

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

WAY FINDERS, INC. and FULLER FUTURE LLC,)	
)	
Appellants,)	
)	
v.)	No. 2017-13
)	
LUDLOW ZONING BOARD OF APPEALS,)	
)	
Appellee.)	
)	

**RULING ON MOTION FOR DETERMINATION
OF CONSTRUCTIVE GRANT**

I. Introduction and Procedural Background

This is an appeal of a decision of the Ludlow Zoning Board of Appeals granting, with conditions, the application for a comprehensive permit of Way Finders, Inc. and Fuller Future LLC (collectively, Way Finders). In its initial pleading appealing from the Board’s decision, Way Finders alleges that the Board’s decision should be deemed a constructive grant of the permit sought. It also objects to conditions in the permit on the grounds that they render the project uneconomic and are not consistent with local needs and are outside the Board’s authority. Way Finders also argues that local requirements and regulations were not applied equally to subsidized and unsubsidized housing.

Following the initial conference of counsel in this appeal, Way Finders filed a Motion for Determination of Constructive Grant pursuant to 760 CMR 56.07(5)(d). Way Finders claims it is entitled to a constructive grant of its comprehensive permit application because the Board failed to comply with 760 CMR 56.05(3), which limits a zoning board’s hearing on an application for a comprehensive permit to 180 days. In support of its motion, Way Finders argues that the Board

conducted two additional hearing sessions beyond the limit of 180 days and the short agreed-upon extension of that time limit. The Board opposes the motion on the grounds that the hearing ended before the end of the regulatory time limit as the additional two sessions were deliberative sessions after the hearing had closed, and the final decision was rendered in accordance with regulatory time standards. It also contends, in the alternative, that Way Finder's claim of a constructive grant is untimely. Way Finders attached exhibits to its memorandum, and the Board filed an opposition with its own exhibits. Way Finders also filed a reply memorandum. For the reasons set out below, the motion is denied.

II. Discussion

A. Circumstances in Which a Constructive Grant May Occur

Way Finders seeks a constructive grant under 760 CMR 56.07(5)(d), which provides:

Decisions Involving Constructive Grant of Permit. The Committee may determine, upon motion pursuant to 760 CMR 56.06(5)(b) [preliminary motions] and after hearing,¹ that a Comprehensive Permit has been granted constructively due to failure of the Board to meet one of the deadlines in M.G.L. c. 40B, § 21 or the 180-day deadline for termination of the hearing set forth in 760 CMR 56.05(3).

Section 56.07(5)(d) specifically allows the Committee to determine a constructive grant of a comprehensive permit has occurred in two circumstances. Here, the circumstance for which Way Finders seeks a constructive grant is the time frame for the Board to conduct its hearing established in 760 CMR 56.05(3), which states:

The Board shall open a hearing within 30 days of its receipt of a complete application, and thereafter pursue the hearing diligently. The Board shall open hearings for Projects in the order in which a complete application is filed. In order to further the purpose of M.G.L. c. 40B, §§ 20 through 23 to provide a

¹ The requirement of a hearing may be met by review on the record under the summary decision standard. Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee if "the record before the Committee, together with the affidavits (if any) shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 56.06(5)(d). See *Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992); *West Street Group, LLC v. Stoughton*, No. 2009-14, slip op. at 2 (Mass. Housing Appeals Comm. Ruling Mar. 19, 2012); *Delphic Assocs., LLC v. Duxbury*, No. 2003-08, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 14, 2010); *Grandview Realty, Inc. v. Lexington*, No. 2005-11, slip op. at 4 (Mass. Housing Appeals Comm. July 10, 2006). Since the parties have submitted documents, including affidavits, in support of the motion and opposition, it is appropriate to review the motion under the standard for summary decision. 760 CMR 56.06(5)(c)4, 56.06(5)(d).

streamlined permitting process that overcomes regulatory barriers to the developing of Low or Moderate Income Housing, *a hearing shall not extend beyond 180 days from the date of opening the hearing*, presuming that the Applicant has made timely submissions of materials in response to reasonable requests of the Board that are consistent with its powers under 760 CMR 56.05, except with the written consent of the Applicant. (Emphasis added.)

