

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

DELPHIC ASSOCIATES, LLC

v.

DUXBURY ZONING BOARD OF APPEALS

No. 03-08

DECISION

September 14, 2010

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

DELPHIC ASSOCIATES, LLC,)	
)	
Appellant)	
)	
v.)	No. 03-08
)	
DUXBURY ZONING BOARD OF)	
APPEALS,)	
)	
Appellee)	

**SUMMARY DECISION AND ORDER
EXTENDING COMPREHENSIVE PERMIT**

This is an appeal pursuant to G.L. c. 40B, § 22, by Delphic Associates, LLC (Delphic) of the decision of the Duxbury Zoning Board of Appeals (Board) to deny Delphic's request to extend an Amended Comprehensive Permit (Amended Permit).¹ The Board has moved for summary decision. Delphic opposes the Board's motion and has moved for summary decision against the Board. Delphic also submitted a motion to consolidate the petitions for review and a motion for reconsideration and clarification regarding applicability of regulations. For the reasons set forth below, summary decision is granted to Delphic.

1. This matter is a continuation of Delphic's appeal of the Board's original decision granting a comprehensive permit with conditions. That case was remanded to the Board, which issued a decision granting the Amended Permit, and the appeal was subsequently withdrawn. This case was reopened upon Delphic's appeal of the Board's denial of Delphic's request to extend the Amended Permit.

I. PROCEDURAL HISTORY AND UNDISPUTED FACTS

A. Duxbury and Marshfield Comprehensive Permits

On January 16, 2002 the Massachusetts Housing Financing Agency (MassHousing) issued project eligibility determinations to Delphic for a 109-unit development called “Webster Point Village,” on adjoining sites across the Duxbury and Marshfield town lines. On March 8, 2002, Delphic filed separate applications with the Board and the Marshfield Zoning Board of Appeals (Marshfield Board) seeking, respectively, comprehensive permits for 51 condominiums and one single-family home in Duxbury and 58 condominiums in Marshfield.

Following public hearings in Duxbury on Delphic’s proposal for a comprehensive permit, on April 3, 2003, the Board issued a comprehensive permit, reducing the number of condominium units to 20. Delphic appealed the decision to the Committee on April 22, 2003.² Following settlement discussions, Delphic agreed to modify its proposal to include 16 individual homeownership units instead of 20 condominiums. The parties stipulated that the Board would re-hear the matter, and on August 30, 2005, the Committee remanded this matter to the Board. After conducting hearings on Delphic’s revised proposal, on June 21, 2006, the Board filed with the Town Clerk its Remand Decision, which granted the Amended Permit. On August 9, 2006, Delphic filed an assented-to motion to withdraw the appeal to the Committee, which was granted on August 11, 2006.

On August 8, 2007, Delphic submitted a request to the Board for an extension of the deadline to begin construction provided by the Amended Permit. Delphic’s request states “Webster Point Village, LLC herewith requests an extension of time, to begin authorized construction, for an additional period of one year ([Amended Decision, p. 1, ¶ 6]).” Letter to

2. Two court appeals were initiated in connection with the Duxbury proceeding:

- (1) *Town of Duxbury, et al. v. Massachusetts Housing Finance Agency and Delphic Assoc., LLC*, C.A. No. PLCV2002-00298, challenging MassHousing’s project eligibility determinations (filed on March 12, 2002; voluntarily dismissed on August 18, 2006); and
- (2) *Anne Poulet, et al. v. James Lampert, et al. [Members of Board of Appeals of Duxbury and Delphic Assoc., LLC]*, No. PLCV2003-00465, abutters and neighbors alleging Duxbury failed to enforce compliance with the requirements of the preliminary project eligibility letter (filed on April 18, 2003; voluntarily dismissed on August 18, 2006).

Board from Edward J. Sylvia, Jr. dated August 8, 2007. After holding hearings on the request, on February 6, 2008, the Board filed its decision denying the request on the ground that the Amended Permit had lapsed prior to the request for extension. Delphic appealed that decision to the Committee on February 26, 2008. On April 1, 2009, Delphic submitted a second extension request to the Board, which the Board denied on April 9, 2009. Delphic appealed that denial on April 23, 2009.

