COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

VIF II/JMC RIVERVIEW COMMONS INVESTMENT PARTNERS, LLC

v.

ANDOVER ZONING BOARD OF APPEALS

No. 12-02

DECISION

February 27, 2013

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COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

VIF II/JMC RIVERVIEW COMMONS INVESTMENT PARTNERS, LLC Appellant	)	
v.	)	No. 12-02
ANDOVER ZONING BOARD OF APPEALS, Appellee	)	

DECISION ON CROSS MOTIONS FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

The Appellant VIF II/JMC Riverview Commons Investment Partners, LLC is the owner of 220 rental apartments and appurtenant improvements located off River Road in an industrial subdivision. The apartment community is known generally as "Andover Place." On February 12, 2012, the owner of Andover Place submitted a Notice of Project Change to the Andover Zoning Board of Appeals, requesting permission to modify the original project by constructing two new, single-story parking garages within the original project's existing paved parking area. In the course of public meetings on the Notice of Project Change, the Board determined that the proposed parking modifications constitute a "substantial" change to the original project. The Board then conducted a public hearing, at the conclusion of which it denied the owner's application. The owner preserved its right to appeal the Board's preliminary determination that the parking modifications are a "substantial" change, and now asks this Committee to find that the proposed change is not, in fact, substantial.

The parties have submitted a Joint Statement of Facts and related exhibits ("Joint Statement") in support of cross motions for summary decision. In its motion for

summary decision, the Board has asserted that this Committee has no jurisdiction to hear the owner's appeal. It has argued in the alternative that the proposed parking modifications are "substantial" changes that were properly denied. For the reasons set forth below, this Committee concludes that (1) the record shows no genuine issue as to any material fact; (2) the Committee has jurisdiction to hear this appeal; (3) the proposed parking modifications are a substantial change to the original project; and (4) the Board's decision to deny the parking modifications was lawful and consistent with local needs.

II. FACTUAL OVERVIEW

The relevant facts in this case are set forth in the Joint Statement. These include the following undisputed facts:

1. The original project consists of 220 rental apartment units and 352 paved parking spaces, together with appurtenant landscaping, utilities and related improvements.

2. The original project was constructed in 1988 pursuant to a comprehensive permit dated August 4, 1987, as amended by Settlement Agreement between the owner and the Board dated December 17, 1987.

3. For the first fifteen years after initial occupancy of the project, twenty-five percent of the units at Andover Place were rented to tenants at or below 80% of the area median income. In 2005 and 2006, pursuant to the terms of the comprehensive permit and applicable subsidy agreements, the affordability requirement for the project expired, and the units originally designated as affordable were rented at market rates. Currently there are no affordable units at Andover Place.

4. On February 3, 2012 the owner filed with the Board a Notice of Project Change describing and seeking permission for the proposed parking modifications. The parking modifications include the construction of two one-story parking garages with a total footprint of approximately 10,442 square feet. The changes proposed by the owner will reduce the total number of parking spaces on site from 352 spaces (all exterior surface spaces) to 340 total spaces (304 surface spaces and 36 garage spaces).

5. The Board convened, and the owner attended, public meetings on the Notice of Project Change on February 15 and February 27, 2012.

6. At its February 27 meeting, the Board determined the proposed parking changes to be "substantial" and opened a public hearing on the Notice of Project Change.

7. The owner elected to continue with the local proceedings before the Board while timely reserving its right to object to the Board's determination that the proposed changes are "substantial."

8. The owner attended the Board's public hearing sessions on April 5 and May 3, 2012. During the public hearing, the Board suggested that the owner offer to restrict some of the units in the project as affordable units. The owner declined to do so.

9. By written decision dated June 14, 2012 and filed with the town clerk on that same date, the Board denied the owner's request for permission to make the proposed parking modifications.

III. JURISDICTION

A. The Committee's Jurisdiction to Resolve Post-Permit Disputes

The dispute in this case involves a proposal to modify a housing project that was constructed and first occupied more than twenty years ago—long after the issuance of the original comprehensive permit. As a preliminary matter, we address the Committee's jurisdiction to hear and resolve disputes between a developer and a local board arising after the original issuance of a comprehensive permit. We then consider the Board's argument that the Committee lacks jurisdiction to hear this appeal or grant the relief requested by the appellant because the project no longer includes any affordable units.

In any analysis of the Committee's jurisdiction, we start, as we must, with the express language of the statute. The Committee's subject matter jurisdiction, like that of all administrative agencies, is "both conferred and limited by statute." *Town of Middleborough v. Housing Appeals Comm.*, 449 Mass. 514, 521 (2007) (quoting *Edgar v. Edgar*, 403 Mass. 616, 619 (1988)). The Comprehensive Permit Law expressly authorizes the Committee to review a decision of a local board of appeals to deny or condition a comprehensive permit. G.L. c. 40B, § 22. Where the local zoning board has denied the permit, the Committee's task is to determine if the board's decision was "consistent with local needs." G.L. c. 40B, § 23. In the case of an approval with disputed conditions, the Committee must determine whether the conditions make the project "uneconomic." *Id.*

The Act authorizes the Committee to "vacate" the local decision, "direct" the local board to issue a permit, and "order [the] board modify or remove" conditions. *Id.* Pursuant to these statutory provisions, there can be no doubt that the Committee has express statutory authority to issue comprehensive permits in the first instance.