Chapter 40B contains no statutory requirement addressing a constructive grant of a comprehensive permit for failing to complete a board's hearing within a specified time period. Therefore, the Committee's regulation, 760 CMR 56.07(5)(d), controls. *See Rosewood Realty Trust v. Mansfield*, No. 2006-03, slip op. at 5 (Mass. Housing Appeals Comm. Apr. 25, 2007), *aff'd Zoning Bd. of Appeals of Mansfield v. Massachusetts Housing Appeals Committee*, 74 Mass. App. Ct. 1117 (2009). In the case of the 180-day deadline in § 56.05(3), no mandate for a constructive grant exists; thus, the use of the word "may" in 760 CMR 56.07(5)(d) reflects the permissive nature of the Committee's determination in this context. *See Weston Development Group v. Hopkinton*, No. 2000-05, slip op. at 5 (Mass. Housing Appeals Comm. May 26, 2004), citing *Tofias v. Energy Facilities Siting Bd.*, 435 Mass. 340, 346 (2001) (recognizing Committee's broad discretion to allow parties to intervene based on permissive "may" in G.L. c. 30A, § 10). By contrast, G.L. c. 40B, § 21, also cited in § 56.07(5)(d), mandates that a comprehensive permit application *shall* be deemed to have been allowed for failure to meet the statutory deadline to convene a hearing or render a decision.² *See also* 760 CMR 56.05(11) (if board fails to meet time limit to notify applicant whether proposed change to previously issued comprehensive permit is substantial, permit shall be deemed modified to incorporate change).³ The parties agree that the Committee has discretion in considering whether to make a determination of a constructive grant on the facts presented here regarding the 180-day hearing limit.

² Section 21 of the comprehensive permit law, G.L. c. 40B, §§ 20-23, is nondiscretionary in requiring the permit to be deemed allowed if a board has failed to comply with either of these two time limits. Although 760 CMR 56.07(5)(d) uses the permissive "may," it does not supersede the mandatory provision of the statute.

³ Section 56.05(11), which is not cited in 760 CMR 56.07(5)(d), provides: "[i]f the change is determined to be insubstantial or if the Board fails to notify the Applicant by the end of such 20-day period, the Comprehensive Permit shall be deemed modified to incorporate the Change."

B. Relevant Facts

The parties' submissions indicate the following: The public hearing to consider Way Finders' application for a comprehensive permit commenced on March 16, 2017. It continued over seven sessions until late August 2017, when the Board and Way Finders agreed to extend the public hearing period to September 18, 2017, six days later than the 180-day deadline of September 12, 2017. The Board provided Way Finders with a copy of a draft decision in early August 2017. Way Finders submitted proposed revisions to the draft decision to the Board on or about September 6, 2017. On September 11, 2017, 179 days from the opening of the public hearing, the Board held a public hearing session in which it announced that the hearing for the consideration of the comprehensive permit was closed.

The Board thereafter held two public sessions regarding Way Finders' application on September 27, 2017 and October 5, 2017 – both after September 18, 2017. Before the September 27 session, the Board provided Way Finders with a draft comprehensive permit that incorporated comments from the September 11 public hearing session. This draft comprehensive permit was the subject of discussion for the September 27 sessions. A further revised draft was discussed at the October 5 session.

The conduct of these sessions is the focus of the parties' dispute about when the public hearing before the Board ended. At both sessions, the Board discussed draft conditions to the comprehensive permit. During their discussion, Daniel Hill, counsel for the Board of Selectmen, spoke numerous times regarding different draft provisions of the comprehensive permit. He offered language suggestions, made specific requests, and engaged in colloquy with the Board's attorney and Board members. No representative of the developer participated in such discussions. The Board asserts that Way Finders made no objection to Mr. Hill's participation during those sessions.

At the October 5 session, 24 days after the September 11 closing of the hearing (17 days after September 18), the Board completed its deliberations on the draft decision and voted to approve a comprehensive permit with conditions. On October 12, 2017, 31 days after the September 11 session (24 days after September 18), the Board filed with the town clerk the comprehensive permit with conditions for the project.

On October 31, 2017, Way Finders filed an initial pleading with the Committee appealing the Board's decision, including among other claims, a request for a determination that the

application for a comprehensive permit be constructively granted. A conference of counsel was held on November 17, 2017. On Monday, December 18, 2017, Way Finders filed a motion for a determination of a constructive grant of the comprehensive permit.

C. Nature of September 27 and October 5 Sessions

Way Finders argues that, because of the participation of counsel for the Ludlow Board of Selectmen in the Board's two sessions on September 27 and October 5, 2017, those sessions constituted a continuation of the hearing on its application beyond the 186 days agreed to by the parties, and thus beyond the regulatory limit of 760 CMR 56.05(3). It cites *Milton Commons Assocs. v. Board of Appeals of Milton*, 14 Mass. App. Ct. 111 (1982) to argue that in a zoning context, a public hearing "connotes the opportunity for interested persons to appear and express their views pro and con" and that "[p]ublic hearings end when the right of interested parties to present information and argue is cut off." *Id.* at 114-15 (citation omitted). *See also Pheasant Ridge Assocs., Ltd. Partnership v. Town of Burlington*, 399 Mass. 771, 783 (1987) (characterizing end of hearing as "last session at which interested persons presented information and argument").

