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BY EMAIL

TO:	Brookline Zoning Board of Appeals; Kathryn Murphy
FROM:	Jay Talerman
RE:	Chestnut Hill Realty – c. 40B Application
CC:	Town Counsel
DATE:	December 31, 2014
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Attorney Murphy and the members of the Zoning Board of Appeals:

On behalf of my clients, I am writing to offer commentary and suggestions on the draft comprehensive permit decision that you have prepared. My comments include both suggestions on the findings and conditions that the Board has drafted and a critique of the comments and revisions proposed by the Applicant's attorney Steven Schwartz, Esq.

With respect to suggestions on revisions to your draft findings and conditions, my clients continue to stress that your draft approval contemplates a project that will irreparably impact the health safety and welfare of Brookline citizens. Notwithstanding my clients' reservation of rights in this regard, there are two key issues that can be addressed within the framework established in the Board's draft decision. These issues, which are discussed in prior correspondence by me to the Board, are the subject of litigation that is presently pending before the Massachusetts Appeals Court. In that litigation, my clients and the Town have, working in tandem, expended significant resources to address certain shortcomings in the proposed project. Specifically, we have challenged the sufficiency of the actions of the subsidizing agency MassDevelopment; and sought the enforcement of the Town's rights under a certain 1946 Agreement that would preclude the project, as proposed. We are in the process of briefing this matter for the Appeals Court and both Town Counsel and I are optimistic that we will receive a favorable review.

In the meantime, as you are aware, Town Counsel and I have worked together in an effort to draft potential conditions and findings that will serve to protect the interest of the Town and my clients in the pending appeal. These findings and conditions do not require the ZBA to take a firm position on the subject of the litigation. Rather, the findings and conditions merely defer to

the ongoing legal process, which both the Town and my clients have diligently pursued. Our proposed findings and conditions are as follows:

FINDINGS

1. *The Board finds that the Applicant has not yet demonstrated that the Project is fundable by a subsidizing agency as required under 760 CMR 56.04(1)(b). This finding is based upon the Town's continuing challenge to the Project Eligibility Letter (PEL) issued by MassDevelopment. A Superior Court Judge has determined that, notwithstanding DHCD Regulations, determinations as to the adequacy of PELs are permissible in the administrative process. The Board finds that the Town's challenge to the PEL raises legitimate questions and, accordingly, the Board finds that the PEL does not and cannot satisfy the requirements of 760 CMR 56.04(1)(b) unless and until the Applicant (and/or MassDevelopment) prevails in the existing litigation (and any appeals) with the Town.*

2. *The Board finds that the Applicant possesses adequate title to the subject site. However, the Board finds that there are significant remaining questions regarding the sufficiency of the Applicant's rights to construct the Project as shown on the Plans. These questions are based upon the effect of a certain 1946 Agreement by and between the Town and the Applicant's predecessor in title. This Agreement, which is expressly binding upon the successors in title such as the Applicant, was a key component of rezoning of the subject property in the 1940s. Per the terms and restrictions contained in the 1946 Agreement, the proposed Project would not be possible. The enforceability of the 1946 Agreement is the subject of ongoing litigation by and between the Applicant and the Town. As a consequence, the Board finds that the Applicant cannot demonstrate adequate "control" of the site under 760 CMR 56.04(1)(c) unless and until the Applicant prevails in the existing litigation (and any appeals) with the Town. The Board finds that, in addition to issues arising under 760 CMR 56.04(1)(c), the 1946 Agreement, if enforceable, would create a practical barrier that would prevent the construction of the proposed Project.*

CONDITIONS

1. *The Applicant may not commence construction hereunder and is not entitled to the issuance of any building permits unless and until the Applicant prevails, with finality, in the litigation filed by the Town wherein the adequacy of MassDevelopment's PEL is challenged. Receipt of "final approval" under 760 CMR 56.04(7) is inadequate to satisfy the requirements of project eligibility under 760 CMR 56.04(1)(b).*

2. *The Applicant may not commence construction hereunder and is not entitled to the issuance of any building permits unless and until the Applicant prevails, with finality, in the litigation filed by the Town wherein the enforceability of the above-described 1946 Agreement will be determined. In the event that the 1946 Agreement is determined to be enforceable, the conditions of approval contained herein shall be null and void.*

I am hopeful that the Board will consider and adopt the attached as a component of their decision. The inclusion of the attached within the ultimate decision should not otherwise affect any approval that the Board may wish to issue on this project.

