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February 28, 2018

Boxborough Planning Board
29 Middle Road
Boxborough, MA 01719

**RE: 700, 750, 800 Massachusetts Avenue – Site Plan Approval Application for
Boxborough Town Center, LLC**

Dear Chair and Members of the Board:

As attorneys for the group Citizens to Save Our Town Center on the proposed development of the above referenced parcels, we offer this letter to emphasize the Planning Board's obligation to deny the pending Site Plan Application due to failure to meet minimum health and safety standards. It is our opinion that the Planning Board (the "Board") has a strong legal basis for disapproval in the Boxborough Zoning Bylaw ("Bylaw").¹

Beyond other reasons for denial this firm has offered the Board, there is a glaring fatal flaw: in our opinion, Article IV, § 4800 of the Bylaw clearly and unambiguously applies to this project, and the applicant needed an Alternative Access Special Permit before it could include the use of Priest Lane in its Site Plan Application.

The lack of this Alternative Access Special Permit for the use of Priest Lane renders the project impossible to approve due to insufficient emergency egress points to support the proposed development.

The application cannot satisfy the Bylaw requirements in Article VI, § 8001, and §§ 8007 (5) and (8). The Boxborough Police and Fire Departments have commented on the issue of safe access to the proposed development, and observed that "a single means of open ingress and egress for a development of this size with two gated emergency access is an undesirable solution that would have significant consequences to life and property." This falsely assumes that Priest Lane will serve as a gated emergency point. Approval of this proposal with three access points is a stretch—approval of the proposed site plan with only two access points is impossible.

The Bylaw requires adequate access and egress points for emergency vehicles. The record includes statements by the Boxborough Police and Fire Departments regarding inadequate access for emergency vehicles for the proposed site plan—these departments opined that the development would be unsafe even with Priest Lane serving as a gated emergency point.

¹ Article VI, § 8001, and §§ 8007 (5) and (8).

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The applicant cannot use Priest Lane as an alternative access point by right, or by simply including it on the project renderings. The pending site plan application is based on a hypothetical. The Board cannot issue an approval on a hypothetical. While the Applicant included other applications for Special Permits in conjunction with its application for Site Plan Approval, it did not include one for Alternative Access to use Priest Lane.

It is impossible to approve the pending site plan application *without* Priest Lane as an emergency access point.

I. Article IV, § 4800 of the Bylaw is Unambiguous and Applies to the Priest Lane Access of the Proposed Development

A board does not have discretion to determine whether or not to apply an unambiguous bylaw to a proposed project.

Article IV, § 4800 of the Boxborough Zoning Bylaw provides that the Board is the Special Permit Granting Authority for an Alternate Access Special Permit, which is required when “an applicant requests to access a lot through a portion of the same lot which is not the legal frontage for the same lot.”

As described in the pending Site Plan Application, the legal frontage of the main parcel to be developed is 785.26 feet along Mass Ave/Route 111. The Applicant seeks to create an additional access point to the same lot, from Priest Lane, which has significantly less frontage.²

“When interpreting a bylaw the place to begin is always with the plain language of the bylaw. If that language is unambiguous, the bylaw is enforced according to its plain wording.” *Libertarian Association of Mass. v. Secretary of the Commonwealth*, 462 Mass. 538, 550 (2012); *Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley*, 461 Mass. 469, 477 (2012.)

In our legal opinion, the language of Article IV, § 4800 of the Bylaw unambiguously requires the Applicant to seek and receive an Alternative Access Special Permit to create an egress point onto Priest Lane, because Priest Lane would serve as access through a portion of the same lot which is not the legal frontage of the said lot.

II. The Board has the Authority to Reasonably Interpret the Application of its Own Bylaw

As stated above, in our legal opinion, it is clear that Article IV, § 4800 of the Bylaw applies to proposed project, and the applicant cannot include Priest Lane as an emergency egress point because they didn't apply for a Special Permit from the Board to do so.

² Approximately 40 feet, as shown on Sheet 7 of 30 of the Site Plan last revised on August 30, 2017.



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However, Town Counsel mentioned at the January 8, 2018 Planning Board hearing that the Board found Article IV, § 4800 of the Bylaw might be ambiguous on whether the Applicant needs to file for (and receive) an Alternative Access Special Permit in order to use Priest Lane as an emergency access point for the proposed development.

Case law is clear that where ambiguities exist in the language of a bylaw, a court owes substantial deference to a local board's reasonable construction of its own bylaw. *Petrillo v. Zoning Board of Appeals of Cohasset*, 65 Mass. App. Ct. 453 (2006); *Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley*, 461 Mass. 469, 475 (2012); *Deadrick v. Zoning Bd. of Appeals of Chatham*, 85 Mass. App. Ct. 539 (2014); *Mellendick v. Zoning Bd. of Appeals of Edgartown*, 69 Mass. App. Ct. 852 (2007); *Cameron v. DiVirgilio*, 55 Mass. App. Ct. 24 (2002); *Wendy's Old Fashioned Hamburgers of New York v. Board of Appeal of Billerica*, 454 Mass. 374 (2009).

