

HOUSING APPEALS COMMITTEE
Brown Street Associates

Decision # **82-02**
Appellant: **Brown Street Associates**
Appellee: **Zoning Board of Appeals for the City of Attleboro**
Date: **March 1, 1983**
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I. STATEMENT OF PRIOR PROCEEDINGS

This is an appeal by Brown Street Associates [1], a limited dividend developer, from the decision of the Zoning Board of Appeals for the City of Attleboro [2] denying the Appellant's application for a Comprehensive Permit under the provisions of G.L. c. 40B, s. 20-23. [3]

- [1] Hereinafter variously referred to as "applicant, petitioner, developer, or appellant".
- [2] Hereinafter referred to as "the Board, the Appellee, or the Respondent".
- [3] Acts of 1969, Chapter 774, now G.L. c 40B, 55. 20-23 hereinafter referred to as "the Statute, Chapter 774 or just 774." References to Sections 20-23 refer to G.L. c. 40B.

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II. ISSUES

Brown Street Associates, a limited dividend developer, on November 5, 1981, submitted an application to the Board for a Comprehensive Permit to construct one hundred and forty (140) units of low or moderate income elderly housing units on an 8.2 acre site in the South Attleboro section of Attleboro, Massachusetts.

After due notice and public hearing, the Board, by written decision, filed on January 11, 1982, granted the Comprehensive Permit, but with conditions which the developer contends renders the proposal uneconomic. This appeal to the Housing Appeals Committee (4) seeks relief from, or modification of those conditions.

This appeal originally sought relief from four of the conditions imposed by the Board, as follows:

1. Condition #1 which reduced the total units from 140 to 70.

2. Condition #2 which required submission of the final building plans for approval by the Building Inspector.
3. Condition #9 which provided for a 25-foot landscaped buffer zone.
4. Condition #11 which provided for submission of wet-land issues to the Conservation Commission.

The application for a Comprehensive Permit does not require the submission of a definitive set of

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detailed construction plans. Generally, the type of preliminary submission usually made to a planning board is sufficient: a site plan showing building locations, major features of landscaping, drainage, sewage, utilities, internal and external access roads or driveways, plus elevations and typical floor plans. Where the developer does not know at that stage whether or not he is going to receive a Comprehensive Permit, he is not required to go to the considerable expense involved in the preparation of detailed construction plans. Such plans, however, are required before actual construction begins. The only requirement of such plans, however, is that they comply with the Commonwealth's Uniform State Building Code. All other approvals are subsumed in the Comprehensive Permit and no further approvals by the building inspector can be imposed as a condition of a Comprehensive permit.

The parties stipulated at the preliminary conference of counsel, that they had arrived at agreements with respect to the buffer zone and the Conservation Commission, and agreed that the only issue remaining between the parties was the condition imposed on the Board's decision reducing the number of units from 140 to 70; whether such a condition is not "consistent with local needs" and has the effect of making the developer's

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proposal "uneconomic".

At the hearing before the Committee, the developer's architect, Mr. Mancino, testified that such reduction would increase the estimated cost per unit from \$34,500 to \$36,480. Impliedly, the developer's position was that this difference of approximately \$2000 per unit would render the proposal "uneconomic" and thus not "consistent with local needs" under the Statute. (Transcript Page 5).

In rebuttal, the Board, through the testimony of its chairman, Mr. Perkosi (Transcript Pp 14-22) and the Public Works Engineer of the city, Mr. Vide (Tr. Pp 1-3) and through other witnesses, sought to show that a serious situation of excess surface and ground water existed on the site, and that the reduction to 70

units was an attempt by the Board to counter the health hazard presented by this development and at the same time respond sympathetically to the objectives of Chapter 774 in providing housing for low or moderate income persons in response to the need.

Mr. Perkoski testified that were this application for an ordinary zoning variance under Chapter 40A, the drainage, density, and open space considerations would have resulted in a denial out of hand, but because it was an application under Chapter 774, the Board had

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leaned over backward in effectuating legislative intent in setting up the Chapter 774 program, and that 70 units on this parcel represented a higher density than any other similar project in the city, and that 70 units represented the highest number discussed among the members of the Board, and the most that could be accepted by the Board in view of the valid planning concerns of open space, and the health hazard presented by the drainage conditions.

There was no testimony submitted on behalf of the developer to rebut the Board's contention as to the health hazard presented by the drainage condition, nor was any drainage plan to meet this hazard submitted at the hearing.

