COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

135 WELLS AVENUE, LLC

v.

NEWTON ZONING BOARD OF APPEALS

No. 2014-11

SUMMARY DECISION

December 15, 2015

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COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

135 WELLS AVENUE, LLC, Appellant	)	
v.	)	No. 2014-11
NEWTON ZONING BOARD OF APPEALS, Appellee	)	

SUMMARY DECISION

I. INTRODUCTION

This is an appeal pursuant to G.L. c. 40B, § 22, by 135 Wells Avenue, LLC (Wells Avenue) of the Newton Zoning Board of Appeals' (Board) denial of its application for a comprehensive permit. The Board's denial was based on its determination that it lacked the authority to waive a deed restriction that prohibits the construction of residential housing on the project site. The parties have filed cross motions for summary decision on the question of whether the Board, and by implication the Housing Appeals Committee, have the authority to amend or release a restriction granted to the City of Newton by deed.

II. PROCEDURAL HISTORY

On May 27, 2014, Wells Avenue filed its application for a comprehensive permit for a 334-unit rental project on a 6.3 acre parcel of land (the Site) in an area of Newton known as the Wells Avenue Office Park. The Site is subject to restrictions on its development and use imposed by a deed conveyed to the City of Newton. Pre-Hearing Order, § II, ¶¶ 1, 3. Exh. 7. Wells Avenue received a project eligibility determination from the Massachusetts Housing Partnership (MHP) that, as amended, requires "[w]aiver of the deed restriction by the Aldermen, or other means as legally applicable to allow for residential use [as] a condition of final approval." Exh. 2; see Exh. 1.

In its comprehensive permit application, Wells Avenue asked the Board to amend or waive the deed restriction as needed to allow it to build and operate the project. Exh. 5. After 6 days of hearing, on December 9, 2014, the Board voted to reduce the size of the proposed project from 334 to 276, and then voted that it did not have authority to amend or waive the deed restriction. The Board also considered draft conditions for the project, but ultimately voted to deny the application. The Board's decision denying the comprehensive permit was filed with the city clerk on January 16, 2015. Exh. 3.

Wells Avenue filed its appeal to the Committee on December 29, 2014. Following a conference of counsel on January 13, 2015, the parties filed preliminary motions and prepared a draft pre-hearing order.[1] In the course of development of the pre-hearing order, the then presiding officer ordered the Board to identify all local concerns it would raise in opposition to the comprehensive permit. The Board, however, chose to rely solely on assertion that it has no authority to amend or waive the deed restriction at issue because it is not a local permit or approval within the meaning of G.L. c. 40B, § 21.[2] Pursuant to the pre-hearing order issued on May 1, 2015, the parties agreed to submit the question of the Board's authority to amend or waive the deed restriction on the written record. They thereafter filed cross-motions for summary decision. Subsequently on August 7, 2015, the present presiding officer conducted a telephone conference with counsel and requested additional documents to be included in the record. As requested by the presiding officer, the parties submitted supplemental written argument and the presiding officer conducted a session for oral argument on October 20, 2015.[3]

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1. The presiding officer granted the request of Michael S. Singer to participate as an interested person. 760 CMR 56.06(2)(c).

2. The Board requests that if we determine that the Committee and the Board have the authority to amend or waive the deed restriction, we remand the matter to the Board to decide first whether to waive the deed restriction, and if so, to determine conditions for the project that are consistent with local needs. The Board acknowledges that this request is inconsistent with the ruling of the previous presiding officer that the Board had waived its right to raise conditions to a grant of a comprehensive permit. Since we decide that the alteration of the deed restriction is beyond the Board's and our authority under the circumstances presented here, we need not reach this issue.

3. The Board moved to strike Sections IV (B) and (C) and Exhibit A of Wells Avenue's supplemental argument on the ground that the arguments presented are beyond the scope of requested supplemental argument. Wells Avenue responded at oral argument that it did not intend to litigate the

III. Undisputed Facts

In support of their motions, the parties rely upon the exhibits submitted in this appeal, certain stipulations of fact, and facts set out in *Sylvania Elec. Products, Inc. v. Newton*, 344 Mass. 428 (1962), which describes the factual background for the issue here in dispute.

