

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

DELPHIC ASSOCIATES, LLC)
Appellant)

v.)

MIDDLEBOROUGH ZONING BOARD)
OF APPEALS,)
Appellee)

No. 00-13

**SUPPLEMENTAL ENFORCEMENT ORDER
AND
ENDORSEMENT FOR REGISTRY RECORDING**

This matter has a lengthy history. In 2000, the developer, Delphic Associates, LLC, filed an application with the Middleborough Zoning Board of Appeals to build affordable housing—ten single-family homes—under the Comprehensive Permit Law, Chapter 40B, §§ 20-23. The Board denied the permit, and after hearing on appeal, the Housing Appeals Committee, in 2002, ordered the Board both to issue the comprehensive permit and to “take whatever steps are necessary to insure that a building permit is issued to the applicant without undue delay....” *Delphic Associates, LLC v. Middleborough*, No. 00-13, slip op. at 18, 19 (Mass. Housing Appeals Committee Jul. 17, 2002). That decision was appealed, and affirmed by the Superior Court. *Town of Middleborough v. Housing Appeals Committee*, No. PLCV2002-00958 (Plymouth Super. Ct. Apr. 30, 2004). Upon further appeal, the Committee’s decision was affirmed by the Supreme Judicial Court in 2007. *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514 (2007). The developer submitted site plans to the Middleborough building inspector, but the town took no action,

and in early 2010, the developer filed a request with this Committee pursuant to 760 CMR 56.07(6)(d) for enforcement of the Committee's decision. I conducted a hearing to allow the parties to present evidence and argument, and after some delay resulting from settlement discussions, I made findings of fact and issued an Enforcement Ruling and Order in December. *Delphic Associates, LLC v. Middleborough*, No. 00-13 (Mass. Housing Appeals Committee Enforcement Ruling and Order Dec. 20, 2010). The Board challenged that order in Superior Court, but on the developer's motion, the court dismissed the matter. *Middleborough Zoning Board of Appeals. v. Housing Appeals Committee*, No PLCV 2011-00079B (Plymouth Super. Ct. Jun. 29, 2011).

On June 8, 2012, the developer filed a Second Motion for Enforcement. I conducted a conference of counsel, which at the parties' request was held by telephone, to discuss how best to proceed, and thereafter issued a Scheduling Order. That order indicated that I intended to rule based upon facts already in the record, but offered the parties the opportunity to file affidavits or argue that there is a genuine issue of material fact which would preclude a ruling based only on the existing record. The parties filed memoranda of law, which were complete on November 7, 2012.¹ Neither party has argued that there are material facts in dispute, although the Board filed the Affidavit of Building Commissioner Robert J. Whalen; for purposes of this order, I accept the facts stated in that affidavit to be true (except for possible minor inconsistencies with my findings of fact after hearing in 2010).² In order to remove any doubt about the Committee's view of the role of the presiding officer in enforcing decisions, I presented the case to the full Housing Appeals Committee, which issued a Ruling Regarding Enforcement of Decision, which is attached to this order as Appendix A.

The Comprehensive Permit Law provides that when the Committee issues a decision in favor of a developer, "it shall direct the board to issue a comprehensive permit or approval to the applicant." G.L. c. 40B, § 23. "The board of appeals shall carry out the order of [the Committee] within thirty days of its entry and, upon failure to

1. I also solicited *amicus* briefs, which were filed November 9, 2012.

2. I am not, of course, bound by the building commissioner's opinions with regard to the law, although in reviewing his affidavit I have considered his interpretation of the State Building Code.

do so, the order of said committee shall, for all purposes be deemed the action of said board....” *Id.* The Committee’s regulations provide clarification with regard to how the enforcement provisions of the statute should be implemented, repeating much of the language of the statute and stating: “The Committee shall have the same power to issue permits or approvals as any Local Board..., [and] [i]f a party fails to comply with an order issued by the Committee, it may impose appropriate sanctions....” 760 CMR 56.07(6)(b), 56.07(6)(d). In addition, either the Committee “or the petitioner shall have the power to enforce the orders of the committee at law or in equity in the superior court.” G.L. c. 40B, § 23. This understanding that the Committee should take full responsibility for the permit, including conditions, rather than remanding to the Board for action, was first established forty years ago: “The absence of a remand procedure comports with the time limit fixed for each stage of the hearing process which together indicate the Legislature’s intent to speed up the permit procedure....” *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 372 (1973). This authority is consistent with the Supreme Judicial Court’s recent, repeated pronouncements: “Where the focus of the statutory enactment is one of reform,... ‘the administrative agency charged with its implementation should construe it broadly so as to further the goals of such reform.’ *Middleborough [v. Housing Appeals Committee]*, 449 Mass. at 524....” *Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 761-762 (2010).³

