

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

_____)	
NATICK HUNTER'S HILL, LLC)	
	Appellant)	
v.)	No. 07-10
TOWN OF NATICK)	
ZONING BOARD OF APPEALS)	
	Appellee)	
_____)	

RULING ON MOTION TO DISMISS

Natick Hunter's Hill LLC (Natick Hunter's) has appealed, pursuant to G.L. c. 40B, § 22, a decision of the Board of Appeals of the Town of Natick (Board) denying an application filed by Natick Hunter's for a comprehensive permit.

The Board has moved to dismiss the appeal. It argues (1) Natick Hunter's failed to file the appeal within the time limits prescribed by 760 CMR 56.06(4)(g)¹; (2) Natick Hunter's did not retain site control; and (3) the Town of Natick (Natick) was certified compliant with its Planned Production Affordable Housing Plan for a one-year period, such that its denial of a comprehensive permit to the Appellant was consistent with local needs. For the reasons set forth below, the Board's motion is granted.

I. PROCEDURAL HISTORY AND FACTUAL OVERVIEW

On or about August 3, 2006, Natick Hunter's applied for a comprehensive permit to construct a 100-unit homeownership condominium development with a mix of town house style and garden style buildings on approximately 13.6 acres of land located on South Main Street and on Jameson Street in Natick. The proposed project had received a

1. Formerly 760 CMR 30.06(8).

project eligibility letter from the Massachusetts Housing Finance Agency on June 14, 2006, which authorized Natick Hunter's to build the development.

The Board held seven public hearings between September 25, 2006 and July 17, 2007. On May 7, 2007, Natick received a letter from the Department of Housing and Community Development (DHCD) that Natick had been certified as having met the one-year certification threshold of .75% of total year-round housing units effective December 31, 2006 through December 30, 2007. Based on this certification, the Board denied the application filed by Natick Hunter's for a comprehensive permit. The Board's Findings and Decision (decision) was filed with the town clerk on July 24, 2007.

On August 14, 2007, Natick Hunter's appealed the Board's decision to the Housing Appeals Committee. The Board filed a motion to dismiss (Board's Brief) on September 27, 2007. On October 30, 2007, Natick Hunter's filed its opposition (Developer's Opposition Brief) and on November 9, 2007, the Board filed its reply (Board's Reply Brief).

II. APPLICABILITY OF NEW REGULATIONS

New regulations for the Committee were promulgated on February 22, 2008. Pursuant to the Transition Rules of these new regulations, certain sections therein apply to cases already before the Committee. According to 760 CMR 56.08(3)(c), the new regulations apply to the procedural and substantive issues of this case. This ruling will reference the new regulations, whose relevant sections employ the same language as the old regulations.

III. TIME FOR APPEAL

The Board argues that the appeal filed by Natick Hunter's should be dismissed because it missed the filing deadline pursuant to G.L. c. 40B, § 22 and 760 CMR 56.06(4)(g). The statute states,

Whenever an application filed under the provisions of section twenty-one is denied..., the applicant shall have the right to appeal to the [Committee] for a review of the same. Such appeals shall be taken within *twenty days after the date of the notice of the decision by the board of appeals* by filing with said committee a statement of the prior proceedings and the reasons upon which the appeal is based.

See G.L. c. 40B, § 22 (emphasis added). The Committee's regulations provide clarification of what constitutes notice: "An appeal shall be taken within 20 days after the written decision of the Board has been filed in the office of the city or town clerk." See 760 CMR 56.06(4)(g).

There is no issue of fact regarding the date upon which Natick Hunter's filed its appeal with the Committee. Natick Hunter's concedes the missed deadline. However, Natick Hunter's argues that the Committee has the discretion to waive the filing deadline pursuant to 760 CMR 56.08(2). This regulation provides that the presiding officer may waive certain regulatory requirements "when in the judgment of the [presiding officer] strict compliance with such provision will result in an *undue hardship* and will be *inconsistent* with the purposes of [the Comprehensive Permit Law]." (emphasis added). Natick Hunter's claims it would experience undue hardship if the Committee refuses it the right to continue its appeal. Unfortunately, this regulatory provision does not provide Natick Hunter's any relief.

