COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

AUTUMNWOOD, LLC, Appellant,	)	
v.	)	No. 2005-06
SANDWICH ZONING BOARD OF APPEALS, Appellee.	)	

RULING AND ORDER ON BOARD'S MOTION TO DISMISS NOTICE OF PROPOSED PROJECT CHANGES TO COMPLY WITH MASSACHUSETTS ENVIRONMENTAL POLICY ACT and on AUTUMNWOOD, LLC's MOTION FOR PARTIAL SUMMARY DECISION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This matter has been before the Committee several times since the initial appeal was filed with the Committee in 2005. The current proceeding was commenced by the filing by Autumnwood, LLC of a Notice of Proposed Project Changes to Comply with the Massachusetts Environmental Policy Act (MEPA). The Sandwich Zoning Board of Appeals has moved to dismiss, and Autumnwood has moved for a partial summary decision determining that the request for project change may proceed before the Committee.

Autumnwood filed its initial application with the Board on March 5, 2004 for a comprehensive permit to build nearly 300 housing units. By decision filed with the town clerk on February 15, 2005, the Board granted Autumnwood a comprehensive permit with conditions. The developer appealed the Board's decision to the Committee on March 4, 2005. In that appeal, the Committee's presiding officer, by ruling dated November 4, 2005, denied the Board's motion to dismiss and ruled that the Board's decision should be deemed a *de facto* denial of

Autumnwood's permit application. Following a hearing, the Committee issued a final decision on June 25, 2007, vacating the Board's decision and directing it to issue a comprehensive permit within 30 days to build 272 single-family homes. *Autumnwood, LLC v. Sandwich*, No. 2005-06, slip op. at 17 (Mass. Housing Appeals Comm. June 25, 2007) (*Autumnwood 2007*).

The Board appealed the Committee's decision to the Superior Court. While that appeal was pending, the Supreme Judicial Court ruled in *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 593-94 (2008) that the Committee lacked the authority to deem a board decision to be a *de facto* denial. Consequently, the parties agreed to a remand to the Committee to review the Board's decision as a grant of a comprehensive permit with conditions. *Autumnwood, LLC v. Sandwich*, No. 2005-06, slip op. at 2 (Mass. Housing Appeals Comm. Mar. 8, 2010 Decision on Remand). (*Autumnwood 2010*). On remand, we determined that conditions imposed by the Board had rendered the proposed project uneconomic, and reaffirmed our 2007 determination that the Board's decision was not consistent with local needs. We also reviewed conditions identified by Autumnwood as unlawful, ordering that certain conditions be preserved, modified, or replaced. *Id.* at 17-21. We vacated the Board's decision, affirmed our earlier decision, and directed the Board to issue a comprehensive permit as provided in *Autumnwood 2007* as modified by the remand decision. *Id.* at 14-15.

On November 16, 2017, Autumnwood filed the pending "Notice of Project Changes to Comply with [MEPA] … and Request for Approval and Ordering of Permits," asserting that the notice was filed consistent with the directive in *Autumnwood 2007* that stated the Committee retained the authority to modify the comprehensive permit if the project was subject to the review process of MEPA, G.L. c. 30, §§ 61-62I.[1] *See Autumnwood 2010* at 18.

Following a conference of counsel on December 6, 2017, the Board filed a motion to dismiss and the developer filed a motion for partial summary decision. The parties' motions are related to each other. The Board has moved to dismiss the request for project change for lack of jurisdiction claiming that Autumnwood's comprehensive permit has lapsed and that the

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[1] On December 7, 2017, Autumnwood also submitted a request for review of insubstantial changes to the Board, which the developer asserts is different than the pending notice of project change filed with the Committee. The Board determined on December 12, 2017 that the proposed changes were substantial. It also stated that at the hearing on the proposed changes it would consider whether Autumnwood's permit had lapsed, which Autumnwood disputes. On December 18, 2017, Autumnwood filed with the Town clerk a notice of withdrawal of those proposed project changes. Board Statement of Material Facts, Autumnwood Response to Board's Statement of Materials Facts and Additional Statement of Material Facts, ¶¶ 28-32.