It is our opinion that the Bylaw is clear. However, should the Planning Board find Article IV, § 4800 of the Bylaw to be ambiguous, they have the authority to reasonably interpret its applicability. The Bylaw does *not* say that a Special Permit for Alternative Access only applies to situations where the legal frontage is not to be used. Further, the criteria listed in Article IV, § 4800, subsection 1-6 list considerations the Board must make when considering whether to issue such a Special Permit. For example, subsection 6 provides that an Alternative Access Special Permit should not be granted if the purpose for the Special Permit is to allow the creation of more buildings than would be allowed without the Special Permit.

The Applicant seeks to use Priest Lane as an additional egress point to increase the capacity for buildings in the proposed development. This is an issue subsection 6 of Article IV, § 4800 speaks directly to. The Board's determination that the Applicant needed to have an Alternative Access Special Permit prior to including Priest Lane egress on its site plan application is consistent with the purpose, spirit, and intent of the Boxborough Zoning Bylaw, and in our opinion, a valid reason for denial of the Site Plan Application.

III. The Board Has Other Valid Reasons to Deny This Site Plan Application

The Board must deny a site plan application if it does not satisfy the standards and criteria of the Bylaw. Without the needed Alternative Access Special Permit to use Priest Lane, the proposed development has only one emergency egress point. This falls well short of meeting Bylaw Article VIII, § 8007 (8). The Town's Police and Fire departments' testimony in the record provides ample evidence and support for a denial of the project on such grounds.

On November 27, 2017, we provided a letter outlining at least eight independent reasons for the Board to deny the site plan application. This letter is attached as Exhibit A. Included in the November 27, 2017 letter are the following reasons for the Board to deny the pending Site Plan Application:

- The 2012 zoning freeze does not apply to all parcels in the Site Plan Application;



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- No accessory structures, such as wells, can be on lots *not* subject to the zoning freeze;
- The Applicant needs a special permit to use the wells located within the zoning setback of Parcel A;
- Proposed project egress does not meet the site plan standard for public safety;
- The Stow Road access easement cannot provide legal access to the development because it is in an Agricultural Residential District;
- Priest Lane cannot be used as an egress point without an Alternative Access Special Permit;
- Unsafe access to this land has been proven before; and
- The proposed development does not have an adequate water supply.

On December 8, 2017, we provided sound case law supporting the Board's authority to deny a Site Plan Application—even if that application was for an as-of-right use. This letter is attached as Exhibit B. A planning board may deny site plan approval for a use by right if the proposed development doesn't comply with the standards and criteria of the bylaw. *Goren v. Weston*, 2006 WL 2382744. In *Auburn v. Planning Board of Dover*, 12 Mass. App. Ct. 998 (1981), the Dover Planning Board denied a site plan application for an as-of-right use because the plans were inadequate with respect to “providing for safe vehicular and pedestrian movement,”—which is also an issue in this pending application.

On February 5, 2018, we provided a third letter, attached as Exhibit C. The February 5, 2018 letter responded to the applicant's non-answers to questions posed by the Board. We opined that the Board's inquiries to the Applicant illustrated three major deficiencies in the application, and the Applicant's non-responses highlighted those deficiencies again, providing additional grounds for the Board to deny this Site Plan Application.

IV. Conclusion

The Board is obligated to follow the Bylaws. In our opinion, Article IV, § 4800 of the Bylaw clearly and unambiguously applies to this project. The Applicant failed to comply with its requirements prior to submitting the pending Site Plan Application. The Board cannot approve aspects of a site plan that the applicant does not have authority to create. Further, without a second emergency access point, there is no way the proposed project can meet the safety thresholds in the Bylaw.

Sincerely,



Gregor A. McGregor



EXHIBIT A

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VIA HAND DELIVERY

November 27, 2017

Boxborough Planning Board
29 Middle Road
Boxborough, MA 01719

RE: 700, 750 & 800 Massachusetts Avenue – Site Plan Approval, and Alternate Access Special Permit Application for Applicant Boxborough Town Center, LLC

Dear Chair and Members of the Board:

This Firm represents the group Citizens to Save Our Town Center with respect to the proposed development of the above referenced parcels. They retained us to review the plans, supporting documents, and other salient materials of this Site Plan Application (“Application”). Here are our initial findings and legal observations.

Our main conclusion and request to the Board is to deny this project as proposed for multiple, independent free-standing legal grounds, each of which is sufficient to justify an outright disapproval.

In our opinion, this project is poorly planned and weakly justified. It presents questionable assumptions and a size and density out of scale and out of character of the community. It’s outside the letter and spirit of both the Zoning that the Applicant asserts is frozen by grandfather protection, and the Zoning they are trying to avoid.