Committee decisions have rarely addressed the timeliness of a developer's appeal directly. See *e.g.*, *Transformations, Inc. v. Townsend*, No. 02-14, slip op. at 3 (Mass. Housing Appeals Committee Sep. 23, 2002 Ruling on a Motion for Summary Judgment)(noting, "the timeliness of [the] appeal, which is dependent on the date on which notice of the decision was given to the developer as required by 760 CMR 30.06(8), has not been challenged."). However, we have addressed whether and on what basis we will waive other regulatory requirements. See *e.g.*, *Methuen Housing Authority by its Agent Lunam Development Corporation v. Methuen*, No. 84-02, slip op. at 16 (Mass. Housing Appeals Committee July 22, 1985)(waiving a regulatory provision, which did not explicitly allow an entity to file an appeal through an authorized agent); *Raymond Daddario v. Greenfield*, No. 80-03, slip op. at 4-10 (Mass. Housing Appeals Committee Jun. 15, 1981); *Crossroads Housing Partnership v. Barnstable*, No. 86-12, slip op. at 5-11 (Mass. Housing Appeals Committee Mar. 25, 1987); *Red Gate Road Realty Trust v. Tyngsborough*, No. 93-01, slip op. at 7-13 (Mass. Housing Appeals Committee Dec. 8, 1993)(determining that the comprehensive permit should be extended beyond the three-year regulatory limit).

Natick Hunter's points to our decision in *Crossroads Housing Partnership v. Barnstable* where we granted a regulatory waiver. There, the Board argued that the developer had failed to establish its standing because it had not submitted sufficient evidence of ownership interest. The Board had rejected the developer's application based on the insufficient submission and the developer appealed to the Committee. First, we found that the developer had a "de minimi[s]" showing of equitable interest and "the lack was cured" by the submission of sufficient evidence at the hearing. See *Crossroads*, No. 86-12, slip op. at 7-8 (Mass. Housing Appeals Committee Mar. 25, 1987). Second, we found there would be undue hardship if we strictly complied with our regulations. We stated, "Such construction would put the developer right back into the catch-22 situation that [the Committee has] sought to remedy." *Id.* at 10. We granted, in the interest of fairness, the regulatory waiver finding the developer to have the requisite standing and moved on to the merits of the case.

There are significant factual distinctions here. First, the developer in *Crossroads*, to have the right to be heard by the Committee, filed its appeal on time. Second, the developer was requesting a waiver of a purely *regulatory* provision, not a statutory requirement. Third, Natick Hunter's was able to demonstrate some effort in satisfying the regulatory requirement before the time of the hearing and had completely cured the defect during the time of the hearing. Fourth, the "catch-22," which we described in detail in *Crossroads*, provided the factual basis to find undue hardship. In this case, Natick Hunter's did not file its appeal on time; it is requesting a waiver of a regulatory *and* statutory provision; and it has provided no factual basis to support its undue hardship claim, save to say, "...the harm to [Natick Hunter's], if its rights to appeal are foreclosed, would be extraordinary." See Developer's Opposition Brief, p. 4.

In both *Crossroads* and *Daddario, supra*, we found undue hardship where there was a programmatic inconsistency, which the developers could not control. The "catch-22" could not be remedied by the developers in those cases because they did not create the problem. Accordingly, we readily recognized that strict compliance with the regulations would be unfair. Here, Natick Hunter's is the only entity responsible for its late filing.

In *Red Gate Road* we discussed equitable principles as well. There, the developer appealed from a Board's denial of a comprehensive permit extension where the Board claimed there had been "no activity." See *Red Gate Realty*, No. 93-01, slip op. at 2 (Mass. Housing Appeals Committee Dec. 8, 1993). We found that the denial was not consistent with local needs, by analyzing a number of factors: unusual circumstances, conduct of the parties throughout the process, any action taken by the developer in reliance on the permit, and the history of the permit.

What is most significant about *Crossroads*, *Daddario*, and *Red Gate Realty* is when the Committee reaches a decision to waive a regulation upon equitable principles. *Red Gate Realty* states, "Thus, under the particular facts presented here, once the appellant has shown that it has *properly requested* an extension of the permit, the Board, in order to prevail..." *Red Gate Realty*, No. 93-01, slip op. at 5 (Mass. Housing Appeals Committee Dec. 8, 1993). This demonstrates that the Committee does not exercise its discretion until the procedural requirements are met. In other words, the Committee only exercises its discretion within the bounds of the administrative process.