Committee lacks authority to consider the notice of project change in the first instance pursuant to 760 CMR 56.05(11)(a), which requires a developer to apply to a board for approval of changes to a project after issuance of a permit. In support of its motion, the Board has filed a Statement of Material Facts (Board SOMF), with supporting documentary evidence and affidavits of the Town planner and Board counsel. Autumnwood filed an opposition, supported by a Response to the Board's Statement of Material Facts, including an additional Statement of Materials Facts (Autumnwood SOMF) and a May 4, 2018 affidavit of the manager of Autumnwood, Mark W. Wisentaner (Wisentaner Affidavit), with accompanying documents. The Board submitted a reply, with a reply to the developer's Response to Statement of Material Facts (Board Reply SOMF) and an additional affidavit of Board counsel.

At the same time, Autumnwood moved for a partial summary decision determining that the Committee has the authority to order post-permit modifications to the comprehensive permit necessary for MEPA compliance without prior review or remand to the Board. In support of its motion, Autumnwood filed an April 17, 2018 Affidavit of Mr. Wisentaner with supporting exhibits. The Board filed an opposition to the developer's motion.

The parties' statements of material facts and accompanying affidavits and documents present both agreed and conflicting facts. We consider their motions in light of facts that are material to the determination of whether the Committee may properly consider the request for project change, noting those that that are undisputed. The Board has also requested that we take "judicial" notice of our docket in this action. Board SOMF, ¶ 7. We now make clear that the entire record of this matter, including the record leading to our *Autumnwood 2007 and Autumnwood 2010* decisions, is part of this proceeding and may be relied upon by any party. Thus, official notice as provided in 760 CMR 56.06(8) (b) is not required.

II. BOARD'S MOTION TO DISMISS

The Board argues two grounds in support of its motion to dismiss for lack of jurisdiction: (1) that pursuant to 760 CMR 56.05(12)(c), Autumnwood's comprehensive permit lapsed three years after disposition of the last court appeal; and (2) that the Committee cannot consider Autumnwood's notice of project change because all requests for project change must be filed in the first instance with the Board. It argues that Autumnwood's comprehensive permit lapsed by

the terms of our regulations, and therefore the Committee has no jurisdiction to hear the notice of project change.

A. Standard of Review

Autumnwood argues that the motion to dismiss should be considered a motion for summary decision because the Board has referred to material outside the pleadings, and further, that it should be denied because material facts are disputed. The Board argues that its motion is properly a motion to dismiss for lack of subject matter jurisdiction even if it relies on external documents. It argues that in any event, Autumnwood is required to respond to its evidence with evidence of "specific facts which would establish the existence of a genuine dispute of material fact," quoting *Pederson v. Time*, 404 Mass 14, 17 (1989), and not simply rely on "conclusory allegations, improbable inferences, and unsupported speculation," quoting *Brooks v. Peabody & Arnold, LLC*, 71 Mass. App. Ct. 46, 56 (2008). The Board is correct that, whether this is considered a motion to dismiss or for summary decision, it is appropriate for the Board to submit specific evidence to show the notice of project change is not properly before us. Autumnwood is therefore similarly required to submit its own specific evidence to support its entitlement to bring this matter to the Committee.

B. Finality of Permit

1. Court Appeals of the Comprehensive Permit

Specifically, the Board argues that Autumnwood's comprehensive permit became final on June 6, 2014, when the last appeal of the permit decision concluded, and lapsed three years later on June 6, 2017. Autumnwood disputes the Board's dates of finality and lapse of the comprehensive permit. It argues that circumstances occurred that prevented the permit from becoming final on the date specified by the Board and that the finality of the permit and the date of lapse of the permit were tolled by different circumstances.

Our regulations address the manner for determining the finality and time of lapse of comprehensive permits:

> (a) Finality of Permits. A Comprehensive Permit shall become final on the date that the written decision of the Board is filed in the office of the municipal clerk, if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of....
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> (c) 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 except

> for good cause, the permit shall lapse. 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 or approval required for the Project. The Board or the Committee may set a later date for lapse of the permit, and it may extend any such date.

760 CMR 56.05(12)(a), (c).[2] Under these provisions, the starting point is determining when all appeals of the comprehensive permit ended, thus making the comprehensive permit final. Evidence submitted by the Board, undisputed by Autumnwood, shows that at the time Autumnwood appealed the Board's 2005 decision to the Committee, certain abutters of the project appealed the Board's decision to the Superior Court. The appeal was transferred to the Land Court from the Superior Court. Board SOMF, Autumnwood SOMF, ¶ 8; Exh. 4. *See* G.L. c. 40B, § 21.

