COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

FORESTVIEW ESTATES ASSOC., INC. Appellant	)	
v.	)	No. 05-23
DOUGLAS BOARD OF APPEALS, Appellee	)	

RULING ON EXTENSION OF COMPREHENSIVE PERMIT

I. PROCEDURAL HISTORY

This case involves the denial of an extension of a comprehensive permit that was issued by the Douglas Board of Appeals pursuant to G.L. c. 40B, §§ 20-23.

On August 15, 2002, the Board granted a permit to the developer, Forestview Estates Associates, LLC, to construct 43 single-family homes off Webster Street in Douglas. Exh. 1. The decision was filed with the town clerk on August 27, 2002. Pre-Hearing Order (Jun. 19, 2006), § II-2. Pursuant to 760 CMR 31.08(4), such a permit normally lapses after three years if construction has not begun, and on September 9, 2005, shortly after that period expired, the developer requested that the Board extend the permit. Pre-Hearing Order, § II-10. On November 16, 2005, the Board found that the permit had lapsed and denied the extension. Pre-Hearing Order, § 13. The developer appealed to this Committee.

The Board moved to dismiss this appeal on the grounds that a dispute concerning extension of a permit is beyond the jurisdiction of the Committee, and the developer moved for summary decision. The presiding officer denied both motions. The Committee then conducted its hearing, receiving prefiled testimony from two witnesses and permitting cross-examination in November 2006. Following the presentation of evidence, counsel submitted post-hearing briefs.

II. JURISDICTION

The Comprehensive Permit 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 (sentence 1) indicates only 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, [rendered the proposal] uneconomic…." It goes on to provide that the Committee may "vacate" local decisions, "direct" the local boards to issue permits, and "modify or remove" conditions, provided it does not "issue any order" that would permit unsafe housing. G.L. c. 40B, § 23 (paragraph 2) states that the "orders of the committee" may be enforced in the Superior Court. It is axiomatic, however, 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, 367 N.E.2d 802 (1977). "Powers granted include those necessarily or reasonably implied." *Grocery Mfrs. of America, Inc. v. Department of Pub. Health,* 379 Mass. 70, 75, 393 N.E.2d 881 (1979).

Particular insight into an agency's power to issue orders is provided by *Massachusetts Mun. Wholesale Elec. Co. v. Massachusetts Energy Facilities Siting Council*, 411 Mass. 183, 196, 580 N.E.2d 1028, 1036 (1991). In that case, the Court concluded that no power to issue "prospective orders" was implied "by a statute which enables the council merely to review and to approve or to reject [electric-power-need] forecasts." *Id.* at 195-196, 1035-1036. That is, the council had no power to issue an order requiring a utility company to make its submission in a particular form. The Court went on to cite with approval the case of *Scannell v. State Ballot Law Comm'n*, 324 Mass. 494, 501, 87 N.E.2d 16 (1949). That case held that "[a]n express grant of authority carries with it by implication all incidental authority required for the full and efficient exercise of the power conferred." Thus, in cases before the Housing Appeals Committee under the Comprehensive Permit Law, the express statutory authority to direct the Board to issue a permit carries with it the authority to issue such orders as are necessary to effect compliance with the permit.

This power is reflected in our regulations, specifically in 706 CMR 31.08(4), which states, "The Board or the Committee… may extend any expiration date."[1] 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).

III. THE PRESIDING OFFICER'S AUTHORITY

Our regulations, in 760 CMR 30.09(5)(b), grant broad authority to the officer who presided over a hearing, but they do not explicitly address the question of whether the presiding officer may rule on the extension of a permit or whether such a ruling requires consideration by the full Committee. In several cases decided in the early 1990s, the issue was in fact considered by the full Committee. 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)); *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); *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). But there is no reason to draw an inference that these cases could not have been decided by the presiding officer alone.

In slightly later cases, the Committee's practice with regard to a quite similar matter—the transfer of a comprehensive permit from one entity to another pursuant to 760 CMR 31.08(5)—was to permit the presiding officer to act alone. See *Wilmington Arboretum Apts. Assoc. Ltd. Partnership v. Wilmington*, No. 87-17, slip op. at 3-4 (Mass. Housing Appeals Committee Order Sep. 28, 1992), *aff'd*, 39 Mass. App. Ct. 1106 (1995)(rescript);

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1. Also see the discussion in the earlier ruling in this matter, *Forestview Estates Assoc., Inc. v. Douglas*, No. 05-13, slip op. at 3-4 (Mass. Housing Appeals Committee ruling Apr. 26, 2006).

