

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

COZY HEARTH COMMUNITY CORPORATION

v.

EDGARTOWN ZONING BOARD OF APPEALS

No. 06-09

DECISION

April 14, 2008

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COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

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COZY HEARTH COMMUNITY)	
CORPORATION,)	
	Appellant)	
)	
v.)	No. 06-09
)	
EDGARTOWN ZONING)	
BOARD OF APPEALS,)	
	Appellee)	
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DECISION

This is an appeal pursuant to G.L. c. 40B, §§ 20-23, and 760 CMR § 56.00,¹ brought by Cozy Hearth Community Corporation (Cozy Hearth), from a decision of the Edgartown Zoning Board of Appeals granting a comprehensive permit with certain conditions with respect to property located in Edgartown, Massachusetts. For the reasons set forth below, the decision of the Board is set aside and the comprehensive permit is ordered modified to conform to this decision.

I. PROCEDURAL HISTORY

On February 22, 2006, Cozy Hearth submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23, for the construction of 11 single family homes on 10.9 acres on Watcha Path, Edgartown. The project was to be financed

1. At the time Cozy Hearth brought its 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 in most respects material to this decision. Where relevant substantive changes to the regulations affect the discussion, they are noted.

under the New England Fund of the Federal Home Loan Bank of Boston. Pre-Hearing Order, § II.3.

The Board's decision indicates that Cozy Hearth's application was initially referred to the Martha's Vineyard Commission (MVC) for its review. The decision of the MVC was received on February 16, 2006.² The application was then presented to the Edgartown Town Clerk on February 22, 2006. The Board's public hearing began on March 15, 2006 and continued on March 22, April 18, April 26, May 10, and May 24, 2006, when the Board voted to granting the permit with specified conditions. The Board filed its decision with the Town Clerk on June 8, 2006. On June 28, 2006, Cozy Hearth filed its appeal with the Housing Appeals Committee. The Presiding Officer held a Conference of Counsel on July 14, 2006, and conducted a Pre-Hearing Conference on November 7, 2006. The parties thereafter submitted pre-filed direct testimony and Cozy Hearth filed pre-filed rebuttal testimony. On May 7, 2007, the Committee's *de novo* evidentiary hearing commenced, and continued on May 9, 2007, consisting of sworn cross-examination. The presiding officer also conducted a site visit. Following the submission of a verbatim transcript, the Board and Cozy Hearth filed their post-hearing memoranda on July 30, 2007.

II. FACTUAL OVERVIEW

Cozy Hearth is a non-profit organization. Its articles of incorporation state its purpose is "creating a community containing affordable housing which qualifies under a state or federal housing subsidy program...." Exh. 9A. Its application to the Board for a comprehensive permit states that "[t]he directors of Cozy Hearth ... are local residents with extensive ties to the community, who came together in 2002 to address the severe shortage of affordable housing on Martha's Vineyard." Exh. 39. Through Cozy Hearth, the individual directors seek approval for the project, which would include three affordable single family

2. The MVC conditioned its approval of the project moving forward on, among other things, 1) Cozy Hearth building three 3-bedroom houses approximately 1,200 square feet each permanently deed-restricted to be occupied by occupants earning 80 percent or less of the area median income for Dukes County, and 2) Cozy Hearth including deed restrictions for four additional lots requiring for 30 years resale to occupants earning less than 150 percent of the area median income and requiring for another lot a 30-year deed restriction requiring any resale to occupants earning less than 140 percent of the area median income. Exh. 2.

houses and eight additional houses in which the directors of the corporation would reside. Specifically the project contemplates the construction of three homes designated for owners at 80 percent of median income, one home designated for an owner at 140 percent of median income, four homes designated for owners at 150 percent of median income and three market rate homes. Cozy Hearth received funding approval from the Mass Housing Finance Agency (MassHousing) under both MassHousing's Housing Starts Program and the New England Fund (NEF) of the Federal Home Loan Bank of Boston. Exh.18. Also see Exh. 39; Pre-Hearing Order, § II.3.

The property currently is zoned as three separate lots. It is located in a district zoned for 3-acre lots, the RA-120 Residential/Agricultural District. Exhs. 10, p. 6; 26B, p. 2; 31, ¶¶ 5-6, 10; 39. The site, comprised of the three lots, is a rectangular parcel with a short side fronting on Watcha Path, an unimproved private roadway that intersects the Edgartown-West Tisbury Road. Other private residential developments are located on Watcha Path.

The Board's decision dated May 24, 2006, granted a comprehensive permit subject to a number of conditions. Exh. 1. Additional facts specific to the disputed issues are addressed below in the discussions of these issues.

III. PRELIMINARY ISSUES

A. Regulatory Changes

During the pendency of this appeal, following the parties' submissions of post-hearing memoranda, DHCD changed its regulations pertaining to Chapter 40B. By its terms, the new regulation, 760 CMR 56.00, supersedes, in most respects, both 760 CMR 30.00 and 31.00, under which the developer brought its appeal. However, the question of whether certain provisions in the new regulation should be held to apply here depends on a number of circumstances.

