

HOUSING APPEALS COMMITTEE  
DENNIS HOUSING CORPORATION Appellant

Decision #       **No. 01-02**  
Appellant:       **DENNIS HOUSING CORPORATION Appellant**  
Appellee:       **DENNIS BOARD OF APPEALS, Appellee**  
Date:           **May 7, 2002**  
DECISION

I.     PROCEDURAL HISTORY

In May 2000, the Dennis Housing Corporation submitted an application to the Dennis Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, s.s. 20-23 to build 50 units of affordable rental housing for the elderly off Main Street (Route 6A) in Dennis Village, to be financed under the Low Income Housing Tax Credit program. After due notice and public hearings, the Board denied the permit by decision of December 27, 2000. From this decision the developer appealed to the Housing Appeals Committee. The Committee held a conference of counsel, conducted a site visit, and held six days of de novo evidentiary hearing, with witnesses sworn, full rights of cross-examination, and a verbatim transcript.[1] Following the presentation of evidence, counsel submitted post-hearing briefs.

II.   FACTUAL BACKGROUND

The proposed housing is a 50-unit apartment building on a 3.2-acre site. It would contain 42 one-bedroom units and 8 two-bedroom units in a two-story building set behind a 60-space parking lot. Exh. 2, sheet 2. All of the apartments will be affordable to households earning 60% or less of the regional median income. Tr. I, 23.

The building will be at the edge of Dennis Village. The village consists of about a dozen buildings-shops and other commercial buildings-spread along Main Street. Tr. I, 53-54, 68; IV, 131; Exh. 12. Main Street is a heavily traveled, two-lane arterial state highway (Route 6A). Tr. I, 60. The proposed housing would be directly behind a cluster of small, renovated, commercial, condominium shops on Main Street. Tr. I, 29-31; Exh. 12. The rear part of the site is zoned Rural Residential (R-60), and a portion in the front is zoned Limited Business (LB). Exh. 2, sheet 2; Pre-Hearing Order, s. I-5.

III.   ISSUES

Where the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a prima facie case by showing that its proposal complies generally with state and federal

requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first,

that there is a valid health, safety, environmental, or other local concern, which supports the denial, and second, that such concern outweighs the regional need for housing. 760 CMR 31.06(6); also see *Hanover v. Housing Appeals Committee*, [363 Mass. 339](#), 365, 294 N.E.2d 393, 412 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

The Board has raised a number of local concerns: the availability of open space on site, fire safety, pedestrian safety, and environmental concerns with regard to storm water drainage, flood control, wildlife habitat, and nitrogen loading from the septic system. Though we will address each of these in turn, it is useful to first provide an overview of our decision with regard to the most critical of the issues-open space.

Although the design of the proposed housing stretches the limits of the site in a number of ways, we conclude, despite the concerns raised by the Board, that it is acceptable in most respects. And, even though the site is currently open space-forested land abutting wetlands that connect directly to a large, undisturbed area of tidal estuary-it is perfectly suitable for development. See Exh. 12, 17-A, 30. It is not an isolated area, but rather is surrounded on three sides by commercial and residential properties. *Id.* In fact, it is particularly suited for housing for seniors since it provides an accessible, pedestrian-friendly location at the edge of Dennis Village. This much all of the members of the Housing Appeals Committee are in agreement upon.

A much more difficult question, however, is whether the design of this housing is acceptable in terms of the intensity of the use on the site, that is, whether there is sufficient open space on the site or whether lot coverage by the building and unusable features is excessive. A minority of the Committee's members believes that the design can be justified for the location and the planned resident population. They emphasize that the nearby commercial and residential uses make the area much like a "Certified Growth Area" under the Cape Cod Commission Regional Policy Plan, and argue that growth could be comfortably accommodated here, relieving development pressure on more pristine areas. They also note that Cape Cod generally has many amenities available for seniors, including protected open space. They argue that the local planning concerns about the site itself-the lack of space to barbeque or garden or engage in other recreational activities-are outweighed by the regional housing need, particularly since all 50 of the apartments in this building would be made available to low-income elderly households. But the majority of the Committee concludes, as will be seen in section III-D, below, that the coverage of the lot by the building, by the parking lot, and by features necessary to address environmental and public safety concerns is excessive, and that therefore the Board's decision should be upheld.

