

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

_____)	
ANSARI BUILDERS, INC.,)	
Appellant)	
v.)	No. 13-01
WESTBOROUGH BOARD OF APPEALS,)	
Appellee)	
_____)	

SUMMARY DECISION

I. PROCEDURAL HISTORY AND DISCUSSION

On August 23, 2010, the Westborough Board of Appeals (the Board) granted a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to Ansari Builders, Inc. (the developer) to build eight single family homes, of which two would be affordable, on a 3.8-acre site at 169 Main Street in Westborough. Exh. FA-A.¹ The developer had originally proposed to build fourteen units, which would be subsidized under the Local Initiative Program (LIP) of the Massachusetts Department of Housing and Community Development (DHCD). Exh. FA-A, pp. 1, 2. On October 20, 2010, the developer notified the Board that it was requesting changes in the project's roadway and stormwater drainage system, and also that the number of units be increased from eight to twelve. Exh. FA-B. The Board

1. The parties submitted documents, including a number of duplicates, with their pleadings. For identification, the documents relevant to this decision have been designated as follows:
Exh. FA-A through AF-G: attachments to the Affidavit of Farooq Ansari (filed Jul. 25, 2013),
Exh. CB-A through CB-B: attachments to the Affidavit of Carl Balduf (filed Sep. 23, 2013),
Exh. R-B: Letter from DHCD to F. Ansari, July 31, 2013 (filed Jun. 6, 2013),
Exh. K: Letter from Board to F. Ansari, June 13, 2013 (filed Jul. 1, 2014)
Exh. K-1: Notice of Decision (May 2014) (filed with Town Clerk Jun. 13, 2014)(filed Jul. 1, 2014)
Exh. K-2: Minutes (May 12, 2014) (filed with Town Clerk Jun. 13 2014)(filed Jul. 1, 2014)
Exh. JS-A: Memo from C. Balduf to Town Counsel (Apr. 4, 2014) (filed Jul. 18, 2014)

promptly determined that this was a substantial change pursuant to 760 CMR 56.05(11)(a), and set in motion the process to hold a hearing to determine whether it would approve the change. Exh. FA-C.

Two years later, in October 2012, the developer's engineer submitted a stormwater management report (dated September 20, 2012) to the town.² Exh. CB-A-1. The cover letter to that submission indicated that the enclosed documentation, in the opinion of the engineer, was sufficient to obtain approval of the stormwater management system, although it would be necessary to obtain a waiver (presumably from the Board of Appeals under the Comprehensive Permit Law) of the town's requirement that "one-inch recharge be provided for all roof areas." Exh. CB-A-1. The town engineer responded by memorandum to the town manager of October 23, 2012, indicating that the new report had properly used the methodology suggested by the town, and that it "accurately models existing and proposed drainage...." Exh. CB-A, pp. 1-2. He further recommended that any approval of the stormwater management system be subject to four technical conditions and submission of revised plans. Exh. CB-A, p. 2.

In November 2012, the developer notified DHCD of the changes it was proposing, asking it to approve the change. Exh. FA-D. It is uncontested that initially DHCD did not respond.³ See Affidavit of F. Ansari, ¶ 10 (filed Jul 25, 2013); Exh. FA-E; also see Developer's Motion for Summary Disposition, ¶ 9.

2. The submission was addressed to the Westborough Board of Selectmen in the care of the town manager. There is no allegation that submission to the selectmen rather than to the Board of Appeals was improper.

3. The Westborough Board of Selectmen, however, voted to approve the change in early 2013. Exh. FA-F. It is fundamental to LIP that the housing proposal proceed only with the approval of the community's board of selectmen. 760 CMR 56.02 ("Local Initiative Project means a Project for which the project eligibility application is submitted by the Chief Executive Officer of the municipality....").

In May 2013, the Board of Appeals conducted a hearing, and in a decision filed May 21, 2013 denied the requested change in the proposal on a single ground, namely that “the petitioner has not shown the Board any evidence of approval from the State (Department of Housing and Community Development).” Exh. FA-G, p. 2.

The developer appealed the Board’s decision to this Committee in June 2013, and filed a motion for summary decision on July 25.⁴ The Board filed an opposition in September 2013, making two arguments: that it “has been waiting for [the developer] to demonstrate that the Subsidizing Agency has approved the proposed changes and for [the developer] to submit engineering plans that are capable of being approved by the town engineer.” Board’s Opposition, p. 1 (filed Sep.23, 2013); also see Affidavit of C. Balduf, ¶¶ 6-7 (filed Sep. 23, 2013). Meanwhile, however, beginning with the filing of this appeal, the parties engaged in settlement discussions.⁵ Though they were unable to finalize a

4. The Committee may grant a motion for summary decision if the record shows no genuine issue of material fact and the moving party is entitled to a decision as a matter of law. 760 CMR 56.06(5)(d); see *LeBlanc v. Amesbury*, No. 06-08, slip op. at 4 (Mass. Housing Appeals Committee Jan. 14, 2013).

