COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

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| WELLESLEY COMMONS, LLC,<br>Appellant | ) | |
| v. | ) | No. 11-02 |
| WELLESLEY ZONING BOARD OF APPEALS,<br>Appellee | ) | |

**RULING ON MOTIONS FOR SUMMARY DECISION**

## I. PROCEDURAL HISTORY

In a decision filed with the town clerk on October 27, 2009, the Wellesley Zoning Board of Appeals granted the developer, Wellesley Commons, LLC's, application for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build five affordable, mixed-income condominium units on land at 65, 67, and 69 Washington Street near Hillside Road in Wellesley. Exh. C1-C.[1] Construction of the housing is now nearing completion. See Exh. C1-I; Affidavit of M. Grant. It has been financed under the Federal Home Loan Bank of Boston's New England Fund, with four of the units to be sold at market rates and one unit sold at a price that would be affordable to a household earning no more that 50% of the area median income. Exh. C1-A, p. 2, ¶ 1; C1-B, p. 2, ¶ 1 ("eligible purchaser"). The development consists of two detached units (that resemble single-family houses) and three homes (including the affordable unit) in a single, larger building. Exh. C1-L.

1. The parties submitted over three dozen documents into the record in support of their motions; these are listed in the appendix to this decision.

On April 14, 2011, the developer requested, pursuant to 760 CMR 56.05(11), that the Board approve a change in the project which would remove the two detached buildings from the condominium and include them in a homeowners association with the remaining condominium units, thus permitting them to be sold as single-family houses.[2] Exh. C1-F. The Board first determined that this change was substantial, and then, on June 9, 2011, denied the requested change. Exh. C1-G, C1-H.

On July 11, 2011, the developer appealed the denial to this Committee, and a hearing was opened July 27, 2011 with a Conference of Counsel pursuant to 760 CMR 56.06(7)(d)(1).

On August 5, 2011, the developer requested that the Board permit a second change in the project. Specifically, the comprehensive permit included a requirement that Unit 2 (one of the detached units) not be granted a certificate of occupancy nor sold until the affordable unit (Unit 4) had been sold. The developer requested that the "hostage" unit be changed from Unit 2 to Unit 3, one of the units in the large building. Exh. C1-I. By letter of August18, 2011, the Board determined that the second request was also a substantial change and scheduled a hearing to consider it.[3] Exh. C1-J. The developer appealed this determination to this Committee, and by order of September 8, 2011, the presiding officer consolidated that appeal with the previous appeal, and ordered that all proceedings before the Board be stayed.

On October 5, 2011, the parties filed cross-motions for summary decision pursuant to 760 CMR 56.06(5)(d).[4]

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2. Approval of changes in the project by the Board or this Committee pursuant to 760 CMR 56.05(11) is distinct from approval of changes "with reference to the project eligibility requirements" by the Subsidizing Agency pursuant to 760 CMR 56.04(5). Cf. Exh. M-6.

3. The parties were apparently unaware of the section of our regulations that provides that the first appeal of the denial of a change stayed the proceedings before the Board. See 760 CMR 56.05(11)(d).

4. The Board also filed motion requesting oral argument and that the Committee conduct a site visit. Those motions are denied.

## II. THE CHANGE FROM CONDOMINIUM TO HOMEOWNERS ASSOCIATION

### A. The Developer's Motion for Summary Decision

The developer argues that its requested change should have been approved because under the case of *Amesbury v. Housing Appeals Commttee*, 457 Mass. 748 (2010) the Board has no authority to impose conditions on a comprehensive permit that require condominium form of ownership rather than a homeowners association. Developer's Brief, pp. 9-20 (filed Oct. 5, 2011). In addition, it argues that the protections afforded by a homeowners association are equivalent to those afforded by a condominium.[5] Developer's Brief, p. 15.

