COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

GROTON RESIDENTIAL GARDENS, LLC, Appellant	)	
v.	)	No. 05-26
GROTON BOARD OF APPEALS, Appellee	)	

RULING ON DEVELOPER'S PETITION TO ENFORCE ITS COMPREHENSIVE PERMIT

In this case, a comprehensive permit has been issued by the Groton Board of Appeals pursuant to G.L. c. 40B, §§ 20-23, and construction is all but complete. Nevertheless, occupancy has been delayed because the parties have been unable to resolve several complicated, and yet ultimately fairly minor matters. That is, the parties have been unable to reach a complete resolution of issues concerning modifications needed to correct possible flaws in the design of the stormwater management system approved by the Board, or to come to agreement on several provisions in the regulatory documents,[1] which provide for long-term affordability and monitoring of the affordable housing. After four days of hearing, I have found the facts and determined the legal issues, and conclude that the development should be allowed to proceed to occupancy.

I. HISTORY AND FACTS

In October 2004, the Board issued a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 for construction of 44 units of affordable condominium housing and a 4,000 square-foot commercial building on a 3.64-acre lot on Route 119 (Main Street) at Mill Street in

1. These consist of a Regulatory Agreement signed by the developer and the subsidizing agency (and sometimes other parties), a form Deed Rider to be used in the sale of individual affordable units, and a Monitoring Services Agreement.

Groton. Exh. 5. Across Mill Street but associated with the housing development (Groton Residential Gardens) is a separate commercial development (Mill Run Plaza). The housing is being built under the New England Fund of the Federal Home Loan Bank of Boston subject to final approval pursuant to 760 CMR 31.09(3) by the Massachusetts Housing Finance Agency (MassHousing). Exh. 35. The two developments are physically connected since stormwater from both Groton Residential Gardens and also from Mill Run Plaza flows into a large retention basin in the southeast corner of the housing site (Retention Basin 3). The comprehensive permit approval was based in part on the recommendation of the Board's consulting engineers that stated that Retention Basin 3 was adequately designed. Exh. 14.

Abutting Retention Basin 3 and across Mill Street from Mill Run Plaza is a single-family house on a half-acre lot at 10 Anthony Drive.[2] See Exh. 3, sixth sheet (sheet CP-1). This house and other nearby houses on Anthony Drive either have crawl spaces under their first floors rather than basements or are built on concrete slabs, due to the historically high groundwater levels in the area. In addition, the parcel of land at 10 Anthony Drive has always been subject to flooding. For example, decades ago, the yard flooded sufficiently so that neighborhood children would play there in a rowboat.

During 2005, repair and reconstruction work was done on Retention Basin 3. Exh. 10, para. 3; Exh. 15. By October 2005, the stormwater management system, including Retention Basin 3, was substantially complete. But during a period of a little more than a week in the early part of October, there were three major rain storms, totaling nearly 12 inches of rain. See Exh. 2, p. 1;[3] Exh. 13; also see Exh. 16, p. 3. Retention Basin 3 overflowed, flooding the property at 10 Anthony Drive. See Exh. 3, sixth sheet (sheet CP-1).

In response, on October 20, 2005, the Board ordered that no occupancy permits be granted for Groton Residential Gardens until the stormwater system was redesigned, new plans submitted for review by the Board's consulting engineer, and the subsequent new construction inspected. Exh. 12. This order prohibiting issuance of occupancy permits remains in effect.

On November 16, 2005, the Board convened what it termed a "modification hearing." Exh. 2. The developer indicated at that time, and the testimony and documentary evidence

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2. This parcel is shown on all the plans at the intersection of Mill Street and Anthony Drive, and is labeled as the property of its previous owners, McCarthy and Jensen.

that I have considered now confirms, that there were two primary reasons that the retention basin overflowed. First, sidewalks and curbs had not yet been completed on Route 119, allowing water from the highway to flow into the basin, and second, sediment had built up in the bottom of the basin during construction,[4] which impeded infiltration of the stormwater into the ground. Though the developer maintained that the basin had been designed properly, he offered three improvements.[5] First, he offered to raise the elevation of the berm surrounding the basin from 218 feet to 219 feet, increasing its capacity substantially. Exh. 2, p. 1. Second, he offered to approach the Massachusetts Highway Department (MassHighway) and if they were amenable, to add an overflow outlet to the basin that would permit excess water to flow directly into an existing stormwater catch basin on Route 119.[6] And, third, he offered to install a culvert under the emergency roadway at Anthony Drive in the western corner of the site.

