COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

FARMVIEW AFFORDABLE HOMES, LLC, Appellant	)	
v.	)	No. 02-32
SANDWICH BOARD OF APPEALS, Appellee	)	

RULING ON
MOTION OF MASS. HOUSING FINANCE AGENCY
TO QUASH SUBPOENAS
and
MOTION OF FARMVIEW AFFORDABLE HOMES, LLC
TO EXCLUDE THE TESTIMONY OF RICHARD HEATON

This case involves the denial of a comprehensive permit to build affordable housing proposed under G.L. c. 40B, §§ 20-23 using the Housing Starts Program of the Massachusetts Housing Finance Agency (MassHousing). The Sandwich Board of Appeals has issued subpoenas to compel the testimony of MassHousing officials "relating to MassHousing's consideration of and issuance of ... Project Eligibility" for the proposed development. MassHousing has moved to quash the subpoenas.[1] The developer has moved to exclude the testimony of one of the Board's expert witnesses, Richard Heaton.

1. The developer, in turn, has moved to exclude "evidence, in the form of documents or testimony, concerning the issuance of the ... Project Eligibility letter dated November 28, 2001." I find it unnecessary to rule formally on that motion at this time. A limited amount of evidence concerning

Motion to Quash Subpoenas – Site Suitability and Financial Feasibility

There are two reasons that MassHousing officials might be asked to testify concerning that agency's project eligibility determination. First, their testimony might be probative with regard to the substantive issues before the Committee, that is, whether the site is suitable for housing in relation to the local health and environmental concerns raised by the Board. Second, they might testify in order to permit the Committee to investigate (or the Board to challenge) the nature and quality of MassHousing's project eligibility determination practices. Both of the possible rationales for hearing testimony must be analyzed with reference to the overall statutory and regulatory framework within which "fundability" is determined.

The project eligibility determination is an outgrowth of the requirement in our regulations that in order for a housing proposal to be eligible to apply for a comprehensive permit, it must be fundable. 760 CMR 31.01(1). Fundability is established by a written determination of project eligibility issued by the subsidizing agency. 760 CMR 31.01(2). That determination, issued in this case by MassHousing, must include findings that the proposed project "is generally appropriate for the site," and "appears financially feasible." See 760 CMR 31.01(2)(b)(3), (2)(b)(4), (2)(b)(5).

That context within which those findings are made was described in detail in our 1992 decision in *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 4-11 (Mass. Housing Appeals Committee Jun. 25, 1992. The legal analysis in that case reflected the consistent practice through the first twenty years of the existence of the Comprehensive Permit Law,

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fundability of the development may be admissible. This ruling provides the parameters under which any such evidence which may be offered during future sessions of the hearing will be considered.

and it remains valid today. In the *Westborough* case, we noted that the issues considered in determining project eligibility fall into three categories. First are health, safety, design, environmental, and planning concerns—the statutory "local concerns"—which are at the heart of any comprehensive permit review. Second are legal issues within the subsidy program—primarily matters of housing policy. Third are issues characteristically within the province of the subsidizing agency, such as financing arrangements, profit projections, the developer's qualifications, and marketability. These are "not intended to be reviewed in detail within the comprehensive permit [hearing] process... [since they] clearly are not matters of local concern in the usual sense." *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7 (Mass. Housing Appeals Committee Jun. 25, 1992).

The first rationale for hearing testimony from MassHousing officials is that they could shed light on the question of site suitability. But practically, their testimony is likely to be of little value. The preliminary review of the proposal conducted by the subsidizing agency encompasses a broad range of issues. See 760 CMR 31.01(2). MassHousing officials' expertise is in the area of finance; there is no indication that they have any particular substantive expertise regarding the site suitability issues that are before us. Under the Chapter 40B statutory and regulatory framework, it is the role of the local Board (initially) and then this Committee (on appeal) to review site suitability issues in great detail in public hearings. Our review will be based on the testimony of experts with greater substantive expertise. There is no need to compel the testimony of the MassHousing officials.

