COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

SOUTH CENTER REALTY, LLC Appellant v. TOWN OF BELLINGHAM ZONING BOARD OF APPEALS Appellee	)	No. 07-03

RULING ON MOTION TO DISMISS

South Center Realty, LLC (SCR) appealed, pursuant to G.L. c. 40B, § 22, a decision of the Town of Bellingham Zoning Board of Appeals to deny SCR's application for a comprehensive permit.

The Board has moved to dismiss the appeal. It argues first that its low and moderate housing stock exceeds 10% of its total year-round housing units and second that because it has reached its 10% threshold, the Housing Appeals Committee does not have the authority to hear SCR's appeal.

For the reasons set forth below, the Board's motion is denied.

I. PROCEDURAL HISTORY

On November 5, 2004, SCR submitted an application to the Board for a comprehensive permit for a project under the Housing Starts Program of Massachusetts Housing Finance Agency and the New England Fund Program of the Federal Home Loan Bank of Boston. The proposed project provides 250 homeownership units on 63.4 acres located on Silver Lake Road in Bellingham. During the comprehensive hearings, the proposed project was modified to 120 units.

Nineteen hearings for the proposed project were held between January 6, 2005 and February 13, 2007, when the Board voted to deny SCR the comprehensive permit. The Board's decision was filed with the town clerk on March 9, 2007.

On March 28, 2007, SCR filed its appeal with the Committee. On April 19, 2007, the Board answered the appeal. The Board filed its Conference of Counsel Memorandum on April 20, 2007. On June 18, 2007, the Board filed a motion to dismiss. On August 20, 2007, SCR filed its opposition to the Board's motion. The Board's reply and SCR's sur-reply memoranda were filed on October 1st and October 12, 2007, respectively.

II. APPLICABILITY OF NEW REGULATIONS

New regulations for the Committee were promulgated on February 22, 2008. Pursuant to the Transition Rules of these new regulations, certain sections therein apply to some cases already before the Committee. According to 760 CMR 56.08(3)(c), the new regulations apply to this case. During the transition, however, the Committee may make some exceptions for practical and due process reasons.

Since this matter is already before the Committee, we will not refer it to the Department of Housing and Community Development (DHCD) for action under 760 CMR 56.03(3)(a). Similarly, 760 CMR 56.03(8), which revises the timing of the subsidized housing unit percentage calculation and outlines a new expedited interlocutory appeal for rebutting the presumption of the subsidized housing inventory's (SHI's) accuracy is not applicable here. Therefore, the Committee will address the matter.

III. MOTION TO DISMISS

The Board moved to dismiss SCR's appeal under 760 CMR 56.06(5)(2),[1] which permits a party to file a motion to dismiss specifically raising issues under the statutory minima described in 760 CMR 56.03(3)(a).[2] The basis for its motion is that the SHI shows that 10.1% of Bellingham's housing is low- or moderate-income.

Following the guidance of the Massachusetts Supreme Judicial Court, the Committee can accept the facts asserted in the appellant's "Initial Pleading" (or

1. Formerly 760 CMR 30.07(2)(b).
2. Formerly 760 CMR 31.04.

complaint) "together with any favorable inferences reasonably drawn therefrom, as true...." *Nathan Eigerman v. Putnam Investment, Inc. & another*, 450 Mass. 281, 282, 877 N.E. 2d 1258 (2007) (citing *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 322, 693 N.E.2d 153 (1998)). *Nathan Eigerman* further suggests that the Committee can reject and refrain from making "'legal conclusions [in the complaint] cast in the form of factual allegations.'" *Id.* (citing *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477, 735 N.E.2d 373 (2000)). Finally, "a motion to dismiss [can] be denied 'unless it appears beyond doubt that the [appellant] can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 286 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