At the end of the November 16 discussion of these improvements, the Board "moved to endorse an agreement with the developer," and voted a decision "approv[ing] the proposed modification," which was filed with the Groton Town Clerk on November 23, 2005. Exh. 2, p. 6; Exh. 1.

Although the parties appeared to be moving toward resolution, there were a sufficient number of points of contention that on December 13, 2005, the developer filed a petition with this Committee requesting that the Board's November 23, 2005 decision be vacated and that the comprehensive permit as originally issued be enforced.

I opened the Committee's hearing with a conference of counsel on January 4, 2006, and though I indicated that I was prepared to proceed on an expedited basis, the parties attempted to resolve their differences through negotiation. When it became clear that the dispute would not be resolved amicably, I conducted four hearing sessions on an expedited

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3. In addition to the documentary evidence, there was considerable testimony during the hearing about this rainfall.

4. This appears to be primarily a maintenance issue. See Exh. 19, p. 3, ¶3. (Note that Exhibit 19 and several other exhibits have limited relevance to the case at hand since they primarily concern site plan approval of Mill Run Plaza by the Groton Planning Board.)

5. The first two improvements may, in fact, have been presented and considered by the Board as alternatives. See Exh. 2, p. 6. During the hearing before me, however, the three changes were presented as a package.

6. The sediment that has accumulated in the basin must also be removed, though this is more accurately described as required maintenance than as a remedial step. See Exh.2, p. 3.

basis, on June 29, 2006, and July 17, 20, and 21, 2006.[7] At the time of the hearing, with the exception of aspects of the stormwater drainage system that remain in dispute, the housing development, including landscaping, was complete and ready for occupancy. Exh. 4-A through 4-V.

II. JURISDICTION

The Comprehensive Permit Law itself provides little specific guidance with regard to the handling of disputes that arise after a permit has been issued. G.L. c. 40B, § 23 (sentence 1) indicates only that the hearing in chief "shall be limited to the issue of whether... the decision of the board of appeals [was consistent with local needs or rendered the proposal uneconomic." It goes on to provide that the Committee may "vacate" local decisions, "direct" the local boards to issue permits, and "modify or remove" conditions, provided it not "issue any order" that would permit unsafe housing. G.L. c. 40B, § 23 (paragraph 2) states that the "orders of the committee" may be enforced in the Superior Court.

It is axiomatic, however, that "[a]n agency's powers are shaped by its organic statute taken as a whole and need not necessarily be traced to specific words." *Commonwealth v. Cerveny,* 373 Mass. 345, 354, 367 N.E.2d 802 (1977). "Powers granted include those necessarily or reasonably implied." *Grocery Mfrs. of America, Inc. v. Department of Pub. Health,* 379 Mass. 70, 75, 393 N.E.2d 881 (1979).

Particular insight into an agency's power to issue orders is provided by *Massachusetts Mun. Wholesale Elec. Co. v. Massachusetts Energy Facilities Siting Council*, 411 Mass. 183, 196, 580 N.E.2d 1028, 1036 (1991). In that case, the Court concluded that no power to issue "prospective orders" was implied "by a statute which enables the council merely to review and to approve or to reject [electric-power-need] forecasts." *Id.* at 195-196, 1035-1036. That is, the council had no power to issue an order requiring a utility company to make its submission in a particular form. The Court went on to cite with approval the case of

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7. Because it was uncontested that a valid comprehensive permit had been issued and that construction was nearly complete, in my May 25, 2006 ruling I alerted counsel that a hearing to resolve the factual issues concerning stormwater and the regulatory documents would be held on an expedited basis and that briefs would be required within seven days after the close of evidence. On July 21, I extended the briefing deadline to fourteen days, but in a ruling on July 27, I declined to extend it further. Because of a change in counsel representing the Board, during a teleconference on August 2, 2006 I orally extended the deadline an additional three days. If no facts had been in dispute, this matter would have been decided based on a motion for summary decision without an evidentiary hearing. See 760 CMR 30.07(4).