In principle, only laws and regulations relating to procedure, and not those affecting substantive rights, are commonly treated as operating retroactively, that is, as applying to pending actions or causes of action. See *City Council of Waltham v. Vinciullo*, 364 Mass. 624, 626, 307 N.E. 2d 316, 318 (1974), quoting *Hanscom v. Malden & Melrose Gas Light Co.*, 220 Mass. 1, 3, 107 N.E. 426 (1914). Also see *Fontaine v. Ebtec Corp.*, 415 Mass 309,

319, 613 N.E. 2d 881, 888 (1993). However, this “rule is far easier to state than it is to apply...” *Vinciullo, supra*, 364 Mass. 624, 626. It is also generally assumed that “new legislation alters existing law.” *Morrison v. Lennet*, 415 Mass. 857, 863, 616 N.E. 2d 92, 96 (1993). The Committee has previously stated that we will “look to the possible intention of DHCD as reflected in the regulatory language itself.” *Casaletto Estates, LLC v. Georgetown*, No. 01-12, slip op. at 19 (Mass. Housing Appeals Committee May 19, 2003) (“removal of the reference to the date of application may well have reflected a desire to change the controlling date”).

We will not follow a change in a provision that would alter the evidentiary proof required to be submitted in a hearing that has already taken place. See *Vinciullo, supra*, 364 Mass. 624, 628 (“once a trial has begun, practical considerations of efficiency and finality dictate that such a statute then in effect will control the trial itself and will be the standard used in any subsequent appellate review of the trial. Although ‘retroactive’ in its operation on past events, the evidentiary statute would nevertheless not apply to court proceedings commenced and under way prior to the statute’s effective date”). This rule is applicable here because of changes to the regulatory scheme that occurred effective February 22, 2008, after the conclusion of the evidentiary hearing in the matter and the submission of post hearing memoranda. Therefore, the existence of a difference in treatment accorded by the new and former regulations would require us to apply 760 CMR 30.00 and 31.00.

B. Preliminary Requirements

To be eligible to proceed on a comprehensive permit application before a zoning board, or to bring an appeal before the Housing Appeals Committee, an applicant must fulfill three preliminary requirements. In accordance with 760 CMR 31.01(1), the parties stipulated that Cozy Hearth controls the site of the project as required by § 31.01(1)(c) and that the project which is the subject of the application is fundable under the NEF program as required by 760 CMR 31.01(1)(b). Pre-Hearing Order, § II.3-4.

The parties specified in the Pre-Hearing Order that Cozy Hearth is required to establish that it is a limited dividend organization or alternatively that it is a non-profit organization in accordance with 760 CMR 31.01(1)(a). Pre-Hearing Order § III.2.A.1. The

parties dispute whether Cozy Hearth, as a non-profit, could also be a limited dividend organization within the meaning of Chapter 40B. Cozy Hearth argues that, even though it is organized as a non-profit, see Exh. 9A, it should be considered to be a limited dividend organization for the purposes of this application because MassHousing considered it to be a limited dividend organization. MassHousing's project eligibility determination stated that the developer must be "a limited dividend organization." Exh. 18, p. 2. The agency also required Cozy Hearth to comply with profit limitations applicable to limited dividend organizations. *Id.* Cozy Hearth also asserts it submitted regulatory documents applicable to a limited dividend organization. See Appellant brief, p. 5.

Under 760 CMR 30.02, the definition of "limited dividend organization" encompassed an applicant for a comprehensive permit that was not a "public agency." However, 760 CMR 56.02 excludes a non-profit from the definition of a limited dividend organization. Based on our reasoning above, since this proceeding was fully litigated before the regulatory change, we apply the former rule in § 30.02 as the law of the case, and consider that Cozy Hearth may be both a non-profit and a limited dividend organization. See *Vinciullo, supra*, 364 Mass. 624, 628.³ However, for the purposes of examining profit, as we discuss below, we believe the non-profit standard is more appropriate here.

The parties have also stipulated that the Town of Edgartown has not satisfied the statutory minima set forth in the second sentence of the definition of "consistent with local needs" in G.L. c. 40B, § 20. Pre-Hearing Order, § II.2. See 760 CMR 31.04(1); 31.06(5); 31.07(1)(e). Also see 760 CMR 56.07(2)(b). As case law and Committee precedents establish, the fact that Edgartown does not meet the statutory minima establishes a rebuttable presumption of a substantial regional housing need that outweighs local concerns. 760 CMR 31.07(1)(e). Also see 760 CMR 56.07(3)(a); *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 367, 294 N.E. 2d 393, 413 (1973) (failure to meet statutory minimum housing obligations "will provide compelling evidence that the regional

3. Under 760 CMR 56.04(6), the issuance of a project eligibility letter by MassHousing, see Exh. 18, would constitute conclusive proof that Cozy Hearth meets the site control, fundability and limited dividend or non-profit organization requirements.

need for housing does in fact outweigh the objections to the proposal”); *Woburn Board of Appeals v. Housing Appeals Committee*, 66 Mass. App. Ct. 1109, 2006 WL 1493052 (2006), further appellate review denied, *Board of Appeals of Woburn v. Housing Appeals Committee*, 447 Mass. 1107, 853 N.E. 2d 1059 (2006).