I. The Planning Board has Authority to Deny this Application

A planning board may deny site plan approval for a use by right if it doesn’t comply with the standards and criteria of the bylaw. *Goren v. Town of Weston*, 2006 WL 2382744. Further, Boxborough Regulations on Site Plan Approval provide that an appeal of a site plan decision by the Boxborough Planning Board will go directly to court under G.L. c. 40A, § 17.¹

The Planning Board should deny this Application for the (at least) nine independent reasons articulated in this letter, many of which are direct violations of the Boxborough Zoning Bylaw. These include, but are not limited to illegal application and expansion of the 2012 zoning

¹ See Town of Boxborough Site Plan Approval Rules and Regulations, Adopted October 16, 1990, most recent amendment April 11, 2011: “Appeal of a Planning Board decision may be in accordance with MGL Ch. 40A s. 17.”

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freeze, improper setbacks and lack of special permits for water sources, unsafe egress, and the unsubstantiated assumption that Applicant has three legal points of access.

II. Freeze of 2012 Zoning Bylaw Does Not Apply to All Parcels in Site Plan

While Applicant acquired a zoning freeze for the land subject to the December 9, 2013 Definitive Subdivision Plan, this proposed Application includes additional parcels which are not subject to the freeze.² Namely, Parcels A, B, C, and Access Easement C, as shown on Sheet 2 of 30 of the Site Plan last revised on August 30, 2017, are not subject to the 2012 Boxborough Zoning Bylaw (“2012 Bylaw”). This raises serious questions about the legality of the proposed wells, frontage, and easement access the Applicant is trumpeting as valid.

A. No Accessory Structures Or Uses Can Be On Lots Not Subject To The Zoning Freeze

No accessory structures or access to the proposed development can be on land outside the proposed subdivision plan. The structures, frontage, and access points located on Parcels A, C, and Access Easement C³, are prohibited under the Current Zoning Bylaw (“Current Bylaw”) because they are accessory uses to a development which would otherwise be prohibited on those parcels without a Special Permit.

B. Applicant Needs Special Permits to use Wells Located on the Lot Line of Parcel A

The wells on the lot line of Parcel A are not approvable by Site Plan Approval for two reasons. First, the wells do not satisfy setbacks for structures in the Town Center District as outlined in the 2012 Bylaw, and second, because Parcel A is not subject to the 2012 Zoning freeze, accessory uses to ‘two-family dwellings, reserved exclusively for elderly occupancy’ are prohibited without a Special Permit.

Under both the 2012 and Current Bylaw § 2101, an “accessory structure” is a “detached...structure, subordinate to the principal building or use and located on the same lot therewith, the use of which is customarily incidental to the principal building or use.”⁴ A well satisfies the definition of structure as described in 2012 and Current Bylaw § 2108.

The two wells on the lot line of Parcel A are the only water supply source for the proposed development.⁵ Therefore, the two wells on the lot line of Parcel A are accessory structures for the enclave of two-family dwellings, reserved exclusively for elderly occupancy.

²The Definitive subdivision plan filed on December 9, 2013, merged seven parcels into two—those parcels were: 103.1; 122; 125; 126; 127.1; 128; 131.1. The Site Plan Application and subsequent drafts of plans include five parcels—the two parcels created during the subdivision approval, and then three additional parcels, marked on Sheet 2 of 30 of the Site Plan last revised on August 30, 2017.

³ As shown on Sheet 2 of 30 of the Site Plan last revised on August 30, 2017.

⁴ Both the 2012 and Current Zoning Bylaw contain identical provisions.

⁵ See Sheet 2 of 30 of the Site Plan last revised on August 30, 2017; BRP WS-15 Report for Boxborough Town Center, LLC prepared by GeoHydroCycle, Inc., dated January 5, 2017.



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Under Article V of the 2012 Bylaw, § 5001, “No structure shall be...used...except in conformity with the requirements of this section.”⁶ The minimum side setback for a structure in the Town Center District is 20 feet.⁷ The two wells, as accessory structures, do not meet setback requirements for Town Center.

In addition to the defect that the wells don’t meet setbacks of the frozen zoning, the wells straddle an “unfrozen lot.” Parcel A is in the Town Center District and subject to the current Zoning Bylaw. Since Parcel A is subject to current zoning, two-family dwellings reserved exclusively for elderly occupancy and accessory structures are only allowed by Special Permit.

Incidentally, in our experience, it’s bad policy and practice to allow drinking water wells on a property line—even if they’re already there. Among other reasons, the impacts to underground extend off premises; ownership may not be merged as planned; ownership may be split in the future without board review and approval; the Town’s enforcement in the future would be complicated; and so would legal liability of or to the facilities and unit owners if things go wrong.

III. Project Egress is Illusory so Project Should be Denied

There are ample specifics to justify denial of the Site Plan on these particular defects, using documented reasons in the record.

A. Project Egress Does Not Meet Site Plan Standard for Public Safety

The proposed Application does not meet the standard required by the 2012 Bylaw § 8001. The purpose of site plan approval is to promote public health, safety, and welfare. The proposed project, on its face and in its details, does the opposite.

The lack of safe egress to and from the proposed site *facilitates* danger to public health, safety and welfare. The letters and attestations from the Boxborough Fire Department and Police Department provide strong grounds for denial of this Application due to its failure to meet the first hurdle to site plan approval.