5. The hearing before this Committee was continued several times. In April 2014, the parties represented to the Committee that “save for one minor correction needed to the project plans, the Town of Westborough Engineer has approved the Applicant’s revised engineering plans. The Applicant has submitted the revised plans to make the correction requested by the Town. The Town has scheduled a hearing with the Zoning Board of Appeals on May12, 2014 to approve the revised plans and the project generally.” Joint Status Report (filed Apr. 22, 2014). After the May 12 hearing, the Board filed a decision with the town clerk on June 13, 2014 again denying the requested changes. This lengthy decision cites several new grounds for denial, notably that that 12 housing units on this 3.8-acre site is “too dense.” Exh. K, p. 7, ¶ 17. In response, the developer renewed its appeal before this Committee, and on July 16, 2014, the presiding officer conducted a Conference of Counsel by telephone at which the parties agreed that the matter should proceed to decision on the motions for summary decision, which had remained pending throughout. At the presiding officer’s request, the parties filed a joint stipulation. Joint Stipulation Regarding Approval of Engineering Plans by Town Engineer (filed Jul. 18, 2014). The Board filed no pleading or argument in support of the new grounds for its decision. We need not consider the new grounds cited for denial of the change since they are waived for failure to raise them in pleadings or in argument. *White Barn Lane, LLC v. Norwell*, No. 08-05, slip op. at 31 (Mass. Housing Appeals Committee Jul. 8, 2011); *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

settlement, the issues were narrowed dramatically, permitting us to resolve the dispute easily.

First, we note that there was no merit to the Board's original argument that it could deny the developer's request for a change in its proposal because DHCD had not approved the change. Although the regulations do require DHCD to respond to the developer's notification within 15 days of receipt, "[f]ailure to respond shall be deemed a finding that the change is not substantial." 760 CMR 56.04(5). That issue is now moot, however, since it is undisputed that by letter of July 31, 2013, DHCD notified the developer that it had reviewed the developer's proposed changes, and explicitly reaffirmed its determination of project eligibility pursuant to 760 CMR 56.04(5). Exh. R-B.

Second, in response to the October 2012 memorandum of the town engineer in which he indicated his general satisfaction with the latest stormwater system design, the developer submitted revised plans on January 24, 2014. Exh. JS-A; also see Exh. CB-A. The parties have now stipulated that "the Town Engineer has approved the Plans." Joint Stipulation (filed Jul. 18, 2014); also see Exh. JS-A. Thus, there is no substantive or procedural basis for denying the changes in the proposal based upon inadequacy of stormwater management system design.

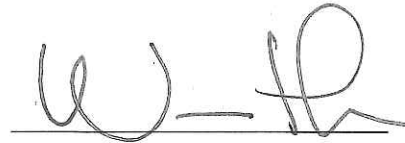
II. CONCLUSION

Summary Decision is hereby GRANTED in favor of the Developer, and DENIED with regard to the claims of the Board. The requested changes in the comprehensive permit granted by the Board are hereby permitted. Construction of the 12 housing units shall be in accordance with the comprehensive permit as modified based upon the request for changes as submitted by the developer and with the additional conditions contained in the town engineer's memorandum of April 4, 2014 (Exh. JS-A).

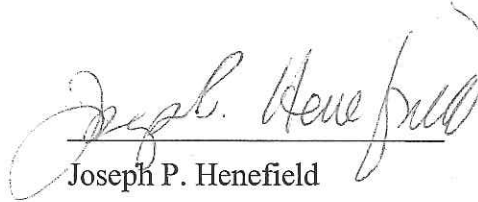
This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within thirty days of receipt of the decision.

Housing Appeals Committee

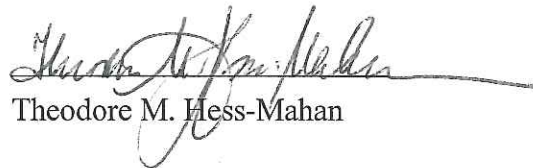
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Werner Lohe, Chairman



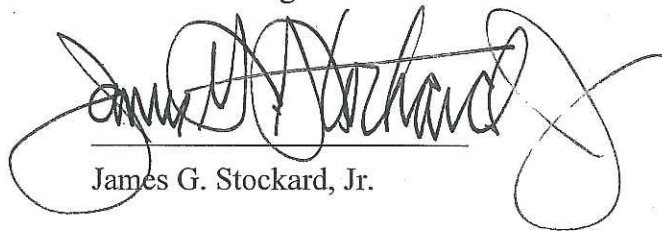
Joseph P. Henefield



Theodore M. Hess-Mahan



Constance Kruger



James G. Stockard, Jr.