COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

SANDWICH HOUSING PARTNERS, II, Appellant	)	
v.	)	No. 07-02
SANDWICH BOARD OF APPEALS, Appellee	)	

SUMMARY DECISION

I. INTRODUCTION

On December 28, 2006, the Sandwich Board of Appeals granted a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to the developer, Sandwich Housing Partners II,[1] to build four units of affordable housing on a six-acre parcel of land on Chase Road in Sandwich. Construction of the housing was to be funded under the New England Fund of the Federal Home Loan Bank of Boston. In January 2007, the developer appealed to this Committee alleging that a condition that required the developer to demonstrate to the satisfaction of town counsel that the permit did not "compromise compliance with" a special permit issued for the construction and operation of a cell tower rendered the project uneconomic. Lengthy settlement negotiations ultimately proved to be of no avail, and on February 28, 2011, after further proceedings before the Board, the developer filed a motion for summary decision pursuant to 760 CMR 56.06(5)(d), supported by an affidavit of counsel and a number of exhibits. On April 12, 2011, the Board submitted an opposition supported by its own affidavit of counsel and exhibits. In May the developer filed a reply,

1. The applicant before the Board was KB Nominee Trust, J. Bruce MacGregor, Trustee.

and the Board a surreply.[2]

II. FACTS

On February 23, 2000, the Sandwich Planning Board issued a special permit to Seacoast Limited Partnership and Sprint Spectrum Limited Partnership to build a communications tower (cell tower) near Chase Road. See Exh. Bd-1. The site had only 116 feet of frontage on Chase Road, and is long and narrow, generally about 300 feet wide and nearly a half mile long. See Exh. Bd-2, Bd-13-1, Bd-13-2. The site was about 17 acres and located in a rural residential area in which the Sandwich Zoning Bylaw required a minimum lot size of 60,000 square feet. Exh. Bd-1, findings 2, 3. The cell tower was located at the southwestern end of the property farthest from Chase Road.

On October 3, 2000, the Planning Board endorsed a plan for the site as "approval under the subdivision control law not required." Exh. Bd-2. This plan subdivided the original site into two lots. Lot 1A included a more or less rectangular, three-acre area near Chase Street at the northern end of the site, which is northwest of the access road to the cell tower; a rectangular area at the opposite, southern end of the site which is slightly less than an acre and is the location of the cell tower; and the "right of way" in which the access road runs, connecting the northern and southern ends of the site. Exh. Bd-2. The remaining eleven acres of land—basically the land on both sides of the access road—formed Lot 2A, which was "to be transferred in fee to a land preservation organization," the Sandwich Conservation Commission. Exh. Bd-2, 13-2. (In 2004, the Planning Board renewed the special permit for a period of ten years. See Exh. Bd-3.)

On December 28, 2006, the Sandwich Board of Appeals issued a comprehensive permit to build four houses on the three-acre area on the northern part of Lot 1A near Chase Road. See Exh. Bd-4. Condition 22 of that permit stated that the "applicant shall demonstrate to the satisfaction of Town Counsel that the issuance of this Comprehensive

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2. The parties are in agreement with regard to the exhibits upon which they rely. That is, the Board filed seventeen exhibits, which included all seven exhibits filed by the developer. In this ruling, we will generally refer to the exhibits by the numbers assigned to them by the Board. That is, we will refer to Exhibits Bd-9, Bd-11, Bd-12, Bd-13-1, and Bd-13-2, which duplicate Exhibits D-B, D-E, D-C, D-F-1, and D-F-2, respectively. There are two exceptions, namely, we will refer to Exhibits D-A and D-D, since they are more complete than the Board's versions of these (Exhibits Bd-4 and Bd-10).

Permit does not compromise compliance with the Special Permit issued by the Planning Board for the construction and operation of the cell tower." Exh. Bd-4, p. 5, Cond. 22. The developer was unsuccessful in obtaining an opinion from town counsel that there was no conflict between the two permits, and therefore in January 2007 requested that the Board modify the comprehensive permit by deleting the condition. Exh. Bd-5. In addition, apparently because the Sandwich building commissioner had raised questions about whether the frontage shown on the comprehensive permit plan was adequate for the cell tower approval, the developer, during the hearing before the Board, also requested that the Board modify the special permit to remove any doubt. Exh. Bd-9. On January 26, 2007, the Board voted unanimously to delete Condition 22, but took no action with regard to the special permit. Exh. Bd-7. In May 2007, the developer made a second, formal, written request to the Board to modify the special permit to authorize the cell tower frontage as shown on the comprehensive permit plan. Exh. Bd-9. On June 12, 2007, the Board of Appeals did endorse a comprehensive permit plan,[3] the intent of which was to subdivide Lot 1A "to create four building lots[4] and a 40'-wide right of way ... to an existing cellular tower site on the remainder of the lot." Exh. Bd-13. Although this showed the relationship between the affordable housing and the cell tower, it did not refer specifically to the special permit. Exh. Bd-11, Bd-12, Bd-13. The developer continued to pursue the matter, and at a meeting on February 12, 2008, the Board formally denied the request to modify the special permit, also noting that it "did not intend to modify the cell tower special permit through its grant of a comprehensive permit…." Exh. Bd-14, Bd-15.

