

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

SUPERIOR COURT
NO. 02-3071

MOHAMED HANIF BUTT)
)
VS)
)
ZONING BOARD OF APPEALS)
OF THE CITY OF SOMERVILLE,)
Et als)

DEFENDANT, EMERALD DEVELOPMENT GROUP, INC.'S,
MEMORANDUM IN SUPPORT OF MOTION FOR LIMITED REMAND

Defendant, Emerald Development Group, Inc., is requesting that this Court grant a Motion for Remand to the Somerville Zoning Board of Appeals for the limited purpose of clarifying several disputes that have arisen during the course of this litigation.

FACTS

1. Emerald Development Group, Inc. (hereinafter "Emerald") is the owner of a parcel of land located at 343-349 Summer Street, Somerville, Massachusetts.
2. On or about June 26, 2002, Emerald received a special permit from the Zoning Board of Appeals of the City of Somerville (hereinafter "ZBA") granting Emerald the right to construct a four story, 14-unit residential building with underground parking.
3. On or about July 24, 2002, plaintiff appealed the decision of the ZBA to this Court by the filing of this action.
4. Originally, this case was set down for a speedy trial in the summer of 2002. Now, more than 16 months later, the case is still pending.

APPEAL

5. In his Complaint, plaintiff alleges several grounds for the appeal. Paragraphs 37-41 of the Complaint state:

37. The Decision states that "the Applicant shall attempt to increase the building setback from the lot line on the east side where possible."

38. It was the Board's responsibility to require the Developer to demonstrate what increases in building setback were "possible" and to submit for approval plans showing the increased building setback.

39. The Board can not lawfully approve a site plan when a building setback must be changed prior to construction. Such action violates Section 5.2.3.3 (requiring site plans showing proposed setbacks) and Section 5.6 of the Ordinance, which requires ZBA approval of all plans for the project as the Developer proposes to construct it.

40. Although it is plainly "possible" to increase the building setback from the lot line on the east side, the Decision unlawfully defers and delegates the resolution of the easterly setback issue by permitting the applicant to determine what is "possible", ostensibly with review only by the Building Inspector.

41. The Board's failure to require the applicant to explore the feasibility and impact of increasing the building setback to the easterly lot line, and to present a proposal for addressing the problem, subject to Board approval, was unlawful, arbitrary and capricious.

6. Without conceding the requirement for any setback in this zoning (Central Business) district, Emerald has taken steps to increase the setback on the easterly lot line as complained of. Further, consistent with the plaintiff's assertion in paragraph 38, Emerald has produced a plan that demonstrates what setback is possible and proposes to submit said plan to the ZBA for approval upon the court's grant of this motion for limited remand.

7. In his Complaint, plaintiff alleges additional grounds for appeal. Paragraph 43 of the Complaint states:

43. The Decision also unlawfully deferred and delegated to other City officials the resolution of numerous other issues, including additional changes to the project (Condition 1), adequacy of condominium documents to achieve landscaping, fencing, lighting and parking areas (Condition 3), implementation of affordable housing (Conditions 4-6), fire access (Condition 7) and construction management (Condition 8).

8. Without conceding the validity of these claims, Emerald avers that most of these conditions either have been satisfied (building changes, fire access, affordable housing) or are readily ratifiable (condominium documents, construction management) by the ZBA and therefore have/will become moot. In such case, it is the interest of judicial economy and fairness that the Board be permitted to either ratify the actions of the designated officials or clarify its position on said designation.

9. Plaintiff alleges that the ZBA did not make findings as required by law. Although Emerald does not concede that such is the case, Emerald would request that the ZBA be permitted to amend its decision and permit the ZBA to restate its findings so as to resolve any perceived ambiguity.

10. Plaintiff alleges that the ZBA misinterpreted a provision of the Zoning Code related to setbacks. The interpretation of that Section of the Zoning Ordinance can be handled by means of cross motions for summary judgment. There are no factual disputes as to that issue, only legal disputes.

11. The remaining issue as to whether the Board acted in an arbitrary and capricious manner and exceeded its authority would remain for purposes of trial.

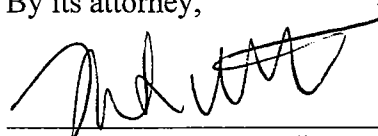
ARGUMENT

The granting of this Motion will permit the Court to narrow the issues for purpose of trial and will not prejudice the plaintiff.

Over 16 months later, Emerald has been compelled to bear the financial burden of maintaining a vacant parcel of land while unable to derive any benefit from the use of its property due to the pendency of this action.

In the interests of fairness to Emerald, plaintiff requests that his Court grant this Motion.

By its attorney,



Mark A. White, BBO #525520
O'Brien & White, P.C.
50 Congress Street, Suite 936
Boston, MA 02109
617-248-2345

Dated: December 10, 2003