



"...the right to a decent, safe and suitable living environment..."

October 11, 2016

Mr. Greg Watson
Masshousing
One Beacon Street
Boston, MA. 02114

*Re: Amended Site Approval Application / "Forest Ridge Residences" – Forest Circle,
Winchester, MA*

Dear Greg:

We are submitting information relating the site approval application submitted by the Krebs Investor Group, LLC, relating to the development of a 296 mixed-income development on Forest Circle in Winchester. On a go-forward basis, the official Applicant for purposes of the Project Eligibility/Site Approval should be considered "KIG Forest Ridge Development, LLC". Justin Krebs is the principal of this LLC as well as the previous entity (Krebs Investor Group, LLC).

We have also included the following information:

1. Letter from Goulston & Storrs dated October 7th 2016 responding to municipal comments submitted by both the Town of Winchester and the Town of Stoneham. This letter also includes requested attachments which show the Applicant demonstrating appropriate site control.
2. Memo from Bohler Engineering dated September 23rd which clarifies the total 40B parcel size as well as clarification as to those individual parcels that comprise the overall 40B parcel.
3. Amended sections to the Site Approval Application and the Existing Conditions Narrative with references corrected (parcel size and Applicant references updated).

Please let us know if you have any questions on any of the information attached herein. Please contact me directly should you have any questions.

Sincerely,

Geoffrey Engler

cc: Town of Winchester
Town of Stoneham

RECEIVED
2016 OCT 17 AM 11:45
TOWN OF WINCHESTER
TOWN MANAGER
BOARD OF SELECTMEN

October 7, 2016

Ms. Katherine Lacy
Massachusetts Housing Finance Agency
One Beacon Street
Boston, MA 02108

Re: Comments on Krebs Investor Group, LLC's Comprehensive Permit Site Approval Application by the Town of Winchester and the Board of Selectmen of the Town of Stoneham

Dear Ms. Lacy:

I write on behalf of our client, Krebs Investor Group, LLC ("KIG"), in response to the September 1, 2016 letter submitted to you by Mark Bobrowski on behalf of the Town of Winchester ("Winchester") and the September 14, 2016 letter submitted to you by Anne Marie O'Neill on behalf of the Board of Selectmen of the Town of Stoneham (the "Stoneham Selectmen").

It is unfortunate that Winchester and the Stoneham Selectmen have decided to oppose the well-conceived project being proposed by KIG, which will bring much needed affordable housing to the Winchester/Stoneham area. It is also concerning that Winchester and the Stoneham Selectmen, in opposing KIG's project, have raised many arguments and issues that are both devoid of support and clearly beyond the scope of what MassHousing is authorized to consider in evaluating KIG's application for project eligibility approval ("PEL"). None of the issues Winchester and the Stoneham Selectmen have raised should give MassHousing any pause as it considers whether to approve my client's application. We will address each of those issues below and explain why none of them should interfere with the issuance of a PEL.

Standing

Winchester and the Stoneham Selectmen are simply incorrect when they assert that KIG lacks control of the project site, including both those portions in Winchester and Stoneham, sufficient to give it standing to apply for a PEL. The following documents, copies of which are enclosed with this letter as Addenda A, B, and C, establish KIG's control of the site: (a) a Purchase and Sale Agreement for the project site dated August 28, 2013, between Carolyn S. Shannon, Mark D. Shannon, and William J. Shannon, Trustees (together, "Shannon"), as seller,

and Joseph A. Marino, James F.X. Marino, and Anthony G. Marino (together, “Marino”), as buyer; (b) an Amendment to Purchase and Sale Agreement dated March 28, 2016 between Shannon and Marino, in which the parties eliminated any provision in their agreement prohibiting or limiting Marino’s right to assign its rights under the purchase and sale agreement (see Addendum B at Section 13); and (c) a letter dated October 6, 2016, from Marino to Justin Krebs of KIG confirming that Marino and KIG have entered into a joint venture and formed an entity named KIG Forest Ridge Development, LLC (“KIG LLC”) for the purpose of developing the project site, and that KIG and Mr. Krebs are authorized to apply for a PEL as representatives of KIG LLC.¹

These documents demonstrate that KIG controls the site, including the Winchester parcels and what Winchester calls the “Access Parcel” in Stoneham, and has standing to apply for a PEL. KIG is the designated developer under the KIG LLC Operating Agreement, and KIG LLC will succeed to Marino’s right to purchase the property under the August 28, 2013 Purchase and Sale Agreement, as amended; form a limited dividend entity to take title to it; and enter into the required regulatory agreement.²

Access to Fallon Road

KIG disagrees with Winchester’s conclusion that KIG does not have the right to use Fallon Road in Stoneham for access to its development and also disagrees with Winchester’s rationale for reaching that conclusion. But there is no need for MassHousing to consider this issue: the law is clear that it would be impermissible for MassHousing, as it reviews KIG’s application for a PEL, to consider rights of access to the project site over adjacent property.

Winchester contends in its letter that KIG’s rights over Fallon Road are relevant to “site control.” That is simply incorrect. The comprehensive permit regulations, at 760 CMR 56.04(4)(g), state that the site control finding that MassHousing must make in connection with KIG’s application is “that the Applicant controls the site, based on evidence that the Applicant or a related entity owns the site, or holds an option or contract to acquire such interest in the site, or has such other interest in the site as is deemed by the Subsidizing Agency to be sufficient to control the site.” This language makes it clear that “site control” relates to ownership of the

¹ Addenda A and B have been redacted to protect some of the economic terms of the deal and certain other confidential information. The redacted information is not necessary to establish KIG’s control of the site, particularly in light of Addendum C, in which Moreno confirms that the purchase and sale agreement is still in full force and effect.

² To further clarify the applicant’s site control, KIG is submitting with this letter a request that the named applicant in its application be changed from KIG to KIG LLC because it is KIG LLC that will succeed to Marino’s right to purchase the property under the August 28, 2013 Purchase and Sale Agreement, as amended.

project site, not to rights of access over property in the surrounding area or the applicant's right to use adjacent property for other purposes.

Indeed, the Housing Appeals Committee has repeatedly confirmed this principle. See Princeton Development, Inc. v. Bedford Board of Appeals, 2005 MA HAC 01-19 (Sept. 20, 2005), at page 2 (“But by the plain language of 760 CMR 31.01(1)(c) [the predecessor to the current regulations], in order to establish jurisdiction the developer is only required to ‘control the site,’ not to have resolved all questions of access to the site. As is further clarified in 760 CMR 31.01(3), site control is a matter of ownership, not access, that is, ‘the applicant’s interest in the site.’”); Bruce v. Dighton Zoning Board of Appeals, MA HAC 10-06 (May 7, 2014), at pages 8-9 (“We have long held that disputes over property rights between parties are not within the jurisdiction conferred by Chapter 40B, but rather should be left for the courts. . . . The existence of a dispute over the developer’s right to place utilities in the street should be decided by the courts, and is not a basis for invalidating a comprehensive permit for lack of site control.”). Copies of the Princeton and Bruce decisions are enclosed as Addenda D and E.³

The sole case cited by Winchester for the proposition that MassHousing should disregard this controlling precedent, Parker v. Black Brook Realty Corporation, is entirely inapposite. Parker was a subdivision control law case, not a comprehensive permit case, and the Appeals Court in Parker made clear that the reason why it decided that it was appropriate for a planning board to consider access rights in reviewing an application for subdivision approval was that the subdivision control statute “expressly admonishes planning boards to exercise their powers under the subdivision control law ‘with due regard for the provision of adequate access to all of the lots in a subdivision’” Parker v. Black Brook Realty Corporation, 61 Mass. App. Ct. 308, 310 (2004). The comprehensive permit statute and regulations contain no similar admonition – and in fact, quite to the contrary, as is explained above they specifically restrict the subsidizing agency in considering “site control” to focus on ownership of the site. Parker therefore provides no support for Winchester’s position.

Indeed, in an analogous case the Land Court (Piper, J.) distinguished Parker and held that it was improper for the planning board to consider an applicant’s rights to access its property in a zoning case where the zoning act and applicable bylaw did not provide that the board should consider that issue when the applicant applied for a special permit. See Sail-On Development Corp. v. City of Brockton Planning Board, 2007 WL 1965316, at *8 (Mass. Land Court July 9, 2007) (“But that line of cases [including Parker] is inapposite, because its principles derive from the provisions of the subdivision control law, and those cases concern the powers of a planning

³ We note that the Housing Appeals Committee cites its 2005 Princeton decision in its 2014 Bruce decision for the proposition that “site control is [a] matter of ownership, not access,” which confirms that this principle applies under the revised (and current) comprehensive permit regulations.

board when it acts under that statute in considering applications for definitive subdivision approval. . . . Absent a legal basis to consider, as a zoning matter, in the permit review process before the Board, the legal rights of the developer to use the streets and ways into the project site, this issue should be left to resolution, if necessary, in another forum.”). The same logic applies here.⁴

For these reasons, it would be improper for MassHousing to consider whether KIG has the right to use Fallon Road, and it therefore need not and should not do so. The bottom line is that it is a judge, not MassHousing, who should resolve any disputes concerning whether one private party has the right to use property owned in fee by another private party.

Stoneham Zoning

KIG likewise disagrees with Winchester and the Stoneham Selectmen’s analyses of Stoneham zoning with respect to the Access Parcel and with their conclusion that Stoneham zoning prohibits the use of the Access Parcel for access to KIG’s development. Indeed, their analyses conflict with one another insofar as Winchester states in its letter that the Access Parcel is located in Stoneham’s Commercial District I (or C-1), whereas the Stoneham Selectmen state in their letter that the Access Parcel is located in Stoneham’s Commercial District II (or C-2). But again, for current purposes it does not matter: MassHousing should not consider Stoneham zoning applicable to property over which KIG proposes to access its project site as part of its review of KIG’s application. Certainly, for the reasons stated above, Stoneham zoning has nothing to do with “site control,” and neither Winchester nor the Stoneham Selectmen have argued that MassHousing should consider Stoneham zoning as relevant to any other issue properly before MassHousing. In any event, it is common that an applicant for a comprehensive permit will seek to make use of property for a multi-family residential development in a zoning district where that use is not permitted (and will seek an exemption from the local zoning restriction as part of the comprehensive permit process before the local board of appeals). Thus, even assuming for the sake of argument that Stoneham zoning would not allow the Access Parcel to serve as access to KIG’s project site, that prohibition would not provide any basis to deny KIG a PEL, which is a prerequisite to it obtaining exemptions from underlying zoning in a comprehensive permit.

To put to rest the issue of whether MassHousing should consider the arguments about Stoneham zoning, KIG hereby requests that MassHousing make clear in its project eligibility approval for KIG’s development that KIG is authorized to apply for a comprehensive permit in Stoneham, if one should be necessary, as well as in Winchester. Should it prove to be necessary,

⁴ Copies of the Parker and Sail-On decisions are enclosed as Addenda F and G.

by obtaining a comprehensive permit in Stoneham, KIG would be able to obtain a waiver from any Stoneham zoning restrictions that might interfere with its project, including the zoning issue raised by Winchester and the Stoneham Selectmen. This should adequately address their arguments.⁵

The Location of the Units

The Stoneham Selectmen, perhaps in tacit recognition of the fact that any zoning prohibitions in Stoneham can be overcome by a comprehensive permit issued by Stoneham, argue that KIG's application is somehow "not filed pursuant to G.L. c. 40B, ss. 20-23," and is therefore ineligible for a PEL, because "the project contains zero (0) 'affordable' dwelling units in Stoneham." The Stoneham Selectmen are simply wrong.

The comprehensive permit statute, regulations, and case law all focus on a requirement that a project contain affordable units. None of them prohibits the site of a single project from extending into more than one municipality, or requires that such a site be treated as two separate projects. Nor does any of them require that affordable units must be located in each of the two municipalities where a project does so. 760 CMR 56.02 defines a "Project" to mean "a development involving the construction or substantial rehabilitation of units of Low or Moderate Income Housing that is eligible to submit an application to a Board for a Comprehensive Permit or to file or maintain for an appeal before the Committee." KIG's proposed project clearly falls within that definition, and it therefore is eligible to receive a comprehensive permit (or two, if both are necessary).

No court has ever read into the comprehensive permit statute or regulations a prohibition against an applicant receiving a comprehensive permit for a portion of its project site that will be used for access to another portion of the project site located in an adjacent municipality where the affordable units are to be located. Nor has the Housing Appeals Committee ever done so. There is therefore no legal support for the Stoneham Selectmen's position. In fact, contrary to the Stoneham Selectmen's contention, local boards have issued comprehensive permits in past situations precisely like this one, where one municipality issues a comprehensive permit for property located within its boundaries that will be used for access to property located in an adjacent municipality, even though no units will be constructed in the first municipality.

Addenda H and I to this letter are copies of two comprehensive permits that do precisely that: one issued by the Zoning Board of Appeals of the Town of Acton on October 20, 2008, and

⁵ The arguments pressed by Winchester and the Stoneham Selectmen are further infirm because they rely on a 2013 rezoning that was intended to preclude any use of the Access Parcel. That unlawful rezoning is ineffective as against the project site. And in any event, our client is entitled to an exception to any restriction on multi-family residential use of the Access Parcel under Lapenas v. Zoning Board of Appeals of Brockton, 352 Mass. 530 (1967). But again, MassHousing need not consider these issues. They will be resolved, if necessary, in another forum.

another issued by the Board of Appeals of the Town of Southborough on May 21, 2004. The Acton decision is particularly enlightening because in it the Board specifically addresses and rejects the argument being made by the Stoneham Selectmen here (see Addendum H, paragraphs 20-29).

Moreover, the Acton decision recites in paragraph 18 that MassHousing issued a PEL for the project on December 6, 2007, and the Southborough decision recites in paragraph 4 that MassHousing issued a letter dated February 14, 2003 for that project stating that the applicant was “eligible to apply for a comprehensive permit and for MHFA financing.” Accordingly, MassHousing itself has issued PELs for projects precisely like KIG’s project. There is no reason it should depart from that practice now.

Sound public policy supports our position on this point. It would make no sense whatsoever to exclude from the provisions of the comprehensive permit law those sites that straddle municipal boundaries. In fact, precisely because of their locations at the outskirts of cities and towns, many of these sites are particularly well suited for the development of affordable housing. To disallow them from qualifying for comprehensive permits would run directly counter to the purpose of the comprehensive permit law, which is to increase the supply of much needed low and moderate income housing in the Commonwealth. Public policy, therefore, as well as past practice and the language of the applicable statute and regulations, requires rejecting the Stoneham Selectmen’s argument.

Appraisal

Winchester raises issues with regard to the value of the property. Under 760 CMR 56.04, the issue of land valuation is solely one between the proponent and the subsidizing agency. In other words, Winchester has no standing to raise these issues.

The Remaining Issues

Winchester and the Stoneham Selectmen’s remaining arguments are easily disposed of. All of the other issues Winchester raises – traffic impacts; fire and police considerations; water and sewer infrastructure; drainage, groundwater, and ledge considerations; wetland impacts; prior site use; screening and noise control; project design; and affordability considerations – are matters that are routinely addressed by the local board of appeals when it considers an applicant’s comprehensive permit application. These issues are always (or nearly always) of concern with respect to any development approved under the comprehensive permit law. They are appropriately dealt with by the comprehensive permit granting authority. None of them provide any basis for denying KIG’s application for a PEL. MassHousing, therefore, should not consider them. And what is more, even if MassHousing were to consider any of them, in its

letter Winchester simply raises these issues as potential problems, but it has not established with evidence that any actual problem exists. For this additional reason, Winchester's letter provides no reason to withhold the approval KIG seeks.

In their letter, the Stoneham Selectmen accuse KIG of misrepresenting in its application that the project is located "entirely within one municipality" because land in Stoneham will be used for access to the development. In fact, there has been no misrepresentation. The project plans included with the application very clearly show the proposed access routes and identify that access will be provided over the Access Parcel in Stoneham. The Stoneham Selectmen also incorrectly suggest that KIG misrepresented that no easement or rights of way over other properties will be required in order to develop the site. On this point there has been no misrepresentation because the statement is true: the project owner will be taking title to the fee in the Access Parcel, so no easement will be required.

Under 760 CMR 56.04, the main issues for MassHousing to determine relating to the project itself are whether the "site is generally appropriate for residential development," and whether the "conceptual project design is generally appropriate for the site on which it is located." KIG's application clearly demonstrates that these requirements are met.

In sum, it appears that Winchester and the Stoneham Selectmen are employing a "kitchen sink" approach, rather than raising issues of any real substance. Moreover, the arguments they have raised are beyond the scope of what the comprehensive permit regulations set forth for consideration by a subsidizing agency in connection with a PEL application. For these reasons we respectfully request that MassHousing approve KIG's PEL application, making clear in its approval that KIG is authorized to apply for a comprehensive permit in Stoneham, if one should be necessary, as well as in Winchester. If MassHousing has any doubt on that point, we would be happy to engage in further discussions with you about any issues of concern.

Very truly yours,



Gary M. Ronan

Enclosures

Cc: Mark Bobrowski, Esq.
Ms. Ann Marie O'Neill

A

PURCHASE AND SALE AGREEMENT

This 28th day of August, 2013

1. PARTIES AND MAILING ADDRESSES

Carolyn S. Shannon, Mark D. Shannon and William J. Shannon, as Trustees of The Shannon Investment Trust, [REDACTED] hereinafter called the SELLER, agrees to SELL and Joseph A. Marino, James F.X. Marino, and Anthony G. Marino having an address c/o James F. X. Marino, [REDACTED], hereinafter called the BUYER or PURCHASER, agrees to BUY, upon the terms hereinafter set forth, the following described premises:

2. DESCRIPTION

The Land described as: (a) land located on and off of Fallon Road, Stoneham, Massachusetts, North Border Road, Winchester, Massachusetts, and Rear Eugene Road, Winchester Massachusetts, being Parcels I, II and III in that certain deed dated November 15, 2002, recorded with Middlesex South Registry of Deeds ("Deeds") in Book 37644, Page 43, and, (b) land located on and off of Forest Circle, Winchester Massachusetts, being Parcels I and II (less the excepted parcel) in that certain deed dated November 15, 2002, recorded with said Deeds in Book 37644, Page 38 (collectively, the "Land" or "Premises")

3. BUILDINGS, STRUCTURES, IMPROVEMENTS, FIXTURES

Included in the sale is the Land only. Any structures or improvements located on the Land are incidental to the transaction, are sold "as is" and "with all faults".

4. TITLE DEED

Said premises are to be conveyed by a good and sufficient quitclaim deed running to the BUYER, or to the nominee designated by the BUYER by written notice to the SELLER at least seven days before the deed is to be delivered as herein provided, and said deed shall convey a good and clear record and marketable title thereto, free from all encumbrances, except:

- (a) Provisions of existing building and zoning laws;
- (b) Such taxes for the then current year as are not due and payable on the date of the delivery of such deed;
- (c) Any liens for municipal betterments assessed after the date of this agreement;

(d) Easements, restrictions and reservations of record, if any, not objected to in Buyer's Title Objection Notice as defined below.

5. PURCHASE PRICE

The agreed purchase price for said premises is [REDACTED] subject to increase as provided in paragraph 20.g. below, of which

\$ [REDACTED] has been previously paid as a deposit (the "Initial Deposit"), and are to be paid at the time of delivery of the deed in cash, or by certified, cashier's, treasurer's, or bank check(s), or by wire transfer.

6. TIME FOR PERFORMANCE; DELIVERY OF DEED

Such deed is to be delivered at 10 a.m. on or before the sixtieth (60th) day following the satisfaction of the Buyer's permitting contingencies set forth in paragraph 20 hereof (or Buyer's written waiver in whole or in part of such contingencies), at the office of Alan Lipkind, Esq., Burns & Levinson LLP, 125 Summer Street, Boston, MA 02110, or, at Buyer's written election, the office of buyers' lender's counsel in the Great Boston area, unless otherwise agreed upon in writing. IT IS AGREED THAT TIME IS OF THE ESSENCE OF THIS AGREEMENT.

7. POSSESSION AND CONDITION OF PREMISES; ACCESS PRE-CLOSING

Full possession of said premises free of all tenants and occupants and personal property, and free of refuse or junk, including by way of example and not in limitation, abandoned vehicles, household furniture and televisions, but specifically excluding (a) ABC Fill, as defined below, and construction debris, the disposal of which shall be governed by and limited as provided in Section 23, below, and (b) brush, fallen or dead vegetation, and litter, is to be delivered at the time of the delivery of the deed, said premises to be then in the same condition as they now are, reasonable use and wear thereof excepted. The BUYER shall be entitled personally to inspect the Premises prior to the delivery of the deed in order to determine whether the condition thereof complies with the terms of this clause.

Buyer shall have the right to access the Premises from time to time prior to the Closing for the purposes of conducting inspections and gathering information necessary or useful to advance Buyer's permitting of the Premises and its post-closing development of the site. All such activities shall be conducted by Buyer and its designees at their sole cost and expense. All arrangements for such activities shall be coordinated through Seller and Seller's representatives. In connection with any entry onto the Premises in connection with such pre-Closing activities pursuant hereto, Buyer shall provide Seller with at least 24 hours advance notice of such inspection (which may be telephonic), in order that Seller may have the opportunity to have a representative present during such inspection. Seller agrees to permit, and to the extent reasonably necessary, to assist Buyer

in obtaining access to the Premises for such pre-Closing activities, provided that all such assistance shall be at no out-of-pocket, third-party cost to Seller. Prior to any such entry, Buyer shall have in place and provide Seller evidence reasonably acceptable to Seller of Buyer's general liability insurance in an amount of at least \$1,000,000 per occurrence, and such other insurance in forms and amounts as are reasonably required by Seller, which insurance shall name Seller and its designees, as additional insureds; upon request, Buyer shall provide Seller with proof of such insurance prior to any entry by Buyer of its designated agents and representatives on to the property, or the commencing of Buyer's physical entry on to the Premises. In connection with exercising its rights under this Section, Buyer agrees to keep the Premises free from all liens and hereby indemnifies and agrees to defend, and hold harmless Seller, and Seller's beneficiaries, members, partners, agents, employees and attorneys, and their respective successors and assigns, from and against all claims, actions, losses, liabilities, damages, costs and expenses (including, but not limited to, attorneys' fees and costs) incurred, suffered by, or claimed against Seller by reason of any damage to the Premises or injury to persons caused by Buyer and/or its agents, employees or contractors in exercising its rights under this Section. In addition, Buyer shall promptly repair any damage to the Premises caused by its entry thereon and shall restore the Premises substantially to the condition in which it existed prior to such entry. The indemnification, restoration and repair provisions of this Section shall survive the Closing or earlier termination of this Agreement.

8. TITLE REVIEW; EXTENSION TO PERFECT TITLE OR MAKE PREMISES CONFORM

Buyer shall, within forty-five (45) days after execution of this Agreement, deliver or cause to be delivered to Seller a preliminary report of title. If the state of title as indicated therein shows encumbrances which are of a nature which in Buyer's opinion would adversely affect Buyer's use of the Premises, then Buyer shall notify Seller of any objections to title (the "**Title Objection Notice**"). Seller agrees to exercise diligent efforts promptly to remove such exceptions from title, provided that Seller shall not be obligated to expend more than the Cure Limit (as defined below) to effect removal of non-monetary objections, and provided further, that Seller shall not be obligated to pay or discharge any monetary encumbrance until the date of Closing, and may use the purchase price to pay the same. If, despite the exercise of diligent efforts, Seller does not, within thirty (30) days after receipt of the Title Objection Notice, have said objections removed from the title, then after the expiration of such thirty (30) day period, Buyer shall, within the following thirty (30) days (x) either waive such objections or agree to cure the same itself, receiving at Closing a credit up to the amount of the unspent portion, if any, of the Cure Limit or (y) terminate this Agreement by giving notice of termination to Seller, and upon giving such notice of termination, this Agreement shall terminate, with no further liability of either party to the other. The "Cure Limit" shall be Fifteen Thousand Dollars (\$15,000).

If the SELLER shall be unable to give title or to make conveyance, or to deliver possession of the premises, all as herein stipulated, or if at the time of the delivery of the deed the premises do not conform with the provisions hereof, then the SELLER shall use

reasonable efforts to remove any defects in title, or to deliver possession as provided herein, or to make the said premises conform to the provisions hereof, as the case may be, and thereupon the time for performance hereof shall be extended for a period of up to thirty (30) days.

9. FAILURE TO PERFECT TITLE OR MAKE PREMISES CONFORM, etc.

If at the expiration of the extended time the SELLER, having complied with its obligations under Section 8, above, shall have failed so to remove any defects in title, deliver possession, or make the premises conform, as the case may be, all as herein agreed, then the Initial Deposit made under this agreement shall be forthwith refunded and all other obligations of the parties hereto shall cease and this agreement shall be void without recourse to the parties hereto, unless BUYER shall make the election afforded it in Section 10, below.

10. BUYER'S ELECTION TO ACCEPT TITLE

The BUYER shall have the election, at either the original or any extended time for performance, to accept such title as the SELLER can deliver to the Premises in their then condition and to pay therefor the purchase price without reduction beyond any portion of the Cure Limit which Seller has failed to expend under Section 8.

11. ACCEPTANCE OF DEED

The acceptance of a deed by the BUYER or their nominee, as the case may be, shall be deemed to be a full performance and discharge of every agreement and obligation herein contained or expressed, except such as are, by the terms hereof, to be performed after the delivery of said deed.

12. USE OF MONEY TO CLEAR TITLE

To enable the SELLER to make conveyance as herein provided, the SELLER may, at the time of delivery of the deed, use the purchase money or any portion thereof to clear the title of any or all encumbrances or interests, provided that all instruments so procured are recorded simultaneously with the delivery of said deed or reasonable arrangements have been made to obtain and subsequently record the same, in conformance with locally accepted commercial real estate conveyancing practice.

13. ADJUSTMENTS

Taxes for the then current fiscal year shall be apportioned as of the day of performance of this agreement, and one-half (1/2) of the net amount thereof shall be added to or deducted from, as the case may be, the purchase price payable by the BUYER at the time of delivery of the deed.

14. ADJUSTMENT OF UNASSESSED AND ABATED TAXES

If the final amount of said taxes is not known at the time of the delivery of the deed, they shall be apportioned on the basis of the taxes assessed for the preceding fiscal year, with a reapportionment as soon as the new tax rate and valuation can be ascertained; and, if the taxes which are to be apportioned shall thereafter be reduced by abatement, the amount of such abatement, less the reasonable cost of obtaining the same, shall be apportioned between the parties, provided that neither party shall be obligated to institute or prosecute proceedings for an abatement unless herein otherwise agreed.

15. DEPOSIT

All deposits made hereunder shall be held in escrow by [REDACTED], subject to the terms of this agreement and shall be duly accounted for at the time for performance of this agreement.

16. BUYER'S DEFAULT; DAMAGES

If the BUYER shall fail to fulfill the BUYER's agreements herein, all deposits and all tax payments made hereunder by the BUYER shall be retained by the SELLER as liquidated damages as SELLER's sole and exclusive remedy at law or in equity, in lieu of any other remedy at law or in equity. The parties acknowledge that ascertaining actual damages arising from BUYER's default may be difficult, uncertain, time consuming and costly. The parties hereto agree to waive any rights one may have against the other to seek a judicial or other determination of actual damages arising from BUYER's default, and mutually hereby agree that the amount of the deposit is a reasonable and acceptable estimate of such damages.

17. LIABILITY OF TRUSTEE, SHAREHOLDER, BENEFICIARY, etc.

If the SELLER or BUYER executes this agreement in a representative or fiduciary capacity, only the principal or the estate represented shall be bound, and neither the SELLER or BUYER so executing, nor any shareholder or beneficiary of any trust, shall be personally liable for any obligation, express or implied, hereunder.

18. WARRANTIES AND REPRESENTATIONS

The BUYER acknowledges that the BUYER has not been influenced to enter into this transaction nor has BUYER relied upon any warranties or representations not set forth or incorporated in this agreement.

19. CONSTRUCTION OF AGREEMENT

This instrument, executed in multiple counterparts, is to be construed as a Massachusetts contract, is to take effect as a sealed instrument, sets forth the entire contract between the parties, is binding upon and enures to the benefit of the parties hereto and their respective heirs, devisees, executors, administrators, successors and assigns, and may be cancelled,

modified or amended only by a written instrument executed by both the SELLER and the BUYER or their respective counsel. The parties may rely upon facsimile copies of such written instruments. If two or more persons are named herein as BUYER their obligations hereunder shall be joint and several. The captions and marginal notes are used only as a matter of convenience and are not to be considered a part of this agreement or to be used in determining the intent of the parties to it.

20. PERMITTING PERIOD

The Buyer's obligations hereunder are subject to and conditioned upon Buyer's receipt of approval for construction of an affordable housing development at the Premises pursuant to the provisions of G.L. c. 40B (hereafter, the "40B Project"), at Buyer's sole cost and expense. Buyer agrees to use diligent efforts to obtain approval of the 40B Project during the period (the "Permitting Period") commencing on the date hereof and expiring not later than [REDACTED] if all of the extensions described in subsection 20.d. below be exercised, and subject to further extension due to appeals as set forth in subsection 20.e., below, subject to the following terms and conditions:

- a. The parties agree that prior to making application to the Town of Winchester for the 40B Project, Buyer shall be entitled to seek approval from the Stoneham Conservation Commission to construct a secondary access across wetlands near Fallon Road and/or Eugene Drive to the upland portion of the Premises in Winchester (the "Stoneham access approval").
- b. Buyer shall have the right to elect to terminate this Agreement by written notice to Seller if it fails to obtain the Stoneham access approval on or before [REDACTED], should Buyer so terminate this Agreement the Initial Deposit made by it promptly shall be returned to it. If Buyer does not make such election, then this Agreement shall continue in full force and effect.
- c. Not later than thirty (30) days following the earlier to occur of (a) [REDACTED] and (b) the date on which Buyer obtains the Stoneham access approval, Buyer shall commence effort to obtain a written determination of project eligibility from the subsidizing agency; during the remainder of the Permitting Period, Buyer shall file and prosecute its application for the comprehensive permit for a 40B Project (the "Comprehensive Permit").
- d. If Buyer is unable to obtain the Comprehensive Permit on or before [REDACTED] [REDACTED] Buyer may extend the period afforded to it to obtain permits for not more than three (3) periods of four months each, upon the payment of an additional deposit of \$4,000 for each such extension period (each of such deposits to be applicable to the Purchase Price but non-refundable).
- e. In the event that during the Permitting Period Buyer is either (i) denied a Comprehensive Permit, or (ii) is granted such approval or permit on conditions that make the 40B Project uneconomic (either a "Decision"), the Buyer shall have the right to appeal the Decision as provided in G.L. c. 40B or otherwise, and such appeal shall extend the Permitting Period, provided that Buyer prosecutes said appeal diligently to a non-appealable final decision. If the Comprehensive Permit is issued, but appealed by a third party, the Permitting Period shall likewise be extended, provided that Buyer diligently defends such appeal to a non-appealable

final decision. The Permitting Period shall not be extended by Buyer's failure to obtain the Stoneham access permit, but nothing herein shall prevent Buyer from appealing a denial of same.

- f. In the event that Buyer, despite diligent efforts, does not obtain a Comprehensive Permit during the Permitting Period upon economic terms acceptable to Buyer, Buyer may elect in a writing to Seller to terminate this Agreement, whereupon the Initial Deposit shall be refunded to Buyer, and this Agreement shall be void and without further recourse to the parties hereto.
- g. In the event that the Comprehensive Permit allows the construction of more than 75 dwelling units, the Purchase Price for the Premises shall be increased by the sum of \$ [REDACTED] per unit for each unit over [REDACTED] up to a maximum price increase of \$ [REDACTED] additional units, [REDACTED] units total), regardless of whether the construction of more than [REDACTED] units is allowed under the Comprehensive Permit.
- h. Buyer shall have the right to waive any one or more of the provisions and contingencies set forth above concerning the 40B Project, but such waiver must be in writing to be effective against Buyer. All decisions concerning any aspect of the 40B Project shall be made solely by Buyer and not Seller.

21. PROGRESS DOCUMENTS

Buyer shall provide Seller, at the notice address set forth in paragraph 27 below, with complete copies of all submissions made to Winchester and/ or Stoneham town officials, contemporaneously with, or promptly following, such submissions, for informational purposes only (with all rights for the use of such submissions remaining solely with Buyer). Further, Buyer, directly or through its 40B permitting consultants, shall provide updates to Seller not less than every ninety (90) days concerning the progress and status of the 40B Project, including the status of applications and appeals.

Seller agrees promptly to execute and deliver to Buyer any and all applications and other writings requested by Buyer in connection with the 40B Project, including without limitation the Stoneham access approval, and to provide written assents (if required) to enable Buyer to proceed with or defend any appeal. Should Seller not deliver to Buyer fully executed originals of such requested documents on or before the tenth (10th) day after Buyer delivers the same to Seller, Seller hereby grants to Buyer a power of attorney coupled with an interest, pursuant to which Buyer shall be and hereby is authorized to execute and deliver such documents on behalf of Seller.

22. TAXES

From and after the execution hereof until the date of Closing, and as a condition of Seller's obligations under this Agreement, Buyer shall remit to Seller, within twenty (20) days of Seller's invoice therefore (sent to the notice address set forth in paragraph 27 below), an amount equal to one-half (1/2) of all quarterly real estate taxes for the Premises then due and payable for then-current tax quarter, as evidenced by a copy of the invoice therefor, which must accompany Seller's request for payment. Buyer shall make its payments payable to the Town of Winchester, or the Town of Stoneham, as applicable.

Seller hereby covenants and agrees to pay when due all remaining amounts of real estate taxes levied against the Premises through the date of Closing.

In the event that Buyer fails to make such payments as required hereunder, or any check delivered by Buyer and tendered to the taxing authority is dishonored, then within ten (10) days of Seller's written demand therefor, Buyer shall reimburse Seller for the amount of such tax payment, together with any interest or late fee imposed by the taxing authority due to such late or dishonored payment. In the event that Buyer fails to reimburse Seller as required hereby, then Buyer shall be deemed to be in material breach hereof, and Seller shall have the right to terminate this Agreement upon five (5) days' notice, unless Buyer during such period fully reimburses Seller, and failing which, following the expiration of such period without such reimbursement having been made, all deposits, together with all tax payments made pursuant hereto, shall be retained by Seller as liquidated damages, and this Agreement shall be void and without further recourse to the parties hereto.

Provided that this Agreement is performed, at Closing Buyer shall receive credits against the Purchase Price due of (a) all (i.e., 100% of) tax payments made by Buyer pursuant hereto, excluding however interest and/or late fees paid pursuant to the provisions of this Paragraph 22; and (b) Ten Thousand Dollars (\$10,000), for sums paid by Buyer towards taxes on the Premises prior to the date of this Agreement.

