



March 4, 2016

**BY ELECTRONIC MAIL: jeanne.guthrie@sherbornma.org
AND BY FIRST CLASS MAIL**

Sherborn Zoning Board of Appeals
Sherborn Town Hall
19 Washington Street
Sherborn, MA 01770

Re: Application for Comprehensive Permit – 247 Washington Street, Sherborn

Dear Members of the Board:

As you know, this firm represents neighbors and abutters to the proposed 32-unit residential development located at 247 Washington Street in Sherborn (the “Project” and the “Project Site”), which is the subject of a pending application for a comprehensive permit under General Laws Chapter 40B, Sections 20-23 proposed by The Fields at Sherborn, LLC (the “Developer”). At the last two Zoning Board hearings on this application, the issue of burdens of proof and legal standards arose. There was some confusion over the applicability of the standards discussed in the *Reynolds v. Stow ZBA* case. I would like to clarify what legal standards the Board should be applying to this application for a comprehensive permit.

Under Chapter 40B, the general legal standard applied to the Board’s decision on a comprehensive permit application is whether the decision is “consistent with local needs.” G.L. c. 40B, §20. In municipalities like Sherborn where less than 10% of the housing stock qualifies as “low or moderate income housing,” there is a rebuttable presumption that the need for low or moderate income housing (the “Housing Need”) outweighs any reasonable local concerns that may be presented by the project, such as a threat to public health, safety or the environment (“Local Concern”). Zoning Bd. of Lunenburg v. Hous. Appeals Comm., 464 Mass. 38, 42 (2010).

Denial of Comprehensive Permit

When a zoning board *denies* a comprehensive permit, the developer must first demonstrate that the Project complies with federal and state standards or regulations. See, 760 CMR §56.07(2)(b)(2). The language of the regulation suggests that this evidentiary burden is

optional, but the practice of the Housing Appeals Committee has consistently required the developer to satisfy this burden. Housing Appeals Committee Standing Order 11-01 requires the parties to draft and execute a “Pre-Hearing Order,” which serves as the governing outline for the presentation of evidence in the HAC’s evidentiary hearing. The Standing Order expressly requires that the Pre-Hearing Order conform to the “Forms for Pre-Hearing Orders” that are attached to the Standing Order. The form Pre-Hearing Order for appeals that concern *denials* of comprehensive permits expressly imposes an evidentiary burden on the developer to “establish a prima facie case by proving that its proposal complies with federal or state statutes or regulations or with generally recognized standards with regard to the following specific issues of local concern.” See, Standing Order 11-01 and Form Pre-Hearing Order, attached hereto as Exhibit A.

If the developer satisfies this initial evidentiary burden, the Board then has the burden “of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need.” Zoning Bd. of Appeals of Lunenburg, 464 Mass. at 42, quoting, 760 CMR §56.07(2)(b)(2).

Conditional Approval of Comprehensive Permit

When a board issues an *approval* of a comprehensive permit with conditions, and the developer appeals to the Housing Appeals Committee, “the applicant shall have the burden of proving that the conditions make the building or operation of the housing uneconomic.” Woburn Zoning Bd. of Appeals v. Hous. Appeals Comm., 451 Mass. 581, 584 (2008), quoting, 760 CMR §31.06(3) (now 760 CMR §56.07(2)(a)(3)). If the applicant presents evidence sufficient to meet this burden, the burden shifts to the board to prove, “first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need.” 760 CMR §56.07(2)(b)(3). The regulation proscribing these burdens of proof is reproduced in the appendix attached to this letter.

In this case, the Board has two options – it could either deny the permit or approve it with conditions. A denial would be supported by two related factors. First, the Project doesn’t comply with state environmental regulations and standards - the Project was denied both a state Title 5 permit from the Board of Health, and an Order of Conditions under the state Wetlands Protection Act from the Conservation Commission. Second, there are significant “local concerns” presented by the Project application that have not been adequately addressed by the Developer, specifically, the threats of contamination posed by the septic system and stormwater management system on downgradient wells and wetlands. These threats have been thoroughly documented through the course of the Board’s public hearing, by expert hydrologists retained by the Neighbors and the Town of Sherborn, and by the Sherborn Conservation Commission.

