COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

ALEXANDER ESTATES, LLC, Appellant	)	
v.	)	No. 05-14
BILLERICA BOARD OF APPEALS, Appellee	)	

RULING ON MOTION TO DISMISS

I. PROCEDURAL HISTORY

In May 2004, Alexander Estates, LLC, submitted an application to the Billerica Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build twenty-two condominium units of mixed-income affordable housing on a three-acre parcel of land on Alexander Road in Billerica. During the hearing process, the developer modified its proposal to sixteen housing units. On June 1, 2005, after public hearings, the Board voted to grant a comprehensive permit for twelve units. From this decision the developer appealed to the Housing Appeals Committee.

On September 28, 2005, the Board filed a motion to dismiss the appeal asserting that the town had achieved sufficient "planned production" of affordable housing so as to render the Board's decision consistent with local needs as a matter of law pursuant to 760 CMR

30.07(1)(i). The Board submitted documentation and a memorandum in support of its motion, and the developer filed an opposition with its own supporting documentation.

II. INTRODUCTION

The purpose of section 31.07(1)(i) of our regulations, the "planned production regulation," is to offer towns a temporary safe harbor from unwanted comprehensive permit developments as an incentive for them to plan for and construct affordable housing.[1] Any comprehensive permit decision of the town's board of appeals is deemed consistent with local needs as a matter of law, and will be upheld if the town has adopted an affordable housing plan that meets specific requirements and has been approved by DHCD, and if, within a calendar year, it has increased the number of affordable housing units in the community by at least 0.75% of the town's total housing stock. 760 CMR 31.07(1)(i). The specific requirements with which the plan must comply appear in sections 31.07(1)(i)(1) through 31.07(1)(i)(3). Procedures for approval of the plan appear in section 31.07(1)(i)(4). Sections 31.07(1)(i)(5) through31.07(1)(i)(7) describe the standards and procedures for certification of the necessary annual housing production under the plan.

III. JURISDICITON

The Board first argues that the town's receipt of certification under the regulation deprives us of jurisdiction to hear this appeal. Motion to Dismiss, p. 3. It argues that section 23 of the Comprehensive Permit Law defines our jurisdiction narrowly, but we interpret the statute differently. The statute directs us, in cases where the Board has granted a permit, to

1. This section became effective in 2002. 760 CMR 31.10.

consider whether conditions imposed "make construction or operation of the housing uneconomic and whether they are *consistent with local needs*." G.L. c. 40B, § 23 (emphasis added). It goes on to provide, "Decisions… by a board of appeals that are consistent with local needs shall not be vacated…." The planned production regulation states, "A decision by the Board to… grant a permit with conditions shall be consistent with local needs if the municipality [has met the planned production requirements]." 760 CMR 31.07(1)(i) Clearly, the question of whether the planned production requirements have been met must be decided in some forum, and we believe that the statute establishes our jurisdiction to do so.

Substantively, the Board's claim is more in the nature of an affirmative defense than it is a challenge to our jurisdiction, and it is properly raised by motion to dismiss pursuant to 760 CMR 30.07(2)(c). There are no factual matters in dispute, and therefore we are able to decide the motion based upon the pleadings and documentation filed by the parties.

IV. FACTS

1. Billerica adopted an Affordable Housing Productivity Plan in November 2004. Developer's Exh. D, ¶ 21 (p. 4).

2. A comprehensive permit for a housing development unrelated to Alexander Estates, that is, the development known as Villas at Old-Concord, Phase II (Villas II), was approved and filed with the Billerica town clerk on March 17, 2005. Developer's Exh. D, 2nd page (p. "1").

3. By letter of March 31, 2005, the Department of Housing and Community Development (DHCD) approved the town of Billerica's Affordable housing Productivity Plan, making it effective for purposes of the planned production regulations on March 24,

2005. Board's Exh. 1.

4. By letter of May 12, 2005, DHCD certified that Billerica was in compliance with its plan, "effective for a one-year period beginning on April 29, 2005 and ending April 28, 2006." Board's Exh. 2.

5. On June 1, 2005, the Board voted the decision in this case, granting a comprehensive permit to the developer for twelve housing units. Initial Pleading, ¶ 11 (filed Jul. 15, 2005)

V. DISCUSSION

A. Section 31.07(1)(i) is a valid exercise of regulatory power to refine a central concept in the Comprehensive Permit Law.

In response to the motion to dismiss, the developer argues that there is no statutory basis for the planned production regulation.

The Housing Appeals Committee is an independent body located by the legislature within DHCD to oversee the comprehensive permit process. G.L. c. 23B, § 5A. Its regulations are formally promulgated by DHCD, which has both broad powers to "...advance the programs of open and adequate housing for all citizens of the commonwealth" and the specific obligation of promulgating the regulations under which the Committee conducts its hearings. G.L. c. 23B, §§ 3, 5A.