23. ENVIRONMENTAL

(a) The parties acknowledge receipt of a Limited Site Assessment prepared by Geological Field Services, Inc., dated October 4, 1993, copies of which have previously been delivered to the Buyer (the "1993 Assessment"). The parties also acknowledge that the Premises have areas of fill, consisting primarily of asphalt, brick and concrete ("ABC Fill"), as well as apparent construction debris, with, according to the 1993 Assessment, reportable concentrations of beryllium, copper, lead and zinc.

(b) At the time of Closing, Seller agrees to place the sum of \$400,000 in Closing proceeds in an escrow account to be maintained by Commonwealth Land Title Insurance Company (the "Escrow Holder") for the purposes described herein (the "Environmental Escrow Fund"), such funds to be placed in an interest-bearing account with all interest payable to Seller. Seller shall have the right to elect to have the Escrow Holder deposit the Environmental Escrow Fund in an interest bearing money market account with a financial institution, such as Boston Private Bank, or a fund investor, such as Vanguard or Fidelity, with which the Escrow Holder has an established relationship or agrees to commence one.

(c) Within ninety (90) days following the signing of this Agreement, Buyer shall obtain three (3) bids from licensed site professionals (each, an "LSP") to provide an assessment and determination (the "Current Assessment") of what remediation/ hazardous waste removal at the Premises is required under the Massachusetts Contingency Plan, if any, in order to construct the 40B Project (the "Remediation Work"), and shall engage the lowest-priced bidder reasonably

acceptable to Buyer to perform the assessment; Buyer shall pay the cost of such assessment but, should the Closing occur, shall be reimbursed for such cost from the Environmental Escrow Fund.

(d) The parties acknowledge and agree that the LSP engaged by Buyer to perform the Current Assessment shall as part of that assessment or in connection with construction work following the Closing, determine what part, if any, of the ABC Fill and construction debris constitutes hazardous material which must be removed pursuant to the Massachusetts Contingency Plan, 310 CMR 40.000 et seq. ("MCP"), in order for the property to be developed as 40B residential property, and only remediation/removal of such material shall be included in the Remediation Work. Buyer further agrees that such LSP and Buyer shall reasonably endeavor to limit the amount of and cost of removal (if the same is required). For the avoidance of doubt, the parties agree that the LSP and Buyer shall create the remediation plan, and the Buyer's development plan, as though the Environmental Escrow Fund did not exist and all costs were being paid by Buyer. Onsite re-use of ABC Fill and construction debris, if any, shall be deemed to be Remediation Work but only to the extent of any additional cost to Buyer of such re-use over the cost of purchasing and bringing on to the site of a like amount of needed fill from other sources.

(e) Buyer shall not commence the Remediation Work until after the Closing. Within ninety (90) days following the Closing, Buyer shall obtain three (3) bids from LSP's for supervision of the Remediation Work; Buyer shall request such bids to include a guaranteed price. Each such bid shall be sent simultaneously to Buyer and to Seller. Buyer shall inform Seller in writing of the bid Buyer elects to accept. Should Buyer accept the lowest guaranteed price bid, or should Buyer's LSP submit and Buyer elect to accept (a) a guaranteed price bid for such supervision work which is not more than 25% higher than the lowest guaranteed price bid Buyer receives, or (b) a non-guaranteed price bid that is not more than 25% higher than the lowest non-guaranteed price bid Buyer receives, Buyer's decision to engage the lowest guaranteed price bidder or Buyer's LSP for such supervision work shall not be subject to review by Seller; if Buyer elects not to accept either the lowest guaranteed price bid or a bid that complies with the provisions of (a) or (b), and if Seller fails within five (5) business days after receiving notice of Buyer's election to accept such bid, to provide Buyer with Seller's written objection to the same, with Seller stating its reasonable basis for such objection, the same shall be deemed to be accepted, and the bid amount shall be released to Buyer. If Seller reasonably disputes the LSP's bid, the procedure set forth in paragraph (f)(iii) below shall apply to such dispute.

(f) (i) Within ninety (90) days following the date of Closing, the Remediation Work shall be put out for competitive bid to at least three (3) hazardous waste cleanup companies, and the Buyer shall engage the lowest-priced bidder reasonably acceptable to Buyer to perform such work, subject to Seller's approval, not to be unreasonably withheld, conditioned or delayed. Buyer shall request such bids to include a guaranteed price. Copies of all bids shall be sent simultaneously

to Buyer and to Seller, and Buyer shall notify Seller in writing on or before the fifteenth (15th) day of Buyer's receipt of the bids of the bid Buyer wishes to accept.

(ii) If Buyer accepts the lowest guaranteed price bid, Seller shall have no right to object to the same.

(iii) If Buyer accepts any other bid, and if Seller disapproves of the selected bid, such disapproval to be given in writing within five (5) business days of Seller's receipt of Buyer's notice, with Seller stating its reasonable basis for such objection. The parties (and/or their respective LSPs) then shall negotiate in good faith (which may include consultation and/or negotiation with the bidders) to reach agreement on the scope and price for the bid. If, after twenty (20) days, the parties have not agreed on a bid (or revised bid), then the parties' LSPs shall together appoint a third LSP (the "Appointee") with at least 10 years experience supervising commercial environmental remediation projects, and the Appointee shall decide the dispute, such decision to be made within twenty (20) days of the appointment. The Appointee shall have no authority to reduce the amount of any bid, but if the Appointee decides that the scope of work should be amended (increased or decreased), the Appointee may request, receive and consider any revised bid(s) submitted by the bidders for an adjusted scope of work. The bid (or revised bid as the case may be) selected by the Appointee shall be the one that most closely approximates the Appointee's determination of the appropriate scope and price for the Remediation Work, and his/her decision shall be final and binding upon the parties.

Promptly upon a bid being accepted as provided above without the need for Seller approval, or the parties' agreement concerning the bid, or if not agreed, the Appointee's determination of the acceptable bid, the Escrow Holder shall release the accepted bid amount to the Buyer (up to a maximum of the Environmental Escrow Fund, less funds previously disbursed for the Current Assessment and the LSP bid for supervision of the Remediation Work, and excluding any earned interest), and shall release the balance of the Environmental Escrow Fund (if any), together with any earned interest, to Seller.

(g) In the event that Buyer is unable to obtain guaranteed price bids, then the above provisions shall apply to the selection of the contractor to perform the Remediation Work, but no money shall be released to either party (other than to Buyer for the Current Assessment and the LSP bid for supervision of the Remediation Work) and the below procedures shall apply to the release of funds:

Buyer shall exercise due diligence in commencing and prosecuting to completion the Remediation Work, consistent with Buyer's schedule for development of its project. Buyer shall submit only one (1) request for release of monies from the Environmental Escrow Fund ("Buyer's Requisition"), which shall include the accepted bid and any additional allowed charges for the Remediation Work, plus, if not previously paid, the fees for the Current Assessment (under paragraph (d) above) and any additional fees of the LSP for oversight of the cleanup

(collectively, the "Remediation Costs"). Buyer's Requisition shall be paid and released to or for the benefit of Buyer as set forth below.

Buyer must submit to the Escrow Holder Buyer's Requisition within nine (9) months following the Closing.

(h) During the progress of the Remediation Work under (g) above (but not under an accepted guaranteed price bid), all invoices for the cleanup company and all change orders by the LSP, as approved by Buyer for payment, shall be sent to the Seller and the Escrow Holder. Unless the Seller objects to an invoice approved by Buyer within five (5) business days of Seller's receipt thereof (including in such objection the basis therefore in reasonable detail), the charges covered by such invoice shall be deemed to be approved by Seller and shall be reimbursed as part of Buyer's Requisition. The parties agree to negotiate in good faith to resolve any disputed invoice, which shall include reasonable efforts by Buyer to obtain the adjustment of disputed invoices. In the event that parties cannot agree within thirty (30) days following Seller's notice of objection, the Escrow Holder shall be entitled to consult an LSP of its choosing (who shall not be one of the three LSPs who bid on the assessment) to determine whether to make payment on the disputed invoice (or whether to adjust the same, in whole or in part, and such determination shall be binding upon the Seller and Buyer.

All charges shown on Buyer's Requisition relating to invoices previously approved pursuant to this paragraph (h), shall be paid to Buyer or as directed by Buyer immediately. All charges in Buyer's Requisition which have not been previously approved shall be subject to the review, approval and adjustment provisions of this paragraph (h). Upon final approval and/or adjustment of all such charges, the approved and/or adjusted amounts shall be immediately paid to or as directed by Buyer, and the remaining balance, if any, of the Environmental Escrow Fund shall promptly be remitted to the Seller, together with all interest earned thereon.

(i) Notwithstanding any other provision of this Agreement, the Buyer shall be responsible for all Remediation Costs in excess of the Environmental Escrow Fund.

(j) To the extent not otherwise specified herein, Buyer shall send copies to Seller of all bids (of LSP and any remediation contractor), the Current Assessment, and all accepted and executed contracts relating to the Remediation Work, and all change orders thereto, if the Remediation Work is proceeding under (g) (but not if it is proceeding under a guaranteed price bid), with reasonable promptness following receipt of same.

24. LIMITED ASSIGNMENT RIGHTS; NO RECORDING

Seller acknowledges that Buyer intends to assign its rights under this Agreement to a limited liability company or other entity beneficially owned and controlled by one or more of the individuals comprising Buyer, and after the issuance of the Comprehensive Permit may assign its rights under this Agreement to a third party, in each instance with such assignee assuming all obligations of Buyer hereunder; Seller consents to such assignment and assumption and agrees to enter into an amendment of this Agreement prepared by Buyer and evidencing such assignment and assumption, and being in form and content reasonably acceptable to Seller. Except as set forth in the immediately preceding sentence, prior to the issuance of the Comprehensive Permit, Buyer shall not assign Buyer's rights and obligations under this Agreement to any person or entity (directly or indirectly, including by transfer of membership or beneficial interests in the entity which succeeds Buyer pursuant to the immediately preceding sentence), without the prior approval of Seller (which may be granted or withheld by Seller in Seller's sole and absolute discretion), in each instance, with the exception of (a) the nominee provisions set forth in Paragraph 4, and (b) transfers to or among the individuals making up Buyer and signing this Agreement, and their family members, or caused by the death of any one or more of such persons, with no Seller approval being required for any one or more transfer described in (a) or (b).

Buyer shall not record this Agreement at said Deeds. Any purported assignment of this Agreement, except as specifically permitted hereunder, or any recording of this Agreement, shall be null and void. If Buyer purports to assign or record this Agreement in contravention of the terms of this Agreement, then at Seller's option, this Agreement shall terminate and all deposits made hereunder shall be retained by Seller as liquidated damages.

25. NO BROKER

Each of Buyer and Seller warrants and represents to the other that no broker or finder introduced them to each other or the Buyer to said Premises, and each of Buyer and Seller respectively agrees to indemnify, defend and hold the other harmless from and against any and all costs and expenses for a brokerage commission or finder's fee arising out of this Agreement or the conveyance hereunder, including reasonable attorney's fees in connection with the Seller's defense against any claim for the same, should such representation or warranty by the indemnifying party be untrue or inaccurate in any respect. Notwithstanding any provision hereof to the contrary, Buyer acknowledges and agrees that Anthony G. Marino did not serve as a broker or finder for the transaction which is the subject of this Agreement, and by his signing this Agreement as one of the persons making up Buyer, said Anthony G. Marino hereby acknowledges and agrees to such statement.

26. PURCHASE "AS IS"

Buyer acknowledges that Buyer has inspected said Premises, and that Buyer is fully satisfied with the condition thereof. Said Premises are to be conveyed in their present "AS IS" condition, except as expressly set forth in this Agreement, and the Buyer further acknowledges Buyer is not relying upon any statement, warranty or representation by the Seller or by any other party with respect to the Premises, it being the understanding of the parties hereto that the entire Agreement of the parties is fully set forth herein.

27. NOTICES; ATTORNEYS; FACSIMILIES, COPIES AND ELECTRONIC VERSIONS

Any notices or other information (including invoices and submittals as described in paragraphs 21 and 22 hereof) required or permitted to be given by this Agreement shall be deemed duly given when mailed by registered or certified mail, return receipt requested, postage and registration or certification charges prepaid, or when hand delivered, or when received via Federal Express or other nationally recognized overnight courier, or when received by telephonic electronic facsimile, addressed in the case of the Seller to:

Carolyn S. [REDACTED], Mark D. [REDACTED] and William J. [REDACTED]
Trustees of The Shannon Investment Trust
[REDACTED]
[REDACTED]

with a copy to:

Erica P. Bigelow
Rich May, P.C.
176 Federal Street
Boston, MA 02110
Direct 617.556.3877
Fax 617.391.5777
Email: ebigelow@richmaylaw.com

and in the case of the Buyer to:

Joseph A. Marino, James F.X. Marino, and Anthony G. Marino
c/o James F.X. Marino
11 Jefferson Road
Winchester, MA 01890

with a copy to:

Alan Lipkind, Esq.
Burns & Levinson LLP
125 Summer Street

Boston, MA 02110
Direct 617.345.3547
Fax 617.345.3299
Email: alipkind@burnslev.com

Any party may change its address for notice by written notice given to the other in the manner provided in this subsection. Any such communication, notice or demand shall be deemed to have been duly given or served on the date personally served, if by personal service, or on the date shown on the return receipt or other evidence of delivery, if mailed, delivered or sent by electronic facsimile. All notices pursuant to this Agreement from Buyer to Seller or from Seller to Buyer will be effective if executed by and sent by their respective attorneys.

Buyer and Seller hereby authorize their respective attorneys named above to execute on their behalf extensions, modifications, notices and other documents affecting this Agreement or in connection with the conveyance of the Premises contemplated hereby.

Facsimiles of signatures shall be deemed originals for purposes of the execution of this Agreement and facsimiles of any modification, extension or notice hereunder shall be deemed originals, provided the sender shall undertake promptly to deposit the original(s) thereof with the United States Postal Service, first class mail, postage prepaid, addressed to the recipient at the address(es) required above.

28. MISCELLANEOUS

(a) Each individual and entity executing this Agreement hereby represents and warrants that he or it has the capacity set forth on the signature pages hereof with full power and authority to bind the party on whose behalf he or it is executing this Agreement to the terms hereof.

(b) This Agreement is the entire Agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements between the parties with respect to the matters contained in this Agreement. Any waiver, amendment, modification, consent or acquiescence with respect to any provision of this Agreement or with respect to any failure to perform in accordance therewith shall be set forth in writing and duly executed by or on behalf of the party to be bound thereby. No waiver by any party of any breach hereunder shall be deemed a waiver of any other or subsequent breach.

(c) This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which when taken together shall constitute one and the same instrument. The signature page of any counterpart may be detached therefrom without impairing the legal effect of the signature(s) thereon provided such signature page is attached to any other counterpart identical thereto except having additional signature pages executed by other parties to this Agreement attached thereto.

(d) Time is of the essence with respect to the performance of, and compliance with, each of the provisions and conditions of this Agreement.

(e) Wherever possible, each provision of this Agreement shall be interpreted in such a manner as to be valid under applicable law, but, if any provision of this Agreement shall be invalid or prohibited thereunder, such invalidity or prohibition shall be construed as if such invalid or prohibited provision had not been inserted herein and shall not affect the remainder of such provision or the remaining provisions of this Agreement.

(f) The language in all parts of this Agreement shall be in all cases construed simply according to its fair meaning and not strictly for or against any of the parties hereto for any reason, including, without limitation, by virtue of the fact that it may have been drafted or prepared by counsel for one of the parties, it being recognized that both Buyer and Seller have contributed materially and substantially to the preparation of this Agreement. Section and Paragraph headings of this Agreement are solely for convenience of reference and shall not govern the interpretation of any of the provisions of this Agreement.

(g) This Agreement shall be binding upon and inure to the benefit of each of the parties hereto and to their respective transferees, successors, and assigns.

(h) The parties mutually agree to execute and deliver to each other, at the Closing, such other and further documents as may be reasonably required by counsel for the parties and Buyer's lender to carry into effect the purposes and intents of this Agreement, provided such documents are customarily delivered in commercial real estate transactions in Massachusetts, are reasonably acceptable to counsel for the parties, and do not impose any material obligations upon any party hereunder except as set forth in this Agreement or otherwise required by law.

(i) Notwithstanding anything to the contrary contained herein, this Agreement shall not be deemed or construed to make the parties hereto partners or joint venturers, or to render either party liable for any of the debts or obligations of the other, it being the intention of the parties merely to create the relationship of Seller and Buyer with respect to the Premises to be conveyed as contemplated hereby.

(j) This Agreement shall be governed by and construed in accordance with the laws of The Commonwealth of Massachusetts.

(k) In no event shall Seller have any obligation to pay any fee to Buyer or Buyer's lender including without limitation attorney's fees of any kind, except as otherwise specifically provided herein.

(l) At Closing, not in limitation of any other provision herein, Seller shall execute and deliver to Buyer's title insurance company an affidavit with respect to (a) mechanics' or materialmen's liens with regard to the Premises, sufficient in form and substance to enable the title insurance company to delete its standard ALTA exception for

such liens, (b) there being no parties in possession of or entitled to possession of the Premises, (c) there being no unpaid bills pursuant to G.L. c. 164 (municipal lighting plants).

(m) Any matter relating to the performance of this Agreement which is the subject of a title, practice or ethical standard of the Real Estate Bar Association of Massachusetts shall be governed by the provisions of said standard to the extent applicable.

(n) It is understood and agreed by the parties that the Premises shall not be in conformity with this Purchase and Sale Agreement unless title to the Premises is insurable at ordinary rates for the benefit of Buyer in a fee owner's ALTA-form policy, subject to (i) the standard printed exceptions provided that such exceptions do not render title to the Premises unmarketable, and (ii) such other exceptions shown on Seller's preliminary title report (or title commitment) and not included in Seller's Title Objection Notice.

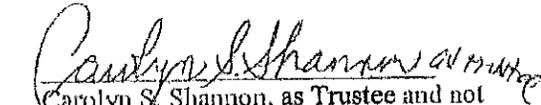
(o) This Agreement, and every term, condition and provision hereof, shall be governed and controlled by mutual, reciprocal and objective covenants of good faith and fair dealing.

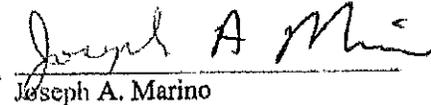
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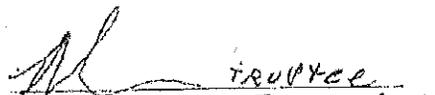
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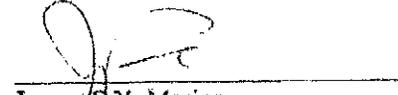
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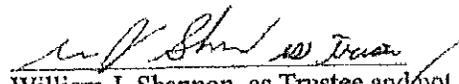
The Shannon Investment Trust


Carolyn S. Shannon, as Trustee and not
individually


Joseph A. Marino


Mark D. Shannon, as Trustee and not
individually


James F.X. Marino


William J. Shannon, as Trustee and not
individually


Anthony G. Marino

4848-1325-1860.19

B

AMENDMENT TO PURCHASE AND SALE AGREEMENT

This Amendment to Purchase and Sale Agreement is made effective this 28th day of March, 2016 (the "Amendment"). Reference is made to that certain Purchase and Sale Agreement dated August 28, 2013 by and among Carolyn S. Shannon, Mark D. Shannon and William J. Shannon, as Trustees of The Shannon Investment Trust, as Seller ("Seller") and Joseph A. Marino, James F.X. Marino and Anthony G. Marino, as Buyer ("Buyer") concerning property in Winchester and Stoneham, Massachusetts (the "Agreement"). All capitalized terms used herein and not otherwise defined shall have the meanings set forth in the Agreement.

RECITALS

WHEREAS, the Agreement contains due diligence obligations and deadlines of the Seller in connection with the study and permitting of the Premises for Buyer's contemplated 40B Project; and

WHEREAS, Seller notified Buyer on January 7, 2016, that Buyer was in default of certain obligations under the Agreement, and requested that Buyer execute a termination of the Agreement, which Buyer refused; and

WHEREAS, on or about January 26, 2016, the Seller filed an action in Superior Court, *Carolyn Shannon Trustee of Shannon Investment Trust et al v. Marino, Joseph A. et al*, Middlesex Civil Action 1681CV00299, seeking a declaration that the Agreement is terminated (the "Civil Action"); and

WHEREAS, the Buyer disputes the notice of default, and further disputes the allegations in the Civil Action; and

WHEREAS, the parties have agreed to resolve their disputes concerning the Agreement and the Civil Action by entering into an Amendment to the Agreement on the terms and conditions herein;

NOW THEREFORE, in consideration of the mutual promises and agreements set forth herein, the parties agree as follows:

1. Within five (5) business days after Buyer and Seller have fully executed this Amendment, Buyer will wire payment of ten thousand dollars (\$10,000) to Seller to such account as may be designated by Seller. This payment will be considered an advance partial payment of the first of the thirty (30) day extension fees (set forth in sections 2, 3, or 4 herein below) incurred by Buyer if Buyer invokes its right to any of said thirty (30) day extensions. If Buyer does not invoke its right to any of the thirty (30) day extensions set forth in those sections, then the payment made pursuant to this section 1 shall be considered a payment toward the Purchase Price of the Premises and shall reduce the amount of the Purchase Price owed upon closing accordingly. The payment referenced in this section is nonrefundable.

2. In furtherance of the Buyer's obligations under Paragraph 20 of the Agreement, the Buyer shall submit a completed application to the Massachusetts Housing Partnership or other Subsidizing Agency as defined in 760 CMR 56.01 et seq. (the "Eligibility Application") for a written determination of project eligibility (the "Site Eligibility Letter") in or within sixty (60) days from the date of dismissal with prejudice of the Civil Action; and as evidence of compliance herewith, Buyer shall provide a copy of such application to Seller within two (2) business days after the filing thereof. Notwithstanding the immediately preceding sentence, Buyer shall be entitled to an extension of not more than [REDACTED] days of the date upon which it must submit the Eligibility Application upon the payment of the sum of twenty-five thousand dollars (\$25,000) to the Seller, such sum to be: (a) non-refundable and non-applicable to the Purchase Price, and (b) paid within one (1) business day after written notice by Buyer of its election of the extension, in immediately available funds by wire transfer to such account as may be designated by Seller.

3. In furtherance of the Buyer's obligations under Paragraph 20, the Buyer shall submit a completed application to the Town of Winchester Zoning Board of Appeal for the issuance of a Comprehensive Permit (the "Comprehensive Permit Application") in or within thirty (30) days of Buyer's receipt of a Site Eligibility Letter and, as evidence thereof (and of compliance herewith), shall provide a copy of such application to Seller within two (2) business days after the filing thereof. Notwithstanding the immediately preceding sentence, Buyer shall be entitled to an extension of not more than [REDACTED] days of the date upon which it must submit the Comprehensive Permit Application upon the payment of the sum of twenty-five thousand dollars (\$25,000) to the Seller, such sum to be: (a) non-refundable and non-applicable to the Purchase Price, and (b) paid within one (1) business day after written notice by Buyer of its election of the extension, in immediately available funds by wire transfer to such account as may be designated by Seller.

4. In furtherance of the Buyer's obligations under Paragraph 20, the Buyer shall submit a completed notice of intent/application to the Town of Winchester Conservation Commission (the "Winchester Conservation Application") and to the Town of Stoneham Conservation Commission (the "Stoneham Conservation Application") (together, the "Conservation Applications"), in each case, for the issuance of an Order of Conditions to allow construction of the 40B Project (collectively the "Conservation Approvals"), in accordance with the following:

(a) Not later than [REDACTED] days after the Buyer submits its Comprehensive Permit Application, Buyer shall file the Winchester Conservation Application (and any required application fee) together with complete copies of all materials submitted as part of the Comprehensive Permit Application (the "Initial Conservation Application Filing Date"). In the event that the Town of Winchester Conservation Commission refuses to act on the Winchester Conservation Application until the issuance of a decision by the Town of Winchester on the Comprehensive Permit Application, then, within twenty (20) days after the decision on the Comprehensive Permit Application has been filed in the office of the Winchester town clerk, irrespective of whether such decision grants, denies or conditions the Comprehensive Permit Application, unless Buyer exercises any right to terminate this Agreement, Buyer shall, in accordance with 310 CMR 10.05(4)(e), refile,

reinstate, or take such other action as may be necessary to file and prosecute the Winchester Conservation Application. In the event Buyer is required to file a revised or supplemental Winchester Conservation Application because the Comprehensive Permit requires modifications to the Winchester Conservation Application or Winchester Conservation Approval, Buyer shall do so within twenty (20) days after the decision on the Comprehensive Permit Application has been filed in the office of the Winchester town clerk, and such revised or supplemental filing shall be considered part of the Conservation Applications.

(b) On or by the Initial Conservation Application Filing Date, Buyer shall file the Stoneham Conservation Application (and any required application fee) together with complete copies of all materials submitted as part of the Comprehensive Permit Application. In the event that the Town of Stoneham Conservation Commission refuses to act on the Stoneham Conservation Application until the issuance of a decision by the Town of Winchester on the Comprehensive Permit Application, then within twenty (20) days after the decision on the Comprehensive Permit Application has been filed in the office of the Winchester town clerk, irrespective of whether such decision grants, denies or conditions the Comprehensive Permit Application, unless Buyer exercises any right to terminate this Agreement, Buyer shall, in accordance with 310 CMR 10.05(4)(e), refile, reinstate, or take such other action as may be necessary to file and prosecute the Stoneham Conservation Application. In the event Buyer is required to file a revised or supplemental Stoneham Conservation Application because the Comprehensive Permit requires modifications to the Stoneham Conservation Application or Stoneham Conservation Approval, Buyer shall do so within twenty (20) days after the decision on the Comprehensive Permit Application has been filed in the office of the Winchester town clerk, and such revised or supplemental filing shall be considered part of the Conservation Applications. And:

(c) As evidence of compliance with this section 4, Buyer shall provide a copy of the Conservation Applications (including any revised or supplemental applications) to Seller within two (2) business days after the filing thereof.

Notwithstanding the foregoing, Buyer shall be entitled to an extension of not more than thirty (30) days of the Initial Conservation Application Filing Date for either or both of the Conservation Applications, upon the payment of the sum of twenty-five thousand dollars (\$25,000) to the Seller, such sum to be: (a) non-refundable and non-applicable to the Purchase Price, and (b) paid within one (1) business day after written notice by Buyer of its election of the extension, in immediately available funds by wire transfer to such account as may be designated by Seller.

5. Subsections 20.a, 20.b, and 20.c of the Agreement are hereby stricken.

6. The Permitting Period set forth in Paragraph 20 shall be amended to expire on [REDACTED] subject to the right to extend the same as provided in subsection 20.d., to a date not later than [REDACTED]. Additionally, in the event that no decision has been issued on the Comprehensive Permit Application on or before [REDACTED] 2017, upon

written notice to the Seller, Buyer can elect to extend the Permitting Period to [REDACTED] and upon such notice, the Purchase Price will be increased by One Hundred Thousand Dollars (\$100,000), due and payable as additional Purchase Price at closing.

7. The Agreement is further modified by striking the last sentence of subsection 20.e of the Agreement ("The Permitting Period shall not be extended by the Buyer's failure to obtain the Stoneham access permit, but nothing herein shall prevent Buyer from appealing a denial of same.") and substituting the following:

Provided Buyer files the Conservation Applications on a timely basis hereunder, and diligently prosecutes the same using best efforts to secure the Conservation Approvals as soon as possible, including by promptly filing any required revised or supplemental applications, defending any appeal of any approval(s) or prosecuting the appeal of any denial(s) or unreasonable conditions thereon, the Permitting Period of the Agreement shall be extended until non-appealable final decisions have issued on both Conservation Applications. In any event, if Buyer has not obtained final non-appealable Conservation Approvals on or before [REDACTED], the Purchase Price of the Premises will be increased by One Hundred Thousand dollars [REDACTED] due and payable as additional Purchase Price at closing.

8. Subsection 20 g. is amended to delete the phrase "regardless of whether the construction of more than 125 units is allowed under the Comprehensive Permit" and substitute therefor the following:

plus [REDACTED] per unit for each unit allowed under the Comprehensive Permit in excess of 125 units. For the avoidance of doubt, if there are [REDACTED] units, the Purchase price will be increased by [REDACTED] thousand dollars [REDACTED] thousand dollars [REDACTED] for the [REDACTED] units over [REDACTED] units, and [REDACTED] thousand dollars [REDACTED] for the [REDACTED] units in excess of [REDACTED] units.

9. From and after the date hereof, Paragraph 21 is amended to provide that Buyer will provide the Seller with a first written progress update by May 15, 2016 and subsequent written progress updates on a monthly basis before the end of each subsequent month with the first of these subsequent written progress updates due by June 30, 2016.

10. Seller represents and warrants that it has paid the entire amount of real estate taxes due on the Premises for the third quarter of 2016. As Buyer has not paid its 50% share of real estate taxes for the third quarter of fiscal 2016, the parties agree that Buyer shall pay the entire fourth quarter real estate tax bill for the Premises. In accordance with Paragraph 22 of the Agreement, such payment shall be applicable to the Purchase Price.

11. The provisions of Paragraph 22 are amended by deleting the last paragraph thereof, and substituting the following:

All payments of real estate taxes made by Buyer from the inception of this Agreement through August 27, 2016 shall be credited against the Purchase Price, together with

\$10,000 as a credit for payments made prior to the inception of this Agreement. From and after August 28, 2016, up until the Closing (inclusive of any tolling periods hereunder) or the termination of this Agreement, all real estate taxes for the Premises shall be paid by the Buyer, and such payments shall be non-refundable and non-applicable to the Purchase Price. Respecting the real estate tax payment which will be due August 1, 2016, the Seller will calculate the Buyer's share of same (with Buyer being responsible for 50% from July 1 through August 27, and for 100% from and after August 28), and Seller shall remit the same in accordance with the provisions of this paragraph. Beginning with the tax bills issued on or about October 1, 2016, Seller will mail the original bills to Buyer's address for notice herein, and Buyer shall cause the same to be paid on or before the date the same become due, and, in making such payments, shall provide evidence of same to Seller by mailing a copy of the remittance copies of the tax bills and all checks for payment simultaneously with the payment thereof.

12. Paragraph 23 is amended by deleting the sum of four hundred thousand dollars (\$400,000) as the amount of the Environmental Escrow Fund in subsection 23(b) and substituting therefor the sum of two hundred thousand dollars (\$200,000). The parties expressly affirm that Seller shall not be liable for any Remediation Costs in excess of the revised amount of the Environmental Escrow Fund, i.e. two hundred thousand dollars (\$200,000). The Seller agrees Buyer is not obligated to perform a Phase II environmental assessment of the Premises until the Closing. All other provisions of Paragraph 23 are hereby ratified and confirmed.

13. The execution hereof by both Buyer and Seller shall operate as a general release and full and irrevocable waiver by the Seller of any and all defaults of the Buyer under the Agreement through the date hereof and shall operate as a full and irrevocable waiver by the Seller, from the date hereof going forward, of any provisions in the Agreement prohibiting, restricting, or otherwise limiting Buyer's assignment rights, including but not limited to the non-assignment/assignment limiting provisions of Paragraph 24 of the Agreement.

14. Immediately upon the Buyer's transmission to Seller of an executed copy hereof, Seller shall (a) execute this Amendment, (b) dismiss the Civil Action with prejudice, and provide evidence of the same to Buyer (or Buyer's counsel).

15. This Amendment shall not be binding upon the Seller until Buyer has transmitted an executed copy hereof to Seller, and Seller has executed the same. Notwithstanding anything else contained herein, in order for the parties to obtain the benefit of the promises and covenants contained herein, this Amendment shall be effective on the earlier to occur of (a) the date the Amendment is executed by Buyer and Seller and (b) March 28, 2016. Evidence of complete execution by the parties may be provided by electronic copy (PDF), and the same shall be deemed to be original(s) for all purposes.

16. Except as expressly set forth herein, the Agreement is hereby ratified and confirmed.

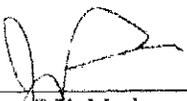
**Balance of this page intentionally left blank.
Signatures on following pages.**

Witness the execution hereof under seal, effective as of the date first set forth above.

BUYER:



Joseph A. Marino



James F. X. Marino

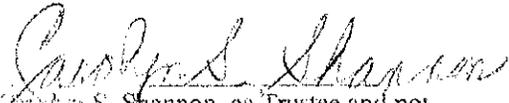


Anthony G. Marino

Witness the execution hereof under seal, effective as of the date first set forth above.

THE SELLER:

The Shannon Investment Trust


Carolyn S. Shannon, as Trustee and not
individually


Carolyn S. Shannon, as Trustee and not
individually


William J. Shannon, as Trustee and not
individually

C

October 6, 2016

Mr. Justin Krebs
Krebs Investor Group, LLC
390 Commonwealth Ave, PH 4
Boston, MA 02215

Re: The Purchase and Sale Agreement Dated August 28, 2013, Between Carolyn S. Shannon, Mark D. Shannon, and William J. Shannon, Trustees, as Seller, and Joseph A. Marino, James F.X. Marino, and Anthony G. Marino, as Buyer, as Amended by an Amendment to Purchase and Sale Agreement dated March 28, 2016 (the "Purchase and Sale Agreement")

Dear Mr. Krebs:

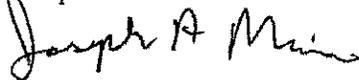
We write to confirm that we have entered into a joint venture with Krebs Investor Group, LLC for the development of the property that is the subject of the Purchase and Sale Agreement (as that term is defined above) (the "Project Site") and have authorized Krebs Investor Group, LLC to apply to the Massachusetts Housing Finance Agency for a project eligibility approval for the Project Site pursuant to the Commonwealth's comprehensive permit law, G.L. c. 40B, §§ 20-23.

We are the Buyer under the Purchase and Sale Agreement, which remains in full force and effect. As you know, together with Krebs Investor Group, LLC we formed KIG Forest Ridge Development, LLC for the purpose of developing the Project Site. The Operating Agreement for KIG Forest Ridge Development, LLC designates Krebs Investor Group, LLC as the Developer of the Project Site, and you individually are the current Manager of KIG Forest Ridge Development, LLC. Accordingly, you and Krebs Investor Group, LLC are authorized to apply for a project eligibility approval as representatives of KIG Forest Ridge Development, LLC.

We are sending this letter to you with the understanding that you will submit it to the Massachusetts Housing Finance Agency in order to establish control of the Project Site. Should you require anything more in this regard, kindly let us know.

