COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

ROSEWOOD REALTY TRIST

v.

MANSFIELD BOARD OF APPEALS

No. 06-03

DECISION ON CONSTRUCTIVE GRANT OF CHANGE IN PROPOSAL

April 25, 2007

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

ROSEWOOD REALTY TRUST, Appellant	)	
v.	)	No. 06-03
MANSFIELD BOARD OF APPEALS, Appellee	)	

DECISION ON CONSTRUCTIVE GRANT OF CHANGE IN PROPOSAL

This case concerns a developer's request to change housing built under a comprehensive permit granted pursuant to G.L. c. 40B, §§ 20-23 from rental housing to ownership housing. We find that the change was granted constructively.

I. PROCEDURAL HISTORY

In May 2003, the Mansfield Board of Appeals granted a comprehensive permit to the developer, Rosewood Realty Trust, to construct 42 units of rental housing in three buildings at the intersection of Routes 106 and 140 in Mansfield in a B-3 zoning district containing primarily retail and office uses. Exh. 1, § II. The housing subsidy was provided under the Permanent Rental Financing Program of the Massachusetts Housing Partnership Fund. Pre-Hearing Order, § II-8. The Board's decision contained a condition prohibiting the conversion of the housing "to a condominium or cooperative..., or any other type of 'for sale' unit without the prior written permission of the Board." Exh. 1, § III-33; Pre-Hearing Order (Oct. 30, 2006), § II-1, II-2. A Regulatory Agreement was executed and recorded in November 2004, and construction has been completed. Pre-Hearing Order, § II-3; Tr., 35. On December 9, 2005, the developer submitted a request to change the development from rental housing to a condominium. Pre-Hearing Order, § II-4, II-5. The Board rendered a decision

denying the request on March 7, 2006, and that decision was filed in the Mansfield Town Clerk's office on March 22, 2006. Pre-Hearing Order, § III-6, II-7. On March 29, 2006, the developer appealed to this Committee, filing a petition alleging that the request had been granted constructively due to the Board's failure to comply with 760 CMR 31.03(3)(b).[1]

II. JURISDICTION

The Committee has jurisdiction over the subject of the developer's petition. Sections 31.03(3)(c) and 31.03(3)(d) of our regulations provide that disputes concerning changes proposed by the developer after issuance of a comprehensive permit may be brought before the Committee.[2] Also see *Groton Residential Gardens, LLC v. Groton*, No. 05-26, slip op. at 4-5 (Mass. Housing Appeals Committee ruling Aug. 10, 2006), *appeal pending*, No. SUCV2006-03793 (Suffolk Super. Ct.).

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1. At the parties' request, the Committee delayed the opening of its hearing pending settlement discussions. The hearing was opened with a conference of counsel in June 1, 2006, though further proceedings were delayed while settlement discussions continued. Written, prefiled testimony was submitted, and a site visit and a hearing session to permit cross-examination were conducted on January 22, 2007. Following the presentation of evidence, counsel submitted post-hearing briefs on March 7, 2007.

2. There is no merit in the Board's argument that this appeal should be dismissed because the developer does not have a project eligibility determination from a housing program that subsidizes ownership housing. When the Board voluntarily issued a comprehensive permit in this case, the jurisdictional requirements of 760 CMR 31.01(1) had been satisfied. Pre-Hearing Order, § II-8; also see Board's Brief, p. 12 ("the Appellant's original site eligibility letter from MHP satisfied the jurisdictional requirements for the original application."); cf. Appellee's Objections to the Committee's Proposed Decision, p. 2, n.2. The original, preliminary project eligibility determination established that the housing proposal satisfied the subsidizing agency's site, design, and programmatic criteria, and allowed the developer to move forward to receive a permit and construct the housing. The Board has not rebutted the presumption of fundability inherent in the original determination of project eligibility. See 760 CMR 31.01(1)(b), 31.01(2)(f); Pre-Hearing Order, § IV-6. The developer now wants to change the development to ownership housing, and therefore subject itself to the regulatory authority of an ownership housing program. At least under the circumstances presented here, where construction has been completed, it is irrelevant whether it seeks the change in the underlying subsidy program before or after obtaining approval of a change in the comprehensive permit. Prior to any changes in tenancy, however, we will require the developer to obtain approval from an ownership subsidy program. See section V-1, below.

III. THE COMMITTEE'S PROCEDURES WITH REGARD TO CONSTRUCTIVE APPROVAL OF PROJECT CHANGES

This Committee's review of a developer's request for a change in a housing proposal after a comprehensive permit has been issued—whether that review is on the merits of the change or after constructive approval, as here—is conducted under 760 CMR 31.03(3). The regulation is silent as to whether that review should be conducted by presiding officer acting for the Committee or by the full Committee. We discussed the policy and law underlying the presiding officer's power in a recent case involving the extension of the expiration period for a comprehensive permit:

> "[D]isputes arising after the issuance of a comprehensive permit… are now more common, and for that reason, the logic applied in *Wilmington*[3] … is even more compelling. That is, one of the reasons that [760 CMR] § 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).
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> "[But even more] 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."

Forestview Estates Assoc., Inc. v. Douglas, No. 05-23, slip op. at 4 (Mass. Housing Appeals Committee ruling Mar. 5, 2007).

