

COMMONWEALTH OF MASSACHUSETTS  
HOUSING APPEALS COMMITTEE

**511 WASHINGTON STREET, LLC**

v.

**HANOVER ZONING BOARD OF APPEALS**

No. 06-05

DECISION

January 22, 2008

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Appellant

v.

HANOVER BOARD OF APPEALS,  
Appellee

No. 06-05

**DECISION**

**I. PROCEDURAL HISTORY**

This case involves a completed development of affordable, mixed-income, rental apartments that has experienced financial difficulties. On January 21, 2003, the Hanover Board of Appeals granted a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to 511 Washington Street, LLC to build a 74-four-unit, age-restricted<sup>1</sup> development on a 3.9-acre site on Route 53 in Hanover. Pre-Hearing Order, § II-1 (Mar. 23, 2007). Construction of the development—called North Pointe—was completed, and rental of individual units began in February 2005. Tr. I, 55. On August 5, 2005, the developer filed a notice of project change seeking to change the development to age-restricted condominium units. Pre-Hearing Order, § II-3. By decision filed with the town clerk's office on April 5, 2006, the Board denied the change, and the developer appealed to this Committee on April 18, 2006. Pre-Hearing Order, §§ II-6, II-7. While the appeal was pending, the developer filed an alternative notice of project change, requesting that it be permitted to change the development to non-age-restricted rental housing, and the Board

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1. Occupancy of the units would be limited to households with one member over 55 years of age.

denied this request as well. Pre-Hearing Order, §§ II-8, II-10. In the current appeal, the developer has chosen to pursue only the second change, and therefore the only issue before us is whether the second denial was proper, that is, whether the developer should be permitted to change the development from age-restricted rental apartments to non-age-restricted rental apartments.<sup>2</sup> Tr. I, 11-12.

Pursuant to the Committee's regulations, after the hearing was opened, the parties then negotiated a Pre-Hearing Order, which was issued by the presiding officer; prefiled testimony was submitted; a site visit and two days of hearings to permit cross-examination of witnesses were conducted; and post-hearing briefs were filed.<sup>3</sup> A proposed decision was issued December 12, 2007 pursuant to 760 CMR 30.09(5)(i), and the parties filed objections and arguments, which were presented to the Committee for its consideration along with the rest of the record. We conclude that the Board's decision to deny the change in the development must be overturned.

## II. FACTS

The Board granted a comprehensive permit for construction of 74 age-restricted, rental units in two buildings in January 2003. Pre-Hearing Order, § II-1. The developer had proposed and the permit confirmed that the construction was to be financed under the MassHousing (Massachusetts Housing Finance Agency) 80/20 Rental Program or a similar MassHousing tax credit program with 40% of the units, or 30 units, to be rented to households at or below 80% of median income. Exh. 1, p. 3, ¶ 5(b) and p. 4, ¶ 8; Exh. 69; Tr. II, 18. At that time, MassHousing noted that "[w]hile the [two] LLC managing

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2. The developer raises no general challenge to the Board's power to impose an age-restriction. Thus, we have not considered the broader question of whether such a restriction might be enforced in perpetuity. Cf. *Lexington Ridge Associates v. Lexington*, No. 90-13 (Mass. Housing Appeals Committee Jun. 25, 1992); *Zoning Board of Appeals of Wellesley v. Ardmore Apartments Ltd. Partnership*, 436 Mass. 811, 767 N.E. 2d 584 (2002).

3. The parties stipulated that the developer has satisfied the three requirements contained in 760 CMR 31.01(1)(limited dividend status, fundability, and site control), and that the town of Hanover has not satisfied any of the statutory minima set forth in the second sentence of the definition of "consistent with local needs" in G.L. c. 40B, § 20. Pre-Hearing Order, §§ II-12 to II-15.

members... have considerable experience with complex single-family and commercial real estate development transactions, they have no prior... multifamily rental development experience.” Exh 69, p.1; Tr. I, 73-74. It therefore suggested that the development team be “strengthened” by the addition of a consultant or LLC manager with multi-family rental experience. Exh. 69, p. 1.