The court's ruling in *Amesbury* generally prohibits "nonzoning restrictions," that is, the Board may not impose conditions with regard to concerns that "fit within the responsibility of State of Federal funding an supervision agencies." *Amesbury*, 457 Mass. at 750, 765. The most straightforward concern at issue in the current case is that if the development is changed from a single condominium on a single lot to a development with single-family houses on separate lots, then the creation of those lots, that is, the drawing of the lot lines, must be reviewed and approved. This is exactly the purpose of the Subdivision Control Law, and is a land use concern that is obviously within the authority of the planning board. Because the development is proposed under the Comprehensive Permit Law, however, this power is exercised by the zoning board, that is, "...the power of the board derives from ... that ... possessed by [the planning board]." *Amesbury*, 457 Mass. at 756. Thus, the Board may certainly require that any change from a condominium to single-family houses be made only with its review and approval—in fact, it is difficult to imagine how such a change could be made without a Comprehensive Permit Plan (showing lot lines) being approved by the Board for recording at the registry of deeds. Thus, the developer's legal argument fails.[6]

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5. The developer also argues that its requests for changes were granted constructively. We find no merit in that argument. See Board's Brief, pp. 13-14.

6. If the developer were to present the argument—which is not clearly articulated in its brief—that the Board has a right to review its proposed lot lines, but may not prevent the developer from changing the form of ownership (instead being required to approve the subdivision of land in some form), its argument would also fail. For example, it is certainly possible to envision a parcel on which separate buildings could be appropriately located so as to leave sufficient space for shared yard space, but on which there is insufficient space to create adequate individual yards. Similarly,

Of course, a condition or requirement that is generally within the Board's power to impose may still be indefensible in a particular case. That is, when the Board denies a request for a change in an approved comprehensive permit project, that decision may be appealed to this Committee pursuant to 760 CMR 56.05(11)(c). But the developer then has the burden of proving that the denial makes construction or operation of the housing uneconomic; if the developer sustains that burden, the burden shifts to the Board to prove that there is a valid local concern that supports the denial of the change, and that this concern outweighs the regional need for housing. *Mattbob, Inc. v. Groton*, No. 09-10, slip op. at 5 (Mass. Housing Appeals Committee Dec. 13, 2010); *Burley Street, LLC v. Wenham*, No. 09-12, slip op. at 4 (Mass. Housing Appeals Committee Sep. 27, 2010); and cases cited.

In this case, the developer's brief contains no explicit argument that the denial of the change rendered the development uneconomic.[7] But its real estate expert did state his opinion that "[t]he likelihood of selling a stand-alone residential unit as a single-family house… is far greater than selling it as a condominium unit," and the two detached homes "will be more marketable… and will demand a higher selling price as single-family homes…, subject to a homeowners association, rather than as condominium units." Exh. C1-K, p. 3. This very general opinion alone, however, would not be sufficient to meet the developer's burden of proof. Cf. *Mattbob, Inc. v. Groton*, No. 09-10, slip op. at 7-21 (Mass. Housing Appeals Committee Dec. 13, 2010). Moreover, the facts with regard to the economics of the development are clearly in dispute. See Exh. Bd-1. Thus, since the

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in the present case, the Board argues that as a factual matter there are significant local concerns raised concerning the maintenance of a shared underground stormwater drainage system.

7. The developer does appear to argue that the protections afforded by condominiums and by homeowners associations are equivalent as a matter of law. But it must concede that associations "are governed by common law principles," while condominiums enjoy statutory protections, including unusual features such as the so-called "super lien" provision. Developer's Opposition, p. 6, (filed Oct. 12, 2011); G.L. c. 183A, § 6(c). This alone is sufficient to refute the developer's legal contention. Clearly, as a matter of law, there are differences between the two mechanisms—differences which might, depending on the facts of individual cases, generate local concerns sufficient to support the Board's requiring one mechanism over the other.

