COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

WEST STREET GROUP, LLC Appellant	)	
v.	)	No. 2009-14
STOUGHTON ZONING BOARD OF APPEALS, Appellee	)	

RULINGS ON CROSS MOTIONS FOR SUMMARY DECISION AND APPELLANT'S MOTION TO AMEND INITIAL PLEADING

This is an appeal pursuant to G.L. c. 40B, § 22, by West Street Group, LLC (West Street) of actions of the Stoughton Zoning Board of Appeals (Board) regarding West Street's September 19, 2009 request to modify a comprehensive permit issued by the Board. West Street has moved for limited summary decision and alternatively, to amend its initial pleading. The Board has submitted a cross-motion for summary decision.

I. PROCEDURAL HISTORY AND BACKGROUND

In May 2006, the Town of Stoughton Board of Selectmen (Selectmen) voted to endorse, under the Local Initiative Program (LIP), West Street's application for "The Villages at Stonegate" a 120-unit condominium development. On September 9, 2006, the Department of Housing and Community Development (DHCD) issued a project eligibility letter and preliminary approval under the LIP program for the proposed project. After a hearing, on November 8, 2007 the Board issued a decision approving a project for 80 units. Appellant Exhs. 1, 2, 6.

After withdrawing an earlier modification request, on September 18, 2009, West Street submitted the proposed modification plan to the Board at issue in this appeal. On October 1, 2009, the Board determined that the modification proposed was substantial, and

thereafter filed its determination with the town clerk. Appellant Exhs. 3, 7; Affidavit of Mary Martin, ¶¶ 3-4, Exhs. 3-4.

The Board held a public hearing on the modification request on October 29, 2009. In a letter to the Board and Selectmen of the same date, West Street stated that the modification request was deemed granted pursuant to 760 CMR 56.05(11) and 56.07(4). At the October 29 hearing, which West Street did not attend, the Board voted to deny the proposed modification without prejudice. It filed its written decision on the proposed modification with the town clerk on November 20, 2009. Appellant Exhs. 8- 9; Martin Aff., Exhs. 9-11. On December 10, 2009, West Street filed its appeal with the Committee. It filed a motion to amend its initial pleading on January 7, 2010. The Board's motion to dismiss the appeal was denied; the developer's motion to amend was granted.

II. MOTIONS FOR SUMMARY DECISION

Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee 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). See *Catlin v. Board of Registration of Architects,* 414 Mass. 1, 7 (1992); *Grandview Realty, Inc. v. Lexington*, No. 05-11, slip op. at 4 (Mass. Housing Appeals Committee July 10, 2006). Summary decision may be granted on one or more issues.

The Board has moved for summary decision that the modification request was not constructively granted. The parties have submitted cross motions on the timeliness of West Street's appeals of the determination of substantiality and the denial of the modification on the merits. The Board has also moved for summary decision that the proposed modification was substantial and that West Street has no claim against the Stoughton Board of Selectmen (Selectmen). Finally, West Street has sought summary decision that the original project eligibility letter remains in full force and effect. The Board has submitted documents and an affidavit in support of its motion[1] and West Street relies on submitted documents in support of its motion.

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1. The "Appellees' Statement of Material Facts in Support of their Motion for Summary Decision," which was signed by the Board's counsel, does not constitute independent evidence since it is an

A. Constructive Grant of Modification Request

The Board seeks a summary decision that it did not constructively grant West Street's request for modification of its comprehensive permit. Whether the modification request was constructively granted depends on whether the Board took the required actions within 20 days of the Applicant's submission of the request for modification. The relevant undisputed facts are sufficient to establish that the Board's notification of its determination of substantiality satisfied the requirements of G.L. c. 40B, § 21 and 760 CMR 56.05(11)(b) and it therefore is entitled to summary decision on this claim. These facts are the following:

On September 18, 2009, a letter of the same date from Paul J. Cleary and Paul J. Sullivan of West Street Group to the Board's chair and counsel, requesting a modification to West Street's comprehensive permit, was filed with the Stoughton Building and Zoning Department.[2] Appellant Exh. 3; Martin Aff., Exh. 2. The Board, at its October 1, 2009 meeting, discussed West Street's request for modification, and voted to determine that the modification proposed was substantial. The Board filed its determination in the town clerk's office on October 5, 2009. Appellant Opp. Mem. p. 2; Martin Aff., ¶ 4, Exhs. 3-4.

