COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

MARITIME HOUSING FUND, LLC

v.

MEDWAY BOARD OF APPEALS

No. 06-14

DECISION ON CONSTRUCTIVE GRANT OF CHANGE IN PROPOSAL

April 25, 2007

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I. INTRODUCTION AND PROCEDURAL HISTORY

In a decision filed with the Medway Town Clerk on January 10, 2005, the Medway Board of Appeals granted a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build rental housing on a 6.3-acre parcel of land in central Medway, at Main and Elm Streets. Two apartment buildings containing a total of thirty units and eight affordable units were to be built under the Permanent Rental Financing Program of the Massachusetts Housing Partnership Fund.

Over a year later, the developer requested that the Board allow it to change the housing from rental apartments to a residential condominium. After considerable delay, the Board granted the request, but required that twenty-five of the thirty units (83%) be affordable. The developer then filed an appeal with this Committee alleging that because the Board had delayed in considering its requested change, the original request—for a development with only eight affordable condominium units—had been granted constructively.

On December 22, 2006, the presiding officer determined, based upon written submissions, that the requested change in the proposal had been granted constructively.[1] That determination, which included a detailed procedural history of this case, is attached to this decision as Appendix A, and is incorporated into this decision of the Committee. The presiding officer also conducted a hearing on January 26, 2007 to determine what conditions, if any, should be imposed upon the comprehensive permit. Neither party chose to present witnesses or documentary evidence. The Board did, however, for the first time, question the Committee's jurisdiction to hear this matter.

II. JURISDICTION

As a general matter, the Committee has jurisdiction over the subject of the developer's petition. Sections 31.03(3)(c) and 31.03(3)(d) of our regulations provide that disputes concerning changes proposed by the developer after issuance of a comprehensive permit may be brought before the Committee. Also see *Groton Residential Gardens, LLC v. Groton*, No. 05-26, slip op. at 4-5 (Mass. Housing Appeals Committee ruling Aug. 10, 2006), *appeal pending*, No. SUCV2006-03793 (Suffolk Super. Ct.).

The Board argues, however, that the Committee "is without jurisdiction to hear the claim of constructive grant… [because the developer] failed to bring that claim within twenty days of the alleged constructive grant, as required by G.L. c. 40B, § 22, and 760 CMR 31.03(3)." Board's Opposition, p. 1 (filed Jan. 26, 2007). In support of its argument, it cites the holding of the Appeals Court in the *Milton Commons* case that "the appeal from a constructive grant of a comprehensive permit under G.L. c. 40B, § 21, must be filed within twenty days after the date on which the constructive permit is deemed to have been issued." *Milton Commons Assocs. v. Board of Appeals of Milton,* 14 Mass. App. Ct. 111, 120, 436 N.E.2d 1236, 1242 (1982). It points out that in the present case, the local hearing terminated on June 21, 2006. Therefore, the Board was required to render a decision within 40 days, or by July 31, 2006. 760 CMR 31.03(3)(c), see G.L. c. 40B, § 21. In these points, the Board is correct. It then goes on to argue that the developer's appeal—filed nearly two months later—

1. That 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. See *Devine v. Bd. of Health of Westport*, 66 Mass. App. Ct. 128, 845 N.E.2d 444 (2066).

was untimely because G.L. c. 40B, § 22 states that any appeal by the developer "shall be taken within twenty days after the date of the notice of the decision by the board of appeals…." This argument, however, misapplies the holding in *Milton Commons*.

