COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

BRADFORD HOLING, LLC, Appellant	)	
v.	)	No. 14-06
HAVERHILL ZONING BOARD OF APPEALS, Appellee	)	

RULING ON MOTION FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

In 2005, the Haverhill Board of Appeals granted a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to Bradford Holdings, LLC to build housing in a residential condominium known as Ridgecrest on a 113-acre site off of Willow Street and Presidential Drive in Haverhill; the development would consist of 360 housing units, of which 90 would be affordable. Exh. 1.[1] On May 21, 2008, at the developer's request, the Board extended the comprehensive permit for slightly more than one year—until June 17 or June 25, 2009. Board's Brief, p. 2, ¶ 5; Developer's Brief, p. 1, ¶ 2; see Exh. 2. By letter of May 4, 2009, the developer requested an additional three-year extension, which

1. The parties submitted documents, including a number of duplicates, with their pleadings. For clarity, the exhibits will be referred to as follows:
Affidavit - November 25, 2011 Affidavit of Board Chairman George Moriarty
Exh. SD-1 - Findings and Decision of Board, June 15, 2005, filed with City Clerk June 17, 2005
Exh. SD-2 - Letter from L.P. Minicucci, Jr. to M. McGuire, May 4, 2009
Exh. SD-3 - Letter from L.P. Minicucci, Jr. to G. Moriarty, April 22, 2011, with Brief
Exh. SD-4-A - Determination, dated May 4, 2011, filed with City Clerk May 5, 2011
Exh. SD-4-B - Letter from R. Kiley to V. Manzi, June 10, 2011
Exh. SD-5 - Extension Agreements
Exh. SD-6 - Notice of Decision, dated May 21, 2014, filed with City Clerk May 29, 2014
Exh. SD-6-1 - Findings and Decision, filed with City Clerk May 29, 2014
Exh. SD-6-A - Appendix A (see Exh. 3, above)
Exh. SD-6-B - Appendix B (Notice of Decision, dated May 15, 2013)

was also granted, extending the expiration date until June 17, 2012. Exh. 2; Board's Brief, p. 2, ¶ 6; Developer's Brief, p. 1, ¶ 3.

More than a year before the permit was due to expire, that is, on April 22, 2011, the developer requested, pursuant to 760 CMR 56.05(11), that the Board modify the comprehensive permit to permit rental, rather than ownership housing units.[2] The request included other changes: a doubling of the number of three-bedroom units in the development, design modifications to comply with an order of conditions issued by the Haverhill Conservation Commission, changes in water system improvements, and elimination of a financial contribution by the developer that was included by condition in the original permit. Board's Brief, p. 3, ¶ 7; Developer's Brief, p. 2, ¶ 5. That request did not contain any request to extend the expiration date of the permit.

On May 4, 2011, the Board determined pursuant to the § 56.05(11)(a) of our regulations that the requested changes constituted a substantial change, and opened a public hearing on that issue on May 2018. Exh. 4-A. The hearing was continued from time to time at the request of one party or the other, and over the course of nearly two years the developer and town officials explored the possibility of reducing the size of the condominium and developing a large solar energy system on a portion of the site. Board's Brief, pp. 3-4, ¶¶ 10, 11; Developer's Brief, p. 2, ¶ 9. For reasons that do not appear in the record, the public hearing was finally closed on May 21, 2014, at which point the Board voted to deny the modifications. Exh. 6.

On June 18, 2014, the developer appealed the Board's decision. The Committee opened its hearing with a conference of counsel pursuant to 760 CMR 56.06(7)(d)(1), and on November 26, 2014 the Board filed a Motion for Summary Decision pursuant to 760 CMR 56.06(5)(d). The developer filed its opposition on December 12, and the Board declined to file a reply.

II. DISCUSSION

The Board has moved for summary decision and requests that "judgment" be entered on its behalf, though the exact relief that it is seeking is unclear. See Board's

2. The request included reducing the percentage of affordable units from 25% to 20%, which was presumably permitted under the subsidy program guidelines.

Brief, pp. 1, 5, 10. Presumably, it seeks to have the Committee uphold its decision issued May 29, 2014 to "deny the Applicant's substantial and insubstantial changes to the 2005 Comprehensive Permit...." Exh. 6, p. 4 ("Record of Vote"). What it rests is argument on is its contention that the comprehensive permit expired on June 17, 2012, since the developer failed to request a further extension. See, e.g., Board's Brief, pp. 7, 10.

The developer argues that the time for exercising its rights under the comprehensive permit was tolled while the request for modification was pending before the Board, and requests that this Committee either remand the matter to permit the Board "to complete the hearing process on the proposed modification," or overturn the decision and order issuance of the permit with the requested modifications.

Comprehensive permits normally expire three years after issuance, but may be extended. 760 CMR 56.05(12)(c). In this case, the developer initially made timely requests for extensions, which were granted by the Board. The question before us is whether further requests and extensions were required when the developer requested modification of the permit and the Board opened a hearing on the that request.

