

HOUSING APPEALS COMMITTEE  
ALBRO/SOUTHBOROUGH LIMITED PARTNERSHIP

Decision # **92-06**  
Appellant: **ALBRO/SOUTHBOROUGH LIMITED PARTNERSHIP**  
Appellee: **SOUTHBOROUGH ZONING BOARD OF APPEALS**  
Date: **December 8, 1993**  
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DECISION

I. PROCEDURAL HISTORY

This is an appeal pursuant to G.L. c. 40B, s.s. 20-23 concerning a comprehensive permit issued by the Southborough Zoning Board of Appeals.

On October 9, 1987, the Board granted a comprehensive permit to the developer to build 170 units of affordable housing on a 54 acre site off Parkerville Road in Southborough. The development was to be subsidized under the state's Homeownership Opportunity Program. Pre-Hearing Order, Stip. 1, 2. The Board imposed a number of conditions, including one which provided that the permit would expire June 1, 1989 if construction did not begin by that time. Exh. 1, p. 4 (condition 2). On four different occasions, in 1988, 1989, 1990, and 1991, the expiration date was extended, the last extension running until July 31,

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1992. In June, 1992, the developer requested a further extension

until July 31, 1993. The Board denied this request August 12, 1992. Pre-Hearing Order, Stip. 3-7.

The developer appealed the Board's denial of the extension to the Housing Appeals Committee.[1] The Committee held a conference of counsel, conducted a site visit, and held a de novo evidentiary hearing, with witnesses sworn, full rights of cross-examination, and a verbatim transcript. Following the presentation of evidence, counsel submitted post-hearing briefs.

II. THE BOARD HAS FAILED TO PROVE THAT DENIAL OF AN EXTENSION OF ITS COMPREHENSIVE PERMIT IS CONSISTENT WITH LOCAL NEEDS.

In response to concern in recent years about comprehensive permits remaining in existence for long periods of time without construction having begun, the Committee addressed the extension of permits by regulation for the first time in 1991. In 1991, 760 CMR 31.08(4) was added, establishing that permits lapse after three years, but may be extended. It also provides that, "An extension may not be unreasonably denied nor denied due to other projects built or approved in

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[1] The parties stipulated to the jurisdictional requirements found in 760 CMR 31.01(1), and, similarly, that the town has not met any of the statutory minima defined in G.L. c. 40B, s. 20, thus foreclosing the defense that its decision is consistent with local needs as a matter of law. Pre-Hearing Order, Stip. 8-11.

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the interim." The first case in which the Committee has interpreted this regulation is Red Gate Road Realty Trust v. Tyngsborough, No. 1993-01 (Mass. Housing Appeals Committee Dec. 8, 1993), also issued today. We will not repeat our rather lengthy analysis here. Suffice it to say that for the reasons stated in Tyngsborough, supra, once the appellant has shown in the case before us that it has properly requested an extension of the permit, the Board, in order to prevail has the burden of proving that there are legitimate health, safety, environmental or other local concerns which support its denial of further extension of the permit and that those concerns outweigh the need for housing.

A. Because the Town Will Not be Harmed With Respect to Any Physical Circumstances Specific to the Proposal, Extension of the Permit is Consistent with Local Needs.

There are two approaches that a Board can take to justify a denial of an extension of a comprehensive permit. First, it can point to changed physical circumstances specific to the proposed housing development or the surrounding area. Here, on cross examination of one of the developer's witnesses, the Board elicited testimony that a commuter rail station is proposed in the general

area of the site in question, and that this might have an impact on traffic volumes. Tr. 64-65. This testimony, however, was highly speculative, and the site is located in the southwest quad-

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rant of Southborough, which in general has seen less development than other parts of the town, and in particular has had fewer building permits issued since 1987 than any of the other three quadrants. Tr. 61-63; Exh. 18. We find that the Board has failed to sustain its burden of proof with regard to this argument.

B. In the Interests of Fairness to Both Parties and of the Integrity of the Comprehensive Permit Process, the Permit Should be Extended.

