

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

CIVIL ACTION NO.

RAD WILLIAMS, ELISA BLANCHARD)
 MARY LYNCH AND STEVE SHEPHERD)
)
 Plaintiffs,)
 v.)
)
 WEST STREET GROUP, LLC, and)
 SHERMAN EPRO, JERALD SAVAGE,)
 ROBERT O'REGAN, STEVEN MITCHELL,)
 PETER BARRON, HERBERT MUSMON and)
 ORLANDO DIGIAMPIETRO)
 as they are members of the Stoughton)
 Board of Appeals)
)
 Defendants)
)

COMPLAINT
G.L. c.40B, s.21 and G.L. c.40A, s.17

Introduction

1. This is an action pursuant to G.L. c. 40B, s. 21 and the procedures of G.L. c. 40A, s. 17, to annul a decision by the Board of Appeals of the Town of Stoughton (“Board”) granting a comprehensive permit under G.L. c. 40B ss. 20-23, to the West Street Group, LLC (“West Street Group” or “Applicant”) to build residential housing units with non-conforming density off of West and Plain Streets (“the project” and “the locus”), Stoughton, Massachusetts (“the Decision”). A certified copy of the Decision is attached as Exhibit 1.

Jurisdiction

2. G..L. c.40A, s.17 and G..L. c.40B, s.21 confer jurisdiction to this Court over the subject matter of this action.

The Parties

3. Plaintiff Rad Williams resides at 566 Plain Street, Stoughton, MA and is a person aggrieved by the Decision of the Board.

4. Plaintiff Mary Lynch resides at 510 Plain Street, Stoughton, MA and is a person aggrieved by the Decision of the Board.

5. Plaintiff Elisa Blanchard resides at 1030 West Street, Stoughton, MA and is a person aggrieved by the Decision of the Board.

6. Plaintiff Steve Shepherd resides at 522 Plain Street, Stoughton, MA and is a person aggrieved by the Decision of the Board.

7. Upon information and belief, Defendant West Street Group, LLC is a registered corporation with an address of 1185 Turnpike Street, Stoughton, MA 02072.

8. Upon information and belief, defendant Town of Stoughton Board of Appeals is a duly appointed board within a political subdivision of the Commonwealth of Massachusetts. The Board has a principal place of business at Stoughton Town Hall, 10 Pearl Street, Stoughton, Massachusetts.

9. Upon information and belief, defendant Sherman Epro resides at 5 Macarthur Street, Stoughton, Massachusetts and is a member of the Stoughton Board of Appeals.

10. Upon information and belief, defendant Jerald Savage resides at 81 Old Maple Street, Stoughton, Massachusetts and is a member of the Stoughton Board of Appeals.
11. Upon information and belief, defendant Robert O'Regan resides at 26 Freely Drive, Stoughton, Massachusetts and is a member of the Stoughton Board of Appeals.
12. Upon information and belief, defendant Steven Mitchell resides at 18 Commercial Street, Stoughton, Massachusetts and is a member of the Stoughton Board of Appeals.
13. Upon information and belief, defendant Orlando Digiampietro resides at 65 Heelan Avenue, Stoughton, Massachusetts and is a member of the Stoughton Board of Appeals.
14. Upon information and belief, defendant Peter Barron resides at 955 West Street, Stoughton, Massachusetts and is a member of the Stoughton Board of Appeals.
15. Upon information and belief, defendant Herbert Musmon resides at 190 Greenbrook Lane, Stoughton, Massachusetts and is a member of the Stoughton Board of Appeals.
16. Upon information and belief, the Stoughton Zoning Bylaw, as revised, was approved by the Town Meeting of the Town of Stoughton, acting in a legislative capacity.
17. Upon information and belief, the Attorney General of the Commonwealth, in accordance with relevant statutory provisions, has approved the Stoughton Zoning Bylaw, as revised.
18. The Decision purports to grant a "waiver" from numerous provisions of the Stoughton Zoning Bylaw.
19. Upon information and belief, the Stoughton Wetlands Bylaw was approved by the Stoughton Town Meeting pursuant to applicable statutory authority.

20. The Decision purports to grant a “waiver” from provisions of the Stoughton Wetland Bylaw.

21. Upon information and belief, the Stoughton Subdivision Rules and Regulations were adopted by the Stoughton Planning Board pursuant to applicable law.