Meanwhile, in Marshfield, the Marshfield Board issued a decision granting Delphic a comprehensive permit with conditions on April 1, 2003. Subsequently, on January 13, 2006, the Marshfield Board granted Delphic an amended comprehensive permit with conditions for 24 ownership units (Marshfield Amended Decision). Two court cases were filed regarding the Marshfield Board comprehensive permit decisions on Webster Point Village, including an abutter appeal of the Marshfield Amended Decision.³

The respective comprehensive permit decision for each town includes a condition that Webster Point Village must conform to design requirements for the parcels located within both towns. E. Sylvia Aff., ¶ 28. The Duxbury Remand Decision states:

Except as otherwise specified in this Remand Decision, the Project must substantially conform to the Comprehensive Permit Plans entitled “Webster Point Village of Duxbury & Marshfield ... prepared by Coler & Colantonio for Delphic Associates ... including, in all respects, that portion of the Project to be constructed within the Town of Marshfield....

Remand Decision, § IV. 4., p. 7. The Marshfield Amended Decision includes a condition that Delphic must have “received all necessary approvals from the Town of Duxbury, to access the Duxbury municipal water system and to construct... the road system” E. Sylvia Aff., ¶ 12; Marshfield Amended Decision, ¶ 19, p. 11.

Edward J. Sylvia, Jr., the attorney for the project, stated in his affidavit:

3. These cases were:

- (1) *Linda Silverberg, et al. v. Warren Baker, et al. [Members of Board of Appeals of the Town of Marshfield and Delphic Assoc., LLC]*, C.A. No. PLCV2003-00466, abutters and neighbors challenging the Marshfield Board’s first decision granting a comprehensive permit (filed on April 18, 2003; voluntarily dismissed on March 20, 2007); and
- (2) *Casey Silverberg, et al. v. Board of Appeals of the Town of Marshfield, et al.*, C.A. No. PLCV06-0142B, abutters seeking to annul the Marshfield Amended Decision (filed on February 2, 2006; voluntarily dismissed on April 9, 2007).

Due to the topography of the two parcels which comprise the Project, the aspects of design of the Project, and the approvals required to be obtained for same, construction could not commence until all of the ... appeals had been dismissed and the final comprehensive permits were obtained from both the towns of Duxbury and Marshfield.

E. Sylvia Aff., ¶ 29. Stephen J. Silva, the project manager, who managed much of the design work for the Webster Point Village project, stated in his affidavit:

Due to the design of Webster Point Village, which was required to treat such project as a single development without regard for the border between [both towns], any attempt to construct the portion of the Project located within ... Duxbury without the ability to simultaneously construct the portion of the Project located within [Marshfield], would require a complete redesign of the entirety of the [project]....

The access/roads, earth work, drainage, potable water and electricity systems, all as shown upon plans for the Project ... would all require complete redesign if it were required that the Duxbury portion of the Project was to be constructed without the simultaneous construction of the Marshfield portion of the Project.

S. Silva Aff., ¶¶ 9, 10.

B. Current Proceedings before the Committee

On February 26, 2008, Delphic petitioned the Committee, pursuant to G.L. c. 40B, § 22 and 760 CMR § 56.00, to review the Board's denial of its request to extend the Amended Permit. The Committee then reopened this case. After an initial conference of counsel, the parties submitted preliminary motions. Rulings issued on October 15, 2008, denying the Board's motion to dismiss for failure to comply with Standing Order No. 08-01, and granting Delphic's motions to waive filing fee and to waive application of certain provisions of 760 CMR 56.06(4)(f), and on January 15, 2009, denying the Board's motion to dismiss for lack of agency jurisdiction, Delphic's motion for constructive grant and Delphic's motion for modification of lapse condition.

At the March 20, 2009 pre-hearing conference, the Board moved to disqualify Delphic's counsel. Delphic's counsel subsequently withdrew and successor counsel assumed representation on April 8, 2009. On April 23, 2009, Delphic's successor counsel filed a second petition for review based on the Board's April 9, 2009 denial of its extension request. After a conference of counsel on June 20, 2009, Delphic moved to consolidate the two

petitions for review. It also filed a motion for reconsideration and clarification regarding the applicability of regulations. The Board filed a motion for summary decision and Delphic filed a cross motion for summary decision against the Board. On January 12, 2010, the Presiding Officer issued a Ruling and Order Extending Comprehensive Permit, which the Board appealed. On July 15, 2010, the Presiding Officer issued an Order of Reconsideration which stated:

Consistent with the inherent administrative authority to reconsider *sua sponte* a ruling or order which I have issued, I have reconsidered this matter, and the Ruling and Order Extending Comprehensive Permit issued January 12, 2010. See *Samuel Moe v. Sex Offender Registry Bd.*, 444 Mass. 1009 (2005) (absent “statutory limitations, administrative agencies generally retain inherent authority to reconsider their decisions”) and authorities cited. Also see *B.J. Alan Company, Inc. v. Interstate Commerce Comm’n*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (discretion to reconsider extends during pendency of appeal where reconsideration does not conflict with proceedings in court).