The Comprehensive Permit Law does not say whether, or to what extent, the Committee may resolve disputes arising *after* a comprehensive permit has been issued. However, the regulations implementing the Comprehensive Permit Law have long recognized the Committee's authority to hear and resolve disputes pertaining to project changes proposed after the issuance of a comprehensive permit by a local board of appeals. *See* 760 CMR 56.05(11) (current appeal process applicable to project changes); *see also* 760 CMR 31.03(3) (superseded regulations governing the Committee's review of project changes proposed after the issuance of the comprehensive permit) (effective from 1986 to 2008); Rules and Regulations of the Housing Appeals Committee, § 17.02 (same) (effective June 1974 to 1986). The Committee has, in some cases, exercised this authority to resolve disputes about project changes even after initial construction of a project has been completed. *See, e.g., 511 Washington Street, LLC v. Hanover Zoning Bd. of Appeals*, No. 06-05 (Mass. Housing Appeals Comm. Jan. 22, 2008) (allowing post-construction removal of permit condition restricting occupancy to tenants at least 55 years old, where market conditions caused the age-restricted project to become uneconomic), *aff'd Board of Appeals of the Town of Hanover v. Housing Appeals Comm.*, 2009 WL 867124 (Mass. Land Ct. Apr. 2, 2009); *Rosewood Realty Trust v. Mansfield Bd. of Appeals*, No. 06-03 (Mass. Housing Appeals Comm. Apr. 25, 2007) (allowing developer to convert rental units to condominium units after construction was substantially complete).

This view of the scope of the Committee's authority is consistent with bedrock principles of statutory interpretation and administrative law. First among these principles is that "[a] statute must be interpreted in such a way as to effectuate the legislative intent underlying its enactment." *Entergy Nuclear Generation Co. v. Department of Envtl. Protection*, 459 Mass. 319, 329 (2011) (citing *Water Dep't of Fairhaven v. Department of Envtl. Protection*, 455 Mass. 740, 744 (2010)). Moreover, the scope of an administrative agency's authority includes both "the powers and duties expressly conferred upon it by statute and such as are reasonably necessary to carry out its mission." *Entergy Nuclear*,

459 Mass. at 331 (quoting *Morey v. Martha's Vineyard Comm'n*, 409 Mass. 813, 818 (1991)). As a result, an agency's authority to act in furtherance of statutory goals can, and often does, extend beyond the powers expressly mentioned in the statute; broader agency authority is implied when reasonably necessary to give effect to the overall legislative intent. *See, e.g.*, *Entergy Nuclear*, 459 Mass. at 328-32 (holding that the state Department of Environmental Protection has implied authority to regulate the industrial intake or withdrawal of water, even though the authorizing statute regulates the discharge of pollutants and does not mention water withdrawals).

The Supreme Judicial Court has consistently applied these principles in affirming the Committee's interpretation of various ambiguous provisions in the Comprehensive Permit Law. *See, e.g., Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 346-55 (1973) (upholding the Committee's interpretation of the Act as permitting it to override local zoning requirements, even though such authority is not expressly stated in the Act); *Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm.,* 385 Mass 651, 654 (1982) (affirming the Committee's decision that a project with some market-rate units can qualify for a comprehensive permit); *Middleborough*, 449 Mass. at 523 (2007) (upholding the Committee's decision that funding through the New England Fund program of the Federal Home Loan Bank of Boston is a valid subsidy under the Act); *Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 44-48 (2013) (deferring to the Committee's definition of the pertinent "region" by which to measure the regional need for low and moderate income housing). In so doing, the Court has acknowledged, many times, the Committee's wide latitude to interpret and enforce of the Act in a manner consistent with the overall legislative intent to "streamline and accelerate the permitting process ... in order to meet the pressing need for affordable housing." *Middleborough*, 449 Mass. at 521 (internal quotations omitted). The Court has made it clear that a broad reading of the Act by the Committee is especially appropriate given the Act's remedial purpose: "'[w]here the focus of a statutory enactment is reform,' as is true of [the Comprehensive Permit Law], … 'the administrative agency charged with its implementation should construe it broadly so as to further the goals of such reform.'" *Middleborough*, 449 Mass. at 524 (quoting *Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Board of Educ.*, 436 Mass. 763, 774 (2002)).

The Comprehensive Permit Law's mandate to facilitate the construction of affordable housing, coupled with the Committee's express statutory authority to issue a comprehensive permit in the first instance, clearly and necessarily implies the authority of the Committee to modify a comprehensive permit, if necessary, to permit a project change that is consistent with local needs. Disputes over project changes are fairly common, and the prompt resolution of such disputes is necessary to achieve the intent of the Act. The Act's implementing regulations establish a process for the Committee to resolve this kind of dispute in an expedited fashion. *See* 760 CMR 56.05(11) (procedures for seeking local approval of an "insubstantial" project change after issuance of a comprehensive permit includes a right of appeal to the Committee); *see also* 760 CMR 31.03(3)(c)-(d) (similar but superseded procedures for Committee review of post-permit changes). The Committee has from time to time exercised that authority in cases like this one, where project changes are proposed after construction has been completed. *See, e.g., 511 Washington Street, LLC v. Hanover Zoning Bd. of Appeals*, No. 06-05 (Mass. Housing Appeals Comm. Jan. 22, 2008) (allowing removal of age restriction where market conditions caused the project to become uneconomic), *aff'd Board of Appeals of the Town of Hanover v. Housing Appeals Comm.*, 2009 WL 867124 (Mass. Land Ct. Apr. 2, 2009); *Rosewood Realty Trust v. Mansfield Bd. of Appeals*, No. 06-03 (Mass. Housing Appeals Comm. Apr. 25, 2007) (allowing post-construction conversion of rental units to condominium units).

For all of these reasons, the Committee has the authority to resolve a post-permit dispute involving a proposed project change. A central issue in this appeal is whether that general authority extends to a project, like Andover Place, with no affordable units. Neither the Comprehensive Permit Law nor its implementing regulations address that issue squarely. The Board relies heavily on the Supreme Judicial Court's decision in *Zoning Bd. of Appeals of Wellesley v. Ardemore Apts. Limited Partnership,* 436 Mass. 811 (2002) in arguing that the Committee has no jurisdiction to hear the appeal. *See* Board Motion, at p. 1-3.[1] The Board's position is that "the benefits accruing to a developer" under the

1. The Board also suggests that the owner lacks standing to maintain this appeal, and that the appeal does not satisfy a "jurisdictional prerequisite" as defined in the regulations. *See* Board Motion at p. 3-4. The "jurisdiction" "standing" and "jurisdictional prerequisite" arguments all of are based on the fact that Andover Place no longer has any affordable units. In our view, the Board has not made a cogent standing argument separate from its jurisdictional argument. In any event our analysis disposes of all of these arguments, regardless of how they are framed.