On cross examination, a number of the Board's witnesses were asked by counsel for the developer whether in their opinion the condition in the Board's decision providing for the submission of a drainage plan satisfactory to Public Works Department was not sufficient to provide adequate safeguard against the alleged health hazard presented by the drainage conditions.

Mr. Perkoski's testimony was that the condition requiring an adequate drainage plan was imposed on an assumption of 70 units on this site, not 140, and that

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in the Board's opinion no economically feasible drainage plan could be devised with 140 units on this site, that could stop additional surface water run-off from going on to neighboring properties. (Tr. P;. 20-21)

Following the evidentiary portion of the hearing before the Committee on May 4, 1982, a number of events supervened which

delayed the closing of the hearing. A date was set, which was informally extended several times, for the submission of briefs by counsel. On August 11, 1982 a letter was received by the Committee from the developer's counsel, Mr. Thompson, copy to Mr. Ovoian, City Solicitor, indicating that a stipulation of the parties was enclosed. An untitled pleading was enclosed, signed by Mr. Thompson on behalf of the developer stating that the developer would present no further evidence and requesting that the Committee proceed to issue its decision. This pleading was assented to on behalf of the Board by Mr. Ovoian.

The Committee's files indicated that Mr. Jacobi, who had represented the Board at the May 4th hearing before the Committee, was still the counsel of record for the Board. Furthermore, the Committee did not recognize that the untitled pleading enclosed with Mr. Thompson's letter was intended as the "stipulation between the parties" and assumed that such "stipulation"

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had been erroneously omitted from the letter. Counsel for the Housing Appeals Committee made inquiries, and was notified that an informal agreement had been reached between the parties to request the Committee to increase the number of units from 70 to 105 and that the Board would not appeal this modification of its decision. Counsel for the Committee made it clear that the record did not support such a decision by the Committee, and that this could be accomplished only by a stipulation in writing, assented to by both parties, and formally presented to the Committee for approval.

The advice given by the Committee's counsel was consistent with the general practice of the Committee, and the particular events in this case. The Committee makes every attempt to effectuate agreement and stipulation between the parties and will cooperate and allow extra time where there is any reasonable prospect of such settlement.

No such written agreement was forthcoming. On October 13, 1982, a letter was received by the Committee from Mr. Jacobi, counsel of record for the Board. The letter explained that at the time of the hearing, May 4th, Mr. Jacobi was the City Solicitor. He was succeeded on July 1st by Mr. Ovoian. Mr. Ovoian developed a possible conflict by a recent purchase of

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property abutting the locus, and Mr. Jacobi was retained by the Board to complete this case.

With this letter was enclosed a brief on behalf of the Board which totally reiterated the position it had taken at the hearing, and made no reference to any increase in the 70 units allowed by the Board's decision. The brief asked the Committee to uphold the decision of the Board allowing only 70 units.

On December 10, 1982, James A. O'Leary, Esq. of Providence wrote to the Committee. His letter notified the Committee that he had been retained as counsel for the developer. The letter stated that the developer had, on December 8th, delivered to the office

of the Committee a site drainage plan for the parcel and a density study for other apartment projects in Attleboro. The letter requested that the hearing be reopened, that this material be admitted in evidence and be considered in support of the appeal, and that the Committee render its decision. The letter indicated further that the Committee would receive a similar request to

reopen the hearing from the counsel for the Board of Appeals.

In reliance on these representations, the Committee on its own motion notified the parties that it would hear arguments to reopen the hearing at its

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office on December 22, 1982.

On December 16th, Mr. O'Leary wrote to the Committee again

indicating that his previous representation that the Board counsel would join him in requesting a reopening of the hearing was based on a telephone conversation with the City Solicitor, Mr. Ovoian. However, Mr. Ovoian had removed himself from the case because of a conflict of interest: Mr. Jacobi had been re-engaged to represent the Attleboro Board of Appeals; and Mr. Jacobi had notified Mr. O'Leary that he would not request a rehearing.

The Committee proceeded, on December 22nd, to hold the hearing on the motion to reopen which it had scheduled. The hearing was conducted by Mr. Corman, Chairman of the Housing Appeals Committee, sitting as Hearing Officer, assisted by Mr. Carney, Counsel, and Mr. Kelley, Clerk, respectively, of the Housing Appeals Committee. The hearing was attended by Mr. Sirois, the principal for the developer, Mr. Sarault, Esquire, his new counsel, Mr. Keane, the Mayor of Attleboro who has been supporting 140 units, Mr. Smythe the City Planner and Mr. St. Pierre, a member of the Board of Appeals.