Following the issuance of *Autumnwood 2007*, the Board appealed that decision to the Superior Court. An appeal of the *Autumnwood 2007* decision was added to the abutters' Land Court appeal. Board SOMF, Autumnwood SOMF, ¶ 10. The Superior Court remanded the matter to the Committee, whereupon we rendered the *Autumnwood 2010* remand decision. Thereafter, the Land Court and the Superior Court reviewed the *Autumnwood 2010* decision pursuant to amended complaints filed after the remand decision. Board SOMF, Autumnwood SOMF, ¶¶ 11-13; Exhs. 4, 5.

On January 23, 2012, the Superior Court issued an order that the "decision of the Committee dated June 25, 2007, to the extent said decision is incorporated in the decision of March 8, 2010, are [sic] AFFIRMED." Board SOMF, Autumnwood SOMF, ¶ 15; Exh. 5. Judgment for the defendant [sic] was entered into the docket on January 27, 2012. Board SOMF, Autumnwood SOMF, ¶ 16; Exh. 5. The Land Court appeal was dismissed by order of the court on June 6, 2014. Board SOMF, Autumnwood SOMF, ¶ 14; Exh. 4.

The Board argues that the dismissal of the abutters' Land Court appeal on June 6, 2014ended all appeals regarding the comprehensive permit. Therefore, it contends, under our regulations, the developer's permit took effect on June 6, 2014, the date on which the last appeal was decided or otherwise disposed of. Relying on the affidavit testimony of the Town planner that no request for an extension was made to the Board before June 6, 2017, or to date, the Board argues further that the permit lapsed three years after this date, on June 6, 2017, because the

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[2] As we note, *infra*, 760 CMR 56.07(5)(c) also provides that a comprehensive permit shall not be implemented until the Committee has fully complied with MEPA.

developer sought no extension of the permit, and no appeals or state or federal permits have tolled this period. Planner Affidavit, ¶ 4; Board SOMF, Autumnwood SOMF ¶ 21.[3] *See* 760 CMR 56.05(12)(c). The appeals to the Land Court and the Superior Court described above are the only appeals evidenced in the record. *See* G.L. c. 40B, §§ 21, 22. Autumnwood does not dispute that these appeals were both disposed of by June 6, 2014.

2. Unspecified Litigation Alleged by Autumnwood

Autumnwood also claims that the comprehensive permit did not become final because "[u]nspecified litigation was apparently continued by the Board beyond June 6, 2014." Autumnwood SOMF, ¶ 19. However, the developer has not supported this assertion with evidence of any specific litigation pertaining to the comprehensive permit. Instead, it relies on published notices of agendas and public meetings as well as public meeting minutes for the Board of Selectmen and the Board of Appeals that include references to litigation involving Autumnwood, as well as a November 22, 2016 email from Town counsel, stating, "the Superior Court case remains pending."[4] Wisentaner Affidavit, Exh. 20. *See* Autumnwood SOMF, ¶¶ 36-42; Wisentaner Affidavit, ¶¶ 22-32; Exhs. 14-17. With the exception of the email from Town counsel, none of the documentary evidence suggests that there was an additional appeal of either the Board's decision or the Committee's decision. In any event, these general statements, by themselves, are not probative of the existence of litigation that would affect the finality of the comprehensive permit or toll the permit's lapse. Moreover, Autumnwood was a defendant represented by counsel in both the Land Court and Superior Court appeals, although he states he was unrepresented in November, 2016. Board SOMF, Exhs. 4, 5; Wisentaner Affidavit, ¶¶ 32-33. In his affidavit submitted in opposition to the Board's motion to dismiss, Mr. Wisentaner stated that his subsequent counsel investigated court dockets and found no record of any case pending against Autumnwood. Wisentaner Affidavit, ¶ 35. Therefore, there is no evidence to

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[3] Autumnwood does not specifically dispute that no extension request was made; it disputes that the permit has expired. Autumnwood SOMF, ¶ 21.

[4] Mr. Wisentaner's affidavit attached copies of a public meeting notice for the Board's January 13, 2015 meeting identifying on its agenda "Executive Session, To discuss litigation," Exh. 17; minutes for the Board of Selectmen's June 26, 2014 public meeting noting "Executive Session for the purpose of discussing Litigation Strategy – Autumnwood v. ZBA," Exh. 14; and a Board of Selectmen public meeting notice for a December 14, 2014 meeting identifying on its agenda, "Executive Session, Potential Litigation Strategy," Exh. 16. The exhibits also include other public notices or minutes that reference the disposition of property connected to Autumnwood.

suggest any court appeal either delayed the finality of the permit beyond June 6, 2014 or justifies tolling its lapse.