Scannell v. State Ballot Law Comm'n, 324 Mass. 494, 501, 87 N.E.2d 16 (1949). That case held that "[a]n express grant of authority carries with it by implication all incidental authority required for the full and efficient exercise of the power conferred." Thus, in cases before the Housing Appeals Committee under the Comprehensive Permit Law, the express statutory authority to direct the Board to issue a permit carries with it the authority to issue such orders as are necessary to effect compliance with the permit. This power is reflected in our regulations, particularly the "enforcement" section, 760 CMR 31.09.

Further, such orders may be issued by the presiding officer.[8] The only limitation on the powers of the presiding officer is that he or she may not normally "make any decisions which would finally determine the proceedings...." 760 CMR 30.09(5)(b). Here, however, that ultimate determination has already been made since a comprehensive permit has already been issued by the Board. That the presiding officer has the power to act alone is also indicated by the section of our regulations that provides for orders to be issued to aid in the enforcement of a permit after it has been granted. That is, that section contains a cross-reference to § 30.09(5)(b), which describes the powers of the presiding officer. 760 CMR 31.09(5).[9]

III. DISCUSSION

The Board has refused to allow the developer to proceed to occupancy, and therefore the ultimate question here is whether the developer is in compliance with the comprehensive permit. The burden of proof lies with the developer. With regard to matters addressed clearly in the permit, the developer simply has the burden of proving that the development has been constructed in compliance with the permit. With regard to matters on which the permit is silent, the developer can prove compliance by showing compliance with town bylaws or regulations or, if no applicable bylaws or regulations exist, with generally recognized standards.

There are two sets of issues relating to the design of Retention Basin 3. First is the question of surface flooding, which is related primarily to aspects of the basin's design that

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8. The Board has requested a proposed decision pursuant to 760 CMR 30.09(5)(h) and G.L. c. 30A, § 11(7). Because this order is not a decision issued by the full Committee, this provision is inapplicable.

9. Due to a typographical error, the regulation refers to 760 CMR 30.09(5)(c) instead of § 30.09(5)(b).

ensure that it will not overflow and flood 10 Anthony Drive. Second is groundwater flooding, that is, flooding of the crawl space beneath part of the house at 10 Anthony Drive that is caused by high groundwater levels. As will be seen below, this may be related to the amount of separation that exists between the bottom of Retention Basin 3 and the seasonally high groundwater level.

For practical purposes, these two issues are unrelated since generally and in this particular case, surface flooding and flooding from ground water are separate phenomena. None of the expert witnesses attempted to quantify the very limited degree to which height of ground water may affect dissipation of surface flooding and *vice versa*.

It should also be noted at the outset that there are frequent references in the evidence to the Massachusetts Department of Environmental Protection (DEP) Stormwater Management Policy, which has been promulgated in relation to the state Wetlands Protection Act (WPA), G.L. c. 131, § 40. The only wetlands on the site are at the opposite corner of the site, and a DEP Superseding Order of Conditions has been issued with regard to that area. Exh. 17. The area in dispute here—Retention Basin 3 and the area near it—is not subject to WPA jurisdiction, and therefore the legal requirements of the Stormwater Management Policy do not apply.

A. Surface Flooding – Even though a year previously, the Board's consulting engineers had determined as a general matter that Retention Basin 3 was properly designed, there was significant flooding during the storms of October 2005 due to overtopping of the berm. Exh. 14. As described above, at the Board's November 16, 2005 "modification hearing," the parties agreed on both the causes of the overtopping and solutions, and the comprehensive permit was modified. Exh. 1.

In the modified permit, the Board imposed three basic design changes to address the surface flooding. First, and least controversial, a culvert was to be constructed under the emergency access roadway near Anthony Drive.[10] Exh. 1, condition 2. This has been completed.[11] Second, the berm surrounding Retention Basin 3 was to be raised one foot.

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10. There is no controversy surrounding this change since it is only indirectly related to Retention Basin 3. That is, historically, there has been flooding on the westerly portion or "side yard" of the lot at 10 Anthony Drive. In the past, the water was able to drain to the north along Anthony Drive. When the emergency access drive to Groton Residential Gardens was built in that area, drainage was blocked. The developer agreed to construct a twelve-inch culvert to restore the drainage.

11. This work has been completed, but there was contradictory evidence with regard to whether the work was done properly. The culvert is to be twelve inches in diameter and made of a durable

Exh. 1, condition 2. This has also been completed. Third, the developer was to provide an overflow outlet connecting Retention Basin 3 to the stormwater drainage system along Route 119. Exh. 1, condition 1. This is only partially completed, and requires explanation.

