COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

BRUCE, LLC, Appellant	)	
v.	)	No. 10-06
DIGHTON ZONING BOARD OF APPEALS, Appellee	)	

RULING ON MOTIONS FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

This matter has a lengthy history of on-again-off-again settlement discussions, permit extensions, appeals to the Superior Court, and withdrawals and reopenings before this Committee. The current dispute involves not whether a comprehensive permit was appropriately granted, but rather whether a permit granted by a local board of appeals currently remains valid.

On June 19, 2003, the Dighton Zoning Board of Appeals granted a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to Bruce, LLC to build 84 homes, of which 26 will be affordable, on approximately 113 acres of land on Tremont Street in Dighton. Exh. D-1.[1] An abutter, Dr. Robert Cserr, appealed the permit to the Superior Court. *Cserr v. Pacheco*, No. BRCV2003-00756 (Bristol Super. Ct. filed Jul. 9, 2003); see Exh. D-2. After settlement negotiations, on April 10, 2007, that appeal was dismissed by stipulation without prejudice. Exh. D-2, D-3. On that date, the three-year time limit

1. The parties submitted over two dozen documents and three affidavits in support of their motions.

within which the developer was required to begin construction commenced.[2] 760 CMR 56.05(12)(c).

The developer encountered various delays, and therefore, on March 17, 2010, it appeared at a meeting of the Board and submitted a written request to extend the permit. Exh. D-4. On April 9, 2010, the Board granted a short, conditional extension to July10, 2010 (first extension). Exh. D-4. The abutter appealed the granting of the extension to the Superior Court. Developer's Brief, p. 3 (filed Sep. 19, 2013); Board' Brief, p. 2 (filed Nov. 6, 2013); Intervener's Brief, p. 4 (filed Nov. 7, 2013). In that appeal, the abutter argued, as it continues to do, that the permit had expired on April 8, 2010. Abutter's Brief, p. 1. The developer, in turn, both appealed the Board's conditional extension to this Committee (on May 17, 2010), and also renewed its extension request to the Board, requesting a longer, two-year extension.

Settlement discussions between the developer and the abutter resumed, and as a result, the hearing before this Committee was not formally commenced, and the Board held the developer's extension request in abeyance. Finally, on May 18, 2011, the Board voted to extend the permit again—to May 17, 2012 (second extension). Exh. D-5. The abutter promptly appealed this second extension to Superior Court. On June 2, 2011, the appeal before this Committee was dismissed without prejudice by agreement of the developer and the Board.

In late April 2012, shortly before the second extension was due to expire, the developer again requested an extension, and on May 15, 2012, the Board extended the permit to May 8, 2013 (third extension). Exh. D-6, Bd-1. This, too, was appealed by the abutter.[3] On June 5, 2012, the developer renewed its appeal before this Committee.[4] On July 25, 2012, the Board revised its third, most recent extension. Exh. D-7. On August

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2. A comprehensive permit only becomes final when the last appeal is disposed of. 760 CMR 56.05(12)(a). It lapses three years after that date, unless it is extended. 760 CMR 56.05(12)(c).

3. The three Superior Court appeals were consolidated, the developer moved for summary decision, and the matter was stayed by the court on May 7, 2013 pursuant to *Taylor v. Board of Appeals of Lexington*, 451 Mass. 270 (2008). Intervener's Opposition, pp. 7, 9.

4. The matter was formally reopened by the presiding officer by order of June 6, 2012. The abutter moved to intervene on June 21, 2012; a year later, on July 2, 2013, intervention was granted by agreement of the other parties.

9, 2012, the appeal before this Committee was again dismissed without prejudice by agreement of the developer and the Board. Exh. Bd-9.

