

HOUSING APPEALS COMMITTEE
Abington Housing Authority

Decision # **89-38**
Appellant: **Abington Housing Authority**
Appellee: **Abington Board of Appeals**
Date: **June 20, 1990**
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I. STATEMENT OF THE CASE

Abington Housing Authority (the "Appellant", "Authority", "Developer", "Petitioner") applied to the Abington Board of Appeals (the "Board", the "Appellee") for a Comprehensive Permit to erect a total of 77 units of public housing on four separate sites in Abington. The housing consisted of elderly housing under the State's "667" Program, family housing under the "705" Program, and "handicapped" housing under the "689" Program. The Authority

received a single grant covering the four sites and filed this application as a single application covering the four sites.

The Board, after due notice and a public hearing, granted the Comprehensive Permit for three of the sites, but denied

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it for the fourth, Linwood Street, where it was proposed to build 12 units of "705" family housing, and one three-bedroom unit for physically handicapped under the "689" Program.

The record shows that after due notice the Board held its hearing on June 9, 1989. The Petitioner appeared, with its counsel, and submitted its case. No one appeared in opposition. The Petitioner moved that the evidence be closed. The Chairman, however, over the objection of Petitioner's counsel, decided that he wanted more interested parties to come forward, so he continued the hearing to June 22, 1989. At that hearing a number of abutters and other residents of the Linwood Street area came forward with objections, following which the Board voted to approve the other three sites and deny the Linwood Street site. (Transcript, pp. 3-5).

From this denial, the Authority filed this appeal to the Housing Appeals Committee, ("HAC", or the "Committee"), alleging in effect that the denial is inconsistent with local needs, and that the four sites constitute a single application under a single grant, and that denial of a part renders the whole "uneconomic".

As our view of the issues here does not require us to decide whether this application should be dealt with

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as a single application for four sites, or four separate

applications, we base our decision solely on whether or not the denial of the Linwood Street site was "consistent with local needs".

A. Stipulations and Agreements

By stipulation, counsel for the Board agreed that the adequacy of the site approval letter is not an issue. (Transcript p. 35). He also stipulated that Abington has not yet met the 10 percent minimum for low or moderate income housing units set out in the Statute (G.L. c. 40B, s. 20). (See Appellant Brief at page 1.)

We agree with the comments on page four of the Board decision that there is a difference between Comprehensive Permits and variances and that statutory criteria for approval of variances, including considerations of "hardship", do not apply.

II. ISSUES

A. The Board Hearing. The Board Decision.

It is not easy, from the decision of the Board, or the presentation at the hearing before the Housing Appeals Committee, to pinpoint the exact grounds on which the Board found that the proposal for the Linwood Street site was

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not "consistent with local needs".

In general, the decision states that the "Board felt that this site would be detrimental to not only the health and safety of the residents in the area, but also detrimental to the health and safety of those families which would be considered for housing there..." (Decision, p. 2).

This general finding was based on concerns of the neighbors respecting "possible pollution of water...." "There appeared to be no plans for a culvert.. .and there was no indication that if there were culverts installed that the problem would be alleviated..." (Board Decision, p. 2).

Reference was made to a well "which could be contaminated... (which) was not indicated on any of the maps presented to the Board.. .The Board thought that an oversight of this magnitude was certainly not "di minimis". (Decision p. 2).

The Board's decision speculated about the possibility of a wetlands problem. The Board pointed out that the applicant had filed for a Determination of Applicability with the local Conservation Commission, "which had not at the time of the hearing, been acted upon, and there was no decision available to the zoning Board to rely on in this regard". The Board referred to a previous Conservation

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Commission hearing on an abutting parcel, stating that "it is unclear what happened, however, it is noted that the project did

not go forward, and the information which the Board had supplied to it by the neighbors was that the Conservation Commission prohibited development of the land. Thus leaving us to believe there are at least wetlands or buffer zone in the immediate area, although again this was not delineated in any of the maps presented by the... Authority... as evidence of Site Approval requirements." (Decision p. 3).

The Board criticized the site approval letter issued by the State funding agency to the Authority as inadequate; as not stating that the Authority was eligible for funding; or that funds were in fact available in view of the State's "budget crunch"; or that if they were, they would not be cut; or that the State did not have some planning concerns about the project, even though the letter did not mention any. (Decision, p. 4).

The absence of sidewalks in the area was pointed to as a safety hazard for school children. It was also asserted that the School Department had an easement with regard to School Department land, and insisted that the access road be maximum width, with sewerage lines for a tie-in

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to a possible future school. (Decision p. 4).

And, finally, the decision states that the location on Linwood Street is distant from shopping, schools, churches, etc., which renders this site unacceptable.

B. Findings and Rulings

We do not rule on the propriety of the action of the Board in continuing the hearing after the petitioner had submitted its case, and no one appeared in opposition, although due notice of the hearing had been given, and there is no indication on the record of exceptional circumstances that justified setting up an additional day for hearing, in effect soliciting opponents to come in to testify against the Housing Authority proposal.

The testimony that did come in at the time of the postponed hearing resulted in a denial of the Linwood Street site based almost purely on the testimony of abutters who simply didn't want this development in their neighborhoods. The result was a decision by the Board, based largely on speculation - a decision difficult to support.

The hearing before the Housing Appeals Committee did little to add support to the Board's conclusions. Again, the Board's presentation consisted solely of testimony from three abutters. Further testimony relating to proceedings

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before the Conservation Commission was submitted by a witness who was a member of the Commission.

Following the hearing before the Housing Appeals Committee,

both parties made short closing statements and thereafter submitted briefs.

The Appellant Housing Authority has presented testimony through its Executive Director, Sylvia Gardner, through its architect, Fernando Domenech, and through Alan Champagne, who is the Project Director from the subsidizing agency, the Executive Office of Communities and Development of the Commonwealth (EOCD).