III. DISCUSSION

Both the nature of this dispute and its procedural posture are unusual since the Board granted a comprehensive permit, and clearly considered the location of the existing

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3. The endorsement read, "approved and endorsed under M.G.L. c. 40B by the Town of Sandwich Zoning Board of Appeals." Although this is slightly different from the language we have recommended, it is entirely proper. See, e.g., *Haskins Way, LLC v. Middleborough*, No. 09-98, at 21, n.24 (Mass. Housing Appeals Committee Mar. 28, 2011). The plan is labeled a "Definitive Subdivision Plan;" our view is that it is better described as a Comprehensive Permit Plan, though we see no legal significance in the label.

4. The four building lots comprise three 30,000-sqaure-foot lots and one 24,000-square-foot lot, all on the northwest side of the access road.

cell tower, that is, noting that there is "a cell tower located in the southwest corner on Lot 1A." Exh. Bd-4, p.2. In fact, the dispute concerning the cell tower appears to be less between the developer and the Board than one involving the building commissioner, who is not a party to this appeal.[5] See, e.g., Exh. Bd-9. The initial appeal to this Committee was an appeal alleging that the Board's condition requiring the developer to demonstrate that the comprehensive permit did not conflict with the special permit rendered the proposed project uneconomic. Initial Pleading, p. 2, ¶ 7 (filed Jan. 17, 2007). After settlement discussions and further proceedings before the Board at which it declined to explicitly modify the special permit, the developer renewed its appeal and filed an Amended Initial Pleading, asking that the of the denial of the modification be overturned because it rendered the development uneconomic. Amended Initial Pleading, p. 5, ¶ 24 (filed Mar. 4, 2008). Whichever way the issue is framed,[6] it is uncontested that construction cannot proceed without a definitive ruling on the effect, or lack of effect, of the cell tower on the proposal. In such a case, the impossibility of proceeding to construction renders the development uneconomic *per se*. *Burley Street, LLC v. Wenham*, No. 09-12, slip op. at 4 (Mass. Housing Appeals Committee Sep. 27, 2010); see *Peppercorn Village Realty Trust v. Hopkinton*, No 02-02, slip op. at 8-9 (Mass. Housing Appeals Committee, Jan. 26, 2004); *Mattbob, Inc. v. Groton*, No. 09-10, slip op. at 5-6 (Mass. Housing Appeals Committee Dec. 13, 2010), *appeal docketed* C.A. No. 11-0104-F (Middlesex Super. Ct. Feb. 8, 2011), and cases cited; also see760 CMR 56.05(11)(c). Thus, the developer has met its initial burden, and the burden shifts to the Board to prove that there is a valid local concern that supports the denial of the change, and that this concerns outweighs the regional need for housing. *Burley Street, LLC v. Wenham*, No. 09-12, slip op. at 4 (Mass. Housing Appeals Committee Sep. 27, 2010).

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5. The building commissioner need not be a party since he or she is a local official who acts under the direction of the Board to implement the comprehensive permit. 760 CMR 56.05(10)(b). For that reason, an alternative way in which the issue in this case might have been framed would have been for the developer to press the building commissioner for a written denial of a building permit, which could then have been appealed to the Board and then, if necessary, this Committee (with regard only to issues arising under the Comprehensive Permit law, not any issues which might have arisen under the State Building Code).

6. We need not address the question of whether a modification to the special permit may have been granted constructively pursuant to 760 CMR 56.05(11)(b).

Once again, however, the posture of this case is unusual because the Board has not alleged any local concern that might outweigh the regional need for affordable housing. Nor does it appear that it could. No such concern was mentioned in any of the Board's decisions, and practically, it is hard to imagine how a cell tower nearly half a mile away, beyond the edge of the existing residential neighborhood, could affect the proposed affordable housing. Instead, the Board's central argument is a legal argument: that the Supreme Judicial Court's ruling in *Jepson v. Zoning Board of Appeals of Ipswich*, 450 Mass 81 (2007) precludes construction housing.[7] Specifically, the Board states:

> ...while it is permissible, of course, for a board of appeals to grant relief from local zoning requirements to allow a commercial use that would support an affordable housing project, it may do so *only* if the commercial use is permitted on the proposed property under the applicable zoning bylaw and *only* if the commercial use is incidental to the affordable housing. (emphasis added)

Board's Opposition, p. 4. In our view, this reading of *Jepson* (which held that when a commercial use is permitted on the property to be developed under the local zoning bylaw, the board has that authority to waive dimensional requirements for an incidental commercial use within the affordable housing development) is too broad. In the case before us, the Board has not been asked to permit a commercial use. Rather the commercial use was already approved by special permit and the cell tower already exists. Thus, the case before us is much more similar to previous cases of ours in which we

