

HOUSING APPEALS COMMITTEE

Wayne Walega and Richard Walega, d/b/a/ Richway Associates

Decision # **89-17**

Appellant: **Wayne Walega and Richard Walega, d/b/a/ Richway Associates**

Appellee: **Acushnet Zoning Board of Appeals**

Date: **November 14, 1990**

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I. INTRODUCTION

On December 6, 1988, Wayne Walega and Richard Walega, d/b/a/ Richway Associates, submitted an application to the Acushnet Zoning Board of Appeals for a Comprehensive Permit pursuant to M.G.L. c.40B, s.s. 20-23 to build a development of 40 units of low and moderate income housing under the Commonwealth's Homeownership Opportunity Program (HOP). After due notice and public hearings, the Board rendered a decision on March 3, 1989 granting the permit,

but with 12 conditions. From this decision the developers appealed to the Housing Appeals Committee alleging that a number of the

conditions made construction of the project uneconomic. Most significantly, the developers alleged that lot size requirements limited the development to less than half the proposed size and that a condition concerning hazardous waste was

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both unworkable and unnecessary.

The Committee held a conference of Counsel, conducted a site visit, and held an evidentiary hearing. After the first day of testimony, the parties agreed to remand the case to the Board for consideration of a revised development proposal. The Board held additional hearings and issued a second decision which superseded the first. This decision granted the permit with 24 conditions and explicitly limited the development to 29 units.

The developers renewed their appeal and five additional evidentiary hearing sessions were conducted, with witnesses sworn, full rights of cross-examination, and a verbatim transcript. Following the presentation of evidence, counsel presented oral argument and submitted post-hearing briefs.

II. ISSUES

Where the Board has granted a comprehensive permit with conditions, the issues before the Committee are first, whether the conditions make the building or operation of the housing uneconomic, and second, whether the conditions are consistent with local needs. M.G.L. c. 40B, s. 23, 760 CMR 31.05(1) (b).

A. Hazardous Waste

Condition nine of the Board's decision (Exh. 10) concerns potential health hazards created by PCBs (polychlorinated biphenyls) near the site. The lot on which the development is proposed is immediately adjacent to the Acushnet River. There is a major hazardous waste site approximately one mile downstream in the New Bedford harbor. When the Board first considered the

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developers' application, and even after remand of this case to the Board, uncertainty remained as to the concentrations of PCBs in the river. The Board's decision therefore required further testing, and as a result, testing for PCBs continued during the Committee's hearing. [1] At the close of the hearing, there was no dispute that because of tidal action in the river there are concentrations of PCBs in the river bottom (as opposed to the river bank) which pose a significant health risk to anyone wading in the water. It is also undisputed that because a very lengthy, multi-million dollar clean-up of the downstream source is just now beginning, there is

no practical way in the foreseeable future to eliminate the contamination in the river bottom adjacent to the development site.

Condition nine clearly makes building of the project uneconomic. The Board concedes that, given the undisputed facts above, its effect is to prohibit the construction of any housing. Tr. VI, 96-97; [2] Appellee's Brief, 21. Thus, the question that

[1] Throughout the hearing and in their briefs, the parties have argued at length about what testing was required by the Board's decision, what testing the Board could properly require, what testing was scientifically required, and whether the testing actually done conformed to both the Board's requirements and scientific requirements. The Committee is convinced that after much confusion between the parties, the testing finally completed on several different occasions not only satisfies the spirit of the Board's requirements, but more important, also provides an adequate basis for assessing the health risks on the site and in the adjacent river.

[2] References to volumes I to VI of the transcript are as follows: I - July 13, 1989; II - Sept. 26, 1989; III - Dec. 14, 1989; IV - Apr. 27, 1990; V - May 18, 1990; VI - June 1, 1990.

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remains is whether the condition is consistent with local needs, that is, whether the town has proven a valid health or environmental or other local concern, and if so, whether that concern outweighs the regional need for housing.

The carcinogenic and non-carcinogenic health effects of PCBs are well documented. Near the development site, the group considered at highest risk of direct exposure consists of children between six and sixteen years old since they may wander into and play in the water. Children under six, while generally less likely to be exposed, are at greater risk of exposure by accidental ingestion by mouth. "Draft Final Baseline Public Health Risk Assessment; New Bedford Harbor Feasibility Study," U.S. E.P.A. Work Assignment Number: 04-1L43 (August, 1989), Exh. 20, pp. 2-29. The question in this case, however, is not simply the degree of risk, but whether the type of risk justifies complete prohibition of development.