IV. ECONOMIC EFFECT OF THE BOARD’S CONDITIONS

When a developer appeals a board’s grant, with conditions, of a comprehensive permit, the central question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee’s procedures, however, there is a shifting burden of proof. The Appellant must first prove that the conditions in the aggregate make construction of the housing uneconomic. See 760 CMR 31.06(3); *Princeton Development, Inc. v. Bedford*, No. 01-19, slip op. at 5 (Mass. Housing Appeals Committee Sept. 20, 2005), *aff’d* No. 05-3711 (Middlesex Super. Ct. Nov. 14, 2007); *Walega v. Acushnet*, No. 89-17, slip op. at 7-8 (Mass. Housing Appeals Committee Nov. 14, 1990). Also see G.L. c. 40B, § 20. Cozy Hearth argues that it has provided sufficient evidence that the conditions render the project uneconomic. The Board contends that Cozy Hearth has failed to make its *prima facie* showing. Although Cozy Hearth objects to many of the conditions contained in the Board’s decision, the primary condition it cites is the limit to the number of homes on the property to nine, rather than the 11 units it sought. See Exhs. 19, 38.⁴

Both parties applied the Committee’s historical methodology -- the Return on Total Costs (ROTC) analysis. See, e.g., *Rising Tide Development, LLC v. Sherborn*, No. 03-24, slip op. at 4 (Mass. Housing Appeals Committee Mar. 27, 2006) (*Sherborn*); *Rising Tide*

4. Other conditions the developer challenged as contributing to making the project uneconomic are Conditions 1 (installation of a 10,000 gallon cistern); 2 (installation of a road turnaround on the site); 3 (installation of a new access road on to a state highway over public property); 4 (turnouts on Watcha Path); 5 (membership in Watcha Path Road Association); 6 (grading and maintenance of Watcha Path during construction); 7 (prohibition of herbicides, pesticides, fungicides or quick release chemical fertilizers); 8 (regulation of home businesses over and above existing local requirements); 9 (prohibition of rental of the income/resale restricted lots); and 10 (limitation on the number, use, configuration and location of outbuildings). Pre-Hearing Order, § III.2.A.2. See Exh. 1.

Development, LLC v. Lexington, No. 03-05, slip op. at 11 (Mass. Housing Appeals Committee June 14, 2005). The estimated ROTC is total sales less total development costs, or when calculated as a percentage, total return divided by total development costs. See *Sherborn*, No. 03-24, slip op. at 6.

As we discuss below, although the parties disagreed about the estimates of certain components of cost and revenue, we agree with Cozy Hearth that the nine-unit project approved by the Board would be uneconomic under any standard, even under the Board's scenario.

A. The Applicant's Presentation

Cozy Hearth's arguments in support of its claim that the Board's decision rendered the project uneconomic rests on the provisions of the former 760 CMR 31.06(3), which states the applicant must show:

- (a) in the case of a public agency or non-profit organization, the conditions make it impossible to proceed in building or operating low or moderate income housing without financial loss,
- (b) in the case of a limited dividend organization, the conditions imposed by the Board make it impossible to proceed in building or operating low or moderate income housing and still realize a reasonable return as defined by the applicable subsidizing agency, or
- (c) alternatively, in either case, the conditions would result in a subsidizing agency refusal to fund. See 760 CMR 31.07(1)(f).⁵

First, Cozy Hearth argues that, even though it is organized as a non-profit, see Exh. 9A, § 31.06(3)(b) should govern in this instance, because MassHousing considers it to be a limited dividend organization. The developer's economic expert testified that MassHousing's site approval letter included conditions that the developer must be a limited dividend organization and must limit its profit to no more than 20 percent, see Exh. 18, p. 2, shifting the uneconomic standard for this project from that of a non-profit to one for a limited

5. 760 CMR 56.00 has eliminated the alternative found in § 31.06(3)(c); however, for the purposes of this appeal, the parties have argued the applicability and meaning of this provision and we will apply it to this case.

dividend organization. He also stated that MassHousing has endorsed the standard of a profit margin below 15 percent as rendering a project uneconomic. Exh. 38, ¶ 1.

For this proceeding, this expert prepared a *pro forma* financial statement assuming construction of the nine unit project approved by the Board. Exh. 19A. He relied on the land value appraisal and estimates of construction, site development and other costs provided by the developer's other witnesses, and stated that they were all reasonable based on his experience in affordable housing development. He also considered projected revenue based on market value testimony of Cozy Hearth's expert witness, as well as his own expertise. Exh. 19. He originally estimated a loss of 49.6% (-\$2,837,744), based on assumptions of a site acquisition value of \$1,338,000 and construction costs of \$3,035,506, with total development costs of \$5,726,744 and total sales revenues of \$2,889,000. Exh. 19. In his rebuttal testimony, he submitted an opinion estimating a loss of 29% or -\$1,580,750, based on 1) reducing the site acquisition value by trending it back to the date of the application for a project eligibility letter as recommended by the Board's expert, and 2) increasing to market value the sales revenue for the five moderate income units as required by MassHousing. See Exh. 18; see note 2, *supra*. As a result his estimate of total development costs decreased to \$5,455,750 and that of total sales revenues increased to \$3,875,000.

B. The Board's Response

1. Economics of Nine-Unit Project

The Board argues that the standard for a non-profit organization, rather than that of a limited dividend should apply. Under such circumstances, it argues, any profit renders the project economic, since the regulation requires for a non-profit organization, that "the conditions make it impossible to proceed in building or operating low or moderate income housing without financial loss." 760 CMR 31.06(3)(a). Based on his own evaluation and analysis of estimated costs and revenues for the project, the Board's expert gave the opinion that the expected profit was \$102,000, or a 2.4% return on a total development cost forecast of about \$4,258,000. Exh. 27, ¶ 76 and Attach/Exh. 9. We agree with the Board that a non-profit, such as the Appellant, should be required to meet the uneconomic standard of

§ 31.06(3)(a), as it is not intended to develop the property as a profitable enterprise; rather its purpose is to earn sufficient revenues to support the costs of the project.

Relying on testimony of its economic expert, Cozy Hearth argues that the nine-unit project approved by the Board would be uneconomic even under the Board's scenario of a small 2.4% profit,⁶ because the Board's conditions would result in the subsidizing agency's refusal to fund the project with such a small profit margin or margin for error. See § 31.06(3)(c);⁷ Exh. 38, ¶¶ 1-2; also see 760 CMR 56.07(2). We find credible the testimony of Cozy Hearth's expert that the Board's estimated profit was an inadequate cushion against risk of loss. He stated that the Appellant, a single purpose corporation, has no assets other than the equity in the project site. Therefore, any cost overruns or overestimation of market sales prices or absorption periods could not be covered. The expert stated that no lender would be willing to fund a project such as this without an adequate cushion, and this profit margin would be inadequate. Exh. 38, ¶ 2; Tr. II, 68. We are persuaded by his opinion that even under the Board's scenario, a 2.4% profit would be inadequate for a lender to agree to fund the project. Therefore, we agree with the Appellant that the Board's estimates of costs and revenues, as well as its own, demonstrate that the nine-unit project would be uneconomic.

2. Comparison of Economics of Proposed and Approved Projects

Relying on its expert's opinion, the Board also argues that the developer must not only show that the approved project is uneconomic, but must also demonstrate that the project it proposed and seeks to have approved would be *economic*, that is, Cozy Hearth must show the project was economic before the imposition of the Board's comprehensive permit conditions. See Exh. 27, ¶ 23.

In response, Cozy Hearth cites *Princeton Development, supra*, No. 01-19, as the authority for its position that the Committee need not rule on the economic feasibility of the

6. Cozy Hearth's economic expert described it as a "2.8% profit." See Exh. 38, ¶ 1. The difference between 2.4% and 2.8% is immaterial here.

7. This provision established a presumption based on proof that the subsidizing agency refused to fund a project based on a condition imposed by the Board. See 760 CMR 31.07(1)(f).

11-unit proposal with which the Appellant is willing to proceed. See *id.* at 8-9. Also see Exh. 38, ¶ 3.

Our general rule is that the developer must simply prove that the development is uneconomic as conditioned by the Board. See *Princeton Development, supra*, No. 01-19, slip op. at 8-9. Following the submission of the parties' briefs in this matter, the Committee decided *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op at 12-13 (Mass. Housing Appeals Committee Sept. 18, 2007), a case involving a denial of a modification to a comprehensive permit to permit access to the town sewer system. In *Avalon Cohasset*, we stated, "[u]nder the facts presented here [involving a proposed change in the project after a permit had been issued], where the denial of a change is at issue, we rule that to sustain its burden the developer is required to establish ... that the ROTC for that development is significantly more uneconomic than the development it proposes to build." *Id.* at 13. We gave no indication as to whether in the future, under different factual circumstances, such a burden should be imposed on a developer when the issue was not presented in the parties' pre-hearing order, or whether the Board should be held to some higher standard. Under the facts in the case currently before us, where the hearing was completed, and briefs had been submitted before the *Avalon Cohasset* ruling was issued, we rule that the developer was not required to establish that the originally proposed development was economic.⁸ See *id.* at 12, noting that under some circumstances, a developer may choose to go forward with an uneconomic development. That possibility does not affect the economic analysis required here under Chapter 40B.

Accordingly, we find that Cozy Hearth has demonstrated that the Board's conditions in the aggregate make construction of the housing uneconomic.

8. While the Board's economic expert focuses much of his testimony on the comparison of the developer's figures for a 9-unit development in comparison to an 11-unit development, he did not analyze whether, assuming his own cost and revenue estimates, an 11-unit development would be economic. It appears that using his own estimates and methodology, the 11-unit project would achieve a profit of roughly 11%, compared to the 2.4% profit he attributed to the 9-unit project. See, e.g., Exh. 27, ¶ 26 and Attach/Exh. 9. This discrepancy is significant.

V. LOCAL CONCERNS

Once the Appellant has demonstrated that conditions in the Board's decision would, in the aggregate, render the project uneconomic, the burden then shifts to the Board to prove that each condition contested by the developer is consistent with local needs. *Princeton Development, supra*, No. 01-19, slip op. at 9. To do so, the Board must prove first, that there is a valid health, safety, environmental, design, open space or other local concern which supports each of the contested conditions imposed, and then, that such concern outweighs the regional need for low and moderate income housing. G.L. c. 40B, §§ 20, 23; 760 CMR 31.06(7). See 760 CMR 56.07(2)(a)(3) and (b)(3). See *Hilltop Preserve LTD Partnership v. Walpole*, No. 00-11, slip op. at 4 (Mass. Housing Appeals Committee Apr. 10, 2002), citing *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E. 2d 393, 412 (1973) and *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

The Board argues that its decision to restrict the development to nine units and impose the other contested conditions was consistent with local needs to ensure roadway safety, safe access to the site and adequate fire protection.

A. Density, Traffic and Roadway Safety

The Board argues that the traffic resulting from the proposed project of 11 units will exacerbate safety concerns on Watcha Path and at the intersection of Watcha Path and the Edgartown-West Tisbury Road. The Board argues that Watcha Path and the intersection with the Edgartown-West Tisbury Road are hazardous and unsafe in their present condition and with the present traffic load and that increased traffic flow, from 9 or 11 additional units will further degrade public safety. It also argues that the issues of site access and traffic are intertwined.

The Board also claims that the density of the project (the issue of 9 versus 11 units) is at the root of the unsafe conditions. Under current zoning, it would be possible to build a single family dwelling and a guest house on each of the three lots that comprise the project site. See Exhs. 10, 26B, p. 19. The Board has granted permission for nine single family homes, rather than the 11 sought by the developer. The traffic expert testified that the project

would generate 10 one way trips per day per residence, or 110 one way trips per day for the proposed development and 90 for the approved project. The additional trips per day caused by the project constitute a difference of 20 additional trips between the approved 9-unit project and the proposed 11-unit project. Exh. 26, ¶ 7; 37, ¶ 2. The developer's traffic expert stated that the 110 trips would not significantly degrade the operation or safety of any of the intersections or roadways within the study area. Exh. 26, ¶ 7; Exh. 26B, p.1.

While the witnesses characterized the increases in traffic in terms of percentages, we do not consider those characterizations to be as relevant as the actual numbers of trips projected under the circumstances, particularly in comparison to the trips that could be generated under current zoning or under the project as approved. Compare Exh. 26, ¶ 7 (developer witness says number of trips represents less than 1 percent of total daily traffic volume on adjacent major roads) to Exh. 29, ¶ 15 (Board engineering expert says traffic would increase on Watcha Path by 65.5 percent). To address traffic safety concerns the Board also placed the following conditions on Cozy Hearth's comprehensive permit: "(3) applicant will work with the Refuse District and local boards to facilitate the installation of a new access road to intersect with Watcha Path;" "(4) Applicant will add turn-outs on Watcha Path where sight lines are obscured;" "(5) All nine lots will become members of the Watcha Path road association;" "(6) Cozy Hearth is to grade and otherwise maintain Watcha Path during construction;" and "(8) no home businesses are permitted without special permits from the Zoning Board." Exh. 1.

The project site is off Watcha Path, a private, unpaved, winding low volume rural secondary road that serves as the only access to twenty-five parcels of land. Brush and trees grow to the edge of the road. Exhs. 26B, p. 6; 28, ¶ 24. According to the Town Highway Superintendent, Watcha Path varies between a width of 12 and 14 feet, compared to the design standard of 12 to 16 feet with a required shoulder of three feet on either side. Exh. 28, ¶¶ 23-24 and Exh. F.

At present 22 dwelling units exist on 25 parcels off Watcha Path, with a maximum additional 28 dwellings possible under current zoning. Exh. 29, ¶ 10. According to a neighbor (and former traffic engineer) who resides off Watcha Path, the road often floods

after rainstorms, particularly in the area of the proposed Cozy Hearth access road. Homeowners maintain the road and the underground utilities through an informal Road Association. Exh. 29, ¶ 10. See Exhs. 26, ¶ 9, 26B, pp. 6-7. The highway superintendent stated that although there are several turnouts on Watcha Path, there is insufficient room on the road for any of the major pieces of the fire department's emergency equipment to pass by another vehicle at most points on Watcha Path. Exh. 28, ¶ 25.

Meeting Watcha Path at an uncontrolled intersection with the Edgartown-West Tisbury Road is Oyster Watcha Road, another unpaved road that intersects the highway where Watcha Path intersects the highway (the Intersection). Near the Intersection is a large bank of mailboxes located on the edge of the highway, which are used by the residents of Watcha Path and Oyster Watcha. Exh. 29, ¶ 13. Oyster Watcha Road has between 22 and 35 residences, many of which are seasonal homes that use a variety of domestic services, which increase the traffic volume through the Intersection on a seasonal basis. Exhs. 29, ¶ 14; 26B.

The Board's witnesses describe the Intersection as dangerous with the present traffic volume. See Exhs. 29, ¶¶ 16, D(a)-(c); 28, ¶¶ 11-19. The Intersection is not a standard "T" intersection, but brings two unpaved roads to the highway, one – Watcha Path – at a severe angle. Traffic on the highway usually exceeds the posted speed limit. No signage on the highway alerts drivers to the Intersection. Exh. 28, ¶¶ 11-14.

The highway superintendent pointed out that the angle of turn between the state highway and Watcha Path is 169 degrees, and that Oyster Watcha meets the highway at a 90 degree angle. He also testified that the approach toward the Intersection from both the east and west contains obscured sightlines because of the grade and curvature of the state highway. Exh. 28, ¶¶ 11, 13-14. The witness also noted that the Intersection does not conform to design guides. He testified that the radius at the Intersection is roughly 12 feet with negligible offset and tapered lengths. Exh. 28, ¶ 12. By comparison, he pointed to design standards for a 150 degree angle: for cars of a radius of 18 feet, offsets of 2 feet and tapers of 20 feet; for single axel trucks a radius of 30 feet, offset of 4 feet and a taper length of 32 feet. Exh. 28, ¶ 15. Also see Exh. 29, ¶ 9b. He also testified that the location of mailboxes near the Intersection caused a vehicle to protrude into the paved shoulder area of

the state highway. Exh. 28, ¶ 17. See Exh. 29, ¶ 13. Based on these factors, he gave his opinion that “the intersection presents a safety hazard to the public in its current condition and at its current level of use.” Exh. 28, ¶ 19. He believed that an additional curb cut on the highway allowing traffic to bypass the intersection to reach Watcha Path would improve the safety of the intersection. Exh. 28, ¶ 20. The Town fire chief testified also that an additional access road between Watcha Path and the State Highway would significantly enhance access to the development. Exh. 30, ¶ 17.

Quoting from *Wilson Street Trust v. Norwood*, No. 71-06, slip op. at 21 (Mass. Housing Appeals Committee Feb. 13, 1974), the Board argues that “that the existing traffic [is] sufficiently near (or past) the critical point so that the additional traffic load from the proposed development will raise the traffic impact beyond the safety point.” Board brief, p. 43. The neighbor witness stated that the increase of 110 daily trips would exacerbate already unsafe conditions and create a public safety standard. Exh. 29, ¶ D(c). The highway superintendent also stated that the increased traffic through the Intersection from the proposed development would compound existing safety concerns, but any limitation on the proposed increase in traffic volume would improve safety. Exh. 28, ¶¶ 18-21. The Board also argues that the limit on home businesses is also intended to reduce the traffic load on Watcha Path and through the Intersection. Board brief, p. 47 n.27.

The developer’s witness testified that the major roadways, Edgartown-West Tisbury Road and Airport (Barnes) Road are physically adequate and can accommodate the additional traffic to be generated by the project, and that the project would have a minimal impact on these roadways and the intersection. Exh. 26, ¶ 11. This witness also testified that a second access point to the site from Edgartown-West Tisbury Road would not be desirable from a transportation planning perspective. *Id.*

We agree with the developer that the Board provided little evidence on the extent to which the difference in impact between nine and 11 units creates health and safety issues that outweigh the regional need for affordable housing. For example the two-unit increase would result in a smaller percentage of increase in traffic volume and impacts. Tr. I, 20. More particularly, these two more units will not be more dangerous than the 28 potentially

additional dwelling units off Watcha Path that would be possible under current zoning. See Exh. 29, ¶ 10. Indeed our role is to look at the addition of these two units now, not potential future growth. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 33 (Mass. Housing Appeals Committee June 25, 1992) (“If the town can sustain the proposed project, but not all of the other growth that is projected, it should be the other growth, not the affordable housing that is curtailed.”). Given the conditions that exist presently, the Board’s witness could not state why nine additional units would be acceptable but 11 would not. The Board’s witness testimony that any reduction increases safety does not rise to the level of proof that a local concern outweighs the need for affordable housing. Presumably any decrease in housing will reduce traffic congestion and improve traffic safety.

This Committee has held that “[a]n existing, off-site hazard which will not be exacerbated in any significant way by the proposed project ... is not a legitimate local concern upon which the denial of a comprehensive permit may be based.” *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. at 6 (Mass. Housing Appeals Committee Jan. 16, 1991). Similarly here, the Board has not demonstrated that the slight increase in traffic resulting from the addition of two units will significantly worsen the traffic at the Intersection and on Watcha Path. See *CMA, supra*, No. 89-25, slip op. at 36 (significant contribution by a proposed development to local traffic problem is not a basis for denying a comprehensive permit when it is technically and financially feasible to improve traffic concerns); 760 CMR 31.06(8). Also see *Silver Tree Ltd. Partnership v. Taunton*, No. 86-19, slip op. at 23-25 (Mass. Housing Appeals Committee Oct. 19, 1988).