Each party presented the opinion of a lawyer specializing in condominium law. See Exh. C2-B and Affidavit of S.M. Marcus. Their expert testimony would appear to be most valuable not in comparing the laws of condominiums and homeowners associations in the abstract, but rather in in establishing—as a matter of mixed fact and law—the relative advantages of a particular condominium structure in comparison to a particular homeowners association.

evidence must be construed in the light most favorable to the Board, the developer's motion for summary decision must fail in any case. See *Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992).

For these reasons, the developer's motion for summary judgment is denied.

**B. The Board's Motion for Summary Decision**

The crux of the argument presented by the Board is that even if its refusal to permit the mechanism for addressing future shared costs to be changed from a condominium to a homeowners association, were to render the development uneconomic, that decision should be upheld because the town's interest in the allegedly greater protection afforded by the condominium arrangement is, as a matter of law, sufficient to outweigh the regional need for housing.[8] There are two prongs to this argument. First, the Board argues that as a matter of law, a homeowners association does not provide the owners with as much legal protection as a condominium. Second, it argues that as a practical matter—based on the financial structure of the development and its physical characteristics—a homeowners association would not provide the owners, particularly the owners of the affordable unit, as much protection as a condominium.

As noted above, the Board is correct in arguing that the two mechanisms provide different protections. That is, it is clear as a matter of law that the protections afforded by the two mechanisms are not identical. But each housing development is unique both in its financial structure and its physical characteristics. Thus, as a practical matter, the extent of risk represented by using one mechanism instead of the other is a factual question, and may vary from a small amount, which would be insufficient to support the denial of the change, to a large amount, which would justify the Board's decision. Based upon the arguments made by the parties and their supporting affidavits, it is clear that the facts concerning the physical characteristics of the development are in dispute. For that reason, the extent of risk associated with the two mechanisms and whether it is sufficient to outweigh the regional need for housing is a factual question, and the Board's motion for summary judgment must be denied. See *Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992).

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8. The Board also argues that the Committee has no jurisdiction over this matter since construction of the development has been completed. Board's Brief, pp. 4-6 (filed Oct. 5, 2011). The facts presented by the Board itself, however, show that construction has not been completed and occupancy permits have not been issued. Affidavit of M. Grant.

We should note that in a dispute such as this one, it is the physical characteristics of the development that are critical. In this case, the long-term economic risks involved with owners staying current with their loan payments and fees and the risks associated with the costs of maintaining retaining walls and the underground stormwater management system are intertwined. These intertwined facts might well show that a condominium offers significantly more protection than a homeowners association, and we leave open the question of whether this might be sufficient to constitute a local concern. But if there were no complicating physical features, it appears quite clear that financial concerns alone would not be local concerns. Rather, ensuring that the financial structure of the development provides sufficient protection—for the affordable homeowner in particular—is exactly the sort of concern that is within the expertise of the subsidizing agency, and not the Board.

## II. CHANGE IN SEQUENCE OF SALE OF UNITS

As noted above, for the sake of administrative efficiency the presiding officer consolidated the initial appeal and the appeal concerning the request for a change in sequence of sale of units—even though the latter issue was arguably raised improperly. We will therefore address it.

Since the question of whether a change in sale sequence should be permitted has not yet been decided by the Board, the initial question before us would be whether it is a substantial change. See 760 CMR 56.05(11)(d), 56.07(4)(a). If we found the change to be substantial, we would remand it to the Board for consideration on the merits; if we found it not to be substantial, we would approve it. *Id.*

But as a preliminary matter, the developer argues with regard to this issue as well that the requested change should have been approved since under *Amesbury v. Housing Appeals Commttee*, 457 Mass. 748 (2010), the Board had no authority to impose conditions that control the sequence in which housing units are sold.[9] Developer's Brief, pp. 18.