In fact, nowhere in the permit modification is there an explicit requirement that the overflow connection be made. Condition 1 of the modification requires that the developer submit an application to MassHighway. This has been done, and MassHighway has granted the necessary permit. Exh. 47. But rather than simply require (or allow) the overflow connection to be made, the modification requires the developer to "submit, to the Board and [its consulting engineers], plans for the above described stormwater management infrastructure." Exh. 1, condition 3. This is an improper "condition subsequent." That is, it improperly requires the developer to appear before the Board in the future for further review and approval. See *Peppercorn Village Realty Trust v. Hopkinton*, No. 02-02, slip op. at 22 (Mass. Housing Appeals Committee Jan. 26, 2004); *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 33-34 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 00-P-245 (Mass.App.Ct. Apr. 25, 2002); *Owens v. Belmont*, No. 89-21, slip op. at 13-14 (Mass. Housing Appeals Committee Jun. 25, 1992); also see 760 CMR 31.09(3). Under the Comprehensive Permit Law, the developer need submit only preliminary plans to the Board for approval. 760 CMR 31.02(2)(f). When the Board issued the modification, it had already thoroughly reviewed the site's stormwater management system, and had fully considered the minor modification involved in adding a simple overflow outlet to the Route 119 drainage system. Requiring subsequent review by the Board of the construction details "undermines the… purpose of a single, expeditious comprehensive permit…" *Peppercorn Village Realty Trust v. Hopkinton*, No. 02-02, slip op. at 22 (Mass. Housing Appeals Committee Jan. 26, 2004). All that may be required is routine inspection during and after construction by the appropriate town official (or, if the Board so desires, its consulting engineers). 760 CMR 31.09(3).

Though the requirement for an overflow connection is not explicit in the permit modification, it is clearly implied. Thus, the question that remains is whether the developer is in compliance with this requirement. The evidence shows that not only has the

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material. If a temporary, smaller, eight-inch polyvinyl chloride pipe was in fact installed, it should be replaced immediately. See, e.g., Exh. 21, ¶ 5. Proper completion of this detail is subject, of course, to routine inspection by the appropriate town official (not to further review by the Board) to ensure construction in conformity with generally recognized standards.

MassHighway permit been received, but the developer has also constructed the first part of the connection, that is, the piping at the MassHighway catch basin. Detailed construction drawings signed and stamped by a registered professional engineer have been prepared. Exh. 24, 24-A. And the developer has testified that the remaining work can be completed in less than two weeks. Construction should be permitted to continue since that construction is in compliance with the modified comprehensive permit, and when it has been completed and inspected, in this regard the development will be in full compliance with the comprehensive permit issued by the Board.

One final aspect of the modified comprehensive permit should be noted. Condition 5 requires the developer to "submit soil testing indicating seasonal high groundwater information to confirm that Infiltration System 3 has a two-foot separation form the bottom of the system to seasonally high groundwater elevation." Any argument that the developer has not complied with requirements relating to surface flooding that is based on this condition is flawed in several ways. First, and most important, this condition is also a condition subsequent—an improper condition requiring further review. Second, the testimony and documentary evidence indicate that soil-testing data was submitted. See Exh. 40. Finally, the condition addresses Infiltration System 3, which is an infiltration system under a parking lot at the northern end of the site, which does not bear any relationship to surface flooding in the area of Retention Basin 3.[12]. See Exh. 3, sheet 6 (sheet CP-1).

B. Groundwater Flooding – The Board alleges argues that a flaw in the design of Retention Basin 3—insufficient separation between the bottom of the basin and seasonally high groundwater—has caused flooding in the crawlspace at 10 Anthony Drive due to a rise in the level of the groundwater, and that this justifies withholding of occupancy permits. There are two major weaknesses in this argument.