In the exercise of my judgment and authority pursuant to 760 CMR 56.08(2), I have determined that strict compliance with the provisions 760 CMR 56.06(11), which limits the authority of the presiding officer on her own initiative to reopen the hearing for the purpose of receiving new evidence, oral argument, memoranda, briefs or motions to acting prior to the rendering of a decision, will result in an undue hardship to the parties and be inconsistent with the purposes of G.L. c. 40B, §§ 20 through 23, which provide for a decision by the Housing Appeals Committee. Since the ruling I issued did not afford the parties an opportunity to present their submissions and argument to the full Committee, I have determined to withdraw the ruling and reissue it as a Proposed Summary Decision and Report of Hearing Officer Concerning Extension of Comprehensive Permit to allow the parties the opportunity to submit to the Housing Appeals Committee any objections and written argument concerning the proposed summary decision pursuant to 760 CMR 56.06(7)(e)(9) and G.L. c. 30A, § 11(7).

Accordingly, pursuant to 760 CMR 56.06(7)(e)(9) and (10), and G.L. c. 30A, § 11(7), the parties may file any objections and written argument concerning the enclosed Proposed Summary Decision and Report of Hearing Officer Concerning Extension of Comprehensive Permit no later than August 3, 2010.

In response to the Presiding Officer’s order, the Board submitted the Affidavit of Dennis A. Murphy (Murphy Affidavit), but filed no objections or written argument

concerning the proposed decision. Nor did the Board file any motion for leave to submit evidence late. The developer did not submit a response to the order.

II. CROSS MOTIONS FOR SUMMARY DECISION

The Board has moved for summary decision on the ground that the Amended Permit lapsed because it became final on June 21, 2006, no direct appeals of that permit tolled the finality of the Amended Permit, and Delphic's request for an extension was made after June 21, 2007 and therefore was untimely. It contends that a void permit may not be extended. It also argues that Delphic's petition for review contains admissions supporting summary decision in favor of the Board. Delphic has moved for summary decision against the Board arguing the extension request was timely because the time to commence construction was tolled by pending court appeals. Delphic submitted two affidavits in support of its motion. Delphic argues that even though it seeks a ruling that 760 CMR 56.00 controls this appeal, it is entitled to summary decision under both the current and former versions of the comprehensive permit regulations.

Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee if "the record before the Committee, together with the affidavits (if any), shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 56.06(5)(d). See *Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992); *Grandview Realty, Inc. v. Lexington*, No. 05-11, slip op. at 4 (Mass. Housing Appeals Committee July 10, 2006).

Delphic submitted two affidavits in connection with the motions for summary decision. The Board did not submit any affidavits in support of its summary decision motion, but relied on the Amended Permit and Delphic's Initial Pleading and proposed pre-hearing order. In response to Delphic's motion for summary decision, the Board filed argument in opposition, but did not file any affidavit or submit other evidence to contradict Delphic's affidavits. Following the Presiding Officer's Order of Reconsideration inviting the parties to submit "any objection or written argument concerning the [proposed decision]," the Board belatedly filed the Murphy Affidavit, but no objections or written argument. That affidavit was unresponsive to the Presiding Officer's order, and unaccompanied by any

motion or argument to warrant accepting additional factual assertions at this late date. Since the Board has provided no basis to accept the new factual assertions for consideration of the motions for summary decision, they are excluded from consideration.⁴

A review of the papers submitted by the parties regarding their cross motion for summary decision demonstrates that no genuine issue exists regarding the facts which are material to when the Amended Permit became final and to whether the Amended Permit lapsed before Delphic requested an extension. Although the Board argues that factual disputes exist over whether construction could proceed in Duxbury pending the Marshfield permit resolution, it submitted no affidavits or documents attesting to a factual dispute in response to Delphic's motion for summary decision. Thus, the relevant facts presented for summary decision are undisputed.