In *Milton Commons*, the developer had filed a complaint requesting both a declaration from the Superior Court that it had secured a constructive comprehensive permit and an order that the board issue such a permit. The Superior Court's judgment in favor of the developer added language requiring that "[a]ll judicial appeals in accordance with G.L. c. 40B, § 21… shall be filed no later than twenty days after the date of [the Board's issuance of the permit]." *Milton Commons, supra*, at 115, 1239. Thus, the holding of the Appeals Court applies only to appeals to the courts, typically by abutters, under section 21 of the statute, and not to appeals by developers to the Housing Appeals Committee under section 22. But more important is the context of the Appeals Court's holding. It noted that it is "no great burden [for] town boards and officials or private interested parties who might wish to appeal from the issuance of a constructive permit… to begin counting to sixty (i.e., forty days plus twenty days) and to lodge an action for judicial review in time. *Milton Commons, supra*, at 119, 1241. The Court's holding was designed to protect the developer from an "indeterminate" waiting period, which would result if the appeal period for abutters and other aggrieved persons did not begin to run until twenty days after such time as the Board might choose to issue a written decision confirming the constructive permit. Further, it wished to prevent the "unhappy applicant [from being] compelled to go to court to obtain observance of the 'expedited' procedure." *Id.*

In the present case, the developer was justified in relying on *Milton Commons*, and was in no way required to apply immediately to the courts or this Committee for a declaration of constructive grant. The hearing was opened and closed on the same day, June 21, 2006. Tr., 7, 12. When, after the passage of forty days (July 31, 2006), the Board had not yet rendered its decision, any prudent developer might well choose not to assert its claim of a constructive grant in the hope of still receiving a late, but favorable decision from the Board. It was only when the developer received notice of the Board's decision—filed with the town clerk on September 8, 2006—that it became clear that Board had, in granting the change, included the unacceptable condition requiring the developer to provide not eight, but twenty-

five affordable apartments. The developer then filed a timely appeal pursuant to section 22 of the statute.[2] Thus, the developer's appeal was properly filed, and the case is properly before us.[3]

III. THE COMMITTEE'S PROCEDURES WITH REGARD TO CONSTRUCTIVE APPROVAL OF PROJECT CHANGES

This Committee's review of a developer's request for a change in a housing proposal after a comprehensive permit has been issued—whether that review is on the merits of the change or after constructive approval, as here—is conducted under 760 CMR 31.03(3). The regulation is silent as to whether that review should be conducted by the presiding officer acting for the Committee or by the full Committee. We discussed the policy and law underlying the presiding officer's power in a recent case involving the extension of the expiration period for a comprehensive permit:

> "[D]isputes arising after the issuance of a comprehensive permit... are now more common, and for that reason, the logic applied in *Wilmington*[4] ... is even

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2. It is also important to note that the appeal period ran from September 8, the date of notice of the decision, not September 6, the date of the decision itself. That is, the issue here must be distinguished from that in *Cardwell v. Board of Appeals of Woburn*, 61 Mass. App. Ct. 118, 120 n.2, 807 N.E.2d 207 (2004). In that case, the decision of the Board was voted at a public meeting that occurred within the forty days of termination of the hearing, but a written decision was not signed until after the forty-day period had expired. The Court held that a permit had not issued constructively because the decision was rendered at the public meeting, that is, before the forty-day deadline expired. No question was raised as to whether the developer filed its appeal in a timely manner. In the present case, however, the permit issued constructively because there was neither a vote taken nor a written decision issued within the forty-day period. The date on which the developer filed its appeal with the Committee was twenty-one days after the vote was taken, but only nineteen days after the decision was filed with the town clerk. Thus, the appeal was within the twenty-day limit since under both the statute and our regulations, it is clear that the appeal period runs from "the date of notice of the decision." G.L. c. 40B, § 22; 760 CMR 30.06(8); also see 760 CMR 31.03(3)(c).

3. The developer has presented an additional argument that the twenty-day appeal period established in G.L. c. 40B, § 22 is merely directory. We find no merit in this. There are several time limits established in G.L. c. 40B, § 22. The Appeals Court has clearly indicated that the thirty-day limit within which the Committee is to issue its decision is directory; failure to adhere to it does not result in a constructive grant or denial. *Cardwell v. Board of Appeals of Woburn*, 61 Mass. App. Ct. 118, 120 n.2, 807 N.E.2d 207, 209 n. 2 (2004); *Milton Commons Assocs. v. Board of Appeals of Milton,* 14 Mass. App. Ct. 111, 118 n. 4, 436 N.E.2d 1236, 1241 n.4 (1982). But there is no precedent or reason to conclude that the appeal period applied to the developer is not mandatory.

