COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

GRANDVIEW REALTY, INC.

v.

LEXINGTON ZONING BOARD OF APPEALS

No. 05-11

DECISION

July 10, 2006

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GRANDVIEW REALTY, INC Appellant v. LEXINGTON ZONING BOARD OF APPEALS, Appellee	)	No. 05-11

DECISION

Appellant Grandview Realty, Inc. (Grandview) has appealed, pursuant to G.L. c. 40B, § 22, and 760 CMR 30.00 and 31.00, the decision of Appellee Lexington Zoning Board of Appeals (Board) denying a comprehensive permit with respect to property in Lexington, Massachusetts. For the reasons set forth below, the decision of the Board is upheld.

I. PROCEDURAL HISTORY

On August 17, 2004, Grandview submitted an application for a comprehensive permit for a multifamily rental project to be developed on three undeveloped parcels on Grandview Avenue, Lexington, Massachusetts. Exh. A., Burns Affidavit, ¶ 5. The proposed development would include 12 units consisting of 9 market rate units and 3 units affordable for tenants with incomes no greater than 50 percent of the area median income.

The Board's decision indicates that the public hearing began on September 9, 2004 and continued on September 21, November 18, and December 16, 2004 and on February 10, and March 10, 2005. A site visit was conducted on October 16, 2004. The Board deliberated on the application on March 24, April 7 and April 14, 2005. Exhs. H, 20, p. 2. The Board voted on the comprehensive permit on April 7, 2005, voting alternative decisions depending on whether the Town of Lexington reached the 10 percent statutory minimum for affordable housing provided in G.L. c. 40B, § 20, by April 19, 2005, the date its decision was due. Exhs. H, 20, p. 3. On April 14, 2005, the Board voted by roll call to deny the comprehensive permit. The Board issued a decision denying Grandview's application for comprehensive permit on April 19, 2005, giving as a reason that the Subsidized Housing Inventory (SHI) maintained by the Massachusetts Department of Housing and Community Development listed Lexington's affordable housing stock at 10.78%. According to Grandview, this decision was filed with the Town Clerk on April 19, 2005.

On May 3, 2005, Grandview filed its appeal with the Housing Appeals Committee. The Committee held a Conference of Counsel on May 20, 2005. On September 21, 2005, Grandview filed a motion for summary decision. Through counsel, several individuals filed a motion to intervene on November 2, 2005. The presiding officer conducted a conference with counsel for Grandview, the Board and the proposed interveners on January 31, 2006.[1] On February 10, 2006, she denied the motion to intervene without prejudice, but granted the proposed interveners status as Interested Persons. In her ruling, the presiding officer allowed the Interested Persons to submit argument, but not evidence, on "the issues raised by the

1. A stenographic transcript was made of this conference.

motion for summary decision, on the timetable set for the Board's submissions on that motion." *Grandview Realty, LLC v. Lexington,* No. 05-11, slip op. at 5 (Mass. Housing Appeals Committee Ruling Feb. 10, 2006); see Tr. I, 41. On February 17, 2006, the Board filed its opposition to Grandview's motion for summary decision and a cross-motion for summary decision. Grandview filed its reply on March 6, 2006, and the Board and the Interested Persons filed sur-reply memoranda on March 20, 2006. Both Grandview and the Board submitted affidavits and exhibits in connection with these motions; the Interested Persons attached an affidavit to their memorandum. On March 24, 2005, Grandview moved to strike portions of the Interested Persons' memorandum as well as the affidavit they had submitted. The presiding officer granted Grandview's motion to strike on June 22, 2006.[2]

II. JURISDICTION

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee, three jurisdictional requirements must be met. Although this issue was not reached before the Committee, we note that the Board's decision indicates that Grandview met the following jurisdictional requirements: that it is a limited dividend

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2. Grandview moved to strike the affidavit and portions of the memorandum supported by reference to the affidavit for the reason that they contravened the presiding officer's order regarding the scope of the Interested Persons' participation. The presiding officer's order specifically barred the Interested Persons from submitting evidence in this appeal, while allowing them to renew their motion to intervene if the case proceeded beyond the motions for summary decision. *Grandview Realty, Inc. v. Lexington,* No. 05-11, slip op. at 5 (Mass. Housing Appeals Committee Ruling Feb. 10, 2006); see Tr. I, 41. The presiding officer's order striking the affidavit and part of the memorandum is consistent with the scope of the Committee's customary grant of participation to interested persons. Interested persons are not parties, but rather have roles generally limited to providing commentary or legal argument in proceedings; they do not contribute evidence to the record. In addition, the portion of the memorandum stricken by the presiding officer also may have failed to comply with the prohibition in G.L. c. 233, § 23C against the disclosure in an administrative proceeding of communications made in the course of a mediation session. We concur in the presiding officer's order striking the affidavit and related argument.