MassHousing had also expressed concerns about the financial feasibility of the development. In January 2002, it reviewed the developer’s application and noted that proposed rents appeared realistic, but that was “a preliminary assessment, based on limited data. Subject rents estimated at later application stages might be different.... [The age] restriction will greatly limit the market potential of the subject and possibly affect achievable rent levels.” Exh. 66, p. 2. In May 2003, it noted, “While the current design appears to be traditional multifamily housing with limited amenities and elderly services, MassHousing staff expects that ongoing market research may dictate design changes... that will better position the development to appeal to the target 55-and-over market.” Exh. 69, p. 2.

Construction of the development began during the summer of 2003. Exh. T-4, ¶¶ 34, 57.

In August 2003, a Residential Market Analysis was prepared by Byrne McKinney & Associates, Inc. for a potential lender to the development. Exh. 71. The developer was aware that this report had been prepared, but did not review it, and only received a copy “much later.” Tr. I, 77. The report predicted that market-rate units would lease up at an absorption rate of “approximately 5 apartment units per month.” Exh. 71, p. 44.

In the spring of 2004, in response to MassHousing’s suggestion that the development team be strengthened, the developer hired a well known real estate management firm as marketing agent, Peabody Properties, Inc. (Peabody). Exh. T-2, ¶ 15; T-3, ¶ 4; Tr. I, 74, 93. As part of its responsibilities, in August 2004, Peabody prepared a market study to determine what other similar age-restricted rental housing was available in the market area. See Exh. 36. The purpose of this was to determine what developments would compete with North Pointe, to help set rental rates, and to identify sources of potential tenants. Exh. T-3, ¶ 10. This was incorporated into a June 2004

Marketing Plan. Exh. 22. This marketing study and plan was considerably less “formal” than the market analysis prepared by Byrne McKinney & Associates. Tr. I, 80. It indicated that “[a]bsorption rates are anticipated to be on the higher side,” and that at “the absorption rate of 8 to 12 units per month,” lease-up would be achieved within six to nine months of completion of construction. Exh. 22, pp. 4-5.

In late April or early May 2004, when construction was approximately one third complete, the developer requested a change in the development’s financing to the New England Fund (NEF) of the Federal Home Loan Bank of Boston and a reduction in the number of affordable units to 19, or 25% of the total number of units. Exh. T-4, ¶ 57. The Board opened a hearing on the request on May 12, 2004, and approved the request on August 10, 2004. Exh. 2; T-2, ¶ 13.

An advertising campaign began in November of 2004, and a Peabody employee began to work exclusively on marketing the development. Exh. 24, pp.1-2, 50; T-2, ¶16.

Construction of the development was completed, and rental of apartments began in February 2005.<sup>4</sup> Tr. I, 55; Exh. T-2, ¶ 15.

The Peabody employee maintained an office in the development which was open seven days per week. Exh. T-2, ¶ 16; T-3, ¶ 8. In March 2005, an addendum to the Marketing Plan was prepared. Exh. T-3, ¶ 22; see Exh. 4. In June, it became clear that few people were interested in renting the market-rate units, and an additional 90-Day Marketing Plan was prepared. Exh. T-3, ¶ 23; see Exh. 5. Though it originally budgeted \$55,000 for marketing, the developer spent over \$90,000 on marketing, including \$30,000 on advertising. Exh. T-2, ¶ 17; T-3, ¶¶11; 22-A. Marketing efforts were extensive, including not only advertising and flyers, but also promotional efforts such as offering free cruises and other incentives to new renters and conducting a flu vaccination clinic on the premises to attract older people. Exh. T-3, ¶¶ 27-30; Tr. II, 60.

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4. There is inconclusive testimony indicating that the first tenants may not have occupied their units until April or perhaps May 1. Tr. II, 51-52.