A. Applicable Regulations

At the time Delphic initiated its original appeal, 760 CMR 30.00 and 31.00 were the applicable regulations in effect pursuant to G.L. c. 40B. Effective February 22, 2008, days before Delphic's appeal of the extension denial, the Department of Housing and Community Development (DHCD) promulgated a revised regulation, 760 CMR 56.00, which, by its terms, supersedes 760 CMR 30.00 and 31.00 and governs this comprehensive permit project in most respects. The transition rules of 760 CMR 56.00 state that it shall generally apply to this appeal:

(c) If an application for a Project had been filed with the Board prior to the effective date of 760 CMR 56.00, then the entirety of 760 CMR 56.00 shall apply to the Project, except that the changes in the numerical standards of 760

4. Even if the Board had timely submitted the Murphy Affidavit, much of it constitutes legal argument, not testimony. Some of the facts included attempt to address the shortcomings of the legal arguments previously submitted by the Board, concerning the relationships of the various proceedings. However, as discussed below, these new facts, if included, would not contradict the relevant testimony of the Delphic witnesses concerning the significant design issues in any material respect, and therefore would not warrant a denial of summary decision in any event. We do consider the arguments in the Murphy Affidavit that pertain to facts that were included in the record during the submission of the cross motions for summary decision, to the extent that such arguments pertain to the analysis of whether undisputed facts support summary decision.

CMR 56.03(4)(c)(2) and 56.03(6)(d), 760 CMR 56.03(8), 760 CMR 56.04(4), and the second and third paragraphs of 760 CMR 56.05(3) shall not apply.

(d) If a Comprehensive Permit for a Project had been finally issued (including the resolution of all appeals) and the Subsidizing Agency had issued its final written approval pursuant to 760 CMR 56.04(7) prior to April 1, 2008, then the entirety of 760 CMR 56.00 shall apply to the Project, except that the financial surety requirements of 760 CMR 56.04(7)(c) shall not apply.

760 CMR 56.08(3)(c) and 56.08(3)(d). The Board does not challenge the use of 760 CMR 56.00 in its entirety. However, it specifically opposes application of 760 CMR 56.05(12)(a) and (c), instead of the former version, 760 CMR 31.08(4), on the ground that the new regulation changed the criteria for the finality and lapse of comprehensive permits. The Board argues that the current regulation would operate retroactively to reinstate and extend a lapsed permit that had become void under the former regulation, and claims that the term of a permit is a substantive matter that cannot be altered retroactively. Delphic argues that the current regulation expressly applies retroactively to this appeal and has moved for clarification to this effect.⁵

The Committee has previously noted that “retroactivity is a question of legislative (and regulatory) intent,” and it is important to examine “the possible intention of DHCD as reflected in the regulatory language itself.” *Casaleto Estates, LLC v. Georgetown*, No. 01-12, slip op. at 19 (Mass. Housing Appeals Committee May 19, 2003). The transition rules in §§ 56.08(3)(c) and (d) plainly state that the current regulation governs this appeal. Under *Leibovich v. Antonellis*, 410 Mass. 568, 576-77 (1991), the reasonableness of retroactive application of a statute takes into consideration “the nature of the public interest which motivated the Legislature to enact the retroactive statute; the nature of the rights affected retroactively; and the extent or scope of the statutory effect or impact.” *Id.* at 577. See *Fontaine v. Ebtac Corp.*, 415 Mass 309, 319 (1993); *City Council of Waltham v. Vinciullo*, 364 Mass. 624, 626 (1974).

