

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss.

18 PS 000253 (M.D.V.)

BOXBOROUGH TOWN CENTER, LLC)
)
)
 Plaintiff)
)
 v.)
)
 TOWN OF BOXBOROUGH PLANNING)
 BOARD AND JOHN MARKIEWICZ,)
 EDUARDO PONTORIERO, ABBY REIP,)
 HONGBING TANG AND NANCY)
 FILLMORE, as they are Members of the)
 TOWN OF BOXBOROUGH PLANNING)
 BOARD)
)
 Defendants)
)

**JOINT STATEMENT
FOR CASE MANAGEMENT
CONFERENCE**

JOINT CASE MANAGEMENT MEMORANDUM

NOW COME the above-named parties and hereby submit this Joint Case Management Memorandum pursuant to the Notice of Case Management Conference dated May 29, 2018, and Land Court Standing Order 1-04.

I. Case Description, Issues and Parties' Position

Plaintiff Boxborough Town Center, LLC's Description and Position

This is an appeal, pursuant to G.L. c. 40A, § 17 and Section 5.3 of the Planning Board Site Plan Approval Rules and Regulations, from a decision that denied the Plaintiff's application for site plan approval and stone walls permit to construct a 100-unit elderly occupancy residential development (the "Proposed Project") on several contiguous parcels of land located at 700, 750 and 800 Massachusetts Avenue (the "Subject Property").

In 2015, a Definitive Plan was approved by the Boxborough Planning Board, subdividing 700, 750 and 800 Massachusetts Avenue (the “Approved Plan”). The Approved Plan provides a zoning freeze with respect to 700, 750 and 800 Massachusetts Avenue of the Subject Project. Because 700, 750 and 800 Massachusetts Avenue benefit from the zoning freeze, the May 2012 version of the Boxborough Zoning By-law (the “By-law”) was correctly used to review the Proposed Project for compliance. The Proposed Project is permitted as-of-right pursuant to Article IV of the By-law, without the need for a discretionary special permit.

The Decision does not allege that the Applicant did not meet the requirements of the Boxborough Planning Board Site Plan Approval Rules and Regulations. Rather, the Board determined that the Proposed Project did not meet the nine (9) criteria items set forth in Section 8700 of the 2012 By-law. The Board therefore denied the Applicant’s application for site plan approval. The powers of the Planning Board under Site Plan Approval are limited to the provisions of the Boxborough Planning Board Rules and Regulations, and the Board’s decision was not consistent with such Rules and Regulations.

The Board exceeded its authority in denying the Project because it exercised discretion normally associated with a special permit application. The powers of site plan review were described by the Appeals Court in *Prudential Ins. Co. of Am. v. Board of Appeals of Westwood*, 23 Mass.App.Ct. 527, 534-535 (2004). The Court in *Prudential* held that such boards may: (1) reject a site plan that fails to furnish adequate information by the bylaw; (2) impose reasonable conditions in connection with plans approval; and (3) reject a site plan, that “although proper in form, may be so intrusive on the needs of the public in one regulated aspect or another that rejection by the board would be tenable.” The Board’s findings are not grounded in fact, are arbitrary and capricious, constitute an abuse of discretion, and are made in bad faith, solely as a pretext for reducing the density of the Proposed Project, which is allowed as-of-right.

The Board's reasoning and findings that the Proposed Project did not meet the criteria of Section 8700, are not grounded in fact, are arbitrary and capricious, constitute an abuse of discretion, and are made in bad faith, solely as a pretext to reduce the density of the Proposed Project, despite such density being allowed as-of-right.

The Plaintiff offered substantial evidence that the Proposed Project meets all the requirements of Section 8700.

The Board, in its Decision, concluded the Application for Site Plan approval did not meet criterion one (1) of Section 8700, because the Proposed Project purportedly did not meet the intention of the Town Center Zoning District "to create a real Town Center with mixed use buildings and a park-like common area in a colonial village style setting that would bring Boxborough townspeople together." The proposed use is allowed as-of-right under the Bylaw, therefore, the Proposed Project meets Criterion one (1).

The Board found that the Proposed Project did not meet Criterion two (2), because the Proposed Project purportedly "is not integrated into the existing terrain and surrounding landscape, and will not protect the abutting properties from noise, odors, sound pollution, or light pollution." The Board cited no evidence of how the Proposed Project would not comply with applicable requirements regarding noise, odors, sound pollution, or light pollution.