For example, the September 5, 2017 draft plan of the proposed project includes three potential access points: Massachusetts Avenue, Priest Lane, and Stow Road. Massachusetts Avenue is proposed to be the main entrance, while Priest Lane and Stow Road are proposed as gated emergency access points.

The Boxborough Police Chief and Boxborough Fire Chief have repeatedly voiced serious concerns about the proposed main entrance off of Massachusetts Avenue. *See June 7, 2013 Letter from Boxborough Police Department; January 19, 2017 Letter from Boxborough Police Department, September 28, 2017 Letter from Boxborough Police Department; January 19, 2017 Letter from Boxborough Fire Department.*

⁶ *Id.*

⁷ *Id.*



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Both Departments likewise have reiterated concerns about the additional access points to Stow Road and Priest Lane, in that both access points pose unanswered questions about how emergency traffic will be mitigated. *See June 7, 2013 Letter from Boxborough Police Department* (access to this parcel “poses a serious risk to motoring public.”); *January 19, 2017 Letter from Boxborough Police Department* (reiterating 2013 concerns); *September 28, 2017 Letter from Boxborough Police Department* (“serious roadway improvements will be necessary” to make proposed main entrance a safe and feasible access point.); *January 19, 2017 Letter from Boxborough Fire Department* (proposed means of access “could have significant consequences to life and property.”) To date, these concerns have not been addressed by the Applicant.

B. Access to Stow Road is Infeasible

i. Access Easement Cannot Provide Legal Access to Development

The Applicant seeks to use an Access Easement granted on April 14, 1995 as a means of egress to the proposed development. The easement contemplates “a right of way for access and egress...” across land in the Agricultural Residential District. Since the Access Easement is on land not subject to the December 9, 2013 Definitive Subdivision Plan, it is not “frozen.” Under the Current Bylaw, § 4003 (1), ‘two-family dwellings, reserved exclusively for elderly occupancy’ and their accessory uses and structures are prohibited in the Agricultural Residential District without a Special Permit.

In addition, as discussed above, the development as proposed unnecessarily endangers the public safety because it does not have adequate egress points. The concerns about endangering the public due to lack of adequate access were voiced under the assumption that the access easement to Stow Road could be used. However, as discussed above, land in the Agricultural Residential District cannot be used to support ‘two-family dwellings, reserved exclusively for elderly occupancy’ because that is a prohibited without a Special Permit.

ii. Access Easement Cannot Qualify for Special Permit for Alternative Access

The Access Easement contemplated by the Site Plan Application does not qualify for a Special Permit for Alternative Access, and is a second reason why it cannot serve as an access point to the proposed development. Both the 2012 and Current Bylaw § 4800 require an applicant to request “to access a lot through a portion of the same lot which is not the legal frontage for said lot.” It is clear that the access easement is not on the same lot or lots where the development is proposed. This is one singular reason that renders the access easement unqualified for such a Special Permit.

There are multiple criteria that the Access Easement does not satisfy for a Special Permit for Alternative Access to Stow Road. Pursuant to both the 2012 and Current Bylaw §4800⁸, the Planning Board may grant a Special Permit for Alternate Access only to ways that the Planning

⁸ Both Bylaw provisions are identical, but each is mentioned in this analysis because part of the contemplated access is subject to the Zoning Freeze.



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Board has determined provide adequate access for fire, police, and emergency vehicles; whether the proposed driveway provides for a safer alternative than a driveway through the legal frontage; and whether, in the opinion of the Planning Board, the issuance of a Special Permit will not allow the creation of more building lots that would be allowed without the Special Permit.

First, as discussed above, there is ample evidence in the record from both the Boxborough Fire Department and Police Department that access by Stow Road does not provide adequate access for fire, police, and emergency vehicles to the proposed development, defeating the requirement of Bylaw §4800 (1). This alone is enough for the Planning Board to deny the Special Permit.

Second, the Special Permit is for alternative access to a development—not additional access. While Stow Road may be less busy and dangerous than a curb cut onto Massachusetts Avenue, the Applicant is still proposing that the hazardous Mass Ave entrance be the main entrance to the development.

The purpose of the Special Permit and this criterion is defeated by the Applicant seeking to add more egress points without reducing the danger of any of them, defeating the requirement of Bylaw §4800 (4). This too, is enough for the Planning Board to deny the Special Permit.

Third, there is ample evidence in the record that this Special Permit would allow for the creation of more buildings in the development than would be allowed without the Special Permit. Public safety officials stated that the number of proposed dwellings in this Site Plan Application cannot be safely accommodated with the access as proposed. *See June 7, 2013 Letter from Boxborough Police Department; January 19, 2017 Letter from Boxborough Police Department, September 28, 2017 Letter from Boxborough Police Department; January 19, 2017 Letter from Boxborough Fire Department.* These letters assume that Stow Road could be an additional access point.

Therefore, the Applicant also doesn't meet the criterion for a Special Permit for Alternative Access articulated in Bylaw § 4800 (6). This is a third, independent reason for the Planning Board to deny the Special Permit.

With one less available access point, the danger of this proposed Site Plan Application increases. This is another, independent reason that provides grounds for denial of this Application.