A. Proposed Project

Wells Avenue's application describes a project to be built at 135 Wells Avenue Newton, MA on a 6.3 acre parcel (the Site) located in a Limited Manufacturing District pursuant to the Newton Zoning Ordinance. *Id.* at 429. It is part of a 153.6 acre parcel that was classified as a limited manufacturing district by the Board of Aldermen (Aldermen) on June 27, 1960. *Id.* Pre-Hearing Order, § II, ¶ 4. The project is proposed to comprise 334 rental units, of which 84 will be affordable housing serving households at or below 80% of area median income. The project proposes 20 studio units (5 affordable), 139 one-bedroom units (35 affordable), 141 two-bedroom units (35 affordable) and 34 three-bedroom units (9 affordable). The project also proposes to include a rental office, a fitness facility and community spaces for residents, as well as space that may be used as a co-working space or café. Initial Pleading, Exh. A.2.

B. History of Deed Restriction Granted to Newton

Zoning for the limited manufacturing district prohibits residential use. In *Sylvania, supra,* at 429, the Supreme Judicial Court upheld the zoning ordinance changing the classification of 153.6 acres owned by Sylvania Electronics Products, Inc. (Sylvania) from a single residence A district to a limited manufacturing district. In addition, the Site and all of the lots within the Wells Avenue Office Park are the subject of a 1969 deed restriction granted to Newton that limits the allowable uses to certain commercial and light manufacturing uses, imposes dimensional controls and specifies a no-build area. Exh. 7.

In 1960, Sylvania had an option to purchase a parcel of land in Newton containing 180 acres. See *Sylvania, supra,* at 430. At that time, Sylvania petitioned the Aldermen to reclassify a portion of that parcel, including the Site, from residential to limited manufacturing. Sylvania also discussed with the City executing an option agreement

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issues raised in those sections before the Committee, but wished to preserve them for appeal. Tr. I, 5. We grant the motion to strike.

whereby the City could purchase from Sylvania 30.5 acres which would be restricted in use and would hold restrictions on the remainder of the parcel. The municipal ordinance reclassifying the land as a limited manufacturing district was enacted on June 27, 1960 by the Aldermen, who also passed an order "authorizing the mayor to accept the proposed option agreement." *Id.* at 429-432. See Exh. 5. The zoning amendment was challenged by abutting landowners and upheld in *Sylvania, supra* at 437.

Following the Aldermen's enactment of the ordinance, Sylvania took title to the 180-acre parcel and executed the option agreement granting Newton an option to purchase the 30.5-acre parcel of land shown as "Parcel 2" on a plan dated July 6, 1960 entitled "Plan to accompany Option Agreement from Sylvania Electronics Products Inc. to City of Newton." Exh. 36. In 1969, Newton exercised the option agreement and a deed from Sylvania's successor-in-interest conveyed Parcel 2 to the City of Newton as a municipal corporation. That deed was recorded on May 27, 1969. Exhs. 7, 27, 34, 36. It states that the conveyed Parcel 2 is:

> Subject to the restrictions for the benefit of adjoining premises of the Grantors that for a period of ninety-nine (99) years from date, no building or structures shall be erected or maintained on the granted premises except for recreation, conservation or parkland purposes (but this shall not be deemed to prohibit construction of fences thereon).
>
> Together with the following restrictions, as appurtenant to the whole or any part of the granted premises, which are hereby imposed on the adjoining premises shown on said plan as Parcel 1, containing 123.1 acres; said restrictions shall run with the land and the Grantors hereby covenant and agree with the Grantee that they will be faithfully observed and performed....

Exh. 7, pp. 1-2. Parcel 1 includes the Site. Exhs. 27, 28, 35. The deed restrictions on Parcel 1 included, among others, the following restrictions: limiting the floor area of buildings to be constructed on the premises; requiring that a percentage of the ground area be maintained in open space not occupied by buildings, parking areas or roadways; imposing setbacks, height restrictions, and a buffer zone; restricting the number and type of signs and the type of lighting; and limiting the use of buildings to certain, but not all, of the uses permitted in a limited manufacturing district. The deed further provides: "No building or structure shall be erected on said Parcel 1, or on any one subparcel or group of subparcels constituting Parcel 1, without the prior approval of the Board of Aldermen with respect to the following specific

items: finished grading and topography, drainage, parking, and landscaping." Exh. 7, ¶ 3. See *Sylvania, supra,* at 431. The restrictions on Parcel 1 "shall continue in force for a period of ninety-nine (99) years from December 1, 1968." Exh. 7.