22. The Decision purports to grant a “waiver” from provisions of the Subdivision Rules and Regulations.

Project Location

23. The location of the project is a 35.5 acre(+/-) parcel off West and Plain Streets in Stoughton, Massachusetts.

The Project

24. On or about October 10, 2006, the Defendant West Street Group, LLC submitted an Application for a Comprehensive Permit (“the Application”) for a 120 unit residential condominium development under the provisions of G.L. c.40B, s.20-23.

25. The above noted Application contains a “pro forma” with itemized costs for the proposed project.

26. The Defendant members of the Board of Appeals concluded that the appraisal submitted by the Defendant West Street Group, LLC in support of the pro forma was “not credible” and that “the Board shall disregard it”.

27. As claimed evidence of “site control”, Defendant West Street Group, LLC submitted to the Defendant Board purchase and sales agreements with the current owners of the property constituting the locus

28. The Defendant Board’s financial analyst, Richard Heaton of H&H Associates, Inc. reported to the Board that “logical appraisal to use (for the land’s value) is the assessor’s value of the property marked up by 5%.”

29. Purporting to comply with the condition precedent requirements of 760 CMR 31.01(1)(b), Defendant West Street Group, LLC applied for, and subsequently received, a Project (site) Eligibility letter issued by the Department of Housing and Community Development (DHCD) dated September 12, 2006.

30. The above noted Project Eligibility letter is contingent upon the approval of the Stoughton Board of Selectmen pursuant to the Local Initiative Program (760 CMR 45.00 et seq.).

31. The Stoughton Board of Selectmen memorialized their approval of the Local Initiative Program application in a letter to DHCD dated June 28, 2006.

32. Included in the above noted June 28, 2006 letter is the condition that “The following conditions are imposed by the Board of Selectmen as a quid pro quo for the grant of the Selectmen’s endorsement pursuant to 760 CMR 45.00 et seq. any [sic] deviation from these conditions or the conditions imposed by the Stoughton Board of Appeals in the Board of Appeals grant of a comprehensive permit for this project shall automatically and without need for further action by the Board of Selectmen, rescind this endorsement and render the project without approval pursuant to 760 CMR 45.00 et seq.”.

33. Included in the above noted June 28, 2006 letter is the condition that “This endorsement is not transferrable or assignable.”

34. The above-noted Project (site) Eligibility letter purports to create a presumption of fundability under 760 CMR 31.01 but fails to adhere to the specific requirements of 760 CMR 31.01 (2)(b)(1-6).

35. The Town of Stoughton is consistent with local needs as that terms is used in G.L. c.40B, s.20-23 and the relevant regulations pertaining to comprehensive permits found at 760 CMR 31.00, et seq.

36. The Defendant Board of Appeals concluded that the Town of Stoughton “had satisfied its low and moderate income housing needs under G.L. c.40B, as of the date of this decision...”.

37. On November 13, 2007, the Board recorded its Decision granting a comprehensive permit to Defendant West Street Group, LLC with the Stoughton Town Clerk. (Exhibit 1).

Chapter 40B Project Qualifications

38. The Plaintiffs incorporates by reference herein the allegations contained within paragraphs 1-37, above.

39. G.L. c.40B, s.20 and 760 CMR 31.01(1)(a) require that an applicant for a comprehensive permit under G.L. c.40B, s.20-23 must be a public agency, a non-profit organization, or a limited dividend organization.

40. Upon information and belief, Defendant West Street Group, LLC is not a public agency.

41. Upon information and belief, Defendant West Street Group is not a non-profit organization.
42. Upon information and belief, Defendant West Street Group is not a limited dividend organization.
43. 760 CMR 31.01(1)(b) establishes as a condition precedent to filing for a comprehensive permit before a municipal board of appeals that the Project be “fundable by a subsidizing agency”.
44. G.L. c. 40B, s. 20-23, empowers local Boards of Appeals to approve, approve with conditions or deny development applications where the Board weighs factors such as “the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces...”, against the regional and/or local needs for affordable housing.
45. G.L. c. 40B, s. 20-23, empowers local Boards of Appeals to grant waivers to affordable housing projects from local rules and regulations where the waiver would not threaten public health, safety or welfare and where, “but for” the waiver, the proposed project would be “uneconomic”, as defined by G.L. c.40B, s.20.
46. Defendant West Street Group, LLC relied and continues to rely upon the purported Project Eligibility letter issued by DHCD as an indicia of compliance with 760 CMR 31.01(1)(b).
47. The above noted Project Eligibility letter was issued pursuant to a letter from the Stoughton Board of Selectmen approving the Defendant West Street Group, LLC’s application for Local Initiative Approval dated June 28, 2006.

