

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

MEDFIELD NORTH MEADOWS, LLC

v.

MEDFIELD ZONING BOARD OF APPEALS

No. 2012-01

**SUMMARY DECISION ON
CONSTRUCTIVE GRANT OF REQUEST FOR EXTENSION
OF COMPREHENSIVE PERMIT**

September 10, 2012

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I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Medfield North, a limited liability company formed to purchase, manage and develop real estate, purchased the subject property in 1990. In 2004, it entered into a contract with West Street Development, LLC (West Street) to sell the site for development, and West Street applied to the Board for a comprehensive permit. The Board granted a comprehensive permit for a 35-unit townhouse condominium project development to West Street, filing its decision with the town clerk on February 19, 2008. Amended and Restated Decision of the Board of Appeals on the petition of West Street Development, LLC for Medfield Woods. On April 1, 2008, the comprehensive permit was transferred by West Street to Medfield North. See First Amendment to Amended and Restated Purchase and Sale Agreement between West Street and Medfield North; Rothschild Affidavit, ¶¶ 2-6.

Due to the recession and collapse of the real estate market beginning in 2007, the Appellant was unable to commence construction before the expiration of the comprehensive permit on February 19, 2011. By letter from its financial consultant, Robert Engler, dated January 3, 2011, Medfield North submitted a request for a two-year extension of the comprehensive permit. On January 20, 2011, the Board granted a one-year extension, stating in the order that the extension was “without prejudice to [the Applicant’s] right to request additional one year extensions.” Rothschild Affidavit, ¶¶ 7-10 and Exhs. C, D; Second Rothschild Affidavit, ¶¶ 3, 6.

On October 18, 2011, Medfield North entered into a purchase and sale agreement for the subject property with Gatehouse Development Corp. (Gatehouse). That agreement reserved to Medfield North the right to take any actions necessary to preserve the comprehensive permit for the site, including seeking extension of the permit. Rothschild Affidavit, Exh. G.

On December 14, 2011, Medfield North, through Mr. Engler, filed a request with the Board for another one-year extension of the comprehensive permit to February 19, 2013, giving as reasons the continued poor economic climate, difficulty in obtaining financing for construction of condominiums, and poor market for selling condominiums. Rothschild Affidavit, ¶¶ 11-13 and Exh. E; Second Rothschild Affidavit, ¶¶ 3, 6; Engler Affidavit, ¶ 7.

A public meeting of the Board was held on January 4, 2012, at which two members were present, and Mr. Engler appeared for Medfield North.¹ After discussion, the two members voted to deny the request for an extension. Cronin Affidavit, Exh. A; Rothschild Affidavit, Exh. F. Medfield North filed its appeal of this denial with the Committee on January 20, 2012.

II. MOTIONS FOR SUMMARY DECISION

Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee if “the record before the Committee, together with the affidavits (if any), shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law.” 760 CMR 56.06(5)(d). See *Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992); *Grandview Realty, Inc. v. Lexington*, No. 05-11, slip op. at 4 (Mass. Housing Appeals Committee July 10, 2006).

Medfield North asserts it is entitled to summary decision that the request for an extension of the permit was constructively granted. Alternatively, it argues that the Board’s grounds for denial are legally erroneous because the request for an extension was not a substantial change, and the Board’s denial was not consistent with local needs since Medfield North has site control and standing to apply for and receive an extension.

The Board’s cross motion asserts 1) that Medfield North failed to file a valid extension request before the permit expired; 2) that it did not constructively approve the request for an extension of the permit; and 3) the decision denying the extension was consistent with local needs because Medfield North no longer had site control for the project and its purchaser was pursuing a comprehensive permit for the site.

A. Timeliness of the Request for an Extension

As a preliminary matter, the Board’s cross-motion on the timeliness of the extension request is easily addressed. This argument rests on the assertion that Mr. Engler was not authorized to seek the extension on the developer’s behalf. However, the undisputed evidence makes clear that he acted with the developer’s authorization and the extension request was valid and thus timely. Second Rothschild Affidavit, ¶¶ 3, 6. Mr. Engler’s

1. The meeting minutes note that the Chairman stated the meeting was not a public hearing. Cronin Affidavit, Exh. A.

consulting services to Medfield North in connection with the comprehensive permit included the two requests for extensions of the permit in January and December, 2011, respectively. Second Rothschild Affidavit, ¶ 3; Engler Affidavit, ¶ 5; Second Engler Affidavit, ¶¶ 3-5.

