COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

WHITCOMB RIDGE, LLC Appellant v. BOXBOROUGH BOARD OF APPEALS, Appellee	)	No. 06-11

SUMMARY DECISION

I. INTRODUCTION

This is an appeal of a decision of the Boxborough Zoning Board of Appeals (Board) granting a comprehensive permit with conditions to the Appellant, Whitcomb Ridge, LLC (Whitcomb). The dispute lies with certain conditions that Whitcomb asserts are unacceptable to the Massachusetts Housing Finance Agency (MassHousing), which will serve as either subsidizing agency or project administrator. This case, and the recent case of *Attitash Views, LLC v. Amesbury,* No. 06-17 (Mass. Housing Appeals Committee Oct. 15. 2007), address questions that are fundamental to the statutory process for issuing comprehensive permits to build affordable housing under G.L. c. 40B. Under that statute, for nearly four decades a complex system has evolved, which addresses the funding, permitting, and long-term preservation of affordable housing. The Comprehensive Permit Law, G.L. c. 40B §§ 20-23, provides the broad outlines of this process. Many legal and programmatic details are prescribed not only in regulations and formal guidelines of different state agencies, but also in policies and practices of those agencies and in precedents of this Committee and the courts.

In recent years, local boards of appeals and municipalities in general have questioned the quality of oversight that has been provided at various stages in the process. We agree that

such oversight is critical, and recognize the consensus that it can and should be strengthened in a number of areas. See *Attitash,* No. 06-17, slip op. at 1. Here, however, the Board has attempted to exercise control in certain of those areas by imposing conditions that extend beyond a board's traditional role of reviewing the siting and design of a housing development. In particular, the Board has sought to dictate how parts of the calculation of the profit limitation will be conducted and assessed, to restrict the choice of the agent that will monitor the development, and otherwise to insert itself into programmatic aspects of the development.

There is no dispute that all of these areas are important and that effective administrative oversight in each individual area is essential. The question presented here, however, is whether that oversight may be taken on by a local board of appeals or whether it is more appropriately left in the hands of state housing agencies. As discussed below, we find *Attitash* to be dispositive of the issues presented here. We conclude that for the most part the functions that the Board seeks to undertake "are functions that, under the statutory scheme, have been reserved for state government." *Id.* at 2. Specifically, the Board has attempted to exercise control over areas which have been determined to be the province of the subsidizing agency or project administrator. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 6-7 (Mass. Housing Appeals Committee June 25, 1992).[1]

II. PROCEDURAL HISTORY

On June 30, 2005, Whitcomb submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build a 60-unit mixed-income affordable condominium housing project under the New England Fund or the MassHousing Housing Starts Program. In a decision filed with the town clerk on August 3, 2006, the Board granted a comprehensive permit for the project subject to a number of conditions. On August 22, 2006, Whitcomb appealed this decision to the Housing Appeals Committee.

On January 12, 2007, the developer filed a motion for summary decision and request for hearing. See 760 CMR 30.07(1)(a) and 30.07(4). Whitcomb argues that it has

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1. In the context of programs funded through the New England Fund, that role is taken by the project administrator. As discussed below, the distinction raised by the Board between a subsidizing agency and a project administrator is immaterial to our analysis.

established the presumption that the conditions it challenges render the project uneconomic and that the Board has failed to meet its burden to show that the conditions are consistent with local needs that outweigh the regional housing need. The Board opposed the developer's motion and requested summary decision against the moving party. It also moved to strike a January 10, 2007 letter from MassHousing submitted by Whitcomb in support of its motion (the 2007 MassHousing Letter).