Similarly, an approval with conditions would be supported by the same “local concerns.” An approval with conditions would likely be viewed as a more reasonable approach by the Housing Appeals Committee than a straight denial, in that it would still allow the Developer to

construct a project on the Project Site, just in way that ensures that the wells and wetlands are protected.

The Board's Standard of Review on a Comprehensive Permit Application

At the previous two Zoning Board hearings, there was some discussion as to whether the Neighbors or the Town of Sherborn bears the burden to demonstrate specific environmental harm or public health or safety risks as a predicate to the Zoning Board rendering a decision that either denies the comprehensive permit, or approves it with conditions. Neither Chapter 40B nor its regulations provide or require such an evidentiary burden be satisfied as a prerequisite to a zoning board decision. In fact, neither the Neighbors nor the Town of Sherborn are parties to the comprehensive permit application proceeding before the Zoning Board, and it would be unreasonable and illogical to expect non-parties to have any kind of evidentiary burden in this proceeding. The regulations do not proscribe any burdens of proof for zoning board Chapter 40B hearings – the regulations only proscribe the evidentiary burdens in the event of a developer appeal to the HAC.

The Board's decisionmaking on this application should be guided by the Chapter 40B regulations, and the appellate-level decisional law under the statute, as summarized above. The *Reynolds v. Stow* case is instructive, in that the Appeals Court annulled a decision approving a comprehensive permit where there was sufficient evidence that the project's septic system would contaminate drinking water wells. Arguably, one could read this decision as meaning that when presented with such evidence, a zoning board should deny a comprehensive permit. The more conservative (safer) approach, in my opinion, would be to condition your approval of a comprehensive permit in such a way to eliminate environmental and public health risks, rather than deny the permit outright. In some cases it might be impossible to condition a permit in such a way as to eliminate all concerns, but I do not believe that to be the case here.

There has been some confusion over the applicability of the legal standards in the *Reynolds v Stow* case to this application. Specifically, there was some discussion over whether the Board's denial of waivers had to be predicated on solid evidence (proof) that waiving protective bylaws or regulations would result in specific environmental harm, or impact to the public health. In *Reynolds*, the Appeals Court's ruling was premised on such evidence. However, in *Reynolds* the plaintiff was an abutter challenging the issuance of a comprehensive permit, which challenge was governed by the judicial review provisions of the Zoning Act, G.L. c. 40A, §17, and decisional law that has evolved under that provision. See, G.L. c. 40B, §21 (importing the review provisions of the Zoning Act into Chapter 40B). Once a permit is issued, an abutter or other "party in interest" can seek judicial review, but first must demonstrate that he is a "person aggrieved" by the issuance of the permit. Even if the plaintiff can demonstrate standing, the plaintiff must still prove that the zoning board's decision was arbitrary, capricious or an abuse of discretion, or that the board's decision exceeded its legal authority. This is a pretty amorphous standard, and it has been applied in number of different ways by the appellate courts. But one thing is sure – the burden on a plaintiff challenging a zoning permit is steep and not easily met.

It would be entirely illogical, and probably “arbitrary and capricious,” to import the high evidentiary standards in judicial review of zoning decisions (such as the *Reynolds* case) to the Board’s consideration of a comprehensive permit application. First, it would be unclear who would bear that burden, since the only party to the application is the developer. While the Neighbors and members of other Town boards and commissions were active participants in the public hearing process on this application, there are certainly plenty of other cases where no interested parties participate. In those situations, if a public health or environmental concern is present that would justify a denial or conditions, the Board would not be precluded from taking the appropriate action merely because no one was there to make the argument, and indeed should act accordingly to protect the public interest that may not be represented.

Second, by requiring someone to present proof of impacts, the Board would, in effect, be abdicating its statutory responsibility under Chapter 40B to balance local concerns with the need for affordable housing. As illustrated by the facts of this case, predicting with 100% certainty that a septic system will cause a well to be contaminated (i.e., exceed a state drinking water standard), or cause a wetland to be materially degraded is scientifically impossible. The best we can do is use predictive models based on the best knowledge of existing environmental conditions and future plans for development, and have experts in the relevant scientific fields advise us on what those models tell us. It should be noted that the quality of those predictable models depends on information being made available by the applicant, including physical access onto the Project Site, which was denied in this case. Here, the experts have concluded, based on the best information available, that the Project, as currently designed, will likely cause exceedances of state drinking water standards in on-site and abutting wells, and will likely cause degradation of the wetland system on the Project Site, which is tributary to a public water supply in Holliston. This evidence in the Board’s record is more than sufficient to justify a denial, or conditions that address the environmental and public health impacts, or deny waivers from the bylaws and regulations that would otherwise prevent or mitigate such impacts, as we previously recommended in our letter of February 9, 2016.