1. First, legally, there is no justification for withholding occupancy permits, because, even assuming the facts as stated by the Board, the developer has proven that it has complied

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12. The Board argues for the first time in its brief that "Infiltration System" was a clerical error and that "Retention Basin" was intended. Board's Brief, p. 9, n.1. The very detailed minutes of the Board's meeting at which this condition was discussed make no mention of e soil testing at all. See Exh. 2. More important, during the hearing, testimony that these were two separate and very distinct parts of the system went unchallenged. Since Infiltration System 3 is referred to in both the original permit and the modification, it seems more likely that there was no error. See Exh. 5, condition 27(a); Exh. 1, condition 5. If the Board intended to pursue this argument, it was incumbent upon it to at least introduce testimony or other evidence from which an inference could be drawn that there was a clerical error.

with the comprehensive permit. The Board approved the comprehensive permit without either party having a definitive understanding of what that separation between the bottom of the basin and seasonally high groundwater would be. From all the evidence, the inference is clear that, at that time, based upon preliminary assessments of groundwater levels on the site, both the Board's engineers and the developer's engineers assumed that there would be two feet of separation since that would be a common standard design both as a matter of general engineering practice and based upon the standards of the DEP Stormwater Management Policy. This is not surprising since the Board did not explicitly address groundwater issues when it granted the permit. Exh. 5. After problems developed, that is, at the November 16, 2005 modification meeting, groundwater levels were mentioned briefly at the end of the meeting in response to a comment by the owner of 10 Anthony Drive. Exh. 2, p. 5. But it appears that this concern emerged slowly, and was first addressed in any detail when new consultants engaged by the town prepared a report dated March 2, 2006. See Exh. 11.

Thus, the comprehensive permit issued by the Board addressed the stormwater management system design only in broad terms, based upon the plans submitted, and in no way highlighted nor imposed additional requirements with regard to separation from groundwater. See, e.g., Exh. 5, conditions 1 and 9(h). Further, there is no indication or evidence that the developer changed the plans, nor that construction deviated from them. There was simply an inconsistency between the parties' assumptions concerning groundwater levels and the final, as-built conditions, and as a result, it now is clear that the design that the Board approved has in fact only provided one and one half feet of separation.

I find, based upon the documentary evidence and all of the testimony, particularly that of the developer and its expert engineer, that the developer has complied with the comprehensive permit in this respect. Thus, the occupancy permits should be issued.

In regard to this legal conclusion, it is important to note that there is no logical inconsistency between my finding that the developer is in compliance with the permit and the existence of unanticipated, unwanted flooding in the crawlspace of 10 Anthony Drive. Land-use permitting is not an exact science. If, as appears likely, the construction of Groton Residential Gardens is the cause of the flooding of 10 Anthony Drive, then the homeowners may have a cause of action against the developer in tort. See, e.g., *Silva v. Melville*, No. 98-0318A12, Mass. L. Rptr. 611, 2001 WL 237526 (Mass. Super. Ct. March 12, 2001); *Wilson v. New Bedford*, 108 Mass. 261, 266(1871); also see *Young v. Baker*, No. 284405, 2004 WL

1088353 (Mass. Land Ct. May 17, 2004). But, especially when no specific modification of Retention Basin 3 has been proposed to remedy the problem,[13] there are no grounds for continuing to delay occupancy of this affordable housing development.

2. Second, the Board's theory is weak factually. From the testimony of the expert witnesses, there is no doubt that groundwater levels are high in the vicinity of Retention Basin 3. Also see Exh. 11, 40. This testimony was amplified by the careful, though non-expert observations of the current owner of 10 Anthony Drive.[14] See Exh. 46, 46-A. It is also apparent that the historical flooding on 10 Anthony Drive has increased, and that the depth and frequency of water in the four-foot crawl space below the house at 10 Anthony Drive has increased.[15] See e.g. Exh. 9, 43, 45.

Identifying the exact causes of these problems is more difficult. One possible cause, at least, can be eliminated. Overflow from Retention Basin 3 is not a cause, since—despite some conflicting testimony—it does not appear that Retention Basin 3 has overflowed since October 2005; in any case, that problem will be solved by the installation of an overflow outlet. See Section III-A, above. Further, it is clear that there is not a single cause, but rather a number of factors related to the recent construction have exacerbated an existing situation. Exh. 11, p. 4 (summary, para. 1). Nevertheless, it appears quite likely, as the Board argues, that as a general matter, mounding of groundwater from under Retention Basin 3 is a significant contributing factor. But it is far less clear whether, as the Board alleges, a specific causal factor is that the basin as actually built provides only one and one half feet of separation from seasonally high groundwater instead of the two-foot separation that was originally anticipated. There is evidence that the reduced separation will impede the

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13. Speculation suggests a simple solution. Since the berm has been raised a foot and an overflow outlet provided, it seems likely that the bottom of the basin could be reconstructed six inches higher. But this simple idea was not even hinted at in the testimony. This may well be an indication that while raising the bottom would technically bring the basin into conformity with the two-foot-separation benchmark, the experts may not think that it would solve the real-world groundwater problems. In any case, there is no basis in the record for serious consideration of this modification. Also see discussion in Section III-B(2), below.