The Board mailed the notice of determination to "MSC [sic] Development, Attn: Mr. Paul Cleary, 10 Porter Street, Stoughton, MA 02072" by certified mail on October 6, 2009. The cover letter to Mr. Cleary, indicating a date of October 5, 2009, states that it was sent by regular and by certified mail.[3] The certified mail envelope to Mr. Cleary, postmarked October 6, 2009, was returned to sender, indicating service was attempted three times and the letter was unclaimed. Appellant Opp. Mem. p. 3; Martin Aff., ¶ 6, Exhs. 5-6. A letter to DHCD dated October 7, 2009, from Stoughton town counsel regarding the status of the project eligibility letter indicated that the Board had scheduled a hearing on the proposed

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unsworn statement of counsel, not an affidavit. For the purposes of the motion, it is treated as additional argument.

2. The letter indicated West Street's address to be 10 Porter Street, S-10B, Stoughton, MA 02072.

3. West Street suggests in a footnote that "the parties disagree on the import of the addressee on the envelopes entered as evidence," Appellant Opp. Mem. p. 3, but offers no further argument. It also states that "West Street was present in Stoughton Town Hall the night of October 1, 2009," but offers no argument on the relevance of this statement. Appellant Opp. Mem. p. 2.

modification and also indicated a copy was sent to Thomas Recupero, West Street's counsel and resident agent. Martin Aff., Exh. 7; Appellant Exh. 3.

The Board published notices of the hearing on the modification request scheduled for October 29, 2009 in the *Stoughton Journal* on October 9 and 16, 2012. It held the hearing as scheduled on October 29, 2009. Martin Aff., Exhs. 8, 10-11. In a letter of the same date, however, West Street stated that it had notified the Board on October 13, 2009 that the modification request was deemed granted pursuant to 760 CMR 56.05(11) and 56.07(4). It further stated that pursuant to 760 CMR 56.05(9)(c) and 56.05(11)(d), it "is appealing to the Housing Appeals Committee … and … such appeal will stay the proceedings before the board." Martin Aff., Exh. 9; Appellant Exh. 8. West Street did not attend the hearing on the modification request.

At the October 29 hearing, the Board voted to deny the proposed modification without prejudice. It filed its written decision on the proposed modification with the town clerk on November 20, 2009. Appellant Exh. 9; Martin Aff., Exhs. 10-11.

The comprehensive permit regulations concerning changes after issuance of a permit provide that within 20 days after an applicant notifies it of a proposed change," the Board shall determine and notify the Applicant whether it deems the change substantial or insubstantial…," 760 CMR 56.05(11(a),[4] and "if the Board fails to notify the applicant by the end of the required 20-day period, the Comprehensive Permit shall be deemed modified to incorporate the Change." 760 CMR 56.05(11(b). See also G.L. c. 40B, § 21.

The Board, citing *Triangle Land Dev. Corp. Inc. v. Northbridge,* No. 07-11, slip op. at 4-6 (Mass. Housing Appeals Committee May 12, 2008), argues that filing the decision with the town clerk on October 5, 2009 satisfied the requirement to notify the developer.

West Street concedes that if filing with the town clerk satisfies the notice requirement, there is no factual dispute and summary decision could be granted. It has

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4. Section 56.05(11)(a) states:

> (a) If after a Comprehensive Permit is granted by the Board, including by order of the Committee pursuant to 760 CMR 56.07(5), an Applicant desires to change the details of its Project as approved by the Board or the Committee, it shall promptly notify the Board in writing, describing such change. Within 20 days the Board shall determine and notify the Applicant whether it deems the change substantial or insubstantial, with reference to the factors set forth at 760 CMR 56.07(4).

stipulated that the Board held a hearing, made a determination that the proposed modification was substantial, and filed with the town clerk its decision regarding the substantiality of the modification request within the required 20 days. Nor does it dispute that the Board sent a notice of its determination by certified mail on October 6, 2009. West Street also acknowledges that the developer was present in Stoughton Town Hall the night of October 1, 2009, Appellant Opp. Mem. p. 2. The record does not indicate when or how the developer first learned of the Board's determination.

West Street argues, however, that receipt of notice is required by 760 CMR 56.05(11), and therefore, the issue must be resolved in an evidentiary hearing to determinate the relative credibility of witnesses. It argues that absent its actual receipt of notice, the Board did not "determine and notify the Applicant" within the meaning of § 56.05(11).

While acknowledging that a constructive grant is a harsh result, West Street argues an affirmative obligation on the Board to ensure the applicant's receipt of its determination is required by *Triangle Land* as well as *Costello v. Board of Appeals of Lexington,* 3 Mass App. Ct. 441, 443 (1975) (interpreting statute's use of word "given" in context of requirement of notice to presiding board to mean actual receipt of notice). The developer therefore contends that summary decision is not appropriate at this time. West Street submitted no counter-affidavit or evidence attesting that it did not receive actual notice.

Although 760 CMR 56.05(11)(b) does not expressly state what action the Board was required to take to "notify" West Street of the substantiality determination, G.L. c. 40B, § 21 affords guidance in stating that "[t]he provisions of section eleven of Chapter forty A shall apply to all such hearings [on comprehensive permit applications]." See *Milton Commons Assoc. v. Board of Appeals of Milton*, 14 Mass. App. Ct. 111, 118 (1982). Chapter 40A, section 11 provides that "[i]n all cases where notice to individuals or specific boards or other agencies is required, notice shall be *sent* by mail, postage prepaid." (Emphasis added.)

Contrary to West Street's argument, *Triangle Land*, No. 07-11, does not stand for the proposition that receipt of notice is required. In that decision, the Committee referred in *dicta* to the notice required by c. 40A, § 11 as "actual notice." It did not address the type of notice required by § 11. *Id.* at 4-6. *Costello* addressed the requirement of notice to be "given" to a governing body, not an individual or party.

Case law and the history of the comprehensive permit regulations also support the treatment of the Board's requirement to "notify" the applicant to mean to "send notice." See *Fifield v. Board of Zoning Appeal of Cambridge,* 450 Mass. 1001 (2007) (requirement to "send" notice of appeal in G.L. c. 40A, § 17 did not require proof of receipt); *Zuckerman v. Zoning Bd. of Appeals of Greenfield,* 394 Mass. 663, 669 (1985) (requirement of G.L. c. 40A, § 15 that notice of board's decision be "mailed" to parties does not require proof of receipt).[5] In addition, comparison with the Committee's former regulatory language regarding notification by a board demonstrates that receipt is not contemplated by the current regulation. Former versions of the comprehensive permit regulations explicitly stated that "notice of the [final] decision shall consist of receipt by the applicant of the written decision by certified mail or hand delivery." 760 CMR 30.06(8) (2001)." See *Cardwell v. Board of Appeals of Woburn,* 61 Mass. App. Ct. 118, 121-123 (2004). By contrast, the current regulation requires only the filing of a final decision with the town clerk to satisfy the notice requirement for a final decision.[6] That difference is significant.

The current requirement to "notify" in 760 CMR 56.05(11)(b) must be interpreted in light of the statutory mandate to follow c. 40A, § 11. The mailing of the Board's notification by certified mail satisfies the requirements of c. 40A, § 11 that "notice shall be sent by mail, postage prepaid," and thus complies with § 56.05(11)(b).

Since there is no express requirement that a board ensure actual receipt of a notice, imposing the "heavy" penalty of constructive grant of zoning action in not appropriate here. See *Cardwell, supra,* 61 Mass. App. Ct. at 123. The Board indisputably considered and

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5. Although the Appeals Court in *Milton Commons* exempted the issuance of the final decision on a comprehensive permit from the requirements of c. 40A, § 11, the court noted that the provisions of that section apply to the conduct during the course of the hearings. The determination and notice issued by the Board were not its final action on the request for modification, leading to the conclusion that § 11 is applicable here.

6. To avoid a constructive grant of a *final* decision on a comprehensive permit application, a Board is only required to file its decision with the town clerk. G. L. c. 40B, § 21. Consistent with § 21, the Committee's regulations require that a Board "forward a copy of any Comprehensive Permit to the Applicant or its designated representative and to [DHCD] when it is filed." 760 CMR 56.05(8)(a). Neither the statute nor regulation requires the sending of a decision denying the permit to the applicant. Moreover, the provision for appeal in 760 CMR 56.06(4)(g) makes clear that the filing date triggers the running of the operative appeal period.

reached a decision on the substantiality of the modification request, filed its determination with the town clerk, and sent notification of that decision to the Appellant.

It is also useful to note that since the Board was required to determine if the request was substantial within 20 days, it is not cumbersome on an applicant to check at the town clerk's office regarding whether a determination had been filed within the 20-day period. See, *e.g., Gallivan v. Zoning Board of Appeals of Wellesley,* 71 Mass. App. Ct. 850, 859 (2008) (actual or constructive notice to abutter was sufficient to place on her a "duty of inquiry with the building department and determine whether to lodge an appeal within the thirty day appeal period); *Fifield v. Board of Zoning Appeal of Cambridge, supra,* 450 Mass. 1001; *Kasper v. Board of Appeals of Watertown,* 3 Mass. App. Ct. 251 (1975). Cf. *Kramer v. Zoning Board of Appeals of Somerville,* 65 Mass. App. Ct. 186, 194 (2005). Accordingly, the undisputed facts in the record demonstrate that no constructive grant of the modification request was made, and summary decision on this issue is granted to the Board.

B. Timeliness of Appeal of Determination of Substantiality

Both parties have moved for summary decision on whether West Street's appeal of the determination of substantiality is barred by the statute of limitations. The relevant regulation, 760 CMR 56.05(11)(d), provides:

> The Applicant shall raise to the Board any objection to the determination by the Board that the change is substantial within 20 days of such determination, subject to the provisions of the next sentence. The Applicant may elect to continue the proceedings before the Board and preserve its right to raise the objection in context of its appeal to the Committee, if any, of the Board's denial of the Comprehensive Permit or approval with unacceptable conditions or requirements, or the Applicant may appeal a determination that a change is substantial by filing an appeal with the Committee on an expedited basis, pursuant to 760 CMR 56.05(9)(c) and 56.06(7)(e)(11), within 20 days of being so notified. Such an appeal will stay the proceedings before the Board.

The Board relies on West Street's letter of October 29 to argue that it first raised an objection to the substantiality determination on that date, which was more than 20 days after the date on which the Board filed its determination with the town clerk. It also argues that the developer's initial pleading filed December 10, 2009 fails to allege a fact or request relief that attempts to appeal the Board's determination of substantiality filed on October 5, 2009.

West Street argues that since the requirement to raise an objection within 20 days of the determination of substantiality is subject to the Applicant's election either to stay the

Board proceedings or continue them and preserve the objection in the context of the appeal to the Committee, the "subject to" language expands the 20-day deadline in the previous sentence. Therefore, it argues it was entitled to raise the issue in the context of its December 10, 2009 appeal, citing *Boston Outdoor Adventures, LLC v. Aikens,* 2011 WL 1601539 at 7 (Mass Land Ct.) (considering actual or constructive notice to appellant in determining timeliness of appeal). Cf. *Devine v. Board of Health of Westport,* 66 Mass. App. Ct. 128, 132 (2006).

Since the record does not demonstrate when West Street actually first learned of the substantiality determination, it is premature to rule on this issue. West Street's October 29 letter did not refer to the Board's determination of substantiality. Instead, it contended that the modification request had been constructively granted. In this context the developer's reference to appealing to the Committee suggests a reference to its subsequent initial pleading alleging a constructive grant. I agree with West Street that the record is inadequate to grant the Board summary decision on the timeliness of the appeal of the determination of substantiality. However, since I grant summary decision to the Board on the merits of whether the modification request is a substantial change, in section II.-C. below, the issue of timeliness becomes moot.

C. Modification Proposal as a Substantial Change

The Board has also moved for summary decision that West Street's modified proposal represents a substantial change. It argues that the developer acknowledges that the size of the project site in the modified plans is only 22.41 acres, more than a 10 percent reduction in the land that was the subject of the 2007 comprehensive permit. See Appellant's Opp. Mem., p. 7; Appellant's Exh. 2, p. 1. Under 760 CMR 56.07(4)(c), "a reduction in the size of the site of more than 10% in excess of any decrease in the number of housing units proposed" is generally a substantial change. West Street's revised proposal seeks the same number of units, 80, that was approved in the Board's permit. The Board also contends that the current proposed site, unlike the original proposal, contains acreage that is not contiguous, as was the original parcel. Finally it argues that the current proposal has eliminated one of two means of egress for the project.

West Street argues that the decrease in the number of units ordered by the Board's 2007 decision should be considered with the acreage of the project site to determine whether

the site reduction is substantial. It does not address the Board's other two points. The developer's argument is misplaced, however. There is no difference between the number of units approved in the Board's decision and the modification proposal, and thus, the reduction in the land area, without a further reduction in the number of units, constitutes a substantial change under 760 CMR 56.07(4)(c)2. For this reason alone, the Board is entitled to summary decision that the modification proposal represents a substantial change.

D. Status of Project Eligibility Letter

West Street has moved for summary decision that DHCD's project eligibility letter remains in force and effect and applicable to the project as modified, and that it has satisfied 760 CMR 56.04(5) with regard to changes to a project that affect project eligibility requirements. DHCD's Guidelines regarding Local Initiative Programs provide:

> Any material changes in any of the conditions of a Determination of Project Eligibility (e.g., the number of units, unit mix, size, design, location, extension of the term of the Determination of Project Eligibility, proposed sale of the project, etc.) REQUIRE that the Determination be amended. The Developer must secure concurrence of the chief executive officer for the proposed change. DHCD will not issue an amended Determination without such local approval, unless it is unreasonably withheld, and without compliance with these requirements.
>
> DHCD may perform an additional site visit, meet with representatives of the municipality and the Developer, and/or request additional financial information, revised site plans, etc., prior to acting on a requested amendment.
>
> DHCD shall be notified immediately if the Developer or the municipality anticipate any material change in the terms of the initial Determination of Project Eligibility. Final approval may be withheld if the Project is not consistent with the Determination of Project Eligibility

DHCD Local Initiative Program (LIP) Guidelines, pp. VI-9-VI-10 (Feb. 22, 2008).

The undisputed facts pertaining to this request are the following: On September 12, 2006, DHCD issued a project eligibility determination to West Street for a "30+ acre site." Appellant Exh. 1. On September 15, 2008, DHCD issued a letter to West Street in response to an August 15, 2008 letter from the developer requesting an extension of the determination of site eligibility and preliminary approval. DHCD gave the opinion that an extension was unnecessary because the project eligibility determination was a prerequisite to an application for a comprehensive permit from a zoning board of appeals, the Board had already issued a

permit for the project, and "[a]ny issues that have arisen since the initial Determination of Project Eligibility can be addressed during the final approval process." Appellant Exh. 4.

On September 4, 2009, West Street submitted two letters to the Town Manager and Selectmen, with copies to DHCD. Appellant Exh. 5 (September 3 and September 4, 2009 letters). The September 3, 2009 letter stated that for the previous 18 months, West Street had proposed to the Board alternative designs for the project, which the Board had considered in numerous executive sessions, and that on June 4, 2009, the Board had voted that:

> No evidence of an amendment to the Determination of Project Eligibility or the concurrence of the chief executive officer has been provided by the ... developer to the [Board] as required under the LIP Guidelines or 760 CMR 56.04(5).