Thank you for your continued diligence in this matter.

Very truly yours,

/s/ Daniel C. Hill

Daniel C. Hill

Enc.

cc: Mark Kablack, Esq.
Board of Health
Conservation Commission
Board of Selectmen
Clients

Sherborn Zoning Board of Appeals

March 4, 2016

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APPENDIX

760 CMR §56.07(2) - (2) Burdens of Proof

(a) Applicant's Case.

1. The Applicant shall have the burden of proving that it has met the project eligibility requirements of 760 CMR 56.04(1). Such burden shall be conclusively met in accordance with the procedure set forth in 760 CMR 56.04(6), except in the event of a substantial change affecting the project eligibility requirements, which shall be reviewed in accordance with 760 CMR 56.04(5).

2. In the case of a denial, the Applicant may establish a *prima facie* case by proving, with respect to only those aspects of the Project which are in dispute (which shall be limited), in the case of a Pre-hearing Order, to contested issues identified in the pre-hearing order, that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern.

3. In the case of an approval with conditions, the Applicant shall have the burden of proving that the conditions make the building or operation of the Project Uneconomic.

4. In the case of either a denial or an approval with conditions, the Applicant may prove that Local Requirements and Regulations have not been applied as equally as possible to subsidized and unsubsidized housing. The Applicant shall have the burden of proving such inequality.

(b) Board's Case.

1. In any case, the Board may show conclusively that its decision was Consistent with Local Needs by proving that one or more of the grounds described in 760 CMR 56.03(1) has been satisfied, in accordance with the procedure set forth in 760 CMR 56.03(8). The Board shall have the burden of proving satisfaction of such grounds.

2. In the case of denial, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need.

3. In the case of an approval with conditions, relative to which the Applicant has presented evidence that the conditions make the Project Uneconomic, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such conditions, and then, that such Local Concern outweighs the Housing Need.

4. In the case of either a denial or an approval with conditions, if the denial or conditions are based upon

the inadequacy of existing municipal services or infrastructure, the Board shall have the burden of proving that the installation of services adequate to meet local needs is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly.

(c) **Applicant's Rebuttal.** In the case of a denial or an approval with conditions, the Applicant shall have the burden of proving that preventive or corrective measures have been proposed which will mitigate the Local Concern, or that there is an alternative means of protecting Local Concerns which makes the project economic.

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

STANDING ORDER NO. 11-01

PRE-HEARING ORDERS

Applicable to all Matters before the Committee on November 9, 2011, and thereafter.

Effective November 9, 2011, it is hereby ORDERED that:

Pursuant to 760 CMR 56.06(7)(d)(3), “prior to the evidentiary portion of the hearing, the presiding officer may issue a pre-hearing order, which, if possible, shall be drafted jointly by the parties.” In drafting such orders, the parties shall, unless granted leave by the presiding officer to proceed otherwise, conform to the “Forms for Pre-Hearing Orders” posted on the Committee’s website, as they may be modified from time to time.

Adopted: November 9, 2011

Effective: November 9, 2011.

Housing Appeals Committee

Werner Lohe
Chairman

F O R M S
F o r
P R E - H E A R I N G O R D E R S

The attached forms should be used for all hearings before the Housing Appeals Committee. It is the responsibility of counsel to discuss the contents of the Pre-Hearing Order well in advance of the Pre-Hearing Conference, and prepare a single draft. Any areas of disagreement will be discussed with the presiding officer at the conference. The pre-Hearing Order will be signed at the Conference or shortly after.

This Pre-Hearing Order should not require substantial redrafting. Sections II through VII should be *completed* by counsel, adding specifics that apply in the particular case. Subparagraphs that are not applicable may be deleted, but language in the form **should not be changed until it is discussed with the presiding officer** at the Pre-Hearing Conference.