IV. THE COMMITTEE'S AUTHORITY

Stating the Board's argument generally, once a town has reached the 10% threshold of low and moderate income housing (the housing unit minimum), the Committee no longer has authority to review a developer's appeal. This view is not consistent with the Committee's regulations. The Committee has the authority to determine if a town has indeed met the 10% minimum including: (1) whether evidence has been introduced to rebut the presumption established by DHCD's SHI; and (2) whether, on the facts of the case, disputed projects should be included. The Committee's regulations state:

> For purposes of calculating whether the city or town's SHI Eligible Housing units exceed 10% of its total housing units, pursuant to M.G.L. c. 40B, §20 and 760 CMR 56.00, there shall be a presumption that the latest SHI contains an accurate count of SHI Eligible Housing and total housing units... [A] party may introduce evidence to rebut this presumption... applying the standards of eligibility for the SHI set forth in 760 CMR 56.03(2).

760 CMR 56.03(3)(a); also see *West Wrentham Village, LLC v. Wrentham*, No. 05-04, slip op. at 3 (Mass. Housing Appeals Committee Jul 13, 2005); *Town of Wrentham Zoning Board of Appeals v. West Wrentham Village, LLC*, No. 10066 (Supreme Judicial Court argued Feb. 4, 2008). The new regulations do not change the scope of the Committee's authority to determine whether the 10% has been reached, but simply change the timing of when the Committee's authority

can be exercised.[3] For the reasons stated above, the Committee will not refer this matter to DHCD.

V. BURDEN OF PROOF

This ruling relies on one main issue: whether the Board met its burden of proof where there is a rebuttal to the presumption that Bellingham has met its housing unit minimum. Since the Board moved to dismiss, the Board has the burden of proof. Pursuant to 760 CMR 56.07(2)(e), the Board may demonstrate that its decision to deny the comprehensive permit was consistent with local needs because it has made progress toward local affordable housing thresholds (e.g. statutory minima, which include housing unit, general land area, and annual land area). "The Board shall have the burden of proving satisfaction of such grounds." 760 CMR 56.07(2)(e).

The Board argues, "SCR bears the burden of proof to demonstrate with conclusive evidence that any units should not be incorporated by [DHCD's SHI]." Board's Reply Brief, p. 2. Such an argument mis-interprets the Committee's regulations and the opinion of the Commonwealth's judiciary. For example, in *Standerwick v. Zoning Board Appeals of Andover*, the Supreme Judicial Court stated, "A presumption does not shift the burden of proof; it is a rule of evidence that aids the party bearing the burden of proof in sustaining that burden by 'throw[ing] upon his adversary the burden of going forward with evidence.'" *Standerwick*, 447 Mass. 20, 34, 849 N.E. 2d 197 (2006) (citing *Epstein v. Boston Hous. Auth.*, 317 Mass. 297, 302, 58 N.E. 2d 135 (1944)). Contrary to the Board's argument, the Committee's regulations do *not* provide that the burden shifts from the party claiming that the SHI is accurate to the party claiming that it is not. Accordingly, for the Board to have prevailed here, it must have shown that SCR's rebuttal did not "warrant a finding contrary to the presumed fact." *Id.* at 35.

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3. While the old regulations allowed a Board to carry its burden of proof regarding the statutory minima before the Committee, the new regulations require, for appeals not already filed with a Board, DHCD to hear the matter first. Either the Board or the developer can then appeal to the Committee in a *de novo* hearing.

VI. BELLINGHAM HAS NOT MET ITS HOUSING UNIT MINIMUM

A. The Denominator

SCR argues that the Committee should include year-round housing built after the 2000 Census. As we have stated before, the Committee does not take into account additional year-round housing units created since the 2000 Census. The Committee's regulations state "[t]he total number of housing units shall be that total number of units enumerated for the city or town in the *latest* available United States Census." 760 CMR 56.03(3)(a)[4](emphasis added).

As the Committee explained in *East Homes Trust v. Tyngsborough*, "The portion of our regulation that requires consideration of additional units that came into existence after the census was issued is inconsistent with the law and therefore null and void." *East Homes*, No. 02-37, slip op. at 4 (Mass. Housing Appeals Committee July 21, 2003). Since the denominator resets every ten years, communities and developers should plan accordingly.

