

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

Superior Court Department
NO. 2182CV00862

WILLIAM M. HAMILTON,

Plaintiff,

v.

HOUSING APPEALS COMMITTEE, 55 SS LLC,
and WALPOLE ZONING BOARD OF APPEALS,

Defendants.

AMENDED COMPLAINT

This action is brought pursuant to G.L. c. 30A, §14 and G.L. c. 40A, § 17, and mandamus, challenging an amended Comprehensive Permit decision issued by the Defendant Walpole Zoning Board of Appeals and endorsed by the Defendant Housing Appeals Committee (“HAC”), through the issuance of a “Decision on Stipulation and Entry of Judgment” (“HAC Decision”). The HAC Decision dated August 20, 2021 was timely appealed for judicial review under c. 30A, as noted on the Civil Action Cover Sheet, within thirty days on September 17, 2021. A copy of the HAC’s Decision is attached hereto as Exhibit A. The Plaintiff is also seeking an order vacating the HAC Decision and the amended Comprehensive Permit, for failure to follow public notice and hearing requirements under G.L. c. 40B, § 21, and 760 CMR 56.05(11).

Parties

1. Plaintiff William M. Hamilton is an individual who is a resident of the Town of Walpole and resides at 45 Eldor Drive, South Walpole, Norfolk County, Massachusetts.
2. Defendant HAC is a statutorily created state agency within the Department of Housing

and Community Development (“DHCD”). Under its enabling act, G.L. c. 23B, § 5A, HAC hears petitions for review of comprehensive permits under G.L. c. 40B, § 22 and conducts hearings in accordance with rules and regulations established by DHCD, including 760 CMR 56.

3. Defendant 55 SS LLC (“Developer”) is a Massachusetts limited liability company, whose managers are Mark Brooks and David E. Hale. 55 SS LLC is the manager of another related entity, 55 SS NV LLC, whose resident agent and SOC signatory is Mr. Hale. Both limited liability companies have their principal place of business at 6 Lyberty Way, Suite 203, Westford, MA 01886.

4. Defendant Walpole Zoning Board of Appeals (“ZBA”) is the duly constituted municipal authority appointed by the Walpole Select Board. Its principal place of business is 135 School Street, Walpole, Massachusetts.

Jurisdiction and Venue

5. This Court has subject matter jurisdiction over each count of this Amended Complaint, as follows: Count I Judicial Review of Agency Decision, G.L. c. 30A, § 14; Count II Judicial Review of Comprehensive Permit, G.L., c. 40A, § 17; Count III Mandamus, G.L. c. 249, § 5.

6. Venue is proper in Norfolk County where Plaintiff resides, Defendant ZBA has its usual place of business, and where the locus is located. G.L. c. 223, § 1; c. 30A, § 14.

Factual Allegations

7. An application for a comprehensive permit was submitted by Developer to the ZBA on January 15, 2020 for the construction of two hundred and forty (240) rental apartments and sixty (60) single-family home ownership units totaling 300 units (“Project”) on property located at 51, 53, and 55 Summer Street, Walpole, Massachusetts (Walpole Assessors Map 52, Parcel 59, Parcel 60 and a portion of Parcel 78) (“Property”).

8. As originally proposed, the rental portion of the Project, labeled “Cedar Crossing”, consisted of four (4) four-story buildings (each containing forty-eight (48) units with parking under) and forty-eight (48) rental townhomes.
9. The single-family home ownership portion of the Project, labeled “Cedar Edge”, consisted of 60 three-bedroom single-family homes.
10. During the public hearing process before the ZBA, Developer revised the configuration of the Project.
11. By plan dated January 27, 2021, the Cedar Crossing rental apartments were changed to 192 units in two six-story buildings with parking underneath, plus fifty-two (52) townhouses in eleven (11) buildings.
12. The Cedar Edge homeownership portion of the Project was changed to sixteen (16) townhouse units within eight (8) duplex style buildings, plus forty (40) single-family homes.
13. Together, the Cedar Crossing and Cedar Edge Project totaled 300 units with 549 bedrooms, as revised.
14. According to the ZBA, the Project “will result in the near doubling the size of the South Walpole community.” (7/14/21 Revised Permit Decision, p. 5, para. 15)
15. During the ZBA’s public hearings, there was significant public input on a number of neighborhood concerns, including the density of the Project, wetlands, water supply, increased traffic and fire safety concerns.
16. According to the ZBA, the Walpole “Fire Department noted a significant concern with regard to the two proposed six-story buildings, both with garages under . . . and stated that the buildings have ‘the possibility to create an extreme challenge for a fire department staffed as Walpole Fire currently is.’” (Id. para. 16)

17. Based on these concerns, the ZBA reduced the six story buildings to four stories each in its permit decision, which was filed with the Town Clerk on April 27, 2021.
18. Developer appealed the ZBA's permit decision to HAC, which referred the matter to mediation.
19. The Developer and ZBA conducted a private mediation on July 12, 2021.
20. Two days later, without noticing a public hearing, the ZBA met in executive session and voted to approve a revised permit decision, which increased the height of the buildings from four to five stories each.
21. At no point prior to the HAC's Decision under review in this case was the ZBA's revised permit decision published for public review or subject to a public hearing for input from the public, including Plaintiff.
22. Unbeknownst to Plaintiff at the time, on July 30, 2021, Developer and ZBA submitted a joint motion at HAC, seeking to have the original permit decision stricken and the revised permit decision entered in its place.
23. Proceedings before the HAC are not generally noticed as open to the public until the time of a hearing, and its docket is not published or publicly available online.
24. HAC granted the joint motion in its Decision dated August 21, 2021, and directed the ZBA to file its Decision with the Town Clerk "forthwith", which was stamped by the Clerk that very same day.

COUNT I – G.L. c. 40B, § 22; c. 30A, § 14
(Judicial Review of HAC Decision)

25. The Plaintiffs incorporate by reference herein the allegations contained within paragraphs 1-24, above.
26. Without a public hearing, HAC's Decision adopting the revised permit deprived Plaintiff

of any opportunity to participate in or comment on the revised permit decision adopted in this matter.

27. Among other violations of law, the Decision violates due process, exceeds the statutory authority and jurisdiction of the agency, is based on errors of law, was made upon unlawful procedure, is unsupported by substantial evidence, and constitutes an arbitrary, capricious abuse of discretion that is not in accordance with law.

28. HAC's Decision must be set aside because it prejudiced Plaintiff's substantial rights to comment on the revised permit decision in a public forum.

29. HAC's regulations state: "Any decision of the Committee may be reviewed in the superior court in accordance with the provisions of M.G.L. c. 30A." 760 CMR 56.07(5)(e).

30. The Decision on Stipulation and Entry of Judgment by its terms constitutes a final decision of the HAC, and no other administrative remedy exists for Plaintiff.

**COUNT II – G.L. c. 40B, § 23, G.L. c. 40A, § 17
(Judicial Review of Revised Comprehensive Permit)**

31. Plaintiff incorporate by reference herein the allegations contained within paragraphs 1-30, above.

32. Under Taylor v. Lexington Board of Appeals, 451 Mass. 270 (2008), the appeal rights of persons aggrieved by the issuance of a Chapter 40B comprehensive permit cannot be abrogated through the resolution of a developer's appeal to the HAC.

33. Under Chapter 40B regulations, 760 CMR 56.05(11), whenever a Chapter 40B developer proposes substantial changes to a comprehensive permit or to a Chapter 40B project itself, the developer must apply to the local zoning board of appeals for approval of the changes, and the board of appeals must conduct a duly-noticed public hearing on the application.