5. Delphic’s motion for reconsideration and clarification addresses an ambiguity in the January 15, 2009 ruling.

Two changes in the permit finality and lapse provisions of current regulation are relevant to this appeal: First, 760 CMR 56.05(12)(c) does not allow a comprehensive permit to expire in less than three years. *Id.* See 760 CMR 31.08(4). Second, § 56.05(12)(c) added the express provision that the time period of a permit “shall be tolled for the time required to pursue or await the determination on any appeal on any other state or federal permit or approval required for the Project.” The language changes are consistent with other provisions in both versions of the regulation which allow the extension of permits and provide that extensions should not be unreasonably denied.⁶ These changes were made to ensure that comprehensive permits are in effect for sufficient time to enable a developer to use them to construct the approved project. Thus, they were promulgated in furtherance of the legislature’s remedial purposes in enacting Chapter 40B, and should be construed broadly to effectuate the statute’s purpose. See *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 530 (2007). In *Forestview Estates Assoc., Inc. v. Douglas*, No. 05-23, slip op. at 8 (Mass. Housing Appeals Committee Mar. 5, 2007 Ruling on Extension of Comprehensive Permit) the Committee’s Chairman, acting as presiding officer, stated: “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.” *Id.* at 4. Therefore, to the extent that 760 CMR 56.00 affords greater protections against lapse of permits than the former regulation, its retroactive application is not unreasonable. The question of extending the term of a comprehensive permit does not warrant departing from the requirements of the current regulation. Also, as shown below, since Delphic is also entitled to summary decision under the former regulation, the two relevant changes in language in § 56.05(12) actually have no substantive retroactive effect with regard to this case. Moreover, unlike the facts in *Cozy Hearth Community Corporation v. Edgartown*, No. 06-09, slip op. at 3-4 (Mass. Housing Appeals Committee Apr. 14, 2008), the parties have been able to refer to and rely upon the current regulation from the beginning of this reopened appeal. Delphic’s motion for

6. 760 CMR 31.08(4) addresses both finality and lapse of a permit. The current regulation provides for the finality and lapse of a permit in §§ 56.05(12)(a) and (c), respectively. As discussed below, finality and lapse are treated differently in both versions of the regulation.

reconsideration and clarification is granted and 760 CMR 56.00, including § 56.05(12), governs this appeal.

B. When did Delphic's Amended Permit Become Final?

“A Comprehensive Permit shall become final on the date that the written decision of the Board is filed in the office of the municipal clerk, if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of....” 760 CMR 56.05(12)(a). Also see former 760 CMR 31.08(4) (essentially same provision).⁷ Finality allows both a board and a developer to know not only that a permit may no longer be challenged, but, as is important here, when to commence the term of the permit – the time period within which the developer must begin construction to avoid the permit’s lapse. See 760 CMR 56.05(12)(c). Also see 760 CMR 31.08(4).

The undisputed facts demonstrate that the Amended Permit became final on June 21, 2006, the date of the Board’s decision, because the decision granting the Amended Permit was not appealed. Indeed, both parties acknowledge that “[n]o new appeals were taken within twenty days from the date of filing of the Amended Permit with the clerk, on June 21, 2006.” See Initial Pleading, ¶ 2. The court appeals associated with the project have no bearing on the finality of the Amended Permit because they were not appeals of the decision granting the Amended Permit. See notes 2 and 3 above. Those cases pertain to the project eligibility letter, the original Board decision or decisions of the Marshfield Board. Neither the current regulation nor the former regulation suggests that an appeal of a different permit granting decision would affect the finality of a permit. Although Delphic’s appeal of the Board’s original decision was technically pending before the Committee and only withdrawn after the Amended Permit was filed, the circumstances of the withdrawal of that appeal do not warrant delaying the finality of the Amended Permit. Similarly, appeals of the Marshfield Board’s permit decisions have no effect on the finality of the Amended Permit. The undisputed record demonstrates that the Amended Permit became final on June 21, 2006.

7. Since this decision also analyzes the timeliness of the extension request under the former regulation, comparable provisions are noted where relevant.

C. The Amended Permit had not Lapsed under the Current Regulation

The Duxbury Remand Decision states:

In accordance with the powers conferred to the Board by 760 CMR 31.08(4), if construction (including site clearing and grading) authorized by this Remand Decision has not begun within twelve (12) months of the date on which the Amended Permit becomes final, the Amended Permit granted by this Remand Decision shall lapse and become void ab initio, and shall be considered without force or effect.

Remand Decision, p. 1. This provision, however, must be read in light of the Committee's regulations: The current regulation, like the former regulation, provides a standard term for a comprehensive permit of three years, unless the permit provides otherwise. 760 CMR 56.05(12)(c); see 760 CMR 31.08(4). However, § 56.05(12)(c) removed a provision in the former regulation that had allow a term shorter than three years. See former 760 CMR 31.08(4). Therefore, the limited one-year term in the Remand Decision is overridden by § 56.05(12)(c). The current regulation requires Delphic's permit to have a duration of three years from June 21, 2006 to June 20, 2009, well after the August 8, 2007 date on which Delphic requested an extension of the permit. Therefore its extension request was timely under § 56.05(12)(c).