C. Good Cause to Toll the Permit

Autumnwood also argues that, assuming that the comprehensive permit lapsed, it has provided "good cause" supporting an exception to the regulatory requirement that a comprehensive permit lapses in three years if construction has not begun. 760 CMR 56.05(12)(c). It argues that good cause exists to determine the permit has not lapsed regardless of when it may have become final because: 1) the Board has submitted no evidence of local concerns that would be violated or compromised or that the Town would be harmed by the continued validity of the comprehensive permit; 2) the Town has not done its part to increase the inventory of affordable housing in Sandwich; 3) the conduct of the Board, the Board of Selectmen, and the Town itself shows a deliberate pattern of misinformation; 4) Autumnwood has pursued compliance with MEPA; and 5) the Board's engaged in obstruction after the conference of counsel in this current proceeding by raising the lapsed permit issue during a request for project change that was filed by the developer after negotiating the changes with the Town.

Under the "good cause" provision, the comprehensive permit lapses if construction authorized by a permit has not begun within three years of the date on which the permit becomes final "except for good cause." We have previously found good cause to toll the time period of a comprehensive permit when related court proceedings impacted the implementation of a comprehensive permit. *See Delphic Assocs., LLC v. Duxbury*, No. 2003-08, slip op. at 12-15 (Mass. Housing Appeals Comm. Sept. 14, 2010) (where project overlapping towns required comprehensive permits from both towns, appeal of one permit tolled lapse of other). The developer's arguments regarding local concerns, harm to the Town and lack of affordable housing do not represent "good cause" within the meaning of 760 CMR 56.05(12)(c).

Moreover, once a comprehensive permit has lapsed, we have previously found it may not be revived, even for equitable considerations. *Leblanc v. Amesbury*, No. 2006-08, slip op. at 6 (Mass. Housing Appeals Comm. January 14, 2013 Ruling and Order on Comprehensive Permit Extension) (comprehensive permit cannot be revived once it has lapsed); *Forestview Estates Assoc., Inc. v. Douglas*, No. 2005-03, slip op. at 10 (Mass. Housing Appeals Comm. Mar. 5,

2007 Ruling on Comprehensive Permit Extension) (equitable considerations are relevant only if an extension is properly requested).

With respect to Autumnwood's argument that Town personnel engaged in deliberate misrepresentation and misinformation inducing it to forego requesting an extension of its comprehensive permit before June 6, 2017, most of the documents on which Autumnwood relies, municipal minutes and agenda referring to unspecified litigation or potential litigation, do not support Autumnwood's claim of inducement. They are routine public notices and records to inform the public of Board and Selectmen activities. *See* note 5, *supra.* Mr. Wisentaner's testimony that Autumnwood met with Town committees regarding wastewater between 2011 and 2018 provides no specific evidence of such an inducement. Wisentaner Affidavit, ¶ 50. The alleged conduct of the Town officials following the December 2017 conference of counsel in the current appeal postdates June 6, 2017, and even if relevant, could not have induced inaction by the developer during the time period before that date. The final document relied on by Autumnwood is the November 22, 2016 email from Board counsel stating, "any requested modification must be presented to the Board per 760 CMR 56.05(11). It is also important to note that the Superior Court case remains pending." Wisentaner Affidavit, ¶¶ 30-36; Exh. 20. *See* Autumnwood, SOMF, Board Reply SOMF, ¶ 41. The Wisentaner Affidavit, ¶ 34, stated that this statement reinforced his understanding that "some kind of litigation was pending and would be brought to my attention." We do not find this sufficient to constitute good cause to toll the permit. As noted above, good cause cannot support revival of a lapsed comprehensive permit.