14. The owner dug monitoring wells in three locations on the property. In May, June, and July 2006, in none of these wells was water more than about two feet below ground level, and frequently, there was flooding. These observations, however, are of limited value since there is no data concerning the ground elevations at these locations, which would permit comparison to known elevations related to Retention Basin 3.

15. The older parts of the house have only a two-foot crawl space. The deeper crawl space is under the kitchen, which is an addition to the original building.

infiltration capacity of the retention basin to some extent. See Exh. 20, ¶ 4. But there is no clear evidence that it affects the mounding, nor exactly how or how much it affects the mounding. Rather, the testimony is that mounding is a very complex phenomenon and the specific mounding conditions in this case have not been studied thoroughly by either party. Thus, from my review of the evidence, there is no proof that six additional inches of separation would have had a significant effect on the mounding, nor that it would have had an effect on the groundwater flooding in the crawlspace at 10 Anthony Drive.[16]

IV. REGULATORY DOCUMENTS

For any affordable housing development, regulatory documents must be executed to formalize the terms of affordability restrictions and other matters. Throughout the second half of 2005, the parties (and apparently the Groton Board of Selectmen, as well) were engaged in extensive negotiations over modifications that the Board had requested in the standard regulatory documents provided by Mass Housing. While this appeal was pending, it became apparent that they had reached an impasse, and on May 4, 2006, the developer moved to amend its appeal, adding claims with regard to the regulatory documents, adding the Groton Board of Selectmen as a party, and requesting clarification as to what form of regulatory documents should be executed. On May 25, 2006, I granted the motion to amend, and denied the developer's motion to add the Groton Board of Selectmen as a party.

The conflict over the regulatory documents appears to result from a misunderstanding shared by both of the parties (and the Board of Selectmen as well). Most aspects of these documents involve issues "that are characteristically within the province of the subsidizing agency, [t]hat is,… which were not intended to be reviewed in detail within the comprehensive permit process. These clearly are not matters of local concern in the usual sense." *CMA, Inc. v Westborough Zoning Board of Appeals*, No.89-25, slip op. at 7 (Mass. Housing Appeals Committee Jun. 25, 1992). The misunderstanding may have arisen since in certain cases involving the New England Fund (NEF) of the Federal Home Loan Bank of Boston [FHLBB]—the so-called "old NEF" proposals—it was incumbent upon the Board to

16. Another level of complexity here is that there is evidence that the basin holds water for extended periods of time. This raises the possibility, but not the certainty, that at such times the groundwater level is above the bottom of the basin, effectively creating a mound that breaks the surface of the land, and that it would have done so even if the separation had been six inches greater. The ramifications of this were not explored during the hearing.

enter into detailed negotiations with the developer since the regulatory documents were imprecise and oversight by the FHLBB limited. *See Stuborn Ltd. Partnership c. Barnstable*, No. 98-01, slip op. at 21-27 (Mass. Housing Appeals Committee Decision on Jurisdiction Mar. 5, 1999).[17]

In this case, however, pursuant to new regulations designed to remedy the weaknesses in the "old" NEF program, the regulatory documents have been prepared by MassHousing, which provides general regulatory oversight as the project administrator. See Exh. 30; 760 CMR 31.01(2)(g)(second sentence), 31.09(3). As noted in footnote 17, above, some voluntary negotiation is anticipated, and this is reflected in the various forms of the Regulatory Agreement that were proposed during negotiations. For example, all of the form documents considered during the negotiations listed the Town of Groton in the introductory paragraph as a party to the agreement. But the form being considered in June 2005 showed the chairman of the Board signing on behalf of the municipality. Exh. 25-A, pp. 1, 14. By August 2005, the parties were considering a different form of this document, based on a version approved by MassHousing in another community, which showed the Board signing only an "acknowledgement."[18] Exh. 29-A, p. 19.

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17. We discussed these negotiations in the following terms. "There may be specific details… that need further attention…. For instance, in the regulatory agreement, the percentage of affordable units has not been set. In a traditional housing program, this would be set by the subsidizing agency. But here, the FHLBB has made it clear that it will not review this sort of detail. Therefore, it is left for negotiation between the developer and the town….