The Board concluded that the Proposed Project does not meet Criterion three (3) or Criterion nine (9) of Section 8007 because the architectural style for the Proposed Project is not in harmony with the prevailing character of the neighborhood and the town, or with the scale of the other buildings in the TC Zoning District. The Board could have imposed reasonable conditions to meet the town's architectural standards.

The Board found that the Proposed Project did not meet criterion four (4) of the By-law because the "stormwater system is inadequate as designed." A report entitled "Stormwater

Management Report” by Stamski and McNary, Inc., dated June 22, 2017, which was presented to the Board, concluded that “[t]here will be no increase in runoff leaving the site for the 2 year, 10 year, 25 year, and 100 year storm event” in pre-development to post development condition. The Board had no legitimate basis for determining that the stormwater system was inadequate. Moreover, if a legitimate concern existed regarding the stormwater system, such concern could have (and should have) been addressed by imposing appropriate conditions.

The Board concluded that the Proposed Project does not provide safe access or egress to the Subject Property from Massachusetts Avenue, and therefore does not meet the criterion five (5). A traffic engineer peer review, completed by Green International Affiliates, Inc., dated September 6, 2017, concluded “[t]he study area and intersections... are reasonable for a development project of this size based on the amount of traffic expected to be generated by the development project, and is consistent with current MassDOT guidelines.” The Board cites no evidence to the contrary in support of its finding.

The Board, in its Decision, concluded the Proposed Project did not meet Criterion six (6) because “adequate buffer would not be provided to protect abutting properties from lighting, sight, sound, dust, and vibration, both during construction and once the project is completed.” The Board’s conclusory finding, made without recitation to specific facts, that the Proposed Project does not meet Criterion six (6) is not grounded in fact, is arbitrary and capricious, constitutes an abuse of discretion, and is made in bad faith.

Regarding Criterion seven (7) as established by Section 8007, the Board concluded the Applicant did not demonstrate right to title to Parcel A, therefore two public water supply wells to serve the Proposed Project were “structures” and did not meet setback requirements¹. The Applicant has a duly signed Purchase and Sale agreement to purchase Parcel A. The Applicant

¹ The Proposed wells are within the side setback minimum of Parcel A.

has control over Parcel A, therefore the wells meet the setback requirements, if applicable.

The Board concluded that the Proposed Project did not provide adequate access to each structure for fire and service equipment, and therefore fail to meet Criterion eight (8). The Proposed Project provides two emergency access ways, which despite the Board findings, the Applicant has the right to use for such purpose without obtaining a special permit.

The Boxborough Stone Wall By-law prohibits “removal, tearing down, or destruction of stone walls within or on the boundary of a Town Way... without prior written approval from the Board.” The Applicant sought a Stone Wall Removal Permit to create an opening in the stone wall at the north end of Priest Lane to construct an emergency access roadway to the Project Site. The Board denied the Stone Wall permit, finding that such a removal required approval from the Priest Lane subdivision. Whether authorization from the owners of the Priest Lane Subdivision is required for the removal of the stone walls is entirely a question of private property rights, not public rights. Board has the authority to amend previously issued subdivision decisions. The Board findings that the plan does not meet the requirements of the Stone Walls By-law are not grounded in fact, are arbitrary and capricious, constitute an abuse of discretion, and was made in bad faith.

Defendant, Boxborough Planning Board’s Description and Position

The Board’s denial decision under review (“Decision”) must be affirmed because it was not based upon legally untenable grounds, nor was it unreasonable, whimsical, capricious or arbitrary. The Board agrees with the plaintiff’s statement that site plan review jurisdiction is subject to the standards described by the Massachusetts Appeals Court in Prudential Ins. Co. of Am. v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278, 281-82 (1986) but states that the Decision satisfies the standards set forth therein, in that no form of reasonable conditions could be devised to satisfy the applicable criteria for site plan review under the May, 2012 version of

the Zoning Bylaw at issue in this case. Contrary to the plaintiff's contention, the Board did not act in "bad faith" in this case, and did not use site plan review jurisdiction as a "pretext" for reducing the density of the Proposed Project. Rather, the Board based its Decision upon specific factual findings demonstrating non-compliance with the nine criteria for site plan approval required under Section 8007 of the 2012 Zoning Bylaw.