C. Priest Lane Egress is Illusory

The proposed egress to Priest Lane does not qualify for a Special Permit for Alternative Access, which further reduces potential emergency access to this development and increases the danger it poses to residents, visitors, and the neighborhood in general.



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As discussed above, under 2012 Bylaw §4800⁹, the Planning Board may grant a Special Permit for Alternate Access only to ways that the Planning Board has determined provide adequate access for fire, police, and emergency vehicles; if the proposed driveway provides for a safer alternative than a driveway through the legal frontage; and whether, in the opinion of the Planning Board, the issuance of a special permit will not allow the creation of more building lots that would be allowed without the special permit.

Access via Priest Lane runs counter to each of these mandatory criteria in the Bylaw. Each potential Bylaw violation is its own independent reason, supported in the record, for denial of this Application.

D. Unsafe Access to This Land has Been Proven Before

The Boxborough Police Chief and Fire Chief in this record provided adequate and appropriate grounds for denial of this Application on the record, based on unsafe and hazardous means of egress. As illustrated above, this proposed project actually lacks the second and third legal access points as contemplated by the Fire and Police Chiefs.

The Planning Board has solid grounds to deny this Application with three access points— it has even more justification for denying this Application since it only has one legal access point, which does not meet the public health, safety, and welfare criteria of the Boxborough Site Plan Approval standards.

It is worth noting that this is not the first time a project of this scope has been proposed on this land. In an August 12, 2012 letter to the Planning Board, then Chair of the Boxborough Board of Selectmen outlined “grave concerns” about a proposed 40B development on this same site. They noted that the project, which was for 88 units, proposed a main access and one gated access. The Chair asserted that such egress accommodations “poses a significant public safety issue”.

This proposed project includes more units than the 2012 40B proposal, and with no change in location of the main access. Further, while the current site plan projects two additional access points, there is potential that neither of them are a legal options. This proposed project is bigger, and more poorly planned than the other projects that did not come to fruition.

Overall, of the three proposed egress points, one is illegal (Stow Road), one is infeasible (Priest Lane), and one is unsafe (Mass Ave.). Without proper egress, this proposed project imposes unnecessary danger to the town, neighborhood, and potential residents. There are fatal flaws with each access point, rendering the proposed project infeasible at the scale and location proposed.

IV. Site Plan Application Harms Interests Protected by Wetlands Bylaw

⁹ 2012 Bylaw, as this parcel is subject to the Zoning Freeze.



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A zoning freeze achieved under G.L. c. 40A, § 6 does not freeze *non-zoning* bylaws. This is very important: It means that the Boxborough Wetlands Bylaws and regulations are not frozen, and apply in full force to the Wetland Resource Areas of the proposed project, including the surrounding upland.

Boxborough enacted its own Home Rule Wetland Bylaw, so this project will be subject to both the state Wetlands Protection Act and the Town Bylaws. The proposed project would take place in local Town Resource Areas that are more extensive than the state Wetlands Protection Act. This project has not shown it will not harm the environmental interests of the Town's Isolated Wetlands and Adjacent Land Resource Areas. Essentially, the state Buffer Zone is fully protectable under your local Bylaw.

One of the purposes of Site Plan Approval is to "ensure new developments are designed to protect and enhance the...environmental qualities of the Town..." This project does not protect or enhance the environmental qualities in town. It's a maximum build development which strategically dances around Resource Areas such as isolated wetlands, includes at least one wetland crossing, and appears to discharge stormwater into Adjacent Land Resource Areas.¹⁰

V. Proposed Development Does Not Have Adequate Water Supply

As discussed in section I (B) of this letter, the Applicant does not have authority to use accessory structures that do not meet set back requirements, nor accessory structures for 'two-family dwellings, reserved exclusively for elderly occupancy' on land not zoned for such use.

Therefore, in our opinion, there is currently no legal access to a water supply for this development. Bylaw § 8007 (7) requires that all Site Plan Applications must have "adequate facilities...for water supply."

This is a serious defect and for it the Planning Board should deny this proposal.

VI. Conclusion

The Board could and should deny the pending Site Plan Application for each and all of the above reasons.

Sincerely,



Gregor I. McGregor

¹⁰ Sheet 6 of 30 on Site Plan revised August 30, 2017.



EXHIBIT B

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VIA EMAIL AND FIRST-CLASS MAIL

December 8, 2017

Boxborough Planning Board
29 Middle Road
Boxborough, MA 01719

**RE: 700, 750 & 800 Massachusetts Avenue – Site Plan Approval, and Alternate Access
Special Permit Application for Applicant Boxborough Town Center, LLC**

Dear Chair and Members of the Board:

As representatives of the group Citizens to Save Our Town Center on the proposed development of the above referenced parcels, we offer this comment letter, by the deadline you set, to provide sound legal authority for application denial and reiterate the strong grounds available on the record.

You decided that comment letters are due by December 10. That turns out to be a Sunday—when your offices are closed. In light of this, we recommend that you regard as valid any comments, from our clients or anyone, post-marked or received by your office by Monday, December 11.

