

COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

IN THE MATTER OF STONEHAM BOARD OF APPEALS AND

WEISS FARM APARTMENTS, LLC, NO. 2014-10

MOTION IN LIMINE OF THE STONEHAM BOARD OF APPEALS

Introduction

The Stoneham Board of Appeals ("Board") respectfully moves for the exclusion from hearing of all exhibits and witness testimony by the Applicant Weiss Farm Apartments ("Applicant") in this case. As grounds, the Board states that the Applicant was required to identify all exhibits and witnesses on or before October 17, 2014, per direction of the Presiding Officer. The Applicant elected to identify no exhibits or witnesses at that time. The Applicant, having been granted a continuance by the Presiding Officer at the close of the Board's case - over the objection of the Board - now seeks to introduce certain exhibits and witness testimony. This should not be permitted. Allowing the Applicant to hear the Board's case, and then prepare its own, violates principles of fairness and due process, as well as the Presiding Officer's explicit instruction, to the Board's prejudice. The Board accordingly requests that the Presiding Officer exclude any and all exhibits, witness testimony, or any other form of evidence not identified in the Prehearing Order and/or produced as of October 17, 2014.

Relevant Facts and Procedural History

1. On or about June 30, 2014, Weiss Farm Apartments, LLC filed a comprehensive permit application with the Town of Stoneham for the development of 264 rental dwelling units on a 25.657 acre parcel of land with an address of 170 Franklin Street, Stoneham, Massachusetts.

2. Within fifteen days of opening public hearing on the application, and otherwise pursuant to the provisions of 760 CMR 56.03(8)(a), by letter dated July 24, 2014, the Board informed the Department of Housing and Community Development (“DHCD”), with a copy of the same to counsel for Weiss Farm Apartments, LLC, (“Applicant”) that it believed the Town of Stoneham consistent with local needs, as that term is found at G.L. c.40B, s.20 and 760 CMR 56.00 et al, as the Town of Stoneham met the statute’s “1.5% General Land Area Minimum” and the regulation’s “related application” provision.

3. By letter dated September 2, 2014 (distributed to the parties by electronic mail on September 5, 2014) DHCD informed the Town of Stoneham “the Board has not met the burden of proof in its assertion that a denial with conditions [sic] would be consistent with local needs.

4. On September 18, 2014, pursuant to 760 CMR 56.03(8), the Board filed its interlocutory appeal of DHCD's finding with the Housing Appeals Committee.

5. By letter to counsel dated September 26, 2014, the Presiding Officer directed the parties to pursue the possibility of "stipulated facts and agreed-upon exhibits") as the basis for hearing. The Presiding Officer further directed that should this approach "prove impractical", "counsel for the parties shall appear at the Conference of Counsel with all exhibits that they intend to introduce into evidence and a list of any witnesses they intend to produce on the day of hearing." See letter dated September 26th, 2014 from Presiding Officer Shelagh Ellman-Pearl.

6. A Conference of Counsel was scheduled for October 9, 2014 and continued by agreement to October 17, 2014.

7. The Board's counsel, pursuant to the Presiding Officer's instructions, brought exhibits intended for introduction at hearing, and a list of witnesses, to the Conference of Counsel on

October 14, 2014. The Applicant's counsel brought no exhibits, nor identified any witnesses for hearing.

8. Counsel for the Board and for the Applicant executed a Prehearing Order dated October 17, 2014, containing several stipulated facts and addressing other matters for hearing. The Board's witnesses were identified. The Applicant identified no witnesses and stated its intent to rely on cross-examination of the Board's witnesses.

9. Hearing commenced before the Presiding Officer on December 11, 2014. The Board put on its witnesses, commencing with Cheryl Noble, the Town Building Inspector. Inspector Noble was examined directly by counsel for the Board and cross-examined by counsel for the Applicant. Counsel for the Board then examined directly Brian Macdonald, the Town's Director of Assessing. Exhibits previously identified by the Board to the Applicant were submitted through the Board's witnesses.

10. At the close of the Board's case, the Applicant's counsel moved for a continuance on the grounds that one figure testified to by the Board's witnesses differed from that stated in the Board's initial pleading. Applicant's counsel stated that he needed time to respond to this figure. Over the objection of Board's counsel, and to the prejudice of the Board, the Presiding Officer granted a continuance of approximately one month (until January 9, 2014).

11. Through electronic correspondence dated December 19, 2014, counsel for the Applicant has indicated an intent to introduce various documents into evidence, and to present a witness, when hearing resumes on January 9, 2014, notwithstanding the Presiding Officer's instruction that all exhibits and witnesses were to be identified and brought to the Conference of Counsel over two months ago, on October 17, 2014. The aforementioned documents, identified in counsel's December 19, 2014, have not been provided to undersigned counsel as of this date.

Argument

I. The Applicant is precluded from introducing documents into evidence, having failed to identify such exhibits in timely manner and as directed by the Presiding Officer

The Applicant and the Board are bound by the same rules. If the Board was required to produce all exhibits on a date certain (October 17, 2014), then the Applicant was required to do so as well. The Applicant elected to produce no exhibits and identify no witnesses as of that date, and should bear the consequences of those choices. Even under the relaxed procedural rules of the Housing Appeals Committee, the parties are presumably held to the same rules. Any other outcome - that is, allowing the Applicant to introduce exhibits or identify previously undisclosed witnesses, two months after the Presiding Officer's deadline - violates any notion of due process or fairness. Permitting the Applicant to hear the Board's case, and then have a month to prepare exhibits and cross-examination is further violation of due process and fairness.