C. Waivers and Amendments of Deed Restriction

Wells Avenue submitted as exhibits over the Board's objections, copies of 20 orders of the Aldermen granting waivers and amendments to the deed restriction between 1971 and 2014.[4] These orders amended the permitted uses of parts of Parcel 1 to include a tennis club, skating facility, squash and racquetball facility, tennis and fitness club, health club, health research and monitoring center, retail shop and food service area, whirlpool, gymnastics academy, dance school, for-profit mathematics school, day care center, nonprofit place of amusement "bouncy house," and education and religious use; to increase the amount of allowed office space "floor to area" ratio; and to allow for construction partially within the no-build area. Exhs. 8-26.

A single building used by Boston Sports Club and Back on Track Physical Therapy occupies the Site. Pre-Hearing Order, § II, 5. Current uses within the Wells Avenue Office Park also include the Russian School of Mathematics, the Solomon Schecter Day School, Newton-Wellesley Hospital's Ambulatory Care Center, the Massachusetts School of Professional Psychology, the Newton Childcare Academy, New England Cable News, Exxcel Gymnastics and Climbing Center, Valeo Sports Center (indoor and outdoor soccer facility), Upromise, and Neurocare Inc. Sleep. Affidavit of John Sullivan, ¶ 3.

In conjunction with its application under Chapter 40B, Wells Avenue applied to the Aldermen requesting a waiver, amendment or release from the provision of the deed restriction, in particular, a waiver of the prohibition on residential use. Exhs. 1, 2, 5. On November 17, 2014, the Aldermen denied the request.[5] Exh. 30.

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4. Although the Board objected, it did not submit evidence to contradict those exhibits. They stand as undisputed evidence for the purposes of summary decision.

5. One of the members of the Housing Appeals Committee, Theodore M. Hess-Mahan, is a member of the Newton Board of Aldermen. He has recused himself from participating in this appeal and decision. The record also indicates that he abstained from the Aldermen's vote on Wells Avenue's application. Committee member James G. Stockard, Jr. also did not participate in this matter.

In its application for a comprehensive permit, Wells Avenue also requested that the Board waive the restriction as part of its decision on the application for a comprehensive permit. The Board determined that it did not have the authority to waive the restriction. Exh. 3.

IV. DISCUSSION

Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee if "the record before the Committee, together with the affidavits (if any), shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 56.06(5)(d). See *Catlin v. Board of Registration of Architects,* 414 Mass. 1, 7 (1992); *Grandview Realty, Inc. v. Lexington*, No. 05-11, slip op. at 4 (Mass. Housing Appeals Committee July 10, 2006). The parties agree that the material facts supporting their cross motions are not disputed. The central issue before the Committee is whether the decision of the Board is consistent with local needs. G.L. c. 40B, §§ 20, 23. If the Board is correct that it lacks the authority to amend or waive the deed restriction, its decision to deny the comprehensive permit on that basis is consistent with local needs. Since the central issue in dispute is a legal question, summary decision on the issue presented is appropriate.

A. Determination of Real Property and Title Issues

Ordinarily we have ruled that real property and title issues are more properly addressed by the courts than by the Committee. See, *e.g., Hollis Hills v. Lunenburg,* No. 07-13, slip op. at 4 (Mass. Housing Appeals Committee Dec. 4, 2009); *Bay Watch Realty Tr. v. Marion*, No. 02-28, slip op. at 5-6 (Mass. Housing Appeals Committee Dec. 5, 2005); *Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 02-21, slip op. at 17 (Mass. Housing Appeals Committee Dec. 12, 2006), *aff'd,* 75 Mass. App. Ct. 1103 (2009). In *Riverside Realty Trust v. Chelmsford,* No. 72-01, slip op. at 3-4 (Mass. Housing Appeals Committee May 10, 1974) citing *Riverside Realty Trust v. Chelmsford,* No. 72-01 (Mass. Housing Appeals Committee Order on Motion to Dismiss July 27, 1972), the Committee ruled that the courts should decide whether the town properly made an eminent domain taking of the applicant's project site for conservation purposes after the filing of a comprehensive permit application, but decided to proceed with the comprehensive permit appeal simultaneously

with the court action to avoid delay if the taking were ruled invalid. See *Chelmsford v. DiBiase*, 370 Mass. 90, 91-92 (1976) (town's taking of project site was made in good faith and for public purpose; Committee grant of comprehensive permit overturned).