The danger here is not one that is specific to the development site. The river bank itself is not contaminated. Soil samples from three locations on three separate occasions (a total of nine samples) showed no significant concentrations of PCBs. Tr. II, 33-49; III, 6-8; Exh. 14. Similarly, there is no allegation that inland portions of the site are contaminated. All of the soil samples showing high concentrations were taken in the water. Tr. VI, 10-12, 20, 21, 30; Exh. 25. Thus, the risk here is to anyone

in the neighborhood who may go into the water at any point along the river bank.

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The development site is in the midst of an existing residential neighborhood. Children currently have access to the river through the development parcel, across a paved parking lot, and at other points. Tr. II, 29-30. Children or adults in the proposed development are in no way at greater risk than current residents. The closest proposed houses in the ten acre development are separated from the river by a four acre wooded buffer area. Tr. I, 45; II, 117; Exh. 3, 4, 18. There is an existing residence considerably closer to the river than the nearest of the proposed units, and the siting of the proposed development with reference to the river is virtually identical to that of the existing Jean Street neighborhood. Exh. 3, 4, 12, 18.

In addition, though contamination of the New Bedford harbor has been a visible public issue for a number of years, the Board introduced no evidence of any action taken by the town to limit access to the river. On the contrary, there is evidence that Acushnet is the only one of the four towns in the immediate vicinity of the harbor which introduced no correspondence into lengthy public hearings conducted by the U.S. Environmental Protection Agency concerning the contamination of the river. Tr. VI, 33-35.

The Board has not proven that the health concern here outweighs the significant regional need for affordable housing. [3]

[3] For the decision of the Board to be consistent with local needs, it must satisfy both prongs of the test established in the definition section of the statute. The decision must be reasonable

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Taking into consideration that there are less drastic measures available to protect residents, the Committee finds that condition nine as written is not consistent with local needs.

But the Committee also recognizes that the health risk, while not overwhelming, is nevertheless real: Thus, pursuant to its power under M.G.L.c. 40B, s. 23 and 760 CMR 31.08(2), ' in order to protect the health of both new and old residents, the Committee will modify the condition to require the developers to

in view of the housing need balanced against local concerns and the local requirements must be "applied as equally as

possible to both subsidized and unsubsidized housing." M.G.L. c. 40B, s. 20. If the decision is found wanting under either prong, there is no need to reach the other. Here, the Board has failed to prove that the health concern

outweighs the housing need. But, in addition, Board member Kurt Blaha testified that as a selectman (a position he later held) he endorsed an application to the Department of Environmental Protection for a sewer permit for a conventional subdivision on the same property. That application had special conditions attached to it just as the comprehensive permit decision did, but contained no reference to PCB's. Tr. IV, 15-16; Exh. 23A. This is sufficient to support the conclusion that condition nine is not consistent with local needs on the second, independent ground that the town's PCB requirement was not applied as equally as possible to both subsidized and unsubsidized housing.

- [4] The developers have brought to the Committee's attention *MP Corp. v. Planning Board of Leominster*, [27 Mass. App. Ct. 812](#), 545 N.E.2d 44 (1989). In that case, where orders from the State Department of Environmental Quality Engineering were pending, the court noted (at 829, 48) that "the matter of hazardous waste would not be proper for consideration for a planning board under G.L. c. 41, s. 81M." Arguably, a zoning board of appeals, both under the reasoning in *MP Corp.* and the statutory scheme of c. 40B, may have no power to act in the absence of local regulations in an area (such as hazardous waste) which is primarily of state concern. But in the present case, where the Board chose to deal with the PCB issue itself rather than refer it to the appropriate state agency, and the Committee is likely to be the only state agency to consider the issue, the Committee would be remiss if it failed to address the health risk directly.

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construct a four foot high fence along the river bank. (See s. III, 1(f), below.)

Because there is access to the river along its entire bank, the modified condition does not completely protect neighborhood residents. But the Committee's authority to address local concerns ends at the boundary of the proposed housing site. It strongly encourages the Board, however, to work with other town agencies to limit access to the contaminated river bottom from other properties as well.