B. The Numerator

As to the number of subsidized housing units on March 9, 2007, the date the Board's decision was filed with the town clerk, SCR has successfully rebutted the presumption regarding certain CDBG units currently in the SHI.

The CDBG program was authorized by Congress and is funded under Title I of the Housing and Community Development Act of 1974, as amended ("the Act"). DHCD is designated as the administrative agency for the Commonwealth of Massachusetts. "[The CDBG Program] is to develop viable, urban communities by providing decent housing and a suitable living environment and expanding economic opportunities principally for low- and moderate-income persons." 42 U.S.C. § 5301(c). The Federal assistance supports local programs that carry out several objectives including "the elimination of slums and blight and the prevention of lighting influences and the deterioration of property and neighborhood and community facilities of importance to the welfare of the community, principally persons of low and moderate income." 42 U.S.C.

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4. Formerly 760 CMR 31.04(1)(b).

§ 5301(c)(1). DHCD's CDBG program has a number of components, one of which is the Community Development Fund ("CDF"). See Board's Reply Brief, Exh. D.

The Bellingham Housing Rehabilitation Program ("BHRP") is a local administrator of DHCD's CDBG program. See SCR's Opposition Brief, Exh. A, ¶ 3. Pursuant to an agreement, BHRP assists the owners in the rehabilitation by directly paying the third-party contractor the amount to cover the cost of the rehabilitation. *Id.* at Exhs. 5-39. The owner pays none or perhaps a fraction of the cost. *Id.* A lien is placed on the home in the amount of the rehabilitation cost. *Id.* The Town of Bellingham then reports the units to DHCD. See SCR's Opposition Brief, Exh. A, ¶ 3. The reporting mechanism is a spreadsheet provided by DHCD, which requires, in part, the name of the owner or renter, address, level of affordability, start date, end date, grant year, number of units, and whether the loan was repaid. *Id.* at Exh. 2. Based only on the information reported, the home and any rental units in a home are then included on the subsidized housing inventory ("SHI"). *Id.* at Exh. A, ¶ 3; also see Exh. 1. Such lien must be discharged when the owner sells, mortgages, or transfers any interest in the property to a person other than an heir or a person of a low or moderate income. *Id.* at Exhs. 5-39. The SHI does not measure when the lien is discharged, but when the "affordability expires." *Id.* at Exh. 1.

A lengthy discussion of the merits of DHCD's CDBG program is not necessary, save to reiterate one of the national objectives of the program: to assist *principally* low- and moderate-income residents. The Commonwealth's CDBG requirements, as they relate to measuring a town's progress toward meeting its housing unit minimum, are even more stringent than the federal standard. *Each* and *every* CDBG unit included on DHCD's SHI must be occupied by a low or moderate income resident. See generally Board's Reply Brief, Exh. D.

SCR's Exhibits 5 through 39, which provide the documents exchanged between owners and the BHRP can be parsed and categorized in the following manner: (1) "old form" owner-occupied units; (2) "new form" owner-occupied units; (3) rental units that are rented out to low and moderate income residents; (4) units that were "Released;" and (5) units that were transferred.

1. Old Form Owner-Occupied Units

Each one of these units appear to be governed by an Assistance Agreement ("Agreement"), a table reflecting the dollar amount of the rehabilitation and the lien recording fee ("finance table"), and a Certificate Not to Encumber ("Certificate"). The Agreement provides that the BHRP will provide financial assistance in the form of a Deferred Payment Loan to the owner. In consideration of that financial assistance, the owner agrees to fourteen (14) requirements (e.g. the owner agrees to pay a percentage of all project costs[5]). The fifth requirement of the Agreement is expressed in the following manner:

> The Owner agrees not to mortgage, sell or transfer beneficial interest or title to the Property identified in the Agreement or to consent to any change in any terms of any existing obligation secured by any existing prior or later permitted mortgage(s) or liens on said property *without the approval of the Town.* If said Property is mortgaged, sold or beneficial interest or title to the Property is transferred to anyone other than an heir, successor or assign through an arms-length transaction to a non-interested party for which real consideration is given or terms of said obligation(s) changed, the Owner hereby agrees to make payment to the Town in the full amount of the financial assistance provided by the Bellingham Housing Rehabilitation Program.