Here, the Board argues that the current situation at the Intersection of Watcha Path and Edgartown-West Tisbury Road is already hazardous, but it has presented no testimony concerning the feasibility of addressing the matter by the Town. The Board has not demonstrated that the traffic concerns related to the two additional units constitutes a valid local concern that outweighs the need for affordable housing

Moreover, as the developer’s witness testified, Cozy Hearth has offered several mitigation measures that would help address some of the concerns raised by the Board. He stated that given that the existing conditions of the private Watcha Path were long

established, and given that an informal road association actively performs regular road maintenance, most of the recommended mitigation measures were geared toward cooperation with the surrounding neighborhood property owners. Exh. 26, ¶ 9. He also stated that at the MVC hearing he offered to fund roadside trimming of vegetation as necessary to maintain intersection sight distances, and that the construction of additional turnouts to allow vehicles to pass in opposite directions of Watcha Path “was also suggested for the future on an as-needed basis.” Exh. 26, ¶ 10. He stated that Cozy Hearth’s offer to contribute \$5,000 to the cost of improving the intersection of Watcha Path and Edgartown-West Tisbury Road was included in the MVC decision. Exh. 37, ¶ 13. We find all of these mitigation measures to be reasonable and will include them in our decision.

Cozy Hearth’s traffic expert testified that the additional access road is not warranted given the level of vehicle travel demand, and given the mitigation offers the developer has made. Exh. 37, ¶ 14-16. In particular he noted that continued incremental improvements would be made by the Watcha Path road association. Exh. 37, ¶ 15. Further, despite requiring Cozy Hearth to work with the Refuse Department and other town departments to obtain use of a second access roadway from the highway, the Board argues in its brief that achieving this access would be difficult because it would require the purchase of additional land or an easement from the Refuse District, and there is no evidence exists to suggest this is likely. Board brief, p. 46 n.26.

With regard to the Board’s condition that “[a]ll nine lots will become members of the Watcha Path road association,” the MVC has included this requirement in its decision, and we need not separately require it. Exh. 2, p. 13. Consistent with this requirement and the developer’s mitigation offers, we expect the residents of the development will work with town officials on improvements to the access to Watcha Path in the ordinary course. With regard to the requirement that Cozy Hearth add turnouts on Watcha Path, its witness has acknowledged that the developer will work on that issue, and it will be made a part of this decision. Similarly, we will require the developer to ensure that the effects of construction vehicles on the condition of Watcha Path are addressed. Finally, the evidence concerning

traffic concerns does not warrant a prohibition that exceeds any existing local requirements regarding home businesses.

B. Site Access and Fire Safety

The Board argues that the proposal for 11 units contains inadequate turnouts and an inadequate turnaround on the project site for safe access. It also argues that the lack of a water source on the project site, together with the distance from the closest water source and the condition of Watcha Path, would create an unsafe condition for fire protection for that many additional homes on the site. In its decision, the Board imposed conditions requiring “an adequate turn around to be laid within the subdivision” on the project site, and the installation of a 10,888 gallon cistern, with all roof run-off directed into the cistern or additional dry wells. Exh. 1.

The Town fire chief stated that there is no source of water on the project site suitable for fire department use. He testified that one of the department’s pumpers holds only 750 gallons, “which is exhausted rapidly in fighting a fire.” Exh. 30, ¶ 9. He also stated that the closest hydrant the fire department could use to replenish its water supply is located at the Martha’s Vineyard Airport, about a three-minute drive west from the Intersection. The department’s standard practice is to dispatch two pumpers to a fire to shuttle back and forth from the water source to the site of the fire. Because of the configuration of Watcha Path as well as the Intersection of Watcha Path and the state highway, two pumpers are unable to pass each other on Watcha Path under present conditions. Exh. 30, ¶ 12.

The fire chief also testified that the site itself contains insufficient turn-arounds and turn-outs, with the only proposed adequate turnaround on the site located in the far cluster of houses. Exh. 30, ¶ 12. The highway superintendent testified that the length of the proposed access road through the site (1,597.67 feet with one full turnout at the far western end) did not comply with Town regulations limiting dead end streets to 500 feet, “unless, in the opinion of the Planning Board a greater or lesser length is necessitated by topography of the local conditions.” Exh. 28, ¶ 26. However, he did not identify how the length, *per se*, raised a safety concern, other than the turnout and turnaround issues he addressed.

