

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

PARAGON RESIDENTIAL PROPERTIES, LLC

v.

BROOKLINE ZONING BOARD OF APPEALS

No. 04-16

**DECISION OF THE COMMITTEE
ON REMAND**

May 12, 2008

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

_____)		
PARAGON RESIDENTIAL)		
PROPERTIES, LLC,)		
)		
Appellant)		
)		
v.)	No. 04-16	
)		
BROOKLINE ZONING)		
BOARD OF APPEALS,)		
)		
Appellee)		
_____)		

**DECISION OF THE COMMITTEE
ON REMAND**

I. ORIGINAL PROCEEDING BEFORE COMMITTEE

On October 14, 2003, Paragon submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23, for a condominium project consisting of 88 units, later amended to reduce the size of the project to 68 units. The project was to be financed by the Massachusetts Housing Finance Agency Housing Starts program. Pre-Hearing Order, § II, ¶ 2; Exhs. 1, 2(a). The Board's grant of the comprehensive permit with conditions was appealed to the Committee. The Committee's Chairman, who recused himself, designated the Presiding Officer to hear this matter. The Presiding Officer granted the motion to intervene of a neighbor of the site.

Following a site visit and an evidentiary hearing, including prefiled direct testimony, oral cross-examination over nine days between April 3, and 20, 2006, and an opportunity for

oral argument to the Presiding Officer,¹ the Presiding Officer issued a “Proposed Decision and Report of Hearing Officer” on January 23, 2007,² in accordance with 760 CMR 56.06(7)(e)(9) and (10) (2008)³ and G.L. c. 30A, § 11(7). In the cover letter for the Proposed Decision, addressed to counsel for all parties, the Presiding Officer stated:

Enclosed please find the Proposed Decision and Report of Hearing Officer in the above case. In accordance with 760 CMR 30.09(5)(i) [now 760 CMR 56.06(7)(e)(10)],⁴ you may file written arguments and objections on or before February 5, 2007 for the Committee’s consideration.

See attached Exhibit A. On February 5, 2007, the Board filed its “Objections and Argument in Opposition to the Draft Decision of the Committee’s Hearing Officer.” See cover letter of Board’s counsel attached as Exhibit B. The Intervener submitted a letter of objection and argument regarding the proposed decision on the same date. The Appellant did not submit any objections or arguments.

With regard to the participating Committee members, although we did not hear or read all the evidence, the Committee members reviewed some of the evidence, as well as the Board’s Objections and Argument, the Intervener’s letter and the parties’ post-hearing

1. One Committee member, who left the Committee following the issuance of the Decision on March 26, 2007, attended part of the first day of hearing on April 3, 2006. The parties chose not to submit oral argument to the Presiding Officer. Tr. IX, 73.

2. The date stated on the Proposed Decision (February 23, 2007) is erroneous. The Proposed Decision was issued on January 23, 2007, with a cover letter correctly dated January 23, 2007.

3. At the time of the Committee’s decision on Paragon’s appeal, 760 CMR 30.00 (2004) and 760 CMR 31.00 (2004) were the applicable Committee regulations in effect pursuant to G.L. c. 40B. Effective February 22, 2008, the Department of Housing and Community Development promulgated a revised regulation, 760 CMR 56.00. Under the transition rules in § 56.08(3)(c), for the most part, the current regulation is applicable to this proceeding. Where applicable, we note the corresponding provisions of the former regulations for convenience. There are no material differences between the former regulations and the current one in effect, with regard to the issues in this Decision on Remand.

4. The citation properly should have been to to 760 CMR 30.09(5)(h) as well, which provides: “If a majority of the committee have neither heard nor read the evidence, the presiding officer shall comply with M.G.L. c. 30A, § 11(7).” Section 30.09(5)(h) is now at 760 CMR 56.06(7)(e)(9).

memoranda. The Presiding Officer also fully participated in our deliberations.⁵ On March 26, 2007, the Committee issued its final Decision.

