HILL LAW

June 20, 2016

BY HAND

Brookline Zoning Board of Appeals
Brookline Town Hall
333 Washington Street
Brookline, MA 02445

Re: Application for Comprehensive Permit – 40 Centre Street, Brookline, MA

Dear Members of the Board:

This firm represents neighbors and abutters to the proposed 45-unit apartment building on 10,889 square feet of land located at 40 Centre Street, Brookline (the "Project" and the "Project Site"), which is the subject of a pending application for a comprehensive permit under General Laws Chapter 40B, Sections 20-23 proposed by Roth Family, LLC (the "Developer"). The purpose of this letter is to put on record the Neighbors' initial concerns with the proposed Project and our recommendations for how the Board should manage this significant development application.

I. The Legal Framework

By way of introduction, I have served as counsel to local zoning boards across the state on numerous Chapter 40B permitting and litigation matters over the last 15 years. I have litigated dozens of Chapter 40B appeals before the Housing Appeals Committee ("HAC"), the state trial courts, the Appeals Court and the Supreme Judicial Court, including the Reynolds v. Stow Zoning Bd. of Appeals case decided September 15, 2015 by the Appeals Court, overturning the issuance of a Chapter 40B permit.

As you likely know from your experience with other Chapter 40B proposals in Brookline, Chapter 40B developers may seek a "comprehensive" permit from the local zoning board of appeals in lieu of separate approvals from all of the other town boards, commissions and officials that would otherwise have jurisdiction over the project. A significant function of the statute is to empower the zoning board to waive any local bylaw, regulation, policy or procedure that would render the construction of the project "uneconomic." In certain circumstances, the zoning board may be justified in denying a comprehensive permit, or just denying specific waivers, where the project presents unacceptable public safety, health or environmental risks, or is completely abhorrent to the town's rationally-conceived master planning interests. The role of the local

zoning board, therefore, is to determine (a) whether such risks exist to justify a denial, and if not, (b) whether the applicant's requested waivers from local bylaws and regulations are justified to make the project economic, and if so (c) whether the granting of any such waivers would, themselves, present any public safety, health or environmental risks.

The primary responsibility of the zoning board under Chapter 40B is to consider whether and to what extent local bylaws and regulations should be applied to a proposed project. In doing so, it must weigh the need for affordable housing against the need to protect the environmental, public health, safety, and planning interests. There is a prevailing myth that local bylaws and regulations don't apply to Chapter 40B projects. This is wrong. Local rules apply to Chapter 40B projects unless the the developer can prove that waivers from them are needed to make the project economically viable, and that the need for affordable housing in Brookline outweighs the "local concerns" protected by the local bylaws and regulations for which waivers are sought.

This balancing test was illustrated in the recent case of Reynolds v. Stow Zoning Bd. of Appeals, Appeals Court No. 14-P-663 (Sept. 15, 2015), where the Court ruled that it was "unreasonable" for the zoning board to grant waivers from restrictive local bylaws given unmitigated environmental and health impacts. The Court held that such concerns outweighed the regional need for housing under Chapter 40B, and revoked the comprehensive permit.[1] As discussed below, there are local bylaws in Brookline that are more restrictive than state law, which were legitimately adopted to protect important local planning and safety concerns, and from which the Developer is seeking waivers through this permitting process.

We respectfully suggest that the Board exercise its authority consistent with this framework, starting with a complete evaluation of how the proposed Project conforms, or doesn't conform, to the Town's local bylaws and regulations, and an assessment of whether the requested or required waivers threaten legitimate local concerns, or if not, are necessary to make the project economically viable.

II. The Requested Waivers

As noted above, the most important task the Zoning Board has in conducting a comprehensive permit application hearing is to evaluate the developer's requested waivers from the local bylaws and regulations, and to determine whether the concerns those waivers may present outweigh the regional need for housing. In order to understand whether there are local regulations that are necessary to protect the public health, safety and the environment, and to

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[1/] Further, the HAC has held that "[t]he legislative intent of the entire statute is to permit affordable housing without undue intrusion on local prerogatives." *Cooperative Alliance of Mass. v. Taunton Zoning Bd. of Appeals*, HAC No. 90-05, at 8, n.12 (April 2, 1992). The SJC has similarly held that the legislature intentionally struck a balance "between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements ... while foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons of low income." Bd. of Appeals of Woburn v. Hous. Appeals Comm., 451 Mass. 581 (2008), citing, Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811, 822 (2002).

which the Project should be made subject, it is essential to have a complete itemization of bylaws and regulations that the Project does not comply with.

