

HOUSING APPEALS COMMITTEE  
Tetiquet River Village, Inc.

Decision # **88-31**  
Appellant: **Tetiquet River Village, Inc.**  
Appellee: **Raynham Zoning Board of Appeals**  
Date: **March 20, 1991**  
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DECISION

This is an appeal pursuant to M.G.L. c. 40B, s. 20-23 of a denial of a comprehensive permit to build affordable housing. For the reasons set forth below, we uphold the decision of the Raynham Board of Appeals to deny the permit.

I. PROCEDURAL HISTORY

On March 22, 1988, Tetiquet River Village, Inc. submitted an application to the Raynham Board of Appeals for a comprehensive permit to build a development of single family homes under the state's Homeownership Opportunity Program (H.O.P).[1] After due notice and public hearings, the Board

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[1] The proposal was originally for 125 units, to be built on a 71 acre site. Because of wetlands and the flood plain of the Taunton River, less than half of the site is buildable. At several points during the proceedings before the Board and this Committee, the proposal was modified. It will be considered in this decision in its final form, that is, the 62 units depicted on the Revised Site Plan (Exh. 16A) and final "pro forma" financial statements (Exh. 18).

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denied the permit on October 19, 1988. The developer appealed to the Housing Appeals Committee which held a Conference of Counsel, conducted a site visit, and held an evidentiary hearing, with witnesses sworn, full rights of cross-examination, and a verbatim transcript.' The developer chose not to be represented by counsel, but rather by its president. Following the presentation of

evidence, the Committee offered the parties the opportunity to present oral argument and briefs. The developer presented a written summary of its case and the Board submitted a response to the summary and a memorandum of law.

## II. Jurisdiction

The Committee finds that the Tetiquet River Village, Inc. has satisfied the jurisdictional requirements of 760 CMR 31.01(1). [2]

The corporation's Articles of Organization (Exh. 2, Sheet 2A) indicate that one of its purposes is to build affordable housing, and that it may limit returns to shareholders as required by the subsidizing agency. As was pointed out during the hearing (Tr. I, 18), the limited

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[2] 760 CMR 31.01(1) was amended on January 4, 1991. The administrative history makes it clear that the amendments were designed to clarify the language. Public Hearing on Amendments to 760 CMR 30.00 and 31.00, H.A.C., Dec. 3, 1990, p. 39. Thus, this section states the substantive jurisdictional standards that have been applied by the Committee for many years and which were in effect when the application was filed before the Board.

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dividend requirement is enforced primarily by the subsidizing agency. If there were any doubt about the developer's status, this Committee would also reinforce the requirement by attaching a condition to any comprehensive permit issued. Under these circumstances, the developer has met the requirement in 760 CMR 31.01(1) (a) that it be a limited dividend organization.

The developer has also met the requirements that it be fundable by a subsidizing agency. Its receipt of a site approval letter dated May 5, 1988 from the Massachusetts Housing Finance Agency satisfies our fundability presumption. Exh. 1, p. 17; 760 CMR 31.01(2). There was, however, considerable discussion of fundability during the hearing. There were meetings between representatives of the Board and H.O.P. staff, and counsel was given the opportunity to present further evidence on this issue. Tr. V, 21; VII, 3. At one point, the Board acknowledged that the proposal had been improved from the point of view of fundability. Tr. V, 23, 24. No evidence that the project is no longer eligible for subsidy was introduced, and thus the presumption stands un rebutted. 760 CMR 31.01(2).

Similarly, the developer has continued to extend its purchase and sale agreement for the site (Exh. 1, p. 10; Tr. V, 26), and thus satisfies the requirement that it control the site. See 760 CMR 31.01(1) (c).

### III. Local Action Prerequisite

A more serious question raised by the Board is whether the developer has met the local action prerequisite found in 760 CMR 31.02(2). This section enumerates the documents which will normally constitute a complete application to the Board.

At the outset, it should be noted that the eight items listed in the regulation have never been viewed by the Committee as rigid, mandatory requirements.[3] Watertown Housing Authority v. Watertown, No. 83-8 (Mass. Housing Appeals Committee June 5, 1984), 10-13. Rather, those items provide guidance to both the developer and the Board as to what information is necessary for the Board to

make an informed decision on the comprehensive permit application. Clearly, that information must be detailed enough so that the Board can reasonably judge the likely impact of the proposal on local concerns, yet at the same time, at this early stage in the project, the developer cannot be required to go to the expense of preparing final construction plans. At the initial application stage it may not be apparent to the developer what issues are truly of concern to local officials. Thus, the regulation is not to be read by the

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[3] This is very clear in s. 31.02(2) as amended on January 4, 1991: "Failure to submit a particular item shall not necessarily invalidate an application." The amendment reflects the Committee's long standing interpretation of this provision. See n. 2, supra.

