COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

**BARTLETT POND VILLAGE, LLC**

v.

**WAREHAM ZONING BOARD OF APPEALS**

No. 09-15

DECISION

September 16, 2014

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

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| BARTLETT POND VILLAGE, Appellant | ) | |
| v. | ) | No. 09-15 |
| WAREHAM ZONING BOARD OF APPEALS, Appellee | ) | |

**DECISION**

## I. PROCEDURAL HISTORY

On July 28, 2008, Bartlett Pond Village, LLC applied to the Wareham Zoning Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build eighteen units of mixed-income ownership housing on an eight-acre site off Standish Avenue in Wareham. See Exh. 3. The housing is to be financed by the New England Fund of the Federal Home Loan Bank of Boston. Exh. 6; 27, ¶ 10.

By decision issued December 2, 2009, the Board denied the comprehensive permit, and on December 22, the developer appealed to this Committee. Soon after the hearing process commenced, the Board moved to dismiss the appeal, arguing that the Town of Wareham was entitled to the "safe harbor" protections of 760 CMR 56.03(8)(a). On July 23, 2010, the Committee's presiding officer issued a ruling denying that motion. At a Pre-Hearing Conference in September, the developer presented a modified proposal, reducing the size of the proposed development to eight total units (two affordable units) on a parcel of land a little less than half the size of that originally proposed. By agreement of the parties, the matter was remanded so that the Board could consider the new proposal.[1]

1. Because of delays, there was a further motion to dismiss, which was denied in an Amended Order of Remand.

On June 21, 2011, the Board issued a second decision, again denying the comprehensive permit. Exh. 22. On July 8, 2011, the developer filed a further pleading before this Committee to renew its appeal. Further conferences of counsel were conducted by the presiding officer on July 21 and September 21. At the latter, the presiding officer ruled that the June 21, 2011 decision of the Board was in the nature a full decision of the Board on remand, and therefore the Board was permitted to file a second motion to dismiss. See letter to Devin and Witten from Lohe (Sep. 22, 2011). On February 14, 2012, the motion to dismiss was denied, but the hearing was stayed since the presiding officer found merit in some of the Board's claims. That is, the presiding officer ruled first, that under 760 CMR 56.05(2) the developer's plans were inadequate in certain respects and the developer was ordered to provide more detailed plans, and second, that the developer should be permitted to voluntarily provide notice to MassHousing (Massachusetts Housing Finance Agency), the Board, and others of the reduction in the size of the proposal to determine whether, under 760 CMR 56.04(5), the change was a substantial one that affected project eligibility requirements. Ruling on Motion to Dismiss (Feb. 14, 2012).

Coincidentally, the developer had provided notice of the change to MassHousing just before the ruling on the motion to dismiss was issued, and MassHousing responded by letter of April 13, 2012. See letter to Busby from Shunk (filed in the record Feb. 15, 2012, but not introduced into evidence); Exh. 21; also see discussion in section III, below. The developer then filed revised plans on April 25, 2012, and the appeal moved forward toward the evidentiary portion of the hearing. See letter to Lohe from Shunk (filed in the record Apr. 25, 2012, but not introduced into evidence); also see Ex. 18-20.

Following the Committee's normal practice, in order to structure the *de novo* hearing and narrow the issues presented, the parties negotiated a Pre-Hearing Order, which was issued by the presiding officer on July 19, 2013. Prefiled testimony was received from three witnesses, a site visit and a single day of hearing to permit cross-examination of each of those witnesses were conducted, and post-hearing briefs were filed.[2]

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2. The Board requested that the Committee issue a proposed decision, pursuant to 760 CMR 56.06(7)(e)(9) and G.L. c. 30A, § 11(7), which it did. The Board also requested that it be

## II. FACTUAL OVERVIEW

The proposed three-and-a-half-acre site is wooded land in the area off Standish Avenue in Wareham. Exh. 25. To the west, it adjoins a residential subdivision of houses on lots typically smaller than half of an acre, many of which are about a quarter of an acre. Exh. 25, p. 1; Exh. 19. On the other three sides is undeveloped land. Exh. 25, p. 1, fig.1 & 2; Exh. 18. The parcel is zoned for single-family residences on lots of a minimum size of three acres. Exh. 25, p. 1; 23, p. 38. The developer proposes to build eight single-family houses on a cul-de-sac on lots slightly larger than a quarter of an acre, with a rain-garden storm water drainage area of approximately the same size, and a fifty-foot-wide wooded open-space buffer between the development and the homes in the adjoining subdivision. Exh. 19.

## III. SITE CONTROL

The Board argues that the developer lacks site control. Site control is one of three project eligibility requirements:[3] that the developer be a "limited dividend organization," that the proposal be "fundable" under a housing subsidy program, and that the developer "control the site." 760 CMR 56.04(1). Although site control is rarely problematic under the Comprehensive Permit Law, it is not uncommon for it to be put into issue during the Committee's hearing. In this case, the issue was raised in the Pre-Hearing Order, where, consistent with our regulations, proof of the three project eligibility requirements generally was included as part of the developer's case. See Pre-Hearing Order, §IV-3 (Jul. 19, 2013); 760 CMR 56.07(2)(a)(1).