Secondarily, I have had a chance to review the comments of Attorney Schwartz on the Board's draft decision. Stated as simply as possible, Atty. Schwartz's comments are disappointing. Many of such comments are not only contrary to existing law but also reveal the Applicant's decided unwillingness to work with the Town in the development of this significant project. More troubling, the comments are emblematic of the Applicant's continued tendency to bully the Board rather than engage in the type of constructive dialogue that is encouraged under c. 40B. As discussed below, I encourage the Board to disregard many of the comments of Atty. Schwartz in preparing its decision. Indeed, the tone and content of Atty. Schwartz should give the Board pause in determining whether more stringent conditions may be necessary in order to ensure cooperation with such a recalcitrant entity.

- Finding 10. Atty Schwartz claims that is beyond the Board's authority to find that the project is not "appropriate for the site." Atty. Schwartz's position is misplaced. It is the Board's province to make determinations with respect to Local Concerns. Included within that authority is to determine whether projects "promote better site and building design in relation to the surroundings." Accordingly, this type of finding is entirely appropriate. Moreover, it is, at best, concerning that Atty. Schwartz would have the temerity to take such position.

- Condition 1. Attorney Schwartz argues that it is beyond the province of the Board to require subsequent review of plans and other construction related items. His arguments and the cases he cites are incorrect. In fact, in a case I litigated on behalf of the Town of Brookline, the Massachusetts Appeals Court definitively held that such subsequent reviews are proper. Specifically, the Court reversed the decision of the Housing Appeals Committee which served to negate conditions relating to subsequent reviews and inspections of plans and project infrastructure: "Paragon argues that condition numbers 14, 18, and 21 were imposed outside the board's jurisdiction because each required subsequent approval, thus negating the single comprehensive permit. We disagree. Though the purpose of G.L. c. 40B is to promote the development of affordable housing, the fact that some delay in project execution might result from conditions requiring further review of the details of its construction management plan (condition number 14), an erosion control plan (condition number 18), or to ensure timely completion of project infrastructure (such as utilities, parking, lighting, sidewalks, drainage, and the like) (condition number 21) does not place them beyond the board's authority to impose." Brookline ZBA v. Housing App. Committee, 79 Mass.App.Ct. 1129 (2011). Accordingly, this Condition (and others – see below) is entirely appropriate and Atty. Schwartz's purposeful omission fo applicable law in this regard should not be countenanced.

- Condition 6. While Atty Schwartz is correct that some housing related conditions are beyond the scope of the Board's purview, this condition is well within the Board's

authority. To wit, the Board possesses certain rights with respect to affordable units (right of first refusal etc) and, moreover, the Town's interest in managing its own SHI is ample justification of such a condition. Furthermore, aside from his penchant for bullying the Board, it is a mystery as to why Atty. Schwartz would concern himself with this condition – after all, his client has proposed the same affordability restrictions that are contained within this condition!

- Condition 8. Similar to my comments with respect to Condition 6, the Town certainly has a vested interest in ensuring that handicapped persons have access to safe and adequate housing. It is certainly telling that Atty. Schwartz's client would resist such a fair-minded condition, especially in that such a condition has no demonstrable impact to the economic feasibility of the project.

- Conditions 10 and 11. For projects that receive a subsidy from MassDevelopment, it actually makes more sense for a Town to refrain from executing the Regulatory Agreement. This is because the MassDevelopment Regulatory Agreement contains various conditions that curtail the rights of the municipality with respect to housing and profit limitation. It is my recommendation that the Board impose a condition that simply requires the execution and recording of a Regulatory Agreement prior to the commencement of any site work or construction; and that the Town otherwise impose conditions that reserve its rights to review and challenge any post-construction audit that is performed with respect to the Project.