As mentioned in our prior letter submitted at your November 27 hearing, Citizens to Save Our Town Center retained us to review the plans, supporting documents, and other salient materials of this Application.

When we attended the hearing, we listened closely to the Applicant's representations and presentations to the Board; heard the reading of all forty-six conditions proposed by Places Associates, Inc.; bore witness to the public comments on the conditions; and noted the many issues, concerns, questions, and facts raised by the public (including our client).

This letter emphasizes the importance of the Board's pending decision, provides legal reasoning grounded in the documents before you, and puts the role of permit conditions in perspective.

I. Applicant's Impatience Should Not Hasten The Decision-Making Process

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Our prior comments are applicable now, more than ever. At the November 27 hearing, the Applicant did not respond substantively to your questions and comments and instead orally argued that you've taken *enough time* on this matter, so it's *time* to close the record to public comment and vote.

We urge that you not be tempted to end this matter due to the applicant's impatience. Rather, we urge you to take as much time as legal and necessary for you to ensure that all i's are dotted and all t's are crossed, all issues are fully addressed in the written record, all concerns and questions are answered in writing, all criteria are fully satisfied, and if not the plans are denied.

Anything less would be reckless. Your decision will rise or fall in court on these documents in the record, as may be supplemented by other documents and witness testimony at trial.

II. The Planning Board Has The Authority To Deny Site Plan Approval

Turning to your authority to deny this Application: you have the authority to deny a site plan application if the project doesn't meet the criteria outlined in the Bylaw. Further, under the Rules and Regulations of Site Plan Approval for Boxborough, a site plan denial is treated as a special permit denial and must be appealed to court under G.L. c. 40A, § 17.¹

"Essentially, site plan review is the process by which the reviewing board determines whether or not the applicant has complied with relevant by-law or ordinance provisions."² A planning board may deny site plan approval for a use by right if it doesn't comply with the standards and criteria of the bylaw. *Goren v. Town of Weston*, 2006 WL 2382744.

As outlined in our first letter, there are several aspects of this Site Plan Application that do not comply with the relevant Bylaw provisions, and cannot be conditioned to do so.

Here are two leading cases with examples of site plan review denials, based on non-conformance with zoning bylaws and criteria, which have held up in court on appeal.

A. *Auburn v. Planning Board of Dover*, 12 Mass. App. Ct. 998 (1981)

In the case of *Auburn v. Planning Board of Dover*, 12 Mass. App. Ct. 998 (1981), the Dover Planning Board denied a site plan application for an as-of-right use that spanned two parcels. The Dover site plan criteria concerned "safe and proper use of the land," as does the Boxborough Bylaw on site plan approval.³ The Dover Planning Board denied the site plan application because the plans were inadequate with respect to "providing for safe vehicular and pedestrian movement," among others.⁴

¹ Boxborough Site Plan Approval Rules and Regulations, §5.3.

² *Y.D. Dugout, Inc. v. Board of Appeals of Canton*, 357 Mass. 25, 29-30 (1970); *Hallenborg v. Town Clerk of Billerica*, 360 Mass. 513, 521 (1971); *Haverty Builders, Inc. v. Fled*, 1989 WL 1182994.

³ Boxborough Bylaw, Art. VII §§ 8001, 8002, and 8005.

⁴ *Auburn v. Planning Board of Dover*, 12 Mass. App. Ct. 998 (1981).



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Upon receiving notice of the site plan denial, the applicant appealed to Superior Court, which determined that “the board’s decision on the [applicant’s] application was based on ‘several problems of apparent deficiencies in the plans presented, any one of which would in and of itself have called for rejection as presented.’”⁵

This example is notable because the court found that a failure to “provide for safe vehicular and pedestrian movement,” on its own, called for rejection of the project as presented. This is the exact scenario for the pending Application in Boxborough.

Further, the Superior Court in the *Auburn* case ruled that “the board’s action was not arbitrary and was based on legally tenable grounds.”⁶ The Superior court entered judgment upholding the Dover Planning Board’s decision to deny the site plan application.

The Applicant then appealed to the Massachusetts Appeals Court, who affirmed the Dover Planning Board’s denial (again). That higher court elaborated that the deficiencies the Planning Board articulated in its denial “were sufficient to justify the board’s rejection of the plans.”⁷

B. *Cumberland Farms, Inc. v. Planning Board of Bourne*, 56 Mass. App. Ct. 605 (2002)

In the case of *Cumberland Farms, Inc. v. Planning Board of Bourne*, 56 Mass. App. Ct. 605 (2002), the applicant sought site plan approval for construction of a convenience store. The Bourne Planning Board conducted public hearings on the site plan and received documentary evidence, testimony by consultants, and comments by planning board members and the public (much like your Board is doing in this instance).

The Bourne Planning Board subsequently issued a detailed decision denying approval of the site plan.⁸ Because the Bourne Zoning Bylaw provided that an appeal of a site plan denial goes to the zoning board of appeals (“ZBA”), (rather than to court under G.L. c. 40A, § 17 as in Boxborough), the applicant appealed the denial to the Bourne ZBA. After a public hearing and comprehensive review, the ZBA affirmed the planning board’s decision to deny the application. The applicant then appealed to Superior Court, which likewise affirmed the planning board’s decision to deny the site plan application.