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9. The developer also argues that in August 2010 the Board determined that a similar change was insubstantial. See Exh. C1-D. First, it is not clear that the Board was correct in that determination, nor that it should be bound by it. More important, just as some changes in the number of units to be built are substantial and some are not, some changes in sequencing may be substantial and others not. Cf. 760 CMR 56.07(4)(c)(2) and 56.07(4)(d)(1).

The Board's arguments in defense of the sequencing are related not to any physical characteristics of the development, but rather to financial considerations—the possibility that in the current difficult economic environment the affordable unit could remain unfinished since it will generate less revenue than the single-family houses. Board's Opposition, pp. 1-2 (filed Oct. 12, 2011).

It is clear, however, that the sequence of sale of units is a matter within the province of the subsidizing agency, and beyond the authority of the Board. *Amesbury*, 457 Mass. at 758 ("...the timing of sale of affordable units in relation to market rate units... [is] subject to challenge as *ultra vires* of the board's authority...."). Thus, it is not a substantial change, and must be approved. See 760 CMR 56.05(11)(b). (It is, however, a change in the "details" of the project, and as such the Board was entitled to written notice, which was properly provided by the developer in this case. See 760 CMR 56.05(11)(a).)

Even though the change in sequencing is outside of the purview of the Board, however, it is a change that should not be made lightly, and it might affect the project eligibility requirements overseen by the Subsidizing Agency. See 760 CMR 56.04(5). Thus, before the units are sold, the Board is entitled to assurance from the subsidizing agency that that agency has approved the change. For that reason, at the conclusion of this matter, we will either modify the Board's condition or impose our own condition to require approval of the sequencing change by the subsidizing agency prior to issuance of occupancy permits.

## III. CONCLUSION

With regard to the change from condominium form of ownership to homeowners association, both the developer's motion for summary decision and the Board's motion for summary decision are DENIED.

With regard to the sequencing of sale of units, the developer's motion for summary decision is GRANTED, and the Board's motion is DENIED.

The Committee retains jurisdiction over this matter, and all proceedings before the Board remain stayed. At the convenience of the parties, and under the direction of the

presiding officer, this matter shall be scheduled for evidentiary hearing sessions to resolve the remaining issues in dispute.[10]

Housing Appeals Committee

Date: November 14, 2011

Werner Lohe, Chairman

Carol A. Gloff

Theodore M. Hess-Mahan

James G. Stockard, Jr.

LPc/w

10. It appears that the only remaining issue is to determine factually whether the Board's denial of the change from condominium to homeownership was proper. As noted above, the burden will first be on the developer to show that the denial renders the project uneconomic. If that is proven, the burden will shift to the Board to prove that the homeowners association raises local concerns that are significantly greater than the condominium does—sufficiently greater so as to outweigh the regional need for housing.

## APPENDIX

DEVELOPER'S SUBMITTALS

Affidavit (first) of M.J. Connolly (developer's agent/principal), filed Oct. 5, 2011

Exh. C1-A - 1/1/08 Project Eligibility Letter (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011)

Exh. C1-B - 10/14/09 Regulatory Agreement (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011)

**Exh. C1-C** - 10/27/09 Modified Comprehensive Permit Decision (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011)

**Exh. C1-D** - 8/18/10 Determination of Non-Substantial Change (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011)

Exh. C1-E - 4/8/11MassHousing letter (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011)

**Exh. C1-F** - 4/14/11 Request for Change (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011)

Exh. C1-G - 5/4/11 Determination of Substantial Change (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011)

Exh. C1-H - 6/9/11 Decision of Denial of Change (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011)

Exh. C1-I - 8/5/11 letter from M.J. Connolly (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011)

Exh. C1-J - 8/18/11 Determination of Substantial Change (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011)

Exh. C1-K - 9/26/11 Affidavit and 9/24/11 Opinion of Nelson Zide (real estate broker) (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011)

Exh. C1-L - 3/31/11 Master Deed Site Plan (unsigned) (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011) (cf. Exh. M-5, p. 3)