D. Effect of MEPA Compliance on Tolling the Permit

The final and most pertinent argument raised by Autumnwood is that the permit has not lapsed because the developer has been pursuing MEPA compliance as directed by the Committee in *Autumnwood 2007*. Autumnwood relies on the testimony of Mr. Wisentaner, who stated he is the person responsible for filing an Environmental Notification Form (ENF) for Autumnwood pursuant to MEPA. Wisentaner Affidavit, ¶ 3. He testified he prepared his affidavit "based on personally conducted research of MEPA rules and preferred policies and in consultation with engineers, architects, Massachusetts State Agencies, Cape Cod Commission, wastewater consultants, renewable energy consultants, town Boards and Committees and the Sandwich Economic Initiative Corporation." Wisentaner Affidavit, ¶ 4. Mr. Wisentaner submitted a description of his efforts to address environmental concerns, including a revised Development

Plan to mitigate potential impacts to the environment. He also stated that the plan is in response to "MEPA regulations and encouragements and determinations by the Secretary of Energy and Environmental Affairs." Wisentaner Affidavit, ¶¶ 8, 13. Autumnwood, with two other developers, presented the Selectmen with a wastewater proposal and a request for support of their application for a MassWorks grant, which was not supported by the Selectmen. *See* Wisentaner Affidavit, ¶ 18; Exhs. 18, 19. The developer argues that its proposed changes are based on "findings and reports discovered or determined in connection with MEPA." Autumnwood Notice of Project Change, p. 1. The notice of project change also references related ENF form sections.

The Board argues that Autumnwood has not pursued the necessary regulatory approval under MEPA, and specifically that the developer has provided no evidence that it has applied for MEPA review. Board SOMF, Autumnwood SOMF, ¶ 34; Planner Affidavit, ¶ 17. It argues that Mr. Wisentaner's affidavit simply describes his own research of MEPA rules and preferred policies. It also contends that even if the permit remains in force, any request for project change must be brought before the Board, rather than the Committee, in the first instance, pursuant to 760 CMR 56.05(11)(a).

1. Committee's Retained Authority in *Autumnwood 2007*

The Board argues that the Committee lacks the authority to consider Autumnwood's request for project change because a developer can only make a request for project change to an issued comprehensive permit by filing with the Board pursuant to 760 CMR 56.05(11)(a) (modification after issuance of a comprehensive permit). The Board contends that no circumstance exists under which Autumnwood could bring its requested project changes to an issued comprehensive permit to the Committee in the first instance.[5]

Autumnwood argues that the Committee has retained authority to consider its proposed project changes in the first instance, because the changes are for the purpose of compliance with MEPA consistent with our decision in *Autumnwood 2007*, which stated in § VII.4., at 18:

> 4. The developer shall comply with the Massachusetts Environmental Policy Act (MEPA), G.L. c. 30, §§ 61-62H and 760 CMR 31.08(3).[6] If applicable, the

[5] The Board also argues that the proposed changes are substantial as defined in 760 CMR 56.07(4)(c)4, and thus require consideration by the Board before review by the Committee.

[6] This version of the Committee's regulations was superseded by 760 CMR 56.00 in February 2008. However, there is no material difference between the versions of the regulation that would affect this proceeding.

> comprehensive permit shall not be implemented until the Committee has fully complied with MEPA and the Committee retains authority to modify this decision based upon findings or reports prepared in connection with MEPA.

Citing case law on statutory interpretation, Autumnwood further argues that the Committee must look to and follow the plain meaning of this language, which requires it to comply with MEPA, and provides that the Committee has retained authority to modify the decision. It also argues that by establishing a requirement to comply with MEPA, the Committee implicitly provides for Autumnwood to file with the Committee under our retained authority.

Compliance with the directive in *Autumnwood 2007* would afford the developer a basis to file a notice of project change directly with the Committee if such changes were required for MEPA compliance. However, as discussed below, Autumnwood has not provided sufficient information that it has complied with MEPA.

2. MEPA Issues in Remand Proceeding (*Autumnwood 2010*)

During the remand proceeding, the issue of MEPA arose when, on August 4, 2009, the Board filed a motion to stay for noncompliance with MEPA, arguing that the project site is a priority habitat for a rare or endangered wildlife including the eastern box turtle, which may be adversely impacted by the project, and that the project meets thresholds for the review by the Executive Office of Energy and Environmental Affairs (EOEEA) under 301 CMR 11.11. It argued that Autumnwood had not filed an Environmental Notification Form (ENF) within 10 days of the submission of its appeal to the Committee pursuant to 301 CMR 11.05(2) and requested a stay until the developer filed this ENF. *See* 760 CMR 56.06(4)(h). Attached to its motion was an October 12, 2007 response letter from EOEEA to a request for advisory opinion regarding the project from an individual named David Lutes. The response referenced the assertion by Mr. Lutes that "the project exceeds several MEPA review thresholds, including the direct alteration of more than 25 acres of land (including Priority Habitat) ...." It also stated that "the project is subject to MEPA and requires the submission of an [ENF]. State agencies cannot issue any required permits for this project until the proponent has complied with MEPA."