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7. The Board also raises several procedural arguments. First, it argues that the developer, in its initial application to build affordable housing, failed to also specifically ask for a use variance or a frontage variance for the cell tower. Board's Opposition, p. 3. Next, it argues that because the developer's initial, timely appeal to this Committee was withdrawn when the dispute appeared to be settled, and then reinstituted when settlement failed, the developer should not have been permitted to revive the appeal. Board's Brief, p.3; see Order (Mar. 2, 2007)("Dismissal/Withdrawal approved pursuant to 760 CMR 30.06(6(a)"). Third, the Board argues that the request to modify the special permit was not presented to it in the form of a "proper application." Board's Opposition, p. 5. Finally, the Board argues that the since the dispute can be characterized as one of interpretation of the comprehensive permit, it should have been brought first to the building commissioner for a "zoning determination." Board's Opposition, pp. 5-6. These are the sort of highly technical arguments that the Committee has never entertained as they fly in the face of the intent of the Comprehensive Permit Law—to streamline the permitting of affordable housing with a simplified administrative process. See, e.g., *In the Matter of Hanover Zoning Board of Appeals and Hanover Woods, LLC*, No 10-02, slip op. at 5-6 (Mass. Housing Appeals Committee Jun. 21, 2010) *Southbridge Housing Authority v. Southbridge*, No. 91-09, slip op. at 8 (Mass. Housing Appeals Committee Feb. 16, 1994), *remanded for further proceedings,* C.A. No. 94-650 (Worcester Super. Ct. Aug. 18, 1995), *decision on remand* (Mass. Housing Appeals Committee Sep. 26, 1996).

approved affordable housing developments that were not inconsistent with earlier planning board approvals. See *Woodridge Realty Tr. v. Ipswich*, No. 00-04 (Mass. Housing Appeals Committee Jun. 28, 2001); *Taylor Cove Development, LLC v. Andover*, No. 09-01 (Mass. Housing Appeals Committee Ruling on Motion for Summary Decision Jul. 7, 2009). Clearly, "…the board, when acting on an application for a comprehensive permit under the act, has the same scope of authority as "any town or city board [or official]." *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 755 (2010). "Since it is within the power of the Planning Board to modify its previous [special permit], it is within the power of the Board or the Committee" to either do the same or otherwise modify its comprehensive permit so as to remove any question about the legality of the use of the property for a cell tower. *Hollis Hills, LLC v. Lunenburg*, No 07-13, slip op. at 33-34 (Housing Appeals Committee Dec. 4, 2009), *aff'd*, No. 10-0020-C (Worcester Super. Ct. Jan. 14, 2011), *appeal docketed* No. 11-P-0670 (Mass. App. Ct. Apr. 8, 2011). Since no substantive concern has been raised by the Board, we will order it to modify the special permit.

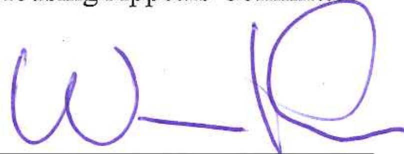
We should note, however, that where the use approved by the planning board has already been in existence for a number of years, it is by no means apparent that formal modification of the special permit is necessary. See *Woodridge Realty Tr. v. Ipswich, supra; Taylor Cove Development, LLC v. Andover, supra.* But neither is there any obstacle to doing so to provide comfort to the Building Commissioner. One of the central intentions of the Comprehensive Permit Law is to enable a developer to receive one "comprehensive" permit from the zoning board of appeals, and thus avoid controversies with other local officials. See G.L. c. 40B, § 21. In that regard, the initial decision of the Board was appropriately broad, stating that it "grant[ed] all waivers that are necessary to construct the project shown on the plans." Exh. Bd-4, p. 3, Condition 4. Although the building inspector might well have relied on that language, the Board did later state that it "did not intend to modify the cell town special permit…." Exh. Bd-14, Bd-15. Thus, certainly in this case, and perhaps in any case, the best practice may well be to bring absolute clarity to the situation by making a formal record that the special permit has been modified to the extent necessary to permit construction of the affordable housing.

IV. CONCLUSION

For the reasons stated above, the developer's Motion for Summary Decision is GRANTED. The Board is ordered to modify the comprehensive permit to indicate that the special permit allowing the cell tower is modified so that it is consistent with the comprehensive permit and comprehensive permit plan or, alternatively, to take such other action or direct other local boards or officials to take such other actions as may be necessary to permit construction of the approved affordable housing. Should the Board not carry out this order within thirty days, then, pursuant to G.L. c. 40 B, § 23, this order shall, for all purposes, be deemed to be the action of the Board.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

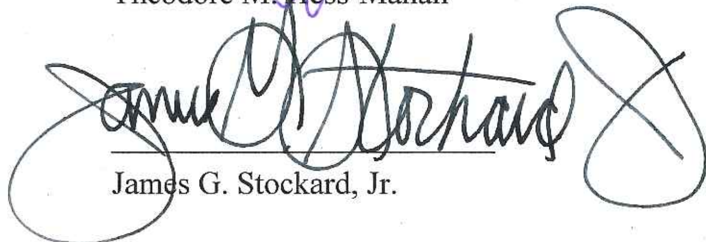
Housing Appeals Committee



Date: June 13, 2011

Werner Lohe, Chairman

Theodore M. Hess-Mahan



James G. Stockard, Jr.

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