The first step is for the Board to ask its peer reviewers to check to make sure all of the nonconformities evident on the site plans are addressed in the waiver requests. Then, the Board can intelligently solicit opinions from the Town's land use boards and officials, as well as its peer review experts, as to whether the waivers present any significant health, safety, environmental or planning concerns. Only then can the Board make an informed decision whether to grant these waivers, and put the burden on the Developer to justify the waivers from an economic perspective.

> ***Recommendation No. 1*** – Retain a civil peer review consultant to review the Developer's waiver request list for thoroughness, and to provide professional opinions as to the wisdom of granting the waivers.

III. Substantive Issues

A. Inadequate Parking Arrangements

As you know, one of the biggest waivers being sought in this application is from the Town's off-street parking requirement under Table 6.02 of the Zoning Bylaw. The Bylaw requires two parking spaces for every unit. This is a relatively high number for an urban setting, but is necessary because Brookline, unlike many of its peer communities, prohibits overnight on-street parking. The Developer is proposing to provide 17 spaces for 45 homes, 19% of what would otherwise be required (90). In its comment letter to MassHousing dated March 8, 2016, the Brookline Board of Selectmen characterized this arrangement as "seriously deficient" and "grossly inadequate." We agree. The lack of visitor parking, and parking and driveway areas for service and delivery vehicles, will add to the already congested traffic and parking situation in Coolidge Corner.

This gross deviation from the requirements of the Bylaw is driven, of course, by the extreme density and intensity of use of the 10,889 square-foot project site, which exceeds the Bylaw's Floor to Area Ratio ("FAR") by a factor of almost five (4.77 versus 1). If the Project was smaller and contained fewer units, this parking deficiency issue could be mitigated. This significant waiver request should be justified by an economic presentation by the Developer supporting the need for such a high level of density.

B. Density, Intensity of Use and Building Design

The Project grossly exceeds what would be allowed under conventional zoning. Under the Zoning Bylaw, this Project would need to comply with the dimensional requirements in the "M-1.0" zoning district. In that district, there must be 3,000 square feet of land area for the first dwelling unit, and 1,000 square feet for each additional dwelling unit. Curiously, the Developer did not request a waiver from this provision, perhaps because it did not want to draw attention to

the Project's gross deviation from this requirement. Without a waiver under the Bylaw, the maximum number of units that could be built on the Project Site is eight. The Project exceeds this density cap by a factor of five.

Similarly, as noted above, the applicable FAR for this Project would be 1.0, and the Project's proposed FAR would be 4.77, according to the Developer. The consequence of this over-utilization of a small parcel of land is the lack of any driveways, loading areas, or useable open space for the future residents of this Project.

The HAC has recognized that a project can be so abhorrent to generally-accepted residential design principles to warrant a denial. Dennis Housing Corp. v. Dennis Board of Appeals, HAC No. 01-02 (May 7, 2002) (zoning board's denial of a 50-unit apartment building on a 3.2-acre site was consistent with local needs because "the proposed design over-utilizes the site"). Here, many factors contribute to an overall judgment that the Project over-utilizes the site and presents unacceptable risks to public safety, as discussed herein. Significantly, the Project would provide no areas for outdoor recreation, in stark contrast to most other residential developments in the neighborhood. There is simply no room left on the Project Site for a lawn or other amenity (such as a swimming pool, like what its neighbor 19 Winchester Street has), because the Developer has proposed a Project that maximizes its profit potential. This over-utilization of this Site is excessive, is not in the spirit of affordable housing, and should be reconsidered.

As the Town's Planning Department has already commented, the scale and massing of the proposed six-story apartment building is inconsistent with the surrounding residential neighborhood. As such, the Project doesn't comport with the Chapter 40B Guidelines adopted by the Department of Housing and Community Development, which proscribe that:

> [when developing multi-family housing in the context of an existing single-family neighborhood], it is important to mitigate the height and scale of the buildings to adjoining sites.
>
> [T]he massing of the project should be modulated and/or stepped in perceived height, bulk and scale to create an appropriate transition to adjoining sites.

DHCD's "Handbook – Approach to Chapter 40B Design Reviews" suggests that projects can be deliberately designed to minimize disruption with neighborhood patterns.

> Affordable housing projects under c.40B often have design elements that are different from the surrounding context as described by the terms used in the regulations; e.g., use, scale. However, with careful design and consideration of the project elements in relationship to the adjacent streets and properties, the projects can better integrate with the surrounding context.