Board in an overly restrictive manner, nor by the developer to permit mere technical compliance with a fixed list of documents. Rather, it is to be read to require the parties to interact over whatever information is essential to a sound final decision, including "any further item[s] not listed." With this in mind, we will consider the Board's objections to the application.

First, the Board notes that plans submitted with the application were not signed by a registered architect. The developer argues that since it intends to build individual houses, the entire project is within the exception in 760 CMR 31.02(2) (a), which does not require an architect's signature if four or fewer houses are to be built. While in some cases plans for individual modular or preconstructed homes may not require such a signature, for a large development such as this the site plans, at a minimum, must be signed. In fact, the signature of a professional engineer and a professional land surveyor is usually also required by M.G.L. c. 112, s. 81D. Nevertheless, the plans submitted to the Board in

this case were quite detailed and were drawn in a professional manner. In all likelihood the signatures could easily have been obtained. While the better practice would have been to cure this technical defect at the Board hearing or at the beginning of the hearing before this Committee, we have previously indicated that such a problem may be addressed by adding a condition to the comprehensive

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permit requiring the signature before construction. *Sheridan Development Co. v. Tewksbury*, No. 89-46 (Mass. Housing Appeals Committee, Jan. 16, 1991), n. 2. Particularly since the developer was not represented by counsel, that would have been sufficient here as well.

The Board also argued that the developer's summary of existing conditions was deficient. We find that the one page report contained in the proposal (Exh. 2, p. 6) and the existing condition

plans drawn by an engineering firm (Exh. 3, sheets 3-5), when taken together, comply with 760 CMR 31.02(2) (b).

Next, the traffic study presented by the developer provided virtually no information on the impact of the proposal on surrounding roads at any point other than the intersection of the development's access road and the existing town street. In many cases, this study would have been inadequate, but here it also showed that the proposal would generate less traffic than a commercial development that could be built as of right. Exh. 1, p. 26. Under these circumstances, the study is sufficient to meet the local action prerequisite.

The Board also argues that the developer failed to show the percentage of the parcel occupied by building, parking, and so on. In fact, the rather detailed figures which appear in the upper left corner of Exhibit 3, sheet 1, while not in the exact form prescribed, provide data sufficient to

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satisfy this requirement in 760 CMR 31.02(2) (d).

Finally, in its decision, the Board indicates that the developer failed to produce an adequate utilities plan. As will be seen in section IV, below, the developer's proof on this issue ultimately was inadequate when it became clear that this was a central issue in the case. Nevertheless, the plans in Exhibit 3, sheets 6 and 7 are sufficient to meet the preliminary application requirements of 760 CMR 31.02(2) (f)

#### IV. The Proposal

The Board, in its Answer and in its brief, raised a number of local concerns in justification of its decision. Several are without merit. The arguments that this project is near another

comprehensive permit project and that both are in an area zoned for business are of little legal weight. In any case, few facts in support of these arguments were developed. Similarly, that the town is near, but not over the 10% statutory threshold which would deny the Committee jurisdiction, is irrelevant. Concerns about fire access, lot size, density, and placement of houses have been largely eliminated by reduction of the proposal from 80 to 62 units. Concerns about availability of water were alleviated by the testimony of the Superintendent of the Raynham Center Water District. Tr. III, 39, 40.

Two major issues remain, however. With regard to

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disposal of sewage, the Board introduced substantial evidence that the town's "master plan" should be adhered to.[4] With regard to roadway design, the Board introduced substantial evidence of safety hazards and Poor design.[5] We need not decide whether the town carried its burden on these issues, however, since the developer failed to prove a prima facie case.

Though the ultimate burden of proof in hearings before

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[4] In general, the Committee will accord some weight to a pre-existing, written master plan. Silver Tree Ltd. Partnership v. Taunton, No. 86-19, slip op. at 34-37 (Mass. Housing Appeals Committee Oct. 19, 1988), aff'd Silver Tree Ltd. Partnership v. H.A.C., No. 88-6435E (Suffolk Super. Ct. May 10, 1989); Harbor Glen Assoc. v. Hingham, No. 80-6, slip op. at 12-14 (Mass. Housing Appeals Committee Aug. 20, 1982). The proposal conflicts with the town's master plan most significantly in that it would use a pressurized sewage main (or "force main"). Currently there are no residential areas in Raynham (and only one commercial development) using such a system. Tr. III, 64, 65. This appears to represent a town policy based in avoiding the higher maintenance costs associated with force mains. The Board also introduced testimony from the Superintendent of Sewers and a waste water engineer concerning the feasibility and costs of alternative methods of providing sewer service to the project.