Exhibits should be exchanged in advance and counsel should attempt to agree on the admission of as many as possible. Exhibits that cannot be agreed upon should be listed in the Pre-Hearing Order as Proposed Exhibits. Their admissibility will either be ruled upon by the presiding officer at the Pre-Hearing Conference or, if the hearing is oral (without prefiled testimony), during the course of the hearing. Exhibits should be listed with consecutive numbers, without regard to whether they are the Appellant's or the Board's exhibits. The exhibits themselves will normally be physically numbered during the Pre-Hearing Conference.

Witness lists should also be exchanged in advance. Each list should be given careful consideration to avoid duplication. Witnesses should be listed with their titles or functions. If the subject matter of their testimony is not clear from their titles or functions, short explanations should be provided.

Two documents are attached below. The first is a form to be used in cases in which the Board issued a denial; the second is for cases in which a permit was granted with conditions. These documents are available in Word.

The draft Pre-Hearing Order and all agreed upon and proposed Exhibits should be filed with the Committee one week prior to the Pre-Hearing Conference.

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

<hr/>)	
[Developer],)	
	Appellant)	
)	
v.)	No. ____ - ____
)	
)	
[Town] BOARD OF APPEALS,)	
	Appellee)	
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DRAFT (DENIAL)

[DATE OF DRAFT]

PRE-HEARING ORDER

I. INTRODUCTION

1. Pursuant to 760 CMR 56.06(7)(d), this pre-hearing order formalizes matters agreed to by the parties at and following the Preliminary Conference of Counsel [DATE], 201[X] and Pre-Hearing Conference [DATE], 201[X] in the above case. Its purpose is to facilitate the presentation of evidence at the *de novo* hearing before the Housing Appeals Committee.

2. For good cause, either party may at any time request modification of this order. Any such request for modification of Stipulations, Issues in Dispute, or Proposed Witnesses shall be by written motion as provided in 760 CMR 56.06(5)(a) and (c). A request for modification of Exhibits may be made orally during an evidentiary session of the hearing, provided that five days prior notice has been given to opposing counsel.

II. STIPULATIONS

1. By decision filed with the town clerk on [DATE], with regard to the parcel of land located [ADDRESS], [Town] Board of Appeals denied the Appellant's application for comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 (see Exhibit 2).

2. The town of [Town] has not satisfied any of the statutory minima defined in sentence two of the definition of “consistent with local needs” in G.L. c. 40B, § 20.

3. The Appellant, [DEVELOPER], has received a determination of Project Eligibility pursuant to 760 CMR 56.04 under the [NAME OF HOUSING PROGRAM], fulfilling the project eligibility requirements of 760 CMR 56.04(1).¹ (See Exhibit 1.)

4. [OTHER STIPULATIONS, INCLUDING ELEMENTS OF EITHER PARTY’S CASE, BELOW, THAT ARE NOT IN DISPUTE]

III. MOTIONS [OPTIONAL]

As further specified in the pleadings on file with the Committee, the parties have moved as follows:

1. Outstanding Motions

- a. Appellant’s Motion to ... (filed __/__/__)
- b. Board’s Motion to ... (filed __/__/__)

2. Motions that have been Ruled Upon

- a. Appellant’s Motion to ... (filed __/__/__) - Ruling __/__/__: Granted/Denied
- b. Board’s Motion to ... (filed __/__/__) - Ruling __/__/__: Granted/Denied

Should this matter be subject to appeal to the courts, the parties reserve their rights with regard to motions that have been ruled upon.

The parties reserve the right to file motions to strike objectionable portions of prefiled testimony if necessary.

1. [ALSO SEE *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 520-521 (2007)(requirements are not jurisdictional, but rather a substantive aspect of the appellant’s case).]

IV. ISSUES IN DISPUTE AND BURDENS OF PROOF

1. Pursuant to 760 CMR 56.07(1)(a), the central issue in this case is whether the decision of the Board was consistent with local needs.

2. Pursuant to 760 CMR 56.07(2), the issues below are the sole issues in dispute, and the parties shall have the burden of proving their cases as follows:

Appellant/Applicant's Case

[ONLY IF THERE IS NO STIPULATION IN THIS REGARD IN ¶ II-3, ABOVE:

X. to prove that it has met the project eligibility requirements of 760 CMR 56.07(2)(a)(1), 56.04(1), and 56.04(6). See Exhibit 1.]

