

A. The Plaintiffs' Position in the Ward Road Comprehensive Permit Appeal

This is an appeal from a decision by the Boxborough Zoning Board of Appeals (“Board”) granting a comprehensive permit to the defendant New Blue Hills Saugus Realty Trust (“Developer”) for the construction of a 246-unit housing development (the “Project”) located at Ward Road and Cunningham Road, off Massachusetts Avenue in Boxborough, Massachusetts (the “Property”).

The Property directly abuts an ExxonMobil gasoline station located at 1245 Massachusetts Avenue, and for over 20 years unsafe concentrations of “volatile organic compounds” have been detected in monitoring wells on the Property and on abutting properties. The sources of this groundwater contamination were leaky underground fuel storage tanks at the ExxonMobil station, and an unknown contributor north of the Property on Hill Road. 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. 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.

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. The plaintiffs contend that the Board did not adequately study or consider whether the Project’s public water supply well would affect the hydrology of the Property, and whether such hydrologic changes would adversely affect the private wells of the neighbors and abutters to the Project. Despite requests made by the public, the Board did

not undertake, or require the Developer to undertake, a comprehensive hydrogeologic study or analysis.

The Board engaged in virtually no objective analysis of the proposed Project's impacts on the wetlands and other protected natural resources on and abutting the Property, or on the historic Whitcomb Homestead that stands near the entrance to the proposed Project on Cunningham Road. The Whitcomb Homestead was the home of Continental Army Lieutenant James Whitcomb, and served as an assembly point for the Boxborough Minutemen fighting the British in the Revolutionary War. Unfortunately, the Homestead has fallen into disrepair since the Developer acquired it in approximately 1988.

Moreover, the Board unnecessarily granted numerous waivers from the Town's local bylaws and regulations through its comprehensive permit. 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." Under the statute, 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. On the other hand, 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.

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. Because the proposed Project at 246 units exceeds the large scale project cap for Boxborough, the Board could have denied the application outright, or approved the application with whatever conditions deemed necessary to protect the public health, safety and the environment, with impunity. It could have also 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.

Further, even if it were rational and appropriate to approve a comprehensive permit subject to conditions for this Property, the Board should not have waived the Zoning Bylaw's density restrictions any more than was necessary to achieve the Housing Unit Minimum. Boxborough currently has 38 "low or moderate income housing" units. It needs a total of 190 units (10%) to meet the Housing Unit Minimum (the Board incorrectly stated in its Decision that the Town needs 263 housing units to satisfy the Housing Unit Minimum - see, Decision, p. 5, ¶12). Boxborough only needs 152 additional housing units to satisfy the Housing Unit Minimum. Thus, the Board arbitrarily and unnecessary waived the density restrictions to such an extent so as to permit the construction of 94 more units than was necessary to satisfy the Town's

obligations under Chapter 40B. The “regional need for affordable housing” was satisfied when the Board approved 152 housing units in the Project.

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). The Board fundamentally misunderstood its obligations under Chapter 40B, and misapplied the balancing test under Chapter 40B to the detriment of the plaintiffs, other neighbors and abutters, and to the citizens of Boxborough generally. While reaching a statutory or regulatory “safe harbor” threshold may not preclude a zoning board from continuing to issue comprehensive permits (see, Boothroyd v. Amherst ZBA, 449 Mass. 333 (2007)), the statutory burdens of proof and balancing tests shift such that local concerns, including environmental protection, public health, and overcrowding, are no longer presumed outweighed by the regional need for housing. Rather than balancing the local concerns presented by the Project with the continuing need for affordable housing in Boxborough as mandated by the statute, the Board’s decision is a manifestation of its desire to push the Town well beyond its Housing Unit Minimum obligation (an improper extraneous consideration), in order to insulate the Town from any future Chapter 40B projects.