> more compelling. That is, one of the reasons that § 30.09(5)(b) grants extensive powers to the presiding officer is that the Committee includes four members who serve without compensation and meets every only two months. 'It is not practical for the full Committee to rule on all matters that arise prior to, during, and after hearings.' *Wilmington*, *supra*, slip op. at 3, n.2. This approach is reflected in amendments to the Committee's regulations that were made in 2004. For instance, to address changes in practice before the Committee during the past fifteen years, provisions were added to explicitly provide for preliminary motions to address technical issues that had become more commonplace. See 760 CMR 30.07(2).
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> "[But even more] important, the presiding officer's authority as provided in 760 CMR 30.09(5)(b) is broad. For instance, the regulation explicitly authorizes "enforcement of decisions of the Committee." 760 CMR 30.09(5)(b). A ruling with regard to the extension or lapse of a permit is a 'post-permit' action that is similar to enforcement of a decision of the Committee. It is one that may properly be made by the presiding officer without consultation with the full Committee."

Forestview Estates Assoc., Inc. v. Douglas, No. 05-23, slip op. at 4 (Mass. Housing Appeals Committee ruling Mar. 5, 2007).

The considerations that apply to extensions of comprehensive permits apply to post-permit changes in a proposal as well, and in some circumstances argue even more strongly that the presiding officer should have the authority to act alone. In particular, many changes requested by a developer are relatively minor and need to be handled expeditiously. When the changes requested are very substantial or involve novel questions under the Comprehensive Permit Law, the presiding officer may always exercise the option of consulting with the full Committee, as he has done in this case. But this choice is in the presiding officer's discretion. When a permit has already been issued, the presiding officer is not making a decision that "finally determine[s] the proceedings," and therefore ruling upon a change in the permit or the constructive grant of such a change pursuant to 760 CMR 31.03(3) is within the broad authority conferred by 760 CMR 30.09(5)(b).[5]

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4. *Wilmington Arboretum Apts. Assoc. Ltd. Partnership v. Wilmington*, No. 87-17, slip op. at 3-4 (Mass. Housing Appeals Committee Order Sep. 28, 1992), *aff'd*, 39 Mass. App. Ct. 1106 (1995)(rescript).

5. The constructive grant of a change in a permit must be distinguished from the constructive grant of the permit itself. Nothing is more central to the Comprehensive Permit Law than the question of whether a permit to construct housing should in fact be issued. Thus, a permit may be granted constructively *only* by the full Committee after hearing. 760 CMR 31.08(8). Typically, the question

IV. Local Concerns

In this case, the Board was afforded the opportunity in a hearing to raise local concerns that might suggest that additional conditions should be imposed on the comprehensive permit. The developer accepted all of the conditions originally imposed by the Board, and the Board's only request at the hearing was that twenty-five of the apartments (83%) be affordable. Tr., 19, 26, 32; also see Developer's Reply (filed Feb. 5, 2007). It neither articulated any local concern in support of such a requirement, nor did it present evidence of local interests that might be promoted by increased affordability. See Tr., 1-44.

Further, it may well be that the reason that the Board did not present any evidence is because, in general, the level or percentage of affordability in a development is not a local concern like the health, safety, environmental, design, open space, or planning concerns addressed in the Comprehensive Permit Law and our regulations. If it can fairly be called a concern at all, it relates not to the local needs enumerated in the statute, but rather to the regional need for low and moderate income housing. And, it is in fact more accurate to classify the level of affordability in a development as a programmatic concern that is within the province of the subsidizing agency.[6] Affordability levels involve complex public policy considerations that are generally beyond the expertise of local boards of appeals or this Committee. Each subsidy program establishes a minimum level of affordability. The most typical level in the various subsidy programs is that 25% of the total number of units must be affordable.[7] Though a higher level of affordability is generally desirable since having more

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of the constructive grant is heard first, on motion before the presiding officer; then, the presiding officer conducts a hearing to consider local concerns and the possible imposition of conditions; and finally the entire matter is brought before the full Committee for decision.