D. The Amended Permit was Tolled under the Current and Former Regulations

Although neither the current nor the former regulation expressly requires an extension request to be made before a permit has lapsed, previous Committee decisions have suggested that a developer must ordinarily demonstrate that a comprehensive permit extension has been timely requested before a Board is required to defend its denial. In *Forestview Estates Assoc., Inc. v. Douglas*, No. 05-23, slip op. at 8 (Mass. Housing Appeals Committee Mar. 5, 2007 Ruling on Extension of Comprehensive Permit) the Committee's presiding officer stated that "where construction has been delayed *not by an appeal or other litigation*, but rather by the need to obtain state-agency approvals, I rule that under the Comprehensive Permit Law, 760 CMR 31.08(4) requires that an affirmative extension beyond three years be sought in a timely manner..." (Emphasis added.) Also see *Red Gate Road Realty Trust v. Tyngsborough*, No. 93-01, slip op. at 5 (Mass. Housing Appeals Committee Dec. 8, 1993)

(developer must “properly” request extension of permit). It is not necessary to determine here whether Delphic’s request had to be submitted before the expiration of its permit because the undisputed relevant facts presented here demonstrate that Delphic’s request was made before the Amended Permit lapsed.

The Board argues that, under the former regulation, because the Remand Decision granting the Amended Permit stated it was valid for only one year, it lapsed as a matter of law by its own terms one year after it became final because no construction was commenced and no extension was applied for during the one-year period following June 21, 2006. The Board suggests that Delphic has conceded the lapse of its permit. However, a clear reading of Delphic’s initial pleading and its letter requesting an extension shows that it only acknowledged that the request was not made within the one-year period of time stated in the Remand Decision. See Initial Pleading, ¶ 1. Delphic does not dispute that construction did not commence, and it made no extension request, before August 8, 2007. It argues, however, that regardless of whether the Amended Permit was valid for one year, as stated in the Remand Decision, or three, as required by the current regulation, 760 CMR 56.05(12)(c), it was tolled by various court appeals, and had not lapsed by August 8, 2007.

The critical issue in determining if the permit’s time period was tolled is whether pending court appeals associated with Webster Point Village legitimately prevented Delphic from commencing construction before the construction deadline. Delphic argues that the appeals established good cause under either 760 CMR 56.05(12)(c) or 760 CMR 31.08(4) to prevent the lapse of the Amended Permit before it requested the permit extension. Section 56.05(12)(c) provides:

If construction authorized by a Comprehensive Permit has not begun within three years of the date on which the permit becomes final except for good cause, the permit shall lapse. This time period shall be tolled for the time required to pursue or await the determination on any appeal on any other state or federal permit or approval required for the Project. The Board or the Committee may set a later date for lapse of the permit, and it may extend any such date. An extension may not be unreasonably denied or denied due to other Projects built or approved in the interim. Extension of a permit shall not, by itself, constitute a substantial change pursuant to 760 CMR 56.07(4).

Although the tolling provision of § 56.05(12)(c) is not found in the former § 31.08(4), the application of tolling on these facts is consistent with *Forestview Estate Assoc., Inc. v. Douglas*, No. 05-23 (Mass. Housing Appeals Committee Mar. 5, 2007 Ruling on Extension of Comprehensive Permit), which considered the use of tolling under § 31.08(4) to determine whether a request for extension of a comprehensive permit was timely. *Forestview* noted that “[t]he concept of tolling is generally applied when litigation or an appeal prevents the holder of a permit from exercising its rights,” *id.* at 7, citing *Woods v. City of Newton*, 351 Mass. 98, 103-104 (1966); *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 4-7 (Mass. Housing Appeals Committee June 28, 1994) (appeal of denial of comprehensive permit tolled expiration of project eligibility letter). *Forestview* explained that Massachusetts zoning cases involving variances have expanded the concept of tolling “beyond situations in which an actual legal impediment exists to the exercise of the variance to cases in which an appeal of a variance by third parties created “equally real practical impediments.”” *Id.* at 7-8, citing *Belfer v. Building Comm’r of Boston*, 363 Mass. 439, 444 (1973).⁸

Delphic argues that the *Casey Silverberg* abutter appeal of the Marshfield Amended Decision (see note 3), which was pending when the Duxbury Amended Permit became final, was also required to become final before the developer could commence construction in Duxbury. Both the Duxbury and Marshfield comprehensive permit decisions required Webster Point Village to conform to design requirements created for the parcels located within both towns. *E. Sylvia Aff.*, ¶ 28. Delphic’s unrefuted affidavit testimony makes clear that the design of the project was as a single development without regard for the border between the towns. The testimony indicates that the project would require significant, if not complete, redesign if only permitted to proceed in Duxbury, due to the nature of the topography of the parcels, the necessary approvals for the project, and the design of the “access/roads, earth work, drainage, potable water and electricity systems.” *E. Sylvia Aff.*, ¶ 29; *S. Silva Aff.* ¶ 10.