Very truly yours,

Joseph A. Marino



James F.X. Marino



Anthony G. Marino

D

2005 MA. HAC. 01-19 (MA.HOUS.APP.COM.), 2005 WL 4930787

Housing Appeals Committee

Commonwealth of Massachusetts

Princeton Development, Inc., Appellant

v.

Bedford Board of Appeals, Appellee

No. 01-19

September 20, 2005

DECISION

I. PROCEDURAL HISTORY

****1** In July 2001, Princeton Development, Inc., submitted an application to the Bedford Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build 258 units of mixed-income, affordable, rental housing on a 50-acre site at 350 Concord Road in Bedford. Pre-Hearing Order, §§ II-1, II-2 (Oct. 4, 2004). The housing is to be financed under the 80/20 Program of the Massachusetts Housing Finance Agency (Mass Housing). Pre-Hearing Order, §§ II-13; Applicant's Brief, p. 16. The developer and town officials had been involved in discussions concerning the proposal for some time, but had been unable to reach agreement. In particular, there was a dispute concerning the developer's right to cross an abandoned railroad right of way to access the development site. On July 18, 2001, the town of Bedford commenced an action in the Land Court seeking a declaration that it owned the abandoned right of way. At a public comprehensive permit ***2** hearing on July 26, 2001, the Bedford Board of Appeals continued the matter, indicating that it would not consider the merits of the application and suggesting that until the developer provide evidence concerning ownership of or rights to the right of way, the jurisdictional requirements of 760 CMR 31.01(1)(c) would not be satisfied. On October 24, 2001, the Developer filed this appeal with the Housing Appeals Committee alleging that the continuance was unnecessary and constituted constructive denial of the permit.

After the opening hearing session before this Committee, a Conference of Counsel held pursuant to 760 CMR 30.09(4) on November 20, 2001, the parties, at the presiding officer's suggestion, filed cross motions. The developer asked that the Committee assert its power of *de novo* review or, in the alternative, remand to the Board with conditions limiting the scope of the Board's review. The Board asked that the Committee dismiss the appeal and the application for a comprehensive permit or, in the alternative, remand the matter with conditions supporting the Board's jurisdiction.

It is not uncommon for cases before this Committee to raise complex title issues that must ultimately be addressed by the Land Court. But since the Comprehensive Permit Law is designed to create an expedited process to facilitate the building of affordable housing, the Committee rarely stays its proceeding while those rights are adjudicated. Nevertheless, on January 22, 2002, because in this case the developer's claim was based upon a legal theory that it acknowledged created a case of first impression in Massachusetts, the presiding officer remanded the matter to the Board, indicating that it was not required to recommence the hearing process until after the issuance of a dispositive ruling by the Land Court.

****2** On July 11, 2003, the Land Court issued a decision in the case of *Feltman v. Cerasuolo*, Land Court No. 273286, and entered a judgment establishing that the town owns ***3** the abandoned right of way, but that the developer has an easement by implication across that land for all lawful uses, including the proposed development. The Town of Bedford appealed the Land Court judgment.

Nevertheless, in compliance with the Committee's Order of Remand, the Board resumed the local hearing, considering a modified proposal that consisted of 213 housing units in seven buildings. See Exh. 1 (p.5), 3. By decision filed with the town clerk on May 24, 2004, the Board approved a comprehensive permit with conditions, notably reducing the size of the development to 156 units. On September 10, 2004, the developer filed with the Committee a notice of a further change in its proposal. See Exh. 2. Most significantly, it eliminated one of seven buildings from the proposal and reduced the size from 213 to 186 units. On September 15, 2004, the presiding officer heard argument on whether those changes were substantial under 760 CMR 31.03, and ruled that they were insubstantial.

On September 20, 2004, the Massachusetts Appeals Court vacated the judgment and remanded the matter to the Land Court. The Board renewed a previous request for a stay in the Committee's proceedings. On September 30, 2004, the presiding officer denied that request, ruling that despite the remaining ambiguity in the Land Court litigation, the developer had shown a reasonable expectation of being able to establish its right of access to the site.

On October 4, 2004, the Committee's hearing commenced, and seven days of *de novo* evidentiary hearing were held, with witnesses sworn, full rights of cross-examination, and a verbatim transcript. A site visit was also conducted. Following the presentation of evidence, counsel submitted post-hearing briefs.

*4 II. JURISDICTION

The Board makes a brief, conclusory argument that because the exact nature of the developer's access to the site via easement has not been finally determined by the courts, it lacks site control, one of the jurisdictional requirements of 760 CMR 31.01(1). See Board's brief, pp. 5-6. But by the plain language of 760 CMR 31.01(1)(c), in order to establish jurisdiction the developer is only required to "control the site," not to have resolved all questions of access to the site. As is further clarified in 760 CMR 31.01(3), site control is a matter of ownership, not access, that is, "the applicant's interest in the site." Questions about access arise frequently in cases involving comprehensive permits, and this case is not unusual. Considering that a project eligibility determination has been issued by the subsidizing agency (Exhibit 15) and that there is no question about the developer's ownership interest in the site, and understanding the posture of the question of access in the courts, we rule that there is proper jurisdiction for the developer to this appeal. This is consistent with our ruling in *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 9-11 (Mass. Housing Appeals Committee Jun. 28, 1994), *affd.*, No. 94-1706-B (Essex Super. Ct. Jul. 29, 1997), which analyses this issue in more detail. And, as in that case, we are confident that any "lingering questions" about access would be laid to rest before any construction were to begin.

*5 III. FACTUAL OVERVIEW

**3 The proposed housing site consists of an approximately square front parcel of 3.6 acres, which has 370 feet of frontage on Concord Road (Route 62), and a rear parcel of 46.3 acres. Pre-Hearing Order, § H-2, see Exh. 2 ("complied plan of land"). These two parcels are separated by a 65-foot-wide abandoned railroad right of way owned by the town of Bedford, which is used for bicycling and hiking. *Id.* Both parcels contain a significant amount of wetlands. It is zoned for single-family residences on 30,000 square-foot lots. Exh. 1 (p. 9). The developer proposes to construct 186 units of rental housing in six buildings. Building No. 1 (30 units) and a small office building with a pool and "clubhouse" would be located on the front parcel, and the remaining five buildings on the rear parcel. There would be a 24-foot wide entrance driveway and 324 parking spaces.

IV. ECONOMIC EFFECT OF THE CONDITIONS

When the Board has granted a comprehensive permit with conditions, the ultimate 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 aggregate make construction of the housing uneconomic. See 760 CMR 31.06(3); *Walegav. Acushnet*, No. 89-17, slip op. at 8, (Mass. Housing Appeals

Committee Nov. 14, 1990). Specifically, the developer must prove that “the conditions imposed ... make it impossible to proceed ... and still realize a reasonable return [or profit] as defined by the applicable subsidizing agency” 760 CMR 31.06(3)(b); also see G. L. c. 40B, § 20.

*6 There are several methods used by real estate professionals to estimate the return on rental housing development. These methods are all generally consistent, and yield similar, reasonably accurate estimates of profit. The simplest approach is to calculate the return on total cost (ROTC), which is the net operating income (NOI) in the first year of stabilized occupancy divided by total development cost (TDC). A more complex measure is the Internal Rate of Return (IRR), which imputes a rate of return by analyzing estimated cash flows over the entire life of the project (development costs, operating costs, rental income, and future sale). If future cash flows are known with any certainty, the IRR approach is the most accurate measure of investment return. But since future cash flows are typically projected from historical data, the results of an IRR analysis rarely differ substantially from an analysis of profitability based upon ROTC.

Finally, a third method is to analyze return on equity (ROE). This is the method that has been generally accepted by the Massachusetts Housing Finance Agency (MassHousing) and affordable housing finance professionals, and that we have used in our cases.¹ Tr. IV, 16-20; see *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 11 (Mass. Housing Appeals Committee Jan. 8, 1998); *Archstone Communities Trust v. Woburn*, No. 01-07, slip op. at 13-14 (Mass. Housing Appeals Committee Jun. 11, 2003), *remanded on other grounds*, No. 03-03320 (Suffolk Super. Ct. Apr. 21, 2005).

**4 Once the ROE is established for a particular proposed development, we must determine whether it is reasonable, that is, whether it is sufficient in the marketplace to *7 induce the developer to invest its resources in pursuing the proposal. Although our regulation refers to a reasonable return “as defined by the applicable subsidizing agency,” it is no longer the practice of subsidizing agencies to define such a return quantitatively. See *Rising Tide Development, LLC v. Lexington*, No. 03-05, slip op. at 11 (Mass. Housing Appeals Committee Jun. 15, 2005). The developer's expert testified that a figure of 10% has generally been in use as the minimum reasonable return since our decision in *Hastings Village*, but we are unwilling to use a standard that is 7 years old. See Tr. IV, 17-18. This is due, in part, to the fact that what level of return is reasonable varies over time depending on changes in interest rates in the financial markets. Thus, what level of return constitutes a reasonable return is a factual question that we must determine from the evidence.

The critical conditions in relation to economics are those that reduce the proposed development from 186 to 156 units. See Pre-Hearing Order, §§ II-8; Applicant's Brief, p. 14. To prove that these conditions render the development uneconomic, the developer retained an affordable housing finance consultant who analyzed the return on equity projected for a 156-unit development by preparing a *pro forma* financial statement.² Tr. IV, 14-15; Exh. 13.

The developer's expert testified in detail concerning the figures and calculations used to prepare that *pro forma*, and their accuracy was confirmed by the developer's chief executive officer. Tr. IV, 33-57; I, 126. The *pro forma* shows quite clearly that ROE in the first year of operation is only 1.8%, and that it rises uniformly, reaching 10.3% in year 13. Exh. 13; Tr. IV, 22. The expert concluded that at this rate of return the 156-unit *8 development is uneconomic. Tr. IV, 31, 57-58, 134. Specifically, he testified that the minimum reasonable REQ in the first year would be 6.5%.³ Tr. IV, 115-117, 124. His testimony remained convincing on cross-examination.⁴ See Tr. IV, 67-134. The developer's chief executive officer also testified unequivocally that the reduction in size of the development from 184 to 156 units renders the project uneconomic. Tr. I, 127-128.

The Board has failed to cast doubt on these conclusions. It presented no witnesses to challenge the analysis of the developer's expert. Instead, it argues that “the only evidence presented ... is that the project as approved with conditions will generate a positive return in the very first year...,” and that this “is not a case where the conditions mean the project will be constructed or operate at a loss at any time,” but rather a case where the developer “has failed to present evidence

from which the Committee can discern the significance of the impact of the conditions on the return." Board's brief, p. 6. The first part of this argument need not be addressed at all since the standard that we are to apply on review is not whether the development as conditioned will generate *any* positive return, but whether it will generate a *reasonable* return.

****5** The last part of the Board's argument is that the developer "cannot meet its burden simply by proving that the project as conditioned by the Board is uneconomic. It must prove that the conditions ... cause it to be uneconomic." Board's brief, p. 7. That is, it argues that it was incumbent upon the developer to affirmatively prove that the proposal is economically ***9** feasible at 186 units. Board's brief, p. 8. We believe, however, that this is unnecessary.⁵ Clearly, the developer believes that the 186-unit proposal is economically feasible and it would not have presented that proposal to this Committee for approval if it did not. Tr. II, 24-26.

The developer's expert testified clearly that the ROE for the 156-unit development in the first year is 1.8% and that that renders the proposal uneconomic. Tr. IV, 31, 57-58; Exh. 13. We believe that that testimony is credible and accurate. The developer has sustained its burden of proving that the conditions imposed by the Board make construction of the housing uneconomic.

V. ISSUES

Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for low or moderate income housing. 760 CMR 31.06(7).

The conditions that are at the center of the dispute between the developer and the Board are those that require elimination of Building No. 1, the building on the front parcel, closest to Concord Road.⁶ See Condition 5.5;⁷ Board's brief, p.14. The Board argues that ***10** there are a number of environmental concerns that are related to one degree or another that support the elimination of the building. Specifically, the Board raises concerns "related to wetlands, setbacks, drainage, and groundwater recharge, as well as ... density and neighborhood preservation, traffic impact and public safety, and open space and recreational areas." Board's brief, p. 14.⁸ We will address the on-site concerns first, since they are the most significant. We will address off-site traffic concerns separately.

A. On-Site Concerns

1. Protection of Wetlands Resources and Stormwater Management

The proposed development is in a sensitive area and will affect a number of natural water resources. The front parcel, on which Building No. 1 is located, is about three and one half acres, and includes nearly an acre and a half of wetlands. Exh. 2, 2-A, 3 (sheet 9); also see Tr. VI, 124-126; III, 53. The five buildings at the rear of the site are on 9 acres of upland, with wetlands behind and to the west. Exh. 2, 2-A, 3 (sheet 9); also see Tr. VI, 124-126. The large area of wetlands on the site behind the buildings is part of a much larger area upstream portion of the Elm Brook watershed. Exh. 3 (sheet 9); also see Tr. VI, 124-126, 139; III, 53; VII, 70, 79-80. Three different, formally designated conservations areas are directly contiguous to the site. Tr. VII, 76. To the east of the site, on an adjacent parcel, is a state-certified vernal pool. Tr. II, 13-14. Downstream of the site, Elm Brook has been designated as an area of core habitat under the state's living waters program. Tr. VII, 68. ***11** The site is also in the Zone 2 of a well-head protection area, though this is of little current significance since the wells are currently closed while contamination is being remediated. Tr. VI, 74-77.

****6** The development is required, of course, to comply with the state Wetlands Protection Act, including the Department of Environmental Protection's Stormwater Management Policy. But Bedford has provided additional protection for its natural resources through a local Wetlands Protection Bylaw, which, in order to minimize storm water

damage and flooding and to protect wildlife habitat and other interests, has a number of requirements that are stricter than state law.⁹ Specifically, it requires that undisturbed, natural vegetation be maintained within 25 feet of wetlands (a "no-disturb" buffer), and prohibits structures within 50 feet of wetlands. Exh. 4, 4-A (Regulations, § 2.2.2.2); see Conditions 3.1, 3.3, 3.4.¹⁰ More important for the case at hand, in order to minimize flooding both by decreasing runoff and by increasing the area available for storm water infiltration, it also limits the amount of impervious surface within 100 feet of wetlands to 25% of that area. Exh. 4, 4-A (Regulations, § 2.2.2.1); see Condition 3.2.

The Board argues that it has given serious consideration to the question of to what degree these local requirements can be waived without undue damage to local concerns, and while it has been willing to waive some provisions, its refusal to permit construction of *12 Building No. 1 is reasonable. Specifically, the Board notes that it has granted a waiver of the 25-foot no-disturb buffer to permit the wetland crossing to access the site and to create a secondary roadway for emergency vehicle access. Condition 3.1; also see Tr. III, 21. With regard to retaining walls, it did not waive the 25-foot no-disturb buffer, but it did grant a waiver of the 50-foot no-structures setback. Conditions 3.1, 3.3. The developer has complied by designing retaining walls to be built within the 50-foot setback, right at the edge of the no-disturb buffer.¹¹ See Exh. 2, 2-A. The developer has also complied with the condition requiring other structures to be set back 50 feet from the wetlands. But the Board denied a waiver of the 25% impervious surface requirement, specifically indicating that this required elimination of Building No. 1. Condition 3.2.

The proposed design is very aggressive in the manner in which it addresses environmental concerns related to the wetlands and other natural resources. For instance, not only will retaining walls of up to five feet in height be built to separate the apartment buildings from the wetlands, but in addition, they are very extensive, approaching half of the perimeter of the site. Tr. II, 159; Exh. 2, 2-A. Stormwater infiltration will be achieved by means of large underground storage tanks, which will require the introduction of 30,000 and 50,000 cubic yards of fill to raise the ground level sufficiently so that they will function.¹² Tr. II, 152, VI, 95-99.

*13 Though Building No. 1 and the five buildings at the rear of the site are isolated from each other by the abandoned railroad bed, both contribute to the overall environmental impact of the proposed development. By granting the comprehensive permit for a five-building development, the Board has made the judgment that if only those buildings are constructed, the total impact on local concerns will be outweighed by the regional need for housing. But in considering whether the Board's decision to eliminate Building No. 1 is justified, we must weight the impact of the entire, six-unit development on all of the resources in the area.

**7 In this regard, the town's public works engineer, who specializes in civil and environmental engineering, testified concerning several issues. She did not testify explicitly concerning the elimination of Building No. 1, but rather with regard to flooding to the rear of the site. Elm Brook is a source of major flooding problems, flooding homes and yards and requiring street closures. Tr. VI, 78, 82; Exh 54. She testified that the town is currently engaged in a mitigation effort, but that the flooding problems will worsen nevertheless when the development is built. Tr. VI, 88, 80. She specifically concluded that even though the development will comply with the state Stormwater Management Policy, because of the particular circumstances in this area, she believed that a higher, local standard should be applied. Tr. VI, 90-91, 96-98.

The Board's expert storm water engineer confirmed the existence of the flooding problem, and testified that though he "did not single out any one building versus another," the removal of a building would improve the situation. Tr. VII, 27-28, 31, 33-34. In his written report, he concluded that "more conservative design assumptions must be applied to *14 the proposed system of storm water management and controls to ensure long term protection of the health and safety of downstream measures [sic]." Exh. 59 (p. 4), also see Tr. VII, 63.

The testimony of these witnesses was not rebutted by that of the developer's environmental expert. His testimony focused on state regulations, and not on the additional local bylaw requirements and the interests they protect. The Developer's

expert testified that assuming the “total impervious area associated with Building No. 1, including the structure itself and the parking areas is 8,273 square feet,” it would not adversely affect the surrounding resource areas. Tr. III, 23-24. He based this on three factors: first, that the wetlands on the front parcel drains under Concord Road, away from the other wetlands; second, that the total watershed of which it is a part is two square miles; and third, that the project will comply with DEP Stormwater Management Policy. Tr. III, 25. His credibility was undercut considerably, however, since the underlying assumption of an area of 8,273 square feet, based on calculations by another person, is grossly inaccurate. A cursory glance at Exhibit 2-A shows that the actual area is several times as big. The Board's engineer estimated it to be a full acre. Tr. VI, 81. The irregularly shaped building alone is about 200 feet long and up to 70 feet wide, and covers an area greater than 10,000 square feet. Exh. 2, 2-A. The 56 parking spaces alone, not including any of the driveways, cover over 8,000 square feet if their size is estimated conservatively as eight by eighteen feet. Exh. 2-A. On cross-examination, the witness acknowledged the error, and he responded by noting that even at a much larger size, the new impervious area was still only a small percentage of the entire watershed. Exh. III, 54-57.

****8** We find that the overall impact of the proposed six-building development—as designed in violation of the local bylaw which limits impervious surface to 25% of the area ***15** of the 100-foot wetlands buffer—constitutes a local concern sufficient to outweigh the regional need for housing, and, thus, justifies the conditions imposed by the Board that require the elimination of Building No. 1.

2. Density, Open Space, and Recreational Area

The Board makes several arguments with regard to the density of the development and open space. For the most part, however, these are too general to support its reduction in the size of the development. For instance, it discusses other developments approved in town as support for what appears to be an arbitrarily imposed limit of twelve units per build able acre. See Condition 1.2; Board's brief, p. 18; Tr. VI, 104-107. That argument is of little avail since, as we have noted frequently in our decisions, it is not sufficient in the context of the Comprehensive Permit Law to simply quantify density; rather, there must a more sophisticated analysis of the proposed design and its relation to the site and surrounding areas. *Hastings Village, Inc. v. Wellesley*, slip op. at 20-31, No. 95-05 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 98-235 (Norfolk Super. Ct. Nov. 12, 1999); *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 27 (Mass. Housing Appeals Committee June 25, 1992); also see *Pyburn Realty Tr. v. Lynnfield*, No. 02-23 (Mass. Housing Appeals Committee, Mar. 22, 2004). The same is true of 50-foot setbacks from property lines. See Condition 1.4; also see, e.g., *Woodridge Realty Tr. v. Ipswich*, No. 00-04, slip op. at 13 (Mass. Housing Appeals Committee, Jun. 28, 2001).

Nevertheless, the Board does make one argument that is quite specific. That is, it cannot be disputed that eliminating Building No. 1 will “increase the buffer area around the bike trail going down the former railroad right of way.” Tr. VI, 140. Because of the rural nature of this trail, the planning director's testimony that there is significant value in ***16** maintaining that vegetated buffer is credible. Tr. VI, 141; cf. *Cloverleaf Apts., LLC v. Natick*, No. 01-21, slip op. at 15 (Mass Housing Appeals Committee Dec. 23, 2002). Standing alone, this argument would not be sufficient to justify the elimination of Building No. 1, if for no other reason than that there will little or no buffer from the five buildings on the rear of the site. But it does lend support to the Board's position.

3. Neighborhood Preservation

The Board argues that a large residential building near Concord Road will be out of character with the surrounding low density residential neighborhood, and that removing it from the plan and retaining vegetation instead “will help to screen the site and help it to fit in better visually in terms of the neighborhood.” Tr. VI, 139. This, too, is a legitimate concern, though the Board introduced no evidence to show exactly how great the concern is in this location. Thus, it adds support to the Board's position, but to a very limited degree.

4. Master Plan

****9** The Board makes an additional, somewhat opaque argument with regard to density. Citing our decision in *Harbor Glen Assoc. v. Hingham*, No. 80-06 (Mass. Housing Appeals Committee, Aug. 20, 1982), it argues that limitation of the development to twelve units per buildable acre should be upheld since “the town has developed a Master Plan which, consistent with ‘smart growth policies,’ envisions higher density mixed-use developments with an affordable housing component in densely-developed business and industrial districts and lower density developments on scattered sites in residential districts.”¹³ Board’s brief, p. 17; also see Tr. VI, 107-111. The flaw in this argument is that the 156-unit development that ***17** it approved is inconsistent with the master plan smart growth provisions that it cites. Since the Board already made the judgment to waive those principles, it cannot be heard to argue that the same principals require the removal of a single, 30-unit building.

B. Traffic

The proposed development will add traffic to an already congested highway. Formally, the Board has continued to press an argument that traffic concerns are sufficiently great to justify the elimination of Building No. 1. Board’s brief, pp. 15-16. As a practical matter, however, we cannot fail to notice that less than a page (one paragraph) of the Board’s brief was dedicated to this argument, while the Brief contains more than eleven pages of argument in support of mitigation measures that the Board imposed by condition.¹⁴ Board’s brief, pp. 15-16, 32-43. This is perhaps a reflection of the evidence that was introduced at the hearing. There was a great deal of testimony and documentary evidence concerning existing traffic problems related to volume and also to mitigation of safety concerns—certainly enough to show that the Board’s general concern with regard to traffic is understandable. But there was little evidence that clearly quantified the impact of additional cars in a way that addresses the Board’s burden of proof in this hearing. That is, the Board must show that the traffic impact specifically attributable to the proposed 186-unit development is sufficiently great to outweigh the need for affordable housing. 760 CMR 31.06(7). This is particularly difficult since it has approved a 156-unit development, thus conceding that the impact from that amount of housing is acceptable.

***18** To meet its burden, the Board focused on an intersection on Concord Road known as the Wilson Park triangle, which is approximately one and a half miles from the site. Tr. VI, 27. This is “one of the worst intersections in Bedford,” and is currently is operating beyond its designed capacity. Tr. VI, 139, 28; V, 33. It is the location where Concord Road (which is an arterial roadway carrying 14,000 vehicles per day) intersects with Great Road and North Road in three separate, unsignalized intersections which surround a large triangular island. Tr. V, 13-14.

****10** The developer’s traffic expert conducted a full study of the roads surrounding the site, including Wilson Park triangle, and concluded that even if the development consisted of 213 housing units, “the additional traffic that this project would generate would result in a measurable but minor impact on operating conditions” at the intersection. Tr. V, 21, 36; Exh. 17 (p. 17), 21.

The Board’s traffic engineer reviewed the work of the developer’s expert, and also focused on the Wilson Park triangle. Tr. VI, 21, 27-37. He disagreed with the methodology used by developer, suggesting that the triangle be analyzed as three separate intersections. Tr. VI, 29, 32; also see V, 38; Exh. 55. He did not conduct his own analysis. Tr. 32, 38.

The developer’s expert also compared the impact of different sized developments, and concluded that there would not be a perceivable difference in impact between a 186-unit development and the 156-unit development” Tr. V, 40-42, 129. The Board did not offer evidence to compare the two developments other than the testimony of the Board’s expert on cross-examination, and that testimony—that “any impact on Concord Road approaching Wilson [Park] triangle in the eastbound direction is significant”—is neither specific nor convincing. See VI, 51-52, 68-70.

***19** The Board would rely on the commonsense logic that “eliminating Building No. 1 will help to decrease the traffic impact on that very difficult intersection.” Tr. VI, 139; V, 50. That is not sufficient, however. The Board has failed to

sustain its burden since it has not shown a specific, measurable difference in impact resulting from the elimination of 30 housing units that outweighs the regional need for housing.

C. Miscellaneous Conditions

The Board's decision also contains a number of miscellaneous conditions that have been challenged by the developer. The Board argues that even though the Committee has found that the Board's decision renders the proposal uneconomic, it cannot modify conditions that do not bear directly on the size of the development. Board's brief, p. 9-10. This is not the law, however, since our precedents indicate that the proper interpretation of G.L. c. 40B, § 23 and 760 CMR 31.06(7) and 31.08(1)(b) is that the conditions are to be reviewed in aggregate to determine whether they render the proposal uneconomic, and if so, each condition contested by the developer is to be reviewed to determine if it is consistent with local needs.¹⁵ See, e.g., *Walega v. Acushnet*, No. 89-17, slip op. at 8, (Mass. Housing Appeals Committee Nov. 14, 1990). This is also reflected in the section IV-6(b) of the Pre-Hearing Order. We will therefore consider the conditions individually (or in related groups).

Conditions 4.1 and 4.2 (fees for building, plumbing, and electrical permits and for water and sewer connections) - In the absence of an allegation that they have been assessed *20 inequitably, the town's need to offset operating costs is sufficient justification for routine fees related to construction. See *Messenger Street Plainville Senior Housing Development Partnership v. Plainville*, No. 99-02 (Mass. Housing Appeals Committee Oct. 18, 1999). Further, the developer's reliance on the Board's decision to waive such fees for another development built under the Comprehensive Permit Law is misplaced since G.L. c. 40B, § 20 requires that local requirements be applied equally to subsidized and non-subsidized housing, not to all subsidized housing. Therefore, this condition will remain in effect.

**11 Condition 7.5 (mosquito control) - Treatment of individual catch basins once per year for mosquito control is simple and inexpensive. This condition will remain in effect, though the developer shall not be required to take steps beyond those described during the testimony of the town's public works engineer. See Tr. VI, 84. It may even be possible to bring the catch basins in the proposed development within the municipal program in return for a one-time cash payment or some other accommodation. The parties are encouraged to pursue such a cooperative solution.

Condition 8.1, 8.3, 8.4, 8.5, 8.7, and 8.8 (crosswalk, flashing signs at crosswalk, entrance and stop sign, sidewalk on Concord Road, and crossing of former railroad bed) - These conditions require the developer to make safety improvements that will benefit both the town and the residents of the proposed development. See Tr. V, 56-57; VI, 22. Such improvements are generally associated with a development of this sort, and the conditions are reasonable. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 36 (Mass. Housing Appeals Committee Jun. 25, 1992). The conditions will remain in effect.

*21 Condition 9.10 (funding for crossing guard) - Placement of a school crossing guard on Concord Road is certainly prudent from a safety standpoint. Tr. V, 56-57. Whether this should be funded by the developer or whether it is a municipal service that should be provided by the town is less clear. The limited testimony on this matter implies that there is consistent town policy requiring that developers of new housing pay for crossing guards when they are necessary. Tr. VI, 26. The developer did not contest this condition specifically, and therefore we find that the Board has presented sufficient support for the condition so that it will remain in effect.

Condition 8.6 (\$28,000 payment for intersection improvement study) — The developer offered to pay \$25,000 to the town as a contribution toward an engineering study of possible improvements at the Wilson Park triangle. Exh. 25. This was clearly intended as part of an offer to settle this controversy, and was conditioned on the approval of 186 or more housing units. Tr. V, 44; Applicant's Brief, pp. 47-48. As discussed in Section V-B, above, the Board has not proven a significant local concern at the Wilson Park triangle resulting directly from the 30 housing units in dispute here. But in any case, under the standard stated in our decision in *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 37 (Mass.

Housing Appeals Committee Jun. 25, 1992), we conclude that the Board has not proven that this development will result in a sufficient increase in traffic volume to justify a payment of this magnitude. Therefore, the condition will be stricken.

Condition 9.7 (\$25,783 payment toward Norma Road pumping station improvements) - The condition requiring payment to make pumping station improvements is similar to Condition 8.6, which requires payment for a traffic improvement study. The Board, however, introduced very little testimony with regard to the underlying need. The town's public works *22 engineer testified that the pumping station currently operates within its designed capacity and will continue to do so after the 156-unit development is brought on line. Tr. VI, 85. The Board argues that even though there is no current problem that needs attention, the developer should contribute to the station's eventual replacement. That is, if the pumping station were to remain below its designed capacity, the pumps would not need to be replaced for many years, but because the new development will add flow, the pumps will wear out sooner. Board's brief, pp. 43-44; Tr. VI, 86. Even when there is an existing problem, however, "it is impractical and unfair to obligate [a developer] to pay for improvements far in the future." *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 37 (Mass. Housing Appeals Committee Jun. 25, 1992). It would be doubly unfair to require the developer to pay without a showing that the proposed development stretched the pumping station beyond its designed capacity. A similar argument could be used to require all developers to make advance payments for road resurfacing simply because the traffic new developments generate causes roads to wear out more quickly. The Board has not demonstrated sufficient support for Condition 9.7, and therefore it is stricken.

*23 VI. CONCLUSION

**12 Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Bedford Board of Appeals is consistent with local needs in that the conditions that have been proven to render the proposed development uneconomic are supported by valid local concerns which outweigh the regional need for housing. The decision of the Board is affirmed, though the Board is directed to remove or modify certain conditions in the comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the permit filed by the Board with the town clerk on May 24, 2004 except as provided in this decision.

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

(a) The development, consisting of 156 total units, of which 20% shall be affordable, shall be constructed as shown on drawings by Noonan & McDowell, Inc. ("Princeton at Bedford"), Sep. 20, 2003, rev. July 28, 2004 (Exh. 2, 2-A).

(b) Prior to commencement of construction, all plans shall be approved under the state Wetlands Protection Act, including the DEP Stormwater Management Policy.

(c) With regard to the Bedford Wetlands Protection Bylaw and Regulations,

the five buildings on the rear parcel may be constructed as shown on Exhibit 2-A, despite small intrusions (totaling several hundred square feet) by retaining walls into the 25-foot no-disturb buffer.

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.

*24 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 the Board or 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) 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.

(e) The Board shall take whatever steps are necessary to insure 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.

****13 *25** 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

Werner Lohe
Chairman
Joseph P. Henefield
Marion V. McEttrick
Christine Snow Samuelson
James G. Stockard, Jr.

Footnotes

- 1 An additional reason to use this methodology in calculating whether an anticipated return is reasonable under 760 CMR 31.06(3)(b) is that it is the same methodology used to determine, after construction, whether the developer's profit as a "limited dividend organization" is acceptable. The concept of a limited dividend organization appears in G.L.c. 40B, § 21, and is defined in 760 CMR 31.02. The definition refers to "dividend on invested equity."
- 2 This witness, Robert Engler, who has over twenty-five years experience in the affordable housing field, was also the developer's expert in *Hastings Village, Inc. v. Wellesley, supra*. Mr. Engler also prepared a *pro forma* using the ROTC approach. Exh. 14. This also indicated that the developer would not realize a reasonable return. Tr. IV, 64.
- 3 There was inconclusive testimony concerning whether MassHousing has defined a minimum reasonable return of 10%, but nevertheless, the Board is incorrect in attributing to the developer the position that it "is entitled to a 10 percent return on equity." See Board's brief, p. 11.
- 4 We are not concerned about small inconsistencies in his testimony. See, e.g., Tr. IV, 83.
- 5 In many cases, the developer may chose to introduce into evidence a *pro forma* for the larger development, in part to substantiate the underlying budgetary figures. We assume that the developer could have done so here, and its choice not to do so is in no way evidence that any of the figures in the 156-unit *pro forma* are suspect.

- 6 The condition permits a swimming pool and clubhouse and office building with six parking spaces to be built on the front
parcel, so long as they comply with normal setback requirements. See Exh. 2 (sheet 2).
- 7 All conditions are found in Exhibit 1, pp. 50-61. Also see Pre-Hearing Order, §§ IV-3, IV-5.
- 8 Sections IV-3 and IV-5 of the Pre-Hearing Order list many conditions as being in issue. Though we address a number of
miscellaneous issues in Section V-C, below, those that were not briefed by the Board are waived. See *Cameron v. Carelli*, 39
Mass. App. Ct. 81, 85, 653 N.E.2d 595, 598 (1995).
- 9 The purpose of the bylaw is "to protect wetlands, related water resources, and adjoining land areas ... by controlling activities ...
likely to have a significant or cumulative effect upon wetland values, including ... public or private water supply, groundwater,
flood control, erosion and sedimentation, control, storm damage prevention, water pollution, fisheries, wildlife habitat, state-
listed rare plant species, recreation, aesthetics, and agricultural values" Exh. 4 (art. 54.1).
- 10 Conditions 5.18 and 7.6 relate to snow storage, but the Board has not drawn our attention to any specific performance standard
in the regulations in this regard. See Board's brief, pp. 22, 28; Exh. 4-A (Regulations § 2.2).
- 11 There are, in fact, several small intrusions (totaling several hundred square feet) into the 25-foot no-disturb buffer by retaining
walls on the rear portion of the site. See Tr. II, 123-131; Exh. 2-A. These appear to be essential to permit the siting of the
buildings on the rear portion. They are not significant enough that they should stand in the way of construction of these
buildings. See our condition in Section VI-2(c), below. They do, however, lend support to the Board's argument that the impact
of the entire development should be reduced by elimination of Building No. 1.
- 12 There was a great deal of testimony by the Board's storm water engineer about the problems and disadvantages of such a
system. See, e.g., Tr. VII, 15-26. We need not address these since they will be subject to review under the Wetlands Protection
Act.
- 13 Though the town's Comprehensive Affordable Housing Plan is an exhibit in this case, the Board did not introduce the master
plan into evidence. See Exh. 30, 38. Nevertheless, we will assume that the Board's characterization of the plan is accurate.
- 14 We address the individual conditions in Section V-C, below.
- 15 A more difficult question is presented in situations in which we have found that the conditons imposed do *not* render the
proposal uneconomic. But even in that case, we will engage in a much more limited review of the conditions. For a full
discussion, see *Archstone Communities Trust v Woburn*, No. 01-07, slip op. at 20-21 (Mass. Housing Appeals Committee, Jun.
11, 2003); *Peppercorn Village Realty Tr. v. Hopkinton*, No. 02-02, slip op. at 16-17 (Mass. Housing Appeals Committee Jan.
26, 2004).

