

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

SALAMONE,

Appellant

v.

READING ZONING BOARD OF APPEALS,

Appellee

No. 10-09

RULING ON MOTION FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

In a decision filed with the town clerk on August 13, 2001, the Reading Zoning Board of Appeals granted Angelo Salamone's application for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build ten affordable, mixed-income housing units on land at 45 Beacon Street in Reading. Undisputed Fact No. 1; Exh. D.¹ The housing would be financed under the Federal Home Loan Bank of Boston's New England Fund. Exh. D, p. 2, ¶ 4. Abutters appealed the issuance of that permit to the Superior Court. Undisputed Fact No. 2. The appeal was finally resolved when the Appeals Court issued a rescript opinion, which apparently took place on April 25, 2007. Board's Motion to Dismiss, p. 2; also see Exh. A. The Superior Court issued a Judgment after Rescript, which was dated August 9, 2007 and entered on the Superior Court Docket on August 13, 2007. Exh. A.

1. "Undisputed Facts" refer to Appellee's Statement of Undisputed Facts and Memorandum of Law... (filed Jun. 8, 2011); "Exh." refers to Exhibits attached Appellee's Statement of Undisputed Facts and Memorandum of Law... (filed Jun. 8, 2011). The Appellant developer has accepted the Appellee Board's Statement of Undisputed Facts. Appellant's Brief, p. 1.

On April 23, 2010, the developer applied to the town building commissioner for a building permit. Exh. B. On May 20, 2010, the building commissioner denied that application. Exh. C. The developer appealed the denial to the Board on June 1, 2010. Exh. F. By decision dated September 16, 2011 and filed the town clerk on September 28, 2010, the Board denied the appeal, and upheld the building commissioner's denial of a building permit. Initial Pleading, Exhibit A (filed Oct. 18, 2010).

On October 18, 2010, the developer appealed to this Committee. The Board filed a motion to dismiss on the grounds that the Committee's jurisdiction had been improperly pleaded, and that motion was denied by the presiding officer on April 14, 2011. Thereafter, the parties filed cross-motions for summary decision pursuant to 760 CMR 56.06(5)(d).

II. DISCUSSION

Initially, the dispute between the parties centered on the building commissioner's "decision that the comprehensive permit [had] expired." Exh. C. Our regulations state that construction must begin within three years of the date on which the permit becomes final, except for good cause. 760 CMR 56.05(12)(c). They state further, however, that "[t]his time period shall be tolled for the time required to pursue or await the determination on any appeal...." *Id.* In this case, Judgment after Rescript was dated and entered on the Superior Court Docket in August 2007. Exh. A. Thus, because of tolling, the three-year period extended until August 2010. The developer filed his application for a building permit well within that period—in April 2010—and therefore the building commissioner's decision in May 2010 that the comprehensive permit had expired was in error. In fact, the Board now "concedes that the commissioner initially erred in determining the date upon which the comprehensive permit became final." Board's Brief, p. 5 (filed Jun. 8, 2011).

The Board goes on, however, to argue that the denial of the building permit was proper because it stated additional reasons, namely that the application was not accompanied by the requisite fee, adequate construction plans, and proof of compliance with certain of the conditions included in the original comprehensive permit. There is not absolute clarity about what was submitted with the application, about what level of detail is customarily expected in Reading with regard to routine requirements, or about whether certain requirements specific to this comprehensive permit were complied with.

Nevertheless, it is undisputed that the application was not complete. Specifically, the developer has accepted Condition 19, which requires that a condominium master deed be submitted for approval prior to issuance of the building permit. The developer has also accepted the Board's statement of undisputed facts, which state that such a deed was not submitted. Undisputed Fact No. 10. This failure to submit the master deed is, alone, sufficient to support the building commissioner's denial of the building permit.² Thus, with regard to denial of the building permit, the Board's Motion for Summary decision is GRANTED.

