COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

SOUTH CENTER REALTY, LLC Appellant v. TOWN OF BELLINGHAM ZONING BOARD OF APPEALS Appellee	)	No. 07-03

RULING ON MOTION TO DISMISS

South Center Realty, LLC (SCR) appealed, pursuant to G.L. c. 40B, § 22, a decision of the Town of Bellingham Zoning Board of Appeals to deny SCR's application for a comprehensive permit.

The Board has moved to dismiss the appeal. It argues first that its low and moderate housing stock exceeds 10% of its total year-round housing units and second that because it has reached its 10% threshold, the Housing Appeals Committee does not have the authority to hear SCR's appeal.

For the reasons set forth below, the Board's motion is denied.

I. PROCEDURAL HISTORY

On November 5, 2004, SCR submitted an application to the Board for a comprehensive permit for a project under the Housing Starts Program of Massachusetts Housing Finance Agency and the New England Fund Program of the Federal Home Loan Bank of Boston. The proposed project provides 250 homeownership units on 63.4 acres located on Silver Lake Road in Bellingham. During the comprehensive hearings, the proposed project was modified to 120 units.

Nineteen hearings for the proposed project were held between January 6, 2005 and February 13, 2007, when the Board voted to deny SCR the comprehensive permit. The Board's decision was filed with the town clerk on March 9, 2007.

On March 28, 2007, SCR filed its appeal with the Committee. On April 19, 2007, the Board answered the appeal. The Board filed its Conference of Counsel Memorandum on April 20, 2007. On June 18, 2007, the Board filed a motion to dismiss. On August 20, 2007, SCR filed its opposition to the Board's motion. The Board's reply and SCR's sur-reply memoranda were filed on October 1st and October 12, 2007, respectively.

II. APPLICABILITY OF NEW REGULATIONS

New regulations for the Committee were promulgated on February 22, 2008. Pursuant to the Transition Rules of these new regulations, certain sections therein apply to some cases already before the Committee. According to 760 CMR 56.08(3)(c), the new regulations apply to this case. During the transition, however, the Committee may make some exceptions for practical and due process reasons.

Since this matter is already before the Committee, we will not refer it to the Department of Housing and Community Development (DHCD) for action under 760 CMR 56.03(3)(a). Similarly, 760 CMR 56.03(8), which revises the timing of the subsidized housing unit percentage calculation and outlines a new expedited interlocutory appeal for rebutting the presumption of the subsidized housing inventory's (SHI's) accuracy is not applicable here. Therefore, the Committee will address the matter.

III. MOTION TO DISMISS

The Board moved to dismiss SCR's appeal under 760 CMR 56.06(5)(2),[1] which permits a party to file a motion to dismiss specifically raising issues under the statutory minima described in 760 CMR 56.03(3)(a).[2] The basis for its motion is that the SHI shows that 10.1% of Bellingham's housing is low- or moderate-income.

Following the guidance of the Massachusetts Supreme Judicial Court, the Committee can accept the facts asserted in the appellant's "Initial Pleading" (or

1. Formerly 760 CMR 30.07(2)(b).
2. Formerly 760 CMR 31.04.

complaint) "together with any favorable inferences reasonably drawn therefrom, as true...." *Nathan Eigerman v. Putnam Investment, Inc. & another*, 450 Mass. 281, 282, 877 N.E. 2d 1258 (2007) (citing *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 322, 693 N.E.2d 153 (1998)). *Nathan Eigerman* further suggests that the Committee can reject and refrain from making "'legal conclusions [in the complaint] cast in the form of factual allegations.'" *Id.* (citing *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477, 735 N.E.2d 373 (2000)). Finally, "a motion to dismiss [can] be denied 'unless it appears beyond doubt that the [appellant] can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 286 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

IV. THE COMMITTEE'S AUTHORITY

Stating the Board's argument generally, once a town has reached the 10% threshold of low and moderate income housing (the housing unit minimum), the Committee no longer has authority to review a developer's appeal. This view is not consistent with the Committee's regulations. The Committee has the authority to determine if a town has indeed met the 10% minimum including: (1) whether evidence has been introduced to rebut the presumption established by DHCD's SHI; and (2) whether, on the facts of the case, disputed projects should be included. The Committee's regulations state:

> For purposes of calculating whether the city or town's SHI Eligible Housing units exceed 10% of its total housing units, pursuant to M.G.L. c. 40B, §20 and 760 CMR 56.00, there shall be a presumption that the latest SHI contains an accurate count of SHI Eligible Housing and total housing units... [A] party may introduce evidence to rebut this presumption... applying the standards of eligibility for the SHI set forth in 760 CMR 56.03(2).

760 CMR 56.03(3)(a); also see *West Wrentham Village, LLC v. Wrentham*, No. 05-04, slip op. at 3 (Mass. Housing Appeals Committee Jul 13, 2005); *Town of Wrentham Zoning Board of Appeals v. West Wrentham Village, LLC*, No. 10066 (Supreme Judicial Court argued Feb. 4, 2008). The new regulations do not change the scope of the Committee's authority to determine whether the 10% has been reached, but simply change the timing of when the Committee's authority

can be exercised.[3] For the reasons stated above, the Committee will not refer this matter to DHCD.

V. BURDEN OF PROOF

This ruling relies on one main issue: whether the Board met its burden of proof where there is a rebuttal to the presumption that Bellingham has met its housing unit minimum. Since the Board moved to dismiss, the Board has the burden of proof. Pursuant to 760 CMR 56.07(2)(e), the Board may demonstrate that its decision to deny the comprehensive permit was consistent with local needs because it has made progress toward local affordable housing thresholds (e.g. statutory minima, which include housing unit, general land area, and annual land area). "The Board shall have the burden of proving satisfaction of such grounds." 760 CMR 56.07(2)(e).

The Board argues, "SCR bears the burden of proof to demonstrate with conclusive evidence that any units should not be incorporated by [DHCD's SHI]." Board's Reply Brief, p. 2. Such an argument mis-interprets the Committee's regulations and the opinion of the Commonwealth's judiciary. For example, in *Standerwick v. Zoning Board Appeals of Andover*, the Supreme Judicial Court stated, "A presumption does not shift the burden of proof; it is a rule of evidence that aids the party bearing the burden of proof in sustaining that burden by 'throw[ing] upon his adversary the burden of going forward with evidence.'" *Standerwick*, 447 Mass. 20, 34, 849 N.E. 2d 197 (2006) (citing *Epstein v. Boston Hous. Auth.*, 317 Mass. 297, 302, 58 N.E. 2d 135 (1944)). Contrary to the Board's argument, the Committee's regulations do *not* provide that the burden shifts from the party claiming that the SHI is accurate to the party claiming that it is not. Accordingly, for the Board to have prevailed here, it must have shown that SCR's rebuttal did not "warrant a finding contrary to the presumed fact." *Id.* at 35.

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3. While the old regulations allowed a Board to carry its burden of proof regarding the statutory minima before the Committee, the new regulations require, for appeals not already filed with a Board, DHCD to hear the matter first. Either the Board or the developer can then appeal to the Committee in a *de novo* hearing.