COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

WOODBRIDGE CROSSING, INC., Appellant v. STOUGHTON BOARD OF APPEALS, Appellee	No. 07-06

RULING ON MOTION TO DISMISS

I. INTRODUCTION

On February 14, 2006, Woodbridge Crossing, Inc. filed an application with the Stoughton Zoning Board of Appeals for a comprehensive permit under G.L. c. 40B, §§ 20-23 to build a 192-unit condominium development of affordable housing on a 24-acre site off Central Street (Route 27) near Island and Mill Streets in Stoughton. After public hearings, the Board filed with the Stoughton Town Clerk, on April 30, 2007, a decision denying the comprehensive permit, and the developer appealed to this Committee. The Committee opened its hearing with a conference of counsel, and thereafter the Board filed a Motion to Dismiss, alleging that the town had reached the 10% statutory threshold, that is, that the Board's decision is consistent with local needs as a matter of law since low or moderate income housing exists in Stoughton "in excess of ten percent of the housing units reported in the latest federal decennial census…." G.L. c. 40B, § 20. The Board's position is based upon an interpretation by the Massachusetts Department of Housing and Community Development (DHCD) of guidelines and regulations concerning the counting of affordable units that involves a previously granted comprehensive permit that is under appeal in the Superior Court. Based upon a recent ruling in that case by the Superior Court, we conclude that the Board's motion to dismiss in the appeal before this Committee must be denied.

II. FACTS

The following facts are not in dispute:

1. On February 14, 2006, Woodbridge Crossing filed its application for a comprehensive permit with the Board, and the Board opened its hearing on March 16, 2006. Appellee's Motion to Dismiss, Exhibit 1, p. 1 (filed May 25, 2007).

2. The Woodbridge Crossing proposal will be subsidized by the New England Fund (NEF) of the Federal Home Loan Bank of Boston. Applicant's Initial Pleading, ¶ 1 (filed May 18, 2007).

3. On May 18, 2006, the Board opened a hearing with regard to the application of Villas at MetroSouth, LLC for a comprehensive permit on a different parcel of land. Appellant's Opposition to Motion to Dismiss, Exhibit A, p. 1 (filed Jun. 13, 2007).

4. On March 1, 2007, the Board granted a comprehensive permit to MetroSouth to construct 240 rental housing units, and on March 2, 2007, it filed that permit with the Stoughton Town Clerk. Appellant's Opposition to Motion to Dismiss, Exhibit A.

5. On March 20, 2007, Woodbridge Crossing filed an appeal of the MetroSouth permit with the Norfolk Superior Court. Applicant's Initial Pleading, ¶ 9(c)(para. 2).

6. On April 30, 2007, the Board filed with the Stoughton Town Clerk the decision in this case, denying Woodbridge Crossing a comprehensive permit. Appellee's Motion to Dismiss, Exhibit 1.

7. On April 30, 2007, the percentage of low or moderate income housing in Stoughton, not including any units from the MetroSouth development, was 9.37%.

8. On May 9, 2007, Massachusetts Department of Housing and Community Development (DHCD) Undersecretary Tina Brooks wrote a letter to the chairman of the Board in response to a letter from him that requested that the MetroSouth units be included in the DHCD Subsidized Housing Inventory (SHI), that is, that they be counted toward the 10% statutory threshold. The DHCD letter stated,

"The application of the second sentence of § 2.A.1 of the SHI Guidelines [entitled 'Eligibility Summary for the Subsidized Housing Inventory'] to the Town of Stoughton's SHI calculation is hereby waived, with the impact that the 240 unit rental unit project, known as Villas at MetroSouth and approved by the Town of Stoughton Zoning Board of Appeals under a comprehensive permit issued by the Board on March 1, 2007 and filed with the Stoughton Town Clerk on March 2, 2007, shall count toward the Town of Stoughton's SHI calculation, as of March 22, 2007.

"As grounds for this waiver, DHCD hereby finds that: (1) the only appeal made from the March 22, 2007 comprehensive permit for the 240 rental units in the Villas at MetroSouth project was filed by a competitor applicant, who seeks approval of a comprehensive permit project located a number of miles from the Villas at MetroSouth project, for the apparent purpose of preventing the Town from adding the 240 rental units to the Town's SHI and, as a result, delaying the provision of affordable housing in the Town of Stoughton by the Villas at MetroSouth; (2) a motion to dismiss the competitor's applicant's appeal has been duly served by the Town of Stoughton Zoning Board of Appeals upon the competitor appellant and shall be filed shortly with the Norfolk Superior Court, to seek dismissal of the competitor applicant's appeal on the grounds that the competitor applicant lacks the required standing to maintain the appeal; and (3) to not take this action, to grant the instant waiver, would undermine the express design and dual purposes of G.L. c. 40B, to both expedite the provision of critically needed affordable housing throughout the Commonwealth and to provide different treatment for those municipalities that achieve the 10 percent subsidized housing inventory benchmark.

"This waiver shall expire one year from March 22, 2007."

Appellee's Motion to Dismiss, Exhibit 2.

9. On May 17, 2007, DHCD notified the town of Stoughton that the MetroSouth units had been added to the SHI, and that "the current percentage for Stoughton is 11.67 percent." Appellee's Motion to Dismiss, Exhibit 3.