Mr. Corman and Mr. Carney indicated to the parties present that the Committee had convened the hearing to give all the parties an opportunity to present argu-

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ments as to whether or not the Committee should reopen the appeals hearing.

Mr. Corman indicated to the Mayor that the Committee appreciated his indication of interest, and would be pleased, as a matter of courtesy, to permit him to make a statement, but that a statement could not be considered as evidence unless the motion to reopen were allowed, and the Mayor appeared as a witness, was sworn, and was subject to cross examination.

The Mayor indicated that he would not make a statement.

Mr. Sarault, the developer's new counsel, indicated that he had been engaged just that morning, and had not had an opportunity to familiarize himself with the case.

Mr. St. Pierre, the member of the Board, indicated the Board's continued position that its decision for 70 units should be upheld by the Committee.

Mr. Jacobi, counsel for the Board, who could not be present, telephoned during the hearing and confirmed to Mr. Carney, the

Committee's counsel, that the Board opposed the re-opening of the hearing, and maintained its position that the Board's decision for 70 units should be upheld by the Committee.

The Committee took the motion under advisement.

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On December 29, 1982, Mr. Thompson, the original counsel for the developer, wrote a letter to the Committee formally withdrawing as counsel for the developer. On the same day, Mr. Jacobi wrote to the Committee, enclosing a copy of the "stipulation" and reiterating the Board's position that the hearing should not be re-opened, and that the Committee should proceed to a decision.

III. MOTION TO REOPEN THE HEARING

The record of the hearings in this case, both before the Board, and on appeal before the Housing Appeals Committee, does not justify re-opening the hearing.

While the new evidence which the developer seeks to introduce purportedly will show that it is possible to create a drainage system that will support 140 units on this site, and that such density is not unreasonable in view of existing developments, it is not reasonable to expect the Committee to reopen the hearing at this late date, and in view of the past history of these proceedings.

In spite of the fact that the ground and surface water conditions, and the density, were obviously major issues in the Board's consideration of the developer's application, there was no effort to bring this evidence

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before the Board, hopefully to convince the Board that the alleged drainage and density conditions did not preclude 140 units.

Had this evidence been submitted to the Committee for the first time, in the appeals hearing, the Committee would still have been faced with the question whether it should consider the evidence, on the ground that the appeal hearing before the Committee is a "de novo" hearing [4], or whether this evidence constituted such a change in the original proposal as to constitute a "new" proposal which should be sent back to be reconsidered by the Board in the first instance before being considered by the Housing Appeals Committee on appeal.

Since the evidence was not presented in the appeal hearing, that question is moot. If the Committee felt there were possible justification to allow the motion to reopen, the Committee would still have to deal with that question. This, however, is not necessary in view of the decision the Committee has arrived at on

the motion to reopen.

[4] Board of Appeals of Hanover vs Housing Appeals Committee, 363 Mass. 339; 368-371 (1973).

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The developer has had two hearings in which to have offered this evidence if he felt it helpful to his case. He has chosen not to file a brief before the Committee. He has indicated as far back as August that he would present no further evidence, and that the Committee should close the hearing and proceed to a decision. Although the developer's position on re-opening has changed, the Board's position not to reopen and to move to a decision has continued unchanged.

The motion to reopen is denied.

IV. FINDINGS AND RULINGS

The denial of the motion to re-open brings the Committee back to a decision based on the existing record. On the evidence submitted before the Committee and on the whole record the Committee finds that ground and surface water conditions exist on the site of gravity sufficient to constitute a health hazard and to justify the decision of the Board to reduce the density from 140 units to 70 units.

We rule that this action by the Board was reasonable and consistent with local needs.

Our decision on the propriety of the Board's action in dealing with the health issue posed by the water problem makes it unnecessary for us to consider

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in detail whether or not the potential increase in the development cost per unit from \$34,500 to \$36,400 would render the construction "uneconomic". If it is relevant, we find and rule that such an increase would not render the construction uneconomic.

On the whole record we find and rule that the decision of the Board is consistent with local needs under the Statute. The decision of the Board is upheld.

Housing Appeals Committee

Maurice Corman, Chairman

End Of Decision