The following year, the developer again requested an extension from the Board, by letter of March 28, 2013. Exh. D-9. Meanwhile, on April 10, 2013, the Dighton Conservation Commission considered the developer's application for an Order of Conditions under the state Wetlands Protection Act (WPA). Exh. D-8, p. 14. On April 17, 2013, the Board considered the developer's extension request, and voted to continue the matter to May 1, 2013 in order to consider "information from the Conservation Commission." Exh. D-10A, p. 13. On April 26, 2013, the Conservation Commission issued a formal denial of the Order of Conditions. Exh. D-8. On May 1, 2013, the Board reconvened, and denied the developer's request to extend the comprehensive permit (issuing its formal decision on May 15, 2013)(fourth extension; denied). Exh. Bd-6, D-10B. On June 5, 2013, the developer renewed its appeal before this Committee.[5]

The parties and the abutter/intervener filed cross-motions for summary decision on September 19, November 6, and November 7, 2013 pursuant to 760 CMR 56.06(5)(d).[6]

II. THE ISSUES

The developer argues that as a matter of law its requests for extensions of the comprehensive permit were timely; that it met the conditions set forth in the second, 2012 extension; and that the Board's denial of the fourth extension was improper since there was no local concern to support the denial. Developer's Brief, p. 1 (filed Sep. 2013). It requests a ruling that this Committee confirm that the permit "remains in full force and for two years following entry of a final un-appealable decision in this matter." Developer's Brief, p. 2.

The Board argues first that "[its own] action... was moot and unnecessary, as the pending litigation [by the abutter] tolled the time for the comprehensive permit to lapse," and therefore its denial of the extension was "without legal consequence." Board's Cross Motion, p. 1 (filed Nov. 6, 2013). Alternatively, it argues that there are material facts in

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5. The matter was formally reopened by the presiding officer by order of June 7, 2013.

6. 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).

dispute which preclude summary decision, but if that were to be found not to be the case, summary decision should be awarded in its favor. Board's Cross Motion, p. 2.

The abutter[7] opposes the developer's request for summary decision, and argues that the permit "lapsed on April 8, 2010, and could not subsequently be 'extended' by the Board." Intervener's Brief, p. 1.

A. This Appeal is Not Moot.

At the outset, we find no merit in the Board's argument that this appeal should be dismissed because the case is moot. First, the Board acted a number of times on requests by the developer—not taking the position, as it does now, that those actions were unnecessary. There have been no changed circumstances since the Board last acted to deny the developer's requested extension; instead, declaring the controversy moot would simply avoid review of the Board's action. This is not a situation in which it can be said that the developer has ceased to have a stake in the outcome of the case. See *Blake v. Massachusetts Parole Bd.*, 369 Mass. 701, 703 (1976). Further, even if the case were moot, it is reasonable that the Committee should exercise its discretion to resolve an issue of public importance which has been fully argued and is very likely to arise again in similar factual circumstances.[8] See *Comm. v. Dotson*, 462 Mass. 96, 98-99 (2012).

B. The Intervening Abutter has Not Shown that the Permit Lapsed.

The abutter asserts that the comprehensive permit "lapsed on April 8, 2010, and could not subsequently be 'extended' by the Board." Intervener's Brief, p. 1. As an initial matter, although the intervener clearly put this question in issue in its opposition, it has waived its claim by failing to present any argument with regard to it. See Intervener's Brief, pp. 9-16; *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 June 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

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7. Pursuant to 760 CMR 56.06(2)(b), the abutter was granted permission to participate in this hearing as an intervener by consent of the parties, without argument. Although his participation "may be limited to the extent and under terms determined in the discretion of the presiding officer," no such limitations were specified. See 760 CMR 56.06(2)(b).

Despite the intervener's waiver, however, and even though this issue is so basic that it would rarely need explanation, we feel that we should address it so that there can be no confusion at all in this very complicated case.