Though it appears in the definition section of Chapter 40B, "consistent with local needs" is less a single term than it is a concept—a flexible concept that is central to the purpose and operation of the Comprehensive Permit Law. See G.L. c. 40B, § 20. The statute provides that "requirements and regulations shall be considered consistent with local needs if

they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect… health and safety…, to promote better site and building design …, or to preserve open spaces…." Further, the statute provides that local decisions shall be upheld as a matter of law in certain circumstances. Specifically, "[r]equirements or regulations shall be consistent with local needs when imposed by a board…" under three quite dissimilar circumstances: first, if the town's affordable housing exceeds 10% of its total housing stock; second, if the town's affordable housing accounts for 1.5% of the town's total land area; or third, if the proposed housing will result in commencement of construction on more than 0.3% of the town's total land area in a calendar year. G.L. c. 40B, § 20. The statute does not say that that the requirements imposed shall be consistent with local needs *only* under these three circumstances. In its elaborate drafting, the legislature recognized that the determination of consistency with local needs is necessarily a complex mix of fact and policy. In general, the interpretation of a statute by the agency with charged with the primarily responsibility of administering it is entitled to substantial deference, and, further, the courts have approved of regulations that, while technically enlarging the meaning of a statute, are consistent with its intent. See *City Council of Agawam v. Energy Facilities Siting Board*, 437 Mass. 821, 828, 776 N.E.2d 1002, 1007 (2002) and cases cited. Here, in a manner consistent with the purpose of the statutory scheme, the regulation promulgated by DHCD elaborates upon the idea that towns are to be held harmless when affordable housing is produced (that is, the permanent safe harbor that is granted when the 10% or 1.5% standards are met and more limited protection from annual production on large tracts of land—the 0.3% standard). Invoking similar policy considerations, section 31.07(1)(i)

provides a temporary safe harbor based upon annual affordable housing production. It is a legitimate exercise of DHCD's regulatory power to advance a program for open and adequate housing by employing sophisticated policy considerations in refining and interpreting the concept of consistency with local needs, and it is consistent with the purpose and intent of the Comprehensive Permit Law.

B. Billerica has complied with the planned production requirements.

1. The Committee's review of an irrebuttable presumption is limited.

Under our regulations, the planned production presumption is "irrebuttable." 760 CMR 31.07(1). The presumption created by section 31.07(1)(i) is as follows: The decision of the Board is presumed to be consistent with local needs and must be upheld if the town has adopted an affordable housing plan, if that plan has been approved by DHCD, and if DHCD has certified production of housing under the plan. The meaning of the word "irrebuttable" in this context is clear. If the planned production has been achieved under an approved plan, the developer is not permitted to present evidence that the decision of the Board is nevertheless inconsistent with local needs.

Beyond this, however, is the question of to what extent the developer may challenge the certification made by DHCD. Certainly, it must be permitted to challenge the authenticity of the certification, that is, to present evidence that no certification was in fact made by DHCD. This has not been alleged in the case at hand.

Further, we believe that it is entitled to challenge the legality of the certification. We will review an allegation that the determination made by DHCD does not comply with the standards or procedures in the regulation. (The developer makes such a challenge, which we address in Section V-B(2), below.)

Finally, is the question of whether the developer can challenge the factual basis underlying the approval of the housing plan and the certification of planned production. (We briefly address such challenge in section V-B(3), below.) We see nothing in the regulation that indicates an intent to permit such a challenge. Rather, for two reasons, we believe that the intent of the regulations is that the determination made by DHCD should be conclusive. First, if review by this Committee had been intended, the regulation would only have spelled out the standards and requirements for housing plans and certification of planned production, and then, naturally, any disagreement as to whether the standards had been complied with would have been resolved in litigation before the Committee. But instead, the regulation also provides a comprehensive process for approval and certification. Second, the regulation could have specifically provided for an appeal to the Committee. This was the approach taken with the Housing Unit Minimum in 760 CMR 31.04(1)(a). Since neither of these two approaches was taken in promulgating the regulation, we believe that the intent was that the determination made by DHCD be factually conclusive, and we will not consider arguments raised by the developer concerning possible flaws.[2]

2. DHCD's inclusion of Villas II within Billerica's planned production in making its certification is not in violation of the regulation.

The developer argues that under the terms of the planned production regulation itself, DCHD should not have included the Villas at Old-Concord, Phase II (Villas II) as housing production counting toward the 0.75 percent threshold. Specifically, the comprehensive permit approving that housing development was filed with the town clerk on March 17, 2005,

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2. Presumably, DHCD itself could permit the developer or members of the public to challenge its determination informally, but there is no evidence of such a practice.

that is, before the March 24, 2005 date on which the town's housing plan was approved, and therefore, the developer argues, the housing was not approved *pursuant to* the plan.