Based upon this statutory and regulatory authority, I will enforce the Committee’s decision in two phases. First, I will require the developer to submit a Comprehensive Permit Plan in a form suitable for recording, which I will review for conformity with the comprehensive permit that the Committee approved in its decision. If it is acceptable, I will endorse it on behalf of the Committee for recording. Second, I will require the developer to submit construction documents and other documentation in preparation for issuance of building permits and other necessary permits.

3. Accordingly, the Superior Court was mistaken to the extent it suggested in *dictum* that “HAC has no power to enforce [its enforcement order] on its own.” See *Middleborough Zoning Board of Appeals v. Housing Appeals Committee*, No. PLCV 2011-00079B, slip op. at 3, n.5 (Plymouth Super. Ct. Jun. 29, 2011). As illustrated above, if anything, the statute and regulations prefer direct enforcement by the Committee to judicial proceedings.

ORDER

I. Recording

My order today supplements my December 20, 2010 Enforcement Order, which has remained and continues to remain in effect. That order states:

1. The board is ordered to endorse a copy suitable for recording of the plans introduced into evidence in this case as Exhibit 3-A, that is, plans entitled "Definitive Subdivision of Pine Grove Hill Estates..., Record Owner Hallmark Financial Corp., Applicant Delphic Associates, LLC, Prepared by: SITEC, Inc." (October 19, 2009). Unless the parties agree on alternate language, the endorsement shall read,

"Approved under the Subdivision Control Law by the Middleborough Zoning Board of Appeals acting for the Middleborough Planning Board pursuant to the power granted by G.L. c. 40B, § 21. This plan is subject to the conditions contained in the comprehensive permit ordered by the Massachusetts Housing Appeals Committee on July 17, 2002, as modified by the ruling of the Housing Appeal Committee of December 20, 2010."

Pursuant to G.L. c. 40B, § 23, this order shall be carried out within thirty days of its issuance, that is, on or before January 19, 2011.

The Board has failed to carry out the above order, and therefore by law, after 30 days, that order is deemed the action of the Board. To effectuate the practical aspects of recording, however, I issue the following order:

The developer is **ORDERED** to file with the Committee⁴ by May 15, 2013 a plan entitled "Comprehensive Permit Plan" suitable for recording identical in substance to the plans introduced into evidence in this case as Exhibit 3-A, that is, plans entitled "Definitive Subdivision of Pine Grove Hill Estates..., Record Owner Hallmark Financial Corp., Applicant Delphic Associates, LLC, Prepared by: SITEC, Inc." (October 19, 2009). Such plan may contain minor, non-substantive revisions, including the title, and two signature blocks, which shall read,

4. Of course, pursuant to 760 CMR 56.06(6), copies of all filings by the developer will be served on the Board. In addition, the developer shall serve a copy of all filings upon Building Commissioner Robert J. Whalen, Middleborough Building Department, 20 Centre Street, 2nd floor, Middleborough, MA 02346. As directed by the full Committee in its February 27, 2013 Ruling Regarding Enforcement of Decision, if the Board or other authorized local officials indicate through counsel a willingness to act at any stage in this process to accomplish the various steps in the permitting process voluntarily, I will attempt to accommodate such a request.

“Approved under the Subdivision Control Law by the Housing Appeals Committee, acting for the Middleborough Zoning Board of Appeals and the Middleborough Planning Board pursuant to the power granted by G.L. c. 40B, §§ 21 and 23 upon failure of the Middleborough Board of Appeals to carry out the order of the Housing Appeals Committee. No endorsement by the Middleborough Zoning Board of Appeals or Planning Board is required. This plan is subject to the conditions contained in the comprehensive permit ordered by the Massachusetts Housing Appeals Committee on July 17, 2002, as modified by the rulings of the Housing Appeal Committee of December 20, 2010 and March 28, 2013.” (with lines for date and signature of “Werner Lohe, Presiding Officer”).