See SCR's Opposition Brief, Exhs. 5, 8, 10, 11, 14, 15, 17, 18, 20, 22, and 23 (emphasis added).

The Agreement does not express any other "words of limitation," that is, an end date or the words: "perpetuity" or "perpetual." The Certificate provides, "[The owner] hereby agree[s] not to further mortgage, sell or transfer beneficial interest or title to the property *during the term* of the Assistance Agreement with the [BHRP]." It states further, "...*during said term* [owner agrees] not to consent to any change in any terms of any existing obligation...." *Id.* (emphasis added).

The Board argues that the Agreement "provide[s] for a perpetual lien that remains in effect for as long as the applicant owns the property." See Board's Reply Brief, p. 3. This interpretation of the Agreement is highly doubtful. "When the words of the contract are not ambiguous, the contract will be enforced according to its terms." *Mejia...v. American Casualty Company,* 55 Mass. App. Ct. 461, 465, 771 N.E. 2d 811 (2002). The

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5. Most Agreements expressed that the owner provide "0% of all projected costs."

unambiguous language of the Agreement provides that the owner cannot mortgage, sell, or transfer its interest "without the approval of the Town." This clause is a condition precedent rather than an expression of how long the Agreement is to remain in effect. The Certificate's reference to "the term of the Assistance Agreement" indicates that there should have been a definite term of years or an express provision for perpetuity in the Agreement. Under DHCD's CDBG program, a condition precedent should not be interchanged with a term of years or a provision for perpetuity.

DHCD's CDBG program is unlike the comprehensive permit process in that new housing is not being constructed, but pre-existing housing is being rehabilitated. The program does not create housing for *new* low or moderate income residents, but provides an incentive for low or moderate persons who are *already* residents to remain such residents. However, the purpose of Chapter 40B—to provide long-term affordable housing— must still be achieved. To that end, after a housing unit is rehabilitated, it should be set aside and *used* only by low or moderate income residents or the heirs of the original owners. In this case, the issue becomes whether the documents that govern the CDBG units express such a *use* restriction.

A use restriction is expressed in a legally binding instrument that is approved by DHCD. This restriction "runs with the land and is recorded with the relevant registry of deeds or land court registry district, and which effectively restricts the occupancy of an [sic] Low or Moderate Income Housing unit to Income Eligible Households during the term of affordability." 760 CMR 56.02.[6]

Here, since there is no indication of an affordability restriction and a temporal limitation (or an express lack thereof) in the Agreement or the Certificate, the old form does not contain a use restriction of any kind. Therefore, the units governed with this old form are not compliant with DHCD's CDBG program, notwithstanding Bellingham's representation to DHCD.

The Board argues that Bellingham's CDBG units are governed by a use restriction. However, the Board, in its reply brief, did not present any evidence supporting its assertion. The Board refers to an Agreement and Certificate, duplicative of

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6. Though no corresponding section appears in the 2004 version of the regulations, the language in the new regulations is consistent with DHCD policy. See Board's Reply Brief, Exh. D.

that which is provided by SCR in Exhibit 5 while arguing a different interpretation of the language therein. This is not persuasive. See Board's Reply Brief, Exh. B. Because the Board failed to meet its burden of proof as to these eleven (11) units, the removal of these units from the SHI would lower the percentage of the subsidized units below the 10% threshold. The Board's motion to dismiss is denied on this finding alone.

