

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

TRIANGLE LAND DEVELOPMENT
CORP., INC.

Appellant

v.

NORTHBRIDGE ZONING BOARD
OF APPEALS

Appellee

No. 07-11

RULING ON MOTION TO DISMISS

Triangle Land Development Corp., Inc. (Triangle Land) has appealed, pursuant to G.L. c. 40B, § 22 and 760 CMR § 56.00,¹ a decision of the Northbridge Zoning Board of Appeals (Board) granting Triangle Land's application for a comprehensive permit with conditions.

The Board has moved to dismiss the appeal. It argues that Triangle Land failed to meet the filing deadline pursuant to G.L. c. 40B, § 22 and 760 CMR 56.06(4)(g).² For the reasons set forth below, the Board's motion is granted.

I. PROCEDURAL HISTORY

On or about July 26, 2004, Triangle Land submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build three (3) single-

1. At the time Triangle Land brought this appeal, 760 CMR 30.00 and 31.00 were the applicable regulations in effect pursuant to G.L. c. 40B. Effective February 22, 2008, the Department of Housing and Community Development (DHCD) promulgated a revised regulation, 760 CMR 56.00, which, by its terms, governs this appeal. Where relevant substantive changes to the regulations affect the discussion, they are discussed.

2. Formerly 760 CMR 30.06(8).

family homes and 52 townhouse style condominiums under the Massachusetts Housing Finance Agency Housing Starts Program and the New England Fund Program of the Federal Home Loan Bank of Boston. The proposed project would be built on an approximately 71.95-acre parcel located off Providence Road in Northbridge, Massachusetts. The Board held several public hearing sessions between August 26, 2004 and June 7, 2007 on which date the Board voted to close the hearing. On July 10, 2007, the Board held a deliberative session regarding its Findings and Decision (decision). On July 11, 2007, the Board filed its decision with the Northbridge Town Clerk granting Triangle Land the permit with conditions. On August 31, 2007, Triangle Land filed its appeal with the Housing Appeals Committee. On September 21, 2007, the Board filed a motion to dismiss and on October 15, 2007, Triangle Land filed its opposition. Triangle Land's supplemental opposition motion and the Board's reply were filed on December 19, 2007 and January 3, 2008,³ respectively.⁴

II. FACTUAL BACKGROUND

According to the approved minutes of the Board, the Board held a public hearing on June 7, 2007 regarding the details of the proposed project and the drafted decision. The June 7 session minutes attest to the following:

A motion was made ... *to close the public hearing* and take the matter under advisement. Motion seconded ..., the vote being 4-0 in favor.

Board's Reply Brief, Exh. C (emphasis added).

Triangle Land asserts that it had received a draft of the Board's decision in May 2007 and expressly stated during the June 7 hearing session that it would "appeal" the decision as it believed the conditions in the decision would make the project uneconomic. See Triangle Land's Opposition Brief, p. 3, ¶ 6. "The Applicant and its representatives left the meeting after a vote by the Board of Appeals." *Id.* The Board's June 7 minutes also state:

3. The Board's motions to extend reply brief deadline filed on October 19 and December 4, 2007 are hereby granted.

4. Triangle Land did not file Exhibits A1, A2, A3, and B when it filed its opposition. Since they were not filed in accordance with 760 CMR 56.06(6)(b), they are excluded from consideration on this motion. In any event, their inclusion would not alter our decision.

The Board discussed briefly the issue to allow further expansion of the units.... *Attorney Pawle will draft a final decision that will be reviewed by the Board at a meeting scheduled on July 10, 2007.*

Thereupon, the meeting was adjourned. Board's Reply Brief, Exh. C (emphasis added).

As announced at the June 7 hearing, the Board held its deliberative session on July 10, 2007. At the July 10 session, the Board voted to grant the comprehensive permit to Triangle Land with conditions and signed the final decision. Board's Brief, Exh. A, Attach. 2; also see Triangle Land's Appeal, Exh. A. On July 11, one day later, the Board filed its decision with the Town Clerk. The Board did not inform Triangle Land or its counsel directly or personally of its action. However, the day after the Board's filing, it emailed notification to Mark Anderson, Triangle Land's engineer, of the filing. On August 2, 2007, twenty days after the filing, the Town Clerk certified that no appeals had been filed. See Triangle Land's Appeal, Exh. A. The developer filed its appeal with the Committee on August 31, 2007.