3. to establish a prima facie case by proving that its proposal complies with federal or state statutes or regulations or with generally recognized standards with regard to the following specific issues of local concern:²

(a) [issue heading] - (for specific issue, see ¶ IV-5(a), below)

(b) [issue heading] - (for specific issue, see ¶ IV-5(b), below)

(c) [issue heading] - (for specific issue, see ¶ IV-5(c), below)

4. [ONLY IF THE APPELLANT CHOOSES TO PURSUE THIS ISSUE] alternatively, to prove that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing with regard to these specific issues:³

(a) [issue]

(b) [issue]

Board's Case

5. to prove that valid health, safety, environmental, design, open space, or other local concerns which support the denial of the comprehensive permit, that is, to prove a local concern with regard to each of the specific issues in ¶ IV-4, above.⁴

For each such issue, the local bylaw, regulation, requirement, or other restriction upon which the Board relies and the Board's position with regard to it is as follows:

2. 760 CMR 56.07(2)(a)(2).

3. 760 CMR 56.07(2)(a)(4).

4. 760 CMR 56.07(2)(b)(2).

(a) [issue heading from ¶ IV-4, above] - [citation to bylaw, reg., etc.] - [position, claim, or allegation]

(b) [issue heading from ¶ IV-4, above] - [citation to bylaw, reg., etc.] - [position, claim, or allegation]

(c) [issue heading from ¶ IV-4, above] - [citation to bylaw, reg., etc.] - [position, claim, or allegation]

6. to prove that such local concerns outweigh the regional housing need.⁵

7. [ONLY IF INADEQUACY OF EXISTING MUNICIPAL SERVICES OR INFRA-STRUCTURE IS IN ISSUE] to prove that existing municipal services or infrastructure, namely, _____ (¶ __, above), are inadequate to meet local needs, and that provision of such services is not [CHOOSE ONE] technically/financially feasible.⁶

Appellant/Applicant's Rebuttal

8. to prove that preventive or corrective measures have been proposed which will mitigate the local concerns.

5. 760 CMR 56.07(2)(b)(2).

6. 760 CMR 56.07(2)(b)(4).

V. EXHIBITS

Exhibits Admitted into Evidence⁷

1. Determination of Project Eligibility - __/__/__
2. Decision of [Town] Board of Appeals - __/__/__
3. Site Development Plans⁸ [required]
4. Architectural Plans [if necessary]
5. List of Requested Waivers of local requirements⁹ [required]
6. Regulatory Agreement [required]
7. Deed Rider [if homeownership]
8. Ltr. to [Name] fr. [Name] - __/__/__
9. Memo to [Name] fr. [Name] - __/__/__
10. etc., etc.

Proposed Exhibits (Admissibility to be Ruled Upon at the Pre-Hearing Conference or during the Hearing)

For the Appellants

- .
- .

For the Board

- .
- .

7. [ALL DOCUMENTS IN EXISTENCE AT THE TIME OF SIGNING OF THIS PRE-HEARING ORDER WHICH ARE KNOWN TO COUNSEL OR SHOULD BE KNOWN TO COUNSEL ARE TO BE ADMITTED INTO EVIDENCE OR PROPOSED FOR ADMISSION. LATE-FILED EXHIBITS WILL BE ADMITTED ONLY IF THEY WERE NOT IN EXISTENCE WHEN THE PRE-HEARING ORDER WAS SIGNED (TYPICALLY, THESE ARE DOCUMENTS PREPARED BY A WITNESS IN AID OF HIS OR HER TESTIMONY) OR DUE TO OTHER EXTENUATING CIRCUMSTANCES.]

8. [ITEMS V-3 THROUGH V-7 SHOULD DESCRIBE THE CURRENT PROPOSAL, WHICH IS BEING PRESENTED TO THE COMMITTEE FOR APPROVAL. PREVIOUS ITERATIONS OF THESE ITEMS SHOULD NOT BE INCLUDED UNLESS THEY ARE ESSENTIAL TO THE PROOF OF THE DEVELOPER’S CASE. TYPICALLY, THE CURRENT PROPOSAL WILL NOT HAVE BEEN CHANGED IN ANY MATERIAL WAY FROM THE PROPOSAL THAT THE BOARD APPROVED WITH CONDITIONS OR DENIED. ANY CHANGE IS SUBJECT TO 760 CMR 56.07(4).]

9. 760 CMR 56.05(2)(h).

VI. PROPOSED WITNESSES

For the Appellants

_____, Proponent [IF NECESSARY]

_____, Architect [IF NECESSARY]

_____, Site Engineer [IF NECESSARY]

_____, [TITLE]

etc.

For the Board

_____, [TOWN ENGINEER] [IF NECESSARY]

_____, [TOWN STAFF MEMBER] [IF NECESSARY]

_____, Consulting Engineer [IF NECESSARY]

_____, [TITLE]

etc.

VII. SCHEDULE FOR PRE-FILED TESTIMONY AND HEARING

1. The Appellant's direct case shall be filed on or before [DATE], 201[X]. [NORMALLY 6 WEEKS AFTER THE PRE-HEARING CONFERENCE]
2. The Board's direct case shall be filed on or before [DATE], 201[X]. [NORMALLY 12 WEEKS AFTER THE PRE-HEARING CONFERENCE]
3. The Appellant's rebuttal case shall be filed on or before [DATE], 201[X]. [NORMALLY 16 WEEKS AFTER THE PRE-HEARING CONFERENCE]
4. A teleconference regarding scheduling of witnesses shall take place at [TIME][X].m. on [DATE], 201[X]. [NORMALLY IMMEDIATELY AFTER THE APPELLANT'S REBUTTAL CASE IS FILED, I.E., 1 TO 2 WEEKS PRIOR TO THE ORAL PORTION OF THE HEARING]
5. The oral portion of the hearing shall convene at 10:00 a.m. on [DATE], 201[X] at [ADDRESS] in the town of [NAME]. This session shall be followed by a site visit. Additional sessions will be scheduled at the Committee's offices in Boston on consecutive days thereafter.

FOR THE APPELLANT, [Developer]

[name], Esq.
[address]

FOR THE [Town] BOARD OF APPEALS,

[name], Esq.
[address]

BY THE HOUSING APPEALS COMMITTEE,

(date)

[name]
Presiding Officer

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

<hr/>)	
[Developer],)	
	Appellant)	
)	
v.)	No. ____ - ____
)	
[Town] BOARD OF APPEALS,)	
	Appellee)	
<hr/>)	

DRAFT (APPROVAL WITH CONDITIONS)
[DATE OF DRAFT]

PRE-HEARING ORDER

I. INTRODUCTION

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2. For good cause, either party may at any time request modification of this order. Any such request for modification of Stipulations, Issues in Dispute, or Proposed Witnesses shall be by written motion as provided in 760 CMR 56.06(5)(a) and (c). A request for modification of Exhibits may be made orally during an evidentiary session of the hearing, provided that five days prior notice has been given to opposing counsel.

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1. By decision filed with the town clerk on [FDATE], with regard to the parcel of land located [ADDRESS], [Town] Board of Appeals denied the Appellant's application for comprehensive permit pursuant to G.L. c. 40B §§ 20-23 (see Exhibit 2).

2. The town of [Town] has not satisfied any of the statutory minima defined in sentence two of the definition of “consistent with local needs” in G.L. c. 40B, § 20.

3. The Appellant, [DEVELOPER], has received a determination of Project Eligibility pursuant to 760 CMR 56.04 under the [NAME OF HOUSING PROGRAM], fulfilling the project eligibility requirements of 760 CMR 56.04(1).¹⁰ (See Exhibit 1.)

4. Evidence introduced by the parties during the hearing concerning costs and revenues in relation to the economics of the Project will, to the extent possible, be current as of the date of submission of a request for project eligibility determination.¹¹

5. [OTHER STIPULATIONS, INCLUDING ELEMENTS OF EITHER PARTY’S CASE, BELOW, THAT ARE NOT IN DISPUTE]

10. [ALSO SEE *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 520-521 (2007) (requirements are not jurisdictional, but rather a substantive aspect of the appellants’ case).]