6. See *Stuborn v. Barnstable*, No. 98-01, slip op. at 21 (Mass. Housing Appeals Committee Mar. 5, 1999)(percentage of affordable units typically set by the subsidizing agency). On the one hand, the question of whether the subsidy program has set an appropriate *minimum* level of affordability is a legal issue that may arise under the Comprehensive Permit Law. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 6-7 (Mass. Housing Appeals Committee Jun. 25, 1992). Higher levels of affordability, on the other hand, though not specifically discussed in *CMA, Inc.*, are logically a programmatic issue of the sort discussed in that case. Also see *Groton Residential Gardens v. Groton*, No. 05-26, slip op. at 13 (Mass. Housing Appeals Committee Ruling Aug. 10, 2006)("the final terms of the regulatory documents are within the regulatory discretion of [the subsidizing agency]"), appeal pending, C.A. SUCV2006-03793 (Suffolk Super. Ct.).

7. To establish eligibility for a comprehensive permit under Chapter 40B, the minimum level of affordability is 25% of total units if affordable to households at 80% of median income or 20% of

affordable units does more to address the affordable housing shortage, in most housing programs, the actual cash value of subsidy provided is not great, and therefore tight development budgets typically preclude affordability levels exceeding the minimum. In programs in which a "deeper" subsidy is available, e.g., in the Low Income Housing Tax Credit Program, there may be incentives, both financial incentives and incentives established by the subsidizing agency as a matter of public policy, that encourage developers to propose levels of affordability greater than the minimum. On the other hand, in certain cases, particularly with rental housing, it may be desirable to place an upper limit on the percentage of affordable units so as not to create a concentration of low-income households in a single development.[8]

It may be that under some circumstances a Board can properly address a programmatic concern through a condition. For instance, in *Lexington Ridge Associates v. Lexington*, No. 90-13 (Mass. Housing Appeals Committee Jun. 25, 1992), the board placed conditions on a voluntarily issued comprehensive permit requiring that the affordability of proposed rental units be maintained in perpetuity. We found that this requirement did not have a significant negative impact on the project's finances, and upheld the conditions.[9] *Lexington Ridge Associates, supra*, slip op. at 36. If, in the case before us, the Board had

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total units if affordable at 50% of median. See detailed discussion *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 8-10 (Mass. Housing Appeals Committee Memorandum on Motion to Dismiss Mar. 21, 1996). There are a limited number of programs—the Affordable Housing Trust Fund, for example—with minimum affordability levels that do not meet the 25%-at-80% and 20%-at-50% standard, and therefore developments proposed under those programs are not eligible for comprehensive permits under Chapter 40B. See G.L. c. 121D, § 2(a).

8. This is unlikely to be of concern in the present case since the housing will be ownership housing.

9. In *Lexington Ridge*, there was a great deal of evidence presented and discussion in the Committee's decision indicating that the conditions were consistent with local needs. This discussion is *dictum*, however, since once a condition is found not to render a development uneconomic, there is generally no need to inquire further into whether it is consistent with local needs. *Cooperative Alliance of Massachusetts v. Taunton*, No. 90-05, slip op. at 8, n.12 (Mass. Housing Appeals Committee Apr. 2, 1992). More recently, in a case involving a *de facto* denial of a permit—that is, where economics were not in issue—we removed a condition requiring 30% affordability instead of 25%) because the Board had not articulated a reasonable factual or legal justification for it. *9 North Walker Street Dev., Inc. v. Rehoboth*, No. 99-03, slip op. at 7 (Mass. Housing Appeals Committee Nov. 6, 2006). Though theses cases support the proposition that a Board may be able to justify at least some higher levels of affordability under some circumstances, we have not definitively ruled on this question.