III. STANDARD OF REVIEW

The Board moved to dismiss Triangle Land's appeal generally under 760 CMR 56.06(5)(c)(2),⁵ which permits a party to file a motion to dismiss raising the issue of the developer's timeliness in filings its appeal. Following the guidance of the Massachusetts Supreme Judicial Court, the Committee should accept the facts asserted in the appellant's Initial Pleading (or complaint) "together with any favorable inferences reasonably drawn therefrom, as true...." See *Nathan Eigerman v. Putnam Investment, Inc. & another*, 450 Mass. 281, 282, 877 N.E. 2d 1258 (2007), citing *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 322, 693 N.E. 2d 153 (1998). *Nathan Eigerman* further suggests that the Committee should reject and refrain from making "legal conclusions [in the complaint] cast in the form of factual allegations." *Id.*, citing *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477, 735 N.E. 2d 373 (2000). Finally, "a motion to dismiss [should] be denied 'unless it appears beyond doubt that the [appellant] can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 286, quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

5. Formerly 760 CMR 30.07(3)(b).

IV. DISCUSSION

The Committee has rarely considered the timeliness of a developer's appeal directly. However, we have recently addressed the issue in *Natick v. Natick Hunter's Hill*, No. 07-10 (Mass. Housing Appeals Committee Apr. 14, 2008 Ruling on Motion to Dismiss), where we reaffirmed that an appeal that is "even one day late ... is not proper." *Id.* at 6. The timeliness of an appeal "is dependent on the date on which notice of the decision was given to the developer as required by 760 CMR 30.06(8)" *Transformations, Inc. v. Townsend*, No. 02-14, slip op. at 3 (Mass. Housing Appeals Committee Sept. 23, 2002 Ruling on Motion for Summary Judgment). The main issue the Committee must determine in considering the timeliness of Triangle Land's appeal of the Board's decision is whether the developer filed within the time period specified by G.L. c. 40B, § 22 and 760 CMR 56.06(4)(g).⁶

In that regard, the parties dispute whether the Board was required to furnish actual notice of its decision, by means of mailing a copy to the developer. Triangle Land argues that it did not receive actual notice until August 14 when it received a paper copy of the decision "through its engineer obtaining a copy of the Decision and forwarding it to [Triangle Land] by overnight mail." Triangle Land's Opposition Brief, p. 4. Secondly, Triangle Land argues that the appeal deadline was tolled because it did not receive proper notice of the Board's July 10 deliberative session and that on July 12 the only "issuance" was an electronic transmission of an unsigned copy of the decision, which was not sent directly to Triangle Land. As we discuss below, Triangle Land's arguments are either unpersuasive or irrelevant to the statutory and regulatory appeal deadline.

A. The Statute and Regulation Governing Notice of Decision

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

6. Formerly 760 CMR 30.06(8), which contains the identical provision.

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.

G.L. c. 40B, § 22 (emphasis added). A board's notice of its decision regarding the application for a comprehensive permit can be given by filing a decision with its Town Clerk, thereby giving notice to the public, or by not filing a decision at all, thereby allowing a constructive grant of the permit. See generally *Milton Commons Associates v. Board of Appeals of Milton*, 14 Mass. App. Ct. 111, 436 N.E. 2d 1236 (1982). The Committee's regulations clarify when an applicant can appeal a Board's decision: "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." 760 CMR 56.06(4)(g)(emphasis added). Based on the plain language of the regulation, Triangle Land's appeal is untimely because it filed its appeal more than twenty days after the Board's decision was filed with the Town Clerk.