On August 6, 2009, the presiding officer issued an order denying the motion to stay and ordered the developer to file an ENF with the Secretary of Environmental Affairs, or demonstrate that there is no need to file an ENF by submitting an advisory opinion from the Secretary, or by other means, by August 31, 2009. *See* 760 CMR 56.06(4)(h). In response, on August 18, 2009, the developer filed a motion for reconsideration of the presiding officer's

order, alleging that: 1) the EOEEA advisory opinion was in response to an *ex parte* communication from the Board; 2) MEPA thresholds are not triggered; 3) the Committee's decision does not constitute a state permit within the meaning of MEPA; 4) 760 CMR 56.06(4)(h) is inapplicable as the appeal commenced before the regulation took effect; 5) the Committee had previously ruled on MEPA in the *Autumnwood 2007* decision; 6) it had no opportunity to respond to the motion before the presiding officer issued his order; and 7) the Superior Court had already refused to issue a stay for this purpose. On August 25, 2009, the presiding officer issued a ruling on motion for reconsideration reaffirming and supplementing his August 6 order, in which he determined that Autumnwood's August 18 filing met the requirements of his order.

The Committee's *Autumnwood 2010* remand decision did not explicitly address MEPA. Our remand decision affirmed our earlier decision with respect to local concerns, and vacated the Board's decision, directing the Board to issue a comprehensive permit as provided in *Autumnwood 2007*, with modifications of conditions as provided in the remand decision.[7] *Id.* at 14-15, 17-22. Our *Autumnwood 2007* decision did not address any environmental legal claims because they were not adequately briefed; we stated that we relied on the record and other cases. *Autumnwood 2007*, slip op. at 4 n.3. The rulings of the presiding officer did not change the MEPA requirement in the *Autumnwood 2007* decision. *See* 760 CMR 56.07(5(c).

3. MEPA Requirements for Committee's Post-Decision Review

The record in this proceeding indicates that EOEEA determined that Autumnwood was required to submit an ENF to that agency. Neither the presiding officer then, nor the Committee, in rendering our remand decision, could waive MEPA's requirements in general, or the requirement to file an ENF as stated in the EOEEA advisory opinion, in particular. *See* 301 CMR 11.05(2). Our regulations require the Committee to comply with MEPA. 760 CMR 56.07(5)(c).

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[7] The Board's decision included a condition that prevented 70% of the land from being developed and required within the remaining developable area that single family housing be built on lots no smaller than one third of an acre." *See Autumnwood 2010,* slip op. at 1 (Mass. Housing Appeals Comm. Decision on Remand Mar. 8, 2010), 2005). In his November 4, 2005 Ruling on Motion to Dismiss and Motion for Clarification of Grant or Denial, the presiding officer noted that this condition was included to address a concern of the Massachusetts Division of Fisheries and Wildlife of the possible presence on the property of the eastern box turtle, a species of a special concern listed in 321 CMR 10.90, under the Massachusetts Endangered Species Act, G.L. c. 131A. He found the condition to be unreasonable. *Id.* at 7-8. Our decision eliminated this condition. *See Autumnwood 2007,* slip op. at 17-18.

A request for project change in compliance with MEPA after the Committee renders its decision is unlike a typical post-permit request for project change under 760 CMR 56.05(11), which is motivated by a developer's interests. *See Adams Road Trust v. Grafton*, No. 2002-38, slip op. at 29 n.25 (Mass. Housing Appeals Comm. December 10, 2004). If a developer required to complete a full MEPA review has not completed the review when the Committee renders its decision, the Committee retains the authority to modify its decision upon completion of the review. The permit is not to be implemented until the Committee complies with MEPA, including by making findings pursuant to G.L. c. 30, § 61, if applicable. 760 CMR 56.07(5)(c)3; *see* 301 CMR 11.02(2)(Agency Action).[8] This obligation to comply with MEPA falls on the Committee specifically. *See* 760 CMR 56.07(5)(c). Therefore, for the purpose of MEPA compliance, if EOEEA determines that an Environmental Impact Report (EIR) is required, and an EIR has received a certificate of compliance from the Secretary of EOEEA pursuant to 301 CMR 11.08(8)(a), the presiding officer may take "official notice of the Certificate without prior notice to the parties pursuant to 760 CMR 56.06(8)(2), and shall include in [the Committee's] decision findings as required by M.G.L. c. 30, § 61." 760 CMR 56.07(5)(c)2.