While the plaintiff seeks to belittle the Board's factual findings with respect to the Town Center Zoning District, it is important to note that the Town Center Zoning District is the geographic center of the community and is crucial to the Town of Boxborough's long-term planning efforts and concerns. It is located along the most highly traveled roadway in Boxborough – Route 111 – which is the only thoroughfare traveling through Boxborough in its entirety, with Route 2 on the east and Route 495 on the west. It was lawful and appropriate for the Board to review the Proposed Project in the specific context of this particular location and to make findings and conclusions as to whether the Proposed Project could be conditioned so as to meet the purpose and intent of the Zoning Bylaw and local planning specifically applicable to this district, as is specifically mandated under the criteria for site plan review set forth in the 2012 Zoning Bylaw. The design of the Proposed Project ignores the purpose and intent of the Town Center Zoning District and essentially usurps the Town's carefully formulated planning concerns with respect to the district.

Criterion 1 of Section 8007 of the Zoning Bylaw requires that the Proposed Project "shall comply with the purpose and intent of the Zoning Bylaw and with existing local and regional plans." The factual basis for the Board's conclusion that the plaintiff failed to satisfy Criterion 1 is set forth on pp. 6-7 of the Decision. The plaintiff contends that since it proposed an as-of-right use in the zoning district in question, this ends the inquiry, but this is not correct. Rather, the proper inquiry is whether the Proposed Project complies with the purpose and intent of the Town

Center Zoning District, which has a particular purpose and intent not found in other zoning districts allowing residential uses as of right. The purpose and intent of the Town Center Zoning District where the Proposed Project is situated “was to create a real Town Center with mixed use buildings and a park-like common area in a colonial village style setting that would bring Boxborough townspeople together.” The Proposed Project, as designed, did not meet this purpose and intent and the plaintiff refused to consider design alternatives which would enable the Board to devise conditions to satisfy the purpose and intent of the particular zoning district at issue. The Board also correctly concluded that the Proposed Project failed to satisfy the “purpose and intent” of “existing local and regional plans” with respect to affordable housing as well as the “purpose and intent” of Section 1100 of the 2012 Zoning Bylaw with respect to street congestion, overcrowding of land, and appropriate use of land, and provided detailed findings of fact to support these conclusions. See pp. 7-8 of the Board’s Decision.

The Board also made careful factual findings with respect to the Proposed Project’s failure to comply with Criterion 2 of the 2012 Zoning Bylaw, which provides as follows:

The development shall integrate into the existing terrain and surrounding landscape and shall be designed to protect abutting properties and community amenities. To the extent possible, building sites shall be designed to minimize the use of wetlands, steep slopes, flood plains, hilltops; minimize obstruction of scenic vistas from publicly accessible locations; preserve unique natural, scenic and historic features; minimize tree, soil and vegetation removal; and maximize open space retention.

With respect to Criterion 2, the Board reasonably found that excessive retaining walls were proposed beyond a normal range in order to build the development, citing specific examples on pp. 9-10 of the Decision. The Board also made specific findings to conclude that the project was not integrated into the existing terrain and surrounding landscape and would not protect abutting properties from noise, odors, sound pollution, or light pollution. The Board also noted that construction would require tremendous grading and massive earth work, including

significant ledge removal and blasting, which will create adverse environmental impacts and directly affect the surrounding neighborhood, especially the adjacent senior housing developments for a prolonged period of time. Decision, p. 10. The Board also noted that the Proposed Project would have a substantial negative impact on the environmental quality of the surrounding area, that extensive grading, blasting, transportation of cut and fill, construction of retaining walls and steep slopes, and clear-cutting of trees and vegetation required to build the project over the estimated 5-year period for completion would increase potential soil erosion, would remove natural habitat, would require otherwise unnecessary stormwater management infrastructure, and would result in significant sustained negative impact on the Town Center Zoning District. The Board also found that the Proposed Project was not designed to minimize tree, soil, or vegetation removal, nor the extreme grading of steep slopes, nor did it maximize open space retention on the property. The Board concluded that in light of the applicant's refusal to consider changes to the design of the Proposed Project to allow for less environmental impact and more effective integration into the existing landscape, no reasonable conditions could be devised to bring the project into compliance with Criterion 2. While such issues may possibly be ameliorated by a less dense project, the Board was not looking to reduce density per se, but was looking for a design which could be reasonably conditioned to meet the standards set forth in Criterion 2.