Exh. C1-M - 9/__/11 Declaration of Covenants and Easements and Establishment of Property Owners Association (unsigned) (attachment to Affidavit (first) of M.J. Connolly, filed Oct. 5, 2011)

Affidavit (second) of M.J. Connolly (developer's agent/principal), filed Oct. 12, 2011

**Exh. C2-A** - 8/18/10 Determination of Non-Substantial Change (attachment to Affidavit (second) of M.J. Connolly, filed Oct.12, 2011, see ¶ 4)

Exh. C2-B - 6/9/11 letter from T. Schofield (attachment to Affidavit (second) of M.J. Connolly, filed Oct.12, 2011, see ¶ 10)

Affidavit of S. Corbett (developer's general contractor), filed Oct. 12, 2011

BOARD'S SUBMITTALS

Affidavit of M. Jop (Wellesley Planning Director), filed Oct. 5, 2011

Exh. J-1 - Rules and Regulations Governing the Subdivision of Land (attachment to Affidavit of M. Jop, filed Oct. 5, 2011, see ¶ 13)

Affidavit of L. Mahoney (Board's Ex. Sec.), filed Oct. 5, 2011

Exh. M-1 - 4/30/09 Comprehensive Permit Decision (attachment to Affidavit of L. Mahoney, filed Oct. 5, 2011, see ¶ 5)

**Exh. M-2**[11] - 10/27/09 Modified Comprehensive Permit Decision (attachment to Affidavit of L. Mahoney, filed Oct. 5, 2011, see ¶ 6)

Exh. M-3 - 4/13/10 Amended Comprehensive Permit Decision (attachment to Affidavit of L. Mahoney, filed Oct. 5, 2011, see ¶ 8)

Exh. M-4 - 7/27/10 Determination of Non-Substantial Change (attachment to Affidavit of L. Mahoney, filed Oct. 5, 2011, see ¶ 9)

**Exh. M-5** - 4/14/11 Request for Change (attachment to Affidavit of L. Mahoney, filed Oct. 5, 2011, see ¶ 11)

Exh. M-6 - 5/2/11 Meeting Minutes (attachment to Affidavit of L. Mahoney, filed Oct. 5, 2011, see ¶ 12)

Exh. M-7 - 6/22/11 Modification Decision (attachment to Affidavit of L. Mahoney, filed Oct. 5, 2011, see ¶ 14)

Affidavit of R.L. Seegel (Board Chair), filed Oct. 5, 2011

Affidavit of M. Grant (Wellesley Building Inspector and Zoning Enforcement Officer), filed Oct. 5, 2011

Affidavit of D.J. Himmelberger (former Wellesley Selectman), filed Oct. 5, 2011

Exh. H-1 - 5/1/07 Development Agreement (attachment to Affidavit of D.J. Himmelberger, filed Oct. 5, 2011, see ¶ 12)

Affidavit of S.M. Marcus (Board's condominium expert), filed Oct. 5, 2011

Exh. Bd-1 - Opinion of H.J. Kelley (real estate appraiser) (filed Oct. 5, 2011)

Exh. Bd-1-A - Qualifications of H.J. Kelley (filed Oct. 5, 2011)

Exh. Bd-2 - Town Meeting Certification by Town Clerk K.F. Nagle, filed Oct. 5, 2011

Affidavit of T.L. Tracy (title examiner), filed Oct. 5, 2011

Exh. T-1 - Title Report (attachment to Affidavit of T.L. Tracy, filed Oct. 5, 2011)

Exh. T-2 - Grantor Schedule (attachment to Affidavit of T.L. Tracy, filed Oct. 5, 2011)

Exh. T-3 - Documents Received and Recorded at the Norfolk County Registry of Deeds (various) (attachment to Affidavit of T.L. Tracy, filed Oct. 5, 2011)

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11. Exhibits in bold typeface were submitted under two different exhibit numbers.