Comprehensive Permit Law—including the right of appeal to the Committee—"do not continue once a project no longer provides affordable housing." Board Motion at p. 2. According to the Board's reasoning, the Committee has no jurisdiction to approve changes to a project with all market-rate units, because such a project does not contribute to the statutory purpose of increasing the supply of affordable housing.

B. Analysis of the Supreme Judicial Court's *Ardemore* Decision

To evaluate the Board's argument, we first need to look closely at the facts and holding in *Ardemore*. In that case, the owner of an apartment building constructed pursuant to a comprehensive permit had entered into a collection of financing agreements with the project's subsidizing agencies.[2] These financing agreements stipulated that the owner would rent 25 percent of the units to low or moderate income persons for a term of 15 years. The comprehensive permit did not specify for how long those units had to remain affordable. The Court was asked to decide whether the project owner had a continuing obligation to make some of the apartments available at below market rents, even after the "expiration" date set forth in the subsidy agreements. The owner argued that the affordable units could be converted to market-rate units upon the expiration of the 15-year term of affordability specified in those agreements. The local board contended that the affordable units must be preserved as affordable for as long as the project needed the zoning relief provided by the comprehensive permit. *See Ardemore*, 436 Mass. at 812-13.

The Court agreed with the local board, concluding that the special zoning relief afforded by a comprehensive permit is intended "to serve the general welfare by providing affordable housing in those cities and towns with an insufficient affordable housing stock." *Ardemore*, 436 Mass. at 825 (*citing Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 363 (1973)). The legislature intended for this "special treatment" to apply '"only when it serves the public interest,' or the 'general welfare.'" *Id.* The Court found "[t]hat public interest is no longer served when affordable units are converted to market rents." *Id.* It therefore concluded, that "unless otherwise expressly agreed to by a town, so long as the project is not in compliance with local zoning ordinances, it must

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2. To be eligible for a comprehensive permit, a project must consist of "housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing ...." G.L. c. 40B, § 20.

continue to serve the public interest for which it was authorized."[3] *Id.*

Ardemore established that when the affordability restrictions in a comprehensive permit project's subsidy agreements expire, the owner must nonetheless keep some units affordable in order to continue to benefit from the zoning protections provided by the comprehensive permit, "unless otherwise expressly agreed to by a town ...."[4] A city or town's agreement to a shorter affordability term can be found, or not, in the comprehensive permit itself: "*where a comprehensive permit itself does not specify for how long housing units must remain below market*, the Act requires the owner to maintain the units as affordable for so long as the apartment building is not in compliance with [applicable] zoning requirements." *Ardemore*, 436 Mass. at 813 (emphasis added).

The *Ardemore* decision raises a number of questions with respect to the Andover Place project and our jurisdiction to hear the owner's appeal. We address these in turn.

1. *Does* Ardemore *Require the Owner of Andover Place to Maintain Some Affordable Units in Perpetuity?*

In this case, the Board contends that when the owner of Andover Place converted its affordable units to market-rate units, it effectively lost all of the benefits of its comprehensive permit—as the Board puts it, "the benefits accruing to [the owner] ... do not continue." Board Motion at p. 2. In the context of this appeal, the Board relies on

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3. Appellant argues that the project continues to serve a "public purpose" even when rented at market rates, because it provides "multi-family rental housing in an affluent market dominated by costly single-family homes." Applicant's Motion at p. 13. We agree that the Comprehensive Permit Law helps to ensure diversity of housing types, but that is an ancillary benefit of the statute, not its primary public purpose, and *Ardemore* suggests it is not enough to justify the special zoning relief provided by a comprehensive permit.

4. *Ardemore* leaves a number of practical corollary questions unanswered, such as: How many units must remain affordable? At what level of affordability? And, who will monitor an owner's compliance with these ongoing requirements after the original subsidizing agency is out of the picture? We do not have occasion to answer these questions in this decision, but we note that the Committee previously has held that a project is eligible for a comprehensive permit only if at least 25% of the units are affordable to tenants earning no more than 80% of area median income; or alternatively if 20% of the units are affordable to tenants earning no more than 50% of the area median income. *See Stuborn Limited Partnership v. Barnstable Bd. of Appeals*, No. 98-01, slip op. at 9 (Mass. Housing Appeals Comm. Mar. 5, 1999); *see also Town of Middleborough v. Housing Appeals Comm.*, 449 Mass. 514, 517 n.7 (2007) (citing to this provision of *Stuborn*). We expect that a project that must maintain its affordability restrictions after the termination of its subsidy agreements would meet one these criteria.

Ardemore not as a lever to force the owner to convert some market rate units back to affordable units,[5] but as support for the proposition that this Committee lacks jurisdiction to hear the owner's appeal. To resolve the jurisdictional issue, it is helpful first to consider what *Ardemore* says about continuing affordability at a project like Andover Place.

As noted above, continuing affordability is required only "where a comprehensive permit itself does not specify for how long housing units must remain below market." *Ardemore*, 436 Mass. at 813. When the comprehensive permit specifies the term of affordability, a comprehensive permit project's affordability restrictions will simply expire on the agreed-upon date. This case appears to fall neatly within that exception. The appellant's comprehensive permit includes the following Condition Q: "The total number of housing units in the Project, market value and low/moderate income housing, shall be no more than 165, of which 25% shall be low and moderate income housing units. This ratio shall remain the same *so long as such units remain subject to and have the advantage of the housing subsidy programs providing financial assistance under the Act.*" Joint Statement, Exh. 3, at p. 17 (emphasis added).[6] This condition indicates that when the comprehensive permit was issued, the Board "expressly agreed" that the number or ratio of affordable units would remain unchanged only for "so long as" the applicable subsidies remained in place. Accordingly, the *Ardemore* decision's exception to the perpetual affordability rule applies to Andover Place. Our analysis of the jurisdictional limits imposed on the Committee by *Ardemore* will be informed by our view that the owner of Andover Place is not required to maintain a percentage of affordable units in perpetuity because a shorter term was "expressly agreed to by [the] town."