With regard to the second rationale, the practical reasons for hearing testimony from MassHousing officials are more compelling since they obviously understand their agency's

procedures for making project eligibility determinations, particularly regarding financing of affordable housing. But under the statutory and regulatory framework, it would not be proper for us to compel their testimony concerning the project eligibility process in general or the specific findings in this case with regard to site suitability, financial feasibility, or other issues.

The fundability requirement in our regulations is very specific. The proposed housing must "be fundable by a subsidizing agency under a low and moderate income housing program," and the written determination of eligibility must "include... the name of the housing program under which the Project Eligibility (Site Approval) is sought...." 760 CMR 31.01(1)(b), (2)(a)(4). The requirement is not simply a general one which is subject to standard procedures for proof of facts during the hearing. Rather, it is a carefully defined jurisdictional requirement, and our regulations prescribe exactly how it is to be proved: "Fundability shall be established by submission of a written determination of Project Eligibility...." 760 CMR 31.01(2). Issuance of such a project eligibility determination creates a rebuttable presumption of fundability. 760 CMR 31.07(1). How the presumption can be rebutted is indicated in general terms: "After issuance of a determination of Project Eligibility (Site Approval), the project shall be considered fundable unless there is sufficient evidence to determine that the project is no longer eligible for a subsidy." 760 CMR 31.01(2)(f). In most cases, such evidence will come in the form of official notification from the subsidizing agency, MassHousing.[2] Finally, our regulations provide that we are not to

2. There is no allegation here that MassHousing has determined that the proposal is no longer eligible and that the purpose of the subpoena is to obtain evidence of that determination which cannot be obtained in any other way.

hear evidence concerning fundability other than evidence "as to the status of the project before the subsidizing agency." 760 CMR 31.07(4)(a).

For these reasons, it is clear that fundability is a technical, administrative matter that is solely within the province of the subsidizing agency. Even if "there is some uncertainty about fundability, the Board or the Committee does not supplant the subsidizing agency and conduct a full review of these issues. ... [T]his approach... prevents the local board from becoming unnecessarily involved in issues which are not among the health, safety, and planning concerns enumerated in the statute, and yet provides additional protection to the local community which is unavailable when non-subsidized housing is being built."[3] *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 8, 9 (Mass. Housing Appeals Committee Jun. 25, 1992); also see *Stoneham Heights Ltd. Partnership v. Stoneham*, No. 87-04, slip at 7, 29, 32 (Mass. Housing Appeals Committee Mar. 20, 1991)(appeal dismissed based on evidence presented voluntarily by the subsidizing agency). While we would certainly consider evidence concerning the current *status* of the development (that is, evidence that the project eligibility determination had expired or had been withdrawn, as was the case in *Stoneham Heights*, above), there is nothing in the statute or regulations that suggests that the Committee is to look behind MassHousing's determination and review MassHousing's procedures or to hear testimony from its officials with regard to how they made their determination of fundability. I therefore quash the subpoenas.

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3. The project eligibility determination is a threshold determination that begins the comprehensive permit approval review process. Since we issued our decision in *CMA, Inc. v. Westborough*, the provisions in our regulations requiring oversight by the subsidizing agency have been strengthened. That is, the requirements for project eligibility determinations in 760 CMR 31.01(2) have been made much more specific, and at the end of the process, prior to construction, the subsidizing agency is now explicitly required to issue "final written approval [of the proposal, which] shall, at a minimum,

Testimony of Richard Heaton – Reasonable Return

Mr. Heaton "is an expert in the review of financial aspects of residential developments... [and] will provide testimony that establishes that the applicant possessed the financial ability to mitigate the impacts highlighted in the Board's underlying decision." Board's Notice of Rebuttal Witnesses (filed Nov. 25, 2003). That is, the Board intends to use this testimony (as it might also use testimony from MassHousing officials) to argue that the developer's profit margin is sufficient so that it can provide additional mitigation[4] of local concerns about aircraft noise in the vicinity of the proposed housing and still realize a reasonable return on its investment.[5]

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address each of the matters enumerated in [the project eligibility determination]." 760 CMR 31.09(3).