After the Board received the December 14, 2011 extension request, its administrative assistant, Ms. Cronin, contacted Mr. Engler about the date for the meeting on the request. She stated that she had no communications regarding an extension of the comprehensive permit with anyone other than Mr. Engler. At the Board's January 4, 2012 meeting on the application, Mr. Engler was the only individual present on behalf of the Appellant. The minutes of the January 4 meeting refer to Mr. Engler as "consultant to the developer." The Board's denial letter of January 5, 2012 does not indicate there was an issue expressed by the Board members regarding Mr. Engler's authority to act for the Appellant. Second Rothschild Affidavit, ¶¶ 4-5; Cronin Affidavit, ¶¶ 1-4 and Exh. A; Engler Affidavit, ¶¶ 7-8; Rothschild Affidavit, Exh. F.

The Board, generally citing G.L. c. 156C, claims that Mr. Engler lacked authority because there is no evidence that he has an interest in Medfield North. According to the Board, since Mr. Engler is an independent consultant, there is no evidence that he acted as either an attorney of law or as an attorney in fact or that he obtained any written authorization from Medfield North to act on its behalf. Therefore it claims that the developer failed to file a timely request for an extension of its comprehensive permit by a person legally authorized to act on its behalf.

Contrary to the Board's assertion, the uncontradicted record shows that Medfield North had authorized Mr. Engler to act for it in seeking the extension requests. Second Rothschild Affidavit, ¶¶ 3, 6; Engler Affidavit, ¶ 7. All correspondence between Mr. Engler and the Board regarding the permit extension requests indicates that Mr. Rothschild, the developer's manager and member, was provided copies of the communications. Since the Board had previously accepted Mr. Engler's representation of the Appellant, and indeed, granted the first extension request by sending the approval letter to Mr. Engler, with a copy to Mr. Rothschild, the Board's claim now that the extension request was invalid comes too late. Second Rothschild Affidavit, ¶ 3. The undisputed evidence shows Mr. Engler was authorized to seek the extension on Medfield North's behalf. Therefore the Board's motion for summary decision on this ground is denied.

B. Constructive Grant of Modification Request

In its motion, Medfield North argues that the Board constructively granted its extension request by failing to take the required actions within 20 days of the Applicant's submission of the request. In its cross-motion, the Board contends that the Appellant waived the 20-day time period. However, the relevant undisputed facts are sufficient to establish that the Board failed to comply with the requirement to notify the developer of a determination of substantiality of a modification, as the extension request was, pursuant to 760 CMR 56.05(11)(a) and (b), and, therefore, the developer is entitled to summary decision on this claim.

After Medfield North's December 14 extension request was filed with the Board, on December 16, 2011, the Board's administrative assistant, Ms. Cronin "had a telephone conversation with Mr. Engler, during which [she] informed him that, because of the holiday season, the Board would be unable to hold a hearing until January 4, 2012 on whether to grant [Medfield North] a further extension of its comprehensive permit." In response, Mr. Engler did not object; he said "Okay." Cronin Affidavit, ¶ 3. On January 4, 2012, which is 21 days after the filing of the extension request, the Board held a meeting on the extension application. The two Board members in attendance discussed Medfield North's request for an extension and voted to deny the request. Cronin Affidavit, ¶ 4 and Exh. A.

While an extension request is a modification under 760 CMR 56.05(11), a permit extension "shall not, by itself, constitute a substantial change...." 760 CMR 56.05(12)(c). The comprehensive permit regulations provide that within 20 days after an applicant notifies it of a proposed change, "the Board shall determine and notify the Applicant whether it deems the change substantial or insubstantial with reference to the factors set forth at 760 CMR 56.07(4)." 760 CMR 56.05(11)(a). "[I]f the Board fails to notify the Applicant by the end of such 20-day period, the Comprehensive Permit shall be deemed modified to incorporate the Change." 760 CMR 56.05(11)(b). See also G.L. c. 40B, § 21.

It is clear from the record that the Board failed to comply with this provision. It failed to provide the required notice regarding whether the change was substantial. Nor did it provide an explanation with reference to the grounds for substantiality. Although 760 CMR 56.05(11)(a) and (b) do not expressly state what action the Board was required to take to "notify" Medfield North of the substantiality determination, we have previously noted that

c. 40B, § 21 affords guidance in stating that “[t]he provisions of section eleven of Chapter forty A shall apply to all such hearings [on comprehensive permit applications].” *West Street Group, LLC v. Stoughton*, No. 2009-14, slip op. at 5 (Mass. Housing Appeals Committee Mar. 12, 2012 Rulings on Motions for Summary Decision and to Amend) (denial of constructive grant of modification request where Board mailed copy of determination to developer within 20 days of filing of request), quoting from *Milton Commons Assoc. v. Board of Appeals of Milton*, 14 Mass. App. Ct. 111, 118 (1982). Chapter 40A, section 11 provides that “[i]n all cases where notice to individuals or specific boards or other agencies is required, notice shall be sent by mail, postage prepaid.”

The telephone conversation reported by Ms. Cronin does not meet this requirement. It does not constitute written notice; nor did she state that the Board took the position the modification requested by the extension request was substantial. Even assuming, without deciding, that her announcement that the Board would meet to decide on the extension implied a determination of substantiality, her information provided no reference to the grounds for determining substantiality in 760 CMR 56.07(4).

Nor did the meeting on January 4, 2012 conform to the 20-day notice requirement. Even if it provided the substantive content required by § 56.05(11)(a), the hearing was held on the twenty-first day after the filing of the extension request, one day too late. The Committee has made clear that a deadline missed by even one day is too late. See, e.g., *Triangle Land Development Corp., Inc. v. Northbridge*, No. 07-11, slip op. at 4 (Mass. Housing Appeals Committee May 12, 2008 Ruling on Motion to Dismiss) (dismissing appeal); *Natick v. Natick Hunter’s Hill*, No. 07-10, slip op. at 6 n.2 (Mass. Housing Appeals Committee Apr. 14, 2008 Ruling on Motion to Dismiss), where the Committee reaffirmed that a developer’s appeal that is “even one day late ... is not proper.”

Finally, Mr. Engler’s response of “Okay” to Ms. Cronin’s statement that the hearing would be held on January 4 does not constitute a waiver of the 20-day notice requirement. The undisputed evidence indicates no explicit request for a waiver of the notification requirement was made. Mr. Engler’s one-word response to Ms. Cronin is ambiguous, and thus cannot represent agreement to delay the written notice required by the regulation. Additionally, his presence at the January 4 meeting without expressly asserting the right to a constructive grant, did not waive the requirement or Medfield North’s prerogative to pursue

it. There is no requirement that the claim of a constructive grant be asserted at this opportunity; indeed, an applicant attending such a meeting is likely hoping to obtain an approval which would obviate the need for a contentious appeal.

Although a constructive grant is a harsh result, it is nondiscretionary if the town has failed to meet the regulatory deadline. *Rosewood Realty Trust v. Mansfield*, No. 06-03, slip op. at 4-5 (Mass. Housing Appeals Committee Apr. 25, 2007), citing *Devine v. Board of Health of Westport*, 66 Mass. App Ct. 128, 134 (2006). There, the Committee, through its presiding officer, ordered a modification of a comprehensive permit constructively granted when the Board clearly exceeded the time limit in the regulation, despite the Board's argument that it was difficult to schedule a hearing on a request received shortly before the Christmas season, a circumstance similar to the one presented here.

Here, as occurred in *Rosewood*, by operation of the unambiguous language of our regulations, because the Board failed to comply with the 20-day period to notify Medfield North that it deemed the extension request a substantial change, and it failed to provide any reference to the substantiality factors at § 56.07(4), "the Comprehensive Permit shall be deemed modified to incorporate the Change." 760 CMR 56.05(11)(b). "This result, that the plain meaning of our regulation should provide a nondiscretionary remedy of a constructive grant of the change in the permit, is consistent with traditional land use laws and principles." *Rosewood, supra*, No. 06-03, slip op. at 5, citing *Devine, supra*, 66 Mass. App. Ct. at 134 (where board failed to mail written determination to plaintiff within time limit, even though it had voted to disapprove application within required time period, statute provides nondiscretionary remedy of constructive grant since board failed to act by either issuing a permit or a written statement of reasons for denial within forty-five days). Accordingly a summary decision awarding a constructive grant of the request for an extension is granted to Medfield North.

C. Consistency with Local Needs

Although we need not reach the Board's arguments concerning the grounds for its denial of the extension request, to ensure a complete record, we briefly address the arguments raised.

Medfield North argues that the extension request should have been treated as a request for an insubstantial change pursuant to 760 CMR 56.05(11)(a). Since § 56.05(12)(c)

provides that an extension by itself is not a substantial change under § 56.07(4), it argues that the granting of extensions is favored in the regulations and statutory scheme, consistent with the purpose to expedite the construction of low and moderate income housing.²

Regarding the arguments on the merits of the denial of the permit, the undisputed record does not support the Board's motion for summary decision. Rather the record supports the developer's motion because it is a proper party to pursue the extension request, the Board failed to comply with the proper procedure for consideration of and denial of the request, and on the merits, the Board has not shown that denial of the extension is consistent with local needs.

1. Medfield North as Proper Party to Pursue Extension

The Board moved for summary decision that its denial of the extension request is consistent with local needs because the Appellant entered into a purchase and sales agreement with Gatehouse Development Group (Gatehouse), authorizing that third party to file and pursue an application for a new comprehensive permit for the subject property. It argues that the Appellant knowingly gave up site control of the property and Medfield North cannot continue to pursue the current comprehensive permit while its prospective purchaser applies for its own permit for the same site. Therefore it argues that local needs support the denial of the extension.

The purchase and sale agreement entered into between Medfield North and Gatehouse for sale of the subject property includes a rider which provides:

Buyer acknowledges that Seller is in possession of the Seller CP, and Buyer agrees that it shall take no action to adversely affect the Seller CP, or any Approvals issued in connection therewith, or file any request to modify or change the Seller CP, and that Seller shall have the absolute right to take any and all actions with respect to the Seller CP deemed necessary by Seller, in its sole discretion to maintain, preserve and protect said Seller CP, including, but not limited to, seeking and obtaining extensions from the Town of Medfield of the date within which Seller must take necessary action

2. The developer also notes, as we discussed earlier, that the Board never made the preliminary determination regarding whether the proposed extension constituted a substantial change. However, assuming that the Board had determined the change was substantial and warranted a public hearing, the Board did not even conduct a proper hearing; rather it held a meeting which its chairman specifically stated was "not a public hearing." Cronin Affidavit, Exh. A. See 760 CMR 56.05(11)(c): "If the change is determined to be substantial, the Board shall hold a public hearing within 30 days of its determination and issue a decision within 40 days of termination of the hearing, all as provided in M.G.L. c. 40B, § 21." Therefore, the Board failed to comply with this aspect of the regulations as well.

pursuant to the Seller CP. Notwithstanding the foregoing provisions of this Paragraph 7, Buyer's filing and prosecution of an application for a new Comprehensive Permit and other Approvals in connection with the Proposed Project (i.e., not a modification of the Seller CP) shall not be deemed to be actions taken to adversely affect the Seller CP." (Emphasis added).

Rothschild Affidavit, ¶¶ 18-19 and Exh. G.

After the Board had denied Medfield North's second extension request, on March 15, 2012, Gatehouse filed with the Board an application for a comprehensive permit for the subject property. The Board scheduled and held the first session of the public hearing on the application on April 11, 2012. Cronin Affidavit, ¶ 5.

Although the purchase and sale agreement grants Gatehouse an interest in the property which constitutes control of the site under the comprehensive permit regulations, as holder of title to the property, Medfield North also has sufficient control of the site. 760 CMR 56.04(1)(a). Under the purchase and sale agreement, the Appellant has not relinquished its right to pursue extensions of the comprehensive permit. Indeed, it remains the owner of the property, and the purchase and sale agreement provides for contingencies in which the acquisition of the property by Gatehouse is not completed. The comprehensive permit regulations do not require that site control be exclusive. Therefore, we conclude that Medfield North has sufficient site control to pursue an extension of the comprehensive permit. See *Baywatch Realty Trust v. Marion*, No. 02-28, slip op. at 4-6 (Mass. Housing Appeals Committee Dec. 5, 2005).

Additionally, the Board's expressed concerns that Medfield North has not created any affordable housing is not a valid local concern to support denying the extension under these circumstances. MassHousing, the subsidizing agency, has approved the developer to pursue the comprehensive permit issued to West Street. Second Engler Affidavit, Exh. A.

2. Economic Climate

The undisputed evidence shows that the continued poor economy supports the granting of an extension request. In its denial letter, the Board stated:

The Board is well aware that the housing market in Massachusetts, both with regard to financing and ultimately the sale of condominium units, is not good. If that was all that was involved here, it might well justify a short additional extension so that both the developer and the Board would have an opportunity to evaluate the condition of the housing market again at some point in the future.

Rothschild Affidavit, Exh. F.

As the developer points out, permitting it to retain and extend its permit allows it to maximize its options during a difficult economic period, thus fostering the creation of affordable housing. The Board's denial of the extension request serves to extinguish the comprehensive permit before an alternative proposal is accepted. If that proposal is not successful in obtaining a comprehensive permit, the site would have no approved affordable housing project once the economic climate improved. Such an outcome would frustrate the purpose of Chapter 40B "to streamline and accelerate the permitting process for developers of low or moderate income housing in order to meet the pressing need for affordable housing." See *Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 521 (2007).

3. Pursuit of Two Comprehensive Permits

Finally, the Board's concerns regarding Medfield North's reserving its right to retain the existing comprehensive permit pending a determination of the outcome of Gatehouse's application for a comprehensive permit and its decision on the purchase of the site do not support denial of the requested extension. The Board has not demonstrated that the pursuit of alternate plans for the same site is prohibited, especially under the circumstances presented here. See *Chira v. Planning Board of Tisbury*, 3 Mass App. Ct. 433, 439 (1975) (two alternative subdivision plans); *Wellesley Zoning Board of Appeals v. Housing Appeals Committee*, 54 Mass. App. Ct. 1113, 2002 WL 731689 (2002) (unpublished memorandum and order pursuant to Rule 1:28 noting developer reserved its right under comprehensive permit approved by Committee pending approval of modification proposal). There is no reason not to allow an existing comprehensive permit to be extended during a long period of a poor economy, so that the owner's rights may be preserved while its purchaser pursues an application for an alternative permit, the outcome of which is uncertain.

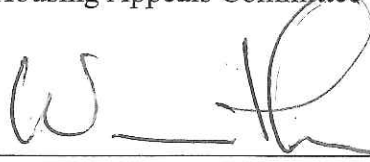
Therefore the Board's motion for summary decision on the ground that the denial was supported by local concerns is hereby denied.

III. CONCLUSION

Based on the foregoing, summary decision constructively granting the requested extension is granted to Medfield North. The Board's motion for summary decision is hereby denied.

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

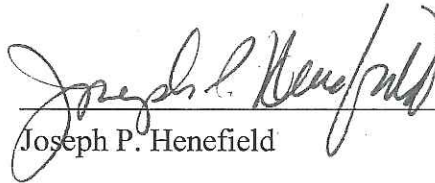


Werner Lohe, Chairman

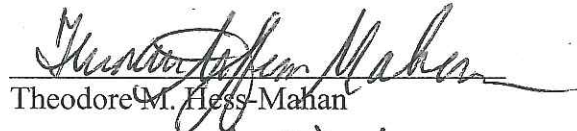
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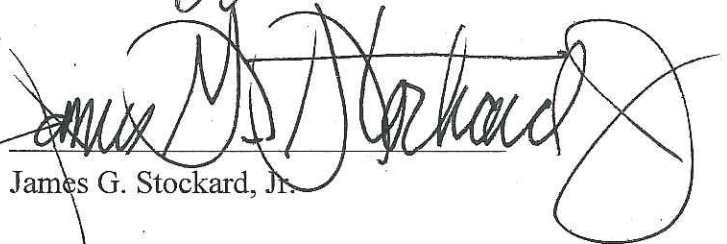
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