The Committee should determine in the first instance whether the deed restriction is the sort of "requirement or regulation" which may be waived under the Comprehensive Permit Law. In addition, we should examine whether the waiver or amendment of the deed restriction is the type of "permit or approval" issued by a local board or official that is contemplated by Chapter 40B. Since it is necessary to examine whether Chapter 40B confers such power on the Board and the Committee, this issue should not be deferred to sole adjudication by the courts.[6]

B. Central Issues for Consideration

1. Board or Committee May Waive "Requirements and Regulations"

The Committee's role is to determine whether the Board's decision to deny the comprehensive permit application on the ground that it lacked authority to waive the deed restriction is consistent with local needs. G.L. c. 40B, §§ 20, 23. Since requirements and regulations that are not consistent with local needs may be overturned by a zoning board or the Committee, it is necessary to consider whether the deed restriction is a "requirement or regulation" for the purposes of the Comprehensive Permit Law.[7] In *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 354 (1973), the court stated:

> ... [Chapter] 40B, § 20, in delineating when a board's decision is consistent with local needs, refers to 'requirements and regulations.' Though this reference is somewhat ambiguous, the Legislature's clear purpose in passing this statute requires our construction of this term to include local zoning by-laws and ordinances. Although the word 'zoning' is not specifically used, the statute's legislative history and avowed purpose to facilitate the construction of low and moderate income housing in areas which have exclusionary zoning

6. There is no disagreement regarding the authority of the Committee and the Board to waive provisions of a municipal ordinance prohibiting residential use.

7. "[R]requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing." G.L. c. 40B, § 20.

> practices compel our decision to construe the statute so that zoning ordinances or by-laws are treated like any other local requirements which hamper the construction of low and moderate income housing. All these local 'requirements and regulations' will be applicable if they are 'consistent with local needs'; if they are not, they must be modified or ignored.

Hanover held that "the Legislature's intent in passing [G.L. c. 40B] was to provide relief from *exclusionary zoning practices* which prevented the construction of badly needed low and moderate income housing." *Id.* at 353-54 (emphasis added). Therefore, Chapter 40B "confers on boards of appeals and the Housing Appeals Committee the power to override local 'requirements and regulations,' including zoning ordinances or by-laws, which are not 'consistent with local needs.'" *Id.* at 355. Whether a deed restriction constitutes such a requirement or regulation is a question that does not appear to have been considered before by either the Committee or the courts.

2. This Deed Restriction is not a Requirement or Regulation

The Board argues that the waiver or amendment of the deed restriction is an action on an interest in land and beyond the power of the Board and the Committee. The Board argues that its authority does not extend to a transfer of an interest in land, which it claims is at issue here. Although the *Sylvania* court acknowledged that "the option proposal was a significant inducement of the zoning amendment and the amendment induced the giving of the option," the court stated:

> The induced, voluntary action of Sylvania, not the vote of the council, imposed the option restrictions; the vote reclassified land which was being subjected to those restrictions. The zoning decision was that the locus, so restricted by its owner, should be made a limited manufacturing district. That, in form, was an appropriate and untainted exercise of the zoning power.

Sylvania, 344 Mass at 434. The option agreement was intended "to give the city a dominant estate capable of enforcing the restrictions. *Id.* at 430-31. Thus, pursuant to *Sylvania,* "the option restrictions are not zoning restrictions...." *Id.* at 436. This holding regarding the status of the option applies equally to the later granted deed to the City which contained the restrictions that are now in place.

The decision of *Town of Brookline v. MassDevelopment Finance Agency*, Appeals Court Case No. 14-P-1817, slip op., 2015 WL 5612275 (Sept. 25, 2015), recently decided by the Appeals Court in a Rule 1:28 decision, supports this analysis. *Brookline* involved an

