

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

_____)	
WHITE BARN LANE, LLC)	
)	
Appellant)	
)	
v.)	No. 2008-05
)	
NORWELL ZONING BOARD)	
OF APPEALS,)	
Appellee)	
_____)	

RULING IN RESPONSE TO SUPERIOR COURT REMAND ORDER

I. Introduction

The Superior Court has remanded this matter from the appeal of the Committee's final decision, *White Barn Lane, LLC v. Norwell*, No. 2008-05, slip op. at 29 (Mass. Housing Appeals Committee July 18, 2011) (*Decision*). In its order of remand, the court stated that the motion of White Barn Lane, LLC to enlarge the administrative record to include the recorded subdivision plan was "allowed." The court further ordered the matter remanded to the Committee "for a determination of the relevancy or materiality of the subdivision plan dated 9/23/92" with respect to the following question:

What, if any, impact the plan has on that portion of the decision of the committee cited in the motion of White Barn Lane, LLC, to enlarge the administrative record:

Enlargement of the roadway appears to constitute a modification of a subdivision covenant under § 81O, and hence trigger § 81W's requirement of the consent of purchasers within the subdivision. To the extent the widening of White Barn Lane constitutes a modification under the Subdivision Control Law, the consent requirement is a matter of state law and beyond the authority of the Committee to waive.

White Barn Lane, LLC v. Housing Appeals Committee, C.A. No. 11-0963B, Plymouth Cty. Super. Ct., Mar. 13. 2012 (Muse, J.).

Upon receipt of notification of the remand, the Presiding Officer held a conference of counsel and requested and received written argument from the parties concerning the purpose, scope, and desired outcome of the remand.

II. Factual Background Pertaining to Subdivision

The following facts, included in the Committee's *Decision*, pertain to the subdivision issue raised here:

"White Barn Lane and a portion of the project site are located within an approved subdivision entitled 'Old Farm Estates in Norwell, Mass.,' pursuant to a Definitive Subdivision Plan dated September 23, 1992, and revised February 24, 1993. The Norwell Planning Board voted to approve the definitive subdivision plan on March 8, 1993. The subdivision plan is referenced in a Town of Norwell Planning Board covenant by the owner of the subdivision premises. The covenant was recorded with the registry of deeds on June 1, 1993." *Decision* at 27 [internal citations omitted].

"The project site is comprised of three parcels which are part of a subdivision accepted by the Planning Board. ... The site has access to Circuit Street, a public way, over White Barn Lane, a two-way unpaved private roadway. ... White Barn Lane is approximately 12 to 14 feet wide ending in a cul-de-sac planted with trees. It is surfaced with a sandy gravel mix and is located within a 50-foot right of way. The project includes an internal roadway network connecting to White Barn Lane and Forest Street." *Id* at 4. "The Interveners reside on White Barn Lane in single family homes. ... White Barn Lane is the sole access for the Interveners to their homes. *Id.* at 5.

"The developer proposes improvements to White Barn Lane, including removal of the island and trees in the cul-de-sac, stormwater management improvements, and paving and widening the roadway to 22 feet, extending through the cul-de sac to the development site. *Id.* at 31.

"The [subdivision] covenant contains a number of restrictions binding on the original owner and successors in title to the premises. For example, it restricts further subdivision of the lots that make up the project site. ... With regard to improvements to White Barn Lane, the covenant also requires that a conservation plan be submitted for approval to the Planning Board before any roadway clearing. ... It also restricts re-grading in areas adjacent to White Barn Lane ...except in conformity with a grading plan bearing an endorsement of approval

by the [Planning] Board which shall be granted upon the Planning Board's finding that any proposed change in grade will not create or aggravate drainage problems on lands adjoining the Grade Control Area." *Id.* at 27 [internal quotation marks omitted].

III. Discussion

The Committee assumes that in stating that White Barn's motion to enlarge administrative record "is Allowed," the Court has ordered that the administrative record be expanded to include the recorded plan attached as Exhibit 1 to the motion. Therefore, we do not address the merits of whether the plan should be admitted into the record; it is hereby admitted as part of the record before us. Rather, our focus is on the specific question presented by the Court.

In their post-hearing memoranda in the comprehensive permit proceeding before the Committee, the Board and Interveners raised the issue of what changes pertaining to the subdivision required approval under state law, G.L. c. 41, §§ 81O and 81W. Chapter 41, section 81O provides that "After the approval of a plan the location and width of ways shown thereon shall not be changed unless the plan is amended accordingly as provided in section eighty-one W...."

We reiterate that the Committee does not have jurisdiction over whether G.L. c. 41, §§ 81O and 81W require the approval of subdivision lot owners of White Barn's proposed actions concerning White Barn Lane.¹ This is a matter for the courts. See *Patelle v. Planning Bd. of Woburn*, 20 Mass. App. Ct. 279, 282-83 (1985). Therefore, the language which the court asked us to examine, to the extent it suggests a finding of fact concerning whether White Barn has "changed the location and width of ways shown [on the subdivision plan]" within the meaning of § 81O should not be so interpreted. By stating, "Enlargement of the roadway *appears* to constitute a modification....," *Decision* at 29 (emphasis added), the Committee specifically refrained from making a finding of fact. Rather, the Committee's statement regarding the developer's enlargement of the roadway, was a suggestion to the

1. Section 81W provides, in pertinent part:

No modification, amendment or rescission of the approval of a plan of a subdivision or changes in such plan shall affect the lots in such subdivision which have been sold or mortgaged in good faith and for a valuable consideration subsequent to the approval of the plan, or any rights appurtenant thereto, without the consent of the owner of such lots, and of the holder of the mortgage or mortgages, if any, thereon....

parties that the issue of subdivision approval under the statute was not foreclosed. Our purpose in making the statement was to alert the parties to the potential issue necessarily to be resolved outside the comprehensive permit proceeding. Neither did we make a ruling of law with regard to this issue. Of course, the language also emphasized that the Committee could not waive such a state law requirement.

The evidence before us, as indicated above, showed that the roadway proper, as opposed to the 50-foot right of way, was intended to be expanded and modified by the developers from some 12 to 14 feet in width to about 22 feet wide. The developer takes the position that all the improvements are within the 50 feet right of way, as described in the hearing, and within the 50-foot wide White Barn Lane depicted on the subdivision plan (White Barn Exhibit 1), and therefore do not trigger the requirements of the subdivision control law. The Board and Interveners disagree. Whether these modifications rise to the level requiring approval under c. 41, § 81W was not before us. See *Patelle v. Planning Bd. of Woburn*, 20 Mass. App. Ct. 279, 282-83 (1985). For this reason, the additional information in the subdivision plan, showing the location, layout and width of White Barn Lane, may be relevant to a determination under G.L. c. 41, § 81O or 81W. See White Barn Exh. 1. However, it does not alter our view expressed in the specified paragraph that the issue is one more appropriately examined outside the Committee's proceeding.

Housing Appeals Committee

Date: June 11, 2012

Werner Lohe, Chairman

Theodore M. Hess-Mahan

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer

Certificate of Service

I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Ruling in Response to Superior Court Remand Order in the case of White Barn Lane, LLC v. Norwell Zoning Board of Appeals, No. 2008-05, to:


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Lorraine Nessar, Clerk
Housing Appeals Committee