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March 29, 2014

Shelagh Ellman-Pearl
Presiding Officer
Housing Appeals Committee
100 Cambridge Street, 3rd Floor
Boston, MA 02114

Re: Greendale Avenue Venture, LLC v. Needham Board of Appeals
Docket No. 2014-02

Dear Ms. Ellman-Pearl:

Enclosed herewith, please find the Respondent's Opposition to Petitioner's Motion for Constructive Grant/De Facto Denial.

Thank you.

Sincerely,

Jason R. Talerman

Enc.
Cc: K. O'Flaherty, Esq.
J. Witten, Esq.

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

DOCKET NO. 2014-02

GREENDALE AVENUE VENTURE, LLC,

Petitioner

v.

NEEDHAM ZONING BOARD OF APPEALS,

Respondent

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION FOR CONSTRUCTIVE GRANT/DE FACTO DENIAL

Now comes the Respondent Needham Zoning Board of Appeals (the "Board") and hereby moves and requests that the Committee deny the Motion of the Petitioner for a Declaration of Constructive Grant or De Facto Denial. As grounds, the Board asserts that the Petitioner has both mischaracterized the facts and has set forth a proposition that has no support in the law. More particularly, the Board asserts as follows:

1. As a threshold matter, the Petitioner has mischaracterized the facts of this matter. In its Motion the Petitioner relies heavily on the notion that the Board's conditional reduction of the project from 268 units to 108 units is bereft of any supporting facts. The Petitioner's representation in this regard is either myopic or purposely misleading. In fact, the Board's decision is replete with facts supporting its decision to reduce the density of the Petitioner's proposed project. For example:
   a. Findings 39-48 at pp. 35-36 of the Board's decision highlight adverse traffic impacts relating to excess density. The Board found that impacts would create problems with

respect to congestion, pedestrian safety, cyclist safety and intersection level of service. The Board concluded that "In the case of a market rate project, these traffic concerns would cause a denial of this project or, as a minimum, a substantial reduction in the size of this project. The increase in traffic supports a reduction in the size of this 40B project."

b. Findings 55-61 at pp. 37-38 of the decision relate to open space concerns. The Board concluded that "The applicant proposes to build an extremely large project on this site resulting in an almost complete elimination of the trees and green space. If the project were an appropriate size, the applicant could preserve some open space and trees. The Board's concerns are magnified by the fact that children will reside in the project and will have virtually no opportunities on site for recreation."

c. Findings 62-65 at p. 38 of the decision address the Board's concerns with respect to a litany of engineering defects in the Petitioner's project. The Board reflected that the "[t]he Town Engineer has concluded that, from an engineering perspective, the site does not support the proposed level of development." The Board concluded that the "applicant has not met its burden to show that the proposed 268 unit project is feasible" but noted that with a "reduction in size of the project", feasibility may be achieved.

d. Finding No. 66 on p. 38 of the decision states that because the proposed project will disturb 98% of the site, it is inconsistent with the requisite Sustainable Development Principles embraced by DHCD.

e. Findings 67-72 at p. 39 of the decision discuss the density of the Project. In particular, these findings include a survey of area development patterns in comparison

to the proposed project and conclude that "[t]he two large hulking buildings proposed by the applicant are wholly inconsistent with the established neighborhood patterns. The mass and design of these buildings adversely impact the neighborhood."

2. Each of these findings (among the myriad other findings of the Board), and the resulting conditions regarding project density is rooted in the language of c. 40B. In G.L. c 40B, §20, a presiding board's requirements will be *consistent with local needs* where they are based upon the "need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces." Relatedly, the Findings of the Board also comport with the Committee's definition of *Local Concern*: "the need to protect the health and safety of the proposed Project or of the residents of the municipality, to protect the natural environment, to promote better site design in relation to the surroundings and municipal and regional planning, or to preserve open spaces." 760 CMR 56.02. Traffic impacts, engineering issues, and adequacy of outdoor recreational areas are expressly included within considerations regarding *local concerns*. 760 CMR 56.07(3). Based upon findings of the type made by the Board, G.L. c 40B, §21 states that it is entirely appropriate "to attach conditions and requirements with respect to height, site plan, size or shape, or building materials." This authority is underscored by the Supreme Judicial Court which has stated that a presiding zoning board may impose conditions regarding a variety of matters, including "building construction, zoning and subdivision control, land use planning, as well as health and safety of local residents." Zoning Board of Appeals of Amesbury v. Housing Appeals Committee, 457 Mass. 748, 757 (2010). It is a foregone conclusion that conditions of this type may include a sharp