The record does not show that Autumnwood has filed an ENF[9] with EOEEA or received a determination regarding whether an EIR must be prepared. If no EIR is required, there would be no need for further proceedings before the Committee pursuant to MEPA, as no G. L. c. 30, § 61 finding would be required in our decision.[10] If, however, Autumnwood was required to prepare an EIR, it was also required file the EIR and compliance certificate with the Committee, and it could file proposed findings pursuant to G.L. c. 30, § 61 to assist the Committee in making our § 61 findings. *See* 301 CMR. 11.12(5)(d); 760 CMR 56.07(5)(c)2, 3. The requirement of these findings is the basis to bring a submission directly to the Committee, whether simply to request § 61 findings, or to request a project change based on MEPA compliance as well. If no §

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[8] Comprehensive permit projects before the Committee are "potentially" subject to compliance with MEPA. 760 CMR 56.07(5)(c). Thus, not all projects will need to undergo this procedure.

[9] If Autumnwood had filed an ENF, it was required to simultaneously file a copy with the Committee. 760 CMR 56.06(4)(h)2.

[10] Our regulations provide that, if no EIR is required, a developer may file with the Committee a certificate that no EIR is required, or an advisory opinion to that effect, 760 CMR 56.07(5)(c)1. We encourage developers to do so, particularly in instances such as this, in which our final decision contains a requirement to comply with MEPA.

61 findings are required, presumably there would be no MEPA-based project changes to bring to the Committee.

Therefore, in order to properly bring this current matter to the Committee, Autumnwood should have included such an EIR and compliance certificate as part of its notice of project change. *See* 760 CMR 56.07(5)(c). Autumnwood's manager, Mr. Wisentaner, who has identified himself as the person responsible for filing an ENF with EOEEA, provided a description of the proposed changes to address environmental impacts, but he has provided no evidence that he responded to the advisory opinion by filing an ENF, or otherwise addressed the MEPA requirements. Wisentaner Affidavit, ¶ 3. *See* Autumnwood's Notice of Proposed Project Changes, ¶ 5.

Autumnwood has asserted in its response to the Board's statement of material facts that it has pursued the MEPA review process. *See* Autumnwood SOMF, ¶ 20 ("Disputed. Litigation and pursuit of MEPA compliance were continuing"). Its responsive statement is insufficient to demonstrate that it has complied with MEPA so that we may undertake to comply with MEPA pursuant to 760 CMF 56.07(5)(c)3. While the general statements provided by Autumnwood are inadequate to meet the requirements to support submitting the notice of project change to the Committee, before granting the Board's motion to dismiss, we believe it is important to allow Autumnwood to specifically demonstrate what formal actions it has taken with regard to the MEPA review requirements, as we order below.

4. Time Frames for Compliance with MEPA

Since the parties have not briefed the issue of the impact of the MEPA regulations on the time requirements for lapse under our regulations, we need not rule at this time whether compliance with the regulatory MEPA review process tolled the finality or duration of the comprehensive permit. *See* 301 CMR 11.02(2) (Agency Action), which states:

> (c) Agency Action is not final if the Permit, contract or other relevant document approving or allowing the Agency Action contains terms such as a condition or restriction that provides that such Agency Action shall be deemed not to have taken place unless and until the Secretary has determined that:
>
> no EIR is required; or
>
> a single or final EIR is adequate and 60 Days have elapsed following publication of notice of the availability of the single or final EIR in the *Environmental Monitor* in accordance with 301 CMR 11.15(2),

provided that the Agency shall reconsider and confirm or modify the Agency Action and any conditions thereof following completion of MEPA review.

(d) Agency Action is final even if subject to subsequent judicial or administrative appeal.