The Board also made specific findings with respect to the failure of the Proposed Project to meet Criterion 3 and Criterion 9 of the 2012 Zoning Bylaw with respect to architectural style in harmony with the existing neighborhood, architectural building materials harmonious with existing buildings in the existing neighborhood, and existing architecture in terms of height, massing, roof shapes, and window proportions. See pp. 11-15 of the Board's Decision. After providing specific factual findings and visual depictions with respect to the foregoing issues, the

Board properly concluded that the proposed architectural style for the Proposed Project was not in harmony with the prevailing character of the neighborhood or with the scale of other buildings in the Town Center Zoning District, in particular the abutting senior housing developments. See Decision, p. 15. The Board also found that the Proposed Project failed to protect and enhance the visual quality of the Town Center Zoning District which is intended to define the rural character of the Town. The Board concluded that the effect would be to create a “private compound in the Town Center with no mixed use development consistent with intended Town Center development” and that no reasonable conditions could be devised to bring the project into compliance with Criterion 3 or 9 of Section 8007. Id.

The Board also noted that the Proposed Project failed to comply with Criterion 4 of Section 8007 of the 2012 Zoning Bylaw requiring adequate measures to prevent pollution of surface and groundwater, to minimize erosion and sedimentation, to prevent changes in groundwater levels, to minimize potential for flooding, and to provide for stormwater drainage consistent with the functional equivalent of the Planning Board’s subdivision rules and regulations. See Decision, pp. 15-16. Contrary to the plaintiff’s contention that the Board lacked support for these findings, the Board specifically cited a report of the Town’s consulting engineer dated September 11, 2017. Id.

The Board also found that the project failed to meet Criterion 5, which requires:

Roadways and circulation system shall be designed to promote convenience and safety for both pedestrians and vehicles. Access roads by which the proposed development is reached shall be adequate in width, grade and construction to carry, without danger or congestion, the additional traffic that is generated from the development.

The Board made specific findings demonstrating that the Proposed Project could not meet this standard, due to on-site and off-site limitations making safe stopping distances impossible to obtain, provide safe access or egress to the project site from Route 111 and that no reasonable

conditions could be devised to bring the project into compliance with Criterion 5 with respect to traffic safety. The plaintiff mischaracterizes the Board's conclusions on this issue by contending that the Proposed Project met minimum MassDOT criteria. However, the Board chose to rely on more stringent MassDOT criteria based upon the specific factual context of the location at issue, where 85% of traffic exceeds the posted speed limit, requiring greater stopping distances, and where geographic conditions lessen site distances. The Board's findings and careful analysis of the traffic safety issue and the inability to condition the Proposed Project, as designed, so as to meet reasonable safety standards is set forth on pp. 16-17 of the Decision.

The Board also cited specific factual findings showing that the Proposed Project could not meet, nor be conditioned to meet, Criterion 6 of the 2012 Zoning Bylaw requiring that adequate buffers be provided to protect abutting properties from lighting, sight, sound, dust, and vibration, and Criterion 7 requiring that adequate facilities shall be provided for water supply and for handling and disposal of waste and other production byproducts. See Decision, pp. 17-18.

Finally, the Board also made specific and detailed findings as to the failure of the project to satisfy Criterion 8 of the 2012 Zoning Bylaw, which requires: "Any new building construction or other site alteration shall provide adequate access to each structure for fire and service equipment." The Fire Chief indicated, and the Board found, that one primary entrance/exit roadway and two emergency access roadways were necessary for fire prevention and emergency response service measures and the plaintiff does not contest this. However, there are unresolved legal issues concerning site control over the areas required to provide emergency access which preclude the Board from conditioning the Proposed Project so as to meet Criterion 8 of the 2012 Zoning Bylaw. See Decision, pp. 18-20.

II. List of All Related Cases.

None.

III. Joint Discovery/Motion Plan.

Plaintiffs' Position

The Plaintiffs propose that the discovery schedule and motion deadlines be scheduled in accordance with the "A" Average Track to which this case has been assigned.

Defendants' Position

Defendants agree.

IV. Statement of willingness to participate in mediation or other methods of alternative dispute resolution.

Plaintiffs' Position

The Plaintiffs state that they are amenable to the possibility of mediation or other alternative dispute resolution.

Defendants' Position

Defendants agree.

V. Identification of anyone whom any party intends to join.

Plaintiffs' Position

The Plaintiff will not seek to join any other parties.

Defendants' Position

None.

VI. Additional notices required.

None.

VII. Additional Matters.

None.

Respectfully Submitted,

Plaintiff,
Boxborough Town Center, LLC,
By its attorneys,

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