- Condition 15. Rather than require the execution of a subsequent restriction on further development, the Board should impose a restriction within the conditions themselves. Such a condition is permitted pursuant to the Killoran (80 Mass.App.Ct. 655 (2011)) and Samuelson cases and the restriction created therein would be perpetual.

- Condition 16. *See comments on Condition 1.*

- Condition 19. *See comments on Condition 1.*

- Condition 20. The Board should not agree to omit the requirement for submission of the listed materials prior to commencement of construction. To omit the language deleted by Atty. Scwartz would be entirely illogical. Essentially, he is suggesting that the Applicant be permitted to commence construction on plans that have not yet been reviewed or approved by appropriate local authorities.

- Condition 21. *See comments on Condition 1.*

- Conditions 22 and 23. Atty. Schwartz is attempting to shift the burden for the VFW curbcut application to the Town. This is absurd. The curbcut application is intended to address public safety issues arising due to the Applicant's project. It would be reasonable to state that the Board will cooperate with such applications but the Applicant should not be permitted to shirk its responsibilities on this issue.

- Condition 29. *See comments on Condition 1.* Additionally, if the plans are deficient with respect to hydrant location and the Applicant desires to close the hearing than a post-permit review of this item is appropriate.

- Condition 30. It is concerning that Atty Schwartz is agreeing to submit stormwater plans but is not willing to stand by a requirement that such plans be approved by appropriate local authorities! *See comments on Condition 1.*

- Conditions 34 and 35. Again, Atty Schwartz is inappropriately resisting the approval by appropriate local officials. *See comments on Condition 1.*

- Condition 38. If the Town is lacking in expertise or staff to complete this review, an additional fee is appropriate. Building Permit fees are for more than the inspector's salary.

- Condition 39. *See comments on Condition 1.*

- Condition 40. *See comments on Condition 1.* With respect to bonding, the Board's ominibus authority allows for appropriate measures to ensure the appropriate completion of project infrastructure. G.L. c. 40B, §21, allows for the imposition of any reasonable conditions. Pursuant to such power, "when acting on an application for a comprehensive permit under the act, has the same scope of authority as 'any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen.'" ZBA of Amesbury v. HAC, 457 Mass. 748 (2010)(citing G.L. c. 40B, §20, definition of "local board"). Accordingly, it is entirely proper for the ZBA to implement the powers of the Planning Board and impose a security requirement. Moreover, it is again troubling that a developer of a major project would attempt to sidestep its obligation to provide security for project infrastructure.

- Condition 43. *See Comments on Condition 1.*

- Condition 44. *See Comments on Condition 1.*

- Condition 45. Atty. Schwartz contends that requiring completion of construction in a reasonable time is not permitted. He is incorrect. Plainly, it is a reasonable exercise of a Board's authority to ensure that a massive construction project be completed in a reasonable time so as to avoid the spectre of an omnipresent construction site, which would adversely impact the health, safety and welfare of the neighborhood. Such conditions are commonplace in other contexts. Additionally, the Board expressly included a rights to seek extensions.

- <u>Condition 47.</u> The Applicant's efforts to delete provisions ensuring accountability for off-site erosion and deposition should not be accepted.

- <u>Condition 56</u>. *See comments on Condition 38.*

- <u>Condition 66</u>. The Board should not agree to a cap on the "review" fund. This is a large project and review fees are likely to greatly exceed $15,000.00. Review fees are a miniscule fraction of construction costs and it is again troubling that the Applicant seeks to *nickel and dime* the Town in this regard.

I hope that the above comments and suggestions prove to be helpful. Finally, I wanted to congratulate you on bringing this longstanding hearing to a close. While my clients and I may not be pleased with the result, I am respectful and appreciative of the time and effort that you have put in; and the professionalism that you have displayed.

Sincerely,

Jay Talerman