III. Legal Short-Fallings Of Application Outlined In Previous Letter

In our November 27 letter, we provided your Board with several, independent reasons why the pending site application should be denied. Two are reiterated here.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Cumberland Farms, Inc. v. Planning Board of Bourne*, 56 Mass. App. Ct. 605 (2002).



A. The Planning Board Should Deny The Special Permit For Alternative Access, Which Provides Another Reason To Deny The Site Plan Application

Notably, among those reasons for site plan denial is that this Applicant doesn't qualify for the Special Permit for Alternative Access for Priest Lane, which is necessary to safely accommodate the development. The Planning Board has discretion to not issue this Special Permit.

Under 2012 Bylaw §4800⁹, your Planning Board may grant a Special Permit for Alternate Access only to ways that the Board has determined provide adequate access for fire, police, and emergency vehicles; if the proposed driveway provides for a safer *alternative* than a driveway through the legal frontage (emphasis added); and whether, in the opinion of the Board, the issuance of a special permit will not allow the creation of more building lots that would be allowed without the special permit.

It is clear on its face that the Planning Board should not grant this special permit. First, there is ample evidence in the record from both the Boxborough Fire Department and Police Department that access by Priest Lane does not provide adequate access for fire, police, and emergency vehicles to the proposed development, defeating the requirement of Bylaw §4800 (1). This alone is enough for the Planning Board to deny the special permit.

To compound these shortcomings, the special permit sought is for *alternative* access to a development—not additional access. While Priest Lane may offer an escape hatch from an overcrowded development out to a winding residential cul-de-sac, the Applicant is still proposing that the hazardous Massachusetts Avenue entrance be the main entrance to the development.

The purpose of the special permit and its criteria are also defeated by this Applicant seeking to add more egress points without reducing the danger of any of them, defeating the requirement of Bylaw §4800 (4). This too, is enough for the Planning Board to deny the special permit.

In addition, there is ample evidence in the record that this special permit would allow for the creation of more buildings in the development than would be allowed without the special permit. Public safety officials stated that the number of proposed dwellings in this Site Plan Application cannot be safely accommodated with the access as proposed. *See June 7, 2013 Letter from Boxborough Police Department; January 19, 2017 Letter from Boxborough Police Department; September 28, 2017 Letter from Boxborough Police Department; January 19, 2017 Letter from Boxborough Fire Department.* These letters assume that Priest Lane would serve as an additional emergency egress point.

⁹ 2012 Bylaw, as this parcel is subject to the Zoning Freeze.



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Access via Priest Lane runs counter to each of these mandatory criteria in your Bylaw. Each potential Bylaw violation is its own independent reason, supported in the record, for denial of this Application.

The proposed egress to Priest Lane does not qualify for a Special Permit for Alternative Access. Without this additional egress point, there are simply not adequate entrances and exits to accommodate this development in this location.

B. Parcels Outside The 2012 Freeze Cannot House Accessory Structures Or Uses Of The Proposed Development

A freeze of the 2012 zoning bylaw does not apply to all parcels in the Application and those parcels therefore cannot support or contain accessory structures to the proposed enclave.

The structures, frontage, and access points located on Parcels A, C, and Access Easement C¹⁰, are prohibited under the current Zoning Bylaw, because they are accessory uses to a development which would otherwise be prohibited on those parcels without a special permit. This includes the wells depicted on Sheet 2 of 30 of the Site Plan last revised on August 30, 2017.

Without applying for and obtaining another special permit to use the wells located within setbacks under applicable zoning, the proposed development lacks a sufficient water supply. Site Plan Bylaw § 8007 (7) requires the proposal to have a sufficient water supply. This proposal fails on that account, another solid ground for the Planning Board to deny this Application.

IV. Conditions

Regarding conditions already being considered by your Board, before your Board has determined that the plans meet your criteria for approval, the Applicant wants to put the cart before the horse.

In our opinion, before entertaining conditions for a permit to issue, your Board must properly consider the following: Is the information submitted complete? Are the Board's and staff's questions answered satisfactorily? Are the Applicant's data and calculations in the record reliable? Are the Bylaw criteria fully addressed and indeed met? What is the input of Town boards and officials on site suitability, project design, projected impacts, etc.?

Is the document record complete—the Application, plans and revisions, supporting submittals, video and audiotapes, letters and emails, any transcripts, and the Bylaws, regulations, and policies of the Board.

We observe that conditions provided by Places Associates, Inc., while making a long list, seem to reflect a poll or survey conducted of interested persons and offices; do not cover the

¹⁰ As shown on Sheet 2 of 30 of the Site Plan last revised on August 30, 2017.



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universe of topics needed to minimize and mitigate a project of this size, complexity, and permanent adverse impacts; and lack the enforceable wording regarded as essential to be workable and effective.