48. G.L. c. 40B, s. 20 defines “low or moderate income housing” as:

“Any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization.” (Emphasis added).

The Board’s Proceedings and Decision

49. The Plaintiffs incorporates by reference herein the allegations contained within paragraphs 1-48, above.

50. On or about October 10, 2006 the Defendant West Street Group, LLC submitted an Application for a 120-unit Project pursuant to G.L. c. 40B, s. 20-23.

51. The Stoughton Board of Appeals opened its public hearing on the Application on November 16, 2006.

52. The hearing was continued numerous times and closed on October 4, 2007.

53. The Stoughton Town Clerk recorded the Board’s Decision on November 13, 2007.

54. The Decision purports to grant approval for “a maximum of 80 condominium units”.

55. The Decision does not restrict the use or occupancy of the dwelling units by age cohort.

56. The Applicant did not supply the Board with information, nor did the Board seek independent information assessing the risks associated with the extensive land clearing required to construct this Project and its impacts on the real property of the Plaintiffs.

57. The Board failed to adequately include in its analysis of the Applicant’s financial information the fact that the inputs used in the Applicant’s pro forma, as submitted to the Board contains inaccurate and unsubstantiated costs thereby resulting in a project of far greater density and far greater impacts to the Plaintiffs.

58. The Board was in receipt of extensive and expert testimony and substantive information that demonstrated that significantly fewer units could be constructed on the locus without rendering the proposed Project “uneconomic”, as that term is used in G.L. c.40B, s.20.

59. Given the Town’s status as “consistent with local needs”, the Board was free to deny the project in its entirety or impose protective conditions for the benefit of the Plaintiffs without being subject to reversal by the Housing Appeals Committee.

60. Upon information and belief, and despite extensive testimony during the public hearings held on this application, the Board of Appeals did not review, nor have others reviewed on its behalf, architectural plans or engineering documents enabling it to conclude the impacts that eighty (80) dwelling units would have during or after construction upon the property of the Plaintiffs, including the impact of storm water disposal, shadows, massing, height, bulk, views or privacy.

61. Upon information and belief, and despite the Board’s concerns as identified in the Decision, the Board of Appeals did not review, nor have others reviewed on its behalf, plans or documents enabling it to conclude the impacts that eighty (80) dwelling units would have during or after construction upon wildlife or other natural resources on the locus or on the real property of the Plaintiffs.

62. Upon information and belief, and despite the Board’s concerns as identified in the Decision, the Board of Appeals did not review, nor have others reviewed on its behalf, plans or engineering documents enabling it to conclude that the drainage system approved by the Decision would protect the Plaintiffs or owners of the dwelling units of the Project from stormwater runoff or flooding.

63. Upon information and belief, and despite the Board's concerns as identified in the Decision, the Board of Appeals did not review, nor have reviewed for it, plans or landscape drawings that could have reasonably informed the Board as to the limitations or deficiencies the landscape design could have in protecting the Plaintiffs from noise, dust, or light trespass onto their real property.

64. Upon information and belief, and despite the Board's concerns as identified in the Decision, the Decision purports to grant waivers from the Stoughton Zoning Bylaw without acknowledging whether any of those waivers are needed to comply with the requirements of the statute.

65. Upon information and belief, and despite the Board's concerns as identified in the Decision, the Decision purports to grant waivers from the Stoughton Wetland Bylaw without acknowledging whether any of those waivers are needed to comply with the requirements of the statute.

66. Upon information and belief, and despite the Board's concerns as identified in the Decision, the Decision purports to grant waivers from the Stoughton Subdivision Rules and Regulations without acknowledging whether any of those waivers are needed to comply with the requirements of the statute.

67. Upon information and belief, and despite the Board's concerns as identified in the Decision, the Board of Appeals did not review, nor have reviewed for it, a pro forma or other analytical instrument to ascertain the cost implications of the waivers the Decision purports to grant, nor the costs implications of not granting the waivers sought by the Defendant West Street Group, LLC.

COUNT I

(G.L. 40B, Section 21 and G.L. c.40A, Section 17)

68. The Plaintiffs incorporates by reference herein the allegations contained within paragraphs 1-67, above.

69. Pursuant to G.L. c. 40B, s. 21, appeals by aggrieved persons, other than the Applicant, are to Superior Court or the Land Court, following the procedures set forth in the Zoning Enabling Act, G.L. c. 40A, s. 17.