The fire chief expressed concern with the reliability of an open cistern as a source of water for fire protection because it could freeze in the winter and collect solids and impurities that could clog firefighting equipment. Exh. 30, ¶ 13. He gave his opinion that a 10,000 gallon, fiberglass or plastic water tank buried in the ground below the frost point would be a more viable source of on site water and the optimum tank would be connected to its own source of water and be equipped with a pump. He also stated that the construction of 11 homes on the site without a viable on-site water supply capable of being connected to fire department equipment would create a hazardous situation and would render the department's ability to provide the fire protection to the area inadequate. Exh. 30, ¶ 11. He stated that reducing the project number of units would permit the creation of better access within the development, including more room for turnouts and another turnaround and reduce the likelihood of traffic conflicts between a fire vehicle and a car on Watcha Path or within the development. Exh. 30, ¶ 16.

The developer's engineer whose firm prepared the site development plan testified that "the proposed turning circle [on the site] meets or exceeds "the requirements of the Town of Edgartown Planning Board regulations for subdivision roads." He also gave the opinion that the proposed site roadway and turning circle are safe and adequate and provide adequate turning radius for emergency vehicles, including fire trucks. Exh. 22, ¶ 2. Neither the fire chief nor the highway superintendent explained how an additional turnaround would mitigate the traffic concern. We find on the record that the developer's proposal contains a turnaround that meets Town's standards. The Board has not demonstrated that a second turnaround on the site is required for vehicle safety. However, given the length of the site roadway, beyond the standard permitted by Town regulations, an additional turnout on the site would be warranted by the concerns raised by the fire chief. We will, therefore, require the developer to provide an additional turnout that is acceptable to the fire chief, whose approval shall not be unreasonably withheld.

With regard to adequacy of access to water, we find the testimony of the fire chief with regard to the need for a source of on-site water to be credible. He testified that the location of the project site would likely result in response time to an emergency of between

15 and 25 minutes, depending on the time of day and year and on weather and traffic conditions. Exh. 30, ¶ 15. We agree that the nature of the roads accessing the project site and the difficulties that emergency vehicles could experience on those roads require the availability of an on-site water source. Therefore, we find that the Board's decision to require a cistern to address the need for an adequate source of on-site water was a reasonable condition based on a valid local concern. We are not persuaded that the fire chief's testimony concerning the distinctions between a cistern and a water tank require the use of a water tank on site. His testimony did not address why a cistern would be a reasonable water source for nine units, as required by the Board's decision, but not be reliable for 11 units. Accordingly, we will require the installation of a water cistern as required in the Board's decision.

C. Other Conditions Imposed on Comprehensive Permit

Of the remaining two conditions at issue, the parties did not develop the record with regard to the Board's decision to impose them. However, with respect to Condition "(7) no herbicides, pesticides, fungicides, or quick-release chemical fertilizers are permitted on any portion of the property," we note that the MVC decision restricts use of synthetic pesticides. See Exh. 2, p. 13, and Cozy Hearth shall comply with this and the other requirements imposed in that decision. The final condition is "(9) no rentals of the income/resale restricted lots are permitted (one outbuilding (nonhabitable) per lot, no more than 15' high and with a footprint to no greater than 24' x 24' (average two-car garage), second floor – if there is one – to be used for storage only. Garages are to be attached to main dwelling; garages may be attached by means of a breezeway or corridor but may not be more than 10 feet from the main structure." The Board has not demonstrated a valid local concern with regard to this condition. Accordingly, it will not be included in the comprehensive permit. See Exh. 1. As we state below, the developer is of course required to comply with all applicable local requirements that have not been waived.

VI. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that:

1. The comprehensive permit shall conform to the application Cozy Hearth submitted to the Board, except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development shall be constructed as shown on drawings by Schofield, Barbini & Hoehn, Inc., dated October 21, 2005 and by Sullivan O'Connor Architects dated May 9, 2006. Exhs. 3-4; see Exh. 5.

(b) Design and construction shall be in compliance with the state Department of Environmental Protection stormwater management requirements.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

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

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

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

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) Construction and marketing in all particulars shall be in accordance with all presently applicable state and federal requirements, including, without limitation, fair housing requirements.

(e) This Comprehensive Permit is subject to 760 CMR 56.00 and DHCD Guidelines issued pursuant thereto with respect to cost certification.

(f) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(g) The Board shall take whatever steps are necessary to ensure that a building permit is issued to the Applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 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

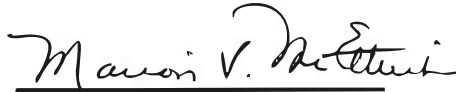
Dated: April 14, 2008



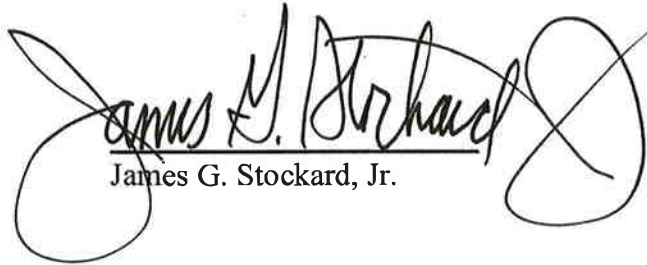
Werner Lohe, Chairman



Joseph P. Henefield



Marion V. McEttrick



James G. Stockard, Jr.



Shelagh A. Ellman-Pearl, Presiding Officer