The Board appealed the Committee's decision to the Superior Court and filed a motion to remand the matter to the Committee on the basis that it was denied an opportunity to present an oral argument to a majority of the members of the Committee after the conclusion of the hearing. The Superior Court remanded the matter to the Committee, ruling that:

There was an absolute right to an oral argument before the presiding officer 760 CMR 30.09(6) [now 760 CMR 56.06(7)(f)] but the right to an oral hearing before the committee is limited. If a majority of the HAC have not either heard or read the evidence, the parties shall have a right to either oral or written argument as directed by the HAC pursuant to G.L. c. 30A, § 11(7) and 760 CMR 30.09(5)(h) [now 760 CMR 56.06(7)(e)(9)]. It is not apparent from the record provided to this court whether or not the HAC reviewed the evidence at the hearing. Therefore, the court ORDERS this matter REMANDED to the HAC for the purpose of *clarifying the administrative record as to whether or not the HAC reviewed the evidence before making a decision*. If the amended record establishes that the HAC did review the evidence, no further action is necessary. If on the other hand the record indicates that they did not review the record, then the decision of the HAC is to be vacated and the parties allowed to present argument either orally or in writing as the HAC may order and thereafter a decision is to be rendered by a majority of the HAC.

Town of Brookline Zoning Board of Appeals v. Housing Appeals Committee, et al., C.A. No. 07-0697 (Norfolk Super. Ct. Jan. 18, 2008) (Emphasis added). The Committee requested that the Court reconsider its decision because, having already provided an opportunity for written rather than oral argument to the Committee members through the Presiding Officer's order, we had already fully complied with 760 CMR 56.06(7)(e)(9)⁶ and G.L. c. 30A, § 11(7). The Court denied the request for reconsideration and remanded the matter to the Committee as follows.

5. Such deliberation is required by 760 CMR 56.06(7)(e)(2) [formerly § 30.09(5)(b)], which states, "[i]n cases in which the presiding officer is not a member of the Committee, he or she shall participate in deliberations of the Committee, but shall not vote."

6. Formerly 760 CMR 30.09(5)(h).

Motion ... Denied 760 CMR 30.09 [now 760 CMR 56.06(7)] and G.L. ch 30 Section 11 (7) provide that if a majority of the Committee did not hear or read the evidence of the parties must be provided the opportunity to file written objections and present oral or written arguments as the Agency may determine. Brookline ZBA has not had the opportunity but it is not known whether they deserve the opportunity until the HAC reveals whether a majority of its members reviewed the evidence.

Town of Brookline, supra, C.A. No. 07-0697 (Mar 12, 2008).

II. REMAND PROCEEDING BEFORE COMMITTEE

On remand, the Presiding Officer issued a "Proposed Decision and Report of Hearing Officer on Remand" dated April 8, 2008, and mailed it to counsel for all parties, with a cover letter stating:

Pursuant to 760 CMR [56.06(7)(e)(9) and (10)], I am enclosing the Proposed Decision and Report of Hearing Officer on Remand in the above case. In accordance with [§ 56.06(7)(e)(9)], you may submit written arguments and objections on or before April 29, 2008 for the Committee's consideration.

See attached Exhibit C.

On April 29, 2008, the Board submitted "Appellee's Objections to Proposed Decision and Report of Hearing Officer on Remand and Demand for Oral Argument." Neither the developer nor the Intervener filed an objection or other response to the Proposed Decision on Remand.

III. DISCUSSION

The Committee has reviewed the Board's objections to the Proposed Decision on Remand. After deliberations with full participation again by the Presiding Officer, we find the Board's objections to be without merit and we reaffirm the previously issued decision, as amended by this decision. On remand, a review of the record makes clear that G.L. c. 30A, § 11(7) and 760 CMR 56.06(7)(e)(9) and (10) have been followed. Section 11(7) states, in pertinent part: "If a majority of the officials of the agency who are to render the final decision have neither heard nor read the evidence, such decision ... shall be made only after ... an opportunity is afforded each party adversely affected to file objections and to present argument, either orally or in writing as the agency may order, to a majority of the officials