organization as required by 760 CMR 31.01(1)(a) and that the project that is the subject of this proceeding is fundable through the MassDevelopment Tax-Exempt Bond Program as required by 760 CMR 31.01(1)(b). With regard to the issue of site control as required by 760 CMR 31.01(1)(c), the Board indicated that Grandview demonstrated adequate control over the parcels upon which the buildings would be constructed, but it questioned whether Grandview had adequate control over Grandview Avenue. This issue has not been reached by the parties in their pending motions and need not be addressed here.

III. CROSS MOTIONS FOR SUMMARY DECISION

Grandview has moved for summary decision overturning the Board's permit denial, arguing that the determination by the Department of Housing and Community Development (DHCD) that Lexington has attained the statutory minimum violates Chapter 40B and applicable regulations. The Board has filed a cross-motion for summary decision on two grounds: 1) that DHCD's decision that Lexington has attained the 10 percent statutory minimum is valid; and 2) that Grandview filed and maintained open a related application within the "cooling off" period specified in 760 CMR 31.07(1)(h). The Interested Persons' memorandum supports summary decision for the Board and opposes summary decision for Grandview, on theories similar to those advanced by the Board.

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 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 30.07(4). See *Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7, 604 N.E.2d 1301 (1992). As discussed

below, we uphold the Board's decision under the related application provision, 760 CMR 31.07(1)(h).

A. Factual Background

As we decide this case based on our related application regulation, the factual background provided relates solely to this issue. In July 1999, a principal of Grandview, David E. Burns, acting through another entity, DEBCO Properties, Inc., submitted to the Lexington Planning Board an Application for Preliminary Subdivision Review for approval to develop market rate single-family housing on three undeveloped parcels on Grandview Avenue in Lexington. Burns Affidavit, Exh. A, ¶ 11. On May, 22, 2000, the Planning Board approved the subdivision application. Exh. 17. A group of abutters then appealed the Planning Board's decision in June 2000. On September 28, 2004, the Land Court overturned the subdivision approval. Exh. 18. The Land Court's decision was appealed and, according to the record, remains pending in the Appeals Court. See *Berg, et al. v. Lexington Planning Board,* Appeals Court No. 2005-P-0045. The subdivision approval appears not to have been recorded in the Registry of Deeds. Messenger Affidavit, Exh. 19. There is no record that Burns has withdrawn his application for approval of the subdivision plan for the parcels in issue from the Planning Board, the Land Court or the Appeals Court.

The Appellant is this proceeding, Grandview, has a purchase and sale agreement to buy the same three parcels on Grandview Avenue in Lexington. On August 17, 2004, Grandview submitted an application for a comprehensive permit for a project to be developed on these parcels. Exh. A., Burns Affidavit, ¶ 5. The Zoning Board conducted a site visit and held public hearings on the application on six days between September 9, 2004

and March 10, 2005. Exhs. H, 20, p. 2. Among the persons appearing before the Zoning Board, were neighbors to the site who raised objections to the project.

The Board issued its decision denying Grandview's application for a comprehensive permit on April 19, 2005, giving as a reason that the Subsidized Housing Inventory maintained by DHCD now listed Lexington's affordable housing stock at 10.78%. The Board attached to its decision, as an exhibit, a list of conditions that it would have required as part of the grant of the comprehensive permit it would have issued had Lexington not received notice from DHCD that it had attained the 10% statutory minimum before the decision on the comprehensive permit was issued.[3] Exhs. H, 20.