2. "New Form" Owner-Occupied Units

Starting in 2002, Bellingham occasionally used the new form. This form was used more consistently from 2003 through 2007. The Agreement and the Certificate are essentially the same as in the old form. However, the following additional paragraph entitled, "Repayment of Deferred Payment Loans" appears below the finance table:

> All financial assistance provided through the program is secured by a **15-year lien** filed with the Norfolk County Registry of Deeds. This prevents speculation and allows owners to remain in their homes after rehabilitation without additional monthly debt. No interest is accrued, and repayment of the loan is not necessary as long as the original applicant or immediate heirs reside at the property. The loan remains in effect for 15 years. If the property is sold or mortgaged to a non-interested party for which real consideration is given, the DPL becomes due and repayment is required at the time of the transaction.
>
> On a case-by-case basis, if extreme hardship can be demonstrated, a homeowner may apply through the Community Development Office to the Board of Selectmen for a waiver of a portion of the lien repayment or total forgiveness of the loan.

See SCR's Opposition Brief, Exhs. 12, 16, 19, 21, and 24-39 (emphasis in original); Board's Reply Brief, Exh. C.

The Board argues that the above 15-year lien language should be interpreted as a use restriction. DHCD policy does not support this position. According to DHCD's Eligibility Summary (2007), "Affordable rehabilitated units must be subject to a minimum 15 year use restriction." Board's Reply Brief, Exh. D.[7] Furthermore, the Committee's decisions do not support the Board's argument. *Silver Tree L.P. v. Taunton*, No. 86-19, slip op. at 14-15 (Mass. Housing Appeals Committee Oct. 19, 1988)

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7. The DHCD guidelines expressed in the Eligibility Summary provided as Exhibit D in the Board's Reply Brief were in effect as of January 2007. Most of the Bellingham units were rehabilitated before 2007, which would mean the 2007 version of the guidelines would technically not apply. However, neither party challenged the use of the 2007 version or produced an earlier version. Therefore, for purposes of this matter, these guidelines apply.

(explaining that certain "programs [were] set up to construct new units or rehabilitate existing units which *are thereafter set aside and "locked in"* for a long term, typically 15 or 20 years or longer, for use as affordable housing for low or moderate income persons."(emphasis added)).

The 15-year lien language is unambiguous. From this language we know: (1) the lien will be in place for 15 years; (2) the purpose of the lien is to prevent speculation (a process whereby investors "flip" a house for profit); (3) no interest is accrued and that the owners do not have to repay the loan as long as they or their heirs continue to reside in that home; and (4) the loan becomes due if the home is sold or mortgaged to a person who is not an heir.

These terms guarantee, not the affordability of a housing unit, but the affordability of a rehabilitation project. Financial assistance secured by a lien is not a use restriction. A lien is a property interest held by Bellingham. See *Hollingsworth v. Dow*, 28 Pickering 228, 36 Mass. 228 (1837). There is no provision in the governing documents restricting Bellingham to approving the sale of a housing unit to a low- or moderate-income resident at any time after the rehabilitation. Absent such a provision, there is no effective use restriction. The town should not then be able to represent to DCHD that there is a 15-year use restriction.

The Board has not met its burden of proof regarding these units. SCR has introduced sufficient evidence to warrant a finding contrary to the presumption. Since these 20 units are not compliant with DHCD policy, they should be removed from the SHI.

3. Rental Units

Two of the four rental units are governed by the old form, while the other two are governed by the new form. All four have an additional document entitled, "Housing Rehabilitation Program Rental Agreement" ("Rental Agreement"). The relevant part of this Rental Agreement reads as follows:

> I agree that for a period of five (5) years from the time the project is completed, any increase in rents will be established in accordance with the provisions of the Town of Bellingham Housing Rehabilitation Guidelines, Tenant Eligibility Section and will not exceed the Fair Market Rent levels established by the HUD Section 8 Existing Program.

> When low- and moderate-income tenant-occupied units are assisted under the Program, I ensure that units will continue to be occupied by a low or moderate-income household for five (5) years following project completion. When vacant units are assisted under the Program, I ensure that those units will be rented to low- or moderate-income household for five (5) years following the completion of the rehabilitation work.