2. *Does the comprehensive permit remain effective after the conversion of affordable units to market-rate units?*

The parties appear to dispute the status of the comprehensive permit granted by the Board. Citing to *Ardemore*, the Board at various points in its motion argues that the

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5. The record does not indicate whether this issue arose in 2005 and 2006, when the affordable units were first rented at market rates. If the owner is required by *Ardemore* to maintain some percentage of affordable units and fails to do so, the owner could be subject to enforcement action for zoning noncompliance pursuant to the applicable provisions of Chapter 40A. This Committee has no jurisdiction to hear zoning enforcement actions under Chapter 40A.

6. A later settlement agreement between the owner and the Board changed the number of units from 165 to 220, but otherwise Condition Q was unchanged. *See* Joint Statement, Exh. 4, at p. 3.

"benefits accruing to a developer pursuant to ch. 40B ... do not continue once a project no longer provides affordable housing." Board Motion, at p. 2. The Board appears to suggest that the project's lack of affordable units "disqualif[ies] the Developer from the benefits of the comprehensive permit." Board Motion at p. 3-4. The owner frames the question as whether "the [comprehensive] permit ... remain[s] in effect." Appellant Motion, at p. 12. We are uncertain if the status of the comprehensive permit issue truly is in dispute, as elsewhere in its motion, the Board concedes that "[t]he Owner continues to enjoy the benefits of the Comprehensive Permit." Board Motion at p. 4; *see also* Board Decision, Joint Statement, Exh. 10, ¶ 5, at p. 4 ("Petitioners continue to enjoy the benefits of the comprehensive permit"). But because the issue appears to have been raised, and because it arguably bears on the jurisdictional issue now before us, we briefly address the question of whether Andover Place's comprehensive permit remains "in effect."

A comprehensive permit, like a special permit or a variance issued under the Zoning Act, is an entitlement affecting the use of land. In many cases, the comprehensive permit gives lawful status to a type of use, and the construction of improvements, that otherwise would be unlawful under the local zoning bylaws. Like a special permit and a variance issued under the Zoning Act, the rights granted by a comprehensive permit must be exercised within a specified period of time, or the rights expire.[7] But neither the Zoning Act nor the Comprehensive Permit Law provide for the expiration of a permit once the construction or the use commences. Upon the recording at the applicable registry of deeds, the entitlement goes into effect, and thereafter it runs with the land,[8] providing lawful status indefinitely.[9] *See Killoran v. Zoning Bd. of Appeals of Andover*, 80 Mass. App. Ct. 655

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7. *See* G.L. c. 40A, § 9, ¶ 14 (special permit will lapse if substantial use has not commenced or construction has not begun, except for good cause, within two years); *id*, § 10, ¶ 3 (rights granted by variance will lapse if not exercised within one year); 760 CMR 56.05(12)(c) (comprehensive permit will lapse if construction is not commenced within three years).

8. Special permits and variances are required by statute to be recorded in the chain of title of the affected land. See G.L. c. 40A, § 11, ¶ 4. Comprehensive permits need not be recorded in order to be effective, but as a matter of practice they often are recorded. Upon the completion of construction, a comprehensive permit is "deemed to run with the land." 760 CMR 56.05(12)(b).

9. While special permits do not typically expire, the permit issuer can by express condition make the permit effective for a limited time, or may require that a permit be renewed periodically. *See, e.g., Hopengarten v. Board of Appeals of Lincoln*, 17 Mass. App. Ct. 1006 (1984) (upholding a permit condition requiring renewal of the permit every three years); *Milton Legion Post No. 114 v. Alves*, 19 Mass Land Ct. Rptr. 311 (Mass. Land Ct. June 6, 2011) (by express condition, a

(2011) (holding that special permit rights and conditions imposed thereon do not expire or become unenforceable due to the passage of time).[10]

Land use entitlements often are granted subject to conditions regulating the permitted project. Such conditions can regulate the construction or dimensions of structures—for example, a condition limiting the height of a building or the maximum lot coverage. Other conditions might regulate the ongoing use. Examples include a condition limiting the volume of traffic, or limiting the discharge of wastewater or its method of treatment and disposal, or requiring the periodic inspection and ongoing maintenance of utility systems. In either case, the conditions in the permit generally are intended to stay in effect for as long as the rights conveyed by the permit. *See Killoran*, 80 Mass. App. Ct. at 660 ("it would be anomalous and unjust if the [plaintiff was] permitted to retain the benefit of the special permit … while discarding the accompanying conditions …."). The permit granting authority, of course, has the discretion to make a condition temporary, as the Board did in the comprehensive permit for Andover Place. We are not aware of any case finding that the expiration of a single time-limited permit condition, by its express terms, triggers the expiration of the entire permit, including its other conditions.[11] And we see no basis in the statutory scheme to infer that a comprehensive permit becomes null and void when a project outlives a single, time-limited condition, which by its express terms expires after a set period of time. That logic does not change despite the singular importance of the expired condition in this case. For these reasons, we conclude that Andover Place continues to be subject to, and have the benefit of, the original comprehensive permit.

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special permit may expire after five years). Those cases support the principle that a land use entitlement without such a condition is valid for as long as the approved uses and structures exist.

10. In *Killoran*, the plaintiff challenged the validity of certain conditions in a 60-year-old special permit, alleging that the conditions expired after 30 years by operation of G.L. c. 184, § 23. The court disagreed. Although *Killoran* focused on the ongoing validity of the permit conditions, not the ongoing validity permit itself (which was not in dispute) the court's analysis presumes that the rights granted by the special permit remain in effect for as long as the landowner needs them.

11. The Andover Place comprehensive permit itself includes certain conditions intended to survive indefinitely. Examples are Condition E.3 ("No on-site parking shall be shared with occupants of premises located off the project Site") and Condition X ("Applicant shall provide … a right along the banks of the River … [for] recreational and park use for the benefit of the general public"). No one could sensibly suggest that the expiration of Condition Q by its own express terms has the effect of nullifying these other conditions.