Generally, the judiciary recognizes and defers to administrative discretion. "The discretion granted to an administrative agency is 'particularly broad when [the] agency is concerned with fashioning remedies and setting enforcement policy.'" See *Boston Preservation Alliance, Inc., & others v. Secretary of Environmental Affairs & others*, 396 Mass. 489, 498, 487 N.E.2d 197 (1986)(quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 857 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)). Courts also defer to an agency's adherence to and enforcement of its procedural requirements. For example, in *Anne McLaughlin v. Federal Deposit Insurance Corporation*, the Massachusetts Supreme Judicial Court dismissed an action because it found it did not have jurisdiction to hear the plaintiff's claim against an administrative agency when she failed to file her claim with that agency on time. See generally *Anne McLaughlin*, 415 Mass. 235, 612 N.E. 2d 671 (1993).

More specifically, courts have addressed whether an agency can exercise its discretion by disregarding one of its own procedural requirements. *DaLomba's Case*, 352 Mass. 598, 227 N.E. 2d 513 (1967) demonstrates that the Massachusetts Supreme Judicial Court may *not* defer to agency discretion when it arbitrarily disregards a

procedural requirement. The Court in *DaLomba's Case* determined that a member of the Industrial Accident Board (IAB) arbitrarily disregarded a rule, which provided that an IAB member “may decline to allow rebuttal of reports of impartial physicians where requests for such rebuttal is received later than seven days after the mailing of such reports.” *DaLomba's Case*, 352 Mass. 598, 603, 227 N.E. 2d 513 (1967). The Court found it “manifestly unfair” when a member denied a request to rebut, which was brought within the seven-day period. *Id.* The Court found no merit in the member’s argument that since the IAB is authorized by the Legislature to *make* its rules that a member of the IAB may therefore disregard them. *Id.*

Here, we find no merit in the developer’s argument that we can disregard our own procedural requirement. Even though the regulations include a waiver provision, that provision has express limitations within the bounds of statutory authority. The waiver of a regulation should not lead to a result that is manifestly unfair. When a developer files an appeal after the twenty-day period, it would be manifestly unfair to the Board for the Committee to waive the filing deadline and reach a decision on the merits. Such action would remove the ability of any party to rely on the regulations the Legislature has authorized the Department of Housing and Community Development to promulgate.

IV. CONCLUSION

The Committee will not disregard the law to exercise agency discretion. Disregarding the filing deadline of 760 CMR 56.06(4)(g) would be wholly inconsistent with the statutory requirements of G.L. c. 40B, § 22—a result, which would be arbitrary. Accordingly, the waiver provision pursuant to 760 CMR 56.08(2) does not apply.

We will comply with our regulations and find that because Natick Hunter’s did not properly² file its appeal, it should be dismissed. Therefore, the Board’s Motion to Dismiss is granted.

2. It is axiomatic to state that filing late—even one day late—is not proper.

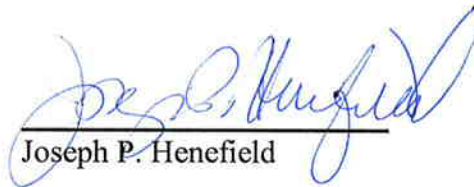
This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Dated: April 14, 2008

Housing Appeals Committee



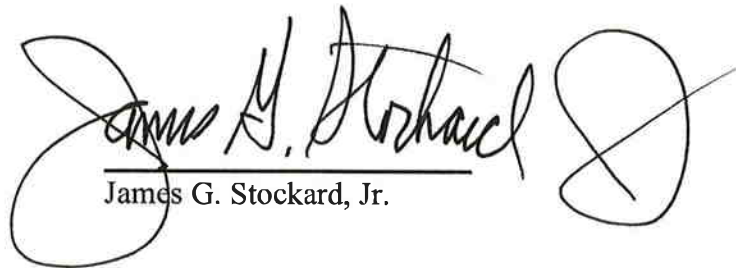
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