B. A Pending Related Application Requires that the Board's Decision be Upheld

The Committee's regulations establish a twelve-month protective period for zoning boards when a comprehensive permit developer has had a related application pending on the same property site. The developer is not prohibited from filing a comprehensive permit application within the same period. However, any decision issued by the zoning board must

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3. The Board's decision notes that it was aware of the possibility that housing units in an Avalon Bay development would be included in the SHI before the Grandview decision was issued, and that it voted alternative decisions, one granting a comprehensive permit in the event the Board's decision was rendered before the SHI was amended, and the version it actually issued, denying the permit on the ground that Lexington had attained the statutory minimum. Exhs. H, 20, p. 3. This approach creates a conundrum. Section 20 of Chapter 40B provides only that attainment of the statutory minimum renders any decision made by the Board consistent with local needs as a matter of law; it does not establish attainment of the minimum as a ground for denial. Even when a town attains the statutory minimum, the statute envisions the Board giving full consideration to the application to build housing, and granting or denying it on substantive grounds relating to the merits of the specific application, and not merely on the town's attainment of the minimum. *Id.* Rather, it is on appeal to this Committee that attainment of the statutory minimum can be raised by the Board as an affirmative defense. See *East Homes Trust v. Tyngsborough,* No. 02-37, slip op at 2 (Mass. Housing Appeals Committee July 21, 2003). Although the Board's couching its grounds for denial in terms of the statutory minimum is illogical, and inconsistent with the spirit of Chapter 40B, it has no practical effect, since however the decision is worded, the Board may raise the affirmative defense on appeal. See G.L. c. 40B, § 20; 760 CMR 31.06(5).

be upheld as a matter of law if twelve months have not elapsed between the date of the comprehensive permit application and the dates of certain actions relating to a prior application for a special permit or other approval that does not include low or moderate income housing. The regulation, 760 CMR 31.07(1)(h), states:

> (h) Related Applications. A decision by the Board to deny a comprehensive permit or grant a permit with conditions shall be consistent with local needs if 12 months has not elapsed between the date of application and any of the following:
> 1. the date of filing of a prior application for a variance, special permit, subdivision or other approval related to construction on the same land if that application included no low or moderate income housing,
> 2. any date during which such an application was pending before a local permit granting authority,
> 3. the date of disposition of such an application, or
> 4. the date of withdrawal of such an application.
>
> An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.[4]

There is no dispute that the prior subdivision application was an application for approval related to the same land and that it included no low or moderate income housing. The parties' disagreement focuses on the meaning of subsection (3) of § 31.07(1)(h): "the date of disposition of such an application." The Board argues that the word "disposition" must be construed to mean "final" disposition and to require the conclusion of all appeals following action by the local board. Here, it argues, because the subdivision approval remains on appeal at the Appeals Court, the comprehensive permit application was filed before the expiration of the one-year protection, or "cooling off," period contemplated by the

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4. In proceedings before the Committee, the existence of a related application establishes an irrebuttable presumption that the board's action is consistent with local needs. 760 CMR 31.07(1).

regulation. Grandview argues that "disposition" refers only to the final decision at the local permit granting authority and therefore, the August 2004 filing of the comprehensive permit application, compared to the Board's May 2000 approval of the subdivision application more than meets the "cooling off" requirements of § 31.07(1)(h).

Our first step in understanding the meaning of "disposition," as it is used in 760 CMR 31.07(1)(h)(3), requires examining the word in the context of the language of the regulation. Grandview compares the language of subsections (h)(1) and (h)(2), which refer, respectively, to "the date of filing of a prior application ....", and to "any date during which such an application was pending before a local permit granting authority," to argue that "disposition" must be construed to refer back to the "local permit granting authority" mentioned in subsection (h)(2). Grandview also contrasts the lack of a reference to any appeal period in § 31.07(1)(h) with the specific reference to filing appeals in 760 CMR 31.08(4), which governs lapse of permits, to argue that the lack of a specific reference in the related application section means that "disposition" was not intended to encompass any appeal period.

The presence or lack of a specific reference to appeal periods in § 31.07(1)(h), however, is not dispositive. Subsection (h)(2) sets the twelve-month clock running from the end of the period encompassed by "any date during which such an application was pending before a local permit granting authority." If subsection (h)(3) only refers to a local board's final decision, the date of disposition would be the same as the last day on which the application was pending before the local board. In this circumstance, subsection (h)(3)

would be superfluous. The same reasoning applies to the "withdrawal" provision of subsection (h)(4).

