

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Building Code Appeals Board  
Docket No. 05-413

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Daniel Gattineri, Waterfront Properties, LLC,	)
Appellant	)
	)
v.	)
	)
City of Gloucester,	)
Appellee	)
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**BOARD’S RULING ON APPEAL**

**Procedural History**

This matter came before the Building Code Appeals Board (“Board”) on the Appellant’s appeal filed pursuant to 780 CMR §122.1. In accordance with 780 CMR §122.3, Appellant asks the Board, under 780 CMR §111.2 to order Appellee to issue a Certificate of Occupancy for the property known as 15 Western Avenue, Unit #2, Gloucester, MA (“Unit 2”).

Appellee has refused to issue a Certificate of Occupancy, because Appellee has concluded that Unit 2 does not comply with the City of Gloucester’s Zoning Ordinance.

In accordance with G. L. c. 30A, §§10 and 11; G. L. c. 143, §100; 801 CMR §1.02 et. seq.; and 780 CMR §122.3.4, the Board convened a public hearing on June 26, 2007 where all interested parties were provided with an opportunity to testify and present evidence to the Board.

Appellant was present at the hearing. Ann-Margaret Ferrante was present as attorney for Appellant. Philip Hagopian was present as a consultant to Appellant. Dan DiLullo was present as the architect for Appellant. Gary Raso, builder for Appellant, was present. Present and representing the City of Gloucester was William Sanborn, Inspector of Buildings. Paul S. Wakem, former State Building Inspector of the District was present in support of Appellant.

**Discussion and Facts**

The issue is whether the City is required to issue a certificate of occupancy for Unit 2 when Unit 2’s construction has been completed, there are no Code violations, City officials had approved the building permits for the construction, and the only question is whether the Unit complies with the City’s Zoning Ordinance. Section 106.1 of 780 CMR provides:

The inspector of buildings and local inspector (herein after building official) shall enforce all of the provisions of 780 CMR, 521 CMR (Architectural Access Board) and any other state statutes, rules and regulations, or ordinances or bylaws which empower the building official. The building official shall act on any question relative to the mode or manner of construction and materials to be used in the construction, reconstruction, alteration, repair, demolition, removal, installation of equipment and the location, use, *occupancy* and maintenance of all *buildings* and *structures* except as otherwise specifically provided for by statutory requirements or as provided for in 780 CMR 109.0.

Further, Section 111.2 provides:

In accordance with the provisions of M.G.L. c. 40A or St. 1956, c. 665 as amended, no permit for the construction, alteration, change of use or moving of any *building* or *structure* shall be issued if such *building* or *structure* or use would be in violation of any zoning ordinance or by-law. (emphasis in original).

Based upon the testimony and the documentation reviewed, the Board concluded that Appellant had received approval from the City's acting Building Inspector, William Normand, to make certain changes to the building permit issued for a condominium project. The project, the renovation of an existing single structure to create a three-unit condominium ("Project"), previously had received a special permit, under the City's Zoning Ordinance, and a building permit.

The specific changes were to Unit 2. The changes involved enclosing a porch in order to create a bedroom as part of Unit 2. The Board found that the Appellant had sought, received, and relied upon the approval of Mr. Normand in order to complete those Unit 2 changes. Mr. Normand had concluded that the changes were not substantial or material and that they complied with variances and special permits granted by the City's Zoning Board of Appeals and the City Council.

Sometime after Mr. Normand had approved the changes, the City's Building Inspector, Mr. Sanborn, concluded that Appellant should have sought, and obtained, further relief from the Zoning Board of Appeals to make the changes to Unit 2. Specifically, Mr. Sanborn concluded that a special permit was required because the changes represented a substantial change to a non-conforming structure, which would require a special permit from the Zoning Board of Appeals. Mr. Sanborn concluded that Mr. Normand made a mistake in approving the changes to Unit 2.

The construction of Unit 2 was completed. Mr. Sanborn testified that there are no Code violations in Unit 2. The testimony in this regard concurred that the only issue was whether Unit 2 complied with the City's Zoning Ordinance. Mr. Sanborn stated that if he believed that there were no issues under City Zoning, he would issue the Certificate of Occupancy for Unit 2. Mr. Sanborn also testified that Certificates of Occupancy had been issued for the two other units in the Project.

**Decision**

Following testimony, and based upon relevant information provided, the Chair entertained a motion to order the Building Commissioner to issue a Certificate of Occupancy for Unit 2, based on the Building Commissioner's failure to act pursuant to §106.1 ("Motion"). If a municipal official, with proper authority, concludes under §111.2 that there is no violation of a zoning ordinance, he must act, pursuant to §106.1 on an occupancy issue. In its discussion of the Motion, the Board emphasized that Project's owner had relied and acted, in good faith, based on the determinations of a duly appointed building official, on numerous occasions, including the official's conclusion that Unit 2 complied with the City's Zoning Ordinance.

As indicated below, two Board members voted in favor of the Motion; one member, Mr. Hoyle, opposed the Motion. Mr. Hoyle commented that he was not opposed to the project but opposed the Motion because he believed that the Board may not determine a zoning issue. The Board voted as indicated below.

..... **Granted**                      ..... Denied                      ..... Rendered Interpretation

\_\_\_.....Granted with conditions                      ..... Dismissed

The vote was:

\_\_\_.....Unanimous                      **X.....**  **Majority**

**The following members voted in the above manner:**

[NO] Keith Hoyle                      Harry Smith                      Sandy Macleod  
Keith Hoyle                      Harry Smith-Chair                      Sandy Macleod

Any person aggrieved by a decision of the State Building Code Appeals Board may appeal to a court of competent jurisdiction in accordance with Chapter 30A, Section 14 of the Massachusetts General Laws.

A complete administrative record is on file at the office of the Board of Building Regulations and Standards.

A true copy attest, dated: October 24, 2007

Patricia Barry  
Patricia Barry, Clerk

All hearings are audio recorded. The digital recording (which is on file at the office of the Board of Building Regulations and Standards) serves as the official record of the hearing. Copies of the recording are available from the Board for a fee of \$10.00 per copy. Please make requests for copies in writing and attach a check made payable to the Commonwealth of Massachusetts for the appropriate fee. Requests may be addressed to:

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State Building Code Appeals Board  
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