11. [THIS IS THE DATE OF LAND VALUATION ESTABLISHED BY THE DHCD COMPREHENSIVE PERMIT GUIDELINES, § IV-B(1). FOR ORDERLY PRESENTATION OF EVIDENCE, OTHER FINANCIAL FIGURES SHOULD BE ESTABLISHED WITH REFERENCE TO THIS SAME DATE. IF THIS DATE IS NOT PRACTICAL, THE PARTIES MAY STIPULATE TO DIFFERENT DATE, E.G., THE DATE OF THIS PRE-HEARING ORDER.]

III. MOTIONS [OPTIONAL]

As further specified in the pleadings on file with the Committee, the parties have moved as follows:

1. Outstanding Motions

- a. Appellant's Motion to ... (filed __/__/__)
- b. Board's Motion to ... (filed __/__/__)

2. Motions that have been Ruled Upon

- a. Appellant's Motion to ... (filed __/__/__) - Ruling __/__/__: Granted/Denied
- b. Board's Motion to ... (filed __/__/__) - Ruling __/__/__: Granted/Denied

Should this matter be subject to appeal to the courts, the parties reserve their rights with regard to motions that have been ruled upon.

The parties reserve the right to file motions to strike objectionable portions of prefiled testimony if necessary.

IV. ISSUES IN DISPUTE AND BURDENS OF PROOF

1. Pursuant to 760 CMR 56.07(1)(a), the central issue in this case is whether the decision of the Board was consistent with local needs.

2. Pursuant to 760 CMR 56.07(2), the issues below are the sole issues in dispute, and the parties shall have the burden of proving their cases as follows:

Appellant/Applicant's Case

[ONLY IF THERE IS NO STIPULATION IN THIS REGARD IN ¶ II-3, ABOVE:

X. to prove that it has met the project eligibility requirements of 760 CMR 56.07(2)(a)(1), 56.04(1), and 56.04(6). See Exhibit 1.]

3. to establish that the following conditions are beyond the power of the Board to impose, intrude impermissibly into areas of programmatic concern of governmental agencies, or are otherwise in violation of the Comprehensive Permit Law.¹²

(a) Condition ____

(b) Condition ____

4. to prove that the following conditions, in aggregate, make the building or operation of the project uneconomic,¹³ and to prove that each condition individually has more than a *de minimus* economic impact.¹⁴

(a) Condition¹⁵ ____ - (for specific issue, see ¶ IV-6(a), below)

(b) Condition ____ - (for specific issue, see ¶ IV-6(b), below)

5. [ONLY IF THE APPELLANT CHOOSES TO PURSUE THIS ISSUE] alternatively, after proof of the economics of the project, to prove that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing with regard to these specific issues:

(a) Condition ____

(b) Condition ____

12. SEE *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 762 (generally), 765, n.21 (“conditions subsequent”) (2010).

13. 760 CMR 56.07, (1)(c), 56.07(2)(a)(3), 56.05(8)(d), and Committee precedents.

14. SEE *Haskins Way, LLC v. Middleborough*, No. 09-08, slip op. at 14, n.15 (Mass. Housing Appeals Committee Mar. 28, 2011, *appeal docketed* No. 11-0481-B (Plymouth Super. Ct. Apr. 25, 2011)).

15. [IN SOME CASES, REFERENCES TO WAIVERS DENIED IN THE BOARD’S DECISION MAY ALSO BE INCLUDED HERE.]

Board's Case

6. to prove that there are valid health, safety, environmental, design, open space, or other local concerns which support each of the conditions in ¶ IV-4, above.

For each such issue, the local bylaw, regulations, requirement, or other restriction upon which the Board relies and the Board's position with regard to it is as follows:

(a) Condition ____ [from ¶ IV-4(a), above] - [citation to bylaw, reg., etc.] - [position, claim, or allegation]

(b) Condition ____ [from ¶ IV-4(b), above] - [citation to bylaw, reg., etc.] - [position, claim, or allegation]

7. to prove that such local concerns outweigh the regional housing need.

8. [ONLY IF INADEQUACY OF EXISTING MUNICIPAL SERVICES OR INFRA-STRUCTURE IS IN ISSUE] to prove that existing municipal services or infrastructure, namely, _____ (¶ ____, above), are inadequate to meet local needs, and that provision of such services is not [CHOOSE ONE.] technically/financially feasible.¹⁶

Appellant/Applicant's Rebuttal

8. to prove that preventive or corrective measures have been proposed which will mitigate the local concerns.