wished to take such an approach, it should have promptly approved the requested change subject to the condition requiring 83% affordability. The decision would then have come before the Committee much as the case did in *Lexington Ridge Associates*. As in any appeal of the grant of a comprehensive permit or of a decision concerning a change pursuant to 760 CMR 31.03(3), the burden would first have been on the developer to show that the Board's action rendered the proposal uneconomic, and if that were proven, the burden would have shifted to the Board to prove a legitimate local concern that outweighed the regional need for housing. We would have considered any such legitimate local concern without regard to the financial effect that it might have on the proposal; that is, if the concern were sufficiently weighty, we would have imposed a condition, and left it to the developer to determine whether financial considerations permitted it to comply with the condition or whether the proposal needed to be abandoned. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 25, (Mass. Housing Appeals Committee Jun. 25, 1992); *Owens v Belmont*, No. 89-21, slip op. at 7, n.5 (Mass. Housing Appeals Committee Jun. 25, 1992); 760 CMR 31.05(3)(commentary); G.L. c. 40B, § 23 (sentence 4); also see, e.g., *Princeton Development, Inc. v. Bedford*, No. 01-09, slip op. at 10-15 (Mass. Housing Appeals Committee Sep. 20, 2005); also see 760 CMR 31.05(3).

But in considering whether conditions are necessary when a permit or approval has already issued constructively, under 760 CMR 31.08(8), the burden is on the Board from the outset to establish local concerns sufficient to require conditions. In this case, the Board failed to act on the request for a change within the required time limits, the request was therefore approved constructively, and the Board has presented no evidence of a legitimate local concern. We conclude, therefore, that in this case the Board has not met its burden of establishing a local concern that outweighs the regional need for housing, and there is no basis in the record for imposing a condition that 83% of the approved housing units be affordable.

V. CONCLUSION

For the reasons articulated in the December 22, 2005 Preliminary Determination of Constructive Grant of a Comprehensive Permit, the developer's request to change its proposal from thirty units of rental housing with eight affordable units to thirty condominium units with eight affordable units was granted constructively. All conditions imposed in the comprehensive permit filed with the Medway Town Clerk on January 10, 2005 shall remain in effect. No additional conditions are imposed by this Committee beyond the following, general conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by the comprehensive permit issued by the Board.

(b) The subsidizing agency or project administrator may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) 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 granted or approved construction financing, until subsidy funding for the project has been committed, and a regulatory agreement has been executed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

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: April 25, 2007

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson

James G. Stockard, Jr.

LPc\m

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

MARITIME HOUSING FUND, LLC Appellant	)	
v.	)	No. 06-14
MEDWAY BOARD OF APPEALS, Appellee	)	

PRELIMINARY DETERMINATION OF CONSTRUCTIVE GRANT OF COMPREHENSIVE PERMIT

On November 26, 2003, Maritime Housing Fund, LLC submitted an application to the Medway Zoning Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build thirty affordable, mixed-income rental housing units on a 6.3-acre site at 123 Main Street (near Elm Street) in Medway. Eight of the units were to be affordable and twenty-two were to be rented at market rates. On January 10, 2005, the Board filed a decision with the town clerk granting the permit. Opinion of the Board, filed with Medway Town Clerk Jan. 10, 2005.

By letter dated May 16, 2005 and filed with the Medway Town Clerk on May 17, the developer requested that the Board permit it to change the housing from a rental development to a residential condominium. The Board, in response, suggested that it would not consider the request until certain fees were paid. The developer evidently paid the fees, and sent another letter, dated August 22, 2005 (though apparently postmarked August 27) asserting that the change had been granted constructively for failure to respond within the time limits provided in 760 CMR 31.03(3). The Board challenged this assertion

and requested certain information from the developer. On May 3, 2006, the developer filed a more formal Petition for Change of Comprehensive Permit.[1] On June 21, 2006, the Board convened a public hearing. In a second decision, dated September 6, 2006 and filed with the town clerk September 8, 2006, the Board granted the change from rental to ownership, but imposed a new condition requiring that twenty-five of the units be affordable and permitting only five to be sold at market rates.[2] All of these facts are readily apparent from the second decision, that is, the Opinion of the Board, filed with Medway Town Clerk Sep. 8, 2006, and attachments.