10. The Norfolk Superior Court has issued a Memorandum of Decision and Order on Defendant's Motion to Dismiss. *Woodbridge Crossing, Inc. v. Conroy Development Corp.*, No. 02-00281 [*sic*, NOCV2007-00477] (Norfolk Super. Ct. memorandum of decision Aug. 14, 2007). The memorandum states,

"The Court accepts [Woodridge Crossing's] allegations as true and draws all inferences in [its] favor....

"...according to Woodbridge, by cherry-picking a later-filed project, the Board was able to reduce the overall number of low or moderate income housing units within the town.

> "The Court finds that permitting the Board to cherry-pick a later-filed application at the expense of another without some sort of review is among the evils the legislature sought to protect against.... Woodridge 'is an aggrieved person entitled to present for judicial review... the [Board's] action granting' a comprehensive permit to its competitor...."

II. DISCUSSION

There is nothing more fundamental to the Comprehensive Permit Law than the concept of consistency with local needs. G.L. c. 40B, § 20; 760 CMR 31.05(1). And, "[t]he Board may show conclusively that its decision was consistent with local needs by proving that one of the statutory minima described in 760 CMR 31.04 has been satisfied." 760 CMR 31.05(1).

Our regulations describe in some detail the procedure for determining on appeal whether one of that statutory minima has been satisfied. Section 31.04(1)(a) provides as follows:

> "There shall be a presumption that the latest [DHCD] Subsidized Housing Inventory contains an accurate count of low and moderate income housing."
>
> "If any party introduces evidence to rebut this presumption, the ... Committee shall on a case by case basis determine what housing... [is] low or moderate income housing. ...

In this case, there is no doubt that as a result of the modification made by DHCD, the SHI (as modified) shows that Stoughton exceeded the 10% threshold as of the date of filing of the Woodbridge Crossing decision with the town clerk. Appellee's Motion to Dismiss, Exhibits 2 and 3. Though the developer has not introduced *evidence* to rebut the presumption created by the SHI, it has raised a legal defense to the Board's motion to dismiss, and therefore under the regulations, rather than simply accept the SHI figure, we must "determine what housing... [is] low or moderate income housing," that is, rule on the accuracy or validity of the SHI as modified. [1]

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1. The regulation also provides that the Committee "shall first be guided by the intent expressed in the regulations governing the program under which the housing is financed...." No evidence was presented in this case, nor have we found any other indication that the Federal Home Loan Bank of Boston, which will subsidize the development through the NEF, has regulations which express any intent with regard to how or when units should be counted toward the 10% threshold.

Section 31.04(1)(a) goes on to provide:

> "[H]ousing units authorized by a comprehensive permit shall be counted when the comprehensive permit becomes final (760 CMR 31.08(4)…."

Section 31.08(4), in turn, provides:

> "The permit shall become final on the date that the written decision of the Board is filed in the office of the… town clerk if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of."

Nearly identical to these provisions are the guidelines issued by DHCD with regard to this issue. That is, section 2.A.1 of SHI Guidelines states:

> "Units shall be eligible to be counted towards the SHI at the earliest of the following:
> 1. When comprehensive permits become final (when applicable).
> Units permitted under a comprehensive permit are eligible to be counted on the SHI when the associated comprehensive permit has become final pursuant to 760 CMR 31.08(4). Comprehensive permits become final *either* on the date that the permit is filed with the town clerk provided that no appeals are filed *or* on the date when the last appeal is fully resolved. However, if twelve months or more elapses before the corresponding building permits are issued, the units will become ineligible for the inventory until such date that the building permits are issued."

The phrasing of this guideline is slightly different from that of §§ 31.04(1)(a) and 31.08(4) of the regulations, but the meaning is identical.

As a general matter, DHCD has the power to waive its own guidelines. But the developer has challenged the propriety of that waiver, and at a preliminary level, without making findings of fact, the Superior Court has lent credence to the developer's legal argument by finding "that permitting the Board to cherry-pick a later-filed application at the expense of another without some sort of review is among the evils the legislature sought to protect against.'" And since this legal question is already pending in the Superior Court, it should be resolved there.

Dismissal of the case before the Committee is appropriate only if it appears certain that the developer can prove no set of facts in support of its position. See *Nader v. Citron,* 372 Mass. 96, 98, 360 N.E.2d 870, 872 (1977), quoting from *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). The clear implication of the Superior Court's ruling is that it may be possible for the developer to prove its case. Therefore the motion to dismiss is denied.

Housing Appeals Committee

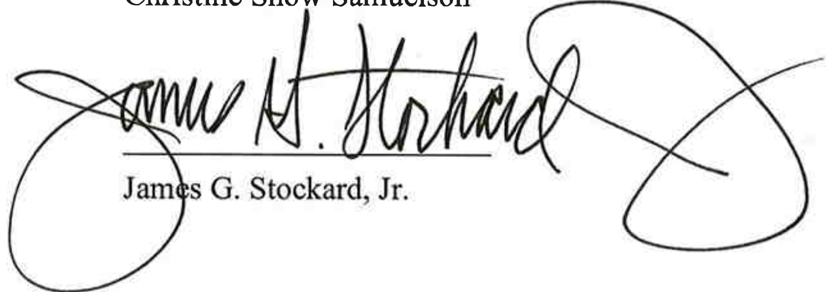
Date: November 19, 2007

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson



James G. Stockard, Jr.

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