Two sections of the regulation imply that there should be a cause-and-effect relationship between the town's plan and housing production. First, the principal, introductory portion of the regulation states that the Board's decision should be upheld if the town has "adopted an affordable housing plan approved by [DHCD] *pursuant to* which there is an increase" in housing. 760 CMR 31.07(1)(i)(emphasis added). Second, a later subsection provides that "[a]n approved plan shall take effect... only when the Department certifies that the municipality has approved permits resulting in an initial annual increase in its low or moderate income housing units of ¾ of 1% of total housing units *in accordance with* its plan." 760 CMR 31.07(1)(i)(6)(emphasis added).

Clearly, the regulation anticipates that there should be some relationship between the plan and the housing actually produced. As noted above, however, planning is inherently imprecise. The town may plan for housing in one location within a general time period, but the plans may never come to fruition. Conversely, a landowner or developer may propose and build affordable housing in a location or at a time that was not anticipated. We believe that what the regulation requires of DHCD in the certification process is only a determination that the town is implementing its plan in a broad sense, and that a specific number of units has been produced. DHCD must have considerable latitude in determining whether the town is in compliance; each housing unit produced need not be individually anticipated in the plan.

With regard to Villas II, the town was clearly aware of the proposal and included it in its planning when the plan was adopted in November 2004, and the fact that it was permitted quickly, a week before DHCD approved the plan, should not invalidate the entire planning

and certification process.

3. We will not disturb the approval of the Billerica Affordable Housing Productivity Plan by DHCD.

The Developer argues that the town's Affordable Housing Productivity Plan should not have been approved since it incorrectly described three of five pending comprehensive permit projects that the town hoped would be built in the first year of the plan. Developer's Brief pp. 5-6. Specifically, it points out correctly that the McKenna Woods development is listed in the plan as containing 30 total units even though it was approved at only 20 units two months before the town adopted the plan in November 2000. Developer's Exh. A, p. 33; Developer's Exh. C, p. 5. In addition, the Princeton at Boston Road development appears in the plan as providing 156 total units, but during the month after the plan was adopted and three months before final submittal to and approval by DHCD, the comprehensive permit was denied. Developer's Exh. A, p. 33; Developer's Exh. B, p. 4. Finally, the developer argues, Alexander Estates, the development involved in the instant appeal, is listed in the plan as 22 units, though only 12 were ultimately approved. Developer's Exh. A, p. 33. It should also be noted that Villas II was described in the plan as 140 units, though 144 units were approved. Developer's Exh. A, p. 33; Developer's Exh. D, p. 5.

By definition, there is some imprecision in planning, and upon review of the entire Affordable Housing Productivity Plan, it is not apparent that the flaws pointed out by the developer are of great significance. See Developer's Exh. A. In any case, as discussed in section V-B(1), above, factual determinations by DHCD regarding the approval of the plan are conclusive, and we will not disturb DHCD's decision to approve the plan.

4. The planned production regulation applies to the case at hand.

Finally, the developer argues that at the time it applied to the Board for a comprehensive permit, the town's plan was neither approved nor certified, and that therefore application of this regulation to the developer violates the general rule against retroactive application of regulations. Developer's Brief, pp. 7-9. Our regulations specifically provide that the planned production regulation "shall apply to all applications for comprehensive permits filed after September 27, 2002." 760 CMR 31.10. The application in this case was filed in 2004. Thus, the regulation is applicable.

Further, for reasons discussed in great detail in our *Caseletto Estates, LLC v. Georgetown* decision, the date used in determining whether a particular decision of the Board is consistent with local needs is the date that decision is finalized. *Caseletto Estates, LLC v. Georgetown*, No.01-12, slip op. at 21 (Mass. Housing Appeals Committee May 19, 2003). Thus, whether the Board's decision in this case is consistent with local needs is not to be determined when the developer applied for the comprehensive permit in 2004, but rather, when the Board rendered its decision in 2005.[3]

VI. CONCLUSION

Since the Town of Billerica had been certified by DHCD on May 12, 2005 as being in compliance with an approved affordable housing production plan, we conclude that as a matter of law the June 2005 decision of the Board granting a comprehensive permit is consistent with local needs and must be upheld.[4] The Board's motion to dismiss is granted.

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3. We do not address the question of whether the developer might have any residual rights under this appeal if the town falls out of compliance and loses its certification. Under those circumstances, the developer could, as an alternative, reapply for a comprehensive permit for the larger number of units.

4. Arguably, the presiding officer has the power to rule alone on matters concerning the planned production regulation. See 760 CMR 30.09(5)(b). Nevertheless, he has exercised his discretion to present the matter to the full Committee.

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: March 27, 2006

Werner Lohe, Chairman

Joseph P. Henefield

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Christine Snow Samuelson

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