4. Mitigation might simply involve better building materials, which would add cost, or might involve a reduction in the number of units built, which would reduce revenue.

5. Factually, the question of whether the developer will realize a reasonable return is nearly identical to the question of whether a project is financially feasible. But the two questions are quite distinct legally, and serve entirely different purposes. Financial feasibility is evaluated by the subsidizing agency as a threshold question when the project eligibility determination is made, whereas the question of whether the developer will recognize a reasonable return is only evaluated later by this Committee if the local Board has imposed conditions and the matter is on appeal.

Further, 760 CMR 31.01(2)(b)(4) and (2)(b)(5) *require* the subsidizing agency to make a finding of financial feasibility. But although 760 CMR 31.06(3)(b) refers to "reasonable return *as defined by the applicable subsidizing agency,*" we do not read § 31.06(3)(b) as *requiring* MassHousing to define reasonable return generally, nor to make case-by-case determinations available to us in our hearings. In fact, it appears that MassHousing has chosen not to prepare a definition of reasonable return. That is of little consequence since under 760 CMR 31.06(3)(b) the case-by-case factual assessment concerning reasonable return is for this Committee to make. While a definition provided by MassHousing might well be useful to us (and we would give deference to it), if it is not available, we are prepared to review competent evidence about generally recognized industry standards in this area. (Similarly, it might be useful to us in making our assessment of reasonable return to have an understanding of the standards used by MassHousing, the Department of Housing and Community Development, or other subsidizing agencies in making the § 31.01(2)(b) financial feasibility findings. Where guidance on issues relating to reasonable return is offered to us by such agencies, we will avail ourselves of it, but we will rely on industry standards where it is not.)

Finally, both these questions—that of financial feasibility and that of reasonable return—because they are related to whether the *developer* will make sufficient profit, are quite different from the

This argument seems to be based on a misunderstanding of our regulations. It is true that if a comprehensive permit has been approved subject to conditions, the developer has the burden of proving that the conditions make the proposal "uneconomic," that is, that the developer will not be able to realize a "reasonable return." 760 CMR 31.06(3), 3(b). But once the developer has proven that or, as is the case here, if the permit was denied, then the burden shifts to the Board to prove that there are valid local environmental or other concerns and that they outweigh the need for housing. See generally, 760 CMR 31.06. Finally, even if such concerns are proven, the developer may still prove that it has proposed corrective measures that will mitigate the concern. 760 CMR 31.06(9).

But mitigation and reasonable return are not related. The question before us is not whether the developer could do more to mitigate the impact of noise, but rather, whether it has done enough. If what the developer proposes is sufficient to alleviate local concerns (as defined in the statute and our regulations), we will not require more. On the other hand, if the proposed mitigation does not address the concerns sufficiently, we will either uphold the Board's denial of the permit or, pursuant to 760 CMR 31.08(2)(g), impose our own conditions requiring further mitigation. If we do the latter, we will do so because we have found that conditions are necessary to protect the public health or safety or the environment, and we will do so without regard to their cost or whether the developer will still realize a reasonable return.

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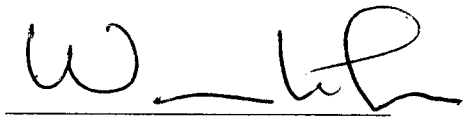
issue of "financeability," which is the question of whether the *lender's* investment is protected sufficiently to justify a loan. For instance, it is easy to imagine a scenario in which a proposal is not financially feasible because the developer has invested so much equity in the proposal that its profit is far too low to justify the risk involved, and yet a small loan by MassHousing would be very secure, making the proposal financeable.

I will therefore exclude evidence from Mr. Heaton intended to establish that the developer has the financial ability to mitigate negative impacts of the proposed housing.

Housing Appeals Committee



Date: May 21, 2004

Werner Lohe, Chairman
Presiding Officer

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