3. *Does* Ardemore *limit the Committee's jurisdiction to hear this appeal?*

The analysis above leads us to conclude that Andover Place is not required by *Ardemore* to maintain affordable units, and that the project's comprehensive permit remains in effect. The real issue disputed by the parties, though, is whether *Ardemore*'s holding, or the rationale that led to it, limits this Committee's jurisdiction to hear a post-permit, post-construction appeal brought by the owner of the project with no affordable units. In our view, *Ardemore* does not much illuminate this question. That case did not involve an appeal to the Committee, and it says nothing about the scope of our jurisdiction. *Ardemore* clearly says that a project is required to maintain some affordable units for so long as it needs the zoning relief provided by a comprehensive permit. It does not say, or even suggest, that the Committee's jurisdiction is curtailed when affordability restrictions lawfully expire as expressly agreed to by the city or town, as is the case here.

The Board also cites to *Town of Middleborough v. Housing Appeals Comm.*, 66 Mass. App. Ct. 39 (2006) for the proposition that the Committee may only act on applications where a developer is proposing to construct or renovate low or moderate income housing. In *Middleborough*, the Court of Appeals stated that "the comprehensive permit procedure governs applications to build 'low or moderate income housing.' … It is not otherwise available." *Middleborough*, 66 Mass. App. Ct. at 43. But that case was about a disputed subsidy program; the court was saying that a housing development must include low or moderate income housing in order to be eligible for the grant of the comprehensive permit. *Middleborough* did not involve a change to a project that used to have affordable units, and it does not speak at all to the issues at play in this case.

C. Decision on Jurisdiction

Based on the preceding analysis, the Committee is required to decide the scope of its own jurisdiction without clear guidance in the statute, the regulations, or the case law. In the past, and as discussed in detail above, the Committee has interpreted its own jurisdiction broadly when needed to assure that the legislative intent of the Act is carried out. We also have recognized the limits to our jurisdiction where appropriate. *See, e.g.*, *White Barn LLC v. Norwell Zoning Bd. of Appeal,* No. 2008-05, slip op. at 3 (Mass. Housing Appeals Comm. June 12, 2012) (the Committee does not have jurisdiction to

interpret or enforce the subdivision control law); *Meadowbrook Estate Ventures, LLC v. Amesbury Zoning Bd. of Appeals*, No. 02-21, slip op. at 17 (Mass. Housing Appeals Comm. Dec. 12, 2006) (the Committee does not have authority to resolve land title disputes). In a case like the one before us, involving a construction project that will not create any affordable housing, we see no compelling reason to take a broad view of our jurisdiction, and we are inclined to allow the greatest degree of local control over the proposal. At the same time, we recognize our duty to comply with the letter of 760 CMR 56.05(11) and other regulations implementing the Comprehensive Permit Law.

In considering whether to take a broad or a narrow view of our jurisdiction, we have considered whether some other existing regulatory process might better apply to changes to comprehensive permit projects with no affordable units. We specifically considered whether and to what extent such projects are akin to a "pre-existing nonconforming" uses and structures as defined in Section 6 of the Zoning Act; and whether the most appropriate procedure in these circumstances is for the owner to seek permission from the local zoning board of appeals to modify the project as an expansion or alteration of a nonconforming use pursuant to the Zoning Act.[12] We conclude that the answer is no, for two reasons.

First, the Zoning Act defines a pre-existing nonconforming use or structure as a use or structure "in existence ... or begun" in compliance with then-applicable zoning requirements. G.L. c. 40A, § 6, ¶ 1. For purposes of deciding whether a use is nonconforming within the meaning of the Zoning Act, "the question is not merely whether the use is lawful, but *how and when* it became lawful." *Mendes v. Board of Appeals of*

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12. The relevant section of the Zoning Act provides a process and standards for altering or expanding pre-existing, nonconforming uses and structures. It first provides that a new zoning ordinance or bylaw will not apply "to any change or substantial extension of such use ... to any reconstruction, extension or structural change of such structure and to any alteration of a structure ... to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent." G.L. c. 40A, § 6, ¶ 1. It then provides that pre-existing nonconforming uses and structures may be extended or altered upon a finding by a local permitting authority that "such change, extension or alteration [is not] substantially more detrimental" to the neighborhood. *Id.* The interplay between these provisions has generated much case law about how and when a nonconforming use or structure may be altered or enlarged. *See generally*, Bobrowski, HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW (3d ed. 2011 and 2012 Supp.) at pp. 183-202. We note that the Board has taken the position that "it is not necessary ... to determine the hypothetical issue of whether the proposed construction is subject to the nonconforming structure/use provisions of G.L. ch. 40A," Board Motion at p. 3, n.3. Neither party to this appeal addressed the issue of nonconforming uses and structures, or potential applicability of Section 6 of the Zoning Act.

Barnstable, 28 Mass. App. Ct. 527, 531 (1990) (emphasis added). To be deemed "nonconforming," the use or structure must have become noncompliant as a result of action by the city or town to change its zoning. *See Mendes*, 28 Mass. at 529-30 ("a use achieves the status of nonconformity for statutory purposes if it precedes the coming into being of the zoning regulation which prohibits it"). Uses and structures which achieve lawful status some other way generally do not benefit from the protections granted to pre-existing nonconforming uses and structures. *See, e.g., Mendes*, 28 Mass. App. Ct. at 531 (a use authorized by a variance is not a nonconforming use and cannot be expanded according to the standards applicable to a nonconforming use); *McHugh v. Grossman*, Misc. Case No. 256987 (Mass. Land Ct. 2002) (an office use authorized by special permit, then prohibited by a subsequent zoning amendment, is not afforded the protections applicable to a nonconforming use). Unlike a nonconforming use, the typical comprehensive permit project is lawfully noncompliant with zoning from the day it is constructed; the comprehensive permit overrides the local zoning requirements that are inconsistent with the need for low and moderate income housing.