An-Co, Inc. v. Haverhill, No. 90-11, slip op. at 5, n.4 (Mass. Housing Appeals Committee order Oct. 9, 1998). More recently, the enforcement provisions of 760 CMR 31.09 have been interpreted to permit the presiding officer to act alone.[2] *Groton Residential Gardens, LLC v. Groton*, No. 05-26, slip op. at 5 (Mass. Housing Appeals Committee Aug. 10, 2006), *appeal filed*, No. SUCV2006-03793 (Suffolk Super. Ct. Sep. 8, 2006).

Further, when the *Westwood*, *Southborough*, and *Tyngsborough* cases were decided in the 1990s, disputes arising after the issuance of a comprehensive permit were unusual. They are now more common, and for that reason, the logic applied in *Wilmington*, *supra* is even more compelling. That is, one of the reasons that § 30.09(5)(b) grants extensive powers to the presiding officer is that the Committee includes four members who serve without compensation and meets every only two months. "It is not practical for the full Committee to rule on all matters that arise prior to, during, and after hearings." *Wilmington*, *supra*, slip op. at 3, n.2. This approach is reflected in amendments to the Committee's regulations that were made in 2004. For instance, to address changes in practice before the Committee during the past fifteen years, provisions were added to explicitly provide for preliminary motions to address technical issues that had become more commonplace. See 760 CMR 30.07(2).

Most important, the presiding officer's authority as provided in 760 CMR 30.09(5)(b) is broad. For instance, the regulation explicitly authorizes "enforcement of decisions of the Committee." 760 CMR 30.09(5)(b). A ruling with regard to the extension or lapse of a permit is a "post-permit" action that is similar to enforcement of a decision of the Committee. It is one that may properly be made by the presiding officer without consultation with the full Committee. Of course, the presiding officer may, in his or her discretion, choose to bring a particularly difficult or novel case before the full Committee for discussion, as I have done in this case.[3]

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2. In the case of enforcement, however, the regulatory authority is slightly clearer since, as noted in the *Groton Residential Gardens* decision there is a cross-reference in § 31.09(4) to § 30.09(5)(b). (Note that due to a typographical error, the regulation refers to 760 CMR 30.09(5)(c) instead of § 30.09(5)(b).)

3. This case was brought before the Committee at its regular meeting on February 20, 2007. The Committee discussed the merits of the extension of the permit, and then also the question of the presiding officer's authority, and concluded and voted unanimously that its regulations authorize the presiding officer to rule upon extensions of comprehensive permits that have already been issued.

IV. FACTS

The developer began the overall permitting process for this development by taking preliminary steps under the state Wetlands Protection Act (WPA). That is, it filed for and then on October 2, 2000 received an ANRAD (Order of Resource Area Delineation) from the Douglas Conservation Commission. Exh. 16. The ANRAD specifically excluded rivers, streams, vernal pools, and endangered species, and was effective for three years. Exh. 16 (p. 2); see Exh. 17. The parties disagree as to what subsequent filings under the WPA were made and as to the dates they were made. See, e.g., Exh. 14, ¶ 12; Exh. 15, ¶ 5; Tr. 44.

On October 10, 2001, the developer began the comprehensive permit process by filing an application with the Board. Exh. (p. 1). On August 15, 2002, the Board granted the comprehensive permit, and the decision was filed with the town clerk on August 27, 2002. Exh. 1 (p.1);[4] Pre-Hearing Order, § II-2.

In January 2003, the developer submitted twenty-five-percent-complete progress drawings to the Board. Exh. 13, ¶ 13. It also submitted sewage disposal designs, but only for some of the proposed housing units. Exh. 13, ¶ 14; cf. Exh.14, ¶ 11; Tr. 43-44. Thereafter, while it was addressing endangered species issues (see below), it submitted only limited documentation to the Board. It did not take any steps to negotiate and finalize a monitoring service agreement, a process that can take several months. Exh. 14, ¶¶ 10, 14(b). Nor did it submit final architectural plans or complete the documents necessary to describe performance guarantees, the planned homeowners association, and the conservation restriction that the permit requires to be given to the town.[5] Exh. 14, ¶¶ 14, 16(e), 16(f), 16(g); also see Exh. 1. ¶ VI-9 (p.14). It made a partial filing to the Conservation Commission in March of 2005. Exh. 14, ¶ 12.

The comprehensive permit explicitly reminded the developer of the need to comply with the state WPA, and also required the developer to bring its WPA filings to the attention of the state Natural Heritage and Endanger Species Program (NHESP) for review. Exh. 1,

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4. Only the first 19 pages of the 20-page decision of the Board were admitted into evidence.

5. The developer contests this, indicating that it submitted a draft conservation restriction to the state Executive Office of Environmental Affairs, and that the draft was approved. Exh. 15, ¶ 7. Thus, this task seems to be partially completed, since appears that town approval has not yet been obtained.

§ VI-3 (p. 13); Pre-Hearing Order, § II-4. NHESP informed the developer by letter of March 11, 2003 that the development might constitute a "take" under the Massachusetts Endangered Species Act (MESA). Exh. 5; Pre-Hearing Order, § II-5.