We note first the facts stated in the "facts" section of the intervener's brief, namely, that "the expiration date of the comprehensive permit was... no later than April 8, 2010," and that on "April 9, 2010, the Board voted to grant a 'conditional extension'." See Intervener's Brief, pp. 3-4. But these undisputed facts alone are not sufficient to support a contention that the permit lapsed. It is also undisputed that the developer appeared at a meeting of the Board on March 17, 2010, and requested an extension of the permit. Exh. D-4. Thus, since an extension request was timely filed before the expiration deadline, the permit did not lapse on April 8. *LeBlanc v. Amesbury*, No. 06-08, slip op. at 8-11 (Mass. Housing Appeals Committee Jan. 14, 2013).

C. The Comprehensive Permit in this Matter Remains in Effect.

The positions taken by the parties in this case are complicated, and arguably run counter to their ultimate interests. In making what it characterizes as a mootness argument, the Board argues that the developer's fourth request for an extension of the Comprehensive Permit was "premature and unnecessary." Board's Brief, pp. 1, 7, 10. Based upon this, it would have us dismiss the appeal without a ruling on the validity of the permit. Board's Brief, p. 17. The developer, in turn, appears to accept the proposition that the extension was necessary. We agree with the Board that the last extension[9] was unnecessary, but conclude that the developer is entitled to a ruling in its favor.

Comprehensive permits normally lapse three years from the date on which they become final. 760 CMR 56.05(12)(c). If the *developer* must pursue or await the outcome of any appeal of any other state or federal permit or approval required for the project, then this three-year period is tolled for the time required. *Ibid.* But if an *abutter* (or any other party) *appeals* the decision granting a comprehensive permit, the three-year period is not tolled, but rather it begins to run only when the last appeal is disposed of. That is, the decision first

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8. We see no need to address the arguments raised by the developer with regard to *Taylor v. Bd. of Appeals of Lexington*, 451 Mass. 270, 276-277 (2008). See Developer's Reply, pp. 8-9 (filed Dec. 13, 2013.

9. The parties have focused only on the last extension, though presumably the second and third extensions were also unnecessary.

becomes final "on the date that the written decision of the Board is filed in the office of the municipal clerk..."—often within a day or two of the Board's vote. 760 CMR 56.05(12)(a). The three-year period then begins to run. Typically, an appeal—either by an abutter, the developer, or some other party—is filed within weeks after that. But then, upon the filing of the appeal, the decision is no longer final, and a new three-year period to exercise the permit begins to run if and when it does become final, that is, "on the date the last appeal is decided or otherwise disposed of." *Ibid.*

In this case, the comprehensive permit became final in 2007, when the abutter's substantive appeal of the permit was dismissed by the court by agreement of all parties. Thus, with the permit due to lapse in 2010, it was proper and necessary for the developer to request that the Board grant an extension. But when the abutter then appealed the Board's grant of that extension, the situation became murky. As noted by the Board, 760 CMR 56.05(12)(a) is "silent on whether or not... tolling... applies to decisions extending the date on which a comprehensive permit will lapse...." Board's Brief, p. 7.

Although we have not ruled directly on this question before, twenty years ago we addressed it in *dictum* in our leading case on permit extensions. We noted that "in all likelihood, we would rule that the extension would be tolled during the pendency of any appeal to the courts." *Red Gate Road Realty Trust v. Tyngsborough*, No. 93-01, slip op. at 12, n.6 (Mass. Housing Appeals Committee Dec. 8, 1993). Today, based upon analogous provisions in 760 CMR 56.05(12)(a) and 56.05(12)(c) concerning finality of permits and tolling pending related permit proceedings,[10] we hold that when a comprehensive permit that has become final is extended by a decision of the Board, and that decision is appealed to the courts by an abutter, then the extension period granted by the Board is tolled until the appeal is decided or otherwise disposed of. Thus, in this case, the comprehensive permit currently remains in effect since it was extended in April 2010 and the extension period has been tolled continuously since then by the appeal taken by the abutter to Superior Court.