A construction that would make subsections (h)(3) and (h)(4) unnecessary must be avoided, if possible. In order to give subsection (h)(3) meaning, it would have to refer to more than the time period during which the application is pending before the local board. Interpreting "disposition" and "withdrawal" to include appeals of local board decisions adds meaningful content to the regulation.

Moreover, interpreting "disposition" to mean a final disposition after appeal is consistent with the language of G.L. c. 41, § 81V, which suggests that subdivision approvals are not considered disposed of until after appeals have been resolved. The comparison to 760 CMR 31.08(4), which governs lapses of comprehensive permits and does not address conventional permits, is not meaningful in this context. Therefore, interpreting disposition to mean final disposition after the conclusion of all appeals renders the regulation provisions consistent and meaningful. To do otherwise would lead to an illogical result. See *Apple Farm Estates, LLC v. Medway,* No. 04-26, slip op. at 2-3 (Mass. Housing Appeals Committee Ruling Feb. 16, 2005).

Similarly, reference to the proposed draft of the regulation submitted for public comment does not require any different result. The proposed regulation provided for a six-month, rather than a twelve-month cooling off period, and only in the case of a denial by the local permit granting authority.[5] Exh. O, p. 2. As promulgated, the regulation expands the

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5. DHCD stated that the proposed regulation would "[i]nvoke a 6-month 'cooling off' period" and that:

scope of related applications, by eliminating the restriction to denials by local authorities and by lengthening the protection period; thus commentary on the proposed regulation is unpersuasive. See Exh. O, p. 4; Exhs. S, T.

Finally, and most importantly, our interpretation of the meaning of "disposition" is also consistent with and advances the purpose and overall policy of the related application provision, which was promulgated to prevent developers from using the Chapter 40B process to coerce or intimidate local zoning boards and communities with respect to traditional zoning applications. See *Stanley Realty Holdings, LLC v. Watertown,* No. 04-04, slip op. at 3 (Mass. Housing Appeals Committee Apr. 15, 2004); *Apple Farm Estates, LLC v. Medway,* No. 04-26, slip op. at 3 (Mass. Housing Appeals Committee Ruling Feb. 16, 2005). It is also intended to discourage developers from maintaining multiple pending applications for the same property. *Stanley Realty Holdings,* No. 04-04, slip op. at 3. Chapter 40B affords developers great flexibility in developing affordable housing projects for submission to local zoning boards for approval. This flexibility is not intended, however, to grant them additional leverage with respect to conventional applications they may pursue.

Grandview's arguments that it is being punished because abutters appealed the grant of the subdivision application, and that applying the related application provision to it would

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> 760 CMR 31.08 would be amended to add a section that bars an applicant from filing a comprehensive permit for 6 months from the date of a prior application or, if later, the date of denial by the local permit granting authority, for a building permit, variance, special permit, subdivision or other approval related to construction on the same land if that application included no low or moderate income housing.

Exh. O. DHCD's letter accompanying the proposed regulatory change stated that the proposed regulatory changes, including the proposal above, "reflect our continued support of affordable housing development, but are responsive to many of the concerns that we have heard from local communities." Exh. O, p. 1; See Exh. T.

amount to retroactive treatment, are without merit. Grandview could have withdrawn its subdivision application and waited the one-year cooling off period before filing its comprehensive permit application. Furthermore, the related application provision was promulgated well before Grandview filed its comprehensive permit application. Indeed, the subdivision application could have been withdrawn following the promulgation of this provision in 2001, and Grandview then could have chosen to file a comprehensive permit application a year thereafter, well before the date on which it did file the application.

We therefore conclude that "disposition" means final disposition after the conclusion of all appeals with respect to a prior application under § 31.07(1)(h)(3). Therefore an active, related application exists for the property in question. A determination that the pending subdivision appeal constitutes an active related application, and that the comprehensive permit application was filed during the protected period, triggers an irrebuttable presumption that the Board's denial of Grandview's application is consistent with local needs under 760 CMR 31.07(1)(h). Such an irrebuttable presumption requires that the Board's denial of the comprehensive permit be upheld.

IV. CONCLUSION

Accordingly, we conclude that the developer's subdivision application constitutes a related application. The Board's denial of the comprehensive permit is therefore deemed consistent with local needs under 760 CMR 31.07(1)(h). The Board's motion for summary decision is granted. We therefore need not reach Grandview's motion for summary decision.

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

Date: July 10, 2006

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer