

COMMONWEALTH OF MASSACHUSETTS  
HOUSING APPEALS COMMITTEE

HOLLIS HILLS, LLC	)	
	)	
Appellant	)	
	)	
v.	)	No. 07-13
	)	
LUNENBURG ZONING	)	
BOARD OF APPEALS,	)	
Appellee	)	

**RULING ON MOTION FOR ENFORCEMENT ORDER**

The Appellant Hollis Hills, LLC (Hollis Hills) has filed a post-decision motion for an order enforcing the Committee’s Decision and Order dated December 4, 2009 (Decision). Hollis Hills asks the Committee to order the Lunenburg building inspector to issue a building permit for part of the project, specifically Units 95 and 96. Hollis Hills submitted two Affidavits of Daniel J. McCarty in support. It argues that the building inspector’s denial of the building permit violates the Decision which ordered that a building permit be issued “without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.” Decision Condition 4(g). The Board argues that Hollis Hills has not satisfied conditions precedent to the issuance of a building permit, as required by the Decision and other state requirements. The Board submitted the Affidavit of Robert Ebersole, Chairman of the Lunenburg Sewer Commission. For the reasons set forth below, the motion is denied.

## **I. BACKGROUND**

The Decision approved a development for 136 condominium units in attached townhouses on approximately 33.8 acres on Hollis and West Streets adjacent to Electric Avenue in Lunenburg. Units 95 and 96 are to be located on Carr Avenue.. The project was to be financed under the Housing Starts Program of the Massachusetts Housing Finance Agency (MassHousing) or the New England Fund Program (NEF) of the Federal Home Loan Bank of Boston.

Following the Decision, the Board did not issue a comprehensive permit; instead it appealed the Decision to Superior Court. However the Decision provides that if the Board does not issue a permit within 30 days, the Decision constitutes a comprehensive permit.<sup>1</sup> Hollis Hills submitted an application for a building permit dated April 28, 2010 to the Lunenburg building inspector, who denied the request by letter dated May 25, 2010. Meanwhile, in the court proceeding, the Board sought to stay all proceedings on the comprehensive permit pending the court appeal. The Superior Court has denied the motion to stay.

## **II. DISCUSSION**

Under 760 CMR 56.05(12)(a), a developer granted a comprehensive permit may proceed with construction of the project at its own risk while the comprehensive permit is subject to appeal. Hollis Hills is candid in stating that it seeks the building permit for Units 95 and 96 to preserve the comprehensive permit for the project in the event Question 2 on the Massachusetts Election ballot in November 2010 passes, thereby repealing Chapter 40B. However, the developer's reason for requesting a building permit is immaterial; the issue is whether it has met the preconditions for obtaining one.

In denying Hollis Hills' request for a building permit, the building inspector determined that the developer had not yet complied with several preconditions to commencing construction of the project established by the Decision:

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1. Condition 3 provides: "Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board."

1. improvements on Carr Avenue, installation of stormwater controls and planned sewer extension -- Condition 2(c);
2. payment of the applicable sewer privilege fee -- Condition 4(a);
3. requirements in the Order of Conditions issued under the State Wetlands Protection Act (WPA) – Conditions 2(b) and 4(d);
4. subsidizing agency approvals – Condition 4(f); and
5. State Building Code requirements regarding access and emergency access to Units 95 and 96 – Condition 4(g).<sup>2</sup>

These conditions fall into three categories – conditions requiring certain actions to be completed before construction, conditions requiring plans demonstrating compliance with state requirements, and, the most contentious issue, a condition that would require the payment of any sewer privilege fee in effect before Hollis Hills submitted its comprehensive permit application to the Board.

#### **A. Carr Avenue Improvements and Subsidizing Agency Approvals**

It is undisputed that Hollis Hills has not yet made the improvements on Carr Avenue, installation of stormwater controls and a sewer extension, or obtained the subsidizing agency approvals which were required to be completed before commencement of construction:<sup>3</sup> The relevant conditions state:

Condition 2(c): No construction on the site shall commence until the developer has completed the construction of the improvements to Carr Avenue, and has installed the stormwater controls and the sewer extension described in the above drawings.

Condition 4(f): No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has

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2. The building inspector also challenged the Committee's decision regarding infectious invalidity and disagreed that the developer could proceed at risk pending the Board's appeal, but did not rely on these in denying the permit. In any event, those grounds would not support denial. First, as noted above, the court has denied the Board's motion for a stay pending appeal. Also, the building inspector's role is not to dispute or revisit the comprehensive permit; rather it is to determine if the request for a building permit conforms to the comprehensive permit. *Owens v. Belmont*, No. 89-21, slip op. at 13 (Mass. Housing Appeals Committee June 25, 1992).

3. With regard to the state requirements of the WPA and State Building Code, Hollis Hills is required to demonstrate that its construction will comply with those standards.

granted or approved construction financing, and until subsidy funding for the project has been committed.

Hollis Hills argues, however, that although it has not yet satisfied the conditions, it should be entitled to a building permit, and these conditions could be incorporated into the building permit so that no actual construction begins before they are satisfied. It claims that the building inspector erroneously made these requirements a condition to issuing a building permit, rather than a condition to construction. However, the developer offers no legal or sensible argument to support its position that the grant of a building permit is for any purpose other than to allow construction to commence. Its argument is unavailing.

Prerequisites to commencing construction are in effect prerequisites to the issuance of a building permit since the building permit is the express authorization to commence construction. See 780 CMR 5113.2, which provides with respect to building permits that “The permit shall be a license to proceed with the work” and that “Permits presuming to give authority to violate or cancel the provisions of 780 CMR 51.00 through 99.00 or other ordinances of the jurisdiction shall not be valid.”<sup>4</sup> Moreover, the developer’s suggestion that a building permit be issued with conditions that preclude actual construction from going forward until the preconstruction conditions are met does not address the mechanism for later allowing actual construction to proceed. As the Board correctly notes, several of the Committee’s conditions, including the requirement for subsidizing agency final approval, have been standard conditions in the Committee’s

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4. 780 5113.2 provides:

Compliance with Code. The permit shall be a license to proceed with the work and shall not be construed as authority to violate, cancel or set aside any of the provisions of 780 CMR 51.00 through 99.00 or any other law or regulation, except as specifically stipulated by modification or legally granted variation as described in the application. Permits presuming to give authority to violate or cancel the provisions of 780 CMR 51.00 through 99.00 or other ordinances of the jurisdiction shall not be valid. The issuance of a permit based on construction documents and other data shall not prevent the building official from requiring the correction of errors in the construction documents and other data. The building official is also authorized to prevent occupancy or use of a structure where in violation of 780 CMR 51.00 through 99.00 or of any other ordinances of this jurisdiction.

decisions. The building inspector's refusal to issue a permit for failure to demonstrate satisfaction of these conditions was not wrong. Nor was it infringing on the subsidizing agency's role with regard to that agency's approvals, since all that is required is confirmation from the subsidizing agency indicating that this condition is satisfied. Therefore with respect to these conditions, the developer's motion is denied.

### **B. Sewer Privilege Fee**

In our Decision, we denied Hollis Hills's request for a condition prohibiting the Town from assessing a sewer privilege or betterment fee for access to the Lunenburg sewer system, clarifying that the only fee that could be assessed must have been in effect before Hollis Hills submitted its application for a comprehensive permit to the Board:

[B]arring any change in state law requirements, no sewer privilege fee or sewer betterment fee may be applied to Hollis Hills if it is based on a local rule adopted subsequent to February 13, 2006, the date Hollis Hills' comprehensive permit application was submitted to the Board. 760 CMR 56.02.

Decision, pp. 40-41. Also see Condition 4(a) ("Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case"). Hollis Hills now argues that the Town cannot now assess a fee upon it because the Board had not earlier provided proof that a local rule in effect at the time of its comprehensive permit application authorized the Town to impose a sewer privilege fee on the developer. In the hearing in 2009, the developer's construction consultant, Mr. Daniel McCarty, testified that Hollis Hills was willing to pay "the sewer connection fee, if any, which is required pursuant to a duly adopted by-law and has been lawfully imposed on developers of market-rate housing." See Decision, p. 41.

The parties submitted cross affidavits disputing whether the "Sewer Betterment Assessment By-law" is applicable to Hollis Hills. Hollis Hills now argues that it is too late for the Board to pursue a sewer fee against it. However, its argument ignores the fact that the Decision expressly left open the possibility of the assessment of a sewer privilege fee, we now decline to prohibit any such lawful fee. The only question presented now is whether under the terms of the above-named bylaw, as it is described, a privilege fee may

be charged to Hollis Hills.<sup>5</sup> The chairman of the Sewer Commission appears to have identified in his affidavit the amount of the sewer privilege fee the Sewer Commission would assess against Hollis Hills. See Affidavit of Robert Ebersole, ¶ 18. Whether that fee conforms to the Decision depends on the history of sewer betterment assessments on the various parcels at issue. In light of the factual questions raised by the parties' cross affidavits concerning the circumstances, it would be appropriate to conduct an evidentiary hearing regarding the applicability of a sewer fee in this case. Accordingly, the Committee has issued with this Ruling a Notice for a Pre-Hearing Conference to prepare for the evidentiary hearing. To the extent the parties contend that any aspect of the determination is beyond the scope of the Committee's authority, it must so demonstrate with sufficient legal authority. Therefore, with respect to the sewer privilege fee, Hollis Hills' motion is denied without prejudice.

#### **C. Compliance with State Building Code**

The building inspector raised issues concerning state building code requirements for emergency access to Units 95 and 96. The Board argues that the Committee cannot waive state building code requirements, particularly the fire prevention code, and that the building commissioner determined that until Carr Road was extended to the location of Units 95 and 96, this provision precluded the issuance of a building permit. The Board correctly points out that any dispute Hollis Hills has regarding the building inspector's interpretation of the State Building Code cannot be resolved by the Committee. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 22 n.12 (Mass. Housing Appeals Committee June 25, 1992) ("Matters solely within the [state building] code are not within our jurisdiction but rather that of the building inspector and the State Building Code Appeals Board. See G.L. c. 143, § 100").

#### **D. Compliance with Order of Conditions**

Hollis Hills disputes the building inspector's denial on the ground that it failed to show that the Conservation Commission had agreed the proposed construction complies

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5. One of the factual disputes is whether the rule is a bylaw or other legitimate local rule applicable to Hollis Hills.

with its requirements. See Conditions 2(b) and 4(d).<sup>6</sup> The specific concerns raised in the letter, preconstruction conditions such as flagging and installation of erosion control measures, should not be the basis for dispute if they are indeed in the Order of Conditions. While Hollis Hills stated it would be willing to have a condition in the building permit requiring it to perform these tasks before beginning construction, even though it already is in the Order of Conditions, such a redundancy is unnecessary. As discussed below, this raises the question whether the developer is obliged to obtain signatures from individual boards rather than the building inspector. In preparation of a request for a building permit, the developer should request from the Conservation Commission a determination of compliance with its requirements and prerequisites to the issuance of a building permit.

#### **E. Signatures of Individual Town Boards or Officials**

Hollis Hills argues that the building department led it to believe it was not required to obtain signatures from all of the local boards before applying for the building permit, but later cited this failure as a basis for why the building department denied the permit. The question of whether Hollis Hills was misled to believe it need not seek individual approvals from individual boards or officials, while a bone of contention between the parties, can be dispensed with quickly. The role of local officials in reviewing plans and compliance following the issuance of a comprehensive permit is to conduct review for consistency with the comprehensive permit and conformance with unwaived local requirements and state requirements they administer. Such a review should be conducted by the local officials who normally perform that role. *Peppercorn Village Realty Trust v. Hopkinton*, No. 02-02, slip op. at 22 (Mass. Housing Appeals Committee Jan. 26, 2004); *Owens v. Belmont*, No. 89-21, slip op. at 13-15 (Mass. Housing Appeals Committee June 25, 1992). “The building inspector, the town engineer, or any other local official normally involved in issuing the building permit can of course consult with whomever he or she chooses.” *Owens* at 15. Thus, although a developer is not required

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6. Condition 2(b) requires that “[d]esign and construction shall be in compliance with the Massachusetts Department of Environmental Protection stormwater management requirements.” Condition 4(d) states that “[c]onstruction ... shall be in accordance with all presently applicable state and federal requirements....”

to approach each individual town department, the building inspector normally would require the confirmation of compliance by appropriate town officials as part of its review. In such a case, it is likely helpful to inform an applicant which local officials must participate before a decision on the building permit application is reached. It is not critical for the purposes of Chapter 40B whether a town informs a developer it may communicate separately with each town department regarding its review and approval, or whether the building department itself refers the application to each board and official for review. However, it is important that the procedure be clear to the applicant, so that the process is expeditious. Since Hollis Hills is not presently entitled to a building permit, any inconsistency in the building department's actions regarding whether Hollis Hills should contact other town departments separately for their approvals did not delay the project. However, to expedite the process hereafter, the building department must inform Hollis Hills in writing of each board or official which must participate in the approval process before issuance of the building permit no later than 15 days following the date of this ruling.

This ruling does not address any attempt by Hollis Hills to argue that the Decision should be modified. To the extent that Hollis Hills wishes to modify any aspect of the project as approved, such a request must be made in the context of a proper motion for modification pursuant to 760 CMR 56.05(11).

### **III. CONCLUSION**

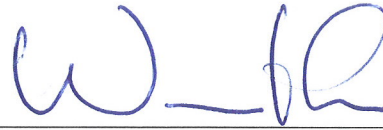
For the foregoing reasons, the denial of the building permit at this point was appropriate and the motion of Hollis Hills for an order of enforcement requiring the building inspector to issue a building permit is hereby denied.



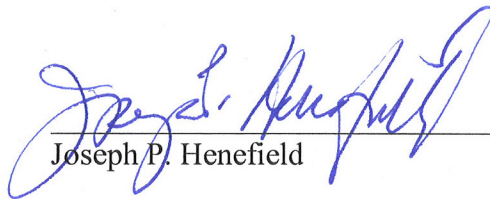
This ruling may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the ruling.

Housing Appeals Committee

Dated: 9/27/10



Werner Lohe, Chairman



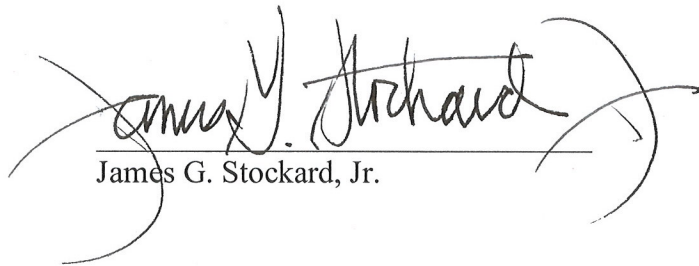
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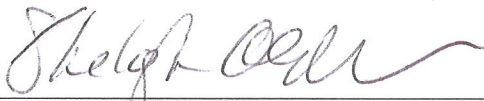
Theodore M. Hess-Mahan



Marion V. McEttrick



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Shelagh A. Ellman-Pearl, Presiding Officer