8. *Forestview*’s refusal to toll the term of the comprehensive permit for the period required to await a state agency approval expressly excluded the circumstance here, “where construction has been delayed ... by an appeal or other litigation.” *Id.* at 8. The change in 760 CMR 56.05(12)(c) to specifically include state agency approvals is not material to this appeal.

The Board submitted no affidavits or documents disputing these facts with its opposition to Delphic's motion for summary decision. Instead it asserted only generally that there were factual disputes at issue over whether construction could proceed in Duxbury pending the resolution of the Marshfield permit litigation. It cited only to the affidavits submitted by Delphic to contend that the Marshfield and Duxbury permits are not so interconnected as to bar construction in one town without a final permit in the other, because, it argued (without affidavit support), the Appellant did not try to coordinate the public hearings or issuance of the comprehensive permits between the towns; the matters proceeded on separate tracks at different times; and when on appeal to the Committee the cases maintained separate case numbers without consolidation or coordination. However, argument, unsupported by facts, cannot establish disputed facts for summary decision. The Board therefore failed to establish a factual dispute in the record. See 760 CMR 56.06(5)(d).⁹ Moreover, even if the proceedings for each town were conducted separately and at different times, this would not contradict the affidavit testimony regarding the interconnectedness of the Marshfield and Duxbury portions of the project with regard to design issues, and the importance of resolving both permits before commencing construction.

The Murphy Affidavit sought to present the Board's arguments regarding the relationship of the various administrative and judicial appeals as facts. It also included, for the first time, the Settlement Agreement referred to in the Amended Permit. As we stated earlier, such new facts are excluded. Finally, the Murphy Affidavit quoted the portion of the Amended Permit that states that "irrespective of whether the Applicant proceeds with the Marshfield portion of the overall project, this roadway shall be constructed in phases," Amended Permit, ¶ 80. However that one provision, which was already in the record, does not contradict Delphic's affidavits regarding the need for significant, if not complete, redesign if the project were only permitted to proceed in Duxbury. *E. Sylvia Aff.*, ¶ 29; *S.*

9. Section 56.06(5)(d) states: "Any party may move, with or without supporting affidavits and a memorandum of law, for a summary decision in the moving party's favor upon all or any of the issues that are the subject of the appeal. The decision sought shall be made if the record before the Committee, together with the affidavits (if any), shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. A

Silva Aff. ¶ 10. Even if the Settlement Agreement had been timely included in the record for summary decision, which it was not, it would not add material facts that preclude summary decision for Delphic.

This case presents the uncommon situation in which two comprehensive permits are necessary for one project to proceed. Thus, the circumstances of this case fall squarely within the allowance for tolling “for the time required to pursue or await the determination on any appeal on any other state or federal permit or approval required for the Project” under 760 CMR 56.05(12)(c). Furthermore, under 760 CMR 31.08(4), the “practical impediment” of the outstanding appeal of the Marshfield Amended Decision would constitute good cause to toll the term of the Amended Permit. See *Forestview, supra*, at 7-8, citing *Belfer v. Bldg. Comm’r of Boston*, 363 Mass. 439, 444; *Neilson v. Planning Bd. of Walpole*, 9 LCR 57, Misc. Case No. 253156 (Mass. Land Ct. Jan. 22, 2001) (good cause existed to delay substantial use under special permit due to pending appeal of subdivision denial and defense of wetlands appeal). The undisputed facts show that the abutter appeal of the Marshfield Amended Decision presented a real and practical impediment to the commencement of construction. Accordingly, the time to commence construction was tolled pending the resolution of *Casey Silverberg*, even though it was filed before the Amended Permit was filed. The tolling period began as soon as the Amended Permit was filed, and ended on April 9, 2007, when *Casey Silverberg* was dismissed. Whether the term of the Amended Permit was one or three years, the time from April 9 to August 8, 2007, was well within the term of the Amended Permit. Therefore, even assuming that Delphic was required to request an extension before its Amended Permit had lapsed, Delphic’s August 8, 2007 request for an extension was timely.