appeal of a project eligibility letter for a comprehensive permit under Chapter 40B. In that case the town challenged the lower court's determination that the town's 1946 deed restriction had expired pursuant to G.L. c. 184, § 23, which limits to 30 years the term of deed restrictions which contain no explicit time limit. Distinguishing between a restriction created under the police power from one imposed by deed, will or other instrument, the court ruled that that the deed restriction was not an exercise of the police power even though it was granted to the town incident to the property owner's request for a zoning change. The *Brookline* court decided that the deed restriction was subject to G. L. c. 184, § 23, and therefore had expired after the 30 years statutory period, since the restriction had provided no term. See also *Killorin v. Zoning Bd. of Appeals of Andover*, 80 Mass. App. Ct. 655, 659 (2011), which contrasted "restrictions held by a public body [as] part of an agreement between parties, one of whom was the government" and "restrictions imposed by a zoning board of appeals as a condition to granting a special permit" holding that the latter restriction was not subject to § 23's statutory 30-year time limit on unlimited restrictions. *Id.* at 659. *Samuelson v. Planning Board of Orleans,* 86 Mass. App. Ct. 901, 902 (2007) applied *Killorin's* distinction regarding special permits to subdivision approval. After discussing *Killorin* and *Samuelson* with approval, the *Brookline* court observed:

> As the court in *Samuelson* observed, "the key distinction we drew [in *Killorin]* was between land use restrictions 'created by deed, other instrument, or a will,' and land use restrictions imposed as a condition to the discretionary grant of regulatory approval under the police power." 86 Mass. App. Ct. at 902, quoting from *Killorin, supra.* In the present case, by contrast, the deed restrictions at issue were created by written agreement between the town and the then-owner of the property, in precisely the sort of instrument described in the above-quoted language from *Killorin.* That the parties entered into the agreement incident to the property owner's request for favorable action by the town meeting on the owner's request for a change to the town's zoning by-law does not alter the essential nature of the instrument itself. The agreement imposing the restrictions, executed by the property owner, was conditioned on the rezoning, and designed as an inducement to the town meeting to approve the requested rezoning. It was not, and could not be, an exercise of the police power, because the property owner did not hold that power. The rezoning amendment itself, by contrast, was an exercise of the police power, but did not impose the restrictions, nor was it conditioned on their imposition. (Footnote omitted).

Brookline, supra. The court's decision does not address whether such a restriction made in 1946 could have been abrogated as part of the comprehensive permit process. Thus, these authorities confirm *Sylvania's* ruling that the deed restriction here was not imposed as part of the city's police power. As in *Brookline,* the zoning change was not conditioned on the grant of the deed restriction.

The restriction granted to Newton by deed is described as being appurtenant to the real estate conveyed by deed for the benefit of the City as an abutter to the restricted property. Exh. 7. Since the deed restriction (as opposed to the limitations imposed by zoning) was derived from Newton's ownership of Parcel 2 with a dominant estate over the Site, those restrictions are not imposed as part of the City's municipal police power, but rather are an interest in property. *Blakeley v. Gorin*, 365 Mass. 590, 596 (1974) makes clear that "the settled law of this Commonwealth is that deed restrictions ... are a property interest in land."[8] *Blakeley* involved the requirement of G.L. c. 184, § 30 that restrictions in deeds conveyed to private parties not be enforced unless it was "determined that the restriction is at the time of the proceeding of actual and substantial benefit to a person claiming rights of enforcement." See also *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 246 (1917)("an equitable restriction is a property right in the person in favor of whose estate it runs or to which it is appurtenant.")

Wells Avenue also claims the restriction was granted by deed to the City in conjunction with rezoning of the Wells Avenue parcels and therefore should be treated as an ordinance. *Sylvania* discredited that argument and made clear that the deed restriction arose from a separate, voluntary conveyance of property to the City from a private entity, *not* from municipal action. *Sylvania, supra,* at 434-436. We cannot second guess the court's findings with regard to the deed restriction. As an interest in land granted to the City by a private entity, separate from the establishment of a municipal ordinance, the deed restriction is not a requirement or regulation imposed by a municipality within the meaning of Chapter 40B, § 20. Therefore, it may not be overridden on the ground that it is inconsistent with local needs. G.L. c. 40B, § 20.

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8. Wells Avenue incorrectly cites *dicta* in *Blakely* to argue that restrictions in private owners' deeds may not be an interest in real property.

3. Board Has Authority to Issue "Permits or Approvals"

Under Chapter 40B, a zoning board "shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section." G.L. c. 40B, § 21. Both the Board of Aldermen and the Mayor are a local board and local official, respectively, under this provision and the Committee's regulations. 760 CMR 56.02. See *Dennis Housing Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 78-79 (2003).