For one example, we point out that condition 3 states that, "All traffic traveling to and from the subject properties during the construction process...shall only be from Route 111/Massachusetts Ave. If access is absolutely necessary through Stow Road or Priest Lane..." This condition appears to impose a prohibition, but then negates it in the next sentence, leaves necessity open to interpretation, and indeed leaves that determination to persons unknown.

It is very important to revise this and all conditions that are this vague, which are loopholes big enough to drive a truck through. Surely the Applicant will claim necessity for the smallest reason about Route 111 and assert the Applicant is the one who decides. At the very least, therefore, this condition needs to add, "...as may be determined in advance by the Planning Board at a meeting, and in consultation with Town boards and officials, as well as with advance notice to the affected owners and residents on Stow Road and Priest Lane...."

For another example, the police and fire chiefs have repeatedly highlighted the dangers of the Route 111/Massachusetts Avenue entrance. Yet the conditions only allude to "sight distance" as an issue, fail to address what the sight distance is now (as measured or corroborated by Town officials or consultant), whether there are problems currently, what sight distance would be safe for a new or expanded road intersection, how sight distance is to be changed by the project, whether that impact is generally acceptable, and what sight distance the Applicant should provide so as to safely accommodate the vehicle trips of contractors, future residents, visitors, over the life of the project and, more immediately, the high traffic volume of large trucks and construction equipment to build out the project over several years.

It is very important to get this right. The proper term is Stopping Site Distance. It also is important to expand this to cover the other parameters for safe road design. To put it simply, Stopping Site Distance is a minimum threshold—it is a near worst-case distance that a driver needs to be able to see in order to have room before colliding with something in a roadway.

Note that this criterion is a minimum only, a worst-case evaluation. If this project were to meet (or promise the Town that it intends to meet) the minimum safety in this one regard (panic stop by one hypothetical driver), that should not be enough to satisfy this Board.

On a related point, members of the public have recommended to you, for good reasons, to adopt the alternative criterion of Decision Sight Distance. The Board should fully inform itself on this.

Note also that sight distance (however calculated, with all its issues and limitations) is only one of several considerations when a new road intersection is being proposed. There is the sight distance each way from the point of view of the entering driver, from where likely to be waiting to pull out into traffic; the window of time available to do so safely at various times of the day in either direction; the speeds of the vehicles on the traveled way at those various times;



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and others beyond the scope of this letter, but well within the menu of what your Board must in our opinion ascertain, evaluate and resolve to your satisfaction before any Site Plan approval could even be contemplated.

V. Conclusion

This Board should not be rushed by a hasty Applicant. There are serious, we believe fatal flaws in the Application that warrant disapproval. As illustrated above, the Board has ample authority to deny this Application. If you do so, in our opinion you are likely to be upheld in court.

Very truly yours,



Gregg I. McGregor



EXHIBIT C

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February 5, 2018

Boxborough Planning Board
29 Middle Road
Boxborough, MA 01719

RE: 700, 750, 800 Massachusetts Avenue – Site Plan Approval, Alternate Access Special Permit, and Stone Wall Alteration Application for Boxborough Town Center, LLC

Dear Chair and Members of the Board:

As representatives of the group Citizens to Save Our Town Center on the proposed development of the above referenced parcels, we offer this letter to comment on the Applicant's so-called responses to your questions posed at the January 8, 2018 hearing.

In short, their responses are non-answers. Each question posed and not answered adequately provides a reason for the Board to deny this application.

The Board requested a legal opinion on overburdening of an access easement. The Applicant answered a different question, on emergency vehicles' rights to use roads. The Board did not ask about a road. The easement in question does not contain a road. It is currently forested. The Applicant's non-response provides the Board with ground for denial based on a lack of information of whether the access easement could be used to serve the proposed development.

The Board's also requested a legal opinion on whether the Access Easement is entitled to a zoning freeze. The Applicant's dismissive three-sentence reply does not dignify the Board's reasonable request, and failed to address why the Access Easement should be entitled to the zoning freeze. The Access Easement is the proposed location of an emergency access point—a crucial part of this Site Plan Application. Without it, a project of this magnitude is simply unsafe. This is not an issue that is irrelevant, as the applicant claims.

Thirdly, the Board requested the location of the project's wells. The Applicant's rendering shows the wells less than 6' from the Zoning Freeze Property line, validating the flaw pointed out in our November 20th letter that the wells cannot comply with Article V § 5001 of the Boxborough Bylaw. Therefore, the project does not comply with the Bylaw and this Site Plan Application must be denied.

Lastly, due to ambiguity in the Boxborough Zoning Bylaw, the Board has yet to determine whether the Applicant needs an Alternative Access Special Permit to utilize the

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frontage on Priest Lane. The Board enjoys “substantial deference” in interpreting its own bylaws, especially jurisdiction. The Board could reasonably determine that the Applicant *does* need to apply for an Alternative Access Special Permit. It is the proposed emergency access points, or lack thereof, that cap the size of this proposed development.

The Board’s inquiries to the Applicant illustrated three major deficiencies in the application. The Applicant’s non-responses then highlighted those deficiencies again.

Again, the Board could and should deny the pending Site Plan Application for the above reasons.

Sincerely,

Olympia Bowker