16. 760 CMR 56.07(2)(b)(4).

V. EXHIBITS¹⁷

Exhibits Admitted into Evidence

1. Determination of Project Eligibility - __/__/__
2. Decision of [Town] Board of Appeals - __/__/__
3. Site Development Plans¹⁸ [required]
4. Architectural Plans [if necessary]
5. List of Requested Waivers of local requirements¹⁹ [required]
6. Regulatory Agreement [required]
7. Deed Rider [if homeownership]
8. Ltr. to [Name] fr. [Name] - __/__/__
9. Memo to [Name] fr. [Name] - __/__/__
10. etc., etc.

Proposed Exhibits (Admissibility to be Ruled Upon at the Pre-Hearing Conference or during the Hearing)

For the Appellants

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—

For the Board

—
—

17. [ALL DOCUMENTS IN EXISTENCE AT THE TIME OF SIGNING OF THIS PRE-HEARING ORDER WHICH ARE KNOWN TO COUNSEL OR SHOULD BE KNOWN TO COUNSEL ARE TO BE ADMITTED INTO EVIDENCE OR PROPOSED FOR ADMISSION. LATE-FILED EXHIBITS WILL BE ADMITTED ONLY IF THEY WERE NOT IN EXISTENCE WHEN THE PRE-HEARING ORDER WAS SIGNED (TYPICALLY, THESE ARE DOCUMENTS PREPARED BY A WITNESS IN AID OF HIS OR HER TESTIMONY) OR DUE TO OTHER EXTENUATING CIRCUMSTANCES.]

18. [ITEMS V-3 THROUGH V-7 SHOULD DESCRIBE THE CURRENT PROPOSAL, WHICH IS BEING PRESENTED TO THE COMMITTEE FOR APPROVAL. PREVIOUS ITERATIONS OF THESE ITEMS SHOULD NOT BE INCLUDED UNLESS THEY ARE ESSENTIAL TO THE PROOF OF THE DEVELOPER’S CASE. TYPICALLY, THE CURRENT PROPOSAL WILL NOT HAVE BEEN CHANGED IN ANY MATERIAL WAY FROM THE PROPOSAL THAT THE BOARD APPROVED WITH CONDITIONS OR DENIED. ANY CHANGE IS SUBJECT TO 760 CMR 56.07(4).]

19. 760 CMR 56.05(2)(h).

VI. PROPOSED WITNESSES

For the Appellants

_____, Proponent [IF NECESSARY]

_____, Architect [IF NECESSARY]

_____, Site Engineer [IF NECESSARY]

_____, [TITLE]

etc.

For the Board

_____, [TOWN ENGINEER] [IF NECESSARY]

_____, [TOWN STAFF MEMBER] [IF NECESSARY]

_____, Consulting Engineer [IF NECESSARY]

_____, [TITLE]

etc.

VII. SCHEDULE FOR PRE-FILED TESTIMONY AND HEARING

1. The Appellant's direct case shall be filed on or before [DATE], 201[X]. [NORMALLY 6 WEEKS AFTER THE PRE-HEARING CONFERENCE]
2. The Board's direct case shall be filed on or before [DATE], 201[X]. [NORMALLY 12 WEEKS AFTER THE PRE-HEARING CONFERENCE]
3. The Appellant's rebuttal case shall be filed on or before [DATE], 201[X]. [NORMALLY 16 WEEKS AFTER THE PRE-HEARING CONFERENCE]
4. A teleconference regarding scheduling of witnesses shall take place at [TIME][X].m. on [DATE], 200[X]. [NORMALLY IMMEDIATELY AFTER THE APPELLANT'S REBUTTAL CASE IS FILED, I.E., 1 TO 2 WEEKS PRIOR TO THE ORAL PORTION OF THE HEARING]
5. The oral portion of the hearing shall convene at 10:00 a.m. on [DATE], 201[X] at [ADDRESS] in the town of [NAME]. This session shall be followed by a site visit. Additional sessions will be scheduled at the Committee's offices in Boston on consecutive days thereafter.

FOR THE APPELLANT, [Developer]

[name], Esq.
[address]

FOR THE [Town] BOARD OF APPEALS,

[name], Esq.
[address]

BY THE HOUSING APPEALS COMMITTEE,

(date)

[name]
Presiding Officer