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permitted to present oral argument before the full Committee. The Committee considered the request before it began deliberations, and as it has done in previous cases, it hereby denies the request. See *Sugarbush Meadow, LLC v. Sunderland*, No. 08-02, slip op. at 2, n.1 (Mass. Housing Appeals Committee Jun. 21, 2010); *LeBlanc v. Amesbury*, No. 06-08, slip op. at 2 (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*, 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).

3. Project eligibility requirements are not jurisdictional requirements. *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 520-521, 870 N.E.2d 67, 74 (2007).

"Compliance with these project eligibility requirement shall be established by issuance of a written determination of Project Eligibility by the Subsidizing Agency...." 760 CMR 56.04(1). Thus, the developer introduced into evidence the Project Eligibility Letter issued by MassHousing (i.e., the Massachusetts Housing Finance Agency) in 2008. Exh. 1, p. 2, first para., item (6).

Section 56.04 of the regulations goes on to provide that "[i]ssuance of a determination of Project Eligibility shall be considered... conclusive evidence [of satisfaction of] the project eligibility requirements...."[4] 760 CMR 56.04(6); also see 760 CMR 56.07(2)(a)(1) and 56.07(3)(h)(1). This is generally consistent with longstanding precedents of this Committee that while the Board has "an interest in ensuring that any lingering questions about ownership of [the] land are publicly laid to rest before construction begins...," it is nevertheless "a matter that is primarily of concern only to the subsidizing agency." *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 11, 10 (Mass. Housing Appeals Committee Jun. 28, 1994), *aff'd,* No. 94-1706-B (Essex Super. Ct. Jul. 29, 1997). Thus, as noted by the Land Court in *Indian Brook Cranberry Bogs, Inc. v. Bd. of Appeals of Plymouth*, as the developer presented its case, "[i]t would have been sufficient... to rest on the conclusive nature of the determination of MassHousing." *Indian Brook Cranberry Bogs, Inc. v. Bd. of Appeals of Plymouth*, Misc. No. 06-322281, 08-381915, slip op. at 14 (Land Ct. Oct. 9, 2009), 2009 WL 3255190, at *7 (rejecting abutter challenge of Board finding of site approval). But, as in that case, there are additional grounds that support a finding that the developer controls the site.

The history of the development parcel in this case is complicated. From the outset, the Board has challenged the developer's control of the site. In its 2009 and 2011 decisions, it raised a number of questions about purchase and sale agreements, which the developer apparently had presented during local Board hearings to show site control, but

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4. However, the Board may—as it has in this case—challenge the developer's failure to continue to fulfill the requirement "at any time, with the burden of proof on the Board...." 760 CMR 56.04(6); *Hanover Woods, LLC v. Hanover*, No. 11-04, slip op. at 21 (Mass. Housing Appeals Committee Feb. 10, 2014)(citing 760 CMR 56.04(5), appeal docketed C.A. No. 14-0274-A (Plymouth Super. Ct. Mar. 11, 2014). As noted in the Procedural History section, above, because of the Board's ongoing challenge to site control, the developer voluntarily submitted the issue to MassHousing under 760 CMR 56.04(5). MassHousing responded that it "would not require that the developer reapply for a new determination of Project [Eligibility]" (sic). Exh. 21.

which are not in the record before us. Exh. 22, pp. 3-4; Exh. 2, p. 3. But the testimony of one of the development partners shows that during that time period, the proposal was reduced from 18 or 19 houses to 8 houses, and "[i]n order to not have a controversial development proceeding [and] because of the question of the access..., the owner reached an agreement with the state... for them to buy [part of the land] for open space...." Tr. 43, 66, 76. At about the same time, a previous, related development entity purchased the site, and then sold it to the current developer. Tr. 69-70, 74. Even if the developer had not introduced the Project Eligibility Letter into evidence, this testimony would be sufficient to prove site control. See *Indian Brook Cranberry Bogs, Inc. v. Bd. of Appeals of Plymouth*, Misc. No. 06-322281, 08-381915, slip op. at 15 (Land Ct. Oct. 9, 2009), 2009 WL 3255190, at *7 (finding that testimony of about one of four purchase and sale agreement extensions was sufficient to establish site control even though it was missing from evidence).

The Board's challenge to site control is exactly the sort of challenge that was rejected in *Indian Brook Cranberry Bogs, Inc. v. Bd. of Appeals of Plymouth.* That is, in this case, the Board's focus is on two deeds that were introduced into evidence. Exhibit 16 is a September 28, 2011 deed from one Donald Brian McDonald to Sandwich Housing Partners II, LLC. Exhibit 17 is an October 14, 2011 deed from Sandwich Housing Partners II, LLC to the developer. Both were recorded in the Plymouth County Registry of Deeds. Exh. 16, 17. Since they were admitted by agreement as part of the Pre-Hearing Order, there is no testimony to indicate for what purpose they were offered. The Board argues that "the deeds describe a different parcel than that depicted on the plans." Board's Brief, p. 7. That much is obvious since they describe a rectangular parcel only 245 feet by 30 feet—well less than a quarter acre. See Exh. 16, 17. They apparently were introduced into evidence by mistake.[5] Also see Tr. 15. These deeds prove nothing. See *Indian Brook Cranberry Bogs, Inc. v. Bd. of Appeals of Plymouth*, Misc. No. 06-322281, 08-381915, slip op. at 15 (Land Ct. Oct. 9, 2009), 2009 WL 3255190, at *7 (noting, "I

