HOUSING APPEALS COMMITTEE
AN-CO, INC., Appellant

Decision # **90-11**
Appellant: **AN-CO, INC., Appellant**
Appellee: **HAVERHILL BOARD OF APPEALS, Appellee**
Date: **October 9, 1998**
MEMORANDUM AND ORDER ON REMAND CONCERNING TRANSFER OF PERMIT

On June 28, 1994, the Housing Appeals Committee issued a decision in this case directing the Board to issue a comprehensive permit to build affordable housing pursuant to G.L. c. 40B, s.s. 20-23. The decision was appealed, and while pending before the Appeals Court (City of Haverhill et al. v. An-Co, Inc. et al., Appeals Court, C.A. No. 98-P-742), it appeared that An-Co, Inc. had transferred its interest in the development site and the comprehensive permit to another entity. On the Committee's motion, the Appeals Court, on July 16, 1998, remanded the matter to the Committee to consider the transfer pursuant to 760 CMR 31.08(5). By order of July 31, 1998, the Committee directed the parties to appear and to present evidence and argument concerning why the comprehensive permit should or should not be transferred from An-Co, Inc. to another entity. A hearing for this purpose was held on September 23, 1998.

We find that on March 1, 1994, An-Co, Inc. did in fact transfer its entire interest in the development site, engineering studies and plans, and the pending comprehensive permit to Fairway Estates, Inc. Exh. A (pp. 28-30 of the record appendix before the Appeals

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Court), Exh. B (pp. 31-34 of the record appendix before the Appeals Court), Tr. A, 32. Fairway Estates is a private corporation organized for the general purpose of acquiring and developing real estate.[1] Exh. C (pp. 35-47 of the record appendix before the Appeals Court). The transfer, for which An-Co was paid $90,000, was occasioned by An-Co's default on its loan payments to the Lowell Institution for Savings and the Federal Deposit Insurance Corporation.[2] Tr. A, 32. To prevent foreclosure, the $90,000 was paid to satisfy the unmet obligations. Tr. A, 32; also see Tr. A, 9-10.

Though An-Co, Inc. was the named appellant in this case before the Housing Appeals Committee, it has always been clear that more than one entity has been involved in the development process. Footnote one in our original decision of June 28, 1994 (p. 50 of the record appendix before the Appeals Court) points out that "An-Co, Inc. and an affiliated corporation, Haverhill Fairways, Inc., will develop the housing jointly. An-Co owns the parcel of

land, and Haverhill Fairways, as a limited dividend organization, will do the actual construction. Together, the two corporations are referred to hereafter as 'the developer'." Equally clear was

that builder and developer John Slavin was the moving force behind these corporations and this project. He testified twice before the Committee, describing himself as the owner of the development, president of Haverhill Fairways, Inc., and owner of a controlling interest in An-Co, Inc. Tr. I, 26-27 (Admin. Rec. II, 285-286); Tr. IV, 22-25 (Admin. Rec. II, 568-571). In fact, the May 7, 1990 project eligibility letter from the Massachusetts Housing Finance Agency, which originally established eligibility to apply for

a comprehensive permit, was addressed to him personally, at An-Co, Inc. Exh. 2 (pp. 5-7 of the record appendix before the Appeals Court). At present, though Mr. Slavin has been forced to sell the development site to Fairway Estates, he nevertheless has an agreement with that corporation to continue as the developer and builder of this project. Tr. A, 35.

Both the Haverhill Golf and Country Club (an abutter) and the developer raise novel arguments here. The country club argues that transfer of the property to Fairway Estates, Inc. deprived this Committee of all jurisdiction to issue a decision. Tr. A, 12. The developer argues that the proper question is not jurisdiction, but rather transfer of the permit, and that such transfer was premature until all appeals were exhausted and a permit was formally issued. Tr. A, 10-11, 27.

We think both of these arguments rely too heavily on technicalities. This Committee has said repeatedly that it disfavors such arguments and construes the procedural provisions of its regulations liberally. See, e.g., Crossroads Housing Partnership v. Barnstable, No. 86-12, slip op. at 5-6 (Massachusetts Housing Appeals Committee Mar. 25, 1987). We think the answer here is considerably simpler than either party has suggested.

On March 1, 1994, when the transfer occurred, the hearing before this Committee had been closed, but no decision had yet been rendered. Our regulations, in 760 CMR 31.03(1), provide that "[i]f an applicant involved in an appeal to the Committee desires to change aspects of its proposal... it shall notify the Committee in writing of such change and the Committee shall determine whether the changes are substantial." A change in the ownership of the land and of the development rights is a change of which the Committee should have been notified, and the developer's failure to do so was improper. But there is no indication that this failure has prejudiced the Board or the country club. Nor is there any assertion that the proposed housing has changed in any way. Thus,

the situation here is

very much like a change in the underlying financing, which

according to our regulations is not normally a substantial change. 760 CMR 31.03(2)(b)(5).