70. The project does not qualify under the terms and requirements of G.L. c.40B, s.20-23 or 760 CMR 31.00, et.seq. as neither Defendant West Street Group, LLC had during the pendency of their application before the Board, a valid site (project) eligibility approval as required by G.L. c. 40B, s. 20-23 and relevant regulations (760 CMR 31.00, et. seq.).

71. The Board approved the project with conditions, but the conditions do not protect the public health, safety and welfare of the residents of the proposed Project or the real property or health, safety and welfare of the Plaintiffs.

72. The Board approved the project with conditions, but the conditions do not protect the environmental resources of the locus or those of the Plaintiffs' real property and as such, the project will cause damage to the environment.

73. The Decision grants waivers from the Stoughton Zoning Bylaw, Subdivision Rules and Regulations and Wetland Bylaw and Regulations, said waivers constitute a threat to public health, safety and welfare, exceed the Board's authority under G.L. c. 40B, s. 20-23 and were granted arbitrarily and capriciously, constitute an abuse of discretion and were made upon an unlawful procedure and are not in accordance with law.

74. Neither Defendant Board of Appeals nor Defendant West Street Group, LLC has met their affirmative obligations to demonstrate the need for project approval pursuant to the local or regional needs test set forth in G.L. c.40B, s.20-23.

75. The Decision imposes a condition that Defendant West Street Group, LLC “obtain declaratory relief from a court of competent jurisdiction to confirm that the Applicant has the right to perform the proposed construction and use the emergency access and that the determinations shall be finally obtained before any clearing or construction occurs.”

COUNT II

(G.L. c. 40B, Section 21)

76. The Plaintiffs incorporates by reference herein the allegations contained within paragraphs 1-75, above.

77. The Board erroneously, arbitrarily and capriciously allowed Defendant West Street Group, LLC to file and maintain an application for a comprehensive permit before the Board and the Town without requiring Defendants to comply with clear and precise requirements of the June 28, 2006 Local Initiative Approval letter from the Stoughton Board of Selectmen.

78. The Board erroneously, arbitrarily and capriciously allowed Defendants West Street Group, LLC to file and maintain an application for a comprehensive permit before the Board and the Town while it knew, or should have known, that neither Defendant is a public agency, non-profit organization or limited dividend organization and that such status is required by both the statute and relevant regulations.

79. Even with the waivers from the Zoning Bylaw granted by the Board, the Project, as approved fails to comply with the purpose and intent of the Zoning Bylaw and G.L. c.40B, s.20 with respect to the protection of the health, safety and welfare of the Plaintiffs.

80. The Decision approves eighty (80) units of housing with no rational basis of support and in doing so, exceeds the authority of the Board and arbitrarily and capriciously ignores objective and analytical evidence indicating that a far fewer number of dwelling units could have been approved in accordance with the statute and in protection of the health, safety and welfare of the Plaintiffs.

81. The Decision approves eighty (80) units of housing without benefit of any plan, drawing, illustration or document upon which the Board could reasonably rely prior to rendering the Decision.

82. On information and belief, Defendant West Street Group, LLC does not intend to obtain any additional relief from the Stoughton Zoning Bylaw, Subdivision Rules and Regulations or Wetland Bylaws.

WHEREFORE, the Plaintiffs respectfully request that this Honorable Court:

1. Annul the Decision of the Board.
2. Declare that the Decision exceeds the authority of the Board.
3. Declare that the Board arbitrarily arrived at the density allowed by the Decision without any rational basis or rational findings.
4. Declare that the Project is not “low or moderate income housing” within the meaning of G.L. c. 40B, s. 20-23.
5. Declare that the Project does not contain the necessary subsidy requirement established by G.L. c.40B, s.20-23 and/or 760 CMR 30.00 and 760 CMR 31.00, et.seq.
6. Declare that Defendant Board failed to adhere to the condition precedent requirements of 760 CMR 31.01(2)(b)(1-6) and, therefore, rule the Project (site) Eligibility letter void *ab initio*.

7. Declare that the Defendant Board of Appeals failed to adhere to the requirements imposed by the Stoughton Board of Selectmen's Local Initiative Approval and therefore annul the Board's Decision.
8. Declare that the permit recipient is not a limited dividend organization and is therefore ineligible to receive a comprehensive permit under G.L. c.40B, s.20-23.
9. Declare that Defendant West Street Group, LLC must comply with all local Zoning Bylaws and other local regulations in the absence of a variance; and
10. Grant other relief as this Court deems just and proper.

Respectfully submitted
On behalf of the Plaintiffs,

By their attorneys,

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DATED: December 1, 2007