Way Finders argues that the transcripts of the sessions before the Board demonstrate that these sessions, although scheduled for deliberation, were actually a continuation of the public hearing because the Selectmen's counsel, Mr. Hill, was allowed to "fully and extensively participate in, and at times to effectively lead, the Board's discussion of the project and the draft decision" prepared by Board counsel. Way Finders Motion, p. 6. Way Finders characterizes Mr. Hill's participation as offering legal advice, proposing alternative language for waivers of bylaws and permit conditions, and making argument regarding the inclusion and language of certain conditions and waivers. Way Finders claims that the Board made changes to the comprehensive permit based upon Mr. Hill's arguments and suggestions. Therefore, it contends that the Board failed to close the hearing within the time required by the Committee's regulations, and a constructive grant of the permit is warranted.

The Board disputes Way Finders' claim that the September 27 and October 5 sessions were a continuation of the public hearing, asserting that these were deliberative sessions following the closing of the hearing. It points to its formal pronouncement at the September 11 session that the public hearing was closed as evidence that the two later sessions were deliberative. The Board also cites *Milton Commons*, 14 Mass. App. Ct. 111, 114, arguing that

these sessions were strictly deliberative because the Board accepted suggestions to previously drafted conditions, and no interested party was given the opportunity to submit new evidence on any substantive matter.

Describing Mr. Hill's participation as providing "feedback," the Board argues that it is common practice for it to accept feedback on proposed conditions, and it is careful not to accept the submission of new evidence. Board Opposition, p. 4. Also the Board claims, it would be harmful to developers if the Board did not accept feedback from town boards because drafts of permits often are not completed before the deliberative sessions due to the short time-period allowed for conducting the public hearing. The Board also argues that Way Finders' attorney, who was present during these two sessions, would have been allowed to provide feedback had he spoken up, which he did not.

Finally, Board argues that even if the two sessions were a continuation of the hearing, the Board's issuance of the decision within 40 days of September 18, the date the hearing was required to close, demonstrates no delay resulted from the conduct of the hearing, and therefore the developer suffered no harm from any extension of the hearing. *See* 760 CMR 56.05(8); G.L. c. 40B, § 21.⁴

Way Finders argues it has suffered significant harm because Mr. Hill's participation in the discussions of the Board members modified the conditions and requested waivers of local rules in the comprehensive permit finally issued. It argues that the changes to these conditions resulted in increased development costs and decreased management and scheduling flexibility.

D. A Constructive Grant is not Warranted

Both parties agree that 760 CMR 56.07(5)(d) gives the Committee discretion since we "may" determine that a comprehensive permit has been granted constructively when a board does not close the public hearing within 180 days. 760 CMR 56.07(5)(d). Within this discretion, the Committee must weigh the circumstances against the "heavy penalty of constructive grant." *Cardwell v. Board of Appeals of Woburn*, 61 Mass. App. Ct. 118, 121-22 (2004) (written decision not required to be issued within forty days after close of hearing if board rendered

⁴ "The board of appeals shall render a decision, based upon a majority vote of said board, within forty days after the termination of the public hearing...." G.L. c. 40B, § 21.

decision within statutory period), quoting *Board of Aldermen of Newton v. Maniace*, 429 Mass. 726, 730 (1999).

“Public hearings end when the right of interested parties to present information and argue is cut off.... Requests by members of the board... for specific items [that involve only uncontested facts and present no opportunity for either party to persuade or contradict do] not extend the hearing.... If asking a question during the course of a hearing in and of itself kept open a hearing which was otherwise concluded, it would be a simple matter to keep hearings open indefinitely and to frustrate the streamlined procedure....” *Transformations, Inc. v. Townsend*, No. 2002-14, slip op. at 3 (Mass. Housing Appeals Comm. Ruling Sept. 23, 2002), quoting *Milton Commons, supra*, 14 Mass. App. Ct. 111, 115.

The Board’s argument suggests the determining factor is that it did not accept new evidence in these two session. *Milton Commons* does not define a deliberative session as one devoid of new evidence; it states that a deliberative session is one where the “right of interested parties to present information and argue is cut off” thus lacking the “minimal characteristics of a public hearing.” *Milton Commons, supra*, at 115. The record supports Way Finders’ claim that for the Selectmen’s counsel, at least, the opportunity to argue continued to the September 27 and October 5 sessions. Although, in a deliberative session, a board may seek information limited to uncontested facts without argument, the Selectmen’s counsel appears to have engaged in argument to persuade the Board members in their deliberations. Thus, the conduct of these sessions was more consistent with a continuation of the hearing to October 5. However, the Board also engaged in deliberations during these sessions, which progressed to the point that they reached a decision on October 5, and issued their decision on October 12.

