

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

WHITCOMB RIDGE, LLC

Appellant

v.

BOXBOROUGH BOARD
OF APPEALS,

Appellee

No. 06-11

SUMMARY DECISION

I. INTRODUCTION

This is an appeal of a decision of the Boxborough Zoning Board of Appeals (Board) granting a comprehensive permit with conditions to the Appellant, Whitcomb Ridge, LLC (Whitcomb). The dispute lies with certain conditions that Whitcomb asserts are unacceptable to the Massachusetts Housing Finance Agency (MassHousing), which will serve as either subsidizing agency or project administrator. This case, and the recent case of *Attitash Views, LLC v. Amesbury*, No. 06-17 (Mass. Housing Appeals Committee Oct. 15, 2007), address questions that are fundamental to the statutory process for issuing comprehensive permits to build affordable housing under G.L. c. 40B. Under that statute, for nearly four decades a complex system has evolved, which addresses the funding, permitting, and long-term preservation of affordable housing. The Comprehensive Permit Law, G.L. c. 40B §§ 20-23, provides the broad outlines of this process. Many legal and programmatic details are prescribed not only in regulations and formal guidelines of different state agencies, but also in policies and practices of those agencies and in precedents of this Committee and the courts.

In recent years, local boards of appeals and municipalities in general have questioned the quality of oversight that has been provided at various stages in the process. We agree that

such oversight is critical, and recognize the consensus that it can and should be strengthened in a number of areas. See *Attitash*, No. 06-17, slip op. at 1. Here, however, the Board has attempted to exercise control in certain of those areas by imposing conditions that extend beyond a board's traditional role of reviewing the siting and design of a housing development. In particular, the Board has sought to dictate how parts of the calculation of the profit limitation will be conducted and assessed, to restrict the choice of the agent that will monitor the development, and otherwise to insert itself into programmatic aspects of the development.

There is no dispute that all of these areas are important and that effective administrative oversight in each individual area is essential. The question presented here, however, is whether that oversight may be taken on by a local board of appeals or whether it is more appropriately left in the hands of state housing agencies. As discussed below, we find *Attitash* to be dispositive of the issues presented here. We conclude that for the most part the functions that the Board seeks to undertake "are functions that, under the statutory scheme, have been reserved for state government." *Id.* at 2. Specifically, the Board has attempted to exercise control over areas which have been determined to be the province of the subsidizing agency or project administrator. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 6-7 (Mass. Housing Appeals Committee June 25, 1992).¹

II. PROCEDURAL HISTORY

On June 30, 2005, Whitcomb submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build a 60-unit mixed-income affordable condominium housing project under the New England Fund or the MassHousing Housing Starts Program. In a decision filed with the town clerk on August 3, 2006, the Board granted a comprehensive permit for the project subject to a number of conditions. On August 22, 2006, Whitcomb appealed this decision to the Housing Appeals Committee.

On January 12, 2007, the developer filed a motion for summary decision and request for hearing. See 760 CMR 30.07(1)(a) and 30.07(4). Whitcomb argues that it has

1. In the context of programs funded through the New England Fund, that role is taken by the project administrator. As discussed below, the distinction raised by the Board between a subsidizing agency and a project administrator is immaterial to our analysis.

established the presumption that the conditions it challenges render the project uneconomic and that the Board has failed to meet its burden to show that the conditions are consistent with local needs that outweigh the regional housing need. The Board opposed the developer's motion and requested summary decision against the moving party. It also moved to strike a January 10, 2007 letter from MassHousing submitted by Whitcomb in support of its motion (the 2007 MassHousing Letter).

Whitcomb subsequently submitted its opposition to the Board's request for summary decision with a supporting affidavit and an opposition to the Board's motion to strike. MassHousing filed a motion for leave to participate as an interested person and submitted a legal memorandum with supporting documents in connection with the parties' motions for summary decision. Thereafter, the Board moved to strike portions of the O'Hagan Affidavit submitted by Whitcomb.²

Because of the serious policy questions involved, by letter dated May 15, 2007, the Presiding Officer in this matter solicited the participation of the Massachusetts Department of Housing and Community Development (DHCD) as an interested person pursuant to 760 CMR 30.04(4) as well. She indicated that the appeal appeared to raise "emerging policy considerations of the sort concerning which the Committee has traditionally looked to DHCD for guidance." See, e.g., *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at 9, n.6 (Mass. Housing Appeals Committee Mar. 5, 1999), citing *Little Hios Hills Realty Trust v. Plymouth*, No. 92-02 (Mass. Housing Appeals Committee Sep. 23, 1993). DHCD responded with a Motion to Participate as an Interested Person, which was granted on June 15, 2007, and thereafter it filed a memorandum of law expressing its views on the issues raised in the case. The Board objected to the participation of MassHousing as an interested person and

2. The Board's motion to strike the 2007 MassHousing Letter is denied. Whitcomb has stated that the letter was submitted for non-hearsay purposes. In any event, to the extent the letter contains hearsay or other objectionable material, it is admissible as the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. G.L. 30A, § 11(2); also see *Farmview Affordable Homes, Inc. v. Sandwich*, No. 02-32, slip op. at 5 (Mass. Housing Appeals Committee Ruling on Motion to Quash May 21, 2004) (Committee will not permit cross-examination of MassHousing officials in order to "look behind" subsidizing agency's approval process); 760 CMR 31.07(1)(f), 31.07(4)(a). For similar reasons, the Board's motion to strike certain portions of the O'Hagan Affidavit is denied.