It is clear that little thought or effort was made by the Developer to respect the "building typology," and the size and scale of the homes in the existing residential neighborhood. Significantly, the existing *circa* 1922 Georgian-Federal Revival style brick building will be torn down and replaced with a cement-paneled big-box conjuring a BU dormitory. The Project's large apartment building is not "modulated" or "mitigated" in any way to provide an "appropriate transition" to the abutting residential properties. In its thoughtful letter dated June 3, 2016, the Planning Board noted that the ground floor parking arrangement, with the front-facing garage door, creates a commercial, rather than residential, appearance for a building that should "serve as a transition between the smaller-scale residential dwellings to the right and the row house to the left."

The Planning Board made a number of other constructive observations about the inconsistency of the Project with prevailing architectural styles, setbacks, heights and massing in the neighborhood (with which we concur), all of which go directly to the point that this Project doesn't even comply with the DHCD design guidelines for high-density Chapter 40B projects, much less the Town's Zoning Bylaw and Coolidge Corner design guidelines. We agree with the crux of the Planning Board's comments, except we think the Zoning Board would be justified in denying the required density and FAR waivers, limiting the size of the Project to eight units. This would solve a number of other planning and safety concerns addressed elsewhere in this letter.

C. Traffic and Pedestrian Safety

In its June 3rd letter, the Planning Board "strongly recommends increasing the front yard setback of the building" to provide for a greater sight distances between vehicles exiting the Project garage and pedestrians on the existing Centre Street sidewalk. As the Board noted, this sidewalk is heavily used by current neighborhood residents, and will presumably be used a lot by the future Project residents since only seventeen of them will be able to park their car in the garage.

We agree with the gist of the Planning Board's comments, that the over-utilization of the Project Site has resulted in a garage door that may be too close to the sidewalk, and which may present real pedestrian/vehicle conflicts if and when the Project is built and occupied. We respectfully request that the Board retain a traffic peer review engineer to study the proposed design, and opine whether changes could be made to eliminate the risk posed by cars and trucks entering and exiting the proposed parking garage.

> ***Recommendation #2*** – Retain an experience traffic peer review engineer to study the proposed garage entrance and potential for conflicts with pedestrian traffic on Centre Street.

D. Specific Impacts to Abutters

One of the consequences of noncompliance with zoning setback requirements is the risk that ground disturbance on the Project Site will adversely affect abutting properties. Setbacks provide buffers, which serve to reduce such risks. Here, construction is proposed in close proximity to the subsurface foundation at 19 Winchester Street (under the swimming pool). Installation of stormwater infiltration chambers will necessarily require excavation. Recharge of stormwater may have unintended consequences, such as interfering with the structural integrity of abutting subsurface foundations. We respectfully request that the Board's peer review engineer consider this potential impact during its review of the Project.

Further, there is a row of mature trees along the Project Site's westerly property boundary and the parking lot for the 19 Winchester Street condominium. See, photo attached as Exhibit A. These trees provide shade to the parking lot and constitute an essential, natural landscaping element for the condominium's property. Construction of the proposed building would be only 5.2' – 5.9' from the property boundary and these trees. The condominium respectfully requests that the Board impose strict and enforceable conditions in any comprehensive permit issued that protects these trees from unintentional destruction through construction and/or excavation activities, include the provision of adequate surety.

> ***Recommendation #3*** – Request the civil peer review engineer to evaluate the potential for impacts from site work on the Project Site on the foundations and structures on the abutting 19 Winchester Street parcel. Impose strict and enforceable conditions protecting existing trees in close proximity to the Project Site.

IV. Applying the Legal Standards to this Application

As noted above, a Chapter 40B applicant is only entitled to waivers from local bylaws and regulations to the extent necessary to make a project "economic." Unless and until the Developer proves to the Board, through the presentation of verifiable economic analyses, that the waivers it is requesting are necessary (or, in this case, the extent of its waivers is necessary), the Board need not, and should not, waive them. Chapter 40B regulations specifically provide for a process of economic peer review towards the end of the public hearing, through which the Board proposes a set of conditions or waiver denials to the Developer, the Developer makes an evidentiary presentation on how the conditions render the project "uneconomic," and the Board then tests the Developer's economic assumptions through its own peer review. See, 760 CMR 56.05(6).

Since the Developer has asked for and needs waivers to deviate significantly from the Town's rationally-conceived zoning bylaws to build a project with 45 apartment units, and the Board does not need to accept a density of 45 units unless the Developer proves that such a density is required for the financial viability of the Project, the Board should not close its hearing until it puts the Developer to this test.

> ***Recommendation #4*** – After receiving testimony and evidence from your peer review consultants, town boards and officials, and the public, put the Developer to the test of justifying its waiver requests through a verifiable economic presentation (pursuant to the procedure set forth in the regulations), and retain your own 40B project economic consultant to peer review this presentation.