Moreover, the Committee has repeatedly emphasized that the Pre-Hearing Order signed by the parties controls the content of the hearing; anything omitted from the Pre-Hearing Order is precluded from hearing and from the Committee's consideration. See, e.g., Archstone Communities Trust v. Woburn Board of Appeals, 2003 WL 25338645 (Housing Appeals Committee No. 01-07, June 11, 2003) ("Pre-Hearing Order and related Stipulation do not allow for consideration of [Board's witness's] alternative analysis to the MassHousing methodology"); Autumnwood, LLC v. Sandwich Zoning Board of Appeals, 2010 WL 1003191 (Housing Appeals Committee No. 05-06, March 8, 2010) (Board's argument "was not adequately raised prior to the hearing so as to put the developer on notice that it would be required to present a defense on this issue; if it had been, the issue would have been included in the Pre-Hearing Order"); Sugarbush Meadow, LLC v. Sunderland Board of Appeals, 2010 WL 3212908

(Housing Appeals Committee No. 08-02, June 21, 2010)(Board precluded from litigating issues not "explicitly includ[ed] . . . in the Pre-Hearing Order"); O.I.B. Corporation v. Braintree Board of Appeals, 2006 WL 3520369 (Housing Appeals Committee No. 03-15, March 27, 2006) (question regarding looping of water main "was not included in the Pre-Hearing Order . . .and has therefore been waived"). The Applicant, as well as the Board, is bound by the terms of the Pre-Hearing Order, and cannot be permitted to present witnesses or testimony not identified in the Pre-Hearing Order.

This appeal is de novo, and the case is decided on the evidence presented at hearing. The Board's initial pleading is the equivalent of the "well-pleaded complaint" in a courts of law; as such, it was required only to provide sufficient notice to the Applicant of the Board's claims. See, e.g., Nordberg v. Massachusetts Dept. of Education, 76 Mass.App.Ct. 216, 218 and n. 5. The fact that certain acreage values provided by the Board's witness - out of the dozens of acreage values entailed in this case - differed from those stated in the initial pleading is not good cause to allow the Applicant to introduce exhibits it did not identify in October of 2014. Although the burden of proof is on the Board, the Applicant was still responsible for preparing its own case in support of DHCD's finding. It is simply not credible that the Applicant's entire case and preparation for hearing could be derailed by any such discrepancy, as claimed by the Applicant.¹ Moreover, to the extent the Applicant believed such discrepancy significant, the proper course would have been to pursue the matter on cross-examination. The wrong course is

¹ Had the value stated in the Board's initial pleading been part of a stipulation contained in the Prehearing Order, the Applicant's request might have some traction. However, it did not appear in the Prehearing Order. Upon information and belief, the Committee has never held that a developer appealing to Committee is bound by the statements in its initial pleading. Rather, it has been the Committee's practice to bind the parties to the contents of the Prehearing Order, carefully prepared and negotiated by counsel, and approved by the Presiding Officer. See cases cited above.

to allow the Applicant to prepare its case and submit exhibits at this late date - after hearing the Board's direct case, and several months after the deadline observed by the Board.

The Board objected to the Presiding Officer's grant of a continuance of the hearing, which provided the Applicant with a month to prepare its cross-examination of the Board's witnesses. The Board here renews its objections to the grant of such continuance. If coupled with allowing the Applicant to submit exhibits not previously identified and contrary to the Presiding Officer's direction, the Board will be doubly prejudiced. There is simply no precedent for a body purporting to be "an impartial forum"² to 1) allow one party to hear the other side's direct case at hearing; then 2) provide that party with a month's continuance to gather evidence and prepare for cross-examination; and 3) to submit exhibits and witnesses not previously identified in utter disregard of a months-passed deadline; 4) with no legitimate basis for either the continuance or the late-filed exhibits.

Conclusion

The Applicant should not be allowed to submit exhibits or call previously undisclosed witnesses at this time, in disregard of the deadline set by the Presiding Officer and observed by the Board. It is grossly unfair for the Applicant to have the benefit of hearing the Board's case before assembling its own (and the benefit of a month to prepare for its presentation and for cross-examination). That certain figures in the testimony of the Board's witness differed from

² "The mission of the Housing Appeals Committee is to provide, within the parameters of the comprehensive permit process established by G.L. c. 40B, §§ 20-23, an impartial forum to resolve conflicts arising from the siting of new affordable housing. In doing so, it will carefully balance the need for such housing and legitimate local concerns-planning, environmental, open space, design, health, safety, and other local concerns."

From the Committee's website: <http://www.mass.gov/hed/economic/eohed/dhcd/hac.html> (last reviewed on December 29, 2014).

those stated in the initial pleading is no excuse for allowing the Applicant to submit exhibits or call previously undisclosed witnesses where it elected not to do so by the deadline set by the Presiding Officer. The Presiding Officer should not add to the Board's prejudice by allowing the Applicant to submit exhibits or call previously undisclosed witnesses at this late date. Any such action would further the impression - already traced - that the Board cannot expect a fair hearing of its appeal.

Respectfully submitted,

For the Stoneham Board of Appeals,
By its attorneys, acting as special Town Counsel

HUGGINS AND WITTEN, LLC

/s/ Jonathan D. Witten

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DATED: January 2, 2015

CERTIFICATE OF SERVICE

I certify that I sent a true copy of the above noted Motion in Limine to counsel for Weiss Farm Apartments, LLC, this day by US Mail, postage prepaid.

/s/ Jonathan D. Witten

Jonathan D. Witten

January 3, 2015