B. Housing Density and other Conditions

1. The Conditions Imposed by the Board Make the Project Uneconomic.

In addressing the other conditions imposed by the Board, including its reduction of the size of the proposal from 40 to 29 units, the Committee must first determine whether the developers can build and operate the project they proposed and still realize a reasonable return on investment.

Two preliminary questions must be addressed. First, the Board argues that its decision must be upheld since the developers failed to prove a specific allowable rate of return established by the Homeownership Opportunity Program (HOP). This misunderstands the appellants' position, however, since, as will be seen below, their contention has consistently been that because of the Board imposed conditions they would realize no profit.

Second, it is important to emphasize that the appellants are

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required to prove that the conditions imposed, when considered in aggregate, make it impossible to build the project. "Uneconomic" is defined in M.G.L. c. 40B, s. 20 as a condition brought about "by any single factor or combination of factors..." (emphasis added). To require a developer to prove that each disputed condition alone renders the project uneconomic would clearly defeat the purpose of the law. A town could block any project by imposing a laundry list of relatively inexpensive conditions, none of which alone would make the project uneconomic.

The Committee received extensive evidence on specific costs and anticipated revenues associated with this project. Richard Walega, one of two partners in the project, who has worked as a city planner, as an employee of an development company, and as a development consultant, testified at length from detailed proforma financial statements prepared both for the project as proposed and as modified by the Board's conditions. John W. French, a licensed architect with extensive experience building subsidized housing, also testified for the developer concerning specific costs. For the Board, Kurt A. Blaha, who is self employed in real estate development and sales and who was a member of the Board when it considered this project, testified concerning the costs associated with similar housing developments with which he has been involved in the Acushnet area.

There are eight conditions which together significantly

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affect the economic of the project. [5] Conditions one and two limit the size of the development to 29 units. Clearly, because of land costs and other fixed costs, a development with fewer units is less feasible economically. The developers testified that if they were to build only 29 units they would sustain a loss of \$278,000, or approximately \$9,600 per unit. Tr. II, 21. This testimony was based upon their pro forma financial statement,

Exhibit 11. Clearly, if the pro forma is accurate, this condition alone makes the project uneconomic. Thus, the central thrust of the Board's case was to challenge the pro forma using the testimony of Kurt Blaha.

Mr. Blaha testified that he built equivalent modular homes more cheaply than the developers' modular homes. [6] We will focus,

[5] The developers have also questioned whether the procedural restrictions contained in conditions 21 through 24 are permissible under M.G.L. c. 40B. It is the Committee's experience that such questions concerning how the developers should proceed after the issuance of the comprehensive permit are best left to the parties to resolve as the project moves forward. Should any prove intractable, the parties may of course apply to the Committee for further relief. It should be noted in general that while a zoning board of appeals may not issue a comprehensive permit conditioned upon subsequent approvals by other local officials or itself, it has the right to expect that the developers will comply with the normal requirements that final construction plans be reviewed by the building inspector and similar officials prior to issuing building permits which insure that construction in fact conforms to the comprehensive permit and state codes. Similarly, a board may establish dates on which rights under the permit lapse and it may limit transferability of the permit, so long as extensions and exceptions are reasonably granted.

[6] Strictly speaking, it is not relevant that similar homes could be built more cheaply. The Board's mandate under c. 40B is to review a particular proposed project and to consider requested exceptions to existing, formal, local, zoning and other requirements. With regard to siding, for instance, if there is a

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as did the parties, on three bedroom units.

The so called "button-up" costs (costs to assemble the modular units) incurred by Mr. Blaha are consistent with those in the pro forma. The pro forma figures are based on button-up costs of \$10 per square foot (Tr. II, 82, 96; 101), for a total per unit (1200 sq. ft.) cost of \$12,000. Similar costs incurred by Mr. Blaha are \$2,500 for basic installation (Tr. IV, 9), \$4,800 for foundation (Tr. IV, 11), \$2,600 for heating (Tr. IV, 13), and \$1,600 for sales tax (Tr. IV, 14), totaling \$11,500. Since these costs are comparable, it is apparent that the real point of contention is the

basic cost of the modular homes themselves.