5. The small parcel described is, in fact, owned by the developer, and appears to have been purchased from the same original owner as the land shown on the proposed housing plan. That is, the original owner appears on the deed as "Donald Brian McDonald," and appears on the development plan as "Donald B. McDonnell." Exh. 16; Exh. 18, note 1.

credit Mr. Pomeroy's testimony.... There was no evidence—other than the absence of the physical document—to suggest the parties did not extend the P & S....").

We conclude that the Project Eligibility Letter introduced into evidence is conclusive evidence that this development has satisfied the project eligibility requirements of the Comprehensive Permit Act. See 760 CMR 56.04(6).

## IV. SUBSTANTIVE ISSUES

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a *prima facie* case by showing that its proposal complies with state or federal requirements or other generally recognized design standards. 760 CMR 56.07(2)(a)(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that the concern outweighs the regional need for housing. 760 CMR 56.07(2)(b)(2); also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

In preparation for the evidentiary portion of the Committee's hearing, the parties negotiated a Pre-Hearing Order, which was signed by counsel and issued by the presiding officer on July 19, 2013. The Board raised only two issues in defense of its decision: "deficient site plan and planning," and lack of "functional open space and overdevelopment of the parcel." Pre-Hearing Order, § IV-5 (Jul. 19, 2013).

With regard to these issues, the developer presented two sorts of evidence: detailed site plans prepared by an engineer, and testimony in support of those plans by the engineer, who prepared them. Exh. 18-20; 28. It is clear from this testimony that it is this expert's opinion that the proposal meets generally recognized design standards with regard to site planning and open space. Exh. 28, ¶¶ 11-19. The plans admitted into evidence and the testimony in support of them are sufficient to establish the developer's *prima facie* case.[6]

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6. Note that "a *prima facie* case may be established with a minimum of evidence." *100 Burrill Street, LLC v. Swampscott*, No. 05-21, slip op. at 7 (Mass. Housing Appeals Committee Jun. 9,

The burden therefore shifts to the Board, and we note at the outset that the Board inexplicably failed to brief the central issues in the case. They are therefore waived. *Sugarbush Meadow, LLC v. Sunderland*, No. 08-02, slip op. at 3 (Mass. Housing Appeals Committee Jun. 21, 2010), *aff'd* 464 Mass. 166 (2013); *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958). The Board did present some evidence on these issues, however—testimony from the Board's engineer and land surveyor, who is also the chairman of the Board—but we do not find it convincing.[7] The engineer addressed the central issues in only four short paragraphs. See Exh. 29, ¶¶ 7-10. And much of this brief, poorly developed testimony is conclusory. For example, he stated, "*The plans speak for themselves*: they attempt to construct eight dwelling units off a series of dead end roads in a subdivision with no redeeming design characteristics, open space or site amenities." Exh. 29, ¶ 8 (emphasis added). At least part of it is clearly not credible. That is, it cannot be credibly maintained that an area of existing woodland that is over 500 feet long and nearly 50 feet wide "provides no substantive 'buffering' as claimed on the site plan...." See Exh. 19; 29, ¶ 7; 31, ¶ 1; Tr. 37-39. Thus, even if the Board had not waived its argument, it would have failed to meet its burden of proof.

## V. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Wareham Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and subject to the following conditions.

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2008), quoting *Canton Housing Authority v. Canton*, No. 91-12, slip op. at 8 (Mass. Housing Appeals Committee Jul. 28, 1993). For example, "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Tetiquet River Village, Inc. v. Raynham*, No. 88-31, slip. op. 9 (Mass. Housing Appeals Committee Mar. 20, 1991).

7. As the developer notes in its brief, the Board also presented evidence about the marketability of the homes to be built. See Exh. 29, ¶ 11; Tr. 80. This issue was not raised in the Pre-Hearing Order, it was not briefed by the Board, and it is a matter for consideration by the subsidizing agency, not the Board or this Committee. See *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748 (2010).

1. The comprehensive permit shall conform to the application submitted to the Board.

2. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.

3. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those specified for waiver in the developer's application to the Board, waived in prior proceedings in this case, or waived by this decision.

(b) The subsidizing agency or project administrator may impose additional requirements for 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 this decision.

(c) If anything in this decision should seem to permit the construction or 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.

(d) Construction and marketing in all particulars shall be in accordance with all presently applicable state and federal requirements, including, without limitation, fair housing requirements.

(e) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and DHCD guidelines issued pursuant thereto.

(f) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(g) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

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 thirty days of receipt of the decision.

Housing Appeals Committee

Date: September 16, 2014

Werner Lohe, Chairman

Joseph P. Henefield

Theodore M. Hess-Mahan

Constance Kruger

James G. Stockard, Jr.