reduction in density. Bd. of Appeals of Woburn v. Housing Appeals Committee, 451 Mass. 581 (2008)(reduction from 640 units to 300 units).

3. It is equally incorrect for the Petitioner to claim that the reduction, from 268 units to 108 units was not accompanied by any guidance. As is noted in the Board's decision, the subject project is comprised of five small townhouse buildings along the frontage of Greendale Avenue and two large garden style buildings closer to eth rear of the property. The Board's concerns with density are largely related to the two large garden style buildings for which the Board found that "the two large hulking buildings proposed by the applicant are wholly inconsistent with established neighborhood patterns." *See Board's decision at p. 39.* The Board then set forth a number of parameters that the petitioner would have to adhere to, including requirements relating to setbacks and building heights. *See Condition No. 3.* The Board's conditions are otherwise reflective of the Committee's longstanding recommendation that a presiding zoning board should refrain from imposing conditions that "redesign the project from scratch." CMA, Inc. v. Westborough Bd. of Appeals, HAC No. 89-25. That is, the Petitioner is free to design the revised 108 unit project as it sees fit, so long as it complies with the height and setback requirements of Condition 3 (and the other conditions in the permit). Indeed, it stands to reason that the Board, which is comprised of local volunteers, should defer to the applicant's engineers and architects in designing a project that can address the local concerns highlighted above.

4. Turning to some of the basic legal precepts governing the instant matter, there can be no doubt that, as discussed above, the Board was fully empowered to impose conditions that require a sharp reduction in density. *See* Woburn, *supra.* As was the case in Woburn, the

reduction here is by slightly more than 50% of the proposed density. However, the facts here readily support that the Board was far more instructive than the presiding board in Woburn. Particularly, the decision in Woburn does not highlight any rationale or guidance applied by the board in reducing density. Nevertheless, the Court upheld the presiding board's unilateral and sweeping authority to impose a drastic reduction in density, subject only to a review on the issue of whether such condition "makes the building or operation of such housing uneconomic *and* is not consistent with local needs" Id. at 593, fn 24-25; G.L. c. 40B, § 23. In this context, the SJC ruled that the Committee had no authority to remove or modify such a condition. Here, the decision of the Needham Board includes a comprehensive set of findings supporting the reduction in density, along with an accompanying set of conditions that will aid in the implementation of the same. Per Woburn, the Committee may not, *sua sponte*, remove those conditions. It would therefore be a disservice to logic and common sense to conclude that the Committee could declare the Board's decision to reduce the density to be a constructive approval.

5. Without belaboring the point, Woburn has also emphatically foreclosed the Petitioner's argument regarding a de facto denial. As succinctly noted by the Woburn court, "[a]bsent a showing that conditions placed on an approval render the project uneconomic, the committee is not empowered to review them under the denial standard." Id. at 594, fn 24-25.

6. Nor can the Board's requirement for a new public hearing result in a conclusion that the project has been constructively approved. As a threshold matter, because the public hearing requirement derives from the legitimate *local concerns* evinced by the Board, it is