See SCR's Opposition Brief, Exhs. 6, 7, 9, and 13.

SCR argues that the 5-year term of the Rental Agreement is too short a lock-in period to be compliant with DHCD policy. Again, DHCD requires at a minimum a 15-year use restriction. Whether it is an owner-occupied or a rental unit, the same use restriction applies. *Silver Tree*, No. 86-19, slip op. at 15 (finding that a 5-year lock-in period is "too short ... to justify counting such a unit as a 'low or moderate income' housing unit for the purposes of the 10 per cent minimum).

4. Released Unit

The documents governing this unit include a Release dated January 23, 2006, a Certificate Not to Encumber dated July 28, 2003, a letter dated December 23, 2005 from the Bellingham Community Development Office to the owners' attorney, and a check dated December 30, 2005 drafted by Connolly & Moynihan Atty, IOLTA Fund, paid to the order of Bellingham for $12,275.50. The check's memo denotes the owners' names and address. See SCR's Opposition Brief, Exh. 16, duplicated, in part, at Exh. 40.

Based on the Release, SCR argues that this unit should be removed from the SHI. DHCD's policy requires notification from Bellingham regarding whether a CDBG loan has been repaid and when the housing unit is no longer occupied by a low or moderate income resident. According to the 15-year lien provision included in the documents, "If the property is sold or mortgaged to a non-interested party for which real consideration is given, the [Deferred Payment Loan] becomes due and repayment is required at the time of the transaction."

The 15-year lien provision should be a secondary consideration to DHCD's policy requiring a 15-year use restriction. DHCD's primary purpose of monitoring the lien is to verify that the housing unit is still occupied by the owner, one of the owner's heirs, or another low- or moderate-income resident. A release indicates that the lien was discharged before the 15-year period. Such a release may show that the property was sold, mortgaged, or transferred to a person who is not an heir or of the required

affordability level. All releases should be reported to DHCD, which should then verify whether the housing unit is occupied by another low- or moderate-income resident until the 15-year period expires.

Since the Board has not provided any information as to the familial relationship or affordability level of the owner subsequent to the Release, the Board has not met its burden of proof. Accordingly, this unit can be removed on this basis in addition to the basis provided above (i.e., the 15-year lien provision is not a use restriction).

5. Transferred Units

The evidence reflects three (3) units that were transferred. The governing documents for the transfer of two of the units show that the grantor transferred part of her interest (a tenancy by the entirety) while she retained a life estate. See SCR's Opposition Brief, Exh. 41; Board's Reply Brief, Exh. E. The second transfer, which appears to be related to the governing documents at SCR's Exhibit 39, shows the grantor retaining a life estate while granting joint tenancy interests to three residents. *Id.* at Exh. 42.

Similar to a release, a transfer may indicate a change in occupancy to a person other than an heir or to a person who is not of a low or moderate income. Such transfers should be reported to DHCD so that it can determine if the next occupant is a low- or moderate-income resident. While the Board did prove that the transfer of two of the units was to an heir, the Board has not provided any proof as to the familial relationship or affordability level of the transferee as to the third unit.[8] For this unit, the Board has not met its burden of proof.

Even if all of these transfers were, in fact, to heirs or low- or moderate-income persons, the underlying documents do not expressly provide a use restriction. Accordingly, these units should be removed from the SHI.

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8. Although SCR's Exhibit 42 shows that the transferor and two of the three transferees have their last name in common, it may be inappropriate here to assume that there is a familial relationship.

VII. CONCLUSION

Since the Board has failed to meet its burden of proof as to meeting the statutory housing unit minimum, all 36[9] CDBG units must be removed from the subsidized housing inventory. This removal reduces Bellingham's percentage calculation to 9.45%, which is below the required threshold. Accordingly, the Board's Motion to Dismiss is denied.

The Housing Appeals Committee

Date: March 24, 2008

Shelagh A. Ellman-Pearl
Presiding Officer

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9. Adding together the units discussed in each section may yield more than 36 units due to some overlapping.