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

BRUCE, LLC,)	
)	
Appellant)	
)	
v.)	No. 10-06
)	
DIGHTON ZONING BOARD)	
OF APPEALS,)	
Appellee)	

RULING ON MOTIONS FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

This matter has a lengthy history of on-again-off-again settlement discussions, permit extensions, appeals to the Superior Court, and withdrawals and reopenings before this Committee. The current dispute involves not whether a comprehensive permit was appropriately granted, but rather whether a permit granted by a local board of appeals currently remains valid.

On June 19, 2003, the Dighton Zoning Board of Appeals granted a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to Bruce, LLC to build 84 homes, of which 26 will be affordable, on approximately 113 acres of land on Tremont Street in Dighton. Exh. D-1.¹ An abutter, Dr. Robert Cserr, appealed the permit to the Superior Court. *Cserr v. Pacheco*, No. BRCV2003-00756 (Bristol Super. Ct. filed Jul. 9, 2003); see Exh. D-2. After settlement negotiations, on April 10, 2007, that appeal was dismissed by stipulation without prejudice. Exh. D-2, D-3. On that date, the three-year time limit

1. The parties submitted over two dozen documents and three affidavits in support of their motions.

within which the developer was required to begin construction commenced.² 760 CMR 56.05(12)(c).

The developer encountered various delays, and therefore, on March 17, 2010, it appeared at a meeting of the Board and submitted a written request to extend the permit. Exh. D-4. On April 9, 2010, the Board granted a short, conditional extension to July 10, 2010 (first extension). Exh. D-4. The abutter appealed the granting of the extension to the Superior Court. Developer's Brief, p. 3 (filed Sep. 19, 2013); Board' Brief, p. 2 (filed Nov. 6, 2013); Intervener's Brief, p. 4 (filed Nov. 7, 2013). In that appeal, the abutter argued, as it continues to do, that the permit had expired on April 8, 2010. Abutter's Brief, p. 1. The developer, in turn, both appealed the Board's conditional extension to this Committee (on May 17, 2010), and also renewed its extension request to the Board, requesting a longer, two-year extension.

Settlement discussions between the developer and the abutter resumed, and as a result, the hearing before this Committee was not formally commenced, and the Board held the developer's extension request in abeyance. Finally, on May 18, 2011, the Board voted to extend the permit again—to May 17, 2012 (second extension). Exh. D-5. The abutter promptly appealed this second extension to Superior Court. On June 2, 2011, the appeal before this Committee was dismissed without prejudice by agreement of the developer and the Board.

In late April 2012, shortly before the second extension was due to expire, the developer again requested an extension, and on May 15, 2012, the Board extended the permit to May 8, 2013 (third extension). Exh. D-6, Bd-1. This, too, was appealed by the abutter.³ On June 5, 2012, the developer renewed its appeal before this Committee.⁴ On July 25, 2012, the Board revised its third, most recent extension. Exh. D-7. On August

2. A comprehensive permit only becomes final when the last appeal is disposed of. 760 CMR 56.05(12)(a). It lapses three years after that date, unless it is extended. 760 CMR 56.05(12)(c).

3. The three Superior Court appeals were consolidated, the developer moved for summary decision, and the matter was stayed by the court on May 7, 2013 pursuant to *Taylor v. Board of Appeals of Lexington*, 451 Mass. 270 (2008). Intervener's Opposition, pp. 7, 9.

4. The matter was formally reopened by the presiding officer by order of June 6, 2012. The abutter moved to intervene on June 21, 2012; a year later, on July 2, 2013, intervention was granted by agreement of the other parties.

9, 2012, the appeal before this Committee was again dismissed without prejudice by agreement of the developer and the Board. Exh. Bd-9.

The following year, the developer again requested an extension from the Board, by letter of March 28, 2013. Exh. D-9. Meanwhile, on April 10, 2013, the Dighton Conservation Commission considered the developer's application for an Order of Conditions under the state Wetlands Protection Act (WPA). Exh. D-8, p. 14. On April 17, 2013, the Board considered the developer's extension request, and voted to continue the matter to May 1, 2013 in order to consider "information from the Conservation Commission." Exh. D-10A, p. 13. On April 26, 2013, the Conservation Commission issued a formal denial of the Order of Conditions. Exh. D-8. On May 1, 2013, the Board reconvened, and denied the developer's request to extend the comprehensive permit (issuing its formal decision on May 15, 2013)(fourth extension; denied). Exh. Bd-6, D-10B. On June 5, 2013, the developer renewed its appeal before this Committee.⁵

The parties and the abutter/intervener filed cross-motions for summary decision on September 19, November 6, and November 7, 2013 pursuant to 760 CMR 56.06(5)(d).⁶

II. THE ISSUES

The developer argues that as a matter of law its requests for extensions of the comprehensive permit were timely; that it met the conditions set forth in the second, 2012 extension; and that the Board's denial of the fourth extension was improper since there was no local concern to support the denial. Developer's Brief, p. 1 (filed Sep. 2013). It requests a ruling that this Committee confirm that the permit "remains in full force and for two years following entry of a final un-appealable decision in this matter." Developer's Brief, p. 2.

The Board argues first that "[its own] action... was moot and unnecessary, as the pending litigation [by the abutter] tolled the time for the comprehensive permit to lapse," and therefore its denial of the extension was "without legal consequence." Board's Cross Motion, p. 1 (filed Nov. 6, 2013). Alternatively, it argues that there are material facts in

5. The matter was formally reopened by the presiding officer by order of June 7, 2013.

6. The Committee may grant a motion for summary decision if the record shows no genuine issue of material fact and the moving party is entitled to a decision as a matter of law. 760 CMR 56.06(5)(d); see *LeBlanc v. Amesbury*, No. 06-08, slip op. at 4 (Mass. Housing Appeals Committee Jan. 14, 2013).

dispute which preclude summary decision, but if that were to be found not to be the case, summary decision should be awarded in its favor. Board's Cross Motion, p. 2.

The abutter⁷ opposes the developer's request for summary decision, and argues that the permit "lapsed on April 8, 2010, and could not subsequently be 'extended' by the Board." Intervener's Brief, p. 1.

A. This Appeal is Not Moot.

At the outset, we find no merit in the Board's argument that this appeal should be dismissed because the case is moot. First, the Board acted a number of times on requests by the developer—not taking the position, as it does now, that those actions were unnecessary. There have been no changed circumstances since the Board last acted to deny the developer's requested extension; instead, declaring the controversy moot would simply avoid review of the Board's action. This is not a situation in which it can be said that the developer has ceased to have a stake in the outcome of the case. See *Blake v. Massachusetts Parole Bd.*, 369 Mass. 701, 703 (1976). Further, even if the case were moot, it is reasonable that the Committee should exercise its discretion to resolve an issue of public importance which has been fully argued and is very likely to arise again in similar factual circumstances.⁸ See *Comm. v. Dotson*, 462 Mass. 96, 98-99 (2012).

B. The Intervening Abutter has Not Shown that the Permit Lapsed.

The abutter asserts that the comprehensive permit "lapsed on April 8, 2010, and could not subsequently be 'extended' by the Board." Intervener's Brief, p. 1. As an initial matter, although the intervener clearly put this question in issue in its opposition, it has waived its claim by failing to present any argument with regard to it. See Intervener's Brief, pp. 9-16; *White Barn Lane, LLC v. Norwell*, No. 08-05, slip op. at 31 (Mass. Housing Appeals Committee Jul. 8, 2011); *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee June 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

7. Pursuant to 760 CMR 56.06(2)(b), the abutter was granted permission to participate in this hearing as an intervener by consent of the parties, without argument. Although his participation "may be limited to the extent and under terms determined in the discretion of the presiding officer," no such limitations were specified. See 760 CMR 56.06(2)(b).

Despite the intervenor's waiver, however, and even though this issue is so basic that it would rarely need explanation, we feel that we should address it so that there can be no confusion at all in this very complicated case.

We note first the facts stated in the "facts" section of the intervenor's brief, namely, that "the expiration date of the comprehensive permit was... no later than April 8, 2010," and that on "April 9, 2010, the Board voted to grant a 'conditional extension'." See Intervenor's Brief, pp. 3-4. But these undisputed facts alone are not sufficient to support a contention that the permit lapsed. It is also undisputed that the developer appeared at a meeting of the Board on March 17, 2010, and requested an extension of the permit. Exh. D-4. Thus, since an extension request was timely filed before the expiration deadline, the permit did not lapse on April 8. *LeBlanc v. Amesbury*, No. 06-08, slip op. at 8-11 (Mass. Housing Appeals Committee Jan. 14, 2013).

C. The Comprehensive Permit in this Matter Remains in Effect.

The positions taken by the parties in this case are complicated, and arguably run counter to their ultimate interests. In making what it characterizes as a mootness argument, the Board argues that the developer's fourth request for an extension of the Comprehensive Permit was "premature and unnecessary." Board's Brief, pp. 1, 7, 10. Based upon this, it would have us dismiss the appeal without a ruling on the validity of the permit. Board's Brief, p. 17. The developer, in turn, appears to accept the proposition that the extension was necessary. We agree with the Board that the last extension⁹ was unnecessary, but conclude that the developer is entitled to a ruling in its favor.

Comprehensive permits normally lapse three years from the date on which they become final. 760 CMR 56.05(12)(c). If the *developer* must pursue or await the outcome of any appeal of any other state or federal permit or approval required for the project, then this three-year period is tolled for the time required. *Ibid.* But if an *abutter* (or any other party) *appeals* the decision granting a comprehensive permit, the three-year period is not tolled, but rather it begins to run only when the last appeal is disposed of. That is, the decision first

8. We see no need to address the arguments raised by the developer with regard to *Taylor v. Bd. of Appeals of Lexington*, 451 Mass. 270, 276-277 (2008). See Developer's Reply, pp. 8-9 (filed Dec. 13, 2013).

9. The parties have focused only on the last extension, though presumably the second and third extensions were also unnecessary.

becomes final “on the date that the written decision of the Board is filed in the office of the municipal clerk...”—often within a day or two of the Board’s vote. 760 CMR 56.05(12)(a). The three-year period then begins to run. Typically, an appeal—either by an abutter, the developer, or some other party—is filed within weeks after that. But then, upon the filing of the appeal, the decision is no longer final, and a new three-year period to exercise the permit begins to run if and when it does become final, that is, “on the date the last appeal is decided or otherwise disposed of.” *Ibid.*

In this case, the comprehensive permit became final in 2007, when the abutter’s substantive appeal of the permit was dismissed by the court by agreement of all parties. Thus, with the permit due to lapse in 2010, it was proper and necessary for the developer to request that the Board grant an extension. But when the abutter then appealed the Board’s grant of that extension, the situation became murky. As noted by the Board, 760 CMR 56.05(12)(a) is “silent on whether or not... tolling... applies to decisions extending the date on which a comprehensive permit will lapse....” Board’s Brief, p. 7.

Although we have not ruled directly on this question before, twenty years ago we addressed it in *dictum* in our leading case on permit extensions. We noted that “in all likelihood, we would rule that the extension would be tolled during the pendency of any appeal to the courts.” *Red Gate Road Realty Trust v. Tyngsborough*, No. 93-01, slip op. at 12, n.6 (Mass. Housing Appeals Committee Dec. 8, 1993). Today, based upon analogous provisions in 760 CMR 56.05(12)(a) and 56.05(12)(c) concerning finality of permits and tolling pending related permit proceedings,¹⁰ we hold that when a comprehensive permit that has become final is extended by a decision of the Board, and that decision is appealed to the courts by an abutter, then the extension period granted by the Board is tolled until the appeal is decided or otherwise disposed of. Thus, in this case, the comprehensive permit currently remains in effect since it was extended in April 2010 and the extension period has been tolled continuously since then by the appeal taken by the abutter to Superior Court.

We note that the extension that remains in effect in this case—the first one—was an extension for only three months (or arguably for only two months, since the Board required

10. We also agree with the Board’s policy argument that it should not “be faced with the need to continually address requests to... extend a comprehensive permit while litigation is pending,” which can lead to confusion, delays, and “more litigation.” Board’s Brief, p. 9.

that any further request for extension be filed within two months). Thus, we expect that once the Superior Court appeals are disposed of, the developer will immediately request a further extension. Assuming that the Board grants a reasonable, much longer extension sufficient for the developer to move toward construction, the developer will nevertheless be in the unenviable position of possibly facing further appeal by the abutter (of the extension, not of the underlying permit, which became final long ago). On the other hand, a request to extend the very first extension will present the parties with an opportunity to address current circumstances on a clean slate. Further, because all of the parties are currently before us, we will follow our normal practice (which is based upon the latitude we have as an administrative body with regard to procedural technicalities) and retain jurisdiction over this dispute, staying any further proceedings, of course, to permit the Superior Court to address the pending appeals. Thus, if at some time in the future the abutter (or the developer) desires to appeal an extension of the permit, this Committee would be available as a forum.¹¹

D. Other Issues

I. Fundamental Fairness Does Not Require the Comprehensive Permit to be Terminated.

The Board argues that “[f]undamental concepts of fairness and the need for closure demand that the permit be terminated at this time.” Board’s Brief, p. 14. It cites our analysis in *Red Gate Road Realty Trust v. Tyngsborough*, No. 93-01 (Mass. Housing Appeals Committee Dec. 8, 1993). But *Red Gate Road* involved allegations of delays caused by the developer. Here, where the permit has not been exercised because of delay caused by abutter appeals, there is no basis whatsoever to abrogate the developer’s right—established in 760 CMR 56.05(12)(c)—to obtain reasonable extensions of the three-year period within which to begin construction.

11. We state no opinion as to whether this Committee would be the *only* forum available to the parties. But, should the abutter appeal to the Superior Court, and should one or more of the parties argue that the interests of judicial economy would be best served by resolving the matter in that forum, we would entertain a motion to relinquish our jurisdiction in favor of the court’s.

2. The Intervener is Not Entitled to Challenge the Developer's Control of the Site.

The intervener also asserts that the developer lacks site control.¹² Intervener's Opposition, p. 2. Its claim has no merit, however. At the outset, even though an intervener may generally have standing as an aggrieved party with regard to the impact the proposed development may have on his property, he typically lacks standing to question the developer's site control. That is, the issue of site control is most commonly raised by the Board, which has "an interest in ensuring that any lingering questions about ownership of [the] land are publicly laid to rest before construction begins..." but even then, it "is a matter that is primarily of concern only to the subsidizing agency." *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 11, 10 (Mass. Housing Appeals Committee Jun. 28, 1994), *aff'd*, No. 94-1706-B (Essex Super. Ct. Jul. 29, 1997). For this reason, the subsidizing agency's determination with regard to site control is generally considered conclusive. 760 CMR 56.04(6), 56.07(3)(h)(1); see *Indian Brook Cranberry Bogs, Inc. v. Bd. of Appeals of Plymouth*, Misc. No. 06-322281, 08-381915, slip op at 12 (Land Ct. Oct. 9, 2009), 2009 WL 3255190. Thus, any challenge with regard to site control is beyond the scope of an intervener's participation. *Paragon Residential Properties, LLC v. Brookline*, No. 04-16, slip op. at 8, n.6, 9, n.7 (Mass. Housing Appeals Committee Ruling on Prehearing Motions Dec. 1, 2004), *aff'd*, No. 10-P-1468 (Mass. App. Ct. Jul. 14, 2011) (Rule 1:28 Decision, 2011 WL 2712960); also see *G-R Highland Glen Ltd. Partnership v. Westwood*, No. 02-17, slip op. at 6 (Mass. Housing Appeals Committee order April 7, 2003); also see 760 CMR 56.04(6) ("failure may be raised by the Board... or by the Committee...").

Nor is the abutter's allegation that he owns a portion of a street through which sewer service is to be provided to the proposed development a basis for not applying this general rule. We have long held that disputes over property rights between parties are not within the jurisdiction conferred by Chapter 40B, but rather should be left for the courts. *Hanover Woods, LLC v. Hanover*, No. 11-04, slip op. at 21 (Mass. Housing Appeals Committee Feb. 10, 2014); *Planning Office for Urban Affairs, Inc. v. Scituate*, No. 73-02, slip op. at 6-7

12. Site control is a "project eligibility requirement." 760 CMR 56.04(1). It is not a jurisdictional requirement. *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 520-521, 870 N.E.2d 67, 74 (2007).

(Mass. Housing Appeals Committee Mar. 14, 1975), *aff'd*, No. 1348 (Plymouth Super. Ct. Jun. 28, 1976). A more recent case in Sandwich is based on facts quite similar to the case at hand. See *Autumnwood, LLC v. Sandwich*, No. 05-06, slip op. at 5 (Mass. Housing Appeals Committee Jun. 25, 2007), *aff'd* No. 07-462 (Barnstable Super. Ct. Jan. 23, 2012), and cases cited; also see *Princeton Development, Inc. v. Bedford*, No. 01-19, slip op. at 4 (Mass. Housing Appeals Committee Sept. 20, 2005) (site control is matter of ownership, not access). The existence of a dispute over the developer's right to place utilities in the street should be decided by the courts, and is not a basis for invalidating a comprehensive permit for lack of site control. *Zoning Board of Appeals of Holliston v. Housing Appeals Committee*, Permit Session No. 09-393326, slip op. at 10-11 (Land Ct. Jun. 24, 2010), *aff'd* *Zoning Bd. of Appeals of Holliston v. Housing Appeals Committee*, 80 Mass. App. Ct. 406, 416 (2011).

3. The Board has not shown that there are material facts in dispute.

The Board argues that there are material facts in dispute, namely that the developer asserts and the Board contests the developer's compliance with the second and third conditions in the third extension of the permit. See Board's Brief, pp. 10-13. Those conditions are as follows:

The Conservation Commission process [under the state Wetlands Protection Act] needs to be resolved prior to the expiration of this extension period.

The property.... shall either be delisted from the endangered species maps created by Natural Heritage or a development plan will be pursued prior to the expiration period... pursued that comports to the existing Natural Heritage Maps....

Exh. Bd-1, pp. 2-3; also see Exh. D-10A, p. 8.

Both of these conditions are improper. The developer must, of course, under all circumstances, comply with state and federal laws and regulations. But the proceedings under the state Wetland Protection Act, G.L. c. 131, § 40, and the Massachusetts Endangered Species Act, G.L. c. 131A, are separate state permitting proceedings pursued by the developer independently of the comprehensive permit process on a schedule related to the overall development process, which is within the developer's discretion. See *Forestview Estates Assoc., Inc. v. Douglas*, No. 05-23, slip op. at 9 (Mass. Housing Appeals Committee Mar. 5, 2007) (denial extension of permit upheld under previous, more restrictive version of 760 CMR 56.05(12)(c)). The Board's power to impose conditions derives from, and is no

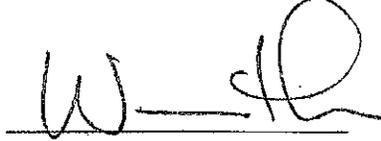
greater than the power of other local boards, and thus does not include the power to dictate when and in what order other approvals are sought. See *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 756, 762, 765, 765 n.21; also see *Zoning Bd. of Appeals of Holliston v. Housing Appeals Committee*, 80 Mass. App. Ct. 406, 416 (2011). Because the conditions are beyond the authority of the Board, whether or not the developer is in compliance with them is not a material fact.

III. CONCLUSION

Summary Decision as described in this ruling is hereby GRANTED in favor of the Developer as described above, and DENIED with regard to the claims of the Board and intervener.

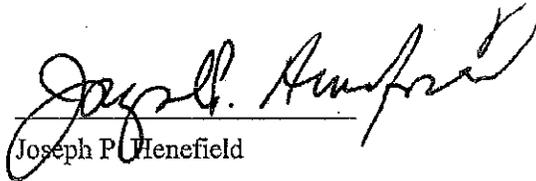
The Committee retains jurisdiction over this matter. Proceedings are hereby stayed, however, pending resolution of related appeals in the Superior Court.

Housing Appeals Committee



Werner Lohe, Chairman

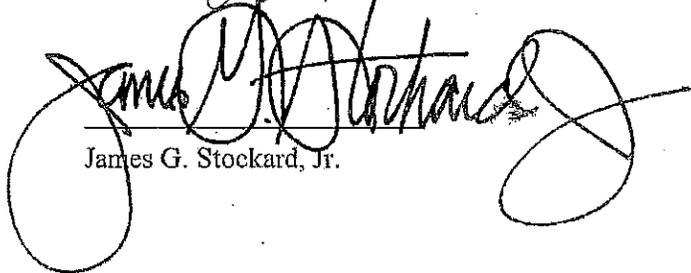
Date: May 7, 2014



Joseph P. Henefield



Theodore M. Hess-Mahan



James G. Stockard, Jr.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Sail-On Development Corp. v. City of Brockton Planning Bd., Mass.Land Ct., July 9, 2007

61 Mass.App.Ct. 308
Appeals Court of Massachusetts,
Suffolk.

¹ Denise Linder, Douglas Moore, Kennett G. Coleman, Colleen M. Strapponi, Mark S. Strapponi, Marjorie O. Clinton, Elizabeth M. Benney, and David J. Benney.

Lynn H. PARKER & others¹

v.

BLACK BROOK REALTY CORPORATION.

No. 03-P-354.

Argued Feb. 11, 2004.

Decided June 9, 2004.

Synopsis

Background: Abutting landowners sought judicial review of town planning boards' approvals of definitive subdivision plan for land located partly in each of the two towns. The Land Court Department, Suffolk County, Peter W. Kilborn, J., annulled the approvals. Subdivision applicant appealed.

[Holding:] The Appeals Court, Mills, J., held that general purposes clause of subdivision control statute provided authority for town planning boards and Land Court Department to consider subdivision applicant's lack of legal right to use adjacent way as necessary component for access to public way.

Land Court Department affirmed.

Attorneys and Law Firms

****1087 *308** John D. Powers, Milford, for the defendant.

Mark S. Bourbeau, Boston, for the plaintiffs.

Present: DOERFER, COHEN, & MILLS, JJ.

Opinion

MILLS, J.

Abutters appealed approvals of a definitive subdivision plan of land located partly in the town of Mendon and partly in the town of Hopedale. A Land Court judge determined that the subdivision proponent, Black Brook Realty Corporation (Black Brook), did not have the legal right to use certain of the land that provided access from the exterior of the subdivision to the nearest adjacent public way. Black Brook appeals the judgments ***309** annulling the approvals by the towns' planning boards of the definitive subdivision plan. We affirm.

Black Brook requested from the Mendon and Hopedale planning boards their approvals of a forty-two lot subdivision that was located partly in each town. As shown on the sketch in the Appendix to this opinion, the plan contains two connection points of its interior ways with Overdale Parkway (parkway), a roadway exterior to the subdivision and owned by the town of Hopedale, though not established as a public way. Black Brook intended to reach the closest public way, Freedom Street, exclusively by way of the parkway. The two boards approved the subdivision. The Hopedale board did not consider the abutters' objection that Black Brook had no legal right to use the parkway. That board commented that "[t]his is a legal issue and will not be determined by the [b]oard." The abutters appealed pursuant to G.L. c. 41, § 81BB, and a Land Court judge annulled the decisions of both boards after determining that Black Brook lacked the legal right to use at least the unpaved portion of the parkway, an essential component of the subdivision's proposed access to Freedom Street.

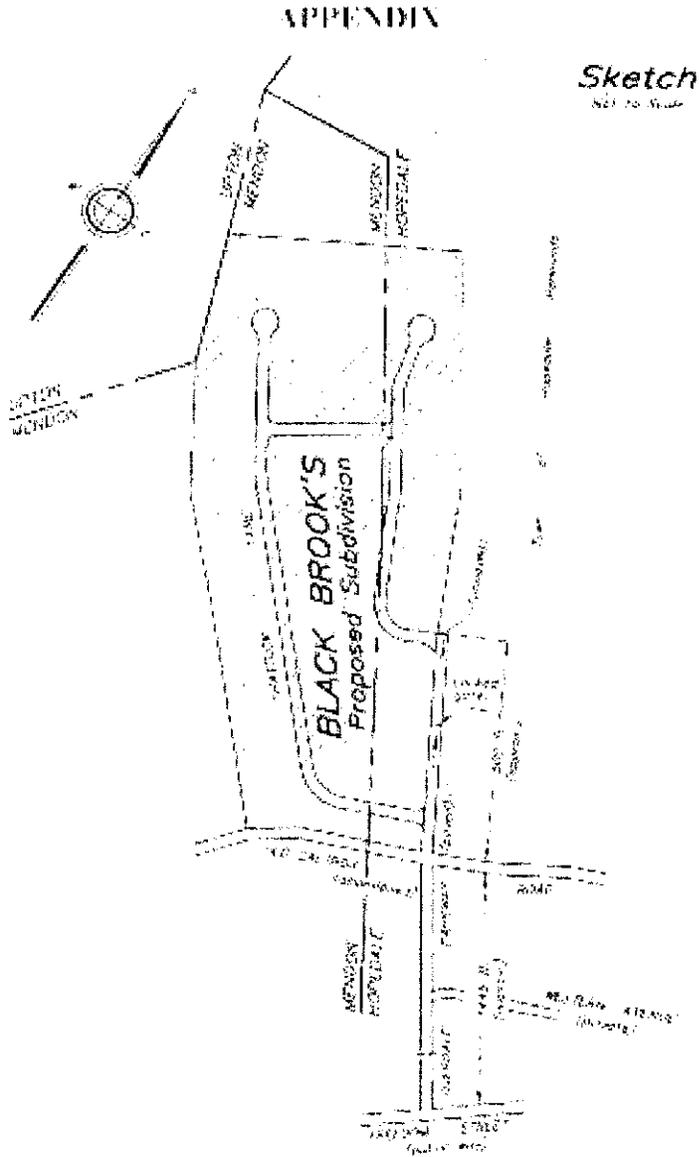
[1] The judge noted that the rules and regulations of neither board expressly require that the applicant have rights in the adjacent ways if they are necessary components of the proposed access to public ways. He considered whether the absence of such regulations made consideration of legal access ultra vires to the boards' evaluation and approval of the plan. He concluded that this case, like *Beale v. Planning Bd. of Rockland*, 423 Mass. 690, 694–697, 671 N.E.2d 1233 (1996) (*Beale*), is an exception to *Castle Estates, Inc. v. Park & Planning Bd. of Medfield*, 344 Mass. 329, 334, 182 N.E.2d 540 (1962) (*Castle Estates*), and that the general purposes clause in G.L. c. 41, § 81M, provides authority for the boards, and the reviewing court, to consider Black Brook's legal right to the access road outside the subdivision, even absent express regulation. We agree.

[2] *Castle Estates* reiterated that planning board regulations must be "comprehensive, reasonably definite, and carefully drafted, so that owners may know in advance what is or may be required of them and what standards and procedures will be applied to them." 344 Mass. at 334, 182 N.E.2d 540. The court said that "[w]ithout such regulations, the purposes of the law may easily be frustrated." *Ibid.* "A planning board exceeds its authority if requirements are imposed beyond those established by the rules and regulations." *Beale*, 423 Mass. at 696, 671 N.E.2d 1233. In *Beale*, the court held that the planning board's authority under the general purposes clause (G.L. c. 41, § 81M) to enforce the zoning by-laws provided a basis for the disapproval of the subdivision plan, where the proposed use of the land in question, to provide access to a proposed retail shopping mall on adjacent land in another town, was not an allowable use in the district and would violate the zoning by-law. *Id.* at 693–697, 671 N.E.2d 1233. Section 81M of G.L. c. 41, as amended by St.1969, c. 884, § 2, expressly admonishes planning boards to exercise their powers under the subdivision control law "with due regard for the provision of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel ... and for coordinating the ways in a subdivision with each other and with the public ways in the city or town in which it is located and with the ways in neighboring subdivisions." The court in *North Landers Corp. v. Planning Bd. of Falmouth*, 382 Mass. 432, 436–437, 416 N.E.2d 934 (1981), affirmed the authority of a planning board to evaluate the adequacy of ways outside the subdivision, under a properly drawn local subdivision regulation.² Black Brook relies upon *Hahn v. Planning Bd. of Stoughton*, 24 Mass.App.Ct. 553, 555–556, 511 N.E.2d 20 (1987), in its argument that the board and court are without authority to consider questions of Black Brook's rights in the parkway, and that a planning board may not consider the matter of title. However, *Hahn* stands for the more limited proposition that a planning board's subdivision approval is not invalid because it fails to determine questions of the subdivider's title, where those questions do not adversely affect development or use of the subdivision. By contrast, the abutters' challenge to Black Brook's rights in the parkway goes to the very heart of the proposed development—the locus has been left without one of the two means of access upon which the boards predicated their approvals. It is well settled that a planning board is entitled to require an applicant for subdivision approval to demonstrate ownership of the subdivided land. *Batchelder v. Planning Bd. of Yarmouth*, 31 Mass.App.Ct. 104, 107–108, 575 N.E.2d 366 (1991). The regulations of the Hopedale and Mendon planning boards have such an express requirement. Ownership of access rights on which the proposed subdivision depends is no less consequential.

2 The court reserved the question whether inadequacy of a public way alone could justify disapproval of a subdivision plan. *North Landers Corp. v. Planning Bd. of Falmouth*, 382 Mass. at 437 n. 6, 416 N.E.2d 934. Here, of course, there is no contention that the parkway is public, and indeed, Black Brook has no legal right to its use.

Judgments affirmed.

*312



All Citations

61 Mass.App.Ct. 308, 809 N.E.2d 1086

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2007 WL 1965316

Only the Westlaw citation is currently available.

Massachusetts Land Court.

Department of the Trial Court, Plymouth County.

SAIL-ON DEVELOPMENT CORP., John
Chuckran and George Berzinis, Plaintiffs,

v.

The CITY OF BROCKTON PLANNING BOARD,
John F. Murphy, Vahan Boyajian, Wallace Peckham,
Paul Sullivan, Donald Ritucci, Robert Sullivan
and John Waldron, as They Each are Members of
the City of Brockton Planning Board, Defendants.

No. 312561 (GHP).

July 9, 2007.

**DECISION GRANTING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

GORDON H. PIPER, Justice.

*1 This case is before the court on the motion of plaintiffs for summary judgment. The plaintiffs, applicants for approval from the defendant Planning Board of the City of Brockton ("Board") to develop a senior residential community in that municipality, contend that the court must, as matter of law, direct the Board to issue the permit the Board denied them, on a remand from this court. I conclude that, on the particular circumstances this case presents, the plaintiffs are justified in their position, and I will require the Board to issue the permit they have denied in its decision on remand.

This is an appeal under G.L. c. 40A, § 17 from the decision of the Planning Board ("Board") of the City of Brockton ("City") denying the application of the plaintiffs for a special permit which they sought in connection with their plans to construct a senior residential community ("Project") in the City. The application was filed under section 27-38(k) of the City's zoning ordinance.¹ The Board is the special permit granting authority for this type of application.

At its August 2, 2005 meeting the Board considered the plaintiffs' revised special permit application under

this section (the application included site plan materials revised in 2005 by the applicants following an earlier application made-and denied by the Board-in 2004)². At the August 2, 2005 meeting the Planning Board voted "... to deny the special permit for the above senior residential community for reasons of public safety due to the conditions that the width of the three streets Loring Street, Pratt Street and Armiston Street are inadequate to support 40 additional units."

The initial written decision of the Board ("Decision") denying the requested special permit after consideration of the plaintiffs' revised plans was dated August 4, 2005, and was filed with the City Clerk the following day.

This case came before the court for a case management conference, on November 22, 2005, at which counsel for the plaintiffs and for the municipal board member defendants were present. At that conference, the parties took up with the court a critical issue-the standard of review the Board was required to employ in considering plaintiffs' revised application. They contended that the application was, under the City's zoning ordinance, to be reviewed as an application for site plan review, and not as a more discretionary special permit application. At the case management conference, counsel discussed with the court the parties' willingness to remand this case to the Board for further deliberation and for the rendering of a revised decision on the plaintiffs' last special permit application. In particular, counsel addressed whether by stipulation they might agree to the standard of review which ought govern the Board's consideration of the plaintiffs' last application and the accompanying revised plans, in the event of a remand. Counsel agreed to consider and report to the court whether their clients were willing: (a) to agree to a remand and (b) to stipulate that the applicable provisions of the City's Zoning Ordinance require the Board to review plaintiffs' application under the standards governing site plan applications, rather than as a discretionary special permit application.

*2 After consultation with their clients, counsel advised the court in writing that they had agreed on the applicable standard of review the Board ought to give to the latest special permit application. They formally stipulated as follows (the "Stipulations"):

- "The Board is authorized by the Zoning Ordinance to review the plaintiffs' site plan to determine and assure

compliance of a Senior Residential Community with the requirements of the Zoning Ordinance.”

-“The Board is authorized to impose such reasonable conditions upon the Project as the Board may deem appropriate, which conditions must be consistent with the Zoning Ordinance and which shall not constitute a prohibition of the use allowed to the Project.”

-“The Board may review the Project to determine whether the proposed project as amended poses site planning issues so intractable as to allow of no reasonable solution.”

-“... the Court may issue [a remand] Order” in the form which was attached to the parties' written stipulation. The parties' proffered form of order provided, in relevant part:

-that on remand the Board was to “meet and, in accordance with site plan review standards, not special permit discretionary standards, provide for reasonable regulation, rather than prohibition of the use of the proposed Senior Residential Community under the site plan approval provisions of the Revised Ordinances of the City ... Section 27-38(k)”;

-that the Board was to “issue the special permit for the proposed Senior Residential Community under the site plan approval provisions of [zoning ordinance] ... Section 27-38(k) unless the Project as so described poses site-planning issues so intractable as to allow of no reasonable solution. The Planning Board may only impose such reasonable conditions upon the Project as the Planning Board may deem appropriate, provided that the same are consistent with the Zoning Ordinance and provided further that any conditions shall not constitute a prohibition of the use allowed to the Project”;

-“Failure of the Board to act diligently in accordance with this Order may be deemed by the Court sufficient to constitute a determination that:

a) the Project as described in the 2005 Site Plans conforms to the site planning and other requirements of Zoning Ordinance Section 27-38(k); and

b) the Project as so described poses no site planning issues so intractable as to allow of no reasonable solution.”