a legitimately imposed condition under the reasoning in Amesbury, *supra*. Accordingly, per Woburn, *supra*, such condition may not be removed unless the Petitioner can somehow determine that it renders the Project uneconomic. Furthermore, the requirement for a public hearing is in concert with applicable law. Specifically, while the applicant may be of the opinion that the public hearing is a procedural device created for its sole benefit, there can no dispute that the requirement for a public hearing is primarily for the public's benefit. The requirement for a public hearing for c. 40B matters expressly derives from c. 40A, §11. In Kramer v. ZBA of Somerville, the Appeals Court held that the public hearing under c. 40A was a mandatory event that serves as a guaranteed "'opportunity for interested persons to appear and express their views pro and con.'" 65 Mass.App.Ct. 186, 190 (2205), *quoting* Milton Commons Assoc. v. Board of Appeals of Milton, 14 Mass.App.Ct. 111, 114 (1982) (decided under c. 40B). "At the least ..., a hearing must afford the person entitled to it 'the right to support his allegations by argument however brief, and, if need be, by proof, however informal.'" Milton Commons, 14 Mass.App.Ct. at 114, *quoting* Londoner v. Denver, 210 U.S. 373, 386 (1908). Here, in the present case, the Petitioner, via its motion, readily admits that it does not yet have a final design for a 108 unit Project. Similarly, the Board has not confined the Petitioner to any one particular design. Regardless of the configuration of any redesigned 108-unit project, it is absolutely essential that the public be afforded an opportunity to view and comment upon the same in a suitable public hearing. To require anything else would be violative of G.L. c 40A, §11 as well as the holdings of Kramer and Milton Commons, *supra*. Accordingly, notwithstanding the Petitioner's misgivings in this regard, the requirement for a public hearing was properly imposed.

7. The requirement for a public hearing is also consistent with the HAC's regulations and past decisions regarding preservation of a local public hearing requirement for projects that have undergone substantial changes. This practice is summarized in the Committee's 2013 ruling involving One Baker Avenue, LLC v. Kingston Bd. of Appeals, HAC No. 07-09. In that case, the Committee stated as follows.

> ... a set of changes that cumulatively "amount to a totally new or different proposal" must be deemed a substantial change and remanded to the Board. *Sherwood Estates*, No. 80-11, slip op. at 4; *CMA, Inc.,* No. 89-25, slip op. at 20. In such a case, a remand is required by the Comprehensive Permit Law, which gives local zoning boards of appeal the first chance to review and decide whether or not to approve a comprehensive permit project. G.L. c 40B, §21. A remand in such cases also serves the important policy goal of preserving local autonomy over land use decisions so long as local requirements and regulations do not exclude low and moderate income housing. *See Zoning Bd. of Appeals of Wellesley v. Ardemore Apts. Ltd Partnership*, 436 Mass. 811, 822-23 (2002)(the Comprehensive Permit Law "reflects the Legislature's careful balance between leaving local authorities their well-recognized autonomy generally to establish local zoning requirements ...")

In the One Baker Ave case, the Committee ordered a new public hearing where a reduction in density and change in project configuration was proposed. The same logic must apply here. That is, in order to safeguard both local autonomy and the public's right of participation, a public hearing was a properly imposed condition in the present instance.

8. Even assuming, *arguendo*, that the Petitioner had a valid argument regarding the alleged impropriety of a public hearing, the remedy would not be a draconian constructive grant or de facto denial. Rather, at best, such condition would necessarily be the subject of further provisions before the Committee to determine whether the requirement for a renewed public hearing was within the spectrum of conditions and requirements that may be imposed by a presiding board of appeals. Amesbury, 457 Mass. at 762. If the

Committee were to determine that such a condition fell outside of the Board's purview, the remedy would be to remove the condition, not declare that the remaining 36 conditions are null and void.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Board respectfully requests that the Committee deny the Petitioner's Motion for Constructive Grant/De Facto Denial.

RESPONDNENT,
NEEDHAM ZONING
BOARD OF APPEALS

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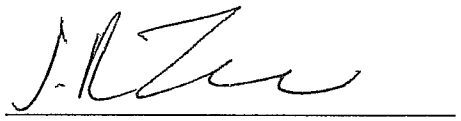
Dated: March 29, 2014

CERTIFICATE OF SERVICE

I Jason R. Talerman, hereby certify that I have caused a copy of the foregoing to be served upon counsel of record for each other party to this action, by mail, this 29th day of March, 2014.



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