question has been raised as to whether modification of the Charlotte Circle Subdivision is required. If such modification were required, G.L. c. 41, § 81W authorizes modifications by the planning board, and the changes which would be necessary here do not appear to be of the sort that "affect" the lots in the subdivision so as to require consent of the owners. *Patelle v. Planning Board of Woburn*, 20 Mass. App. Ct. 279, 282-284 (1985)("traffic pattern, view, and over-all neighborhood density… or an unwanted

backyard neighbor are matters with which § 81W is unconcerned"); cf. *Matthews v. Planning Board of Brewster*, 72 Mass. App. Ct. 456, 463-464 (2008)(modification required in order to use a subdivision lot for roadway to a new subdivision). Since it is within the power of the planning board to modify a previously approved subdivision, so too is it within the power of the Board or this Committee under the Comprehensive Law. *Mahoney v. Board of Appeals of Winchester*, 366 Mass. 288, 232-233 (1974)(power to override local requirements and regulations is "equally applicable to the requirements of the subdivision control law"); also see *Woodridge Realty Tr. v. Ipswich*, No. 00-04 , slip op. at 23 (Mass. Housing Appeals Committee Jun. 28, 2001). This is consistent with the limits on the Committee's power, as described by the Supreme Judicial Court. That is, the power to override local "requirements and regulations" conferred on the Committee by G.L. c. 40B, § 20 relates to "'limitations on an owner's use of his property,'... not to the use of someone else's property." *Zoning Board of Appeals of Groton v. Housing Appeals Committee*, 451 Mass. 41 (2008)(power does not extend to granting of an easement); *Chelmsford v. DiBiase*, 370 Mass. 90, 94 (1970)(power does not extend to preventing good-faith taking of land for a public purpose). Modification of the Charlotte Circle Subdivision here would be within the Board's or the Committee's power since it would permit the owner of Parcel A to avoid the limitation on his property that it only be developed with a single home; it would not affect the use of the lots on Charlotte Circle by their owners.

Under the circumstances presented here, however, I see no need to go through the formality of modifying the existing subdivision. See *Blue View Construction, Inc. v. Town of Franklin*, 70 Mass. App. Ct. 345, 353 (2007)(where a comprehensive permit superseded a previously approved, unbuilt subdivision, no modification required since "[w]e conclude that § 81W has no effect on a zoning board of appeals and in no way limits that board's authority under G. L. c. 40B."). As a matter of policy, it matters little whether the existing subdivision is modified—either by the planning board itself or by the board of appeals acting for the planning board under the Comprehensive Permit Law—or whether the overall development scheme is simply reviewed during the comprehensive permit hearing. Rather, what is important is that there be a comprehensive public review process at which the relationship between the existing subdivision and the proposed development can be fully considered. See

Hamilton v. Planning Board of Beverly, 35 Mass. App. Ct. 386, 388-389 (1993). It is that sort of process that the Comprehensive Permit Law provides during the local hearing before the Board.

3. Finally, as part of its overall argument, the Board maintains that including Parcel A in the development "would put a cloud on the marketability of the title of the remaining landowners in the Charlotte Circle [Subdivision]...." Board's Brief, p. 3 (filed May 29, 2009). In support, the Board has submitted an affidavit from an experienced conveyancing lawyer which states his opinion[7] that, under the law in *Mucci v. Brockton Bocce Club, Inc.*, 19 Mass. App. Ct. 155, 159 (1985), "including [Parcel A]... as part of the Taylor Cove Project would cause a cloud on the marketable title of the remaining lot owners in the Charlotte Circle Subdivision and impair the marketability of those titles." Affidavit of Daniel S. Casper, p. 2, ¶ 6 (filed May 29, 2009).

The logic of the Board's argument is hard to grasp. As the Board points out, marketable title assuredly is "title free from reasonable doubt," but even in *Mucci*, the court noted that it "does not mean perfect title." *Mucci v. Brockton Bocce Club, Inc.*, 19 Mass. App. Ct. 155, 159 (1985)(upholding the lower court's ruling that encroachment of a small part of an old building with little value did not render title unmarketable). The only cases cited by the Board in support of its position are *Mishara v. Albion*, 341 Mass. 652, 654-655 (1961) and *Lee v. Dattilo*, 26 Mass. App. Ct. 185 (1988). See Board's Brief, pp. 3, 4 (filed May 29, 2009); Board's Surreply Brief, pp. 2-4 (filed Jun. 18, 2009). Neither of these bear enough similarity to the facts at hand to provide any direct support for the Board's contention, nor do they—as cases involving the sale of real estate—enunciate a theory of law that is directly applicable in the context of the Comprehensive Permit Law. The cases that appear in the Board's brief in quotation from the *Mishara* decision provide little further assistance. See *First African Methodist Episcopal Soc. v. Brown*, 147 Mass. 296, 298 (1888); *Conley v. Finn*, 171 Mass., 70, 72 (1898); *Chauncey v. Leominster*, 172 Mass 340, 346 (1898); *O'Meara v. Gleason*, 246 Mass 136, 138 (1923); *Cleval v. Sullivan*, 258 Mass. 348,

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7. Although this opinion was submitted in the form of an affidavit, I do not view it as evidence. All of the inter-related questions in this matter, including those involving possible effects on the legal rights of the owners of lots in the Charlotte Circle Subdivision, are questions of law.

351 (1927); *Sullivan v. F.E. Atteaux & Co., Inc.*, 284 Mass 515, 520 (1933); *Oliver v. Poulos*, 312 Mass. 188, 191-192 (1942). A case that bears a bit of similarity to the instant case is *Chicago Title Ins. Co. v. Kumar*, 24 Mass. App. Ct. 53, 56-57 (1987). That case involved uncertainty related to a possible future governmental action under G.L. c. 21E, and the court held that the presence of hazardous material may affect the market value of land, but does not affect the title to the land.

Ultimately, the Board has pointed to no precedent that prohibits the quite logical and acceptable use of a comprehensive permit that is proposed here for constructing affordable housing on a buildable lot. It basically argues that because, on the other hand, no precedent definitively permits it, it cannot issue a permit lest that cast doubt on the legal status of the subdivision parcels. But its very action of approving the permit, particularly if in response to this ruling of the Housing Appeals Committee,[8] will establish the legality of the land-use configuration in this location.

III. CONCLUSION

For the above reasons, the developer's motion for summary decision is granted.

During the local hearing, the parties focused on the legal question presented here. At that time, and in the current appeal, the developer has not pressed for immediate consideration of the merits of the comprehensive permit application. Thus, in denying the application for a comprehensive permit, the Board considered only "the issues surrounding the inclusion of Parcel A in the proposed project;" it "took no action on the merits." ACC, Exh. 2, p. 13. That is, it did not consider the design of the development or other possible issues of local concern. Therefore, this case is remanded to the Andover Board of Appeals for further consideration of the merits of the comprehensive permit application pursuant to 760 CMR 56.05.

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8. Although no interlocutory appeal of this ruling is available to the Board, it could contest the ruling in the courts after considering the development on remand. See *Town of Wrentham v. West Wrentham Village, LLC*, 451 Mass. 511 (2008). Prior to any such eventuality, this ruling would receive consideration by the full Housing Appeals Committee, since as presiding officer I am "not... empowered to make an decision that would finally determine the proceedings ...." 760 CMR 56.06(7)(c)(2).

Pending decision by the Board on remand, the Committee retains jurisdiction over this matter.

Housing Appeals Committee

Date: July 7, 2009

Werner Lohe
Presiding Officer

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