The parties, by their counsel, having agreed to a remand to the Board for further deliberation and consideration concerning the Decision, and to allow the Board the opportunity to reconsider and to revise the Decision, the court, based on their Stipulations and joint motion for remand, on December 6, 2005 entered an order (“Remand Order”). The Remand Order ordered that the Decision of the Board be annulled, and then also ordered as follows:

“**ORDERED** that Land Court Miscellaneous Case No. 312561 is **REMANDED** to the Board for the limited purposes of: (a) deliberating on and considering further plaintiffs' application for a special permit under section 27-38(k) of the City's zoning Ordinance, said deliberation and consideration to be undertaken by the Board in accordance with the parties' Stipulations [as submitted to the court by counsel to the parties, and as set forth above], and (b) revising and then refileing its earlier Decision, so as to set forth the Board's reasons in accordance with the Stipulations. Unless all parties otherwise in writing agree, the Board's further deliberations, and the rendering of its revised Decision, shall occur without receipt by the Board of further information, evidence, arguments, or presentations, in which case the Board shall act at a lawfully noticed open public meeting but need not convene (or give notice of) a new public hearing. If the parties in writing agree that the Board will receive further information, evidence, arguments, or presentations, the Board shall do so only after first having given full legal notice of, and conducted, a new public hearing. It is further

*3 **ORDERED** that the Board shall render and file with the Clerk of the City the Board's revised written decision no later than December 30, 2005, unless the court allows a request for a later filing. It is further

ORDERED that the parties shall file with the court, within ten days after the Board files its revised decision with the City Clerk, a joint written status report on the outcome of the Board's deliberations on remand, accompanied by a true copy of the revised Board decision, and requesting specific further action by the court, consistent with the parties' joint stipulation. It is further

ORDERED that the court retain jurisdiction over the case, including over any appeals which may be taken (or other actions brought) from or relating to the Board's

further proceedings pursuant to this Order. No party currently a party to this litigation who is aggrieved by the Board's revised decision need initiate in this court a new lawsuit appealing the Board's revised decision, but any such aggrieved party shall, within twenty days of the filing of the Board's decision with the City Clerk, (a) file with the court (and serve on all parties) a proper motion for leave to amend the pleadings to assert a right to judicial review of the revised decision, with the form of the proposed amendment annexed, and (b) file with the City Clerk written notice of having filed the motion to amend, accompanied by true copies of the moving papers."

The Stipulations, filed with the court by counsel for all the parties on December 2, 2005, in the form set forth at length above, were incorporated at length in the Remand Order issued by the court on December 6, 2005.

The Board met on the evening of December 6, 2005, entered executive session, and took no action on plaintiffs' application pursuant to the Remand Order. The Board scheduled another meeting for December 21, 2005, but did not hold one, having failed to achieve a quorum on that night. The Board next took the matter up on January 25, 2006. There were only five member of the Board present that night. This was the minimum number of members of the nine member Board required to conduct business, and less than the six members which, in any event, would have been necessary to approve the plaintiffs' application, *see* G.L. c. 40A, § 9.

Nevertheless, the Board did act on January 25, voting to deny the application which had been sent back to them for consideration by the Remand Order. The following day, the Board filed its one-page decision ("Remand Decision") with the City Clerk. The Remand Decision succinctly assigns four reasons for the denial:

"-The developer has made no showing that they have the legal right to use the streets leading into the development.

-The developer has made no showing that they have a legal right to develop under the Edison easement.

-The developer has made no showing that they have a legal right to pave a portion of Allerton Street (between Loring Street and Pratt Street).

*4 -Access to the site over private ways may harm residents."

On January 20, 2006, the defendants moved to extend the time for action by the Board pursuant to the Remand Order, which had required the Board to file its decision on remand by December 30, 2005. By the time the court heard the motion to extend telephonically on January 27, 2006, the Remand Decision had been filed with the City Clerk, and a copy of it had been transmitted to the court. The Court exercised its discretion, and treated the late filing of the Remand Decision as compliant with the Remand Order, and then scheduled hearing on the plaintiffs' motion for summary judgment, renewed in light of the Remand Decision's denial of their application. The parties were given a sufficient interval to permit them to update their summary judgment submissions to take into account the Board's action on remand. They did so, and plaintiffs in their summary judgment request now ask the court to order issuance of the permit turned down by the Board in its Remand Decision. The defendants defend the Board's action in issuing the Remand Decision, and ask the court to uphold it, or at a minimum to hold the case for trial to resolve factual issues they contend cannot be settled on summary judgment. After argument, and taking into account the submissions of the parties on the recast motion for summary judgment filed following the issuance of the Remand Decision, I conclude that, as matter of law, there are no genuine material issues of fact in dispute, and that, as matter of law, plaintiffs are entitled to a grant of their summary judgment request.

"Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." *Ng Bros. Constr., Inc. v. Cranney*, 436 Mass. 638, 643-644 (2002); Mass. R. Civ. P. 56(c). "The moving party bears the burden of affirmatively showing that there is no triable issue of fact." *Ng Bros.*, 436 Mass. at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. *See Attorney General v. Bailey*, 386 Mass. 367, 371 (1982), *cert. den. sub nom. Bailey v. Bellotti*, 459 U.S. 970 (1982). Whether a fact is material or not is determined by the substantive law, and "an adverse party may not manufacture disputes by conclusory factual assertions." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Ng Bros.*, 436 Mass. at 648.

To a significant extent, the disposition of the case at bar which I decide must be made here is a result of the Stipulations the parties, by their counsel of record, voluntarily entered into and laid upon the docket of the court, and of the Remand Order which entered based on those Stipulations and the parties' joint request to send the project back to the Board for fresh consideration. These consensual undertakings, made in the setting of contentious, multiple-round litigation about the Board's unwillingness to approve the plaintiffs' senior residential project, are entitled to respect not only by the parties to those stipulations, but by the court, to whom they were rendered.

*5 One definite, central focus of the parties' disagreement, all along, was the standard of review which was to govern the Board's consideration of the special permit application for plaintiffs' proposed project. The language of the relevant section of the Ordinance uses words which, by their mandatory character ("[u]se shall be authorized ..."), suggest strongly that the Board's role, in reviewing special permit applications under this section, is not a discretionary one, where the Board would have a broad power of denial, but rather a role more in the nature of site plan review, where the Board would be obliged to approve the project, albeit with reasonable changes and conditions, unless truly intractable problems appeared. *Cf. Britton v. Zoning Bd. of Gloucester*, 59 Mass.App.Ct. 68 (2002) with *Prudential Insur. Co. of America v. Board of Appeals of Westwood*, 18 Mass.App.Ct. 632 (1984). Other aspects of the Ordinance section are suggestive of site planning review, rather than discretionary special permit approval, given their focus on "design standards," improvement of "site layouts," "protection of nature attributes and environmental values," etc. It is not clear that the court, if called upon to decide the question in the absence of a firm stipulation from the parties' lawyers, would necessarily have ruled that the relevant Ordinance section left the Board without a plenary discretionary power of denial. The Ordinance section might also have led to a determination by the court that the Board did possess the power, at least as to some matters, to turn down the application, given that there appear to be aspects of the section which are of a more objective variety than customary in a purely "site plan review" provisions of local zoning legislation.

This issue, however, was effectively taken away from the court by the unequivocal Stipulations the parties

made directly on this point. Faced with a section of the Ordinance which appeared to lend itself to either one interpretation about the Board's required standard of review, or another, it was proper for the court to accept counsels' stipulation on this disputed matter, and hold them to their decision on it. There was nothing on the face of the Stipulations of the parties which suggested the Stipulations were palpably in error or unreasonable, given the language of the Ordinance and the circumstances of the zoning permission sought. In the context in which it was made, such a stipulation is enforceable and binding on the parties, and the court may accept what the parties, through their legal representatives, have accepted themselves. *See Martin v. Roy*, 54 Mass.App.Ct. 642 (2002). Litigation would come much closer to being unworkable if parties could, with full and fair opportunity to consider the consequences of doing so, first stipulate to a particular issue, taking it out of controversy in the case, and then have the court come to a result directly contrary to their stipulation, even though no fraud or fundamental unfairness was shown in the reaching of the stipulation or the court's acceptance of it. Compromise, and the narrowing of issues being tried by the court, would suffer greatly if facially reasonable stipulations and concessions made in the course of a case have no holding power. I conclude that the Stipulations, and the Remand Order issued based on them, govern me in reviewing the Board's action on remand.

*6 This means that the task before me is more limited than defendants have argued that it ought to be. In reviewing what the Board did in response to the Remand Order, I accept that the mission which the Board agreed to carry out was limited to considering the plaintiffs' application again, imposing "reasonable conditions upon the Project as the Board may deem appropriate, which conditions must be consistent with the Zoning Ordinance and which shall not constitute a prohibition of the use," and that the Board's opportunity to deny the application was limited to an instance where the Board fairly decided that the "proposed project as amended poses site planning issues so intractable as to allow of no reasonable solution."

I thus consider the reasons the Board offers in support of its Remand Decision in light of this standard. I consider the Board's reasons to see if they properly fall within the ambit of review to which the Board committed itself, and, if so, whether or not there are facts shown by the Rule 56

record in front of me which are material and in dispute, and so justify holding this case for trial. I address each of the Board's contentions in turn.

Much is made in the Board's briefs on summary judgment (though not in the Remand Decision itself) about a claim of error or confusion concerning the particular section of the City's Zoning Ordinance under which plaintiffs sought approval for their senior residential project. The Board, pointing out that the application was filed under section 27-38(k), goes on to note that this section was altered by the City Council on May 12, 2003, when the Council struck section 27-38(k) and replaced it with section 27-27.6. This legislative change preceded the first application put in by plaintiffs for this site. From this the Board's counsel argues strenuously that the Board was right all along in rejecting the plaintiffs' several applications, and was right again on remand in issuing its denial, because the Board had no ability to consider, much less approve, an application under the earlier repealed version of the senior housing section of the Ordinance. Review of what, without dispute, actually happened here, shows that this argument of the Board is the proverbial "red herring."³

There was confusion in the numbering system the City employed for a time for the Ordinance after the May, 2003 vote which substantially revised the relevant provisions on senior residential housing projects. For a time the newly enacted provision continued to bear the old number, section 27-38(k), in printed versions of the Ordinance available at City Hall and to the public. The text of the new version of the law was made available by the City, but the revised section continued to be labeled with the former number. After a time, the numbering system was updated, and the senior residential housing section of the Ordinance, in the form it had been enacted by the Council in May, 2003, was assigned section 27-27 .6 in the final codification of the Ordinance.

*7 Plaintiffs evidently made their initial application to the Board referencing section 27-38(k). They did so at the time that the May, 2003 provisions were in force, and there is nothing in plaintiffs' application, nor in their prosecution of it before the Board, to suggest that there was any lack of clarity by anyone that the application was being treated as under the May, 2003 version of this section, rather than under the prior enactment, which had been repealed at that time. Everything about the way

this application was treated by the municipal officials involved, including the Board members, shows without doubt that they knew they were acting under the May, 2003 section, regardless of which codifying number it may or may not have borne. One critical change the Council made in the 2003 revisions was to take the responsibility for senior residential housing applications away from the Zoning Board of Appeals, giving it, for the first time, to the Planning Board. The plaintiffs' applications went to, and were at all times considered by, the Board, not the Zoning Board of Appeals.

The record of all that happened in the various times the Board took up plaintiffs' proposal to develop senior residential housing on this site shows, without controversy, that the Board was well aware that it was operating under the May, 2003 version of the Ordinance section, and applying its standards in conducting the Board's review. Even when the parties collaborated on the Remand Order the court issued, they referenced the wrong section number, 27-38(k), and that number made its way as a result into the Remand Order. But there is no doubt that in the proceedings in this court leading up to the issuance of the Remand Order by the parties' stipulation, the version of the Ordinance section which the parties, by their counsel, had in mind, and brought before the court, was the current version, as enacted in May, 2003. The parties acted fully aware that this was the only version of the Ordinance ever controlling the decisions of the Board and this court. The misidentification of the section by the former number was the simple result of the City's error in the way it handled the recodification of the Ordinance, or the parties collective error in not timely catching the numbering change. But the error is one of nomenclature only, and did not affect the substance of what was done. This issue relied upon by the Board lacks merit.

At least one of the reasons given for the denial in the Remand Decision has fallen away since it was issued. The Board decided that it needed to deny the plaintiffs' application because they had not shown that the developer has a legal right to develop under an electrical utility easement that runs over the driveway for the site. At the hearing on summary judgment, counsel for the Board wisely abandoned this argument as a basis for this court to uphold the Remand Decision. Counsel's concession on this issue was wise because there was no showing that this concern was in any manner within the province of the Board under the governing provisions of the

Ordinance. Beyond that, there is in the summary judgment record unopposed evidence showing that the utility which holds this record easement right had reviewed and in writing approved the development plans for the project. The Board had been advised of the utility's assent to development under the electric easement area, and no contrary evidence was put forward at any time to the Board at any of the hearings, including on remand, and no such contrary showing was made in the summary judgment record.

*8 The Board said in its Remand Decision that it denied the plaintiffs' application because the developer had not shown the legal right to use the streets leading into the development. First, the Board has not demonstrated that the issue of legal right to use access streets into a senior residential project is a proper concern of the Board under the applicable Ordinance section. At hearing, counsel for the Board was unable to identify any particular provision in the text of the Ordinance section that explicitly makes the legal right of access to the project site a matter the Board is empowered to address.

There are provisions in the section which address the safety of the road network within the project site, requiring it to be "designed and constructed as not to allow vehicular traffic throughout the development from neighboring parcels or streets..." (§ 27-27.6 G7). The site is to be "reasonably protected from traffic ..." (§ 27-27.6 D1(b)). But these provisions evince concern that the senior citizens who will occupy the project be protected from the dangers and burdens of traffic passing through the site. The Board denied approval not on that ground, but rather because the applicant had not shown it would be able to build out and use the roadways planned to reach the site. The Board, in arguing the validity of this reason for denial, referred the court to cases, such as *Parker v. Black Brook Realty Corp*, 61 Mass.App.Ct. 308 (2004), which stand for the proposition that a planning board may rely upon lack of proof of adequate access to a subdivision in denying a request to approve one. But that line of cases is inapposite, because its principles derive from the provisions of the subdivision control law, and those cases concern the powers of a planning board when it acts under that statute in considering applications for definitive subdivision approval. Here, the Board was not acting under the subdivision control law or considering a plan of subdivision. What the Board had under review

was an application for a permit pursuant to the senior residential project provisions of the Zoning Ordinance.

Absent a legal basis to consider, as a zoning matter, in the permit review process before the Board, the legal rights of the developer to use the streets and ways into the project site, this issue should be left to resolution, if necessary, in another forum. The City, or other landowners with some standing to object, could well challenge the right of the developer to pass and repass over the ways in question, in a separate civil action in this or another appropriate court. In such a litigation, the title rights (or not) of the developer to use the disputed ways would be settled. If the project site did not as a matter of property law enjoy the rights to use those ways, the court would prevent their use. And if the developer lacks the right to get to and from the project parcels over the routes claimed, there is no limitation of the rights of the City or private parties to obtain judicial relief simply because the Board did not address this concern-as a zoning matter-when considering the permit request.

*9 Even if there were authority in the Board in this context to consider the rights of the applicant to use the access ways, the summary judgment record does not reveal a material issue of fact about that question. The plaintiffs have access to the development site over Loring Street, Allerton Street, Pratt Street, and Armiston Street, in the manner shown on the plan submitted to the board with the application for the permit. From all that appears in the record, Loring Street, which leads directly from North Quincy Street to the driveway which the developer proposes to move traffic through the project site, is a public way. Plaintiffs have placed in the record an order of the City Council from June, 1974, recorded with the Plymouth Registry of Deeds in Book 4003, Page 236, which lays out Loring Street, then a private way, as a public street or way in the City, from North Quincy Street to Allerton Street. Allerton Street, which runs perpendicular to Loring Street, runs north and south along the entire western side of the project site. Defendants have attempted to cast doubt on the meaning and effect of this taking order, but have not, in any event, done so with proper record material. Although the defendants have submitted a letter, unsworn, from an individual in the City's Engineering Department, this letter is not before the court in proper form required by Rule 56. Even were it to have been submitted appropriately, all it would do is suggest that an individual in the Engineering Department

considers the length of the 1974 public layout of Loring Street from North Quincy Street to come about 63 feet short of Allerton Street. This view is belied by the recorded 1974 City Council layout, which recites that Loring Street was laid out to the *easterly* line of Allerton Street. Even if the Engineering Department letter were in adequate form to be considered, it would not have created a material issue of fact as to the public layout of Loring Street directly to the border of the project site. This was the clear intent of the taking order, the authenticity of which has not been questioned by the Board.

The remaining streets involved are claimed by the plaintiffs to be private ways in which the developer has good rights to pass and repass to and from the project site. The plaintiff Sail-On Development Corp. in 2002 took title to land involved in the current development by deed from the City, acting through its Treasurer/Collector, recorded with the Registry in Book 22128, Page 263. That conveyance, for which Sail-On paid the City consideration of \$250,000, includes descriptions of the locus which indicate, both in the words used, and the plans referenced, that the locus bounds on Allerton Street (beginning at its intersection with Loring Street) and Armiston Street. The Board is in the difficult position of arguing, without any record support at all (such as an affidavit based on title examination), that the land at issue lacks rights to use the long-standing private ways which border and lead directly to it. This task is particularly difficult given the recent conveyance of this valuable parcel to this plaintiff by a deed of the City replete with references to these private ways and to a plan showing them as providing access. Even if it were the responsibility of the Board to have demanded and received adequate proof of the plaintiffs' property rights to use these private ways, which I cannot conclude to be so, the record without any meaningful contradiction would support the developer's contention that it has rights to pass and repass. Because, however, I decide that this was not a proper matter for the Board's consideration in the context of the zoning decision it made—the only action now before this court—I leave for another proceeding, should there be one, the ultimate resolution of plaintiffs' property rights to use these private ways.

*10 A closely-related issue advanced by the Board requires the same treatment by the court. The Board raises the point that the developer may or may not have the rights it needs to improve by clearing and paving (and by

installation of utilities) some of the disputed ways shown as access routes to and from the Project. Counsel for the Board conceded at the hearing that this issue is subsidiary to the question of the title rights of the developer to use the private ways to reach the site. If those rights are available, they will afford the developer the reasonable right to improve the roadways, including potentially by paving them, to make reasonable use of those easement rights. This concern stands, (and, in the case of the limited zoning decision review I now have before me, falls) with the question of the developer's rights to use the private ways. I do not see any reason to uphold the Remand Decision based on the question of the developer's title rights to improve the disputed private ways, but that issue may arise again should there be litigation over the title rights.

The final grounds for denial initially advanced by the Board in its Remand Decision, that “[a]ccess to the site over private ways may harm residents,” while at the surface not an issue to be taken lightly by either the Board or this court, has receded in the process of submitting and arguing the parties' position on summary judgment. In the initial round of summary judgment, plaintiffs put in the opinions of the Board's own expert on traffic matters, William Gillon. He was hired by the Board to review the Project, and opined that, particularly given the demographics of those who are to reside in the Project, and based on the analysis conducted extensively by the plaintiffs' own expert, with which he did not in substance offer any real disagreement, that the Project would “work without a problem.” In arguing to have the court uphold the denial in the Remand Decision, the Board's counsel in its brief does not address in any meaningful way the issue of traffic safety. No facts are put in by the Board to raise a material factual issue on this point; the plaintiffs' expert record material, including that of the Board's own expert, goes unchallenged in the record. This is not a properly-supported basis for denial.

Applying the standard of review which the parties, by their counsel, stipulated is the one which under the Ordinance governed the Board's deliberations on remand, I decide that there is no material issue of fact in dispute, and that, as matter of law, the Board issued the Remand Decision erroneously. Applying the standard under the Ordinance which the Board committed itself to apply, there was no basis for the Board to deny the requested special permit. This is so because there is no material factual dispute,

based on the summary judgment record before me and I thus am able to decide as matter of law that the plaintiffs' Project which the Board considered does not pose site-planning issues so intractable as to allow of no reasonable solution.

*11 I will direct the entry of judgment requiring the Board to issue the requested special permit under Ordinance Section 27-27.6. I will defer the entry of that judgment, however, for a brief time to permit the Board and the plaintiffs, through counsel, to confer and, if at all reasonably possible, settle the language of the special permit. Over the next forty-five days, the parties, through their counsel, are to confer in good faith, and use all reasonable effort, to reach agreement on the language of

the special permit which I will direct be issued. At the end of that time, the parties will file with the court a detailed joint written report on the results of their efforts. If they have settled on the language of the special permit, they are to submit it for my consideration. If they are, despite their good faith reasonable efforts, unable to reach agreement, they are to submit their respective versions of a suggested form of special permit. Notwithstanding the participation of the parties in this effort, the rights of all to appeal from the final judgment is, of course, reserved until the time that judgment enters.

All Citations

Not Reported in N.E.2d, 2007 WL 1965316

Footnotes

- 1 See discussion, below, regarding the denomination of the section of the Ordinance under which the applicants applied, the Board acted, and the court now considers the appeal.
- 2 The 2004 denial was the subject of an earlier appeal in this court involving the same parties. The earlier case is Misc. 304192. The parties to that earlier appeal brought plaintiffs' revised site plans back to the Board without seeking a remand of the earlier case, 304192. The parties have agreed that the earlier case, 304192, became moot, because plaintiffs intended to proceed, if at all, only with the revised plans for their project. Plaintiffs are only pursuing the later-filed appeal, 312561.
- 3 "Red herring. Something that draws attention away from the central issue." *American Heritage College Dictionary*, 4th ed., at 1166.

H



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November 12, 2008

TO WHOM IT MAY CONCERN:

This is to certify that the attached Board of Appeals Decision (#08-02) on an application of West Concord Development LLC, for a Comprehensive Permit for 48 - 50 Powdermill Road, Acton, Massachusetts was filed with the Town Clerk's Office on October 20, 2008.

DEED AT BOOK 25904 PAGE 26

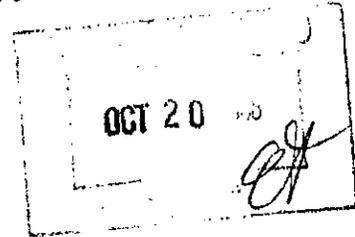
This is to certify that the 20 day appeal period on this decision has passed and there have been no appeals made to this office.

Eva K. Taylor
Eva K. Taylor
Town Clerk

LOCUS: OLD POWDER MILL RD., ACTON

Deborah Horwitz, Esq.
GOULSTON & STORRS
400 Atlantic Avenue
Boston, MA 02110-3333

66261.0142



A True Copy. Attest:

[Handwritten Signature]
TOWN CLERK ACTON, MASS.

**DECISION
TOWN OF ACTON, MASSACHUSETTS
ZONING BOARD OF APPEALS
DECISION UPON APPLICATION OF WEST CONCORD
DEVELOPMENT LLC FOR A COMPREHENSIVE PERMIT
BOARD OF APPEALS CASE NO. 08-02**

I. APPLICANT AND PUBLIC HEARING

1. Pursuant to notice duly mailed, published and posted, a public hearing was held by the Acton Zoning Board of Appeals (the "ZBA" or "the Board") at the Acton Town Hall, 472 Main Street, Acton, Massachusetts, on February 27, 2008, commencing at 7:30 p.m., upon the application of West Concord Development, LLC, a Massachusetts limited liability company, ("Alexan Concord" or the "Applicant") for a comprehensive permit for a project known as Alexan Concord under Massachusetts General Laws Chapter 40B, §§ 20-23 ("the Act") and under Town of Acton Zoning By-Laws to build low or moderate income housing in a development of 350-unit apartment housing development on a parcel located at 48 and 54 Powdermill Road, Concord, Massachusetts, including a parcel off Sudbury Road in Acton to the Concord town line situated between Parcels 59-4 and 61 on Map J-3 of the Acton Town Atlas, as more particularly described on the Plans referenced in this Decision below (the "Project"). The Applicant proposes access through Acton via Sudbury Road and Old Powdermill Road for the Project. The Project is to be built on a parcel of land of 30.1 acres in Concord located at Concord Assessors Map A12 2971-4, B12 2971-6 and B13 2973 (the "Site"), with off-site improvements proposed on Powdermill Road and Sudbury Road in Acton. The ZBA conducted a view of the premises and held continued public hearings on the original application on March 17, 2008, June 10, 2008, July 14, 2008, August 14, 2008, September 3, 2008, September 14, 2008, and September 24, 2008. The hearing was closed on September 24, 2008 and the ZBA began its deliberations on October 6, 2008.

2. The ZBA has issued this Decision within the time frame specified in Massachusetts General Laws. Chapter 40B. §§ 20-23.

3. Detailed minutes were taken of all sessions. The minutes and exhibits are available for public inspection in the ZBA's offices. A list of the Exhibits is attached hereto and incorporated by reference as Exhibit A.

4. Throughout the public hearing the Applicant was represented by Attorney Deborah S. Horwitz, of GOULSTON & STORRS, Boston, Massachusetts.
5. Sitting for the ZBA and present throughout the public hearings were Marilyn Peterson, Member; Jonathan Wagner, Alternate and acting as Chairman; and Richard Fallon, Alternate.
6. Voting on this Decision were the three signatories to this Decision, below.

II. NATURE OF THIS PROCEEDING

7. In conducting its hearings in this matter, the ZBA is guided by the decision of the Supreme Judicial Court in Dennis Housing Corp. v. Board of Appeals of Dennis, 439 Mass. 71, 76-77 (2003) (citations omitted), that a qualified developer proposing to build low or moderate income housing:

may submit to the zoning board of appeals "a single application to build such housing in lieu of separate applications to the applicable local boards." The zoning board is then to notify those "local boards" for their "recommendations" on the proposal; the zoning board may "request the appearance" of representatives of those "local boards" at the public hearing as may be "necessary or helpful" to the decision on the proposal; and the zoning board may "take into consideration the recommendations of the local boards" when making its decision The zoning board then has "the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application," ... and, in some circumstances, has the power to override requirements or restrictions that would normally be imposed by those local boards If the zoning board denies the application for comprehensive permit, or approves it only on conditions that make the project "uneconomic," the applicant may appeal to the housing appeals committee ... which also has the power to override local regulations and direct the issuance of a comprehensive permit."

8. Any person aggrieved by the issuance of a comprehensive permit has a right of appeal to the Superior Court under Section 17 of the Zoning Act (Chapter 40A).

III. GOVERNING LAW

9. The law governing this case is The Low and Moderate Income Housing Act, Massachusetts General Laws, Chapter 40B, §§ 20-23 (the "Act"), and the regulations promulgated by the Department of Housing and Community Development ("DHCD") Housing Appeals Committee, 760 CMR 56.00ff (the "Regulations").

10. The Act prevents the possible use by cities and towns of exclusionary local bylaws to shut out needed low and moderate income housing. Board of Appeals of Hanover v. Housing Appeals Committee 363 Mass. 339 (1973). The purposes of the Act are satisfied if (a) a town has low or moderate income housing in excess of 10% of the housing units reported in the latest decennial census or which is on sites comprising 1.5% or more of the town's total land area zoned for residential, commercial, or industrial use, or (b) if the application results in the commencement of low and moderate income housing construction on sites comprising more than 0.3% of such total area or 10 acres, whichever is larger, in one year. See, e.g., Arbor Hill Holdings Limited Partnership v Weymouth Board of Appeals, Housing Appeals Committee No. 02-09 (9/24/03).

11. Acton does not presently meet any of these criteria. That being the case, Acton's Zoning Bylaw and its other local bylaws and regulations which ordinarily govern development in the Town may be overridden by a comprehensive permit issued by this Board upon a proper showing by the Applicant. Hanover v. Housing Appeals Committee, *supra*.

IV. GOVERNING PRINCIPLE

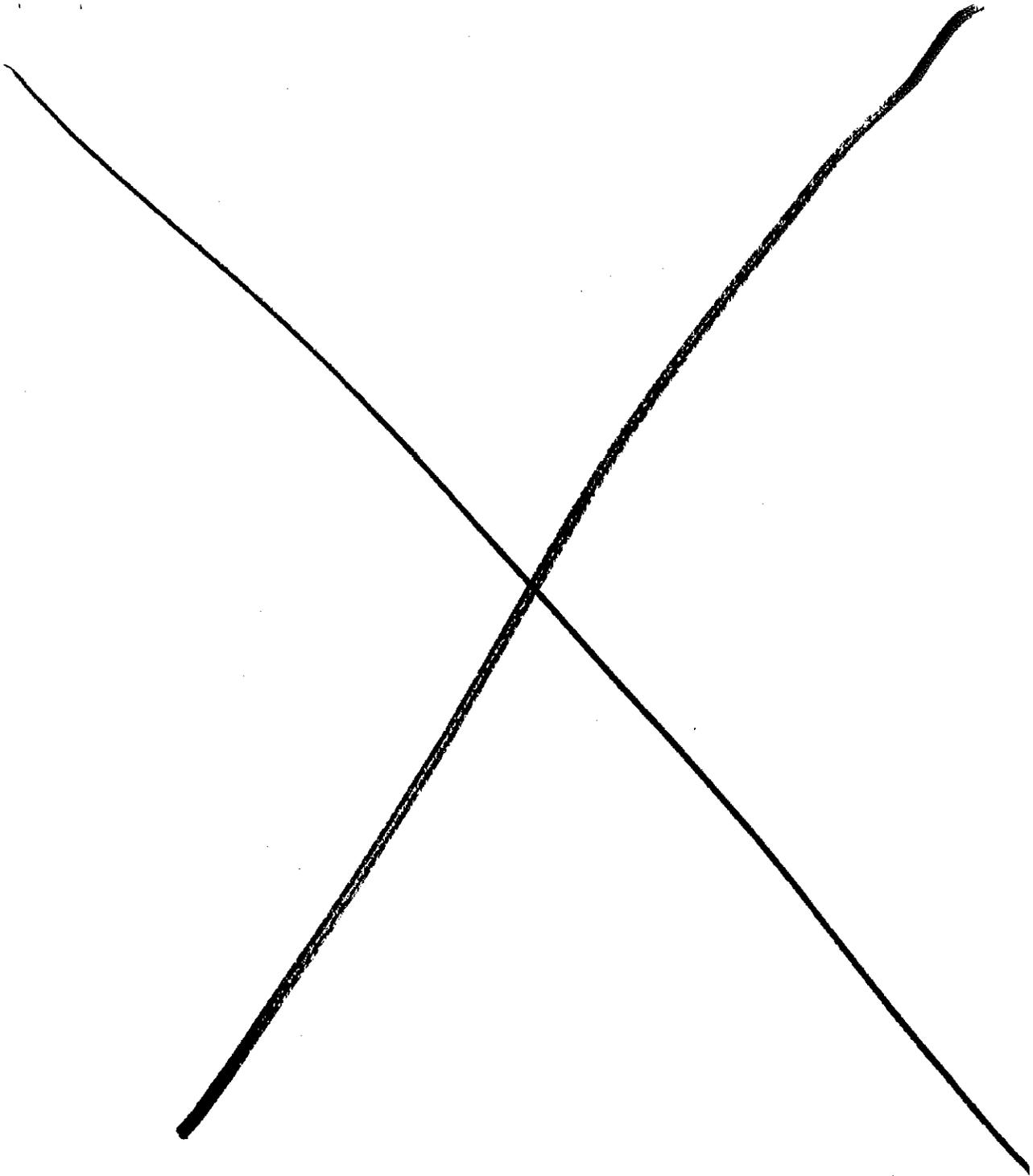
12. Under the Act and the Regulations, in deciding this application, the ZBA must balance the regional need for low and moderate income housing against any local objection to the proposed plan. Board of Appeals of Hanover v. Housing Appeals Committee 363 Mass 339 (1973). If a comprehensive permit is granted with conditions, those conditions must not render the project uneconomic.

V. APPLICABLE REGULATIONS

13. The Regulations were rewritten and the rewritten Regulations became effective on February 22, 2008. The rewritten Regulations were issued at 760 CMR 56.00ff. The new Regulations contain Transition Rules at 760 CMR 56.08 (3). 760 CMR 56.08 (3) (c) provides that if an application had been filed with the Board prior to the effective date of 760 CMR 56.00, then the entirety of 760 CMR 56.00 shall apply to the Project, except that the numerical standards of 760 CMR 56.03 (4) (c) (2) and 56.03 (6) (d), 760 CMR 56.03 (8), 760 CMR 56.04 (4), and the second and third paragraphs of 760 CMR 56.05 shall not apply.

14. The Applicant filed its Application with the Board before February 22, 2008, and therefore the provisions of 760 CMR 56.00 apply in their entirety, except for the exceptions set forth in 760 CMR 56.08 (3) (c) and repeated in the previous paragraph.

15. One of the exceptions set forth in 760 CMR 56.08 (3) (c) that is relevant to this Application is the exception for the provisions of 760 CMR 56.03 (8), which provides that if the Board wishes to invoke the "large project" provisions of 56.03 (6), it must provide the Applicant with written notice of its intention to do so within fifteen (15) days of the opening of the hearing. This requirement does not apply to this application, and if the ZBA wishes to invoke the "large project" provisions, it was not required to give written notice of its intention to do so within fifteen (15) days of the opening of the hearing.



VI. JURISDICTIONAL ELEMENTS

16. Pursuant to the Act and the Regulations, an applicant for a comprehensive permit must fulfill three initial jurisdictional requirements:

- a. The applicant must be a public agency, a non-profit organization, or a limited dividend organization;
- b. The project must be fundable by a subsidizing agency under a low and moderate income housing subsidy program; and
- c. The applicant must "control the site." 760 CMR 56.04 (1).

760 CMR 56.04 (1) provides that compliance with these project eligibility requirements shall be established by issuance of a written determination of Project Eligibility by the Subsidizing Agency that contains all the findings required under 760 CMR 56.04 (4), based upon its initial review of the Project and the Applicant's qualifications in accordance with 760 CMR 56.04.

17. 760 CMR 56.04 (6) provides that issuance of a Project Eligibility Letter shall be considered by the Board to be conclusive evidence that the Project and the Applicant have satisfied the project eligibility requirements of 760 CMR 56.04 (1).

18. The Applicant has filed with its application with the Board a copy of its Project Eligibility Letter, dated December 6, 2007 from Mass Housing. The Project Eligibility letter includes a written determination that the Applicant is financially responsible and meets the general eligibility requirements of the subsidy programs, that the proposed housing design and land use are generally appropriate for the Site and Site location, that the proposed Project appears generally financially feasible within the housing market in which it will be located, that an initial pro forma has been reviewed and the Project appears financially feasible, and the proposed financing is reasonable and the profit is properly limited.

