COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. Superior Court Department
Civil Action No. ________

MICHAEL MATCHETT,

Plaintiffs,

v.

KARIM RAAD, LONNIE WEIL, THOMAS GORMAN, CHRISTIAN HABERSAAT, and MICHAEL TOUPS, as they comprise the BOXBOROUGH ZONING BOARD OF APPEALS, and ARTHUR J. GUTIERREZ, WILLIAM J. EISEN, and JOHN A. CATALDO, Trustee of the NEW BLUE HILLS SAUGUS REALTY TRUST,

Defendants.

COMPLAINT

1. Pursuant to General Laws Chapter 40B, Section 21 and Chapter 40A, Section 17, the plaintiffs are appealing a decision by the Zoning Board of Appeals of the Town of Boxborough (the "Board") issuing a comprehensive permit to the defendant New Blue Hills Saugus Realty Trust ("Developer") for the construction of a 246-unit housing development located at Ward Road and Cunningham Road, off Massachusetts Avenue in Boxborough, Massachusetts (the "Property"). A true and accurate copy of the Board's decision (the "Decision") is attached to this Complaint as Exhibit A.

The Parties

2. The plaintiff Michael Matchett resides at 45 Hill Road, Boxborough, and is an abutter to an abutter within 300 feet of the Property.

3. The plaintiff __________________ resides at ________________________, and is a ___________________to the Property.

4. The plaintiffs are "persons aggrieved" by the Decision and are entitled to a presumption of standing for purposes of G.L. c. 40B, §21 and G.L. c. 40A, §17.

5. The defendant Developer is an unincorporated realty trust.

6. Upon information and belief, the defendant trustee Arturo J. Gutierrez is a resident of Weston, Massachusetts.

7. The defendant trustee John A. Cataldo resides at 94 Ridge Street, Arlington, MA.

8. The defendant trustee William J. Eisen resides at 64 Fairbanks Avenue, Wellesley, MA.

9. The Board is the duly constituted Board of Appeals of the Town of Boxborough, Massachusetts, with a place of business at 29 Middle Road, Boxborough, MA 01719.

10. The following defendants are members of the Board: Karim Raad, 70 Houghton Lane; Lonnie Weil, 350 Burroughs Road; Thomas Gorman, 560 Hill Road; Christian Habersaat, 200 Sargent Road; and Michael Toups, 118 Pine Hill Road.

The Project and the Board's Proceedings

11. On or about May 15, 2007 the Developer applied to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§20-23 ("Chapter 40B"), to permit the

construction of a 246-unit mixed-income housing development located on the Property (the "Project").

12. The Board opened its public hearing on the application on June 19, 2007, and closed the hearing on April 1, 2008. See Exhibit A, p. 2.

13. On April 18, 2008, the Board voted to approve the comprehensive permit application, approving the construction of 246 units of housing on the Property. It filed its Decision with the Town Clerk on April 18, 2008.

14. The Property directly abuts an ExxonMobil gasoline station located at 1245 Massachusetts Avenue.

15. For over 20 years, unsafe concentrations of "volatile organic compounds" have been detected in monitoring wells on the Property and on abutting properties. The source of this groundwater contamination was leaky underground fuel storage tanks at the ExxonMobil station.

16. The Developer has proposed, and the Board has approved, the placement of a 47,000 gallon-per-day public water supply well within a couple hundred feet of the ExxonMobil property.

17. The Developer has proposed, and the Board has approved, the construction of a wastewater treatment plant to serve the Project, which is expected to discharge approximately 47,000 gallons of treated wastewater into the ground.

18. There is no public water system in the vicinity of the Project and the residents of this neighborhood are entirely dependent on private wells for their domestic water needs.

19. A 2001 Department of Environmental Protection well source approval, relied upon by the Applicant as evidence of the sufficiency and adequacy of its proposed water supply arrangements, pertained to an office park use with a projected consumption of 30,000 gallons per day ("gpd"), with a "peaking factor" of 17,000 gpd to account for irrigation and maintenance demands.

20. The projected water demands of the Project are approximately 47,000 gpd, based on the design standard of 110 gallons per bedroom per day, not including water demands for irrigation.

21. Despite requests by the plaintiffs and other neighbors and abutters to the Project, the Board did not undertake, or require the Developer to undertake, a comprehensive hydrogeologic study or analysis to determine what impact the extraction and discharge of 47,000 gallons of water per day would have on the hydrology of the Property, and whether such hydrologic changes would adversely affect the private wells of the neighbors and abutters to the Project.

22. Despite concerns raised during the public hearing, the Board did not adequately study or consider whether the Project's public water supply well would affect the quantity or the quality of the water in the existing wells of the Project's abutters and neighbors.

23. Despite concerns raised during the public hearing, the Board did not adequately study or consider whether the Project's public water supply well would draw volatile organic compounds from the polluted ExxonMobil site towards the Project's well, or towards the private wells of the abutters and neighbors.