## A. Pedestrian Safety

One of the most attractive features of this proposal is that its location provides excellent pedestrian access to Dennis Village for the population it serves. Although Main Street (Route 6A) is a busy road, there are existing sidewalks and crosswalks. Tr. I, 69, 111. The proposed development would not create an appreciable increase in vehicular traffic. Tr. IV, 23; Exh. 17, 17A. Walkways from the new development would connect with the existing sidewalks, and the developer has offered to provide an additional crosswalk on Main Street. Exh. 2, sheet 5; Tr. 110. The Board has not sustained its burden of proving a local concern with regard to traffic safety which outweighs the need for housing.

## B. Fire Safety

The Dennis Fire Department recommended that an 18-foot-wide fire access road circle the entire building. Tr. VI, 10. We need not determine whether this is necessary since the developer, albeit reluctantly, agreed to build it. Tr. II, 116; Exh. 2, sheet 5. The only point of disagreement that remains is whether it must be a completely non-porous surface such as asphalt or whether, as the developer maintains, a porous paving system (with the trade name "Grasspave") is acceptable. We are confident that such a system would be adequate. See Tr. II, 115, 136; also see Tr. VI, 12. Similarly, the developer has shown that the proposed design of the entrance and parking lot will permit fire trucks to negotiate the necessary turns, even though curb radiuses are slightly smaller than is customary in Dennis. Tr. II, 149, III, 69-70.

Finally, although the Fire Department would also like to see more points of egress and entry to the building for fire emergencies, the building (which has sprinkler and alarm systems) has four exits-more than are required by the state building code. Tr. II, 25-39; also see Tr. VI, 14.

## C. Environmental Concerns

### 1. Nitrogen loading

Limiting the concentrations of nitrogen introduced to the ground water is important for protecting the environment on Cape Cod, as it is anywhere that communities are dependent on ground water for drinking water. Recognizing this early in the approval process, the developer proposes a sophisticated and expensive wastewater treatment mechanism-a traditional septic field augmented by a three-tank, "enhanced, air-recirculating, denitrification system" (with the trade name "Microfast 9.0"). See Tr. III, 14-19, 26-28, 130.

Nitrogen loading is regulated by three different jurisdictions with three different performance standards: statewide (Department

of Environmental Protection), regional (Cape Cod Commission), and local (Dennis Board of Health). Tr. III, 21. The CCC standard is twice as restrictive as the state standard. See Tr. III, 156. Under appropriate circumstances, the Committee has the power to override not only the local requirement, but also the CCC requirement. St. 1989, c. 716, s. 11(k). In that case, the

proposal would nevertheless be required to comply with the state standard-Title 5-and because the system is relatively large, DEP would itself review the design. Tr. III, 162. The developer has committed itself, however, to conform to both the local and the CCC standard. See Tr. III, 57.

During the hearing, the Board's consultants questioned many details of the proposed design, and there was a certain amount of ambiguity both about exactly how the performance standards should be applied and whose calculations are accurate. See, e.g., Tr. III, 149-154. The developer's engineer, however, testified unequivocally that the system as currently designed meets all three standards.[2] Tr. III, 57. DEP review of the system, which would likely resolve the methodological disagreements, has not yet been done, however. Tr. III, 149. If that analysis showed that the design still fell short of the Cape Cod Commission standards, either the current design could be upgraded slightly, or if necessary, an even more sophisticated system could be installed for an additional \$40,000. Tr. III, 160-161.

Under these circumstances, we find that the Board has not sustained its burden of proving a legitimate local concern with regard to nitrogen loading.

## 2. Storm water drainage

The developer introduced evidence that it has designed a storm water drainage system to normal industry standards. Tr. II, 154-160; Exh. 2, sheet 3; Exh. 13. Neither in testimony nor in its brief did the Board challenge the design, except in relation to nitrogen-loading calculations.

## 3. Flood Control

The northwest corner of the building and the fire access roadway require a limited amount of filling of a flood plain. Tr. II, 95-99; IV, 114-118, 147-149; Exh. 2, sheet 3. The developer argues that because this is a coastal flood area, the loss of flood storage capacity will have little effect. See Tr. III, 77. Certainly, the effect will not be as direct as the effect that removal of storage capacity in an upstream area would have on downstream properties. There is not sufficient evidence before us, however, to determine exactly what the effect will be. Thus, the Board has not established that loss of flood storage is a problem significant enough to outweigh the need for affordable housing.

## 4. Wildlife habitat

The site is not a "Priority Site for Rare Species" nor any other of the designated areas within the categories defined as Significant Natural Resource Areas by the Cape Cod Commission. Exh. 30; also see Tr. III, 92. It is, however, is "Unfragmented Forested Habitat." Further, it appears that development would not disrupt a wildlife corridor since the site is at the periphery of the unfragmented habitat area. Exh. 30. We find, therefore, that the Board has not sustained its burden with regard to this issue.