Upon the facts presented here, we rule the change was not a substantial one, and thus under our regulations should be permitted. 769 CMR 31.03(1).3 The purpose of the Comprehensive Permit Law is to assist and expedite the construction of needed housing. We ruled in 1994 that construction of this affordable housing development is consistent with local needs. There is no reason to believe that John Slavin and Fairway Estates will not construct the housing as approved. To prohibit Fairway Estates, Inc. from stepping into the place of An-Co, Inc. would simply exacerbate the delay that the statute was enacted to prevent.

We concur with the Superior Court, which noted in its July 29, 1997 Memorandum... on Plaintiffs' Application to Present Additional Evidence that the question of what entity's name appears on the final approval documents immediately before construction is "more appropriately placed... before [the ultimate subsidizing] agency." To deny Fairway Estates the right to proceed as the developer here would be merely to create another, unnecessary "rung on the ladder toward construction." See record appendix before the Appeals Court, p. 209.

For these reasons, pursuant to 760 CMR 31.03 and 31.08(5), we rule that Fairway Estates, Inc. is to be considered the developer entitled to exercise the comprehensive permit ordered in our decision of June 28, 1994.4 It is to be considered the developer either in place of or in addition to An-Co, Inc. and Haverhill Fairways, Inc.

Housing Appeals Committee
/s/__________________
Werner A. Lohe Jr.
Chairman

October 9, 1998

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[1] There is no requirement that development of affordable housing be specifically enumerated among the corporation's purposes. Prior to construction, the subsidizing agency, by entering into a regulatory agreement, ensures that the developer is a proper, limited dividend organization. Hanover v. Housing Appeals Committee, 363 Mass. 339, 379, 294 N.E.2d 393, 420 (1973)("...the question of standards for eligibility as a limited

dividend organization is properly left to the appropriate State or Federal agency."); Maynard v. Housing Appeals Committee, 370 Mass. 64, 67, 345 N.E.2d 382 (1976). Similarly, the developer need not perfect its control over the site until immediately before construction. Hanover, supra , at 377-378, 419-420.

[2] The developer argued, but did not present evidence, that its financial difficulties and default "resulted primarily from delays through the appeal process." Tr. A, 9.

[3] This is consistent with our previous rulings in cases involving changes in the developer. With regard to the requirement that the Committee be notified of any such change, in Owens v. Belmont, No. 89-21, slip op. at 4 (Massachusetts Housing Appeals Committee Jun. 25, 1992), we noted in passing, "Any addition of other people or entities to the development group would be a change requiring approval... pursuant to 760 CMR 31.03(3)." Nevertheless, we have been liberal in permitting substitution of parties. In Methuen Housing Auth. v. Methuen, No. 84-02, slip op. at 15-16 and appendix (Massachusetts Housing Appeals Committee Jul. 22, 1985), we waived a provision of our regulations rather than dismiss an appeal in which the original application was improperly filed by a private "turnkey" developer rather than the housing authority for which it was acting as agent. In Interfaith Housing Corp. v. Gardner, No. 72-05, slip op. at 16 and appendix, pp. 1-3 (Massachusetts Housing Appeals Committee Feb. 13, 1974) we granted a motion to substitute a new developer. In that case we noted that, "[b]ecause of a series of financial setbacks..., Interfaith Housing Corp. is in the process of liquidating.... [But], nothing in the proposed development is changed except the identity of the developer." To deny the motion would have been to require the new developer "to start all over again..., with attendant delay and expense, [which] would be totally contrary to the plain intent of the legislature to encourage and facilitate the production of low and moderate income housing with minimum delay and expense.... This... would be a useless waste of time and expense...."

[4] The presiding officer has the authority to rule upon the question presented here on remand without consulting with the full Committee. "An application to the Committee for an order to take any action... shall be by motion.... The presiding officer shall have discretion to rule on any motion...." 760 CMR 30.07. "The presiding officer shall have all those powers conferred upon the Committee for the conduct of a hearing, except... to make... decisions which would finally determine the proceedings...." 760 CMR 30.09(5)(c). Permitting a change in the developer is the sort of limited action well within the authority of the presiding officer, particularly since the proceedings here were finally determined when the Committee issued its June 28, 1994 decision, which is now on appeal. Wilmington Arboretum Apts. Assoc. Ltd. Partnership v. Wilmington, No. 87-17, slip op. 3-4 (Mass. Housing Appeals Committee Order Sep. 28, 1992)(on remand from the Appeals

Court, the presiding officer may rule upon the transfer of a permit pursuant to 760 CMR 31.08(5)), aff'd, 39 Mass. App. Ct. 1106 (1995)(rescript).

End Of Decision