34. Here, rather than following the regulatorily-prescribed process, the ZBA engaged in

settlement negotiations with the Developer, and deliberated and approved substantial changes to the permit and the Project in a closed-door meeting on July 14, 2021.

35. The ZBA and the Developer subsequently offered a revised permit decision to the HAC to endorse as a “Decision on Stipulation,” skirting the normal public vetting process. The Decision on Stipulation was then recorded in the Town Clerk’s office on August 21, 2021 without any notice to any of the “parties in interest” who were entitled to notice of the original public hearing on the Chapter 40B application.

36. Neither the statute nor the regulations condone the alternative procedures followed by the ZBA and the Developer here, which deprived the public from participating, or at least observing in an open meeting, discussions and deliberations on the proposed substantial changes to the Project. Without knowledge of the secret meeting, the public had no opportunity to provide comment, learn what the outcome was, and comprehend that a new comprehensive permit decision had issued from which a 20-day appeal deadline had run.

37. To the extent that the Plaintiff’s zoning appeal contemplated by the Supreme Judicial Court’s Taylor decision was untimely due to its filing more than 20 days from the date the HAC Decision was filed in the Town Clerk’s office, such delay is excusable in light of the egregious and unlawful process engaged in by the ZBA in concert with the Developer and the HAC.

**COUNT III – G.L. c. 249, § 5
(Mandamus)**

38. Plaintiff incorporate by reference herein the allegations contained within paragraphs 1-37, above.

39. HAC regulations required the Developer, who was the appellant in the administrative matter, to file an Environmental Notification Form (“ENF”) with the Secretary of Environmental Affairs under the Massachusetts Environmental Policy Act (“MEPA”) “No later than ten days

after filing the initial pleading”, which occurred on May 12, 2021. 760 CMR 56.06(4)(h).

40. No ENF was filed at HAC as required by the regulations.

41. HAC regulations also require the agency to comply with MEPA, which it could not do because no ENF had been timely filed.

42. No MEPA findings were included in the HAC’s Decision as required by the regulations.

43. The Administrative Procedure Act, G.L. c. 30A, § 10, and Article 29 of the Massachusetts Declaration of Rights guarantee the opportunity for a full and fair hearing, and an impartial interpretation of the laws and administration of justice.

44. By failing to enforce and follow its own regulations, HAC violated MEPA.

45. The statutory mandamus remedy authorizes the Court to compel prospective action to prevent future violations of law or deprivations of rights.

46. Based on the identified failings and violations of law, the Court should order Developer and the HAC to comply with all applicable regulations, including those involving MEPA and the ENF filing process, in any further administrative proceedings on remand.

WHEREFORE, Plaintiff requests that this Court:

1. Vacate HAC's Decision and the amended Comprehensive Permit issued thereunder;
2. Order HAC or ZBA to conduct a duly noticed public hearing on the proposed changes to the Comprehensive Permit at which members of the public like Plaintiff may attend and comment;
3. Order HAC to comply with all applicable ENF and MEPA regulations;
4. Award Plaintiff his costs and fees; and
5. Grant such other and further relief deemed proper by the Court.

Respectfully submitted on behalf of Plaintiff
By his attorneys,

/s/ Dennis A. Murphy

Dennis A. Murphy (BBO #645168)
Daniel C. Hill (BBO #644885)
HILL LAW
6 Beacon Street, Suite 600
Boston, MA 02108
(617) 494.8300
dgusmurphy@gmail.com
dhill@danhilllaw.com

Dated: October 19, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have served of a copy of the foregoing on the counsel of record listed below by email and electronic service this 19th day of October, 2021.

Amy E. Kwesell, Esq.,
KP Law, P.C.
101 Arch Street, Floor 12
Boston, MA 02110

Francisco Alejandro Parra, Esq.
D'Agostine, Levine, Parra and Netburn, P.C.
268 Main Street
Acton, MA 01720

/s/ Daniel C. Hill

Daniel C. Hill