#### D. Open Space and Lot Coverage

The core of the Board's position, as presented in testimony by the Dennis planning director, is that usable open space on the proposed site is extremely limited and inaccessible. That is, the lack of outdoor amenities and space for recreational activities will have a negative effect on the quality of life for residents of the apartment building. Tr. IV, 101-103, 113, 133-134, 152. The developer argues that the proximity of the housing to Dennis Village addresses the need for recreation. Tr. I, 17; IV, 141-144.

Evaluation of open space should involve both review of relatively objective performance standards and more subjective consideration of whether the extent of lot coverage has compromised the design to an unacceptable degree. Local standards, whether couched in terms of open space or lot coverage, are quintessentially the sort of local requirements that may be overridden pursuant to the Comprehensive Permit Law under appropriate factual circumstances. This is equally true of the requirements imposed by the Cape Cod Commission. St. 1989, c. 716, s. 11(k). The CCC Regional Policy Plan, however, takes a much more thoughtful approach to these questions than do the open space and lot coverage requirements found in most local zoning codes. And, it not only addresses specific natural resource interests in detail, but it also addresses affordable housing issues. See Exh. 21, pp. 19-54, 91-97. Thus, while the Committee will not enforce the Regional Policy Plan requirements per se, they provide a useful frame of reference.

Objectively, impervious surfaces (the building itself, the roadway and parking lot, and the fire access drive<sup>[3]</sup>) will cover 47% of the 3.2-acre site.<sup>[4]</sup> Exh. 2, sheets 2, 5; Tr. II, 141. Sidewalks are not included in this figure, and are considered open space. Thus, 53%, or about 1.7 acres of the entire site, is open space. This includes both upland area and wetlands open space. But intrinsic to the methodology contained in the Cape Cod Commission Regional Policy Plan Minimum Performance Standard 2.5.1.3 (Open Space Protection) is that only upland area be considered when calculating open space. See Exh. 21, p. 48. The upland area on the site is about 2.7 acres, and the remaining 0.5 acres is wetlands. Exh. 2, sheet 2; Exh. 1, p. 3. Thus, subtracting the wetlands from the entire open space area, 1.2 acres

of the site is upland open space. This is about 44% of the entire upland area.

If the Regional Policy Plan standard were applied directly, the proposed design would fail in two ways. First, the Regional Policy Plan suggests that 65% of the upland area be set aside as open space for a site in a Significant Natural Resource Area, as this is. Exh. 21, p. 49 (C.C.C. Regional Policy Plan Minimum Performance Standard 2.5.1.3). The standard in typical, unregulated areas is 50%.<sup>[5]</sup> Id. Second, the Regional Policy Plan suggests that all of this open space should "consist of undisturbed woodlands or other natural areas." Exh. 22, p. 3 (C.C.C. Technical

Bulletin 94-001: Guidelines for Calculation...).

The Regional Policy Plan applies a different standard to development in Certified Growth Areas. There is no evidence concerning where such areas are (or even what their purpose is), and presumably, as a formal matter, the proposed site is not located in such an area. But arguably, the more liberal standard might be applied to affordable housing being built in close proximity to a village locality. The proposal comes closer to meeting this standard, but it still falls short. It meets the quantitative standard, which is 40%. But even in Certified Growth Areas, a minimum of half of the required open space must be natural, while the remainder may be perimeter landscaping and the like. Exh. 22, p. 3. All of the open space on the proposed site (after excluding wetlands as the methodology requires) is perimeter landscaping, and none is natural. Exh. 2, sheet 5.

What is ultimately more important, however, than technical compliance with standard open space requirements is whether the particular design before us responds appropriately to the site itself and the surrounding area. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 26-27 (Mass. Housing Appeals Committee, Jun. 25, 1992). From this perspective, two of the most important attributes of open space are that it creates an agreeable visual environment and that it provides recreational opportunities.

Visually, the proposed housing is well designed, though it is affected by the limitations of the small site. On the positive side, the semi-circular shape of the building means that the rear windows look out away from each other toward the woodlands of adjoining properties. The "interior" windows look onto an attractively landscaped traffic circle. Exh. 2, sheet 5. The circle separates the entrance from the visual clutter of the parking lot. Thus, the parking is not significantly more intrusive for residents of the proposed housing than is the parking lot that serves the shops located between the housing and Main Street.<sup>[6]</sup> Unlike the latter, however, the proposed parking lot is visible from Main Street.