"The deed rider … has not been substantively reviewed by the FHLBB, and changes in details may have unintended effects…..

"…Another policy question which may be of particular concern to the town is how buyers of units are qualified and chosen….

"These general issues are apparently given little or no consideration by the FHLBB, though in fairness to the developer, a number of them are addressed adequately in the regulatory agreement. Nevertheless, the Board, in consultation with other local officials, should review them carefully…" *Id.*, at 21-23.

We also noted that the developer had "indicated a willingness to negotiate, at least with regard to local involvement in monitoring of the development…. Even in traditional [i.e., non-NEF] subsidy programs, where the subsidizing agency typically provides model regulatory agreements and deed riders, changes in those documents are frequently negotiated. See, e.g., *Lexington Ridge Assoc. v. Lexington*, No. 90-13, (Mass. Housing Appeals Committee Jun. 25, 1992)(holding that a board may require that housing be maintained as rental in perpetuity)." Id., at 22, n.15. Such negotiations, however, are not required, and are most effective when, as in the *Lexington* case, they take place before the permit is issued, not after.

18. The Board seems to have accepted this form of the Regulatory Agreement since on October 13, 2005, its members signed, for recording purposes, a document entitled "Modification of Comprehensive Permit," in which they "acknowledge[d] that the Regulatory Agreement recorded

But the final terms of the regulatory documents are within the regulatory discretion of MassHousing. In order to bind the developer to comply with general affordable housing requirements and also to protect the public interest, the municipality, and the low or moderate-income homeowners, all that is necessary is a Regulatory Agreement (with accompanying deed rider and monitoring agreement) between that developer and MassHousing. MassHousing, may, in its discretion, provide for other signatories to the agreement in a form that it deems appropriate. But if agreement cannot be reached on the terms of the agreement or who the signatories will be, MassHousing may unilaterally decide those issues. For these reasons, and because it is a condition subsequent, as discussed above, the condition in the comprehensive permit requiring submission to and approval by the Board of a draft Regulatory Agreement is improper and thus void. See Exh. 5, condition 5. Nevertheless, a regulatory agreement must be signed before housing units are occupied, and in that sense the Board has been justified in withholding occupancy permits pending final resolution of these issues by MassHousing.

Finally, as is permissible, the comprehensive permit contains several substantive conditions that relate to the Regulatory Agreement that neither are conditions subsequent, nor impinge upon MassHousing's prerogatives as project administrator. These will remain in effect. See Exh. 5, conditions 2-4, 5(a), 5(b), 5(c), 5(d), 6,[19] and 7.

V. ORDER

Based upon the testimony and evidence presented at the hearing and upon the findings and discussion above, I conclude that Groton Residential Gardens, LLC is in compliance with the comprehensive permit issued by the Board. The Board is directed to order the building inspector or other appropriate local official to issue occupancy permits for all housing units, subject only to that official's inspection of final construction details and of a Regulatory Agreement executed by the developer and MassHousing, as discussed above. Specifically,

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herewith satisfie[d] the requirement of the Comprehensive Permit." Exh. 35. For unexplained reasons, the Regulatory Agreement was not actually recorded with this document.

19. The clause in Condition 6 requiring subsequent approval by the Board's legal counsel is improper and therefore stricken.

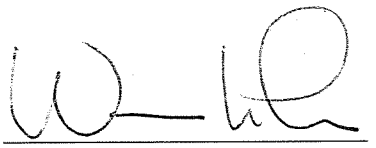
1. the overflow outlet connecting Retention Basin 3 to the stormwater drainage system in Route 119 shall be completed in conformity with Exhibit 24-A (see Section III-A, above),

2. the culvert under the emergency access to the site shall be inspected, and if the work was done improperly, it shall be replaced immediately in conformity with generally recognized standards to ensure that the culver is twelve inches in diameter and made of a durable material (see Section III-A, n.11, above), and

3. Groton Residential Gardens, LLC shall execute a Regulatory Agreement in a form approved by the Massachusetts Housing Finance Agency, acting as project administrator pursuant to 760 CMR 31.01(2)(g)(second sentence), 31.09(3).

This ruling 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: August 10, 2006

Werner Lohe
Presiding Officer

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