Even if the conduct of those sessions made them a continuation of the hearing, even in part, the Board’s timing for these two sessions is consistent with the intent of the regulatory time frame. See 760 CMR 56.05(3), 56.05(8). The Board proceeded diligently to conclude its deliberations and issue its decision within a reasonable time following the stated closing of the hearing. Importantly, the Board voted to grant the comprehensive permit with conditions on October 5, 2017, which is within the statutorily mandated 40 days after the close of the public hearing, regardless of whether the public hearing ended on September 11 or continued until October 5. Furthermore, it issued its written decision on October 12 within 40 days after

September 11. Therefore, the conclusion of the process before the Board occurred within the time period required by Chapter 40B and our regulations.

Way Finders' complaints that it was harmed by Mr. Hill's influence on Board's decision do not bear on whether a constructive grant should be determined. The *de novo* hearing before the Committee is the appropriate forum to consider whether the Board's decision is consistent with local needs and to address Way Finders' challenges to the conditions and denial of waivers of local rules included in the decision, if they render the project uneconomic or are unlawful.

Under these circumstances, in the exercise of my discretion, I will not determine that the heavy penalty of a constructive grant has occurred.

D. Way Finders' Appeal and Motion are not Untimely

Alternatively, the Board argues that Way Finders' constructive grant claim is untimely because it was not made within 20 days of the date on which the developer "had knowledge of the purported failure to close the hearing." Board Opposition, p. 8. Both G.L. c. 40B, § 22 and 760 CMR 56.06(4)(g) require a developer to file an appeal to the Committee within 20 days after the filing of the board's decision with the town clerk. *See* 760 CMR 56.06(9). The Board argues that if, as of September 27, 2017, Way Finders believed the public hearing had continued beyond its allowed time, it should have filed this appeal by October 17, 2017, 20 days after September 27, or at the latest by October 25, 20 days after the October 5 session. Since Way Finders' appeal was filed on October 31, 2017, the Board argues that it is untimely. It cites *Transformations, supra*, No. 2002-14, slip op. at 4, to argue that Way Finders was obligated to take action promptly by filing an appeal to the Committee within 20 days after the date that it understood the public hearing had continued past its time limitation. The Board argues that the 20-day period of G.L. c. 40B, § 22 and 760 CMR 56.05(9) is jurisdictional and cannot be waived, citing *Natick Hunter's Hill, LLC v. Natick*, No. 2007-10 (Mass. Housing Appeals Committee April 14, 2008).

Way Finders responds that, under Chapter 40B and our regulations, an appeal must be filed within 20 days of the date that a board's decision is filed with the town clerk. It also argues that under 760 CMR 56.06(5)(b), motions for constructive grant are timely if filed within 30

days of the conference of counsel. It argues that its motion for constructive grant was filed on December 18, 2017, within the allowed time period.⁵

The Board incorrectly characterizes the *Transformations* ruling as requiring an appeal to be filed 20 days after the purported close of the public hearing. *Transformations* was decided under the former regulation, 760 CMR 31.02(3) (2001), under which no time limit for a board's public hearing existed. Addressing an ambiguity that arose when a board prolonged a hearing in the absence of any time limitation, the presiding officer suggested as a best practice that the developer wait for the 40-day period for the board to issue a decision following the date it believed the hearing should have closed. *Transformations, supra*, No. 2002-14, slip op. at 4. This is consistent with *Milton Commons, supra*, 14 Mass. App. Ct. 111, 119, which stated, in the context of judicial review, that counting from the date a comprehensive permit was constructively granted:

...imposes no great burden on town boards and officials or private interested parties who might wish to appeal from the issuance of a constructive permit. Except for the unusual case where the end of the hearing is in doubt ... it is not difficult for interested parties to begin counting to sixty (i.e., forty days plus twenty days) and to lodge an action for judicial review in time.

Way Finders' appeal under G.L. c. 40B, § 22 was filed on October 31, well within this 60-day time period, even counting from September 11, the asserted end of the public hearing. The Board's decision, filed with the town clerk on October 12, ultimately established November 1, 2017 as the deadline to appeal. Moreover, as Way Finders points out, our regulation expressly states that a motion for constructive grant is to be filed within 30 days of the conference of counsel, as Way Finders has done. 760 CMR 56.06(5)(b)4. Way Finders' appeal is not untimely.

⁵ The conference of counsel was held on November 17, 2017. Thirty days from November 17, 2017 was Sunday, November 17, 2017, thus extending to Monday, December 18, the deadline to file preliminary motions under the definition of "days" found in 760 CMR 56.02.

III. Conclusion and Order

For the foregoing reasons, Way Finders' motion for determination of constructive grant is denied.

HOUSING APPEALS COMMITTEE



Shelagh A. Ellman-Pearl, Chair
Presiding Officer

December 21, 2018

Certificate of Service

I, Tanya J. Reynolds, 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 Determination of Constructive Grant in the case of Way Finders, Inc. and Fuller Future LLC v. Ludlow Zoning Board of Appeals, No. 2017-13, to:

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Tanya J. Reynolds, Clerk
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