The developers show a basic cost of \$43 per square foot. Tr. II, 82, Exh. 11. They introduced testimony that the range for similar modular housing is from \$36 to \$48 per square foot. Tr. II, 100. They received estimates as low as \$37. Tr. II, 81. Mr. Blaha testified that he purchased a 1008 square foot house

local prohibition on the use of vinyl, the Board may consider waiving it. In the absence of such a prohibition, it may not affirmatively impose a requirement that the developer use wood siding simply because it feels this would improve the project.

Similarly, it may not require the developer to use cheaper materials to lower costs. Such matters are within the province of the subsidizing agency, which certainly would not approve a proposal with unnecessary extravagances.

In this case, the Board not only exaggerates the importance of comparative prices, but also would like the benefit of both sides of this argument. On one hand, it required the developer to use more expensive siding (condition eight), but at the same time argues on appeal that the units could be built more cheaply. Both the Board and the Committee are limited to reviewing the project as the developer proposes to build it. Thus, comparative prices are relevant only to the extent they tend to prove that particular items in the pro forma are not bona fide.

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for \$33,257 (Tr. IV, 6-8) or \$33 per square foot. Mr. Blaha's cost may be slightly low for comparison purposes since the developers' figures were projections of inflated costs at the time of actual construction while Mr. Blaha's are exact amounts from contracts entered into well prior to his testimony. It is the Committee's view that these figures are basically consistent. Since there is no requirement that the developer seek out the cheapest vendor, [7] there is no reason to conclude that this aspect of the pro forma is not bona fide.

The Board also challenged other aspects of the pro forma, including costs for construction of roads and installation of utilities, land costs, developers' fees, construction management fees, and amounts for contingencies. On all of these matters, however, the Committee finds the developers' testimony credible and notes that the Board introduced no evidence that the pro forma in any way failed to conform to the standards of the subsidizing agency. Within the limits of its intended purpose, that is, to provide reasonable estimates in a realm that is inherently speculative, the pro forma is an accurate reflection of the economics underlying the development.

In addition, the pro forma only accounts for losses resulting from the reduction in the number of housing units. The developers

will suffer additional losses due to other changes

[7] The majority of houses in this HOP project will be sold by the developers at market rates. Thus, in addition to oversight of cost and quality by the subsidizing agency, market forces insure that the developers will attempt to build the best possible houses at the lowest cost. Also see note 6, above.

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required by the board. The developers introduced evidence that condition five, requiring a sump hole, would cost an additional

\$1,100 per unit (Tr. II, 104, 109); that condition eight, requiring wood siding, would cost \$1,300 to \$2,000 (Tr. II, 63; II, 105-108); and that condition sixteen, requiring underground utilities, would cost \$1,000 (Tr. II, 20). [8] These per unit costs of more than \$3,000 (approximately \$90,000 for the entire project) would bring total losses for the development to over \$350,000.

The Committee finds that the conditions imposed by the Board make this project uneconomic.

2. Are the Conditions Imposed by the Board Consistent with Local Needs?

The Board introduced evidence with regard to local health, safety, or design concerns only with regard to density (conditions one and two), sump holes (condition five), and common driveways (condition fourteen).

- a. Density - The overall density of the proposed development is 3.7 units per acre. Tr. II, 121. Typical lot size is 5000 square feet. Exh. 18. These figures compare favorably with figures for the surrounding area. Density on four

[8] Conditions four, fourteen, and eighteen deal with configurations of roads and driveways. While the changes imposed by the Board clearly involve increased costs, both in design and construction, the developer chose not to introduce detailed evidence on these, and thus the costs will be considered insignificant.

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surrounding streets varies from 1.6 units per acre to 7.3 units per acre. Exh. 7. The most significant comparison is to Jean Street, which is adjacent and parallel to the street on which the

development is to be built, and like that street is not a thoroughfare. Jean Street has a density of 5.2 units per acre (Exh. 7), and lot sizes varying from 5,000 to 10,000 square feet (Tr. IV, 44). Equally important, as confirmed by the site visit, this project, while slightly more dense than the surrounding area, is consistent with it from both aesthetic and use points of view. Both density and use vary considerably in the area. For instance, the neighborhood is generally single family homes (as is the proposal), but there is also a dense elderly housing project located nearby. Tr. IV, 42; Exh. 12. The Committee concludes that the proposal will fit well into the neighborhood and that conditions one and two are not consistent with local needs.