Whitcomb subsequently submitted its opposition to the Board's request for summary decision with a supporting affidavit and an opposition to the Board's motion to strike. MassHousing filed a motion for leave to participate as an interested person and submitted a legal memorandum with supporting documents in connection with the parties' motions for summary decision. Thereafter, the Board moved to strike portions of the O'Hagan Affidavit submitted by Whitcomb.[2]

Because of the serious policy questions involved, by letter dated May 15, 2007, the Presiding Officer in this matter solicited the participation of the Massachusetts Department of Housing and Community Development (DHCD) as an interested person pursuant to 760 CMR 30.04(4) as well. She indicated that the appeal appeared to raise "emerging policy considerations of the sort concerning which the Committee has traditionally looked to DHCD for guidance." See, e.g., *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at 9, n.6 (Mass. Housing Appeals Committee Mar. 5, 1999), citing *Little Hios Hills Realty Trust v. Plymouth*, No. 92-02 (Mass. Housing Appeals Committee Sep. 23, 1993). DHCD responded with a Motion to Participate as an Interested Person, which was granted on June 15, 2007, and thereafter it filed a memorandum of law expressing its views on the issues raised in the case. The Board objected to the participation of MassHousing as an interested person and

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2. The Board's motion to strike the 2007 MassHousing Letter is denied. Whitcomb has stated that the letter was submitted for non-hearsay purposes. In any event, to the extent the letter contains hearsay or other objectionable material, it is admissible as the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. G.L. 30A, § 11(2); also see *Farmview Affordable Homes, Inc. v. Sandwich*, No. 02-32, slip op. at 5 (Mass. Housing Appeals Committee Ruling on Motion to Quash May 21, 2004) (Committee will not permit cross-examination of MassHousing officials in order to "look behind" subsidizing agency's approval process); 760 CMR 31.07(1)(f), 31.07(4)(a). For similar reasons, the Board's motion to strike certain portions of the O'Hagan Affidavit is denied.

moved to strike its memorandum. Although the Board also expressed its objection to the granting of DHCD's request to participate as an interested person before it had an opportunity to object to DHCD's motion, it had not objected to the Presiding Officer's earlier invitation to DHCD.

We grant MassHousing's request to participate as an interested person. The Board's argument that the request should be denied without the similar inclusion of the Inspector General is without merit. The Inspector General does not have a personal interest in this comprehensive permit proceeding, nor has he sought to participate in this proceeding. We also deny the requests of the parties and MassHousing for oral argument on the motion for summary decision. We believe that this matter should be decided on the record presented. See 760 CMR 30.07(1)(a).

III. FACTUAL BACKGROUND

To be eligible for a permit under the Comprehensive Permit Law, the developer's proposal must be fundable by a subsidizing agency under a low and moderate income housing subsidy program. 760 CMR 31.01(1)(b); G.L. c. 40B, §§ 20, 21. MassHousing issued a site eligibility letter on July 13, 2004. See 760 CMR 31.01(2).

Whitcomb has chosen to proceed with its project under two alternative funding programs. See 760 CMR 31.01(4). It plans to finance the development either under the Housing Starts program, whereby MassHousing will serve as the subsidizing agency, or under the New England Fund (NEF), in which case the Federal Home Loan Bank of Boston, acting through a member bank, will be the subsidizing agency. In the latter case, because funding will be provided by a non-governmental entity, MassHousing would act as project administrator. 760 CMR 31.01(2)(g). Although the Board stresses that MassHousing's status as project administrator in the case of NEF funding, that is immaterial to our ruling since under either funding scenario, the developer cannot proceed to construction until it receives final approval from MassHousing. See *Attitash*, No. 06-17, slip op. at 4. Also see *Town of Middleborough v. Housing Appeals Committee,* 449 Mass. 514, 530 n.22, 870 N.E. 2d 67 (2007). The conditions at issue here were negotiated between Whitcomb and the Board during the Board hearing process. The developer agreed to the conditions subject to MassHousing's final approval of the project. See O'Hagan Affidavit, ¶ 3.