The Board also raises a second argument--that fundamental concepts of fairness and the need for closure demand that it be allowed at this point to terminate the permit. In its decision denying the extension, it cited the several previous extensions and the developer's failure to comply with conditions requiring it to obtain both private financing commitment and final subsidy approval. Exh. 13, p. 2. The chairman of the Board elaborated that the Board felt the need "to preserve the integrity of the entire process." Tr. 48.[2]

We agree with the fundamental point made by the Board--

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[2] In support of its arguments, the Board cites the same zoning cases discussed in our Tyngsborough decision and in addition *Smith v. Board of Appeals of Brookline*, [366 Mass. 197](#), 316 N.E.2d 501 (1974). For the reasons set forth in detail in Tyngsborough, we believe these cases are distinguishable, and in any case, zoning precedents are not controlling, since the purposes of chapter 40A and of chapter 40B are entirely different. See Tyngsborough, *supra*, slip op. at 8 n. 5, and cases cited therein.

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that at some point the permit should terminate, regardless of whether or not physical conditions have changed. There can be no doubt that this is the implication of the three-year presumptive limit that our regulation establishes. And, as the court noted in *Hunters Brook*, *supra* n. 5, at 982, citing the legislative history of c. 40A, "...there should be a time limit... in order to eliminate to some degree the current confusion regarding the status of land within municipalities...." Though the need for closure may not be as easy to quantify as the local concerns typically raised under our statute, it is nevertheless a legitimate concern of the town. But the question remains as to whether the point at which the permit should be terminated has been reached in this

case.

To determine whether, in the interests of fairness to both parties and of the integrity of the comprehensive permit process, the permit should be extended, we will review the four factors articulated in Tyngsborough, supra.

1. First, we consider whether there are any unusual circumstances which heighten the need for closure. For instance, it might well have been relevant if the Board had shown that there were a viable proposal to rezone adjacent land for uses which might

be incompatible with this project. In this case, however, the Board has not proven any unusual circumstances.

2. The conduct of the parties throughout the process

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may also be relevant. Everything in the record indicates that both parties conducted themselves as professionally throughout this process as they have before this Committee. The only hint of impropriety was testimony that in June, 1991, when the Board granted an extension of the permit, the developer represented, incorrectly, that the project would be under construction by late spring of 1992. Exh. 21, p. 1; Tr. 30. There is no evidence that any deception was intended; it is more likely that the developer was simply overly optimistic.

3. Action taken by the developer in reliance on the permit is also relevant. The developer argues that we should balance actions taken in good faith toward implementing the permit and, in particular, funds already spent, against the need for closure.[3] It points out that it has spent slightly over a million dollars on design work and permitting. Tr. 24. It has paid twenty-five thousand

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Clearly, it is only with regard to closure that such a balancing might be appropriate. With regard to any substantive objection to an extension, we must be guided by the general principle which appears throughout our statute and regulations: "Consistency with local needs is the central issue in all cases before the Committee." 760 CMR 31.05. The definition of consistency with local needs requires us to balance local concerns against the regional need for housing. G.L. c. 40B, s. 20; Hanover v. Housing Appeals Committee, [363 Mass. 339](#), 294 N.E.2d 393, at 365-367, 413 (1973). It would not be proper to consider the developer's expenditures. If circumstances had changed so greatly that the project were no longer consistent with local needs, i.e., that there were serious harm to the health, safety, or other interests of the town, we would not permit construction no matter how much the developer had expended.

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dollars to the town as what is described as a "non-refundable good will token." Exh. 1, 10/9/87 decision, p. 7, s. III-17; Tr. 26. Even the professionally printed, glossy, color, advertizing brochure for the project is indication of the seriousness with which the developer has pursued the project. Exh. 15; Tr. 17.

The Board, however, continues to focus on the fact that no matter how great its efforts were, the developer was unable to fulfill the requirement in the comprehensive permit that it secure a financing commitment. And, the Board notes that the developer repeatedly was overly optimistic about the time needed to obtain

financing and begin construction. See s. II-2, supra. In response, the developer points out that in 1991 and 1992, it explored a number of sources for financing, and by early 1992, Waterford Investment Capital, Inc. was willing to commit to financing the project subject to its obtaining all necessary permits. Tr. 19, 71. But the market was very difficult and competitive at that time, and this financing was lost when the project was not able to obtain its last permits until June, 1992. Tr. 17-20, 34, 71-72. But, by June of 1993, when evidence was heard in this case, the developer had several concrete possibilities for obtaining financing. In particular, it had a letter of intent (as opposed to a firm commitment) from Waterford Investment Capital, Inc. to provide equity and construction financing of four million dollars on a

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revolving basis. Exh. 19, p. 3; Tr. 35, 72-73. At that time, because it had been continuously pursuing the permits it needed, it also had all necessary permits in place. Tr. 39, 58-60.