Triangle Land claims, however, that the 20-day period to file its appeal did not commence until it received *actual* notice of the filed decision. The Appellant relies on G.L. c. 40B, § 21, which states, "The provision of section eleven of chapter forty A shall apply to all such hearings." Chapter 40A, § 11 provides:

Upon the granting of a variance or special permit, or any extension, modification or renewal thereof, the permit granting authority or special permit granting authority *shall issue to the owner and to the applicant if other than the owner a copy of its decision*, certified by the permit granting authority or special permit granting authority, containing the name and address of the owner, identifying the land affected, setting forth compliance with the statutory requirements for the issuance of such variance or permit and certifying that copies of the decision and all plans referred to in the decision have been filed with the planning board and city or town clerk.

Triangle Land's argument misinterprets how G.L. c. 40B uses G.L. c. 40A, § 11, which addresses the issuance of special permits and variances. Chapter 40B, § 21 applies the actual notice requirements of G.L. c. 40A, § 11 to

Chapter 40B comprehensive permit public hearings,⁷ but not to the *post*-hearing process, which includes the Board's notice of decision. The court in *Milton Commons* stated, "[s]ection 21 of c. 40B also refers to G.L. c. 40A, Section 11, to guide the conduct of hearings under c. 40B. *We do not think that reference extends to the last paragraph of Section 11, which deals with posthearing matters.*" *Milton Commons*, 14 Mass. App. Ct. at 118 (emphasis added). Based on the governing statute and regulation and the limited applicability of G.L. c. 40A, Triangle has no supportable justification for missing the appeal deadline.⁸

B. Tolling of Appeal Period for Lack of Notice of Deliberative Session

The first secondary issue regards Triangle Land's argument that it should have received actual written notice of the Board's deliberative session on July 10 and the lack of such notice precludes the running of the 20-day appeal period from July 11. It argues the Board "frustrated the Comprehensive Permit Process" in part because "on July 10, 2007 [it] held a meeting without notice and made a decision without notice." Triangle Land's Supplemental Opposition Brief, p. 3. This argument fails.

Triangle Land's argument that it should have received actual notice of the July 10 meeting is not persuasive. First, G.L. c. 40A, § 11 does not apply to the post-hearing process, which includes deliberative sessions; and second, the open meeting law does not

7. It is undisputed that the Board did provide such actual notice throughout the entire public hearing process.

8. Our decision is not inconsistent with our previous ruling in *Shamray Limited Partnership v. Raynham*, No. 84-01 (Mass. Housing Appeals Committee Apr. 9, 1985). In *Shamray*, we chose to decide the case on its merits notwithstanding the Board's argument that the developer had an untimely submission. *Id.* at 13-26. There, the Raynham Zoning Board of Appeals wrote its decision on April 11, 1984 and filed its decision on April 20. The developer picked up a copy of the decision on April 20 and filed its appeal on May 10. The Committee ruled that the 20-day count began on April 20—when the Board filed *and* the developer received actual notice. *Shamray* was decided before the adoption of the filing rule in our regulations, which accordingly supersede the decision. Therefore, *Shamray* is no longer controlling.

require a separate or an additional notice of the deliberative session as such notice can simply be provided at the public hearing. See G.L. c. 30A, § 11A½.⁹

Since a deliberative session is not a public hearing, but a different type of meeting that follows the public hearing, the notice requirements of G.L. c. 40A, § 11 do not apply. Committee and court decisions have demonstrated that there is a distinct difference between a public hearing and a deliberative session. See *Merrimack Meadow Corp. v. Tewksbury*, No. 87-10, slip op. at 6-7 (Mass. Housing Appeals Committee Aug. 23, 1988); see also *Milton Commons*, 14 Mass. App. Ct. at 114-115 (emphasis added).

Furthermore, the Committee finds the Board gave proper notice in conformance with the open meeting law at G.L. c. 30A, § 11A½. The Board held an open session on June 7 for which proper notice was given; the majority of the members voted on record to terminate the hearing;¹⁰ the chair of the Board cited the purpose of the deliberative session; and it was clear that the Board would not reconvene a public hearing on the matter because it had voted to close the public hearing, an act that was entered into the June 7 minutes.