19. The Project Eligibility Letter satisfies the requirements of 760 CMR 56.04 (4) and, pursuant to 760 CMR 56.04 (6), constitutes conclusive evidence that the Project and the Applicant have satisfied the eligibility requirements set forth in 760 CMR 56.04 (1). The ZBA finds that the three initial jurisdictional requirements set forth in 760 CMR 56.04 have been met.

VII. THRESHOLD JURISDICTIONAL ISSUE

20. At the outset of the hearing the ZBA identified a threshold jurisdictional issue. The Project does not include any housing units in Acton, but the access road to the Project is in Acton. The ZBA raised the question whether it had jurisdiction under c. 40B.

21. The ZBA asked for submissions on this issue from the Applicant's counsel and from the ZBA's counsel.

22. The Applicant's counsel and the ZBA's counsel each submitted legal memoranda to the ZBA on this jurisdictional question.

23. Neither c. 40B nor the Regulations addresses this question. The Applicant's counsel and ZBA's counsel each researched the issue, and there are no reported court decisions or HAC decisions that address it.

24. G.L.c. 40 B, sec. 21-24 does not contain any provision setting forth procedures applicable to a case such as this one, where the access road is in Acton and all the housing units are in Concord.

25. The project includes the use of a single primary access road in Acton for a 350 unit apartment project in Concord. The road in Acton, Old Powdermill Road, is in very poor condition, and it leads to an intersection with Sudbury Road which is also in very poor condition.

26. At the same time that the Town of Acton is asked to accommodate all of the traffic from this 350-unit Project, it does not get the benefit of inclusion of any of those 350 units in the Department of Housing and Community Development (DHCD) subsidized housing inventory.

27. G.L. c. 40B, secs. 20-23 do not contain any provision that says that these sections apply to a town for a project where there is only an access road in the town and no housing units. Indeed, G. L. c. 40B, sec. 21 uses the term "single application," namely that an applicant may file a single application to the board of appeals in lieu of multiple applications to various local boards. It could be argued that the present situation is not within the language of the statute and was not within the contemplation of the Legislature when it drafted the statute.

28. However, the Supreme Judicial Court has consistently stated that it interprets c. 40B liberally for the purpose of promoting affordable housing. In Jepson v. Zoning Board of Appeals of Ipswich, 450 Mass. 81 (2007), the SJC rejected an argument that the ZBA had no powers beyond those explicitly stated in the statute. In that case, the SJC rejected an abutter's argument that a project that included waiver of commercial front and side setbacks was not within the language of c. 40B and therefore the ZBA had no authority to grant a waiver of the commercial setback requirements. The SJC stated where the commercial use itself was permitted (only a waiver of the setback was at issue) and the commercial use was incidental to the housing use, the ZBA had the authority to grant the waiver, on the grounds that there was no prohibition of it in c.40B.

29. There is no settled law in the statute or in case law to direct the ZBA. The ZBA concludes that it is more likely that the SJC would conclude that there is jurisdiction than that it would conclude that there is no jurisdiction.

VIII "LARGE PROJECT"

31. 760 CMR 56.03 (1) provides that a decision by a Board to deny a comprehensive permit will be upheld if one or more specified circumstances exists. One of these is that the project is a "large project" as set forth in 760 CMR 56.03 (6).

32. 760 CMR 56.03 (6) prescribes that a "large project" is determined by comparing the number of units in the project with the number of housing units in the municipality. Acton has 7,645 year round housing units. According to the Regulation, any project with more than 300 housing units, such as the present application, would be a "large project" if the Regulation applies in this case.

33. The portion of the Project in Acton is a short access road. None of the housing units are in Acton.

34. 760 CMR 56.03 (6) does not specifically say that the units must be in the same municipality as the municipality seeking to invoke the "large project" provision.

35. It is up to the discretion of the ZBA whether to invoke the "large project" provision.

36. Without reaching or deciding whether the "large project" provision applies in this case, the ZBA decides that, if the "large project" provision does apply, the ZBA in its discretion decides not to invoke it. The ZBA does not decide whether the "large project" provision applies in this case or whether it would apply in any other case presenting different facts.

37. This paragraph intentionally omitted.

IX. THE PROJECT

38. The Site is 30.1 acres in a relatively flat, L-shaped parcel of land in Concord, right at the borders of Concord, Acton and Sudbury. The Project includes 350 apartment units in nineteen residential buildings of three stories or two stories, plus parking throughout the Site, all using a single road, Old Powdermill Road in Acton for access. The Project also includes a clubhouse, a pool, and two playgrounds. In addition, an industrial facility, the Hayes Pump facility, is located on property adjacent to the Site to the north, and is to have a non-exclusive easement over a strip of land included in the Site for access to and from its industrial facility and the entrance to the Site.

39. On June 18, 2008, the Concord Zoning Board of Appeals issued a comprehensive permit to the Applicant, allowing the Project.

40. The Project uses Old Powdermill Road in Acton as its access. This use is not permitted under the Acton Zoning Bylaw. The permitted use in the Powdermill District, in which the access road is located, is business use.

X. APPROVED PLANS

41. Original Application Submission:

1. "Layout Plan, Plans to Accompany a Comprehensive Permit to the Town of Acton for 48 & 54 Old Powdermill Rd. in the Town of Concord Massachusetts" by Beals Associates Inc., dated January 25, 2008.

2. "Plans to Accompany a Comprehensive Permit Application to the Town of Acton for Alexan Concord, 48 & 54 Old Powdermill Road, Concord, Mass." by Beals Associates Inc., dated January 24, 2008, consisting of 12 sheets (cover sheet, C-1, C-2, L1, CD1, GN1, GN2, GN3, PR1, PR2, XS1, XS2)

42. Title Survey:

"ALTA/ACMS Land Title Survey in Concord, MA (Middlesex County) by Precision Land Surveying, Inc., 2 sheets, dated December 8, 2006 (3649TP1.DWG).

43. Sudbury Road Drainage:

Submitted under cover letter from Cynthia Theriault, P.E. (Beals Associates Inc.), dated September 3, 2008 and accompanied by drainage diagram and drainage calculations the following:

1. "Sudbury Road Exhibit Plan - Sudbury Road & Route 62 in Acton, Massachusetts" by Beals Associates, Inc. (Project C-472.06), dated August 12, 2008, last revised 09/02/08 (showing Sudbury Road with proposed drainage infrastructure improvements).

2. "Existing Watershed Plan - Sudbury Road & Route 62 in Acton, Massachusetts" by Beals Associates, Inc. (Project C-472.06), dated August 12, 2008.

3. "Proposed Watershed Plan - Sudbury Road & Route 62 in Acton, Massachusetts" by Beals Associates, Inc. (Project C-472.06), dated August 12, 2008.

44. Sudbury Road Improvements:

1. "General Plan BSC Alt.3 Modified", Drawing Number GN1 by Vanasse & Associates, Inc., dated July 2008.

2. "General Plan VAI Alt.1 Modified", Drawing Number GN1 by Vanasse & Associates, Inc., dated July 2008.

3. "General Plan BSC Alt.3 Modified", Drawing Number GN2 by Vanasse & Associates, Inc., dated July 2008.
4. "General Plan VAI Alt.1 Modified", Drawing Number GN2 by Vanasse & Associates, Inc., dated July 2008.
5. "General Plan VAI Alt.1 Modified", Drawing Number GN3 by Vanasse & Associates, Inc., dated July 2008.
6. "General Plan BSC Alt.3 Modified", Drawing Number GN3 by Vanasse & Associates, Inc., dated July 2008.

45. Emergency Access:

1. "Aerial Photograph Showing Proposed Emergency Access Alternatives" by Beals Associates Inc., dated 9/2/08
2. "Plans to Accompany Comprehensive Permit for 48 Old Powdermill Rd. In the Town of Concord, Massachusetts – Snow Storage Plan by Beals Associates Inc., dated February 01, 2008, revised 9/2/08 for "Emergency Access Alternatives", last revised 9/24/08 "Per ZBA Comments".
3. "Emergency Access Concept" plans dated 9/2/08, 4 sheets.

XI. CONCLUSORY FINDINGS

46. Based on the evidence presented by the Applicant, local boards and officials, and interested parties at the public hearings, the ZBA finds as follows:
- a. Acton does not presently have sufficient low or moderate-income housing to meet Chapter 40B's minimum criteria.
 - b. the proposed Project, including 350-units of housing in Concord, together with all roadway and infrastructure improvements shown on the Approved Plans, will, when conforming to the conditions set forth in this Decision, adequately provide for traffic circulation and safety, pedestrian safety, storm water drainage, and sewerage without an undue burden on the occupants of the Project, the neighborhood, or on the Town of Acton.
 - c. the proposed Project, including 350 units of housing in Concord, together with all roadway and infrastructure improvements shown on the Approved Plans will, when conforming to the conditions in this Decision, not be a threat to the public health and safety of the occupants of the Project, the neighborhood, or the Town of Acton.
 - d. the proposed Project on the Site is supported by the evidence, and as conditioned in this Decision, (i) would not be rendered uneconomic by the

terms and conditions of this Decision, and (ii) would represent a reasonable accommodation of the need for regional low and moderate-income housing.

XII. TRAFFIC, OLD POWDERMILL ROAD AND SUDBURY ROAD

47. The intersection of Old Powdermill Road and Sudbury Road is severely inadequate for the Project in its present current condition. It has limited sight distance where the traffic from the Site will enter it. During one of the hearings, a resident presented a photograph of a motor vehicle accident that had recently occurred at this intersection.

48. According to the Applicant's traffic study, presently Sudbury Road carries 3,990 vehicles per day. The Project will increase the traffic by 2,254 vehicles per day. The Project will result in an increase in traffic of 56 % at the intersection of Old Powdermill Road and Sudbury Road.

49. The 2,254 cars from the Project will be entering Sudbury Road at a point where there is limited sight distance. The Applicant's traffic consultant has acknowledged this and acknowledged that changes to this intersection are necessary.

50. At the present time, the limitations of the intersection of Sudbury Road and Old Powdermill Road result in most vehicles using caution as they enter this intersection. With the requirements to accommodate the additional traffic, vehicles would increase speed unless slowed by some other device. The Applicant's traffic consultant has proposed a three-way Stop sign at this intersection, which is necessary to slow the traffic.

51. After the Sudbury Road Old Powdermill Road intersection, Sudbury Road slopes sharply toward Route 62 and curves. It is presently a dangerous road, particularly in winter conditions, in the dark, and for drivers unfamiliar with the road.

52. According to the Applicant's traffic consultant, the intersection of Route 62 and Sudbury Road operates at Level of Service F in the evening peak hour and Level D in the morning. With the Project built, both morning and afternoon peak hours will be at level F. These results often mean that a traffic light is required.

53. The ZBA's traffic consultant determined that a traffic light is not required at the intersection of Route 62 and Sudbury Road at this time if Sudbury Road is modified to feature separate right and left turn lanes at the intersection with Route 62, but that this situation should be reviewed when the Project is occupied or partially occupied.

54. The ZBA's traffic consultant determined that it was essential that the Applicant provide sidewalks from the Project to Route 62.

55. The Project is an affordable housing Project of 350 units. It is expected that it will generate significant pedestrian traffic to Route 62 for shopping and other purposes.

56. The Applicant has agreed to furnish sidewalks from the Project to Route 62 on one side of Sudbury Road, interrupted only by driveways. The Applicant is required to build such sidewalks.

57. Old Powdermill Road at present is a short street providing access to the Hayes Pump facility, the Northstar facility, and the Site. The Applicant has a Purchase and Sale Agreement with FTN to purchase the Site.

58. The existing grade of Sudbury Road between Route 62 and Old Powdermill Road varies from a minimum of approximately 1% at the intersection with Route 62, to a maximum of 9.25%, according to the Application. Sudbury Road also curves as it descends from the intersection with Old Powdermill Road to Route 62.

59. The ZBA retained an independent traffic consultant, Sam Offei-Addo, P.E., PTOE, of BSC Group, Inc. to review the Applicant's plans.

60. Mr. Addo reviewed the Applicant's traffic studies and plans, and made several recommendations for improvements to Old Powdermill Road, the intersection of Old Powdermill Road and Sudbury Road, and Sudbury Road from Old Powdermill Road to Route 62. The Applicant agreed with these recommendations. These recommendations are essential to making these roadways and intersection safe and adequate for the traffic that will be generated by the Project.

61. Consistent with Mr. Addo's recommendations, the Applicant will be required to reconstruct Sudbury Road between Route 62 and Old Powdermill Road to provide a minimum travelled-way width of twenty-two (22) feet, with a continuous sidewalk provided along the east side of the roadway between Old Powdermill Road, and Route 62. The improvements will include rehabilitation and resurfacing of the roadway, drainage system installation and improvement; sign and pavement marking installation; and sight line improvements, shown on Drawing Numbers GN1 through GN3 attached to the July 11, 2008 letter from Jeffrey S. Dirk, P.E. of Vanasse & Associates, Inc. to Roland Bartl, Acton Town Planner. The Applicant will perform these improvements.

62. Consistent with Mr. Addo's recommendation, the Applicant will reconstruct and realign the intersection of Sudbury Road and Powdermill Road at Old Powdermill Road to improve the horizontal and vertical alignment of the approaches to the intersection. In conjunction with these improvements, the Powdermill Road southbound approach and the Old Powdermill Road westbound approach will be placed under STOP-sign control, with advance "STOP SIGN AHEAD" warning signs (graphic symbol) and pavement markings provided. In addition, the vertical curve situated to the south of the intersection (adjacent to the electric substation) will be milled (lowered) and existing vegetation will be trimmed in order to improve lines of sight to and from the intersection by the Applicant. A sign indicating a speed limit of 20 miles per hour will be erected on the northeast side of Powder Mill Road, as it approaches the intersection of Old Powdermill Road and Sudbury Road. These improvements are shown on Drawing Number GN3 attached to the July 11, 2008 letter from Jeffrey S. Dirk,

P.E. of Vanasse & Associates, Inc. to Roland Bartl, Acton Town Planner. The Applicant will resurface Old Powdermill Road and Sudbury Road from Old Powdermill Road to Route 62.

63. Consistent with Mr. Addo's recommendation, the Applicant will reconstruct the intersection of Route 62 at Sudbury Road to provide accommodations for left-turning motorists from the Route 62 westbound approach through a separate left-turn lane permitting right-turning traffic to by-pass motorists waiting to turn left onto Sudbury Road. The Applicant will widen the Sudbury Road approach to Route 62 to provide two travel lanes approaching Route 62 (separate left and right-turn lanes). The Applicant will install traffic signal conduit and pullboxes to facilitate the future installation of a traffic control signal, if and when warranted. These improvements are shown on Drawing Number GN1 attached to the July 11, 2008 letter from Jeffrey S. Dirk, P.E. of Vanasse & Associates, Inc. to Roland Bartl, Acton Town Planner.

In addition, the Applicant will complete at its expense a detailed traffic signal warrants analysis for the intersection of Route 62 and Sudbury Road at 90 per cent occupancy of the Project, and furnish it to the Town's traffic consultant, with a copy to the ZBA. The Applicant will pay for the services of the Town's traffic consultant. If the Town's traffic consultant in his discretion determines (within ninety (90) days of his receipt of such analysis) as a result of said analysis that a traffic signal is required as a result of project related traffic, the Applicant will:

1. Prepare the necessary 100% complete engineering design plans and cost estimates for the construction of a fully actuated traffic control signal at the intersection at its expense; and
2. Provide funding of twenty-five (25%) percent of the amount required for the construction and completion of the traffic signal, provided that said funding shall not be required more than five (5) years after the completion of said design plans and that it shall remain a fixed amount based on the aforesaid cost estimates.

64. Consistent with Mr. Addo's recommendation, the Applicant will develop and implement an optimal traffic signal timing and phasing plan for the signalized intersection of Route 62 and High Street within one year of occupancy of 90 per cent of the units within the Project. The Applicant will base the timing plan on actual traffic volumes as measured at the intersection during the weekday morning (7 to 9 A.M.), weekday evening (4 to 6 PM) and Saturday midday (11 AM to 2 PM) peak periods in order to reflect traffic volume demands at the intersection with the Project.

65. Consistent with Mr. Addo's recommendation, provided the Board of Selectmen or other applicable Board grants permission, the Applicant will trim or remove existing vegetation within the public right-of-way at the intersection of High Street and Parker Street as may be required to improve lines of sight to and from the intersection. In addition, the existing signs at and approaching the intersection will be reviewed by the Town Engineer and the Applicant will supplement or replace them as necessary and as determined by the Town Engineer.

66. Consistent with Mr. Addo's recommendation, the Applicant will complete planned improvements at the intersection of Route 62 at Sudbury Road including installation of wheelchair ramps and a crosswalk for crossing Sudbury Road at its intersection with Route 62. In addition, the Applicant will repair or reconstruct the existing discontinuous sidewalk along the south side of Route 62 between Sudbury Road and High Street as necessary according to the determination by the Town Engineer, including reducing the width of existing driveways subject to receipt of the necessary rights and approvals.

67. At the ZBA's request, the Applicant's traffic consultant did an evaluation of the access points on Old Powdermill Road serving, the Project, Northstar, and Hayes Pump.

68. The access drive serving Northstar intersects Old Powdermill Road east of Sudbury Road. The Project access intersects the terminus of Old Powdermill Road. Upon entering the Project site, the Project access turns slightly north, at which point the relocated access drive to Hayes Pump intersects the access drive from the north.

69. The three subject driveways will be situated approximately 80 to 90 feet apart, measured between the driveway centerlines.

70. The Applicant's traffic consultant reported to the ZBA that travel speeds along Old Powdermill Road and the Project access are expected to be maintained through design features and traffic control to no more than 20 miles per hour, which he said is a speed consistent with the maximum desired travel speed within the Project and the presence of pedestrians and truck traffic associated with the adjacent industrial/manufacturing uses.

71. The Applicant's traffic consultant stated that the Northstar and Hayes Pump facilities are each expected to have relatively limited traffic volumes, estimated at less than 100 vehicles per day.

72. The Applicant's traffic consultant concluded that A) there are adequate lines of sight provided to and from the access points; B) traffic volumes and conflicts between the drives would be minimal if at all; and C) the access points are appropriately located to minimize impacts related to operating conditions at the intersection of Sudbury Road at Old Powdermill Road.

73. The ZBA accepts the Applicant's traffic consultant's findings with respect to the safety and adequacy of the three access drives.

74. The ZBA finds that the access drives for the Project, Hayes Pump, and Northstar are adequate and safe for traffic, provided that all of the roadway and infrastructure improvements on and adjacent to Old Powdermill Road and on and adjacent to Sudbury Road are completed.

75. Consistent with Mr. Addo's recommendation, the Applicant will implement a detailed monitoring and reporting program for the Project that will consist of the collection of 7-day (Monday through Sunday, inclusive) automatic traffic recorder counts on Old Powder Mill Road and performing a 12-hour (7 AM to 7 PM) manual turning movement and vehicle classification count on an average weekday at the intersection of Route 62 at Sudbury Road. The Applicant will use the 12-hour manual turning movement to complete the traffic system warrants analysis at the intersection of Route 62 at Sudbury Road. The Applicant will perform the traffic monitoring program at 90 per cent occupancy. The Applicant will report the results of the monitoring program to the Town Engineer, the Acton Planning Department, and the ZBA.

76. Consistent with Mr. Addo's recommendation, the Applicant will make available to the residents of the Project information concerning available public transportation services, including bus and commuter rail schedules and fare information. In addition, the Applicant will consult with MassRides and disseminate information to the residents of the Project regarding ride-sharing services. The Applicant will consult with Acton Council on Aging and make available to the residents of the Project information with regard to services and accommodations that may be available to qualified residents of the Project.

77. The Applicant will construct all improvements shown on the plans attached to Mr. Dirk's letter of July 11, 2008, consistent with said plans. In addition, the Applicant will install a supplemental sign, "Oncoming Traffic Does Not Stop," in combination with the STOP sign for vehicles traveling northbound from Sudbury on Powdermill Road towards the Sudbury Road/ Old Powdermill Road intersection.

78. The traffic and infrastructure improvements required herein will be consistent with the relevant plans and letters submitted, as revised during these proceedings.

79. The Applicant's requirement to complete the roadway improvements is subject to obtaining required approvals from the Town of Acton for work in the public right of way.

80. In the event that the intersection of Route 62 and High Street is resurfaced within two years of 50 per cent occupancy, the Applicant will prepare an analysis of bicycle accommodation.

XIII. DRAINAGE

81. The ZBA advised the Applicant during the hearing that its rules required Drainage Calculations and plans that were more detailed than "conceptual" plans. In response the Applicant filed drainage calculations and plans on August 12, 2008.

82. The Applicant presented drainage plans whose stated intent was to provide an improved drainage layout over the present drainage layout.

83. The Applicant's design uses infiltration chambers to attenuate a portion of the existing runoff that is currently flowing along and across Sudbury Road into Route 62. Along with the infiltration chambers, overflow outlets will be provided for severe storm events to discharge to a Town-owned detention basin adjacent to Sudbury Road and also to the existing drainage system. Runoff will be directed through water quality structures to provide Total Suspended Solids removal prior to discharging to the abutting resources. The redevelopment of the drainage design will meet the Massachusetts Stormwater Management Policy to the greatest extent possible.

84. At present there is limited drainage and stormwater management along Sudbury Road. The improvements required by this Decision to be completed by the Applicant will be a significant improvement over the conditions that currently exist along the roadway.

85. The catch basins and berms along the road will be an improvement over the existing condition. The addition of a Stormceptor prior to drainage discharging to the Assabet River will improve water quality.

86. The Applicant is required to construct new drainage facilities in and adjacent to Sudbury Road in accordance with the Plans submitted by the Applicant's civil engineer to the ZBA and Town Engineer.

87. The Town Engineer, Bruce Stamski, prepared a Memorandum dated August 14, 2008 in response to these calculations and plans. Mr. Stamski said that infiltration systems were located near a steep embankment and asked whether they could be relocated. Mr. Stamski also noted that the calculations were based on a 25-year storm, and asked that they be recalculated for the 100-year storm. He also asked whether there was an alternative to using Westside Drive for overflow drainage from Sudbury Road.

88. The Applicant's engineer submitted a response on September 3, 2008. The response relocated the infiltration system, provided a 100-year storm drainage analysis, and provided an alternative to the use of Westside Drive for overflow drainage from Sudbury Road. The alternative provided was to have the overflow drainage flow to the Assabet River as it does now.

89. The Town Engineer submitted a Memorandum dated September 16, 2008, stating that he was satisfied with the Applicant's response and with its drainage plans, with the provision that the final drainage design be reviewed and approved by the Acton Engineering Department.

90. The Applicant's requirement to complete the drainage improvements is subject to obtaining required approvals from the Town of Acton for work in the public right of way and Town property.

91. Consistent with the recommendation by the Town Engineer, the Applicant is required to construct the drainage system in accordance with its filings with the Board, as

revised by its most recent submission, and further, the final drainage plans and design must be reviewed and approved by the Town Engineer before construction starts. In addition, the Applicant is required to furnish the Town Engineer with As-Built plans of the drainage structures within 120 days after completion of construction of the drainage structures.

92. The drainage and infrastructure improvements required herein will be consistent with the relevant plans and letters submitted, as revised during these proceedings.

XIV. ADDITIONAL ACCESS AND EMERGENCY ACCESS

93. The Applicant's plans show a single access from the Site, by way of Old Powdermill Road, through Acton. During the hearing the ZBA asked the Applicant whether there was any other access(es). The Applicant, through counsel, said that there was no other access.

94. The ZBA asked its counsel to address the question. In addition, Board members walked the Site.

95. There are no other streets or ways presently in use by motor vehicles to travel to and from the Site. The Board finds that it is not clear that there is another access(es).

96. The Board finds that there is insufficient evidence to establish that there is another access(es) other than Old Powdermill Road through Acton.

97. The Project includes 350 apartment units in a parcel of about 31 acres that accesses and exits the Site in a single road, Old Powdermill Road in Acton. In addition, an adjacent industrial parcel also discharges onto the Project driveway just after the driveway enters the Site. In addition, another industrial property accesses Old Powdermill Road immediately after it exits the Site. In short, the Project includes an extremely large number of units with a single access. By way of comparison, the Acton Subdivision Regulations, though not applicable because the Project does not involve a subdivision, require an additional access if the road serves 40 or more living units. With a single access, if an accident occurred at the entrance to the Project, emergency vehicles could not get into and out of the Project. If there were an emergency that required the residents to leave immediately, a single access road would not permit a safe and orderly exit.

98. The ZBA finds that it is essential as a matter of public safety that there be at least two emergency exits from the Site, in addition to the primary access from Old Powdermill Road in Acton.

99. The Applicant is required to construct at least two emergency accesses, in addition to the primary access, in accordance with the Emergency Access Plan filed with the ZBA. The emergency accesses shall not, when provided, and in the future, be blocked or impeded by any building, construction, land use, topographical condition, or other obstruction and should be kept free of snow sufficiently to allow the passage of emergency vehicles.

100. The emergency accesses will be at least 18 feet wide and shall be wide enough to allow emergency vehicles to pass in opposite directions. They will be constructed of "grasscrete," asphalt, or a similar substance that may be readily plowed to be free of snow. The Applicant will maintain the emergency accesses and plow them to keep them free of snow.

101. The Applicant will incorporate in the emergency accesses the specifications set forth in Roland Bartl's email of September 8, 2008 relative to the emergency accesses, except that the Fire Chiefs of Acton and Concord may remove or change those specifications in their discretion.

102. The Applicant will comply with whatever specifications are required by the Fire Chiefs of Acton and/or Concord, not inconsistent with the above. The above specifications are minimum requirements. Any additional requirements by the Fire Chiefs of Acton and/or Concord will be over and above these requirements.

103. The Applicant has submitted plans for emergency accesses, numbered 1 to 5.

104. The ZBA finds that any two of the Emergency Accesses are satisfactory. The Fire Chiefs of Acton and Concord will decide which two of Emergency Accesses 1-5 that they select to be the emergency accesses and provide written notice of their selection to the Board.

105. The Applicant is required to complete construction of the emergency accesses and obtain the written certification from the Acton Town Engineer that the emergency accesses have been constructed in accordance with this Decision before the issuance of any certificate of occupancy for the Project. The written certification from the Town Engineer required by this paragraph will be filed with the ZBA.

Paragraphs 106 and 107 intentionally omitted.

XV. DEVELOPMENT AGREEMENT

108. The Applicant and the Town of Acton, through its Board of Selectmen, have entered into a Development Agreement dated October 6, 2008 ("Development Agreement"). The Development Agreement is attached hereto and incorporated by reference as Exhibit B. In the Agreement and the Development Agreement the Applicant has agreed with the Town of Acton to make certain payments to mitigate the financial and other impacts of the Project on the Town of Acton. The Applicant is required to comply with the Development Agreement as a condition of the Comprehensive Permit issued herein.

XVI. NOTICE OF ASSIGNMENT

109. In the event that the Applicant wishes to assign its rights under this Permit, the Applicant shall provide the ZBA with complete information about the proposed assignment and

proposed assignee sufficient for the ZBA to be informed as to the ability and willingness of the Assignee to perform the obligations of the Applicant hereunder.

XVII. WAIVERS

110. The Applicant has requested waivers from certain local bylaws and regulations.

Town of Acton Rules and Regulations for Comprehensive Permits

111. Section 3 - Requested General Waiver: The Applicant has requested a general waiver of certain provisions of the Board's Regulations. The ZBA denies a general waiver on the grounds that the specific waivers requested are listed.

112. Section 3.2 Evidence of Compliance with Jurisdictional Pre-Requisites: The ZBA grants this request for a waiver except that the Applicant is to furnish the ZBA with an executed copy of the Regulatory Agreement promptly after it is executed. The Regulatory Agreement is an essential part of the comprehensive permit process and the mechanism under which the "limited dividend" nature of the Applicant and Project is enforced. Compliance with the Jurisdictional Prerequisites has been established by the Site Eligibility Letter. In addition, the Concord Zoning Board of Appeals has issued a comprehensive permit for the Project.

112A. Section 3.5 Use Description: The ZBA grants this request insofar as it relates to Site conditions and other matters that relate only to Concord, and otherwise denies it.

113. Section 3.6 Existing Site Conditions: The ZBA grants this request insofar as it relates to on-Site traffic circulation and other matters that relate only to Concord, and otherwise denies it.

114. Section 3.7, Recorded plans and deeds to be furnished to Board: The ZBA grants this request for a waiver.

115. Section 3.8 Legal documents pertaining to condominiums or tenancy to be furnished to Board: The ZBA grants this request for a waiver.

116. Section 3.9 Drainage calculations to be submitted to Board : The ZBA denies this request for a waiver. During the hearing, the ZBA specifically required the Applicant to submit drainage calculations for the Sudbury Road drainage, and the Applicant submitted such calculations.

117. Section 3.10 Earth removal calculations to be provided to Board: The ZBA grants this request for a waiver.

118. Section 3.12 Subdivision Regulations: The ZBA takes no action on this request for a waiver, as the Project does not include a subdivision.

119. Section 3.14.2 Filing of Master Plan Sheet with Board: The Applicant represents that its filings with the ZBA have included all information required by this Regulation relative to the plan in Acton and all information in Concord that is relevant to the Acton ZBA's determination. The ZBA is satisfied that the Applicant has done so. The ZBA grants this request for a waiver insofar as Section 3.14.2 requires additional information.

120. Section 3.14.3 Filing of Recordable Plan Sheet, The ZBA grants this request for a waiver.

121. Section 3.14.5 Site Development Plan Sheet to be filed with Board; The ZBA denies this request insofar as it pertains to information in Acton or information in Concord that is relevant to the ZBA's decision. The ZBA grants this request insofar as it pertains to additional information.

122. Section 3.14.6 Plan and Profile Sheet to be filed with Board: The ZBA grants this request for a waiver.

123. Section 3.14.8 Landscape Plan Sheet to be filed with Board: The ZBA grants this request for a waiver.

124. Section 3.14.9 Erosion and Sedimentation Control Plan Sheet to be filed with Board; The ZBA grants this request for a waiver.

125. Section 3.14.10 Architectural Floor and Elevations Plan Sheet to be filed with Board: The ZBA grants this request for a waiver.

126. Section 3.16 Information on Affordable Dwelling Units to be filed with Board: The ZBA grants this request for a waiver.

127. Section 3.17 Development Schedule to be filed with Board: the ZBA grants the request for a waiver of the regulation insofar as it requires additional information.

128. Section 3.18 Unit Composition Schedule to be filed with Board: The ZBA grants this request for a waiver.

129. Section 3.19 Development Pro Forma to be filed with Board: The ZBA grants this request for a waiver.

130. Section 3.20 Market Study to be filed with Board: The ZBA grants this request for a waiver.

131. Section 3.22 Report on Local Needs to be filed with the Board: The ZBA grants this request for a waiver insofar as it requires the information required by 3.22 (a) and

3.22 (b) and insofar as it requires a separate, individual report containing the information required in 3.22 (c).

B. Town of Acton Zoning Bylaw

132. Section 3.1 and Table of Principle Uses

The Applicant seeks to use Old Powdermill Road as its access. Multifamily use is not a permitted use in the Powdermill District. The Applicant seeks a waiver of this provision of the Zoning Bylaw. There are no housing units in Acton, and the Project does not include any provision for inclusion of any units for Acton in the Subsidized Housing Inventory maintained by Department of Housing and Community Development ("DHCD"). In addition, the existing condition of the intersection of Sudbury Road and Old Powdermill Road is severely inadequate for the Project.

Nonetheless, the Applicant insists that it has no other legal access other than Old Powdermill Road in Acton. The ZBA's traffic consultant has determined that the construction of the improvements to the roadways, sidewalks and other infrastructure specified by him will be sufficient to create safe and adequate conditions for traffic and pedestrians. The Town's engineer has determined that the drainage improvements proposed by the Applicant are adequate. In addition to the primary access, the Applicant will provide two emergency accesses wide enough for emergency vehicles to travel in opposite directions at locations approved by the Board and the Fire Chiefs of Acton and Concord.

Provided that all of the improvements described in the above paragraph are completed, the Applicant complies in full with the Development Agreement referred to herein, and the Applicant complies with all other conditions and requirements of this Decision, the ZBA finds that the health, safety and welfare of the public will be adequately served and protected by the Project. The ZBA grants the waivers of Section 3.1 and Table of Principle Uses of the Zoning Bylaw subject to the conditions of this Decision.

133. Section 3.8.1.5, Prohibition of Common Drives that would serve more than 12 lots:

The ZBA repeats and incorporates by reference its discussion with respect to the preceding request for a waiver of Section 3.1 and the Table of Principle Uses. The ZBA grants this request for waiver subject to the conditions of this Decision, for the same reasons as described in the previous section.

134. Section 4.1 Flood Plain Overlay District

The ZBA waives the requirements of Section 4.1 of the Zoning Bylaws, the requirements of the Flood Plain Overlay District.

135. Section 4.3 & Table 4.3.7.2, Restrictions on use of property in Groundwater Protection Overlay District

The ZBA grants this request for a waiver, subject to all conditions of this Decision.

136. Section 5.1 & Table of Standard Dimensional Regulations

The ZBA grants this request for a waiver, subject to all conditions of this Decision.

137. Section 7.3 – Signage

The ZBA has no jurisdiction to permit signs in the public right of way. Therefore, if the Applicant seeks to construct signage in the public right of way, the Applicant will be required to seek approval from the Board of Selectmen. To the extent that the Applicant seeks to erect signage on private property, the ZBA hereby grants all waivers from Section 7 necessary to install two signs consistent with the sign plan submitted by the Applicant to the ZBA. Notwithstanding the foregoing the Board does not waive the requirement for a sign permit by the Building Commissioner. In addition, signage at the intersection of Sudbury Road and Route 62 shall be positioned to not obstruct intersection sight lines.

Paragraphs 138 through 141 intentionally omitted.

142. Section 10.2 - Building Permit Requirement

This request asks for a waiver of the requirement in the Zoning Bylaw that says that a building permit application must comply with the Zoning Bylaw. The ZBA grants this request for a waiver insofar as the ZBA has waived applicable provisions of the Zoning Bylaw, and otherwise denies this request.

C. Town of Acton Subdivision Rules and Regulations

143. Section 8.1; Table I – Horizontal Design Standards, Table II – Vertical Design Standards, and Table III- Stopping Sight Distance

The ZBA allows this request for a waiver on condition that all roadway, sidewalk, and infrastructure improvements specified by the ZBA are completed.

144. Section 8.2

The ZBA allows this request for a waiver on condition that all roadway, sidewalk, and infrastructure improvements specified by the ZBA are completed.

145. Section 8.3

The ZBA allows this request for a waiver on condition that all roadway, sidewalk, and infrastructure improvements specified by the ZBA are completed.