The Board relies primarily on the Committee's ruling in *Forestview Estates Assoc., Inc. v. Douglas*, No. 05-23 (Mass. Housing Appeals Committee Ruling Mar. 5, 2007).[3] In that case, the Douglas board granted a permit in August 2002. The developer submitted further, preliminary comprehensive permit plans to town officials early in 2003. A few months later, state review under the Natural Heritage and Endangered Species Program (NHESP) began, and negotiations under that program continued into 2005. The developer also made a partial filing under the state Wetlands Protection Act in 2005. Meanwhile, On January 17, 2005, the developer had filed a request to the board to modify its plans. Slightly less than four months after that, the board approved those changes as insubstantial. This Committee ultimately ruled that the comprehensive permit then expired at the three-year mark, in August 2005, and that a request in September to extend it was untimely, and could be denied by the board on that basis. The Committee noted that "tolling is generally applied when litigation or an appeal prevents the holder of

3. Our decisions in *LeBlanc v. Amesbury*, No. 06-08 (Mass. Housing Appeals Committee Ruling Jan. 14, 2013), *Medfield North Meadows, LLC v. Medfield*, No. 12-01 (Mass Housing Appeals Committee Summary Decision Sep. 10, 2012), and other cases involve factual circumstances that make them less relevant.

a permit from exercising its rights," and then, based upon the specific facts of the case, ruled that "where construction has been delayed not by an appeal or other litigation, but rather by the need to obtain other state-agency approvals... the running of the expiration period is not tolled." *Forestview Estates Assoc., Inc. v. Douglas, supra*, slip op. at 7-8.

Arguably, *Douglas* is not controlling in the present case simply because the facts are so different.[4] But more significant is that the law has changed. When *Douglas* was decided in 2007, our regulations contained no tolling provision. 760 CMR 31.08(4).[5] When DHCD revised the regulations in 2008, this sentence was added, overturning our ruling in *Douglas*: "This time period shall be tolled for the time required to pursue or await the determination on any appeal on any other state or federal permit ore approval required for the Project." 760 CMR 56.05(12)(c). These revisions did not address whether tolling applies while the Board is considering a project change, but the policy implied is clear. As noted above, tolling has traditionally been applied to circumstances largely beyond the developer's control such as litigation or appeals. In changing the regulatory provision, the policy was broadened to include non-adversarial, administrative permitting processes, where the developer has somewhat greater, though admittedly not complete control. The hearing before the Board on a project modification falls somewhere between these two situations, and the regulatory intent is clearly that tolling should apply in this case.

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4. For instance, estoppel principles might apply. The Board not only repeatedly continued an open hearing and considered the modification request after the date on which it *now* argues the permit lapsed, but in addition both it and the developer appear to have agreed that the relevant deadline was a deadline that applied to *the Board's* issuance of a decision—that is, the 180-day limit in 760 CMR 56.05(3) for issuance of its decision required multiple extensions. See Exh. 5.

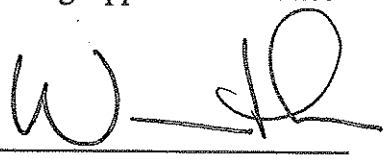
5. Section 31.08(4) provided:

> Lapse of Permits. If construction authorized by a comprehensive permit has not begun within three years of the date on which the permit becomes final, the permit shall lapse. The permit shall become final on the date that the written decision of the Board is filed in the office of the city or town clerk if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of. The Board or the Committee may set an earlier or later expiration date and may extend any expiration date. An extension may not be unreasonably denied nor denied due to other projects built or approved in the interim.

III. CONCLUSION

The Board's Motion for Summary Decision is hereby DENIED. This case is remanded to the Board for further proceedings with regard to the requested changes pursuant to 760 CMR 56.05(11)(c).[6] The Board shall issue its decision on or before March 16, 2015.[7] This Committee retains jurisdiction over this matter, and, if necessary, either when the Board issues its decision, or should it fail to do so timely, the appeal may be renewed upon motion of either party.

Housing Appeals Committee



Date: February 2, 2015

Werner Lohe
Presiding Officer

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6. On remand, the parties are cautioned to review the process for this reconsideration carefully. In the earlier proceedings, on the one hand the developer—perhaps anticipating denial of the requested modifications—unnecessarily complicated matters by prematurely filing an argument concerning the projected economics of the development. But on the other hand, the Board in its decision misstates the law with regard to how modifications are to be handled. See Exh. 6, p. 2, ¶ 6. The case cited by the Board in its decision, *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at. 13 (Mass. Housing Appeals Committee Sep. 18, 2007), holds that *in the context of an appeal before this Committee*, if the developer's proposal is already uneconomic, the developer's burden is not just to prove that the proposal is uneconomic after denial of modifications by the Board, but also that it is significantly more uneconomic than the development the developer proposes to build. That decision says nothing about what the test regarding modifications is when that question is before the Board. The process for considering a request for modifications is described in our regulations. See 760 CMR 56.05(11). That provision is primarily procedural and states no clear substantive standard for the Board to apply (though the Board should refer to the substantive standards in § 56.07(4)(c) and (d)). But the implications are clear. "Only the changes in the Project or aspects of the Project affected thereby shall be at issue in such hearing." 760 CMR 56.05(11)(c). Nowhere is the economics of the development mentioned. Rather, the implication is that the project itself and its impact on local concerns are to be considered on their merits, just as they were during the initial hearing process when the permit was granted. But just as during the original hearing, economic concerns are not entirely excluded from consideration; rather they are secondary—if they are considered at all. That is, the Board should first consider the substance of the changes, determining if they raise local concerns, and if so, and then weighing those concerns against the regional need for housing. Should the Board decide to grant the changes, but only with further conditions (or with alternative changes), and if the developer then indicates that these would render the development uneconomic, then the Board may request to see *pro forma* financial statements. See 760 CMR 56.05(6).

7. This deadline may, of course, be extended by agreement of the parties.

Certificate of Service

I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Ruling on Motion for Summary Decision in the case of Bradford Holdings, LLC v. Haverhill Board of Appeals, No. 2014-06, to:

Theodore C. Regnante, Esq.
Paul J. Haverty, Esq.
Regnante, Sterio & Osborne, LLP
401 Edgewater Place, Suite 630
Wakefield, MA 01880

Mark Bobrowski, Esq.
Bobrowski, Blatman & Mead
9 Damonmill Square, Suite 4A4
Concord, MA 01742

Dated: 02/04/15

Lorraine Nessar, Clerk
Housing Appeals Committee