We do not believe that it is significant that the developer was unable to follow through on one or more representations to the Board that it would arrange financing and begin construction. Clearly the crux of this case is financing. There is little logic in the Board's arguing that the developer should not have received more time to obtain financing, because it had not obtained financing. On the contrary, the amount of time, money, and effort expended in trying to bring this project to fruition, and the fact that these expenditures have been continuous, weighs heavily in favor of granting an extension.

4. Finally, we consider the history of the permit. The permit here has been in existence for six years, and was extended four times. That the board granted multiple extensions weighs in its favor, though not heavily since two were for a year and the other two for only six months. Exh. 1.

After consideration of all of these factors, we conclude that an additional extension has not been shown to be unreasonable. For this reason, we will extend the permit for eighteen months, which will result in a total life of

the permit of seven and a half years.[4]

In addition, we note that the parties, instead of simply setting a construction deadline, were careful to lay out interim deadlines for finalizing financing arrangements, an approach we suggested in our Tyngsborough decision. This is important due to the difficulties inherent in keeping the subsidy approval process, the financing process, and the design process moving together on parallel tracks toward construction. We will continue that by establishing in our conditions an intermediate deadline by which financing arrangements must be confirmed and fundability pursuant to 760 CMR 31.01 reconfirmed. See section III, *infra*.

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As we noted, in Tyngsborough, *supra*, we hope that the parties will be able to work together amicably for the next year, as they did when this project was first proposed. But we recognize that it is possible for a number of difficult procedural issues to arise. For instance, changes in the proposal would have to be addressed by the Board under s. 31.03(3) of our regulations. Though we decline to rule definitively since this matter is obviously not before us, we are of the opinion that so long as the Board acts expeditiously pursuant to s. 31.03(3), any questions concerning such changes can be resolved within the one year extension we are granting. If they are not, however, but rather must be appealed to this Committee once again, in all likelihood we would rule that the extension would be tolled during the pendency of such an appeal or any appeal to the courts.

### III. CONCLUSION AND ORDER

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee overrules the denial of an extension of the comprehensive permit granted by the Southborough Zoning Board of Appeals. The comprehensive permit as issued by the Board October 9, 1987 and modified May 18, 1988 shall be extended and remain valid as provided in the text of this decision, subject to the conditions below.

1. Within twelve months of the date of this decision (or of the date on which it becomes final, if it is appealed), the developer shall submit to the Board a project eligibility letter written, pursuant to 760 CMR s.s. 31.01(1)(b) and 31.01(2), by the subsidizing agency, that is, by the Executive Office of Communities and Development or by the Massachusetts

Housing Finance Agency. This letter shall be dated not more than one year before the date it is submitted, and may either be a new project eligibility determination or it may reaffirm a previous determination.

2. Within twelve months of the date of this decision (or of the date on which it becomes final, if it is appealed), the developer shall submit to the Board a letter containing a firm construction financing commitment (which may be conditioned upon receipt of final subsidy commitment or approval)

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from a bank or other lending institution approved by the subsidizing agency. If the developer intends to provide construction financing from a source other than a bank or other lending institution approved by the subsidizing agency, then that construction financing shall be described and approved in the

project eligibility letter required by condition 1, above.

3. Within eighteen months of the date of this decision (or of the date on which it becomes final, if it is appealed), the developer shall apply to the Tyngsborough Building Commissioner or Building Inspector for a building permit.

4. The developer shall commence construction within 30 days of issuance of a building permit, provided that the developer shall not be required to commence construction sooner than one year from the date of this decision (or of the date on which it becomes final, if it is appealed).

5. Failure of the developer to comply with any of the above conditions shall cause the comprehensive permit to lapse on the date specified.

6. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision

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or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the 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.

(d) No construction shall commence until detailed con-

struction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(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 G.L. c. 40B, s. 22 and G.L. c. 30A by insti-

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tuting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: 12/8/93

/s/ Werner A. Lohe Jr.

Acting Chairman  
Presiding Officer

/s/ Grace A. Abruzzio

/s/ Joseph P. Henefield

End Of Decision