146. Section 8.4

The ZBA allows this request for a waiver on condition that all roadway, sidewalk, and infrastructure improvements specified by the ZBA are completed.

147. Section 8.5

The ZBA allows this request for a waiver on condition that all roadway, sidewalk, and infrastructure improvements specified by the Board are completed.

148. Section 8.7.6

The ZBA allows this request for a waiver on condition that all roadway, sidewalk, and infrastructure improvements specified by the ZBA are completed.

149. Section 9.1

The ZBA allows this request for a waiver on condition that all roadway, sidewalk, and infrastructure improvements specified by the ZBA are completed.

D. Town of Acton Board of Health Rules and Regulations

150. Section 16.3

The ZBA allows this request for a waiver.

E. Bylaws of the Town of Acton: Chapter F- Environmental Regulations (Wetland Protection)

The ZBA allows this request for a waiver.

F. WAIVERS NOT LISTED

151. By granting the waivers from local bylaws and regulations listed above, it is the intention of the ZBA in this Permit to permit construction of the Project as shown on the final Approved Plans. If, in reviewing the Applicant's building permit(s) application, the Building Commissioner determines that any additional waiver from local zoning, wetlands, health, or subdivision regulations is necessary to permit construction to proceed as shown on the final Approved Plans, the Building Commissioner shall proceed as follows: (a) any matter of de minimus nature shall be deemed within the scope of the waivers granted by this Comprehensive Permit; and (b) any matter of a substantive nature, including those having a

potential adverse impact on public health, safety, welfare, or the environment shall be reported back to the Board for expeditious disposition of the Applicant's request for a waiver therefrom.

XVIII. CONDITIONS

152. The Decision of the Concord Zoning Board of Appeals dated June 18, 2008 allowing the Applicant's application for a Comprehensive Permit should be incorporated by reference and made a part of this Board's decision. In the event of a conflict between decision of this Board and the Concord ZBA, this ZBA's decision will control.

153. The Project will include at least 25% affordable units. The Project will comply with all profit limitations and other requirements for comprehensive permits at all times.

154. Prior to commencement of any construction concerning any portion of the Project (whether in Concord or Acton), the Applicant shall submit to the Town Engineer of Acton a final set of Engineering Drawings for the portions of the Project in Acton which shall be identical to those cited in Section X (above) of this Decision except that they shall be updated in accordance with the requirements of this Decision. The deadline for submission of said Plans may be extended by the Town Engineer for good cause shown. The submission shall in addition include a list of the specific changes made to conform to the requirements of this Decision; this list and the final set of Engineering Drawings shall be signed and stamped by the Design Engineer for the Applicant. The Town Engineer shall review the final set of Engineering Drawings to ensure that they are consistent with and in conformity with this Decision. Upon the Town Engineer so finding the final set of Engineering Drawings shall constitute the final "Approved Plans" under this Decision and shall be filed with the records of the Board.

155. This Decision shall be recorded at the Middlesex South Registry of Deeds. This Decision shall become effective upon recording. Proof of recording shall be forwarded to the Board prior to issuance of a building permit or to the start of construction.

156. The Applicant shall comply with all local rules and regulations of the Town of Acton and its boards and commissions unless expressly waived herein or as otherwise addressed in these conditions.

157. Applicant shall copy the Board and the Town Engineer on all correspondence between the Applicant and any federal, state, or Town official, board, or commission that concerns the conditions set forth in this Decision, including but not limited to all testing results, official filings, and other permits issued for the Project.

158. Each condition in this Decision shall run with the land and shall, in accordance with its terms, be applicable to and binding on the Applicant and the Applicant's successors and assigns for as long as the Project and the use of the land does not strictly and fully conform to the requirements of the Acton Zoning Bylaw.

----- Paragraph 159 intentionally omitted.

160. This Decision permits the construction use and occupancy of 350 rental units on the Site. The construction and use of the Site shall be in conformity with the Approved Plan, and there shall not be the creation of any additional housing units or any other structures or infrastructure in Acton except that which is shown on the Approved Plan without further approval by the Board in the form of an amendment to this Decision

161. As Built Plans: Within 120 days after the completion of construction of the work to be performed in Acton hereunder, the Applicant shall submit to the Board an "As Built Plan" showing all pavement, sidewalks, drainage structures, and other infrastructure required to be constructed in Acton as they exist in Acton, above and below grade, including appropriate grades and elevations. The plans shall be signed by registered professional civil engineer, certifying that the Project in Acton as built conforms and complies with this Comprehensive Permit.

162. The Applicant shall be responsible to ensure that nuisance conditions do not exist in Acton in and around the Site during the construction operations. The Applicant shall at all times use all reasonable means to minimize inconvenience to residents in the general area.

163. The hours of operation for any construction activities for the Project in Acton shall be between 7:00 a.m. and 5:00 p.m. Monday through Saturday, and no work shall be allowed for the Project in Acton on Sundays and legal holidays, except as otherwise permitted by the Town Engineer.

164. The Applicant shall implement measures to ensure that noise from Project construction activities does not exceed acceptable levels, as set forth by Federal and State regulatory agencies. The Applicant shall cease any excessively loud activities when directed by the Town Engineer.

165. Prior to the issuance of a building permit, the Applicant shall deliver to the Town Engineer final stormwater management design plans and construction details evidencing compliance with DEP's Stormwater Management Policy as applicable to this Project in Acton to the greatest extent feasible.

166. Prior to the issuance of the final Certificate of Occupancy, the Applicant shall submit to the Town Engineer a certification from a professional engineer that the portion of the Project in Acton has been constructed in accordance with the approved construction drawings.

167. Prior to the issuance of any Certificate of Occupancy, the Applicant shall submit to the Town Engineer a certification from a professional engineer that the Project has complied with all applicable stormwater management requirements as specified by the Federal Clean Water Act National Pollution Discharge Elimination Systems (NPDES).

168. Prior to the issuance of a Certificate of Occupancy for the 200th dwelling unit, all site work and construction of roadway improvements, drainage structures, and any other infrastructure in Acton shall be completed, and the Applicant shall submit to the Town Engineer a certification from a professional engineer that the portion of the Project in Acton has been constructed in accordance with the approved construction drawings, or the Applicant shall provide the Acton Planning Director with a letter of credit or other form of performance guarantee acceptable to the Planning Director to cover the cost of the remaining work.

169. Intentionally omitted.

170. The Applicant shall implement necessary traffic safety controls during construction as directed by the Town Engineer

171. The Applicant will construct the roadways and infrastructure required by this Decision at its own expense.

172. **Material Changes:** If, between the date this Decision is filed in the office of the Acton Town Clerk and the completion of the Project, the Applicant desires to change in a material way and/or to a significant degree the Project as reflected in and approved by this Decision, such changes shall be governed by 760 CMR 56.05 (11). In no case shall the Applicant be allowed to implement a Project change that increases the number of units without submitting a new application and undergoing a new public hearing and decision process. Without limitation, in the event any subsequent permitting process (such as Superseding Order of Conditions to conform to the Project as approved, groundwater discharge permit review of the Project by DEP, or any other state or federal governmental approvals) results in a change to the Approved Plans that triggers the need for further waivers from local bylaws, procedures in 760 CMR 56.05 (11) shall be followed.

173. **Expiration Date:** If construction authorized by this Decision has not begun within three years of the date on which the Permit becomes final, the permit shall lapse. The permit shall become final on the date that the written Decision is filed in the office of the Town Clerk if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of. The ZBA may grant an extension of the three-year lapse date for good cause shown, which shall include without limitation (notwithstanding the Applicant's diligent efforts) in the issuance of a governmental permit or approval or delay occasioned by a third party appeal of a government permit or approval required for the Project.

174. At least seven days prior to the start of construction, the Applicant shall provide written notice to the ZBA and to the residential abutters in Acton of the anticipated construction start date and the anticipated construction schedule

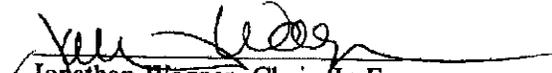
XIX. CONCLUSION

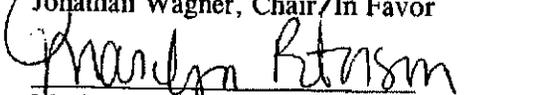
By a vote of two to one, with two Members in favor and one Member opposed, the Application for a Comprehensive Permit by the Applicant is granted for the reasons stated

above and subject to the provisions, terms, and conditions provided herein. The provisions, terms, and conditions contained herein will not render the project uneconomic.

Date:

ACTON ZONING BOARD OF APPEALS


Jonathan Wagner, Chair, In Favor


Marilyn Peterson, Member, In Favor

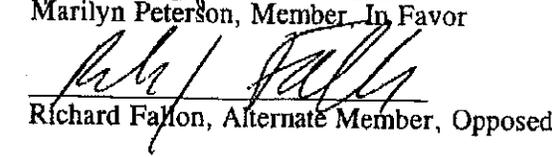

Richard Fallon, Alternate Member, Opposed

EXHIBIT A

<u>EXHIBIT NO.</u>	<u>DOCUMENT</u>
#1	Permit Application
#2	Supplemental Motor Vehicle Crash Analysis from VAI
#3	Traffic Impact and Access Study from VAI 10/29/2007
#4	Existing Site Conditions
#5	Traffic Impact and Access Study 2/20/2008
#6	Town of Concord Request for Quote for Traffic Peer Review
#7	Commonwealth of Mass Environmental Notification Form
#8	Letter from residents of Westside Drive with signatures
#9	Public Notice, Newspaper Legal Ad and billing authorization
#10	IDC from Board of Health
#11	IDC from Municipal Properties
#12	Memo from ACHC Nancy Tavernier
#13	IDC from Engineering Dept.
#14	Memo from James Shea to Roland Bartl
#15	Memo from James Shea on Alexan/Concord 40B project proposal
#16	IDC to BOA from Steve Ledoux, town Manager
#17	Letter to BOA from Town of Sudbury
#18	Duplicate of IDC to BOA from Steve Ledoux, Acton TM
#19	Email from resident to Transportation Advisory Committee
#20	Extension agreement for hearing continuance
#21	Board of Appeals sign in sheet
#22	Goulston & Storrs Title Materials & ALTA Survey
#23	Goulston & Storrs memo regarding Board's jurisdiction
#24	Minutes of hearing from 2/27/2008 hearing
#25	Comment from Historical Commission
#26	Memo to Concord from VHB re: Review of Traffic Impact Study
#27	Letter from Acton to Town of Concord re: Thoreau Realty Trust access
#28	Letter from Town of Sudbury to Town of Concord re; traffic impact and access
#29	Extension of hearing agreement
#30	Hearing sign in sheet 3/17/2008
#31	Book from town of Sudbury abutters re: vehicle trips
#32	Memo from Roland Bartl dated 3/20/2008 regarding access
#33	IDC to Town Clerk for continuance
#34	IDC Nancy Tavernier ACHC re: Town of Acton Subsidized housing inventory
#35	Minutes of March 17, 2008 hearing
#36	Memo to BOA from Acton Finance Committee regarding benefit of tax revenues
#37	Goulston & Storrs letter to BOA re: Large project and jurisdiction
#38	Letter from Steve Ledoux to BOA re: emergency access and pedestrian access

- #39 Extension of hearing document
- #40 Booklet from VAI to Town of Concord BOA re: support of amended traffic impact study
- #41 Minutes of hearing dated 3/17/2008]
- #42 IDC from town Engineer to BOA re: Engineering review
- #43 IDC from Town Engineer to BOA review of supplemental traffic information 4/4/08
- #44 Email from Selectwoman Lauren Rozensweig re: resident with traffic issues
- #45 Email from Roland Bartl to Fire Chief & Police Chief re: single access & emergency access
- #46 Email from resident to Selectmen urging Acton to deny the permit
- #47 IDC to Town Clerk for continuance of hearing
- #48 Department of Planning & Land Management Supplemental report
- #49 Email to Selectmen & BOA from resident re: impact on Town of Acton
- #50 Town of Concord Planning Board Agenda
- #51 Planning Department letter re: Request for Quotes Design and Eng. Review services
- #52 Letter from Town of Concord to Town of Sudbury re; traffic volume
- #53 Minutes of hearing dated 4/2/2008
- #54 Extension of hearing document
- #55 Continuation of hearing IDC to Town Clerk
- #56 Sign in sheet for hearing 4/2/2008
- #57 Letter re: Thoreau Realty Trust to Town of Concord Board of Appeals
- #58 Letter from Comins & Newbury LLP re: access issues
- #59 Letter from Acton Fire Chief to BOA
- #60 Town of Concord Development Agreement
- #61 Letter from residents of North Sudbury letter & signed petition re: traffic impact
- #62 Letter to Acton BOA from Acton Selectmen
- #63 Document from BSC Group re: Peer Review of Traffic Impact
- #64 Extension of Hearing document
- #65 BOA sign in sheet
- #66 IDC to Town Clerk re: Site Visit
- #67 Letter from Goulston & Storrs to Michael O'Neill Title Materials & ALTA Survey
- #68 Letter from Goulston & Storrs to Michael O'Neill from Valerie Gwinn
- #69 Document of Decision of Concord BOA GRANTING 40B PERMIT
- #70 Booklet from VAI to Roland Bartl preliminary responses to 6/3/2008 memo for peer review and traffic assessment.
- #71 Letter from West Concord Development to Acton BOA re: # of drivers & cars
- #72 Memo from BSC Group reviewed responses to comments by VAI
- #73 Letter from VAI to Town Planner dated July 8, 2008
- #74 Letter from Beals Associates re: Sudbury Road Drainage Improvements dated 7/10/08
- #75 Email from Bruce Stamski Town Engineer responding to Beals Associates letter
- #76 Extension of hearing document

- #77 Letter to Jon Wagner from Mike O'Neill dated July 21, 2008
- #78 Letter to Roland Bartl from BSC Group re: peer review of traffic impacts
- #79 Letter from Beals Associates dated 7/10/2008 re; Sudbury Rd. drainage improvements
- #80 Memo from Goulston & Storrs to Michael O'Neill dated 8/1/2008
- #81 Memo from Michael O'Neill to BOA re: large project dated 7/21/2008
- #82 Memo from ACHC, Nancy Tavernier re: revised comments on application
- #83 Email from Roland Bartl to BOA & Robb Hewitt re: 3 driveway issue
- #84 Memo from West Concord Development dated 8/8/2008
- #85 Letter from VAI from Roland Bartl dated 8/8/2008
- #86 Letter from Goulston & Storrs dated 8/12/2008 re: various 40B Regulatory matters
- #87 E-mail from Roland Bartl to BOA, Michael O'Neill dated 8/12/2008
- #88 Drainage diagram and analysis prepared by Beals Associates
- #89 Letter from Comins & Newbury LLP to the BOA dated 8/14/2008
- #90 IDC to Roland Bartl to from Bruce Stamski Eng. Dept. review of drainage analysis dated 8/14/2008
- #91 Letter from BOS of Acton to BOA regarding Financial Mitigation Package
- #92 Agreement from BOS signed by applicant and BOS.
- #93 Map submitted by Beals Associates (Orthographic Locus Map)
- #94
- #95 Minutes of the hearing from 7/14/2008
- #96 Minutes of the hearing from 6/10/2008
- #97 Letter from West Concord Development LLC date 8/28/2008 to BOA
- #98 Letter from Michael O'Neill to BOA in response to Deb Horwitz memo second access
- #99 Email from Roland Bartl to BOA regarding email from resident concerning car accident on Sudbury road.
- #100 Memo from Goulston & Storrs to BOA dated Sept. 2, 2008 re: response to Michael O'Neill
- #101 Letter from Beals Associates to Town Engineer re: Drainage analysis for Sudbury Road
- #102 Minutes for hearing dated 8/14/2008
- #103 Extension agreement for hearing
- #104 Board of Appeals sign in sheet for hearing
- #105 Letter from BOS/Town Administrator for the Town of Maynard
- #106 Memo from Michael O'Neill dated 9/12/2008 to BOA re: applicant's waivers
- #107 Memo from Engineering dept. dated September 16, 2008 Review of drainage analysis
- #108 Memo from Goulston & Storrs dated September 18, 2008 response to Michael O'Neill exemptions rules and regulations
- #109 Emergency Access Plans
- #110 Walpole Decision
- #111 7/23/08 Letter from Acton Traffic Peer Review
- #112 9/23/08 Memo on Signage Waiver Request from Goulston & Storrs

Exhibit B

DEVELOPMENT AGREEMENT

This Development Agreement (this "Agreement") is entered into as of this 6th day of October, 2008, by and between WEST CONCORD DEVELOPMENT LLC, a Delaware limited liability company (the "Developer"), and the TOWN OF ACTON, acting by and through its Board of Selectmen, (the "Town"), for good and valuable consideration the receipt and sufficiency of which are hereby acknowledged. This Agreement represents the understanding between the parties with respect to the contributions and commitments of the Developer with respect to mitigating potential impacts arising from the development of a multifamily housing community by an affiliate of Trammell Crow Residential (the "Project"), located on Old Powdermill Road in the Town of Concord, with access off of Sudbury Road in the Town of Acton, as more particularly described on Exhibit A attached hereto (the "Site") and, in general, to promote the creation of affordable housing and the public welfare in the Town of Acton.

1. GENERAL

- 1.1 The Developer has applied for a so-called comprehensive permit under M.G.L. c. 40B (a "comprehensive permit") from the Town of Acton Zoning Board of Appeals (the "Acton ZBA") in connection with access to the Project. The Project-related work in Acton involves primarily improvements to Sudbury Road and Powdermill Road. The Project includes 350 units of multi-family housing in Concord. In order to mitigate various potential impacts of the Project on the Town and to promote the creation of affordable housing and the public welfare, the Developer has agreed to pay for certain improvements as specified herein.
- 1.2 Construction of the Project is contingent on the granting of a comprehensive permit from the Acton ZBA, the granting of an order of conditions by the Acton Conservation Commission, permits and approvals from the Town of Concord and the Massachusetts Highway Department regarding various off-site traffic and roadway improvements, a groundwater discharge permit from the Massachusetts Department of Environmental Protection, and various other permits and approvals (collectively, the "Required Permits").
- 1.3 In consideration of the Developer's promises contained herein, the Acton Board of Selectmen agree not to oppose the Developer's requests for the Required Permits in order to effectuate the terms and intent of this Agreement. Nothing contained herein shall be deemed to be a guarantee of the successful or affirmative vote on any such Required Permit.
- 1.4 The Developer and the Town incorporate by reference an agreement, executed by the parties on August 14, 2008, which expresses the intent of the parties to enter into this Agreement and outlines the terms of this Agreement.

2. MITIGATION

2.1 In conjunction with the development of the Project, and to mitigate potential impacts of the development, the Developer agrees to contribute to the Town (the "Mitigation Payment") the following sums for the following purposes:

- a. \$500,000 to the Acton Community Housing Program Fund, a 501(c)(3) organization;
- b. \$250,000 for sidewalk construction in Acton in the vicinity of the Project (this \$250,000 portion of the Mitigation Payment does not include the construction of sidewalks along Sudbury Road and Acton's Powdermill Road (Route 62), which are improvements that the Developer has agreed to undertake in its written submissions to the ZBA independent of this Agreement);
- c. \$150,000 for unanticipated costs associated with the Project, to be used as determined by the Acton Board of Selectmen.

2.1.1 The Mitigation Payment amount shall remain the same for a period of five (5) years. Said five (5) year period shall commence on the date of issuance of a Comprehensive Permit from the Acton ZBA approving the Project, which permit and all conditions therein or related thereto must be consistent in all material respects with the Project as applied for by the Developer and as previously approved by the Concord ZBA and in all other respects acceptable to the Developer. After the expiration of said five (5) year period, the Mitigation Payment amount (or any portion thereof that remains unpaid at that time), shall be increased by the "CPI" from the date of issuance of the Comprehensive Permit by the Acton ZBA. "CPI" means the Consumer Price Index For All Urban Consumers (CPI-U) for the Boston area published by the Bureau of Labor Statistics, U.S. Department of Labor. If the Bureau of Labor Statistics should cease to publish such an index in its present form and calculated on the present basis, a comparable Index or an Index reflecting change in the cost of living determined in a similar manner shall be utilized to calculate the payments due hereunder.

2.1.2 The Mitigation Payment amount is over and above any costs or payments associated with infrastructure improvements or other requirements upon which any of the Required Permits are conditioned. Nothing contained herein shall be deemed to limit the Developer's rights to appeal any condition of the Comprehensive Permit that renders the Project uneconomic. *The Developer agrees not to appeal solely on*

the basis of the Mitigation Payment.
2.1.3 The Mitigation Payment shall be due and payable pursuant to the following schedule:

- a. One-third (1/3) shall be paid upon the issuance of an occupancy permit for the Project's fiftieth (50th) residential unit;
- b. One-third (1/3) shall be paid upon the issuance of an occupancy permit for the Project's one hundredth (100th) residential unit;

- c. One-third (1/3) shall be paid upon the issuance of an occupancy permit for the Project's one hundred and fiftieth (150th) residential unit.
- 2.2 Notwithstanding any other provision of this Agreement, the obligation of the Developer to pay the Mitigation Payment hereunder shall become effective only if and when all Required Permits have been issued (and all appeal periods applicable thereto have expired without contest or appeal, or any such contests or appeals have been concluded in favor of Developer) for the Project permitting 350 rental units.
- 2.3 Upon becoming effective as aforesaid, each portion of the Mitigation Payment shall be paid to the Town by certified cashier's, treasurer's or bank check, or by wire transfer by the Developer within ten (10) days of its respective due date.
- 2.4 In the event that, prior to issuance of an occupancy permit for the Project's one hundred and fiftieth (150th) residential unit, the Town delivers to the Developer all necessary permissions, easements, and any other authorization required to allow construction of sidewalks in Acton (other than the sidewalks that the Developer has agreed in its written submissions to the ZBA to construct along Sudbury Road and Acton's Powdermill Road (Route 62) independent of this Agreement), the parties may discuss making the \$250,000 payment (or a portion thereof) for the sidewalk component of the Mitigation Payment (as described in paragraph 2.1(b) above) "in-kind," meaning that the Developer would construct the sidewalks during construction of the Project. In the event that Developer agrees to make the sidewalk component of the Mitigation Payment, or any portion thereof "in-kind," the Developer shall document the actual cost of constructing any sidewalk(s) that it builds, and the Town shall be entitled to receive the balance, if any, between the cost to the Developer and the \$250,000 portion of the Mitigation Payment for sidewalks, to be used by the Town for construction of additional sidewalks to offset impacts from the Project.
3. MISCELLANEOUS
- 3.1 The Town acknowledges that nothing contained herein shall prohibit or hinder the Developer from exercising Developer's rights to use the Site alternatively for the uses and purposes currently allowed under the current Zoning By-Law if and to the extent Developer does not elect to exercise its rights under the Required Permits.
- 3.2 The Developer may assign the rights and obligations contained in this Agreement to an assignee or transferee of the Required Permits. At least 10 days in advance of any such assignment, Developer shall provide the Town with written notice of the same together with reasonable evidence of the capacity and experience of the proposed transferee and its ability to perform the Developer's obligations hereunder. At the request of the Town, the Developer and/or the proposed transferee will attend a meeting of the Board of Selectmen in order to discuss the transferee's said capacity and the overall status of the Project at that time. All terms of this Agreement shall bind and inure to the benefit or burden of any successor or assign of this Agreement or any successor or assign of the Site, and all such successors or assigns shall assume the obligations hereunder in a writing which shall be delivered to the Town promptly after the assignment of this

Agreement. Such written assumption shall include contact name(s) and information for the assignee.

3.3 The parties anticipate that, if the Project is approved as proposed, this Agreement will be incorporated into the comprehensive permit from the Acton ZBA.

3.4 Notices

Unless otherwise specified herein, all required Notices hereunder shall be deemed sufficient if sent registered mail to the parties at the following addresses:

Town: Town of Acton
472 Main Street
Acton, MA 01720
Attn: Town Manager

with a copy to

McGregor & Associates, P.C.
15 Court Square - Suite 500
Boston, MA 02108
Attn: Gregor McGregor

Developer: West Concord Development LLC
c/o Trammell Crow Residential
35 Corporate Drive, Suite 400
Burlington, MA 01803
Attn: Robert D. Hewitt

with a copy to:

Goulston & Storrs, P.C.
400 Atlantic Avenue
Boston, MA 02110-3333
Attn: Deborah S. Horwitz

3.5 The Developer acknowledges and agrees that this Agreement shall be binding upon the Developer and each of its successors or assigns as to the obligations which arise under this Agreement during their respective periods of ownership of the Project.

3.6 As and when requested by the Developer, the Town will promptly advise, in writing, the status of the Developer's obligations or satisfaction thereof under this Agreement for the benefit of existing and prospective mortgagees of all or a portion of the Project and such other persons as the Developer may designate.

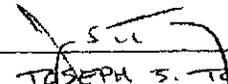
3.7 Amendments to this Agreement must be in writing and signed by both parties. Amendments to the terms of this Agreement may be agreed to on behalf of the Town by the Board of Selectmen. This Agreement shall be null and void and of no further force and effect if the

Developer withdraws its application for a comprehensive permit from the Acton ZBA, or advises the Acton ZBA that it relinquishes said permit.

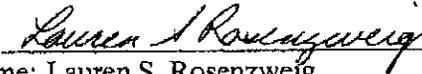
3.8 This Agreement is an enforceable contract, and shall be governed by the laws of the Commonwealth of Massachusetts. The parties hereby consent to non-exclusive jurisdiction of the courts of the Commonwealth of Massachusetts sitting in the Counties of Middlesex or Suffolk.

EXECUTED under seal as of the date and year first above written.

WEST CONCORD DEVELOPMENT, LLC

By: 
Name: JOSEPH S. TORZ
Its: Vice President of its General Partner
Hereunto Duly Authorized

TOWN OF ACTON BOARD OF SELECTMEN

By: 
Name: Lauren S. Rosenzweig
Its: Chair
Hereunto Duly Authorized

Sept 10, 2015

STATE OF NEW YORK

County of Nassau, ss.

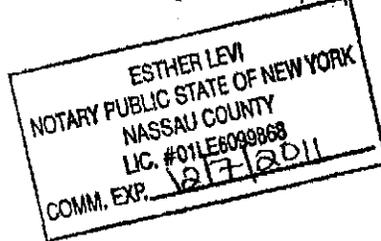
On this 3rd day of October, 2008, before me, the undersigned notary public, personally appeared Joseph S. Torg, proved to me through satisfactory evidence of identification, which was personal knowledge, to be the person whose name is signed on the preceding document, and acknowledged to me that he signed it voluntarily for its stated purpose, as vice president of West Concord Development, LLC.

of its GP

Esther Levi

Notary Public

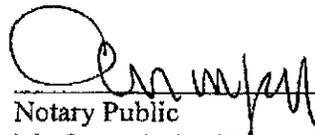
My Commission Expires: 12/7/2011



COMMONWEALTH OF MASSACHUSETTS

County of Middlesex, ss.

On this 6 day of October, 2008, before me, the undersigned notary public, personally appeared Lauren S. Rosenzweig, proved to me through satisfactory evidence of identification, which was known to me, to be the person whose name is signed on the preceding document, and acknowledged to me that he signed it voluntarily for its stated purpose, as Chair of the Town of Acton Board of Selectmen.



Notary Public

My Commission Expires: 10/16/2015

EXHIBIT A

Description of Premises

Parcel 1

The land, together with the buildings thereon, located in Concord, Middlesex County, Massachusetts, being shown as Lot 1 on a plan entitled "Land in Concord, Mass. Surveyed for Electronic Space Systems Corporation, Scale 1" = 40', February, 1982" by Charles A. Perkins Co., Inc., Civil Engineers and Surveyors, recorded in the Middlesex South Registry of Deeds with Deed recorded February 1, 1984 at Book 14545, Page 486, bounded and described according to said plan as follows:

NORTHWESTERLY by land now or formerly of Digital Marine Electronics Corporation four hundred feet (400);

NORTHEASTERLY by land now or formerly of Marshall B. Dalton, et al., two thousand three hundred sixty-eight and 15/100 (2,368.15);

SOUTHERLY by land now or formerly of said Marshall B. Dalton, et al., by measuring three lines respectively forty-two and 31/100 feet (42.31), one hundred nineteen and 78/100 feet (119.78) and two hundred ninety-eight and 36/100 feet (298.36); and

SOUTHWESTERLY by land now or formerly of said Marshall B. Dalton, et al., by five lines measuring respectively five hundred seventy-eight and 80/100 feet (578.80), on hundred eighty-eight and 81/100 feet (188.81), two hundred thirty-eight and 72/100 feet (238.72), one hundred ninety-seven and 33/100 feet (197.33), and eight hundred sixty-nine and 99/100 (869.99).

Said premises contain 20.08 acres, more or less, according to said plan.

Subject to and with the benefit of rights of way and easements of record, the same as now are in force and applicable. Together with rights of ingress to and egress from the premises over a right of way running along the southwest boundary of the premises to Sudbury Road marked as a "forty foot right of way to Sudbury Road" on plan entitled "Plan of Concord, Mass., November 26, 1956, scale 1 inch equals one hundred feet, Laurence A. Murray, Engineer, Concord, Mass." Recorded in the Middlesex South Registry of Deeds as Plan Number 2071 of 1956.

Parcel 2

The land with the buildings thereon situated off the northeasterly side of Old Powder Mill Road and on the southerly side of the Assabet River in Concord, Middlesex County, Massachusetts, the same being shown as Lot E, containing 15.8 acres of land, more or less, on a plan by

Laurence A. Murray, Engineer, dated May 11, 1968, recorded with said Deeds Book 11511, Page 662, and being more particularly bounded and described as follows:

SOUTHWESTERLY by land now or formerly of John T. Spinelli, seven hundred twenty-six feet;

NORTHWESTERLY by land now or formerly of Hayes and Swett, nine hundred ninety-five feet, more or less;

NORTHERLY by a curved line following the thread of said Assabet River, five hundred thirty feet, more or less;

EASTERLY by land of Marshall B. Dalton, et al., Trustees, one thousand one hundred sixty feet, more or less; and

SOUTHEASTERLY by said land of Marshall B. Dalton, et al., Trustees, three hundred feet.

Being the premises described in deed dated May 23, 1968 recorded with said Deeds, Book 11511, Page 662.

Excepting from the above, a certain parcel of land with the buildings thereon in Concord, Middlesex County, Massachusetts, thereon being shown as Lot 2 on a plan entitled "Hayes Pump & Machinery Co." Definitive Subdivision Plan, Land in Concord, Mass., Owner and Developer: Hayes Real Estate Trust" by R.D. Nelson, Civil Engineers" dated March 24, 1977, April 29, 1977 and recorded with Middlesex South District Registry of Deeds in Book 13203, Page End and bounded and described as follows:

NORTHWESTERLY by the dividing line between the Town of Acton and Concord as shown on said plan Seventy-Five (75) feet, more or less;

NORTHERLY by the thread of the stream of the Assabet River Five Hundred Thirty (530) feet, more or less;

EASTERLY by land of Marshall B. Dalton and Royal Little, as shown on said plan One Thousand One Hundred Sixty (1,160) feet, more or less;

SOUTHEASTERLY by said land of Dalton and Little Three Hundred and 00/100 (300.00) feet;

SOUTHWESTERLY by land of John T. Spinelli, Two Hundred Eighty-Six and 00/100 (286.00) feet;

NORTHWESTERLY by Lot 1 as shown on said plan Three Hundred Forty-Five and 00/100 (345.00) feet;

NORTHERLY by Lot 3 as shown on said plan Two Hundred Five and 02/100 (205.02) feet;

WESTERLY by Lot 3 as shown on said plan Five Hundred Thirty and 00/100 (530.00) feet; and

SOUTHWESTERLY by Lot 3 and part of Lot 1 as shown on said plan Four Hundred Nineteen and 91/100 (419.19) feet.

Containing 5.50 + acres according to said plan.

For title reference see deed from Electronics Space Systems Corporation dated January 16, 1996 and recorded with said Deeds on January 19, 1996 at Book 25984, Page 26.

I

15



**OFFICE OF THE SOUTHBOROUGH
TOWN CLERK
17 COMMON STREET
SOUTHBOROUGH, MASSACHUSETTS
01772-1662
(508)-485-0710**



Bk: 36244 Pg: 224 Doc: DECN
Page: 1 of 15 05/03/2006 10:51 AM

**BOARD OF APPEALS
CERTIFICATION
(20 DAYS HAVE ELAPSED)**

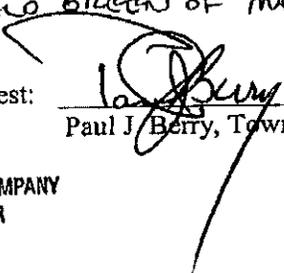
I, Paul J. Berry, Town Clerk of the Town of Southborough, Massachusetts, hereby certify as follows:

1. The original Zoning Board of Appeals Application thereof was filed with me as said Town Clerk on **February 6, 2003 at 2:00 PM.**
2. The Southborough Board of Appeals Decision dated **May 21, 2004** relative to a petition of **Fairfield Green at Marlborough, behind 155 Northboro Road**, for a **Comprehensive Permit under MGL c40B**, was filed with the Town Clerk on **June 30, 2004 at 9:30 AM.**
3. **Twenty (20) days have elapsed** since filing the Zoning Board of Appeals Decision with the Town Clerk; and
4. No appeal therefrom has been filed.

Witness my hand and the Town Seal of Southborough this **21st** day of **July 2004** at **9:00 A.M.**

OWNER: **FAIRFIELD GREEN OF MARLBOROUGH, L.P.**

A True Copy Attest:


Paul J. Berry, Town Clerk

TOWN SEAL

PLEASE RETURN TO: JOANN ALLAN
FIRST AMERICAN TITLE INSURANCE COMPANY
101 HUNTINGTON AVENUE, 13TH FLOOR
BOSTON, MA 02199

15
3



PAUL J. BERRY, TOWN CLERK

**Town of Southborough
Board of Appeals
Southborough, Massachusetts 01772
17 Common Street
P.O. Box 9109
Southborough, MA 01772-9109
508-485-0710**

Paul J. Berry
Town Clerk
Town House
Southborough, MA 01772

**SOUTHBOROUGH ZONING
BOARD OF APPEALS
FINDINGS & DECISION**

**COMPREHENSIVE PERMIT
FAIRFIELD GREEN AT
MARLBOROUGH**

A. GENERAL FINDINGS OF FACT

1. The Project site consists of a total of approximately 22 acres located in Marlborough, Massachusetts and is shown on Assessors Map 116, Parcels 3A and 4A and is zoned LI, Limited Industrial, as set forth in the Marlborough Zoning Ordinance.
2. Primary access to the site is over a private road off of Northboro Road in Southborough, Massachusetts in the Industrial Park District. The property over which the access road is located is shown on Map 70, Parcels 4 and 5 of the Town of Southborough Assessor's Map.
3. The Applicant is Fairfield Green at Marlborough, L.P., having a place of business at 1424 Post Road, Fairfield, Connecticut 06430. Representing the Applicant were Mr. Andrew Montelli (of the Applicant), Mr. Jay Johnson (of the Applicant), Attorney Philip A. Jenks, Attorney Deborah Horwitz (of Goulston & Storrs), John Shipe (of Rizzo Associates) and Rick Bryant (of Rizzo Associates).
4. After proper notice and posting in accordance with M.G.L. c.40B, §21 and c.40A, § 11, the public hearing on this matter was opened on February 27, 2003. Continued public hearings were held on April 8, 2003, May 22, 2003, June 24, 2003, July 23, 2003, September 17, 2003, October 8, 2003, November 12, 2003, December 10, 2003, January 6, 2004, March 23, 2004, April 15, 2004 and May 20, 2004. Each continuance of the public hearing was with the consent of the Applicant.