The developer is **ORDERED** to file with the Committee or submit to the Board by May 15, 2013 security as required by G.L. c. 41, § 81U. If security is provided in the form of a bond or deposit of money or negotiable securities, it shall be submitted to the Board, and an affidavit shall be filed by the developer with the Committee reciting facts sufficient to permit me, as presiding officer, to determine whether the amount is sufficient as prescribed by G.L. c. 41, § 81U.

II. Subordinate Permits

I hereby amend and supplement my December 20, 2012 order as follows.

The developer is **ORDERED**, by June 30, 2013, to file with the Committee⁵ the following documents, all in compliance with the Committee’s decision and subsequent orders in this matter and the Massachusetts Residential Code:⁶

1. Building Permit Application on a form in compliance with 780 CMR 5101.1(R105.3).⁷ No fee need accompany such form, as I hereby order such fee,

5. See n. 4, *supra*.

6. Mass. Residential Code, 780 CMR 51.00, 5101.1 (adopting and incorporating by reference the International Residential Code for One- and Two-Family Dwellings 2009). The developer must, of course comply with all aspects of this state building code; any disputes that may arise under that code, and not under the comprehensive permit itself, will be resolved by the State Building Code Appeals Board. See *Board of Appeals of North Andover v. Housing Appeals Committee*, 4 Mass. App. 676 (1976).

7. See “Building Permit Application to Construct, Repair, Renovate or Demolish a One- or Two-Family Dwelling” (for municipal use; revised Mar. 2011; <http://www.mass.gov/eopss/consumer-prot-and-bus-lic/license-type/buildings/building-permit-application-forms.html>.)

which is a local requirement, waived pursuant to G.L. c. 40B, §§ 20-23;

2. Construction documents and other information (in two or more sets) in compliance with 780 CMR 5101.1(R106.1). A set of construction documents need not be filed with the head of the local fire department since this Committee has the power to act for that local official. At a minimum, the construction documents shall include:
 - 3.1 Site plan and plot plan in compliance with 780 CMR 5101.1(R106.2);
 - 3.2 Foundation plans and details (as necessary);
 - 3.3 Floor plans (including basement and attic levels, if applicable; floor plans shall include location of all required fire protection systems and heating systems storage areas);
 - 3.4 Exterior building elevations;
 - 3.5 Framing plans and/or building section(s) adequately depicting structural systems;
 - 3.6 Schedules, legends, and/or details adequately depicting doors, windows, and related material installations; and
 - 3.7 Energy conservation information;
3. All plans and specifications for work designed by a registered design professional shall bear a seal and signature of the responsible registered design professional in compliance with 780 CMR 5101.1(R106.1);
4. Proof of availability of water supply in compliance with 780 CMR 5101.1(R105.3.1.2);
5. Proof of availability of wastewater disposal in compliance with 780 CMR 5101.1(R105.3.1.2);
6. Proof of availability of debris removal in compliance with 780 CMR 5101.1(R105.3.1.2);
7. Proof of Workers' Compensation Insurance in compliance with 780 CMR 5101.1(R105.3.1.2);
8. Wind zone loading information;
9. Stormwater drainage system plans designed to comply with the Massachusetts

- Department of Environmental Protection Stormwater Management Policy;
10. Other local approval documentation or forms as may be customary in Middleborough;
 11. Final written approval by the Subsidizing Agency in compliance with 760 CMR 56.04(5); and
 12. A blank form of Building Permit(s) for one or more houses suitable for signature in a form consistent with the requirements of 780 CMR 5101.1(R105.3.1).

ENDORSEMENT

Upon the authority in G.L. c. 40B, § 23, this document, Appendix A (Ruling Regarding Enforcement of Decision, February 27, 2012), and the Comprehensive Permit Plan described above are deemed by the Housing Appeals Committee to be recordable in the Plymouth County Registry of Deeds.

Housing Appeals Committee



Werner Lohe
Presiding Officer

March 28, 2013

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

_____)	
DELPHIC ASSOCIATES, LLC)	
Appellant)	
v.)	No. 00-13
MIDDLEBOROUGH ZONING BOARD)	
OF APPEALS,)	
Appellee)	
_____)	

RULING REGARDING ENFORCEMENT OF DECISION

As noted by the presiding officer in his Enforcement Order of December 20, 2010, the approval process for the affordable housing development that is the subject of this matter has been protracted. And, although the substantive issues were resolved five years ago by the Supreme Judicial Court in *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514 (2007), this case raises issues of first impression, under 760 CMR 56.07(6), with regard to the enforcement of the Committee's decision, which ordered issuance of a comprehensive permit. That is, this is the first time in the forty-three-year history of the Comprehensive Permit Law that the developer, after unsuccessful negotiations with local officials and appearances before the local board of appeals, has applied to the Committee asking it to actually endorse plans for recording and issue building permits. The presiding officer, in order to remove any doubt about our view with regard to the scope of a presiding officer's enforcement authority under 760 CMR 56.06(7)(e)(2), has brought that question before the full Committee.