The question before the Committee, however, is whether the action sought by Wells Avenue, the waiver or amendment of the deed restriction, is the kind of permit or approval under Chapter 40B that is within the authority of the Board and the Committee. Not all of the powers of entities that constitute local boards under chapter 40B are granted to a zoning board in a comprehensive permit proceeding. See *Zoning Board of Appeals of Groton v. Housing Appeals Committee*, 451 Mass. 35, 40 (2008). In *Groton,* the Supreme Judicial Court overturned the Committee's grant of a comprehensive permit because the Committee included a condition requiring the municipality to convey an easement on its land to the project developer. The court discussed the scope of the Committee's, and a local board's, authority at length:

> This same reasoning applies with respect to the committee's authority to override requirements and regulations, G.L. c. 40B, § 20, that might be imposed by local boards. See *Dennis Hous. Corp. v. Zoning Bd. of Appeals of Dennis, supra.* The requirements and regulations involved pertain to *local* zoning ordinances and bylaws, and "conditions and requirements with respect to height, site plan, size or shape, or building materials," G.L. c. 40B, §§ 20, 21; *Boothroyd v. Zoning Bd. of Appeals of Amherst,* 449 Mass. 333, 337–338 n. 11 (2007), and do not relate to obtaining easements from abutters.

Id. at 40 (emphasis in original). Although the Groton electric light department could have granted an easement on its own property, the power to do so did not extend to the Committee.

4. Action on Deed Restriction not Locally Imposed Permit or Approval

Groton held that the Committee lacked authority to direct a municipality to convey an easement, since it was not equivalent to a board's power to grant "permits or approvals" under G.L. c. 40B, § 21:

> The phrase "permits or approvals," read in the context of the entire Act, refers to building permits and other approvals typically given on application to, and evaluation by, separate local agencies, boards, or commissions whose approval would otherwise be required for a housing development to go forward. This interpretation is virtually compelled by the language, "who would otherwise act with respect to such application," appearing in § 21. The interpretation is further supported by the examples expressly cited in § 21, namely, action typically required by local permitting authorities with respect to "height, site plan, size or shape, or building materials." To obtain approval to develop a site (whether for affordable housing or another use), a developer would not usually be required to obtain easements from abutters, and a local board would have no authority to direct an abutter to grant an easement.

Id at 40. Similarly, a developer would not apply to a municipality to obtain the relinquishment of a restriction in the deed of an abutter, as is the case here. The two Committee decisions cited by Wells Avenue as precedent for modifying the deed restriction do not assist the developer. See *White Barn, LLC v. Norwell,* No. 08-05, slip op. at 9, 29 (Mass. Housing Appeals Committee July 18, 2011) (Committee modified planning board covenant); *Woodridge Realty Trust v. Ipswich,* No. 00-04 slip op at 22 n. 19 (Mass. Housing Appeals Committee June 28, 2001) (Committee modified planning board condition to subdivision approval). In neither instance did the municipality hold restrictions by virtue of ownership of abutting property acquired separately from the imposition of municipal requirements. See *White Barn, supra,* at 9, 29 (noting suggestion that planning board decision controlled the covenant restrictions). In both of those cases, the restrictions at issue were conditions to the issuance of municipal approvals in connection with a subdivision plan, and not conveyed by deed to the municipalities.[9] In modifying them, the Committee was modifying municipal actions consistent with G.L. c. 40B, § 21.

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9. Although *Groton* stated that "the phrase "requirements and regulations" in § 20 describes "limitations on an owner's use of his property" rather than "the use of someone else's property," *id.* at 40-41, we do not agree with Wells Avenue that the deed restriction can be solely viewed as a limitation on its use of its property. Under G.L. c. 40, §§ 14 and 15 it also constitutes a right granted to the City of Newton through the grant of the deed.

Furthermore, Chapter 40B allows only the removal of local, rather than state law, barriers to affordable housing:

> [Chapter 40B] may only be relied on to remove *locally* imposed barriers to affordable housing, not State law governing the disposition, or transfer, of land, or interests in land, owned by municipalities. To be sure, in enacting G.L. c. 40B, the Legislature indicated that, in some circumstances, compliance with locally imposed barriers may need to yield to the regional need for affordable housing, but this legislative judgment cannot be stretched to empower the committee to act as the legislative body of a municipality for purposes of land transfers.

Groton, supra, at 41. See *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 754-756 (2010).