On September 27, 2006, the developer filed an appeal with this Committee alleging that because of the Board's failure to comply with time limitations in 760 CMR 31.03 in considering the requested change from rental to ownership, that change had been granted constructively. On October 16, 2006, at the Conference of Counsel which opened the Committee's hearing in this case, the Board filed an answer. On November 2, 2006, the developer filed a motion for constructive grant pursuant to 760 CMR 30.07(2)(e). The Board filed no opposition.

I assume *arguendo* that the deadline by which the Board was to respond to the initial request for a project change was tolled while certain fees remained unpaid and while further documentation was prepared. That is, I will assume that the request for a project change that is before me is only the more formal request filed on May 3, 2006. Even considering this date, however, the Board did not convene a hearing until June 21, thus failing to meet the thirty-day deadline for doing so that is provided for in 760 CMR 31.03(3)(c). Further, every

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1. On March 13, 2006, a determination of project eligibility pursuant to 760 CMR 31.01(2) was issued by MassHousing (the Massachusetts Housing Finance Agency) under either the Housing Starts Program of the Federal Home Loan Bank of Boston's New England Fund (NEF).

2. The dramatic increase in the number of affordable units is at the heart of the dispute between the parties. I have no need to consider whether there was a proper substantive basis for that condition, though it appears questionable.

indication is that that hearing terminated on June 21.[3] Since the Board did not render its second decision addressing the change until September, it also clearly failed to meet the forty-day deadline for issuing a decision that is also contained in 760 CMR 31.03(3)(c).

Since the Board clearly exceeded the time limits in the regulation, the only remaining question is whether the proper remedy is a determination that the requested change was approved constructively. This question must be answered by reference to our regulations alone since the Comprehensive Permit Law itself does not contain detailed administrative provisions. That is, the statute provides for the constructive grant of a permit if the Board fails meet hearing deadlines, but it does not anticipate the need to modify a development proposal after a permit has been issued. See G.L. c. 40B, § 21. That eventuality is addressed in § 31.03(3) of our regulations, however. And, the regulatory language follows the statutory language closely. With regard to the initial permit application, § 21 of the statute states, "The board… shall… within thirty days of receipt of such application, hold a public hearing… [and] render a decision… within forty days after the termination of the public hearing…." The regulation states that in considering a request for a change "the Board shall hold a public hearing within 30 days … and issue a decision within 40 days of termination of the hearing, all as provided in G.L. c. 40B, § 21." It does not explicitly provide a remedy, but the clear inference of the words "all as provided in G.L. c. 40B, § 21" is that when the Board fails to adhere to the deadlines, the requested change is approved constructively. Further support for this is found in § 31.03((b), which provides that "if the Board fails to notify the applicant [of its determination as to whether a requested change is substantial], the comprehensive permit shall be deemed modified…."

I therefore conclude that because the Board failed to adhere to the deadlines in 760 CMR 31.03(3), the developer's request to change its proposal from thirty units of rental

3. The developer alleged in its Initial Pleading (¶ 15) that the hearing was closed on June 21. The Board did not deny this in its answer.

housing with eight affordable units to thirty condominium units with eight affordable units was granted constructively.

This ruling is a preliminary determination pursuant to 760 CMR 31.08(8), 31.03(3), 30.07(1), and 30.07(2)(c) that a permit has been granted for thirty housing units. Pursuant to 760 CMR 31.08(8), a further hearing shall be held before me at 10:00 a.m. on January 18, 2007 to determine what, if any, additional, reasonable conditions should be imposed. Based upon that hearing, the full Housing Appeals Committee will consider issuance of a final determination.

Housing Appeals Committee

Werner Lohe
Presiding Officer

Date: December 22, 2006

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