In April 2003, the developer met with officials of the NHESP and by August, a protocol for habitat assessment was finalized. Exh. 13, ¶ 18, 19. Because of the mating cycle of certain endangered species, a survey could not be begun until spring of 2004, and it was completed and submitted to NHESP in September 2004. Exh. 13, ¶¶ 20-23; see Exh. 6.

Negotiations concerning minimization of impact on endangered species continued well into 2005, and the developer remained in communication with town staff concerning the status of its proposal. Exh. 13, ¶¶ 24-25.

On January 17, 2005, the developer submitted revised preliminary plans to the Board incorporating changes based upon a rare species survey, including a reduction in the number of units from 43 to 40. Pre-Hearing Order, § II-7; Exh. 18; also see Exh. 6. By letter of April 14, 2005, the NHESP requested further changes in the proposal. Exh. 7. On May 4, 2005, the Board approved the changes in the plans as insubstantial. Pre-Hearing Order, §§ II-8, II-9; also see Exh. 13, ¶ 28. At this time, fifty-percent-complete plans had been submitted to the Board. Exh. 13, ¶ 28; Exh. 15, ¶ 16(d). On July 11, 2005, the NHESP suggested "additional consultations… to meet the MESA permitting standards," and on November 8, 2005, NHESP issued a Conservation and Management Permit for the development. Exh. 8; Pre-Hearing Order, § II-12.

The comprehensive permit included no expiration date. Cf., Exh. 1, § XI-8 (p. 18). No construction had begun by August 28, 2005. See, e.g., Tr. 46-47; cf. Exh. 13, ¶ 40.

By letter of September 9, 2005, the developer for the first time requested of the Board that the comprehensive permit be extended. Exh. 9; Pre-Hearing Order, § II-10.

On November 16, 2005, the Board found that the permit had expired prior to the request for an extension and that the request was untimely, and it denied the extension. Exh. 12; Pre-Hearing Order, § 13.

The president of the developer originally testified that it "is ready to begin construction." Exh. 13, ¶ 40. On cross-examination, he acknowledged that the design is fifty-percent complete, that there are a number of design issues that need to be clarified with

the Board, and that it will take between six months and a year from the date on which the comprehensive permit is finalized to actually begin construction. Tr. 46-47.

V. DISCUSSION

The Board argues that because no construction had begun within three years after the comprehensive permit was recorded with the town clerk, by the clear terms of 760 CMR 31.08(4), it lapsed on August 28, 2005. It also relies on *Red Gate Road Realty Trust v. Tyngsborough*, No. 93-01, slip op. at 5 (Mass. Housing Appeals Committee Dec. 8, 1993), in which the Committee implied in *dictum* that for an extension to be granted, the developer must have "properly requested an extension of the permit." *Red Gate Road, supra*, slip op. at 5. It argues that having waited until after the expiration date, the developer clearly did not properly request an extension in this case, and therefore no extension need be granted.

The developer presents two arguments in support of its position.[6] First, it argues that as a matter of law "the comprehensive permit was tolled from the March 11, 2003, the date the NHESP ordered an endangered species survey, until November 8, 2005, the date of the Endangered Species Conservation and Management Permit." Developer's Brief, p. 11.

The concept of tolling is generally applied when litigation or an appeal prevents the holder of a permit from exercising its rights. See *Woods v. City of Newton*, 351 Mass. 98, 103-104, 217 N.E.2d 728, 733 (1966). This Committee recognized this general principle when it ruled that the expiration of a project eligibility letter, which, pursuant to 760 CMR 31.01(2), established jurisdiction for issuance of a comprehensive permit, was tolled by an appeal of the denial of that permit. See *An-Co, Inc. v. Haverhill*, No.90-11, slip op. at 4-7 (Mass. Housing Appeals Committee Jun. 28, 1994).

In Massachusetts zoning cases involving variances, the concept of tolling has been extended beyond situations in which an actual legal impediment exists to the exercise of the variance to cases in which an appeal of a variance by third parties created "equally real

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6. I need not consider the argument raised in the developer's September 14, 2005 letter to the Board that the Board's Certificate of Granting of Comprehensive Permit created sufficient confusion about the effective date of the permit as "to induce reasonable reliance on the part of a developer" since this argument was not pursued in its brief. *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995); see Exh. 10.

practical impediments." *Belfer v. Bldg. Comm'r of Boston*, 363 Mass. 439, 444, 294 N.E.2d 857, 860 (1973); also see *Hadley v. Casper*, No. 01-0734 (Essex Super. Ct. Jun. 28, 2002), 15 Mass. L. Rptr. 107, 2002 WL 1991609. The developer argues that the expiration period in this case should be tolled by analogy to these precedents, particularly as they have been extended in the case of *Neilson v. Planning Bd. of Walpole*. In that case, the Land Court found that under the rationale of *Belfer*, the pendency of a closely related appeal of a subdivision denial and the defense of an appeal under the Wetlands Protection Act constituted practical impediments to the use of a special permit. *Neilson v. Planning Bd. of Walpole*, 9 LCR 57, Misc. Case No. 253156 (Mass. Land Ct. Jan. 22, 2001).