From this testimony we make the following findings. The Commonwealth has approved a grant to the Housing Authority for the construction of low income housing on these four sites. Preliminary plans for such housing have been prepared by the architect to the satisfaction of the Authority and EOCD. The Linwood Street site was deeded to the Authority by the Town as the result of a Town Meeting.

We find that in making this gift, the Town was aware that the sole mandate of a public Housing Authority is to build, rent, etc., and manage public housing projects. We find that the land was gifted to the Authority by the Town for that purpose, and we dismiss testimony of abutters

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which contended that it behooved the Authority to look for a better site, or that in using the Linwood Street site for public housing, EOCD was departing from its own guidelines. (Transcript, pp. 54-55). Nor are we impressed by testimony that the site is not convenient to services or schools, from abutters who themselves live in the area, some all their lives, have children, and school

busses that take care of the school children. (Transcript, pp. 46, 65).

Three objections relating to water were raised with respect to this site: (1) that there were drainage problems; (2) that there were wetlands problems; and (3) that there was danger of pollution to a nearby well.

There was no engineering or other reliable evidence submitted by the Board to support any of these contentions, or from which even a prima facie finding could be made that would have shifted the burden on going forward to disprove these contentions to the Authority. (Transcript, p. 23).

The Authority met with the Water Department, the Building Inspector and the Health Department. There is nothing on the record to indicate any concerns from those agencies with respect to drainage, ground water or a contaminated well. (Transcript, pp. 20-21).

The picture submitted by an abutter showing that water

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accumulated on a part of his land during wet seasons does not of itself indicate that there is something on the subject site that is causing it or that needs correction or that the new proposal

will aggravate it. (Transcript pp. 38-42, Exhibit 1). The general undertaking by the Developer to take any remedial steps indicated by the Conservation hearings (see *infra*) covers any potential adverse effect here.

The Board's decision states that a purported well does not show on the architect's preliminary plan, and that it is not a matter to be taken lightly. We do not understand the implication of this comment. The burden of showing the Committee that a well exists, and how it is endangered by this project, rests in the first instance on the Board. There were some references in the testimony of abutters about a well, and the well was pointed out in the site visit, but there was no evidence that the well was contaminated or how it is in danger of contamination from this proposal. We are not prepared to find, on the basis of evidence submitted, that there is even potential danger. What the record does show is that there is a municipal water supply (Transcript p. 40) and a municipal sewer system (Transcript p. 28). It is difficult to see on the record which the

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problem is at this stage.

The reply of the Authority is more than a sufficient answer. At this point, both the plans and the development process are in a preliminary stage. If in the development process or in the hearings presently pending before the Conservation Commission such problems emerge, or the need for a culvert is shown, the Developer will take such steps as are indicated in the findings or orders of the Commission, to deal with them. The Appellant offered similarly to follow recommendations of the Building Inspector regarding

sidewalks. (Transcript, p. 68, 75).

We draw no conclusions adverse to this site from the comment in the Board's decision that there had been a previous Conservation hearing on an abutting site, and that the project did not go forward from which the Board drew the conclusions that "there are at least wetlands or buffer zone in the immediate area". (Decision, p. 3).

The Board produced as a witness James Dombrowski, a member of the Conservation Commission. (Transcript p. 47-52). Normally the Developer does not risk the expense involved in going before the Conservation Commission until after he has obtained a Comprehensive Permit. (See Appellant Brief, p. 10.) In this case, however, the Authority has already

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filed with the Conservation Commission. Mr. Dombrowski testified that the Commission had walked the site; that matters of flooding, drainage, wetlands protection, and protection of public and private water are all matters within the purview of the Conservation Commission. At the time of the HAC hearing, however, the

Commission had taken no evidence or made any findings or determinations.

III. CONSISTENCY WITH LOCAL NEEDS. RULINGS AND ORDER.

In view of the subsidiary findings, and upon a review of the whole record, under the provisions of G. L. c. 40B, ss. 20-23, the Housing Appeals Committee finds that the decision of the Board of Appeals of the Town of Abington, in denying a Comprehensive Permit on the Linwood Street site, was unreasonable and not consistent with local needs.

The decision of the Board of Appeals of the Town of Abington is hereby vacated and the Board is directed to issue a Comprehensive Permit on the Linwood Street site, in accordance with the Appellant's application.

Said Comprehensive Permit shall provide for the construction of a housing developing on the Linwood Street site in the approximate number of units and design as presented before the Housing Appeals Committee subject

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to the following conditions:

(1) Construction shall in all particulars be in accordance with all present applicable zoning and building by-laws for the construction of multi-family buildings, except those which are not consistent with this decision. The subsidizing agency agencies may impose requirements for compliance with any other recognized building codes or portions of such codes, and in the event of conflict, the requirements of the subsidizing agency or agencies shall govern.

(2) No construction shall commence until detailed construction plans and specifications shall have been approved by the

subsidizing agency or agencies and such agency or agencies have granted a construction mortgage loan and subsidy financing for the project has been committed.

(3) The design of the development is to be subject to such changes in site and building design, type and location of units, and amenities, as are recommended or required by the subsidizing agency or agencies.

(4) Prior to final financial commitment,

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the subsidizing agency shall, as part of its project review, comply with any applicable requirements of the Massachusetts Environmental Policy Act, G.L. c. 30, ss. 61-62.

(5) If anything in the decision of the Housing Appeals Committee would seem to permit the building or operation of such housing in accordance with standards less safe than the applicable building and site plan requirements of the

subsidizing agency or agencies, the standards of such agency shall control.

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

HOUSING APPEALS COMMITTEE

Maurice Corman, Chairman

Date: June 20, 1990

End Of Decision