Second, and as importantly, the Committee has no jurisdiction to interpret or apply the Zoning Act. There is no statutory or other basis for the Committee to declare that a project permitted and constructed pursuant to a comprehensive permit might someday, under some circumstances, ripen into a nonconforming use governed by Section 6 of the Zoning Act. The zoning status provided by a comprehensive permit is a unique kind of zoning relief authorized by a wholly separate statutory scheme, to advance a wholly separate legislative goal, and subject to a wholly separate process of administrative and judicial review. If a comprehensive permit project is to be deemed equivalent to a pre-existing, nonconforming use we think that decision must come from a court with jurisdiction to interpret the Zoning Act.

Nor do we see any other clear, alternative means for an owner like the appellant to seek municipal permission for the construction it wants to undertake consistent with the Comprehensive Permit Law, other than the process set forth at 760 CMR 56.05(11). That being so, we are compelled to conclude that the parking modifications at issue in this case must be evaluated within the framework established by that regulation. Under that regulation the local board gets to decide in the first instance whether a proposed change is

substantial; if it is, then the local board then gets first crack at determining if the change is consistent with local needs. But the regulation also allows the owner to appeal to this Committee. We cannot apply only a portion of the applicable regulation and ignore the rest—so, for example, we cannot say that the proper procedure is for the owner to approach the Board for approval as set forth in 760 CMR 56.05(11)(a), (b) and (c), and then disregard the parts of the regulation ((c) and (d)) that deal with appeal to the Committee. Accordingly, we conclude that the Committee has jurisdiction to hear this appeal and to determine if the proposed parking changes are "substantial" pursuant to 760 CMR 56.05(11).

IV. DECISION ON WHETHER THE PROPOSED CHANGES ARE SUBSTANTIAL OR INSUBSTANTIAL

A. The Standard for a "Substantial" Change

Under 760 CMR 56.05(11), the first step in this case is for the Committee to determine if the Board was correct in concluding that the parking modifications proposed for Andover Place constitute a "substantial" change to the original project. The regulations do not define the terms "substantial" or "insubstantial." Instead, they provide guidance on the kinds of changes that "generally" should be deemed substantial, as well as the kinds of changes that ordinarily should be deemed insubstantial. 760 CMR 56.07(4). The list of examples in the regulations is by no means an exhaustive list. Moreover, the listed examples apply only "generally" and may not apply to a particular project set in a specific context.[13] None of the examples listed in the regulations are similar enough to the proposed parking modifications to compel a result one way or another.

Where the regulatory examples are not determinative, the issue of whether proposed project modifications are "substantial" is one that requires a careful factual analysis. The specific changes proposed must be examined in relation to the original project, taking into consideration the adverse impacts, if any, the changes could have on residents or on the surrounding area. *See Lever Development, LLC v. West Boylston Zoning Bd. of Appeals*,

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13. By way of example, the regulations state that "a reduction in the number of housing units proposed" generally is not a substantial change. 760 CMR 56.07(4)(d)1. That general rule does not foreclose the possibility that a project with fewer units nevertheless will be configured on the site in a way raises a valid local concern.

No. 04-10, Rulings on Notice of Change, slip op. at 2 (Mass. Housing Appeals Comm. Dec. 16, 2005) ("the effect of the proposed changes on local concerns is important"). Changes that lessen the impact of a project will not be considered substantial, or reason to remand a case to the local board. *Id.* (*citing Cloverleaf Apts. v. Natick*, No. 01-21, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 23, 2002).

Before applying this standard to the facts of this case, we note that Committee precedent has applied the "substantial" change standard in two distinct contexts. Many of our cases deal with project changes that are proposed before construction has commenced—that is, after the issuance of a permit by the local board, but while an appeal is pending before the Committee. *See, e.g.*, *Lever Development*, No. 04-10, Rulings on Notice of Change, slip op. at 2-6; *Cloverleaf Apts.*, No. 01-21, slip op. at 5; *CMA, Inc. v. Westborough Zoning Bd. of Appeals*, No. 89-25, slip op at 19-20 (Mass. Housing Appeals Comm. June 25, 1992). In such a case, the issue of whether a project change is substantial or not determines only whether a proposed change is remanded to the local board for review before the Committee holds its own *de novo* hearing. Whether a proposed change is deemed "substantial" or "insubstantial" is of only limited importance in this context, because even if a proposed change is deemed to be insubstantial—and therefore deemed approved by the local board—the modified project still has to be evaluated by the Committee to ensure it is consistent with local needs. Accordingly, in this first context, the Committee has been more amenable to determining that proposed changes are insubstantial. For example, in *Lever Development*, the Committee found that project changes were insubstantial where they involved, among other changes, a reduction in the number of buildings from 5 to 4, the relocation of one of those buildings; an increase in the number of bedrooms from 190 to 209; reconfiguration of the access roadway for two-way rather than one-way travel; a small increase in building footprint; and a slight reduction of impervious area. *See Lever Development,* slip op. at 2-3. That holding meant simply that there would be no remand of the proceedings, and the developer would not be required to present the changes to the local board before the Committee proceedings went forward. *Id.* at 6.

In very few cases have we applied this same regulatory framework to cases like this one, where a change is proposed after construction has been completed. In that context, a

determination that a change is "insubstantial" has more practical importance—hanging in the balance is not simply whether or not the developer will avoid a remand to the local board and save some time, but whether the change will be deemed approved on its merits. Yet, our few precedents show that the issue of whether a proposed change is substantial often is not contested in this context. *See, e.g., Mattbob, Inc. v. Groton Zoning Bd. of Appeals*, No. 09-10, slip op. at 2-3 (Mass. Housing Appeals Comm. Dec. 13, 2010) (removal of age restriction and potential, ancillary changes to the wastewater system and roadway characterized by the local board and analyzed by the Committee as "substantial" changes, without objection by the owner); *511 Washington Street, LLC v. Hanover Zoning Bd. of Appeals*, No. 06-05 (Mass. Housing Appeals Comm. Jan. 22, 2008) (assuming, without addressing, that the removal of an age-restriction on tenants is a substantial change); *Drumlin Development, LLC v. Sudbury Bd. of Appeals*, No. 01-03 (Mass. Housing Appeals Comm. Sep. 27, 2001) (post-construction approval of a change in the design and location of signage analyzed as a substantial change, even though the changes caused little, if any, adverse impact). The Committee generally has not approved post-construction changes as "insubstantial" except in the unusual circumstance of when the local board has missed the regulatory deadlines for responding to the applicant. *See Rosewood Realty Trust v. Mansfield Bd. of Appeals*, No. 06-03, slip op. at 5 (Mass. Housing Appeals Comm. Apr. 25, 2007) (finding that constructive approval is non-discretionary where the regulatory deadline is missed).