The considerations that apply to extensions of comprehensive permits apply to post-permit changes in a proposal as well, and in some circumstances argue even more strongly that the presiding officer should have the authority to act alone. In particular, many changes

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3. *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).

requested by developers are relatively minor and need to be handled expeditiously. When the changes requested are very substantial or involve novel questions under the Comprehensive Permit Law, the presiding officer may always exercise the option of consulting with the full Committee, as he has done in this case. But this choice is in the presiding officer's discretion. When a permit has already been issued, the presiding officer is not making a decision that "finally determine[s] the proceedings," and therefore ruling upon a change in the permit or the constructive grant of such a change pursuant to 760 CMR 31.03(3) is within the broad authority conferred by 760 CMR 30.09(5)(b).[4]

IV. DISCUSSION

As noted above, there is no dispute that the developer submitted a request to change the development from rental housing to a condominium by certified letter mailed December 6, 2005 and that it was received in the Mansfield Town Hall on December 9, 2006. Pre-Hearing Order, § II-4, II-5; Exh. 2, 3. Nor is there any dispute that the Board did not conduct a hearing until February, did not render a decision denying the request until March 7, 2006, and did not file the decision in the Mansfield Town Clerk's office until March 22, 2006. Pre-Hearing Order, § III-6, II-7; Exh. 4. There is no allegation by the Board that it took any action within twenty days of December 9 to determine and notify the developer whether the requested change was substantial, as required by 760 CMR 31.03(a). On the contrary, the Board claims that it was not "aware of [the twenty-day time limitation until] after the fact", and argues only that because the request came "shortly before the Christmas season, …[it was] difficult for the Board to schedule a hearing…." Tr. 77-78; Exh. 15, ¶ 6.

Since the Board clearly exceeded the time limit in the regulation, the only remaining question is whether the proper remedy is a determination that the requested change was approved constructively. This question must be answered by reference to our regulations

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4. The constructive grant of a change in a permit must be distinguished from the constructive grant of the permit itself. Nothing is more central to the Comprehensive Permit Law than the question of whether a permit to construct housing should in fact be issued. Thus, a permit may be granted constructively *only* by the full Committee after hearing. 760 CMR 31.08(8). Typically, the question of the constructive grant is heard first, on motion before the presiding officer; then, the presiding officer conducts a hearing to consider local concerns and the possible imposition of conditions; and finally the entire matter is brought before the full Committee for decision.

alone since the Comprehensive Permit Law itself does not contain detailed administrative provisions. That is, the statute provides for the constructive grant of a permit if the Board fails meet hearing deadlines, but it does not anticipate the need to modify a development proposal after a permit has been issued. See G.L. c. 40B, § 21. That eventuality is addressed in § 31.03(3) of our regulations, however. And, there is no question that by operation of the unambiguous language of our regulations, because the Board "fail[ed] to notify the applicant, the comprehensive permit shall be deemed modified to incorporate the change." 760 CMR 31.03(3)(b). This result, that the plain meaning of our regulation should provide a nondiscretionary remedy of a constructive grant of the change in the permit, is consistent with traditional land use laws and principles. See *Devine v. Bd. of Health of Westport*, 66 Mass. App. Ct. 128, 845 N.E.2d 444 (2006).

We cannot accept the Board's argument that 760 CMR 31.03(6) gives the presiding officer the discretion to waive the twenty-day time limitation. The presiding officer is authorized "to extend any time limit for good cause," but that section of our regulations addresses the filing of pleadings during the appeal process before the Committee, and does not apply to the provisions of section 31.03(3), which apply to procedures before the Board.

V. CONCLUSION

The comprehensive permit filed with the Mansfield Town Clerk on May 7, 2003 (Exhibit 1) is hereby determined to have been modified to permit all of the housing units to be changed from rental units to condominium units. All other provisions and conditions in that permit shall remain in effect. Twenty-five percent of the housing units (11 units) shall be affordable to households at or below 80% of median income. The permit shall be subject to the following additional conditions:

1. Prior to any change in ownership or tenancy, the developer shall, pursuant to 760 CMR 31.09(3), obtain from an ownership housing subsidy program final written approval of the development as an ownership development and shall enter into a standard Regulatory Agreement with such subsidy program or project administrator and a Monitoring Services Agreement to ensure proper monitoring of compliance with all affordability requirements, profit limitation requirements, and other program requirements. The normal, thorough

review by the subsidizing agency of all aspects of the development is particularly important in this case since this Committee has not reviewed the local concerns presented by the Board in support of its denial of the requested change. Because of the location and design of the housing, there are significant, legitimate local concerns about whether the development is appropriate for ownership housing.[5] As the subsidizing agency conducts its review and analysis of the proposal to determine whether it will approve the housing as ownership housing, the Committee will, of course, make the entire record of proceedings before it available upon request.

2. General Conditions

(a) The subsidizing agency or project administrator may impose additional requirements for or modifications of site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(b) If anything in this decision should seem to permit the operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

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5. For instance, the Board argues not only that the development's location—a busy intersection—is suitable only for rental housing, but also that the development is inappropriate for condominium units since it lacks amenities normally associated with such units. It alleges that such amenities are particularly important since purchasers in Mansfield typically view condominium units as "starter homes." See Exh. 14, ¶ 8. For this and other reasons, it alleges that if the conversion is finally approved, an underperforming rental development will simply be replaced by an underperforming condominium development. See Board's Brief, p. 21.

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: April 25, 2007

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson

James G. Stockard, Jr.

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