The end of a public hearing marks “the beginning of a period during which the board had to issue a decision;” therefore, “it is not difficult for interested parties to begin counting to sixty (i.e., forty days plus twenty days)” and to lodge an action for [administrative] review in time.” *Milton Commons*, 14 Mass. App. Ct. at 113 and 119.¹¹

9. “No executive session shall be held until the governmental body has first convened in an open session for which notice has been given, a majority of the members of the governmental body have voted to go into executive session and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has cited the purpose for an executive session, and the presiding officer has stated before the executive session if the governmental body will reconvene after the executive session.” Deliberative sessions, are akin to executive sessions as therein, “the right of interested parties to present information and argue is cut off.” *Milton Commons*, 14 Mass. App. Ct. at 114-115.

10. Perhaps the Board could have voted expressly to go into the deliberative session period as well.

11. “Even in cases where the starting point for purposes of the twenty-day appeal period is in doubt, it is open to persons wishing to appeal to err on the side of caution.” *Milton Commons*, 14 Mass. App. Ct. at 120, n.5. Triangle Land filed its appeal more than 50 days after the Board filed its decision. Based on the facts surrounding the June 7 hearing alone, we conclude that Triangle Land’s appeal deadline did not toll.

The record indicates Triangle Land left after the vote, but before the June 7 hearing adjourned, and therefore may not have been present for the announcement of the deliberative session. However, Triangle Land's departure in no way changes the Board's notice obligations. It was incumbent on Triangle Land to learn of the scheduled deliberative session on July 10, which was announced at the public hearing. Triangle Land could have asked after the meeting was adjourned or at any time after the public hearing "to remove all ambiguity." *Transformations, supra*, No. 02-14, slip op. at 4. Triangle Land may not avoid the consequences of its own decision to depart before the session ended.

C. Tolling of Appeal Period Pending Actual Notice of Decision

As an additional secondary issue, Triangle Land argues that the Board's July 12 actual notice of the filed decision to Triangle Land's engineer, Mark Anderson was not proper because it was not sent directly to Triangle Land. The Board responded that Triangle Land held Mr. Anderson out as its "agent for purposes of transmitting information about the project to and from the Board." Board's Reply Brief, p. 7. The Committee need not decide whether Mr. Anderson had the apparent authority to receive notice; this disputed fact is not material to the conclusion that the Board provided proper and lawful notice to Triangle Land when it filed its decision with the Town Clerk. However, it is notable that the record shows Mr. Anderson had filed the comprehensive permit application "on behalf of Triangle Land ..." Board's Brief, Exh. A, Attach.1; see also Triangle Land's Opposition Brief, Exh. B.

V. CONCLUSION

To achieve predictability and fairness, the Committee will not disregard the procedural requirements, which have been mandated by regulation *and* statute. See generally *Natick Hunter's Hill, supra*.

The 20-day period in which the developer can file an appeal commenced on July 11. Triangle Land filed its appeal almost a full month after its July 31, 2007 appeal deadline. The Board complied with statutory notice requirements at every step of the proceeding.

The Committee may not move beyond the defective procedural posture of this case. Because Triangle Land did not timely file its appeal, it shall be dismissed. The Board's Motion to Dismiss is hereby granted.

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.

Housing Appeals Committee



Werner Lohe, Chairman

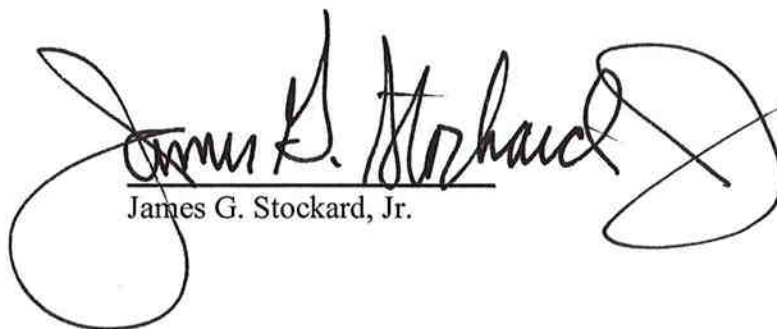
Dated: May 12, 2008



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