We note that the extension that remains in effect in this case—the first one—was an extension for only three months (or arguably for only two months, since the Board required

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10. We also agree with the Board's policy argument that it should not "be faced with the need to continually address requests to... extend a comprehensive permit while litigation is pending," which can lead to confusion, delays, and "more litigation." Board's Brief, p. 9.

that any further request for extension be filed within two months). Thus, we expect that once the Superior Court appeals are disposed of, the developer will immediately request a further extension. Assuming that the Board grants a reasonable, much longer extension sufficient for the developer to move toward construction, the developer will nevertheless be in the unenviable position of possibly facing further appeal by the abutter (of the extension, not of the underlying permit, which became final long ago). On the other hand, a request to extend the very first extension will present the parties with an opportunity to address current circumstances on a clean slate. Further, because all of the parties are currently before us, we will follow our normal practice (which is based upon the latitude we have as an administrative body with regard to procedural technicalities) and retain jurisdiction over this dispute, staying any further proceedings, of course, to permit the Superior Court to address the pending appeals. Thus, if at some time in the future the abutter (or the developer) desires to appeal an extension of the permit, this Committee would be available as a forum.[11]

D. Other Issues

1. Fundamental Fairness Does Not Require the Comprehensive Permit to be Terminated.

The Board argues that "[f]undamental concepts of fairness and the need for closure demand that the permit be terminated at this time." Board's Brief, p. 14. It cites our analysis in *Red Gate Road Realty Trust v. Tyngsborough*, No. 93-01 (Mass. Housing Appeals Committee Dec. 8, 1993). But *Red Gate Road* involved allegations of delays caused by the developer. Here, where the permit has not been exercised because of delay caused by abutter appeals, there is no basis whatsoever to abrogate the developer's right—established in 760 CMR 56.05(12)(c)—to obtain reasonable extensions of the three-year period within which to begin construction.

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11. We state no opinion as to whether this Committee would be the *only* forum available to the parties. But, should the abutter appeal to the Superior Court, and should one or more of the parties argue that the interests of judicial economy would be best served by resolving the matter in that forum, we would entertain a motion to relinquish our jurisdiction in favor of the court's.

2. The Intervener is Not Entitled to Challenge the Developer's Control of the Site.

The intervener also asserts that the developer lacks site control.[12] Intervener's Opposition, p. 2. Its claim has no merit, however. At the outset, even though an intervener may generally have standing as an aggrieved party with regard to the impact the proposed development may have on his property, he typically lacks standing to question the developer's site control. That is, the issue of site control is most commonly raised by the Board, which has "an interest in ensuring that any lingering questions about ownership of [the] land are publicly laid to rest before construction begins...," but even then, it "is a matter that is primarily of concern only to the subsidizing agency." *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 11, 10 (Mass. Housing Appeals Committee Jun. 28, 1994), *aff'd,* No. 94-1706-B (Essex Super. Ct. Jul. 29, 1997). For this reason, the subsidizing agency's determination with regard to site control is generally considered conclusive. 760 CMR 56.04(6), 56.07(3)(h)(1); see *Indian Brook Cranberry Bogs, Inc. v. Bd. of Appeals of Plymouth*, Misc. No. 06-322281, 08-381915, slip op at 12 (Land Ct. Oct. 9, 2009), 2009 WL 3255190. Thus, any challenge with regard to site control is beyond the scope of an intervener's participation. *Paragon Residential Properties, LLC v. Brookline*, No. 04-16, slip op. at 8, n.6, 9, n.7 (Mass. Housing Appeals Committee Ruling on Prehearing Motions Dec. 1, 2004), *aff'd*, No. 10-P-1468 (Mass. App. Ct. Jul. 14, 2011) (Rule 1:28 Decision, 2011 WL 2712960); also see *G-R Highland Glen Ltd. Partnership v. Westwood*, No. 02-17, slip op. at 6 (Mass. Housing Appeals Committee order April 7, 2003); also see 760 CMR 56.04(6) ("failure may be raised by the Board... or by the Committee....).