But areas that might provide recreational opportunities on site are very limited-even for elderly residents. The largest open area, a half-acre panhandle behind the building, is mostly wooded swamp. See Exh. 2, sheet 2. In dry weather, residents might be able to walk into that area, though access is somewhat difficult

since it involves descending a steep embankment from the fire access roadway. Tr. II, 145; IV, 101; Exh. 2, sheet 3. Practically, this area cannot be considered usable open space.

A similarly sized wooded area to the northeast of the site is not usable for two reasons. First, it is not owned by the developer, and second, it is not physically accessible since it too is isolated by a steep four-foot-high incline that slopes down from the edge of the parking lot. Tr. II, 87; Ex. 2, sheet 3. Other off-site open space-wooded areas and large wetland areas leading to a tidal estuary-are private property to which there is no assurance that residents will be granted access.

On the site itself, there are two small areas that are well designed with the resident population in mind. The pathway from

the building entrance toward the village center passes through the 60-foot-diameter landscaped traffic circle and a 2,500-square-foot grassy island in the middle of the parking lot. Exh. 2, sheets 2, 5. With the addition of benches, these areas would provide opportunities for passive recreation. But virtually all of the few remaining areas of open space on the site are either storm water detention basins or mounded areas of landscaping near the parking lot, and none of these are usable. Exh. 2, sheet 5, Tr. II, 109.

After consideration of the evidence, a majority of the Committee concludes that the proposed design over-utilizes the site-that the coverage of the lot by the building, parking, and various other unusable features is excessive-and that this local concern outweighs the regional need for housing. Tr. IV, 101-102, 133-134, 152-153.

#### IV. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Dennis Board of Appeals is consistent with local needs.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, s. 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

Issued: May 7, 2002

/s/ Werner Lohe, Chairman

/s/ Marion V. McEttrick

/s/ Mark Siegenthaler

Dissenting:

/s/ Joseph P. Henefield

Dissenting:

/s/ Frances C. Volkmann

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[1] The Committee issued a joint Pre-Hearing Order (Jul. 2, 2001), agreed to by the parties. In it, the parties stipulated that the developer satisfies one of the three jurisdictional requirements found in 760 CMR 31.01(1), that is, that it controls the site. Pre-Hearing Order, s. I-3. Whether the developer is a limited dividend organization and whether the proposal is fundable pursuant to 760 CMR 31.01(1)(c) remained at issue. We find that the Department of Housing and Community Development project eligibility (site approval) letter of March 31, 2000 established that the proposal is fundable. Exh. 11; 760 CMR 31.01(2)(f). The developer's commitment to enter into a regulatory agreement limiting its profit qualifies it as a limited dividend organization pursuant to 760 CMR 31.01(1)(a). See *Owens v. Belmont*, No. 89-21, slip op. at 3-4 (Mass. Housing Appeals Committee, Jun. 25, 1992).

The Board also conceded that Dennis has not met any of the statutory minima defined in G.L. c. 40B, s. 20 (e.g., that 10% of its housing stock be subsidized housing; see 760 CMR 31.04), thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, s. I-2.

[2] The Board also expressed concern about the location of the septic system's leaching fields beneath the parking lot. This would typically not be permitted, but we need not determine whether it is justified here since the Dennis Board of Health granted a variance to allow it. Exh. 9; Tr. II, 64.

[3] As noted above, the developer proposes to construct the fire access roadway using a porous paving system instead of the bituminous asphalt requested by the fire chief. Tr. II, 115. This area is approximately 10,000 square feet, and could be considered additional open space. It is bounded by wooden guardrails and steep slopes, however, and therefore its utility and attractiveness are limited. See Exh. 2, sheets 3, 5; Tr. II, 120.

[4] The Dennis planning director testified that the site coverage was 34.8%. Tr. IV, 106. He was mistaken, however, since the site plan indicates that the lot coverage is 46.7%, and this was confirmed by testimony from the developer's civil engineer. Exh. 2, sheet 2; Tr. II, 141.

[5] The town's zoning standard for multifamily housing is that 75% of the site remain open. Exh. 5, p. 15; Tr. IV, 105.

[6] This contravenes Regional Policy Plan Minimum Performance Standard 6.2.10 (Community Character), which suggests that parking should be to the rear or side of buildings "in order to promote traditional village design." See Exh. 21, p. 102.

End Of Decision