West Street therefore requested "that the chief executive officer for the Town of Stoughton provide concurrence of the proposed change created by the vote of November 8, 2007 (e.g., the reduction in the number of units from 120 to 80)." The September 4, 2009 letter included marked up plans, summarized the developer's proposed changes, stated that an 80-unit project is uneconomic without a site reduction, and reiterated the request for the chief executive officer's concurrence. By letter dated October 7, 2009 to West Street, with a copy to DHCD, the Selectmen declined to endorse the proposed revisions to the project. Appellant Exh. 6. The record includes neither a letter from West Street to DHCD seeking its amendment of the determination of eligibility nor a letter from DHCD specifically addressing a request for an amendment.

West Street argues that DHCD's September 15, 2008 letter constituted a determination that the subsidizing agency would not review any changes to the application until the developer applied for final approval. The difficulty with West Street's argument is that DHCD's letter by itself is inadequate to demonstrate its point. West Street did not submit with its motion its own correspondence to which DHCD, as subsidizing agency, replied. Thus, West Street has not provided evidence to show that it notified the subsidizing agency directly of its proposed changes as required by 760 CMR 56.05(5), or that the letter was in response to such a notice. Indeed, DHCD's letter refers only to a request for an extension, rather than the proposed substantive permit changes. Nor has the developer provided any evidence or argument that notification of the subsidizing agency was not required by 760 CMR 56.04(5) under these circumstances. See LIP Guidelines, *supra*. The

language of DHCD's letter is insufficient to demonstrate that DHCD has assured West Street that it has satisfied 760 CMR 56.04(5).

Although the record indicates that the Selectmen expressed concerns with the substantial nature of the project changes, this body is not the subsidizing agency, and its response to West Street's September 4, 2009 letter does not meet the requirements of 760 CMR 56.04(5) for a subsidizing agency response to a developer's notification of changes to a proposal.

Finally, West Street's letter to the Selectmen, even though copies were sent to DHCD, was not a direct notification of the subsidizing agency. It has not demonstrated that this letter satisfied the requirement of 760 CMR 56.04(5) to notify DHCD, thereby triggering the subsidizing agency's obligation to "determine within 15 days whether such changes are substantial with reference to the project eligibility requirements." Since there is no other evidence that the developer provided the requisite notification to the subsidizing agency, West Street has not demonstrated it is entitled to summary decision on the validity of the project eligibility letter with regard to the proposed modification.[7]

West Street is encouraged to include in the Committee hearing record all correspondence on this issue. If it has not submitted a notification to the subsidizing agency pursuant to § 56.04(5), it shall do so before the hearing proceeds further in this matter.

E. Claims against Selectmen

The Board has moved for summary decision in favor of the Selectmen on the ground that the developer has averred no facts that state a claim for relief against them in the original or Amended Pleading. West Street opposes, arguing that the Selectmen are necessary to determine the status of the project eligibility letter. The Board's earlier motion to dismiss claims against the Selectmen was deferred until after the pre-hearing conference and the developer was ordered to submit a memorandum in support of any claim that the Committee has jurisdiction over the Selectmen. At this stage, the developer has had an opportunity to submit facts and argument to demonstrate the necessity of including the Selectmen in this proceeding. It has not done so.

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7. The proposed Intervener, Rad Williams, also submitted an opposition to summary decision on this issue. However, it is beyond the scope of his permitted participation. See my ruling on Mr. Williams' motion to intervene, issued today.

Under the LIP Guidelines, as well as § 56.04(5), it is DHCD's responsibility to determine the substantiality of the changes for the purposes of project eligibility, and if so, whether local approval was unreasonably withheld, and whether the determination of project eligibility should be amended.

Once the record demonstrates that the developer sought a determination from the subsidizing agency, the Committee has the power to determine whether DHCD has complied with § 56.04(5). That determination can be made without asserting jurisdiction over the Selectmen. Accordingly, the Board's motion for summary decision on this issue is granted.

F. Appeal of Denial of Modification

The Board and West Street each seek summary decision on the timeliness of the developer's challenge to the Board's denial of the modification request. The Board argues, minimally, that even though West Street filed an appeal within 20 days after the November 20, 2009 filing of the Board's decision denying the modification request, the initial pleading cannot be considered an appeal of that decision because it did not raise a specific challenge to the written decision. It also argues that the subsequent amended initial pleading filed on January 7, 2010 cannot relate back because it does not arise out of the same transaction or occurrence as the allegations of the December 10 initial pleading.

