

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

TRIANGLE LAND DEVELOPMENT
CORP., INC.

Appellant

v.

NORTHBRIDGE ZONING BOARD
OF APPEALS

Appellee

No. 07-11

RULING ON MOTION TO DISMISS

Triangle Land Development Corp., Inc. (Triangle Land) has appealed, pursuant to G.L. c. 40B, § 22 and 760 CMR § 56.00,¹ a decision of the Northbridge Zoning Board of Appeals (Board) granting Triangle Land's application for a comprehensive permit with conditions.

The Board has moved to dismiss the appeal. It argues that Triangle Land failed to meet the filing deadline pursuant to G.L. c. 40B, § 22 and 760 CMR 56.06(4)(g).² For the reasons set forth below, the Board's motion is granted.

I. PROCEDURAL HISTORY

On or about July 26, 2004, Triangle Land submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build three (3) single-

1. At the time Triangle Land brought this appeal, 760 CMR 30.00 and 31.00 were the applicable regulations in effect pursuant to G.L. c. 40B. Effective February 22, 2008, the Department of Housing and Community Development (DHCD) promulgated a revised regulation, 760 CMR 56.00, which, by its terms, governs this appeal. Where relevant substantive changes to the regulations affect the discussion, they are discussed.

2. Formerly 760 CMR 30.06(8).

family homes and 52 townhouse style condominiums under the Massachusetts Housing Finance Agency Housing Starts Program and the New England Fund Program of the Federal Home Loan Bank of Boston. The proposed project would be built on an approximately 71.95-acre parcel located off Providence Road in Northbridge, Massachusetts. The Board held several public hearing sessions between August 26, 2004 and June 7, 2007 on which date the Board voted to close the hearing. On July 10, 2007, the Board held a deliberative session regarding its Findings and Decision (decision). On July 11, 2007, the Board filed its decision with the Northbridge Town Clerk granting Triangle Land the permit with conditions. On August 31, 2007, Triangle Land filed its appeal with the Housing Appeals Committee. On September 21, 2007, the Board filed a motion to dismiss and on October 15, 2007, Triangle Land filed its opposition. Triangle Land's supplemental opposition motion and the Board's reply were filed on December 19, 2007 and January 3, 2008,³ respectively.⁴

II. FACTUAL BACKGROUND

According to the approved minutes of the Board, the Board held a public hearing on June 7, 2007 regarding the details of the proposed project and the drafted decision. The June 7 session minutes attest to the following:

A motion was made ... *to close the public hearing* and take the matter under advisement. Motion seconded ..., the vote being 4-0 in favor.

Board's Reply Brief, Exh. C (emphasis added).

Triangle Land asserts that it had received a draft of the Board's decision in May 2007 and expressly stated during the June 7 hearing session that it would "appeal" the decision as it believed the conditions in the decision would make the project uneconomic. See Triangle Land's Opposition Brief, p. 3, ¶ 6. "The Applicant and its representatives left the meeting after a vote by the Board of Appeals." *Id.* The Board's June 7 minutes also state:

3. The Board's motions to extend reply brief deadline filed on October 19 and December 4, 2007 are hereby granted.

4. Triangle Land did not file Exhibits A1, A2, A3, and B when it filed its opposition. Since they were not filed in accordance with 760 CMR 56.06(6)(b), they are excluded from consideration on this motion. In any event, their inclusion would not alter our decision.

The Board discussed briefly the issue to allow further expansion of the units.... *Attorney Pawle will draft a final decision that will be reviewed by the Board at a meeting scheduled on July 10, 2007.*

Thereupon, the meeting was adjourned. Board's Reply Brief, Exh. C (emphasis added).

As announced at the June 7 hearing, the Board held its deliberative session on July 10, 2007. At the July 10 session, the Board voted to grant the comprehensive permit to Triangle Land with conditions and signed the final decision. Board's Brief, Exh. A, Attach. 2; also see Triangle Land's Appeal, Exh. A. On July 11, one day later, the Board filed its decision with the Town Clerk. The Board did not inform Triangle Land or its counsel directly or personally of its action. However, the day after the Board's filing, it emailed notification to Mark Anderson, Triangle Land's engineer, of the filing. On August 2, 2007, twenty days after the filing, the Town Clerk certified that no appeals had been filed. See Triangle Land's Appeal, Exh. A. The developer filed its appeal with the Committee on August 31, 2007.

III. STANDARD OF REVIEW

The Board moved to dismiss Triangle Land's appeal generally under 760 CMR 56.06(5)(c)(2),⁵ which permits a party to file a motion to dismiss raising the issue of the developer's timeliness in filings its appeal. Following the guidance of the Massachusetts Supreme Judicial Court, the Committee should accept the facts asserted in the appellant's Initial Pleading (or complaint) "together with any favorable inferences reasonably drawn therefrom, as true...." See *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 should 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 [should] 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).

5. Formerly 760 CMR 30.07(3)(b).

IV. DISCUSSION

The Committee has rarely considered the timeliness of a developer's appeal directly. However, we have recently addressed the issue in *Natick v. Natick Hunter's Hill*, No. 07-10 (Mass. Housing Appeals Committee Apr. 14, 2008 Ruling on Motion to Dismiss), where we reaffirmed that an appeal that is "even one day late ... is not proper." *Id.* at 6. The timeliness of an appeal "is dependent on the date on which notice of the decision was given to the developer as required by 760 CMR 30.06(8)" *Transformations, Inc. v. Townsend*, No. 02-14, slip op. at 3 (Mass. Housing Appeals Committee Sept. 23, 2002 Ruling on Motion for Summary Judgment). The main issue the Committee must determine in considering the timeliness of Triangle Land's appeal of the Board's decision is whether the developer filed within the time period specified by G.L. c. 40B, § 22 and 760 CMR 56.06(4)(g).⁶

In that regard, the parties dispute whether the Board was required to furnish actual notice of its decision, by means of mailing a copy to the developer. Triangle Land argues that it did not receive actual notice until August 14 when it received a paper copy of the decision "through its engineer obtaining a copy of the Decision and forwarding it to [Triangle Land] by overnight mail." Triangle Land's Opposition Brief, p. 4. Secondly, Triangle Land argues that the appeal deadline was tolled because it did not receive proper notice of the Board's July 10 deliberative session and that on July 12 the only "issuance" was an electronic transmission of an unsigned copy of the decision, which was not sent directly to Triangle Land. As we discuss below, Triangle Land's arguments are either unpersuasive or irrelevant to the statutory and regulatory appeal deadline.

A. The Statute and Regulation Governing Notice of Decision

The Board argues that Triangle Land's appeal should be dismissed because it missed the filing deadline pursuant to G.L. c. 40B, § 22 and 760 CMR 56.06(4)(g). Section 22 states:

6. Formerly 760 CMR 30.06(8), which contains the identical provision.