- b. Sump holes - The developers' test indicate ground water eight to nine feet below grade. Tr. II, 62. Board Chairman Marshall testified, however, that other houses in the area have experienced basement water problems

(perhaps due to the proximity of the river), and that their pumping of water into the street in winter has created dangerous icing conditions. Tr. IV, 31. Foundation seepage problems are difficult to predict and in view of quite limited evidence offered by the developers on this issue, actual experience is likely the better guide. The concerns expressed by Mr. Marshall are legitimate, and the

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requirement in condition five that all houses "have a sump hole tied to a street drain with a gravity feed" is consistent with local needs.

We note in particular that the condition is not overly restrictive. It only requires work that is not easily done after a house is built and a water problem develops, that is, that a sump hole be constructed and the drainage be reconfigured to give each house access to the street drainage system. Installation of sump pumps is not required. They may be installed in individual houses if and when problems actually develop.

- c. Road and driveway configurations and utilities - The Board presented no testimony with regard to the local concerns that might underlie conditions four, fourteen, sixteen, and eighteen. It relies solely upon Exhibit 24, a two page letter of recommendations from the Acushnet Planning Board which the zoning Board considered during its initial deliberations. Appellee's Brief, 21. It has not substantiated local health, safety, or design concerns sufficient to justify the imposition of these conditions, and the Committee finds them not consistent with local needs.

- d. Siding - The first set of plans for the development, submitted to the Board December 6, 1989 (Exh. 17), provided for wooden siding. When the parties agreed to remand this case to the Board after this appeal was filed, the plans were modified considerably. The existence of condition eight, requiring wooden siding, indicates that the Board understood that one of the

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modifications was that vinyl siding would be used. Since the remand, the developers have consistently indicated their intention to use vinyl siding. Tr. II, 105. The Board would like to hold the developer to the original plans, but offers no reasons for doing so. It introduced no evidence to support its requirement in condition eight that wood be used. It has articulated no local concern, and thus the Committee finds the condition not consistent with local needs.

III. CONCLUSION AND ORDER

Upon review of the entire record and the findings of fact and discussion above, the Housing Appeals Committee concludes that the conditions imposed by the Acushnet Zoning Board of Appeals make the construction or operation of the proposed housing uneconomic and that, except for condition five requiring sump holes and drainage, they are not consistent with local needs. The decision of the Board, Exh. 10, is vacated and the Board is directed to issue a comprehensive permit as provided below.

1. The decision of the Board (Exh. 10) shall be amended to read as follows:

- (a) Condition 1
The total number of units shall be 40.
- (b) Condition 2
The lots shall be as shown on the site plans, Exh. 18.

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- (c) Conditions 3, 5, 6, 7, 11, 12, 15, 17, 19, 20
These conditions remain in effect, unchanged.
- (d) Condition 4, 14, 18
These conditions are eliminated. In their place shall be:

Condition 4
All streets and driveways shall be as shown on the

site plans, Exh. 18.

(e) Condition 8

All houses shall be as shown on the architectural plans, Exh. 17, except that wooden siding shall not be required.

(f) Condition 9

The applicant shall construct a fence not less than four feet high parallel to the Acushnet River

bank,

not more than ten feet above the average high water line. The applicant shall be required to donate land along the river to the Acushnet Conservation Commission pursuant to condition eleven only if the Conservation Commission or another town agency agrees to maintain this fence.

(g) Condition 10

This condition has no effect since it applied only to the reduction of the proposal to 29 units.

(h) Condition 11

This condition is eliminated by agreement of the

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parties. Tr. IV, 36.

2. If there are any inconsistencies between the section at the end of the Board's decision entitled "waivers," and paragraph 1, above, as read in conjunction with the site plans (Exh. 18) and the architectural plans (Exh. 17), paragraph 1 and the above plans control.
3. The comprehensive permit shall be subject to the following further conditions:
 - a. Construction in all particulars shall be in accordance with all presently applicable zoning and building by-laws except those which are not consistent with this decision. The subsidizing agency 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 shall control.
 - b. No construction shall commence until detailed construction plans and specifications have been approved by the subsidizing agency and such agency has granted or approved a construction mortgage loan

and subsidy funding for the project has been committed.

- c. The design of the development is to be subject to such changes in site and building design as are required or recommended by the subsidizing agency.
- d. If anything in this decision should seem to permit the

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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.

- 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 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

End Of Decision