DHCD is the state's principal housing agency and the agency charged with the administration of the Comprehensive Permit Law. G.L. c. 23B, §§ 3, 3(r), 5A ("rules and regulations established by the director"). MassHousing is "an independent agency that may determine project eligibility and issue eligibility determinations for projects proposed under G. L. c. 40B, §§ 20-23. See St. 1966, c. 708, § 3, as amended through St. 1996, c. 204, §§ 43, 44." *Town of Marion v. Massachusetts Housing Finance Agency*, 68 Mass. App. Ct. 208, 209 (2007); also see G.L. c. 23B, § 2(b).

IV. DISCUSSION

A. Standard of Review

Whitcomb objects to the disputed conditions only to the extent that they preclude MassHousing's final approval of the comprehensive permit. It argues that because MassHousing has stated it would not approve these conditions, the developer is caught in the middle of a policy dispute between the Board and MassHousing which prevents the project from proceeding to construction. It argues that the disputed conditions render the project uneconomic because they are inconsistent with the requirements of MassHousing as either the subsidizing agency or the project administrator, depending on the funding source. As a result, it argues, the developer will be unable to obtain final approval of and funding for the project. The Board argues that the conditions do not render the project uneconomic.

We need not review the economics, however. In our review of conditions imposed by decisions of local boards of appeals to determine whether they are supported by valid local concerns, we have frequently reviewed conditions imposed to ensure that they are consistent with the law. In that context, we have stricken from comprehensive permits matters improperly addressed by a board of appeals. See, e.g., *Attitash,* No. 06-17, slip op. at 5; *Paragon Residential Properties, LLC v. Brookline*, No. 04-06, slip op. at 14 (Mass. Housing Appeals Committee Mar. 26, 2007), *appeal docketed*, No. 07-00697 (Norfolk Super. Ct.). Also see *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7 (issues such as financial arrangements, profit projections, developer's qualifications and marketability are not intended to be reviewed in detail within comprehensive permit process and are not matters of concern in usual sense). We conclude that the requirement that the developer prove that the

conditions imposed render the proposed development uneconomic is not applicable since the challenge is to the legality of the conditions. See 760 CMR 31.07(1)(f).

In this matter, there is no genuine issue as to any material fact, and summary decision is appropriate. 760 CMR 30.07(4); *Grandview Realty, Inc. v. Lexington*, No. 05-11, slip op. at 3-4 (Mass. Housing Appeals Committee, July 10, 2006). There is no dispute regarding what conditions the Board imposed in its decision on Whitcomb's application for a comprehensive permit, which is attached to Whitcomb's memorandum in support of summary decision. The developer challenges the following conditions: II.A. (All); II.A.3; II.A.5; II.B.7; and II.C.8-15. We will address each in turn.

B. **Role of the Board of Appeals**

This Committee has consistently taken the position that under Chapter 40B, although the Board has primary responsibility for the local health, safety, and environmental concerns that are "at the heart of any comprehensive permit review," other issues "such as the financing arrangements, the profit projections, the developer's qualifications, and marketability" are solely within the province of the subsidizing agency. *Attitash,* No. 06-17, slip op. at 7, quoting from *CMA*, No. 89-25, slip op. at 6-7. Also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 379, 294 N.E.2d 393, 420 (1973), in which the Supreme Judicial Court determined that "the question of standards for eligibility [to receive a state or federal subsidy as a limited dividend organization] ... is properly left to the appropriate state or federal funding agency." This view of the law is in harmony with the interpretation of Chapter 40B by both DHCD and MassHousing. See April 27, 2006 Memorandum from the Director of DHCD (2006 DHCD Memorandum); DHCD Memorandum of Law; MassHousing Memorandum of Law. Also see DHCD "Guidelines for Housing Programs in Which Funding is Provided Through a Non-Governmental Entity" (August 8, 2005). The 2006 DHCD Memorandum provides:

> Zoning boards of appeals may not under any circumstances impose conditions in a comprehensive permit that impinge on the regulatory responsibilities of the subsidizing agency. Accordingly, ZBAs should not impose any conditions that specify how cost certification, project monitoring or the sale or rental of affordable units is to be performed, or by whom those tasks will be performed during the period the subsidizing agency retains regulatory oversight.