This precedent supports the principle that the Committee will avoid an interpretation of 760 CMR 56.05(11) that allows an owner an expedited way to secure approval of post-construction changes without a thorough vetting of whether the proposed change is consistent with local needs. That is, at the end of the day, the relevant statutory standard. This Committee will exercise its discretion in making decisions about "substantial" changes accordingly.

B. Application of the Facts to the "Substantial" Standard

In this case, the parties have made cross motions for summary decision based on the pleadings, the Joint Statement and the various documents attached thereto. A motion for summary decision "shall be made if the record before the Committee, together with the

affidavits (if any), shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 56.06(5)(d).

In this case there are no disputed facts. The record shows that the owner has proposed the construction of two new single-story parking garages within the original project's existing paved parking area. Joint Statement, ¶ 6, at p. 2. One of the garages will have a footprint of approximately 5,382 square feet and the other will have a footprint of approximately 5,060 square feet. Joint Statement, Exh. 5, Exh. 2 (site plan showing dimensions of proposed garages). The original project's parking area comprises 352 surface spaces. The new parking configuration would provide 304 surface spaces and 36 new garage spaces, for a net loss of 12 parking spaces. Joint Statement, ¶ 6, at p. 2.

The record also includes a good deal of information bearing on the question of whether the parking modifications will adversely affect residents, abutters or the surrounding neighborhood. Most, if not all, of this information supports the conclusion that the parking modifications will provide a welcome amenity for some of the residents of Andover Place without creating or exacerbating any adverse impact on the neighborhood. For example, it seems clear that there is more than enough parking capacity on site now, and that there will continue to be sufficient parking capacity if the garages are constructed.[14] There is no evidence on record to suggest that the proposed net loss of 12 parking spaces will cause a parking shortage on the project site or otherwise cause a hardship for the residents of the project, or any abutters. Similarly, the parking modifications will not increase the impervious area on the site, and will not increase storm water runoff or adversely affect storm water management. See Joint Statement, Exh. 6. There is no reason to believe that abutting properties or wetlands will be impacted any differently from storm water runoff. And finally, it is undisputed that after the parking garages are constructed, the structures on the site will continue to comply in all respects

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14. The owner's property manager has attested that in the 22-year period since the original project was constructed, there has always been a surplus of parking spaces available to the residents, staff and visitors. Joint Statement, Exh. 5. In addition, the Joint Statement includes a Parking Demand and Utilization Study prepared for the owner which establishes that the proposed parking supply of 1.55 spaces per unit at full occupancy exceeds the actual peak parking demand of 1.36 spaces per unit. Joint Statement, Exh. 8. The traffic study further states that the proposed parking ratio is consistent with parking generation rates of the Institute of Transportation Engineers for low to midrise apartment communities. *Id.*

with the applicable dimensional requirements in the zoning bylaws, including height, setback, and lot coverage limitations. *See* Joint Statement, Exh. 6. Accordingly, abutters will not contend with any impacts related to building height, massing or setback that they would not expect from an allowed industrial use on this site.

On the other hand, it also is undisputed that the owner's proposal will add two wholly new structures to the site, increasing the cumulative building footprint from 39,170 square feet to 49,612 square feet—an increase in total lot coverage of approximately 26.7%. *See* Joint Statement, Exh. 6, at p. 5. Even though the lot coverage will remain well under the maximum allowed as of right in the Industrial zoning district (or in any district, for that matter), we agree with the Board that a significant increase in lot coverage—even without the addition of more units, and even if the new structures comply with current zoning requirements—could be deemed a more intensive use of the site. At the very least, the addition of building footprint increases the building density and reduces the open area on the site.[15]

Of course, the question presented originally to the Board and now to this Committee is not whether adding building footprint increases the intensity of use, or reduces open space, but whether that increase (or reduction) is "substantial." The developer has convincingly shown that the increase in building footprint has no *actual impact* on any matter of local concern. The Board has not introduced any evidence on the record to demonstrate an actual adverse impact. Rather, the Board has taken the position that the increase in building footprint, the introduction of a new building type, and the net loss of 12 parking spaces is enough to meet the "substantial change" standard, regardless of actual impact, or lack thereof. *See* Board Motion at p. 3 ("there is no justification to allow intensified residential use of the site in the form of more building footprint") and p. 7-8 (asserting without reference to any matter of local concern that a 26.7 percent in lot coverage is a substantial change); Joint Statement, Exh. 10, ¶ 9, p. 4 (Board's decision states that "[t]here is no justification to allow … more building footprint ... when there is no contribution whatsoever" to the Town's supply of affordable housing).

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15. The record does not indicate what impact the new buildings might have on views or scenic vistas, so we do not include that issue in our analysis of potential impacts. By referring to the reduction in the site's "open area," we mean only the area left free of buildings, and do not imply that a parking lot is the equivalent of undisturbed or landscaped open space.

In evaluating these positions, we have looked first to our own precedent to see what kinds of changes we have deemed to be "substantial." In at least one prior decision, a project change that involved a modest increase in building footprint, among other changes, was deemed an insubstantial change. *See Lever Development, LLC v. West Boylston Zoning Bd. of Appeals*, No. 04-10, Rulings on Notice of Change (Mass. Housing Appeals Comm. Dec. 16, 2005). However, that case is distinguishable from this one in several respects. First, it appears that the owner here is proposing a significantly greater increase in lot coverage than was at issue in *Lever*. *See Lever*, No. 04-10, Rulings on Notice of Change, slip op. at 5 (describing the changed footprint as only "slightly larger"). Second, the increase in footprint at issue in *Lever* was but one of numerous changes proposed, including a reduction in the total number of buildings and a slight reduction in the total impervious area. *See id.* at 2. *Lever* also was a case in which the permit was still being appealed before the Committee, so the finding that the changes were insubstantial meant only that the changes would not be remanded for a hearing in front of the local board. The posture of this case is much different, since construction was completed long ago, and a finding that the changes are insubstantial would mean the changes are deemed approved, and consistent with local needs.