24. According to a Response Action Outcome Statement filed by ExxonMobil on August 9, 2007, elevated levels of MBTE were measured in a monitoring well on the Property in 2007, at a location within 200 feet of the proposed public water supply well.

Count I – G.L. c. 40B, §21; G.L. c. 40A, §17

25. Plaintiffs restate the allegations of Paragraphs 1-24, above.

26. Chapter 40B charges local boards of appeal to weigh "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 surroundings, or to preserve open spaces…" against the "regional need for low or moderate income housing."

27. Pursuant to Chapter 40B, Section 20, there is a presumption that when at least 10% of the total housing stock of a municipality consists of "low or moderate income housing" (the "Housing Unit Minimum"), the regional need for affordable housing has been met and that any decision made by the board of appeals on a comprehensive permit application is, per se, "consistent with local needs" and must be upheld as a matter of law.

28. Pursuant to Chapter 40B, Section 21 and regulations adopted thereunder, when a town has not satisfied the Housing Unit Minimum, there is a rebuttable presumption that the regional need for housing outweighs any local concern with the application, and the burden falls on the board of appeals to justify any denial of a comprehensive permit application on health, safety, environmental or other local concern grounds.

29. In additional to the Housing Unit Minimum, a board's decision (including approvals with conditions and denials) will be also be deemed "consistent with local needs" and

upheld as a matter of law if the application proposes a quantity of housing units that is in excess of the applicable "large scale project cap." See, 760 CMR 31.07(1)(g). In Boxborough, the large scale project cap is 150 units.

30. Because the Project at 246 units exceeds the large scale project cap for Boxborough, the Board could have denied the application outright, with impunity. The Board could also have approved the application with whatever conditions it may have deemed fit.

31. Boxborough currently has 38 "low or moderate income housing" units.

32. For purposes of determining Boxborough's progress towards the Housing Unit Minimum, the Town has 1,900 total housing units, and therefore it needs a total of 190 units (10%) to meet the Housing Unit Minimum.

33. The Board incorrectly stated in its Decision that the Town needs 263 housing units to satisfy the Housing Unit Minimum. See, Exh. A, p. 5, ¶12.

34. Boxborough needs 152 additional housing units to satisfy the Housing Unit Minimum under Chapter 40B.

35. The Board approved the construction of 94 more units than was necessary to satisfy the regional need for affordable housing pursuant to Chapter 40B, Section 20.

36. The "regional need for affordable housing" was satisfied when the Board approved 152 housing units in the Project. The Board abused its discretion and exceeded its authority by approving 94 additional units after the regional need for affordable housing had already been met, notwithstanding the threat those additional units pose to the abutters' and neighbors' health.

37. Because the Project application exceeds the large scale project cap, the Board could have imposed any conditions it deemed necessary to protect the public health, safety and the environment. It could also have imposed conditions that would have promoted "better site and building design in relation to surroundings," and "to preserve open spaces." See, G.L. c. 40B, §20.

38. The Board abused its discretion by unnecessarily approving a project that threatens the health and safety of the future residents of the Project and that of the abutters and neighbors.

39. The Board acted as if it had no authority to require thorough independent studies and analysis of the hydrology of the Property and its surroundings, and acted as if its conditions would not be afforded deference under the "consistent with local needs" standard set forth under Section 20 and 760 CMR 31.07(1)(g).

40. The plaintiffs have substantial, credible concerns that the Project will exacerbate the existing water quality problems in the neighborhood, and will draw water away from their own wells.

41. In its Decision, the Board incorrectly stated that "the site has undergone extensive subsurface testing and analysis that exceeds typical submissions at this stage of the comprehensive permit application process." In fact, the subsurface testing that has occurred was done in connection with a previous office park development proposal in 2001.

42. It is atypical for a zoning board of appeals not to require more updated studies and analysis given its position under the "consistent with local needs" standard and the large

scale project cap, and particularly given that elevated levels of groundwater contamination were measured as recently as February, 2007.

43. The Project, if constructed, would be grossly out of scale with the surrounding neighborhood, which is comprised primarily of single-family homes on large lots.

44. Despite its unbridled authority to deny any requests from the Developer for waivers from local protective bylaws and regulations, the Board granted waivers from Article VI.7004(g) and 7007(1) governing development in the Aquifer Protection District.

45. The Board also unnecessarily granted a waiver from the Town's wetland protection bylaw to permit the construction of parking lots, structures, and a septic system within a wetland resource area defined by the bylaw.

46. The Board exceeded its authority by unnecessarily waiving the Town's rationally-conceived local bylaws and by not thoroughly scrutinizing the potential impacts of this Project on the neighborhood.

47. The Board's decision exceeded the Board's legal authority, was arbitrary and capricious, and was an abuse of the Board's discretion.

WHEREFORE, the plaintiffs request that this Court:

1. Annul the Decision;
2. Award the plaintiffs their costs in this action; and
3. Grant the plaintiffs such other relief as it deems just and proper.

By their attorney,

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