The Board argues that transfers of real property by municipalities are governed by state law – G.L. c. 40, §§ 3 (holding of real estate by towns) and 15A (transfers of real estate) and that amending the restriction is a legislative action under state law which is prohibited by *Groton.* We do not need to distinguish which types of legislative actions may be permitted under Chapter 40B for our decision here. See *Maynard v. Housing Appeals Committee,* 370 Mass. 64, 69 (1976) (allowing Committee to dispense with town meeting vote to allow a sewer extension). We do agree with the Board, that *Groton's* objection to the Committee's decision was to the conveyance of an interest in land owned by an abutter, in that case the town. Wells Avenue argues that the power to amend the restriction is derived from the city charter, rather than state law. See Affidavit of John Sullivan, Exh. A. Chapter 40, §§ 3 and 15A control the acquisition and disposition of municipal real estate. In addition the abandonment by a municipality of an easement or right to real property is governed under G.L. c. 40, § 15. In light of *Sylvania's* clear determination that the deed restriction was not a municipal action, under the circumstances of this case, *Groton* controls and prohibits our directing Newton to amend or waive the deed restriction granted to it. *Groton, supra,* at 40-41.

5. Aldermen's Past Practices Do Not Alter the Nature of Deed Restriction

Wells Avenue also suggests that the content of the restriction constitutes classic subjects of zoning under G.L. c. 40A and the city's zoning ordinance. While this argument technically correct – the restrictions found in the deed restriction are found in municipal

zoning ordinances – it is not dispositive. There has been no demonstration that such restrictions are generally inappropriate for inclusion in deeds.

Wells Avenue also makes a waiver argument of sorts – that the Aldermen have actually treated the deed restriction as an ordinary local regulatory restriction. It argues that the Aldermen used the special permit standard in weighing requests for amendments of the restriction. It is true that the Newton Aldermen have granted numerous amendments to the deed restriction. In addition, as Wells Avenue points out, in a grant of an amendment to the restriction in 1972, the Aldermen decision erroneously stated "that the public convenience and welfare will be substantially served by its action and that said action will be without substantial detriment to the public good, and without substantially derogating from the intent or purpose of the *zoning ordinance....*" Exh. 10. See Exh. 23. In 1990, the Board's amendment decisions recited this language: "That the Board finding that the proposed amendment can be made without derogating from the purposes for which the City of Newton was granted certain restrictions in a deed.... to the City of Newton dated May 22, 1969...." Exh. 13. Wells points out that the deed restriction contained no such description of its purpose.

While Wells Avenue's argument that the Aldermen have treated the deed restriction as an exercise in police power may have some initial appeal, it has provided no authority to suggest that Newton has waived or could waive its real property rights in this manner. Moreover, the amendments made by the Aldermen to date have maintained the restricted site as commercial and industrial. They have not included any residential use. Wells Avenue has provided no basis for the Committee to make such a determination.

We are sensitive to Wells Avenue's argument that if this deed restriction stands unmodified, municipalities in the future may seek to create new covenants and restrictions to circumvent Chapter 40B. This deed restriction, however, was granted based on an option agreement executed years before Chapter 40B was enacted, one which was found to be solely based on the private owner's action. *Sylvania, supra,* 344 Mass. 428, 434. As discussed in *Chelmsford v. DiBiase, supra*, 370 Mass. 90, 91-92, there is no indication that the restriction was granted to put this Site beyond the reach of Chapter 40B. We caution that agreements or real estate transactions made or occurring following the enactment of

G.L. c. 40B that may have been conducted to avoid Chapter 40B, may be examined to determine whether they constitute the sort of municipal action contemplated by this chapter.

Accordingly, the Committee determines that the deed restriction conveyed to the City of Newton is not a requirement or regulation for the purposes of G.L. c. 40B, § 20, and the waiver or amendment sought by the developer is not a permit or approval under c. 40B, § 21. Therefore, the Board's determination that it lacked authority to amend the restriction was consistent with local needs and supports denial of the comprehensive permit.

V. CONCLUSION

Based on the foregoing, summary decision is granted in favor of the Board. Wells Avenue's motion for summary decision is hereby denied. The denial of Wells Avenue's comprehensive permit application on the ground that the Board lacked the authority to release the deed restriction is upheld.

This decision 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 decision.

Housing Appeals Committee

Issued: December 15, 2015

Shelagh A. Ellman-Pearl, Chair

Joseph P. Henefield

Constance Kruger