Despite the unusual circumstances of this case, the relief requested and the actions required are largely practical, mechanical matters,¹ rather than questions of law or policy. Thus, they fit squarely within the powers authorized in 760 CMR 56.06(7)(e)(2), which provides, “The presiding officer shall have all those powers conferred upon the Committee for the conduct of a hearing, except that he or she shall not be empowered to make any decisions that would finally determine the proceedings, except.. with regard to the enforcement of decisions of the Committee....” Therefore, we hereby rule that in this matter, and similar enforcement matters that may arise in the future, the presiding officer has full authority, without further consultation with the full Committee, to issue such orders, take such actions, and execute such documents on behalf of the Committee and any and all local officials as may be necessary to enforce the decision of the Committee. In doing so, he shall, in his discretion, give deference where possible to local procedures, and, if practical, to such local officials as cooperate in good faith in the permitting process.

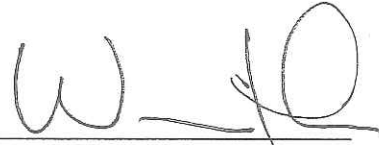
The Board also requested oral argument before the full Committee. As we have done in previous cases, we deny the request, and note that we rely upon the discretion of the presiding officer to bring matters to our attention when consideration by the full Committee is desirable, but not required by law or regulation. See *Sugarbush Meadow, LLC v. Sunderland*, No. 08-02, slip op. at 2, n.1 (Mass. Housing Appeals Committee Jun. 21, 2010), *aff’d* 464 Mass. 166 (2013); *LeBlanc v. Amesbury*, No. 06-08, slip op. at 2, n.4 (Mass. Housing Appeals Committee May 12, 2008); *Tiffany Hill, Inc. v. Norwell*, No. 04-15, slip op. at 4 (Mass. Housing Appeals Committee Sep. 18, 2007). Concerning practical considerations which limit the full Committee’s ability to hear evidence and argument, see *Wilmington Arboretum Apts. Assoc. Ltd. Partnership v. Wilmington*,

1. They are not, however, merely ministerial; rather, they require careful exercise of discretion.

No. 87-17, slip op. at 3, n.2 (Mass. Housing Appeals Committee Order Sep. 28, 1992),
aff'd, 39 Mass. App. Ct. 1106 (1995)(rescript).

Housing Appeals Committee

February ²⁷ 26, 2013



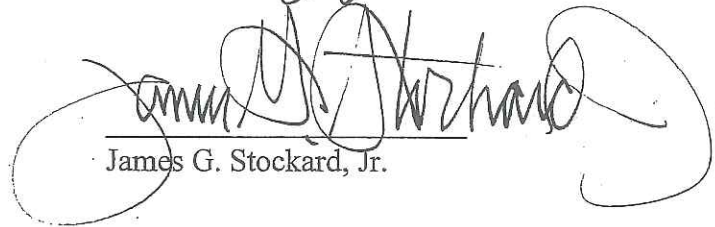
Werner Lohe, Chairman



Carol A. Gloff



Theodore M. Hess-Mahan



James G. Stockard, Jr.

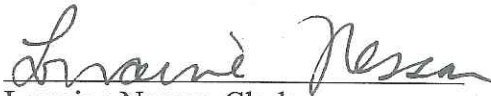
Certificate of Service

I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Supplemental Enforcement Order and Endorsement for Registry Recording in the case of Delphic Associates, LLC, No. 2000-13, to:

Joseph J. Czerwonka, Esq.
Attorney and Counselor at Law
226 South Main Street, Suite 5
Fall River, MA 02721

Jonathan D. Witten, Esq.
Barbara M. Huggins, Esq.
Huggins and Witten, LLC
156 Duck Hill Road
Duxbury, MA 02332

Dated: 03/28/13


Lorraine Nessar, Clerk
Housing Appeals Committee