Our regulations state that the comprehensive permit shall not be implemented until the Committee has complied with MEPA. 760 CMR 56.07(5)(c)3. However, they also provide that a comprehensive permit is final when all appeals have been disposed of. 760 CMR 56.05(12)(c). Although our regulations do not specify the time frame for compliance with MEPA following issuance of the Committee's decision, they implicitly recognize that action should be taken with a reasonable degree of expedition, in light of our strict requirements regarding finality and lapse of permits, and the timing of the MEPA review process set forth in 301 CMR 11.00. We have not always required developers to comply strictly with the requirement in 760 CMR 56.06(4)(h)1 to file an ENF, if required, within 10 days of its filing an initial pleading with the Committee. Nevertheless, the responsibility of a developer to file an ENF or obtain an advisory opinion within a reasonable time remains. *See* 760 CMR 56.06(4)(h)1; G.L. c. 30, § 62A; 301 CMR 11.00.

Moreover, the comprehensive permit cannot be held open indefinitely waiting for completion of a potential MEPA review. The strict rules for finality of permits and lapse of permits make clear that the permitting process was not meant to continue for an unreasonable amount of time. Therefore, consistent with our regulations and the requirements of MEPA, developers are required to act with reasonable diligence in pursuing any required MEPA review. Since the developer has not submitted specific evidence of proceeding with MEPA administrative review, no determination can be made regarding whether it has acted with reasonable diligence and expedition.

Since Mr. Wisentaner stated that Autumnwood has responded to "encouragements and determinations from EOEEA," Wisentaner Affidavit, ¶ 13, we will allow Autumnwood to file, within 30 days of the date of this ruling, an amendment to its notice of project change consisting of copies of any ENF and request for advisory opinion it has submitted to EOEEA for this project, all of which must be dated before the date of this ruling, as well as any determinations by EOEEA on such submissions, and any EIR and certificate of compliance from the Secretary of EOEEA. If such documents evidencing Autumnwood's undertaking administrative MEPA compliance are submitted, the parties will be allowed to submit appropriate motions, including

regarding whether such MEPA compliance was made with reasonable diligence and consistent with the time frames in our regulations for finality and lapse of comprehensive permits. For the reasons stated above, the motion to dismiss is denied without prejudice.

III. AUTUMNWOOD'S MOTION FOR PARTIAL SUMMARY DECISION

The developer seeks a partial summary decision that its post-permit request for project changes necessary for MEPA compliance are properly before the Committee, not the Board. Many of the issues raised in its motion were addressed in our discussion of the motion to dismiss and need not be repeated here. The Board also argues that Autumnwood already brought its proposed changes to the Board, and the Board issued a determination that the proposed changes were substantial, but the developer withdrew its modification request and did not appeal the determination of substantiality to the Committee. Thus, the Board argues its determination of substantiality is final. Autumnwood argues that the notice of project change filed with the Committee is different than that submitted to the Board. Board SOMF, Autumnwood SOMF, ¶¶ 28-33. No ruling with respect to foreclosure of issues need be made at this time.

For the reasons set forth above, the motion for summary decision is also denied without prejudice.

IV. CONCLUSION AND ORDER

Accordingly, the motion to dismiss and motion for summary decision are both denied without prejudice. Autumnwood is ordered to submit, within 30 days from the date of this Ruling and Order, an amendment to its notice of project change consisting of copies of any ENF and request for advisory opinion it has submitted to EOEEA for this project, all of which must be dated before the date of this ruling, as well as any determinations by EOEEA on such submissions, and any EIR and certificate of compliance from the Secretary of EOEEA. If such a submission is made, a conference of counsel will be held thereafter to discuss the scheduling of motions.

If Autumnwood fails to submit such materials within 30 days of the date hereof, Autumnwood's motion for summary decision shall be deemed denied and its notice of project change shall be deemed dismissed effective 30 days from the date hereof.

If this matter is deemed dismissed in 30 days, this Ruling and Order 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 thereafter after the date on which this matter is deemed dismissed.

HOUSING APPEALS COMMITTEE

February 22, 2019

Shelagh A. Ellman-Pearl, Chair

Marc L. Laplante

James G. Stockard, Jr.

Certificate of Service

I, Sean Kelley, 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 and Order on Board's Motion to Dismiss Notice of Proposed Project Changes to Comply with Massachusetts Environmental Policy Act and on Autumnwood, LLC's Motion for Partial Summary Decision in the case of Autumnwood, LLC v. Sandwich Zoning Board of Appeals, No. 2005-06, to:

Jonathan D. Fitch, Esq.
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KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 02116-4102

Dated: 02/22/2019

Sean Kelley, Clerk
Housing Appeals Committee