

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

TAYLOR COVE DEVELOPMENT, LLC,)	
Appellant)	
v.)	No. 09-01
ANDOVER BOARD OF APPEALS,)	
Appellee)	

RULING ON MOTION FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

On July 14, 2008, Taylor Cove Development, LLC submitted an application to the Andover Zoning Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build 32 affordable, mixed-income residential condominium units on a twelve-acre site off of River Street in Andover. The housing is to be financed under the Massachusetts Housing Finance Agency (MassHousing) Housing Starts Program or the Federal Home Loan Bank of Boston New England Fund. The Board denied the permit by decision filed with the town clerk on February 13, 2009. On March 2, 2009, the developer appealed to this Committee. The hearing was opened with a conference of counsel on March 19. On May 5, 2009, the developer filed a Motion for Summary Decision pursuant to 760 CMR 56.06(5)(d), which the Board opposed.¹ Both parties filed affidavits, exhibits, and memoranda of law in

1. Because of the Committee's relatively informal, administrative hearing procedures, the issues raised by both sides can be fully joined without any technical requirement that the Board file a cross-motion for summary decision. See 760 CMR 56.06(5)(d) ("Summary decision may be made against the moving party, if appropriate.").

support of their positions.² The issue presented on this motion concerns whether a comprehensive permit may properly be granted for a site that includes an undeveloped lot of an existing subdivision. For the reasons discussed below, I rule that on the facts presented here, the subdivision lot may be properly included as part of the proposed development, and I grant the developer's motion and remand the matter to the Board for further review of the merits of the application.

II. FACTS

Taylor Cove Condominiums, the development that is the subject of this appeal, is proposed on a site adjacent to an existing subdivision of about the same size, the Charlotte Circle Subdivision. The twelve-acre Taylor Cove development site has been assembled from more than one lot. Most notably, about half of the 32 proposed housing units are to be built on a 2.86-acre lot³ that was designated as "Parcel A" in the Charlotte Circle Subdivision in 1984. Affidavit of Applicant's Counsel, Exh. 3, 9, 11 (filed May 5, 2009)(hereafter, "AAC"). That is, Parcel A was designated when the Andover Planning Board approved a definitive subdivision plan and a "Special Permit to Cluster" under the town's cluster development bylaw on January 10, 1984. AAC, Exh. 6, ¶ 16; 7; 9.

More specifically, the Charlotte Circle Subdivision consists of seven lots totaling 10.88 acres. AAC, Exh. 9. Five buildable lots, which are roughly an acre in size, are clustered around the Charlotte Circle *cul de sac*, and are labeled "Lot 1" through "Lot 5." AAC, Exh. 9. Behind Lots 1 and 2, to the northwest of the circle, is a lot that is set aside and labeled "Parcel B - Open Space." AAC, Exh. 9. At a little over three acres, Parcel B provides the open space required by the cluster development bylaw—30% of the total

2. The Board requested the opportunity to present oral testimony by a hostile witness, the surveyor who laid out the subdivision described below. Motion to Present Oral Argument [sic] (filed May 1, 2009). No arguments concerning factual difference about the subdivision layout, however, were pursued in the briefs of the parties. Further, our regulations provide that "a hearing maybe held at the discretion of the presiding officer." 760 CMR 56.06(5)(a)(1). I find that there is no genuine issue as to any material fact with regard to the issues presented, that the motion for summary decision can be decided on the record presented without the need for a hearing, and therefore the motion for oral testimony is denied.

3. As noted in the Board's decision, Parcel A was originally 2.6 acres, but by an amendment in 1985, it was increased to 2.86 acres, and Lot 5 was reduced in size. See ACC, Exh. 2, p. 4, n."a."

subdivision. See ACC, Exh. 4, p. 45, ¶ 3. Parcel A, also a large, nearly three-acre lot, is a sixth buildable lot set off some distance from the circle to the south behind Lots 4 and 5; its access was not to be from the north at Charlotte Circle, but rather from the southwest (the far end) from River Street—by right of way that was confirmed by a variance approved in 1983.⁴ ACC, Exh. 5, 9.

III. DISCUSSION

The question presented in this case is not answered in the text of the Comprehensive Permit Law nor in court precedents, and therefore the Board raises a number of new, complex, and interrelated arguments. It denied the developer's application for a comprehensive permit on the grounds that Parcel A cannot properly be included in the proposed development. "Parcel A would effectively be subtracted from the cluster subdivision," making it a size that would have prevented approval, and thus, "'double-counting' Parcel A's area—first as an essential component of satisfying the 10-acre requirement for the cluster subdivision and later as an essential part of the proposed 40B development—derogat[ing] from the cluster subdivision approval... and the Zoning Bylaw." ACC, Exh. 2, p. 9, ¶¶ 10, 12. The Board elaborates this position in its brief: "Removing

4. This description of the Charlotte Circle Subdivision is not readily apparent on the face of the 1984 plan and decision of the Andover Planning Board. The approved subdivision plan contains a number of ambiguities, and could be read as showing the subdivision as consisting of either seven lots or eleven lots. On the one hand, the plan shows eleven lots totaling 13.22 acres: Lots 1 through 5, and Parcels A through F. And, the plan notes, "Total site area = 13.22 Ac.; total number of buildable lots = 7 (Lots 1,2,3,4,5, Parcels A & D)." AAC, Exh. 9. Another note on the plan indicates that the five numbered lots and lots A and D are the buildable lots. AAC, Exh. 9. Parcel B is designated "open space," and was to be conveyed to the Andover Conservation Commission. ACC, Exh. 6, ¶ 12; 9. Parcels D and E are adjoining one-acre house lots on River Street, one of which contains an existing house. Parcels C and F are small lots, which are to be conveyed to abutting landowners. ACC, Exh. 9.

The November 9, 1983 Cluster Development Application, on the other hand, lists the "total area of parcel being subdivided" as 10.88 acres. Affidavit of Zoning Board of Appeals Counsel, Exh. 1, p. 2, ¶ 7 (filed May 29, 2009)(hereafter "AZBAC"). The approved subdivision plan has a notation of: "Total Site Area (excluding Parcels C, D, E, & F) = 10.88 A." Further indication that the subdivision is 10.88 acres is that the cluster development bylaw requires that 30% of the land within a cluster development be set aside as open space, and Parcel B, the open space that is set aside, is 3.27 acres, or exactly 30% of 10.88 acres. See ACC, Exh. 4, p. 45, ¶ 3. Thus, it is clear, and the parties do not dispute, that the intention of the planning board was to approve a seven-lot cluster subdivision of 10.88 acres.