[5] In particular, the Board's traffic engineer testified that the proposed 2000 foot straight-away would encourage speeding and would be in violation of a national standard for this sort of development. Tr. II, 35, 36. The town planner agreed, and elaborated that much of this street would be lined with houses with small lots from which children might enter the street. Tr. II, 84-86. The Board also raised safety problems associated with an excessive number of curb cuts. Tr. VI, 7-9.

In addition, the Board indicated concern about the impact of traffic from the development on the external road system.

This claim, however, has little merit since (as pointed out in s. II, supra) a commercial development can be built as of right which would generate more traffic.

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the Housing Appeals Committee naturally remains on the developer, in cases of a denial of a comprehensive permit the regulations and practice of the Committee permit the developer to establish a prima facie case with a minimum of evidence.[6] When the developer has proved that its proposal complies with generally recognized standards with respect to aspects of the project which are in dispute, the burden shifts to the Board to prove valid local concerns which support its decision. There are no set requirements as to how the developer must present its case. Under the Committee's administrative rules of evidence, it may suffice for the developer to simply introduce professionally drawn plans and specifications. Or the developer may present expert testimony. Most commonly, it does both since plans rarely speak unequivocally for themselves, and since ambiguities would normally be resolved against the draftsman if he was not available for cross examination by counsel for the Board.

The most critical issue in this case is sewage disposal. The developer maintains that because of the topography in the vicinity of the site a sewage pumping station and a pressurized sewage main (or "force main") are necessary at

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[6] The elements of a prima facie case are stated in 760 CMR 31.06(2), which was adopted January 4, 1991, and in the previous version, s. 31.06(4) (a), which was adopted December 31, 1986.

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least on a temporary basis to deliver sewage to the town system. Even if the town installs a new gravity main called for in its sewage system master plan, the developer argues, a number of the houses located in the lower portion of the site would still require some sort of pressurized system. The Board, on the other hand, insists that any housing built on this site can and should use the planned gravity main.

The engineering, planning, and economic questions involved with this issue are many and complex. Though the parties presented testimony concerning a number of the more esoteric issues, in the final analysis we must rule that the developer failed to establish on the most basic level that the specific plan it proposed meets generally accepted standards in this area.

The developer introduced two exhibits concerning the sewer system. Exhibit 3, sheet 7 schematically shows the location of

sewer mains and the pump station. Exhibit 12 is a letter and attachment which describe and provide specifications for a commercially available pump. These documents do not consider the overall system nor the installation, operation, or maintenance of the pump in this particular setting.

The developer also introduced testimony from an engineer with expertise in sewer issues. His testimony, however, was limited primarily to the issue of cost. He did not testify that he was involved in the design of the system

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or that he had reviewed any design to insure that it is feasible or meets minimum standards.

Particularly in light of the disadvantage the developer faced in not being represented by counsel, the question arises as to whether from all the testimony on various quite subtle aspects of the sewer problem we should not draw the inference that the basic approach proposed by the developer was proven to be sound. Or, the developer might argue, sewer design is sufficiently simple so that this Committee could draw that inference, based upon common sense and its experience with similar systems in prior cases. This might be true if we viewed the prima facie case as some sort of technical requirement to be fulfilled by the developer. The opposite is true, however. The prima facie requirement exists both so that this Committee will have a clear idea of the proposal before it,

and so that the Board has a fair opportunity to challenge it. Neither is true in this case. Reviewing the entire record, we find that after a great deal of testimony, serious questions remain not only about problems raised by the Board, but also about exactly what system has been proposed and whether sufficient design work has been done to insure that it will function in a satisfactory manner for this particular housing development on this particular site.

Similarly, the developer introduced little evidence

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with regard to roadway design. There was no question that the design of the interior roadway was at issue. It is raised both in the Board's decision of October 19, 1988 (p. 5) and by reference in the Board's Answer (P.1). And yet while the developer introduced site plans depicting the roadway, he chose not to introduce testimony from an architect, traffic engineer, or other design professional to explain those plans. Particularly since these plans are not signed by a registered architect as required by 760 CMR 31.02(2) (a), [7] we must conclude that there has not been sufficient evidence presented to establish a prima facie case that the proposed roadway conforms to generally recognized design standards.

V. CONCLUSION AND ORDER

Upon review of the entire record and the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Raynham Zoning Board of Appeals must be affirmed.

This decision may be reviewed in accordance with the

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[7] This technical failure is not dispositive on its own. See s. III, supra. But, an architect's signature on sufficiently detailed plans might well create an inference that the plans were drawn in accordance with generally accepted standards.

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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: March 20, 1991

End Of Decision