The Board’s only objection to summary decision in Delphic’s favor rested on its allegation that the extension request was untimely. Since the request for extension was not late, there is no reasonable basis in the record to deny it. 760 CMR 56.05(12)(c). See *Red Gate Road Realty Trust v. Tyngsborough, supra* at 3-8 (board has burden of demonstrating denial of extension is not unreasonable; consideration based on local concerns, harm to town,

summary decision may be made on any issue, even if other issues remain for hearing. Summary

or infringement of fundamental principles of fairness). The Board has not presented evidence of local concerns, harm to the town, undue delay or bad faith by the developer or any equitable considerations in its favor. Moreover, considerations of fairness weigh in the developer's favor. See *Forestview, supra*, at 9. Finally, granting an extension under the circumstances presented here is entirely consistent with the remedial purpose of the Comprehensive Permit Law. See *Town of Middleborough v. Housing Appeals Committee, supra*, 449 Mass. 514, 530. Delphic's motion for summary decision is hereby granted, and the Board's motion is denied. See *Forestview, supra*; 760 CMR 56.06(e)2.

III. CONCLUSION AND ORDER

The Board's motion for summary decision is denied. Delphic's motion for summary decision is granted. Delphic's motion to consolidate is treated as a motion to amend the petition for review by adding an additional count, pursuant to 760 CMR 56.06(4)(d), and it is hereby granted. However, since the August 8, 2007 extension request was timely and summary decision has been granted to Delphic, there is no need to consider the second extension request in Delphic's Second Petition for Review. Delphic's motion for reconsideration and clarification is granted.

Summary decision shall enter for Delphic. The Board's denial of the extension of the Amended Permit is vacated and the Board is directed to issue and file with the Town Clerk an Order on Amended Permit providing that the Amended Permit shall lapse if construction authorized by the Amended Permit has not begun within three years of the date on which the Order is filed with the Town Clerk.

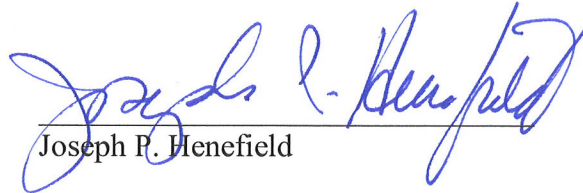
Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.

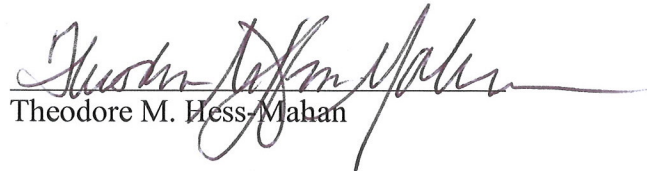
decision may be made against the moving party, if appropriate."

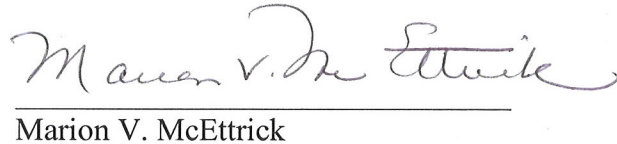
This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

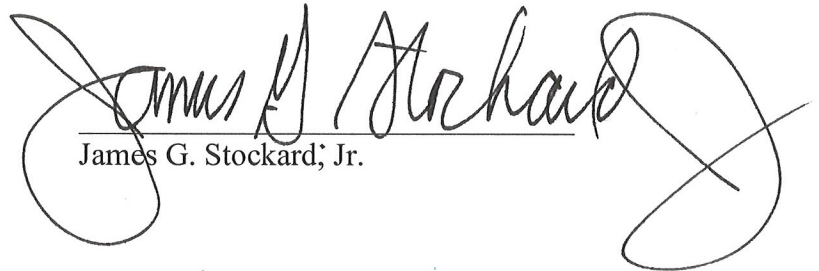
Housing Appeals Committee

Issued: September 14, 2010


Joseph P. Henefield


Theodore M. Hess-Mahan


Marion V. McEttrick


James G. Stockard, Jr.


Shelagh A. Ellman-Pearl, Presiding Officer