Nor is the abutter's allegation that he owns a portion of a street through which sewer service is to be provided to the proposed development a basis for not applying this general rule. We have long held that disputes over property rights between parties are not within the jurisdiction conferred by Chapter 40B, but rather should be left for the courts. *Hanover Woods, LLC v. Hanover*, No. 11-04, slip op. at 21 (Mass. Housing Appeals Committee Feb. 10, 2014); *Planning Office for Urban Affairs, Inc. v. Scituate*, No. 73-02, slip op. at 6-7

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12. Site control is a "project eligibility requirement." 760 CMR 56.04(1). It is not a jurisdictional requirement. *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 520-521, 870 N.E.2d 67, 74 (2007).

(Mass. Housing Appeals Committee Mar. 14, 1975), *aff'd*, No. 1348 (Plymouth Super. Ct. Jun. 28, 1976). A more recent case in Sandwich is based on facts quite similar to the case at hand. See *Autumnwood, LLC v. Sandwich*, No. 05-06, slip op. at 5 (Mass. Housing Appeals Committee Jun. 25, 2007), *aff'd* No. 07-462 (Barnstable Super. Ct. Jan. 23, 2012), and cases cited; also see *Princeton Development, Inc. v. Bedford*, No. 01-19, slip op. at 4 (Mass. Housing Appeals Committee Sept. 20, 2005) (site control is matter of ownership, not access). The existence of a dispute over the developer's right to place utilities in the street should be decided by the courts, and is not a basis for invalidating a comprehensive permit for lack of site control. *Zoning Board of Appeals of Holliston v. Housing Appeals Committee*, Permit Session No. 09-393326, slip op. at 10-11 (Land Ct. Jun. 24, 2010), *aff'd Zoning Bd. of Appeals of Holliston v. Housing Appeals Committee*, 80 Mass. App. Ct. 406, 416 (2011).

3. The Board has not shown that there are material facts in dispute.

The Board argues that there are material facts in dispute, namely that the developer asserts and the Board contests the developer's compliance with the second and third conditions in the third extension of the permit. See Board's Brief, pp. 10-13. Those conditions are as follows:

> The Conservation Commission process [under the state Wetlands Protection Act] needs to be resolved prior to the expiration of this extension period.
>
> The property.... shall either be delisted from the endangered species maps created by Natural Heritage or a development plan will be pursued prior to the expiration period... pursued that comports to the existing Natural Heritage Maps....

Exh. Bd-1, pp. 2-3; also see Exh. D-10A, p. 8.

Both of these conditions are improper. The developer must, of course, under all circumstances, comply with state and federal laws and regulations. But the proceedings under the state Wetland Protection Act, G.L. c. 131, § 40, and the Massachusetts Endangered Species Act, G.L. c. 131A, are separate state permitting proceedings pursued by the developer independently of the comprehensive permit process on a schedule related to the overall development process, which is within the developer's discretion. See *Forestview Estates Assoc., Inc. v. Douglas*, No. 05-23, slip op. at 9 (Mass. Housing Appeals Committee Mar. 5, 2007)(denial extension of permit upheld under previous, more restrictive version of 760 CMR 56.05(12)(c)). The Board's power to impose conditions derives from, and is no

greater than the power of other local boards, and thus does not include the power to dictate when and in what order other approvals are sought. See *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 756, 762, 765, 765 n.21; also see *Zoning Bd. of Appeals of Holliston v. Housing Appeals Committee*, 80 Mass. App. Ct. 406, 416 (2011). Because the conditions are beyond the authority of the Board, whether or not the developer is in compliance with them is not a material fact.

III. CONCLUSION

Summary Decision as described in this ruling is hereby GRANTED in favor of the Developer as described above, and DENIED with regard to the claims of the Board and intervener.

The Committee retains jurisdiction over this matter. Proceedings are hereby stayed, however, pending resolution of related appeals in the Superior Court.

Housing Appeals Committee

Date: May 7, 2014

Werner Lohe, Chairman

Joseph P. Henefield

Theodore M. Hess-Mahan

James G. Stockard, Jr.

LPc/w