Id., p. 2. DHCD has reemphasized that interpretation in its memorandum of law in this case, stating, "...the Board has exceeded its authority under G.L. c. 40B and has infringed upon the jurisdiction and authority of the Project Administrator, MassHousing." DHCD Memorandum of Law, p. 1. Our consideration of each of the Disputed Conditions follows the guidance of this interpretation. See, e.g., *Stuborn*, No. 98-01, slip op. at 9, n.6; *Little Hios Hills*, No. 92-02.

C. **Conditions II.A. 3 and II.A.5 (Designating the Boxborough Housing Board as the Monitoring Agent).**

In Conditions II.A.3 and II.A.5, the Board reserves the prerogative to designate the Boxborough Housing Board as the Monitoring Agent for the development and establishes rules by which preference categories for assignment of affordable units shall be made. Whitcomb argues that MassHousing will not accept or grant a waiver of its prerogative to select the Monitoring Agent. Not only is appointment of the Monitoring Agent within the province of MassHousing, but further, MassHousing's responsibility to supervise the work of the Monitoring Agent, including the right to replace it with a new agent if necessary, should not be diluted by giving the Board veto power.[3] See *Attitash,* No. 06-17, slip op. at 6-7. Therefore Conditions II.A.3 and 5 shall be stricken and replaced by a single condition providing:

> The applicant shall execute a Regulatory Agreement and a Monitoring Services Agreement for the development and Deed Riders (or Affordable Housing Restrictions) for individual units, all in form and content as approved by MassHousing either as Subsidizing Agency under the Housing Starts program or as Project Administrator under the New England Fund.

D. **Condition II.B.7 (Limited Dividend Requirement)**

The Board's condition would establish its own standard for determining Actual Development Costs. As we stated in *Attitash,* "[t]here is no area of policy analysis or project review that is more squarely within the expertise of MassHousing than the financial analysis of each project for which it provides funding. An important part of that analysis is the review of the developer's profit." *Id.* at 9. This condition would not only supplant the prerogative

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3. MassHousing has indicated it is amenable to a request that it appoint the Boxborough Housing Board as Monitoring Agent, subject to its requirements and standards.

of MassHousing to make this determination, but it would alter the profit requirements and conflict with those established by MassHousing. Thus, this condition improperly interferes with matters within the province of the subsidizing agency. Condition II.B.7 is stricken.[4]

E. **Conditions II.C.8-15 (Town's Independent Auditing and Monitoring Requirements)**

With these conditions, the Board has claimed the authority, and seeks to establish procedures, to conduct an independent audit of the financial performance of the developer. As with the definition of Actual Development Costs described above, the audit provisions interject the Board into the review and compliance process, which is within the scope of MassHousing's exclusive authority. These conditions are stricken.

F. **Condition IIA. – Affordability Provisions other than II.A.3 and 5 (Acceptable to MassHousing only if it retains Final Determination of Compliance)**

These conditions set out affordability restrictions and other requirements relating to the construction schedule of affordable units. The only issue raised by Whitcomb with respect to these conditions is the authority for determining final compliance with these standards. MassHousing and DHCD have indicated no dispute that these conditions may be set by the Board as part of the comprehensive permit if the permit explicitly provides that the final determination of compliance is the responsibility of MassHousing. For the reasons stated above, we agree with MassHousing and DHCD. The comprehensive permit shall be revised to so provide.

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4. In *Attitash,* No. 06-17, slip op. at 10, we struck the Board's condition rejecting the developer's land acquisition price. We noted there that the municipality had full enforcement rights to pursue excessive profits as a third-party beneficiary of the Monitoring Services Agreement, the primary vehicle for enforcement of the profit limitation. We expect that a similar status will be made available to the Board with regard to this project.

V. CONCLUSION

For the reasons stated above, Whitcomb's Motion for Summary Decision is hereby granted. The Board's request for summary decision is denied.

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

Date: January 22, 2008

Werner Lohe, Chairman

Marion V. McEttrick

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer WL