Pursuant to G.L. c. 40B, § 22, an appeal to the Committee "shall be taken within twenty days after the date of the notice of the decision by the board of appeal by filing with said committee a statement of the prior proceedings and the reasons upon which the appeal is based." West Street's "Appeal of Adverse Action, 760 CMR 56.05(11) Changes after Issuance of a Permit" was filed on December 10, 2009 and alleges that "West Street Group appeals from all adverse rulings...." Initial Pleading, ¶ 4. West Street's prayers for relief focus on claims that the Board failed to act, or failed to act reasonably and in good faith on West Street's modification request. The prayers request that the Committee find that the comprehensive permit is deemed modified to comport with the modified plans, and "make any other finding which may be fair and in compliance with M.G.L. c. 40B, 760 CMR 56.00, and the goals for development of affordably [sic] housing thereunder." Initial Pleading Prayers f, g, k. West Street's Amended Appeal of Adverse Action acknowledges the filing of the Board's decision, albeit on the incorrect date, and requests a finding that the project it proposed be allowed.

In my previous ruling denying the Board's motion to dismiss and allowing the amended initial pleading, I noted that the amended initial pleading would relate back to the date of the original December 10, 2009 filing. The amended initial pleading refers to the Board's decision on the merits and specifically requests that the proposed project as submitted on September 18, 2009 be allowed. As I previously noted, the Committee's regulations allow amendment of pleadings at the discretion of the presiding officer. The essence of the developer's complaint is that the Board has not properly acted on its request to modify the comprehensive permit. A review of the original initial pleading and the January 7, 2012 amendment demonstrates that the developer indeed sought to appeal from the Board's actions with regard to its modification request. Cf. Mass.R.Civ.P. 15(c). This is sufficient to withstand the Board's motion. Therefore, the Board's motion for summary decision on this issue is denied and West Street's motion is granted.

III. MOTION TO FILE AMENDED PLEADINGS

West Street has also filed a motion to amend its pleading, in the event its appeal of the determination of substantiality is found untimely to further incorporate issues arising out of Board's November 20, 2009 decision, including a challenge to the substantiality of the modification, and to be allowed to include all such issues in the prehearing order.

Although 760 CMR 56.06(4)(d) gives "[l]eave to file amendments to any pleadings may be allowed in the discretion of the presiding officer," if there is no basis for a claim, amendment should be denied. Since the Board is granted summary decision that the requested modification was substantial, the motion to amend is denied with regard to this issue. However, in the exercise of my discretion, I grant the motion to amend so the developer may clarify its challenges to the denial of the modification. Since the pre-hearing order is traditionally the method to clarify the issues for hearing, the developer shall identify these issues in the proposed pre-hearing order. See Section IV.

IV. CONCLUSION

Summary decision is granted to the Board on the following issues: 1) that no constructive grant of the modification request was made; 2) that the modification request is a

substantial change; and 3) all claims against the Selectmen. Summary decision is denied to the Board in all other respects.

West Street's Motion for Limited Summary Decision is granted with respect to the timeliness of its challenge to the Board's denial of its modification request, and denied in all other respects.

A teleconference shall take place on March 29, 2012 at 10:00 a.m. to discuss the appropriate course for this proceeding, including scheduling the filing of a revised draft pre-hearing order and prehearing conference, staying this matter pending resolution of the issues pursuant to 760 CMR 56.04(5), and remand of this matter to the Board subject to continuing jurisdiction of the Committee. Counsel for West Street shall be responsible for arranging for the teleconference call.

Housing Appeals Committee

March 19, 2012

Shelagh A. Ellman-Pearl
Presiding Officer

Certificate of Service

I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Rulings on Cross Motions for Summary Decision and Appellant's Motion to Amend Initial Pleading in the case of West Street Group, LLC v. Stoughton Zoning Board of Appeals; No. 2009-14, to:

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