This does not end the matter, however. The developer has requested a ruling that the comprehensive permit remains valid. In that regard, it is also clear from undisputed facts that the application was submitted four months before the deadline set in the comprehensive permit for commencement of construction. The necessary documentation to complete the application might well have been submitted and the full fee paid in that time. And even if they had not been, the developer had the right to ask that the permit be extended, and such an extension "may not be unreasonably denied...." 760 CMR 56.05(12)(c).

Since the Board has conceded, above, that the building commissioner erred in calculating the expiration date of the permit, it is clear that the comprehensive permit was valid at the time of application. Expiration of the permit is tolled while the developer appealed that denial to the Board and then this Committee. See, e.g., *Forestview Estates Assoc., Inc. v. Douglas*, No. 05-23 (Mass. Housing Appeals Committee Mar. 5, 2007). Thus, the permit remains valid at present. The parties agree that the tolling period should be calculated from June 1, 2010. Developer's Brief, p. 2 (filed Jun. 14, 2011); Board's Brief, p. 7. The permit would have expired August 10, 2010, and thus, the permit will expire slightly over two months after the tolling period ends, that is, after this decision becomes final.³ The developer's motion for summary decision with regard to the validity

2. Other facts are less clear cut. The developer acknowledges, for instance that an application fee was not paid, but argues that the fee was tendered, but rejected by the building commissioner; the Board appears to dispute this. Similarly, whether detailed plans, stamped by a structural engineer, for a retaining wall (required by comprehensive permit condition 6) were provided appears to be in dispute.

3. Having issued this decision affirming the validity of a comprehensive permit, we expect that the parties will take the appropriate actions necessary to proceed to construction. If, however, further

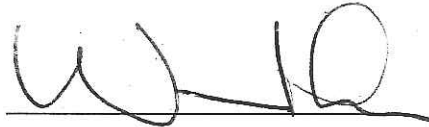
of the comprehensive permit is GRANTED, and, specifically, we rule that if this decision is not appealed, the permit is valid until October 18, 2011.

As a practical matter, however, it may well be that the developer will be unable to submit a completed application and begin construction by October. If that is the case, and if he files a request for an extension of the permit prior to the expiration date, we would expect that such an extension would be granted. See 760 CMR 56.05(12)(c). An extension for a minimum of one year would not appear at all unreasonable. See, e.g., *Red Gate Road Realty Trust v. Tyngsborough*, No. 93-01 (Mass. Housing Appeals Committee Dec. 8, 1993).

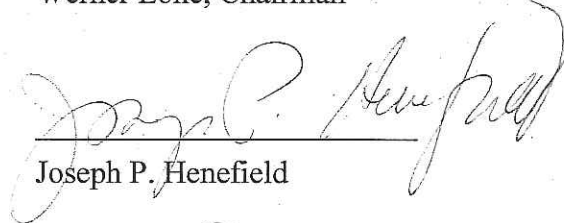
This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: August 8, 2011



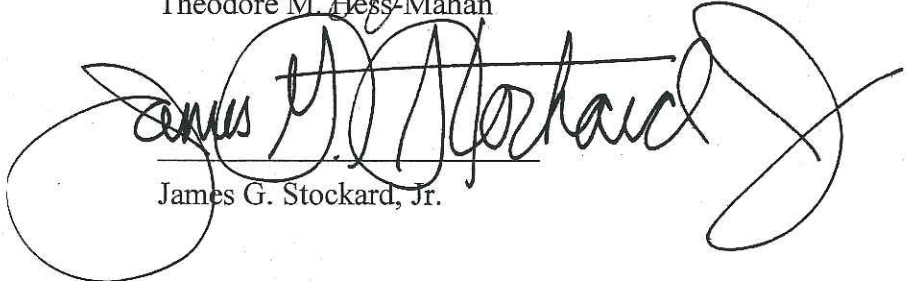
Werner Lohe, Chairman



Joseph P. Henefield



Theodore M. Hess-Mahan



James G. Stockard, Jr.

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disputes develop, we hereby authorize the presiding officer to act to enforce this decision and ensure prompt issuance of a building permit. See 760 CMR 56.06(7)(e)(2).