Even if the Developer can meet its "economic burden of proof" under Chapter 40B, the Board can still deny the Project, or deny specific waivers, or condition its approval of the Project, if the local concerns presented by the Project outweigh the regional need for housing. Chapter 40B regulations, 760 CMR 56.07(3)(b) inform how a zoning board is to weigh these factors:

> 1. the weight of the Housing Need will be commensurate with the regional need for Low or Moderate Income Housing, considered with the proportion of the municipality's population that consists of Low Income Persons;
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> 2. the weight of the Local Concern will be commensurate with the degree to which the health and safety of occupants or municipal residents is imperiled, the degree to which the natural environment is endangered, the degree to which the design of the site and the proposed housing is seriously deficient, the degree to which additional Open Spaces are critically needed in the municipality, and the degree to which the Local Requirements and Regulations bear a direct and substantial relationship to the protection of such Local Concerns; and
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> **3. a stronger showing shall be required on the Local Concern side of the balance where the Housing Need is relatively great.**

(emphasis added).

Importantly, and directly relevant to the unique circumstances in Brookline, the HAC interpreted this regulation in a 2009 decision, observing that "how close the town is to reaching the 10 percent threshold [under Chapter 40B]" is an important factor towards how much weight should be afforded to the "local concern" side of the balance test. *Hollis Hills, LLC v. Lunenburg ZBA*, HAC No. 07-13 (Dec. 4, 2009), p. 14, *aff'd*, Lunenburg ZBA v. Hous. Appeals Comm., 464 Mass. 38 (2013). In other words, for towns like Brookline that are very close to reaching the 10 percent threshold, objections to a Chapter 40B project based on legitimate public safety or planning concerns will be credited more than they would in towns that have a poorer showing of subsidized housing.

According to information provided in the Developer's application, Brookline is at 9.2%. Such progress towards achieving its state-mandated affordable housing goal will serve the Board well should it issue a decision that is appealed by the Developer to the HAC.

Finally, the Project's substantial nonconformity with the Town's Comprehensive Plan and the Coolidge Corner District Plan is relevant to the Board's consideration. The HAC and

reviewing courts have long recognized that a Chapter 40B proposal's inconsistency with municipal planning interests can justify a denial of the application, or at least conditions to an approval to minimize planning objections. See, 760 CMR 56.07(3)(g); *Stuborn Ltd. Partnership vs. Barnstable Bd. of Appeals*, HAC No. 98-01 (Sept. 18, 2002). Coincidentally, in a decision published today, the Appeals Court cited the factors the HAC considers when a planning defense is asserted by a zoning board:

> Consistent with our precedents and regulations, the analysis of these complex, interrelated interests can be broken into several factors. The Board need not introduce evidence with regard to each of these, but it must introduce enough evidence to cumulatively establish a local concern of sufficient weight to outweigh the regional need for affordable housing. The Board may establish the weight of its local planning concern by demonstrating the following:
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> > 1. The extent to which the proposed housing is in conflict with or undermines the specific planning interest.
> > 2. The importance of the specific planning interest, under the facts presented, measured, to the extent possible, in quantitative terms . . . .
> > 3. The quality . . . of the overall master plan (or other planning documents or efforts) and the extent to which it has been implemented. A very significant component of the master plan is the housing element of that plan (or any separate affordable housing plan). The housing element must not only promote affordable housing, but to be given significant weight, the Board must also show to what extent it is an effective planning tool. . . .
> > 4. The amount [and type] of affordable housing that has resulted from affordable housing planning.

Eisai, Inc. v. Hous. Appeals Comm., Appeals Court No. 15-P-680 (June 20, 2016), *quoting*, *Hanover R.S., L.P. v. Andover ZBA*, HAC No. 12-04 (Feb. 10, 2014).

We could fill another comment letter with all of this Project's inconsistencies with Brookline's master planning objectives (and perhaps we will before the next hearing), but we call on the Planning Board and the Planning Department to provide the Zoning Board with its own comment letter addressing this planning issue.

> ***Recommendation #5*** – Ask the Town's Planning Department to evaluate and comment on the Project's consistency, or lack thereof, with the Town's master plans.

VI. Conclusion

We expect that the Neighbors will have more comments to share on the merits of this comprehensive permit application as the hearing progresses. In the meantime, we appreciate the Board's diligence in deploying the best available resources to study this application and the significant impacts the proposed Project will have on the neighborhood and the Town generally.

Very truly yours,

Daniel C. Hill

Enc.
cc: Applicant
Clients
Brookline Board of Selectmen
Brookline Planning Board