We also have looked for guidance to the case law pertaining to nonconforming uses, which although not applicable here, carries some weight by analogy due to the similarity between a pre-existing nonconforming use, and comprehensive permit project that has outlived its affordability restrictions. In that context, we note that the existence of a nonconforming use does not permit the addition of new buildings for the extension or enlargement of that use. *Powers v. Building Inspector of Barnstable*, 363 Mass. 648, 658 n.4 (1973) (citations omitted).[16] Courts also have held that a new free-standing structure cannot be added to a pre-existing, nonconforming lot. *See Boutin v. Brown*, 2012 WL 4858991 at *7 (citing *Schiffenhaus v. Kline*, 79 Mass. App. Ct. 600 (2011)).

Finally, we have looked to the policy goals underlying the Comprehensive Permit Law. The primary policy goal is "to provide relief from exclusionary zoning practices

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16. The cases cited in *Powers* are decisions interpreting a prior version of the Zoning Act, but there is no reason to doubt their continuing validity. *Powers* continues to be cited by courts working under the current Zoning Act. *See, e.g., Vokes v. Avery W. Lovell, Inc.*, 18 Mass. App. Ct. 471, 484 n.21 (1984).

which prevented the construction of badly needed low and moderate income housing ...." *Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow*, LLC, 464 Mass. 166, 168 (2013) (internal quotations and citations omitted). The Comprehensive Permit Law plainly was intended to increase the supply of affordable housing units. It is not at all clear that it was intended to enable the construction of accessory parking structures for those units long after they were constructed, occupied and converted to market-rate apartments. Moreover, "[t]he structure of the act itself reflects a 'careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements ... while foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons of low income.'" *Sunderland*, 464 Mass. at 168 (internal citations omitted). That the Act is intended to balance local autonomy against the need for affordable housing suggests that the views of local officials should hold greater sway where no new affordable housing is at stake. We may properly take that legislative policy judgment into consideration when deciding whether to disturb the Board's decision in this case.

For all of these reasons, we find that under the circumstances of this case the construction of new accessory parking garages will increase the lot coverage and the intensity of use on the site, that these impacts are legitimate matters of local concern, and that these impacts are significant enough to conclude that the proposed parking modifications constitute a substantial change to the original project. Accordingly, we will now review whether the proposed parking changes are consistent with local needs.

V. IS THE BOARD'S DENIAL CONSISTENT WITH LOCAL NEEDS?

Under our precedents, the denial of a proposed change to an approved project is treated as an approval with conditions. The owner bears the initial burden of proving that the denial makes the proposal uneconomic. If the owner sustains its burden, the Board must show that there is a valid local concern that supports the denial of the change, and that this concern outweighs the regional need for affordable housing. *See 511 Washington Street, LLC v. Hanover Zoning Bd. of Appeals*, No. 06-05, slip op. at 9-10 (Mass. Housing Appeals Comm. Jan. 22, 2008); *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at 8 (Mass. Housing Appeals Comm. Sep. 18, 2007). In this case, the owner has not attempted

to show that denial renders the project uneconomic, instead staking its case on the threshold issue of whether or not the parking changes are "substantial." *See* Appellant's Memorandum in Opposition, at p. 5. This approach may be unavoidable, since it would be difficult to convincingly argue that an existing apartment community, constructed long ago and profitably leased for many years, is made uneconomic by the absence of a new parking amenity. We find in this case that the owner has not met its initial burden, and conclude that the Board's denial of the change is consistent with local needs.

VI. THE SETTLEMENT AGREEMENT

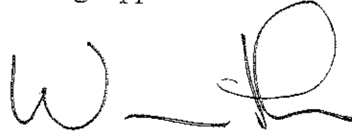
The Board also has argued that a settlement agreement entered into by the Board and the owner precludes this Committee from issuing a decision on the owner's appeal, ostensibly because the settlement agreement is "an enforceable document requiring a certain number of parking spaces on the property." Board's Motion for Summary Decision, at pp. 6-7. Because we have ruled in favor of the Board on the merits of the primary issue in dispute, we do not need to dispose of this argument, other than to say that we view the settlement agreement as a modification of the comprehensive permit mutually consented to by the owner and the Board. To the extent the Board desired to seek enforcement of the settlement agreement as a contract separate and apart from the comprehensive permit, it would have had to do so in a court of competent jurisdiction. This Committee does not have jurisdiction to resolve contract disputes.

VII. CONCLUSION AND ORDER

For the reasons stated herein, the Committee concludes that the parking modifications proposed by the owner constitute a substantial change as that term is used in 760 CMR 56.05(11) and that the Board's denial of that change was consistent with local needs. Accordingly, the owner's cross motion for summary decision is DENIED and the Board's cross motion for summary decision is ALLOWED. The Board's decision denying the proposed parking changes is affirmed.

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.

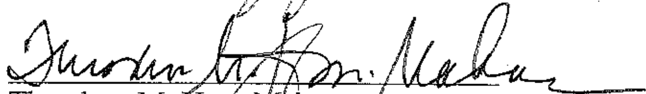
Housing Appeals Committee



Date: February 27, 2013

Werner Lohe, Chairman

Carol A. Gloff



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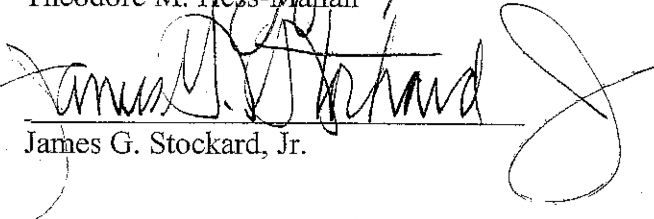

James G. Stockard, Jr.

Jonathan M. Cosco
Counsel and Hearing Officer