The facts before me, however, are different from those in *Neilson* since our regulations explicitly provide for extension of the comprehensive permit. In *Neilson*, the Land Court noted first that nothing in the language of G.L. c. 40A, § 9 "provides or even suggests that an affirmative extension is required to prevent an automatic lapse of [a] special permit," and went on to hold that "no affirmative extension is required to preserve rights under as special permit beyond two years, if good cause exists for the permit grantee's failure to commence substantial use under the permit with in the two-year period." *Neilson, supra*, at 59; also see *Braccia v. Mountain*, 13 LCR 20, Misc. Case No. 289072 (Mass. Land Ct. Jan. 20, 2005), 2005 WL 107092.

Under the facts before me, where construction has been delayed not by an appeal or other litigation, but rather by the need to obtain state-agency approvals, I rule that under the Comprehensive Permit Law, 760 CMR 31.08(4) requires that an affirmative extension beyond three years be sought in a timely manner, and that the running of the expiration period is not tolled.

Second, the developer argues that the Comprehensive Permit Law does not bar a request for extension after its expiration date, and that under the facts presented here, "fundamental concepts of fairness require that the… permit be extended…."[7] Developer's Brief, 12. This is basically an argument on the equities—that despite the late request, the

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7. The developer also argues that because G.L. c. 40A, § 10 explicitly states that a request is valid only if the request is filed prior to the expiration date, the failure of the drafter of 760 CMR 31.08(4) to include such a provision creates an inference that requests may be filed after the expiration date. I find no merit in this argument.

general considerations articulated in *Red Gate Road Realty Trust v. Tyngsborough*, *supra*, support an extension of the permit.

Though there may be some truth to the Board's claim that the developer could have moved more quickly toward exercising the comprehensive permit, it appears that the developer at least met minimum standards of diligence in pursuing other necessary approvals and development activities. Therefore, the equities do in fact weigh in favor the developer. Housing development is always a complex process, and the development of affordable housing doubly so. Nowhere is there a requirement that any developer pursue every aspect of permitting and approval simultaneously. On the contrary, permits often cannot be pursued effectively at the same time. For example, in this case, the developer could not finalize the comprehensive permit plans until endangered species issues were resolved, and it appears likely that its final WPA submission was dependent on that as well. Similarly, approval of certain documents, even though they are not necessarily dependent on design decisions, are normally deferred until it is certain that there are no impediments in the permitting process (e.g., appeals under the WPA) which might prevent the entire proposal from moving forward.[8] Within reason, the timing for placing all the pieces into the development puzzle should be left to the developer.

From the opposite perspective, it is also true that the Board did not present evidence of equitable considerations weighing in its favor. In interpreting the standard in 760 CMR 31.08(4) that "an extension may not be unreasonably denied," the Committee has indicated that consideration should be give to the existence of local concerns, harm to the town, or infringement on fundamental principles of fairness. See *Red Gate Road Realty Trust v. Tyngsborough*, No. 93-01, slip op. at 3-8 (Mass. Housing Appeals Committee Dec. 8, 1993). There is no evidence of such concerns here.

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8. For instance, the Board notes that no work has been done to finalize a monitoring services agreement—the agreement that establishes how affordability of units, limitation on profit, and other matters will be monitored after construction is completed. But, historically, state requirements for such agreements have changed every few years. Should there be a long delay if there were a WPA appeal, particularly an appeal to the courts, it would be highly inefficient to have negotiated such an agreement only to find that it needed to be renegotiated after state standards had changed. It is for this reason that negotiation of such agreements is often left until final, or nearly final, construction plans are approved, as noted by the developer. See Exh. 15, ¶ 4.

But these equitable considerations do not overcome the clear provision of law in 760 CMR 31.08(4) that a comprehensive permit expires in three years unless extended. They only become relevant when an extension is "properly requested." See *Red Gate Road, supra*. Because the request for an extension in this case was made after the permit had expired, the extension was not properly requested and could be denied for that reason.

VI. CONCLUSION

Based upon the testimony and evidence presented at the hearing and upon the findings and discussion above, I conclude that the comprehensive permit issued to Forestview Estates Associates, LLC expired, and the Board's denial of an extension thereafter was proper.

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 decision.

Housing Appeals Committee

Date: March 5, 2007

Werner Lohe
Presiding Officer

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