5. The Applicant applied to the Zoning Board of Appeals for a Comprehensive Permit in accordance with the Commonwealth of Massachusetts Comprehensive Permit process as set forth in M.G.L. c. 40B, sections 21-23.
6. The Town of Southborough has not met the statutory minima set forth in G.L. c. 40B §20 or 760 CMR 31.04. In particular, the Town is under the 10% threshold for low and moderate-income housing. The Board finds that the Town of Southborough has not met the ten percent requirement or the other statutory minima as provided in Chapter 40B, and that the Application is properly before the Board.

B. REQUIREMENTS FOR FILING

1. The application for the project was properly noticed in The Metrowest Daily News on February 12, 2003 and February 19, 2003, mailed to parties in interest and posted at Town Hall. In accordance with the requirements of M.G.L. c.40B, §21, all appropriate Town boards, commissions, committees and departments received copies of the application. The list of such boards, commissions, committees and departments which received a copy is in the Board's file on this matter.
2. Site Control – The Applicant submitted to the Board a Purchase and Sale Agreement between FF Realty LLC and W/S Development LLC, together with a Purchase and Sale Agreement between W/S and the owner of the property. The Board finds that the Purchase and Sale Agreement gives site control to the Applicant as required by M.G.L. c.40B.
3. Limited Dividend Organization – The Applicant submitted its formation documentation to the Board, indicating it is a Limited Dividend Organization within the meaning of 760 CMR 31.01(1)(a). The Board finds that the Applicant has satisfied the requirements of M.G.L. c.40B that it be a limited dividend entity.
4. Project Fundable by Subsidizing Agency – The Applicant submitted to the Board a letter dated February 14, 2003, from the Commonwealth of Massachusetts, Massachusetts Housing Finance Agency located at 1 Beacon St. Boston, Massachusetts. Said letter stated: “the proposed site complies with the requirements of MHFA’s rental finance programs, and will therefore be eligible to apply for a comprehensive permit and for MHFA financing.” The Board finds that the foregoing letter from MHFA satisfies the requirements of M.G.L. c.40B for a site approval letter from a subsidizing agency. The Board finds that subsidized financing under any of the approved subsidy sources under M.G.L. c.40B would be permissible for the project.
5. The Applicant will cause a Regulatory Agreement to be executed and recorded in conformance with the requirements of M.G.L. c.40B.

C. PROPOSAL

1. The Applicant's proposal consists of 13 apartment buildings containing a total of 332 units and a leasing office/community center. The apartment buildings will all be 3 and 4 level buildings. Twenty-five percent (25%) of the units will be affordable for a period of 99 years.
2. Primary access will be provided over an existing easement through Southborough, Massachusetts off of Northboro Road. The Board has copies of the existing easement agreements in its files on this matter.
3. Emergency and construction access will be provided over the adjacent Boston Properties site to Crane Meadow Road pursuant to an easement agreement with Boston Properties. The Applicant and the adjacent property owners will execute and record the easement simultaneously with the Applicant's acquisition of title to the property and will provide the Board with evidence thereof.
4. The Applicant indicated the property in Southborough over which the access road is located is in the Industrial Park District. The use of property in the Industrial Park District for multi-family residential purposes is prohibited under the Southborough Zoning Bylaw. Therefore, zoning relief is required for the proposed access drive to be used for residential purposes.
5. The Applicant submitted a Certificate of the Secretary of Environmental Affairs dated January 23, 2003 stating that "this project does not require the preparation of an Environmental Impact Report (EIR)" under the Massachusetts Environmental Policy Act. A copy of the Secretary's Certificate is in the Board's file.
6. All water and sewer service for the Project will come through Marlborough.
7. The City of Marlborough has agreed to offer to the Town of Southborough 10% of the affordable housing unit credits, up to a maximum of 30 units, partially by increasing the size of the project from its original 306 to 332 units. An agreement by all parties – the City of Marlborough, the Town of Southborough, Fairfield Green at Marlborough, LP, and the Department of Housing and Community Development – was approved on March 5, 2004. (Attached herewith as Exhibit #1)

D. TRAFFIC

1. The Applicant presented to the Board a traffic study prepared by Rizzo Associates of Framingham, Massachusetts meeting all guidelines of the Executive Office (of) Transportation and Construction (EOTC) and MEPA for traffic studies, including use of the Institute of Transportation Engineers statistics for trip generation in accordance with FOTC standards, and projection of the traffic impacts over a 5-year build-out

period in and around the project site. The study was reviewed and approved by SEA Consultants, Inc., a third party engineering firm hired by the Board.

2. The primary entrance to the project is via a private road off Northboro Road in Southborough. The Applicant presented to the Board easement documents which allow the Applicant to use that access road as proposed for the project. Copies of those easement documents are in the Board's file.
3. The Applicant's traffic study states that the majority of traffic leaving or entering the site will be going to or coming from Simarano Drive/495 interchange. The Applicant noted that MassHighway intended to construct some improvements at this interchange. The Applicant committed to constructing those improvements if MassHighway did not. However, in the interim, MassHighway has completed construction of the improvements.
4. The Applicant presented evidence that the site could accommodate 250,000 sq. ft. of office space by right. Rizzo stated that this type of use would generate 2680 trips per day based on ITE projections. Rizzo also noted that the traffic pattern for a by-right office project would be in the same direction as the bulk of the traffic currently utilizing the access drive. The traffic pattern from the proposed multifamily project will be in the reverse directions from the existing traffic during the morning and afternoon peak hours.
5. The Board expressed its desire for primary access to the Project to be over the Boston Properties site from Marlborough. The Applicant stated that it had made significant attempts to obtain the necessary easements to permit such primary access, but had been unsuccessful. The Town of Southborough contacted Boston Properties directly in a letter, in which the Town asked Boston Properties to permit primary access to the Project to come through its site. In a letter dated April 3, 2003, Boston Properties responded directly to the Town refusing to permit primary access through its site. Copies of the letters from the Town to Boston Properties and from Boston Properties to the Town are in the Board's file for this application.
6. The following documents and exhibits, among others, were received during the public hearing:
 - Site Development Permit Plan prepared by Rizzo Associates, dated November 27, 2002 and updated through the hearing process.
 - Traffic Impact and Access Study prepared by Rizzo Associates, dated November 27, 2002.
 - Drainage Report, as submitted in Comprehensive Permit application, dated November 27, 2002.
 - SEA Consultants, Inc. peer review of drainage report and traffic study, dated April 22, 2003.
 - Response to peer review by Rizzo Associates, dated May 20, 2003.

- SEA Consultants, Inc. letter regarding pedestrian and bicycling safety, dated June 10, 2003.
 - Letter from Rizzo Associates regarding traffic issues, dated June 17, 2003.
 - Correspondence from the residents of Fisher Road, Andrews Way, Schipper Farms Lane, Choate Lane, Jericho Hill Road, and Northboro Road, dated May 5, 2003.
 - Correspondence from The Maggiore Companies, dated February 19, 2003.
7. Various correspondence, review and comment from Town Departments including:
 - A. Comprehensive 40B inter-departmental review team
 - B. Planning Board
 - C. Southborough Police Department
 - D. Southborough Fire Department
 8. Town of Southborough residents living in the Fisher Road area expressed concern that the project would increase serious traffic problems that already exist in the neighborhood. They voiced their dismay that there are no sidewalks proposed and that the Applicant has not done enough to work with the electric company to remove a ledge outcropping that obstructs motorist view near their facility.
 9. Applicant responded that they contacted the Massachusetts Electric Company, offering to pay for the removal of the ledge, offering to use a contractor of their choosing, offering to pay for any repairs or any damage that would possibly occur as a result of blasting. The company refused Applicant's request. Applicant submitted that the ledge outcropping is an existing condition over which they have no control. Applicant offered to continue to work with the electric company with the help of the Town of Southborough, stating that the Town might have additional authority in such matters.
 10. Applicant stated that many of the roads in the Town of Southborough are without sidewalks. Applicant offered that it might be possible to pull out the entrance a little into the town layout of Northboro Road, with the permission of the Town of Southborough, to improve sight distance, stating that it would be a low cost modification. Applicant also proposed a flashing signal to warn of oncoming motorists.
 11. The Applicant stated that the increased traffic due to the change from 306 to 332 units did not trigger the need for an EIR. However, a Notice of Project Change will be filed with MEPA for their review and possible action.
 12. The Board specifically finds that the increased traffic from this project represents only an incremental increase in the peak hour vehicle trips in Southborough. The main concern of the Board is the increase in traffic exiting the project onto Northboro Road. The ledge outcropping limits the sight distance from the east, and while this sight distance meets the requirements for the posted speed limit, it is not in accordance with the actual speed of

the traffic. The use of this road by students and school buses going to Algonquin Regional High School makes this a concern.

E. MITIGATION

Applicant agreed to the following:

- 1) A 200,000.00 cash contribution to the Town of Southborough
- 2) Annual contributions in an amount equal to 3% of the real estate taxes paid to the City of Marlborough.

Public Hearing closed on May 21, 2004 at 12:23 a.m. Meeting adjourned: 12:33 a.m.

DECISION

Pursuant to G.L. c. 40B, the Southborough Zoning Board of Appeals, after public hearing and findings of fact, hereby **GRANTS** by a vote of 4-1 (James W. Falconi in opposition) a *Comprehensive Permit* to the Applicant for the construction of 332 apartment dwelling units, with associated infrastructure improvements, as shown on the Site Plan, subject to the following conditions which shall be binding and enforceable against the applicant and its successors and/or assigns. Said approval is limited to those aspects that directly relate to and impact the Town of Southborough. The Town of Southborough makes no comment relative to, and has not considered, those issues that relate to or are located in the City of Marlborough. This decision should be considered in tandem with any decision rendered by the City of Marlborough.

The Applicant has requested, and the Board of Appeals hereby GRANTS the following waivers from local rules:

<u>Zoning ByLaw</u>	<u>Description</u>	<u>Proposal</u>
174-8.6	Use Regulation	Construction of access to multi-family dwellings with three hundred thirty-two (332) individual units accessed through an IP zoning district.
174-8.6.E.2	Dimensional Regulations	Allow the proposed development without site frontage.

This Decision relies on the March 5, 2004 stipulation agreed to by the City of Marlborough, the Town of Southborough, Fairfield Green at Marlborough, LP, and the Department of Housing and Community Development, attached herewith as Exhibit #1 and incorporated herein by reference.

<p><i>In favor:</i></p> <p><i>Thomas M. Starr, Chairman</i></p> <p><i>Salvatore M. Giorlandino</i></p> <p><i>Fred Scott</i></p> <p><i>William Keville</i></p>	<p><i>Opposed: James W. Falconi</i></p>
--	--

CONDITIONS

1. During all blasting and construction applicant shall conform with all local, state, and federal laws regarding noise, vibration, dust, sediment, and blocking of Town roads. The applicant shall sweep streets at least three times per week during construction. The applicant shall at all times use all reasonable means to minimize inconvenience to residents in the general area. Construction shall not commence on any day before 7:00 A.M. and shall not continue beyond 6:00 P.M. Routine maintenance of construction equipment may occur outside these established hours. There shall be no construction on any Sunday or state or federal legal holiday.
2. The Board of Appeals hereby requires that the Town of Southborough shall not have, now or ever, any legal responsibility for operation or maintenance of the following:
 - a. All roadways and parking areas (including sweeping and line marking)*
 - b. Stormwater management facilities
 - c. Snow and ice control
 - d. Landscaping
 - e. Trash removal
 - f. Street lighting

*In this regard, the Applicant shall not attempt to have the access driveway and the roadways within the development dedicated to or accepted by the Town of Southborough.
3. As built drawings shall be submitted to the Town of Southborough Department of Public Works.
4. The term "Applicant" as set forth herein shall mean the Applicant, its heirs, successors and assigns. This permit, in its entirety, including all conditions, may be transferred at any time to a limited dividend entity that controls, is controlled by, or is under the common control of the applicant, without approval of the Board of Appeals.
5. The Applicant shall pay to the Town of Southborough, as offered at the Public Hearing on May 20, 2004, the sum of Two Hundred Thousand (\$200,000.00) Dollars as mitigation for the project. Said mitigation payment shall be made prior to the issuance of the final certificate of occupancy for the Project's first unit to be occupied.
 - a) Twenty Five Thousand Dollars shall be apportioned to Southborough's share of the Rider-Request Transit Service Grant through the Boston MPO's 2004 Suburban Mobility Program;
 - b) One Hundred Seventy Five Thousand (\$175,000.00) Dollars shall be used to mitigate traffic and safety impacts along Fisher Road, at the intersection of Jericho Hill and Fisher Road, at the intersection of Jericho Hill and Northboro Road, or otherwise in the residential areas immediately affected by the increased traffic flow from this project

6. The Applicant shall pay to the Town of Southborough, for as long as the granted zoning relief remains in effect, an annual contribution equal to three (3%) percent of the real estate taxes paid to the City of Marlborough. This payment shall be made to the Town of Southborough at the same time the real estate taxes are paid to the City of Marlborough. Should these taxes be paid to Marlborough quarterly, the required payment to Southborough shall also be paid quarterly, and at the same time.
7. The Applicant shall modify the drainage design as per Rizzo Associates letter dated May 20, 2003.
8. The Applicant shall install Stop signs at the new internal intersection and at the entrance to the project site as per the Rizzo Associates letter dated May 20, 2003.
9. The Applicant shall, with the assent of the City of Marlborough, set aside 20% of the local preference affordable units for residents of the Town of Southborough, totaling eleven (11) units.
10. The Applicant shall design, subject to review and approval by the Town of Southborough Public Works Department and approval of other property owners as necessary, a modification of the intersection of their site driveway and Northboro Road to increase the sight distance from the east to the maximum practicable extent. In addition, the Applicant shall fund and execute the construction of that design. The design may include a warning sign for traffic approaching on Northboro Road from the east. Applicant per the Stipulation of Agreement, dated March 5, 2004, shall fully cooperate in the allocation of the percentage of units set forth therein, as specified in 'Exhibit 1' hereto.


Thomas M. Starr, Chairman

Notice: Appeals, if any, shall be made pursuant to Massachusetts General Law, Chapter 40A, s.17, and shall be filed within twenty (20) days after the filing of this notice in the Office of the Town Clerk, Town Hall, Southborough, Massachusetts.

**The Commonwealth of Massachusetts
Town of Southborough
Board of Appeals**

Date: June 30, 2004

**Certificate of Granting of Comprehensive Permit
(General Laws Chapter 40B, Section 21 - 23)**

The Board of Appeals of the Town of Southborough hereby certifies that a Comprehensive Permit has been granted:

To: Fairfield Green at Marlborough, L.P.

Address: 1424 Post Road

Town: Fairfield, Connecticut 06430

affecting the rights of the owner with respect to land or buildings at:
Map 70, Parcels 4 and 5 of the Town of Southborough Assessor's Map

And the said Board of Appeals further certifies that the Decision attached hereto is a true and correct copy of its Decision granting said Comprehensive Permit, and that copies of said Decision, and of all plans referred to in the Decision, have been filed with the Planning Board and Town Clerk.

The Board of Appeals also calls to the attention of the owner or applicant that the provisions of section (11) eleven of Massachusetts General Laws Chapter 40A shall apply to the Comprehensive Permit and that no permit, or any extension, modification or renewal thereof, shall take effect until a copy of the Decision, is recorded in the registry of deeds for the county and district in which the land is located, and indexed in the grantor index under the name of the owner of record, or is recorded and noted on the owner's certificate of title. Said Decision shall bear the certification of the Town Clerk that twenty days have elapsed after the Decision has been filed in the Office of the Town Clerk and no appeal has been filed or that, if such appeal has been filed, that it has been dismissed or denied. The fee for such recording or registering shall be paid by the owner or applicant.

Any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section (17) seventeen of MGL, Chapter 40A.


Thomas M. Starr, Chairman

Town Clerk

Filed with Southborough Town Clerk: June 30, 2004

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
DOCKET NO. 04-0025B

TOWN OF SOUTHBOROUGH AND THE
SOUTHBOROUGH ZONING BOARD OF
APPEALS,

Plaintiffs,

v.

MARLBOROUGH ZONING BOARD OF
APPEALS, FAIRFIELD AT
MARLBOROUGH, LLC, FAIRFIELD
REALTY, LLC, W/S DEVELOPMENT
ASSOCIATES, LLC, AND THE
DEPARTMENT OF HOUSING AND
COMMUNITY DEVELOPMENT OF THE
COMMONWEALTH OF
MASSACHUSETTS,

Defendants.

and

SHANES LANE, LLC,

Intervenor
Plaintiff.

STIPULATION

It is stipulated by all the parties who have appeared in this matter as follows:

1. Subject to the approval of the Court, the hearing presently scheduled in this matter for March 5, 2004 is continued without date.

2. To facilitate and effect a resolution of this matter, the parties will proceed as follows:

- (a) The Fairfield defendants will make the appropriate submittals to seek approval under their currently pending applications for a comprehensive permit for the construction of a 332 unit plan, as expeditiously as possible.
- (b) The Marlborough Zoning Board of Appeals and the Southborough Zoning Board of Appeals will expeditiously consider the comprehensive permit applications with a view toward the issuance of a decision by each Board no later than May 1, 2004.
- (c) Fairfield agrees to apply expeditiously for building permits for all units approved for the project promptly after all permits necessary to perfect Fairfield's rights to seek building permits have become final in a form acceptable to Fairfield with no appeals pending.

3. By agreement between Plaintiffs town of Southborough Zoning Board of Appeals and Defendant Marlborough Zoning Board of Appeals, on behalf of the City of Marlborough, upon approval of the Fairfield M.G.L. c. 40B Comprehensive Permit Project for 332 rental units, thirty (30) affordable housing credits units will be allocated and distributed to the Town of Southborough for its affordable housing inventory, as maintained by the State Department of Housing and Community Development (DHCD). This allocation and distribution is made by the City and the Town pursuant to the directions and suggestions made by the Director of DHCD, Jane Gumbel, in correspondence dated September 24, 2003. The units to be transferred to the Town will

be consistent with 760 CMR 31.04 1(a) that is, Southborough will be allocated the 30 affordable units credits when the Comprehensive Permits from both Southborough and Marlborough become final, and thereafter subject to applicable regulations. To the extent less than 332 units are available to count toward the statutory minima established in G.L. c. 40B, §29, at any point in time, 10% of the total number of qualifying units available to count toward the minima shall be allocated and distributed to Southborough and the balance to Marlborough.

4. Defendant DHCD accepts and will reflect this allocation and distribution of qualifying units on its affordable housing inventory for Marlborough and Southborough.

5. The Complaint of Shane's lane, LLC, is dismissed.

6. DHCD agrees to credit the qualifying units allocated and distributed to Southborough pursuant hereto to the Town of Southborough's Planned Unit Production in the manner specified in 760 CMR 31.07(i).

7. Both the Marlborough Zoning Board of Appeals and the Southborough Zoning Board of Appeals agree to return to public hearing review and deliberations of the Fairfield project forthwith and in an expedited manner. Said Boards, in furtherance hereof shall immediately undertake to complete proceedings regarding conditions of the respective Comprehensive Permits including completion of discussions on the appropriate level of mitigation.

8. Provided all parties to this stipulation are in compliance with their obligations hereunder, no further request for injunctive relief or for any relief for which would in any way interfere with the progress of the hearings before the Marlborough and

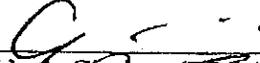
Southborough Zoning Boards of Appeals which are the subject of this stipulation will be made by any party.

9. Upon the issuance of building permits by the appropriate authority in Marlborough and the expiration of any appeal period therefrom for Fairfield's comprehensive permit project (the "Marlborough Final Permit"), all claims asserted by the plaintiffs in this action will be dismissed as to all parties without prejudice and without costs, and upon the issuance of both the Marlborough Final Permit and a building permit for the Fairfield comprehensive permit application in Southborough by the appropriate authority in Southborough, and the expiration of any appeal period therefrom, Fairfield's counterclaim in this action will be dismissed without prejudice and without costs.

10. In the event that Fairfield no longer utilizes land located within the Town of Southborough, it is understood and agreed that this agreement shall become void and the issuance of any credits by DHCD to said Town shall be withdrawn, and, additionally, if special zoning relief by a MGL Chapter 40B Comprehensive Permit is granted by Southborough, then the parties further acknowledge that said relief would be rescinded together with the Permit.

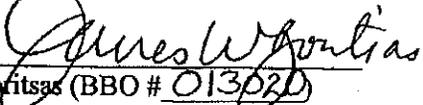
Plaintiffs,
SOUTHBOROUGH ZONING BOARD
OF APPEALS AND THE TOWN OF
SOUTHBOROUGH

By their attorney,


Aldo A. Cipriano (BBO #084300)
Town Counsel
277 Main Street
Marlborough, MA 01752
(508) 485-7245

Defendant,
MARLBOROUGH ZONING BOARD OF
APPEALS

By its attorney,


James Agoritsas (BBO # 013020)
City Solicitor
City of Marlborough
140 Main Street
Marlborough, MA 01752

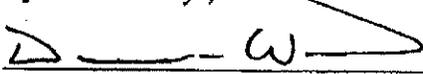
Defendant,
DEPARTMENT OF HOUSING AND
COMMUNITY DEVELOPMENT

By its attorney:


James J. Arguin (BBO # 557350)
Assistant Attorney General
Commonwealth of Massachusetts
One Ashburton Place, 20th Floor
Boston, MA 02108

Defendant,
FAIRFIELD AT MALBOROUGH, LLC
FAIRFIELD REALTY LLC

By their attorneys,


David S. Weiss (BBO #521090)
Kurt W. Hague (BBO #643267)
Goulston & Storrs
A Professional Corporation
400 Atlantic Avenue
Boston, MA 02110-3333
(617) 482-1776

Intervenor,
SHANES LANE, LLC

By its attorney,


Arthur Bergeron (BBO # 038960)
27 Prospect Street
Marlborough, MA 01752

Dated: March __, 2004

ATTEST: WORC. Anthony J. Vigliotti, Register



BOHLER
ENGINEERING

ENGINEERING MEMORANDUM

DATE: September 23, 2016

TO: Krebs Investor Group
Justin Krebs, Geoff Engler

FROM: John A. Kucich, P.E., Bohler Engineering
Jesse M. Johnson, P.E., Bohler Engineering

SUBJECT: Forest Ridge Residences – Project Area Clarification

We are writing this memorandum to clarify the parcel area associated with the Forest Ridge Residences Site Approval Application. After receiving further clarification from the property's ownership group, we understand that the total acreage of the site proposed for use as part of this project will include only 3 of the parcels described in the original application document, as listed below:

1. 9.05 acres in Winchester which contains frontage on Forest Circle in Winchester as shown on a plan of land by Parker Holbrook dated May 10, 1944
2. 4.26 acres on a plan titled "Plan of Land in Stoneham and Winchester, Mass" by Warrant M. Mirick, Reg. Surveyor, dated October 16, 1959, recorded with the Middlesex South District Registry of Deeds in book 9601, Page 557.
3. Roughly a quarter of an acre contiguous to the above parcel in Stoneham Massachusetts and referred to as Access Parcel" in a cert Deed dated August 7, 1968 recorded at Book 11552, Page 537.

Please allow this Memorandum to serve as a correction for the total Project Area associated with the Forest Ridge Residences. The total area is 592,303 square feet (+/-13.597 Acres). The development plans submitted as part of the Property Eligibility Letter Application utilize only the above mentioned parcels.

Existing Conditions

The Applicant is providing a brief summary of the existing conditions in conjunction with the plans and reports submitted by the Applicant's civil engineering firm Bohler Engineering.

Existing Conditions

The subject site consists of 592,303 square feet (13.597 acres) of land located off of Forest Circle in the Town of Winchester, MA ("Site"). The property is further identified as Parcel 26-0-1A on the Town of Winchester Tax Assessor's Maps.

The Site abuts the Town of Stoneham to the southeast with a common property line in excess of 650 feet. Access rights are available through an existing fifty (50) foot wide strip that connects the locus parcel to the right-of-way of Fallon Road in Stoneham. There is common ownership of the access strip and the locus parcel. Access is also available to Forest Circle in Winchester through 122.33 feet of frontage along the Forest Circle right-of-way.

The Site is bordered by residential subdivisions to the northeast, northwest, and southwest. These abutting properties are developed with residential dwellings and uses. The abutting parcel to the southeast in Stoneham is currently owned by Park Avenue, LLC and developed with an industrial warehouse building.

The Site is currently undeveloped consisting of conifer and deciduous woods throughout and bordering vegetated wetlands to the south and southeast. There are also sporadic areas of exposed ledge on the Site. The Site topography consists of slopes ranging from 2% up to 50% with onsite elevations ranging from 118 at the frontage along Forest Circle to 192 along the northeastern property line. In general, the northwestern half of the Site drains overland toward Forest Circle and the abutting properties. The southeastern half of the Site drains overland toward the bordering vegetated wetlands.

Municipal water and sewer are available in Forest Circle. Electric, cable and telephone services are available via aboveground utilities along Forest Circle. There is an existing gas main within Fallon Road in Stoneham.

**Application for Chapter 40B Project Eligibility/Site Approval
for MassHousing-Financed and New England Fund ("NEF") Rental Projects**

Section 2: EXISTING CONDITIONS / SITE INFORMATION (also see Required Attachments listed at end of Section 2)

In order to issue Site Approval, MassHousing must find (as required by 760 CMR 56.04 (4)) that the site is generally appropriate for residential development.

Name of Proposed Project: Forest Ridge Residences

Buildable Area Calculations	Sq. Feet/Acres (enter "0" if applicable—do not leave blank)
Total Site Area	592,303 SF
Wetland Area (per MA DEP)	148,494 SF
Flood/Hazard Area (per FEMA)	
Endangered Species Habitat (per MESA)	
Conservation/Article 97 Land	
Protected Agricultural Land (i.e., EO 193)	
Other Non-Buildable (Describe)	
Total Non-Buildable Area	
Total Buildable Site Area	592,303 SF

Current use of the site and prior use if known: undeveloped land.

Is the site located entirely within one municipality? Yes No

If not, in what other municipality is the site located? _____

How much land is in each municipality? (the Existing Conditions Plan must show the municipal boundary lines) _____

Current zoning classification and principal permitted uses: Single Family Residential, RDB-10 Zone

Previous Development Efforts

Please list (on the following page) any previous applications pertaining to construction on or development of the site, including (i) type of application (comprehensive permit, subdivision, special permit, etc.); (ii) application filing date; (iii) date of denial, approval or withdrawal. Also indicate the current Applicant's role, if any, in the previous applications.

Note that, pursuant to 760 CMR 56.03 (1), a decision of a Zoning Board of Appeals to deny a Comprehensive Permit, or (if the Statutory Minima defined at 760 CMR 56.03 (3) (b or c) have been satisfied) grant a Comprehensive Permit with conditions, shall be upheld if a related application has previously been received, as set forth in 760 CMR 56.03 (7).

**Application for Chapter 40B Project Eligibility/Site Approval
for MassHousing-Financed and New England Fund ("NEF") Rental Projects**

Please be sure to answer ALL questions. Indicate "N/A", "None" or "Same" when necessary.

Section 1: GENERAL INFORMATION (also see Required Attachments listed at end of Section 1)

Name of Proposed Project: Forest Ridge Residences

Municipality: Winchester

Address of Site: Forest Circle

Cross Street (if applicable): _____

Zip Code: 01890

Tax Parcel I.D. Number(s) (Map/Block/Lot): 26-0-1A

Name of Proposed Development Entity (typically a single purpose entity): _____

KIG Forest Ridge Development, LLC

Entity Type: Limited Dividend Organization Non-Profit* Government Agency

* If the Proposed Development Entity is a Non-Profit, please contact MassHousing regarding additional documentation that must be submitted.

Has this entity already been formed? Yes No

Name of Applicant (typically the Proposed Development Entity or its controlling entity or individual): _____

KIG Forest Ridge Development, LLC

Applicant's Web Address, if any: _____

Does the Applicant have an identity of interest with any other member of the development team or other party to the Proposed Project? Yes No If yes, please explain: _____

Primary Contact Information (required)

Name of Individual: Justin D. Krebs

Relationship to Applicant: Developer

Name of Company (if any): KIG Forest Ridge Development, LLC

Street Address: 390 Commonwealth Ave, PH4

City/State/Zip: Boston, MA 02215

Telephone (office and cell) and Email: 617-638-3458; jkrebs@transnationalgroup.com

Secondary Contact Information (required)

Name of Individual: Geoff Engler

Relationship to Applicant: 40B Consultant

Name of Company (if any): SEB, LLC

Street Address: 165 Chestnut Hill Ave #2

City/State/Zip: Brighton, MA 02135

Telephone (office and cell) and Email: gengler@s-e-b.com; 617-782-2300 x 202

**Application for Chapter 40B Project Eligibility/Site Approval
for MassHousing-Financed and New England Fund ("NEF") Rental Projects**

Section 6: APPLICANT QUALIFICATIONS, ENTITY INFORMATION AND CERTIFICATION

In order to issue Site Approval, MassHousing must find (as required by 760 CRM 56.04 (4)) that the applicant is either a non-profit public agency or would be eligible to apply as a Limited Dividend Organization and meets the general eligibility standards of the program.

Name of Proposed Project: Forest Ridge Residences

Development Team

Developer/Applicant: KIG Forest Ridge Development, LLC

Development Consultant (if any): SEB, LLC

Attorney: _____

Architect: Elkus Manfredi Architects

Contractor: _____

Lottery Agent: _____

Management Agent: _____

Other (specify): LEC Environmental Consultants, Inc.

Other (specify): Bohler Engineering

Role of Applicant in Current Proposal

Development Task	Developer/Applicant	Development Consultant (identify)
Architecture and Engineering		Elkus Manfredi Architects and Bohler Engineering
Local Permitting		SEB, LLC
Financing Package		
Construction Management		
Other		

Applicant's Ownership Entity Information

Please identify for each of (i) the Applicant and, if different (ii) the Proposed Development Entity, the following (collectively with the Applicant and the Proposed Development Entity, the "Applicant Entities"): the Managing Entities, Principals, Controlling Entities and Affiliates of each.

Note: For the purposes hereof, "Managing Entities" shall include all persons and entities (e.g., natural persons, corporations, partnerships, limited liability companies, etc., including beneficiaries of nominee trusts) who are managers of limited liability companies, general partners of limited partnerships, managing general partners of limited liability partnerships, directors and officers of corporations, trustees of trusts, and other similar persons and entities that have the power to manage and control the activities of the Applicant and/or Proposed Development Entity.

"Principal or Controlling Entities" shall include all persons and entities (e.g., natural persons, corporations, partnerships, limited liability companies, etc., including beneficiaries of nominee trusts) that shall have the right to

- (i) approve the terms and conditions of any proposed purchase, sale or mortgage;
- (ii) approve the appointment of a property manager; and/or
- (iii) approve managerial decisions other than a decision to liquidate, file for bankruptcy or incur additional indebtedness.

Such rights may be exercisable either (i) directly as a result of such person's or entity's role within the Applicant or the Proposed Development Entity or the Managing Entities of either or (ii) indirectly through other entities that are included within the organizational structure of the Applicant and/or Proposed Development Entity and the Managing Entities of either.

In considering an application, MassHousing will presume that there is at least one Principal or Controlling Entity of the Applicant and of the Proposed Development Entity. Any person or persons who have purchased an interest for fair market value in the Applicant and/or Proposed Development Entity solely for investment purposes shall not be deemed a Principal or Controlling Entity.

"Affiliates" shall include all entities that are related to the subject organization by reason of common control, financial interdependence or other means.

Applicant

Name of Applicant: KIG Forest Ridge Development, LLC

Entity Type (limited liability company, limited partnership, limited liability partnership, corporation, trust, etc.):
LLC

State in which registered/formed: MA

List all Managing Entities of Applicant (you must list at least one): _____

KIG Forest Ridge Development, LLC

List all Principals and Controlling Entities of Applicant and (unless the Managing Entity is an individual) its Managing Entities (use additional pages as necessary): _____

Justin Krebs

List all Affiliates of Applicant and its Managing Entities (use additional pages as necessary): _____

Krebs Investor Group, LLC

KIG Forest Ridge Development, LLC

2. Proposed Development Entity

Name of Proposed Development Entity: Krebs Investor Group, LLC

Entity Type *(limited liability company, limited partnership, limited liability partnership, corporation, trust, etc.):*
LLC

State in which registered/formed: MA

List all Managing Entities of Proposed Development Entity *(you must list at least one):* _____

Krebs Investor Group, LLC

KIG Forest Ridge Development, LLC

List all Principals and Controlling Entities of Proposed Development Entity and *(unless the Managing Entity is an individual)* its Managing Entities *(use additional pages as necessary):* _____

Justin Krebs

List all Affiliates of Proposed Development Entity and its Managing Entities *(use additional pages as necessary):* _____

Krebs Investor Group, LLC

KIG Forest Ridge Development, LLC

Applicant Entity 40B Experience

Please identify every Chapter 40B project in which the Applicant or a member of the project team has or had an interest. For each such project, state whether the construction has been completed and whether cost examination has been submitted *(use additional pages as necessary)*.

40B Project	Applicant or Team Member	Role	Municipality	Number of Units/Type	Year Completed	Cost Cert Submitted?
Greendale Village	Team Member	Developer	Needham	20/For-sale	Q4 2015	Not yet
The Village on Main	Team Member	Developer	Newton	20/For-sale	TBD	No
75/83 Court Street	Team Member	Developer	Newton	36/For-sale	TBD	No
Parkview Homes	Team Member	Developer	Newton	10/For-sale	2011	Yes
416 Cambridge	Team Member	Developer	Winchester	96/Rental	TBD	No