

Brookline Neighbors Group  
Presentation before the ZBA Meeting – November 12, 2014

Speaking for certain Town Meeting Members of Precinct 16 and neighbors.

We have urged you to deny or severely reduce the scope of the proposed project, or projects.

In the 6 months of attending and participating in your hearings, we have listened to a great deal of testimony regarding every conceivable relevant issue, and some not necessarily relevant. We have heard representations about what may be considered, what may not be considered, and so on. This evening we will review Local Concerns that have been raised – and particularly in the specific context of the current 2008 regulations.

It is important to bear in mind that some of the comments we've heard in the context of this hearing appear to be derived from case law prior to 2008. Much of that case law remains relevant after the 2008 regulations, but some of it does not. Our own case of *Brookline v. MaDev and CHR* is an example of the present conflict with the new regulations and the 2007 *Marion* case, which we will address later.

On the basis of Local Concerns identified in this hearing process, on the basis of the 2008 regulations and the still-relevant case law, we have urged denial of the project – or alternatively – for the same reasons, a very substantially reduced project

<p><b>The Project is not CONSISTENT WITH LOCAL NEEDS</b> – <b>considering Local Concerns</b> – <b>applying Local Requirements equally as to unsubsidized Projects</b> – <b>and the need for subsidized housing “considered with the number of Low Income Persons” in Brookline</b></p>
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In the language of the regulation, the Board's denial, or Conditions on the Project must be **consistent with Local Needs**. In determining to deny this Project, or to condition this Project on Local Concerns, this Board is directed by the regulations to balance the Local Need for affordable housing in Brookline with the Local Concerns associated with this Project.

Denial or Conditions reflecting Local Concerns must be Consistent with Local Needs – means **either** that

(a) ~~one or more of the grounds set forth in 760 CMR 56.03(1) have been met [SHI Housing, etc.]~~, **or**

(b) Local Requirements and Regulations imposed on a Project are reasonable in view of

1. with Local Concerns, **and**
2. if such Local Requirements and Regulations are applied as equally as possible to both subsidized and unsubsidized housing, **and**
3. the **regional** need for Low and Moderate Income Housing **considered with the number of Low Income Persons in the affected municipality**.

760 CMR 56.02 **Definitions** [emphasis supplied]

Subsection (a) is a reference to the jurisdictional exclusions from MGL c. 40B, such as the exclusion for a community with a Subsidized Housing Index (“SHI”) of at least 10%. **Subsection (a) does not apply, and we will focus on subsection (b)** “Local requirements are reasonable,” etc. In particular we will focus on item 1, the relevant Local Concerns regarding this Project.

**Local Concerns include considerations of site design, open space and other Local Concerns, as well as considerations of safety.**

Regarding **Item 1** LOCAL CONCERNS, under the Housing Appeals Committee (“HAC”) review standards - whether the Zoning Board of Appeals (“Board”) decision is denial or approval with conditions – the Board would have the burden of proving:

Item 1, that there are sufficient valid health, safety, environmental, design, open space, or other Local Concerns which supports such denial or conditions.

In this regard we want to note that “design” and “open space” are listed separately from “safety” and would constitute valid Local Concerns on their own under this first item. There is no suggestion in the regulation that only site design and open space concerns that endanger public safety would be relevant in this analysis.

Before we begin our review of Item 1, Local Concerns, however, we will comment briefly on items 2 and 3:

**Even denial of this Project would be consistent and equal treatment of prior non-subsidized proposals by this applicant.**

**Item 2** specifies that the Board must apply local requirements to subsidized housing and non-subsidized housing similarly. We point out that with respect to **item 2**, even *denial* would be treating this project “equally” to both subsidized and unsubsidized housing in that since 1946, and particularly since 2009, the Town Boards have never permitted additional construction at Hancock Village, especially including where the project is proposed to be built, where even additional parking has been denied.

**The “municipality’s” housing need is “considered in proportion of the municipality’s population of Low Income Persons in the municipality: the proportion of Brookline’s persons living in households with less than 80% of Area Median Income is 30%, versus 45% for the Boston Metropolitan area.**

Regarding **Item 3**, the need for Low and Moderate Income Housing is to be weighed in the balance against Local Concerns:

The regulations provide that “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,**” 760 CMR 56.07 (3) Evidence (b) Balancing (1)

In fact the regulation specifies that “[a] stronger showing shall be required on the Local Concern side of the balance where the Housing Need is relatively great than where the Housing Need is not as great.” 760 CMR 56.07 (3) Evidence (b) Balancing (1). Conversely, a lesser Housing Need should indicate a lesser showing is required of Local Concerns to outweigh the Housing Need.

This is a reference not to housing units but to the number persons in Brookline who would be eligible for subsidized housing – **persons who live in households with less than 80% of the Area Median Income, AMI.**

After looking hard (the Boston regional data is not easy to find), it appears that **the percentage** of households with income less than 80% of AMI **in the Boston Metropolitan Area is 45%**. (U.S. Census American Community Survey, 2008 Public Use Microdata).

**The percentage of such households in Brookline is 30%**. Therefore LOCAL CONCERNS should be subject to a lower threshold.

#### ROLE OF TOWN BOARDS

We focus primarily on **Item 1** - the nature of the Town's Local Concerns:

We have set out the considerations that constitute LOCAL CONCERNS under the regulations and summarized input by Town Boards, Commissions, Town Meeting members and others submitted to this Board in the order in which the regulation lists LOCAL CONCERNS need to be considered.

**Permitting authority of Town Boards is consolidated in the local zoning board, but the zoning board is *directed* to consider the input of the other Town "boards."**

Law and regulation consolidates "permitting" in this Board, but it does not otherwise dispense with the role of other Town Boards.

The regulation stipulates that this Board shall consider the input of the Town's boards in arriving at its decision -

760 Code of Mass. Regs. §56.05 Local Hearing:

(8)(a) Board Decisions

... In making its decision, the Board shall take into consideration the recommendations of Local Boards, but shall not be required to adopt same. ...

The regulation defines "Local Boards" to include any local board or official, including, but not limited to any board of survey; board of health; planning board; conservation commission; historical commission; water, sewer, or other commission or district; fire, police, traffic, or other department; building inspector or similar official or board; city council or board of selectmen.

**Local rules are not irrelevant - HAC directs the zoning board to consider the factors as set out in 56.07 (2 & 3), in the manner prescribed by HAC for its own review of a zoning board decision.**

The regulations direct this Board to follow the specific elements of review the HAC would apply to its review of an appeal of the Board's decision. In particular, the HAC - and therefore this Board - will review of the factors which comprise the assessment of "consistency with Local Needs as set out in detail in 56.07 (2) & (3)."

In its conduct of a hearing, the Board should make itself aware of the detailed provisions for burden of proof and evidence, set forth in 760 CMR 56.07 (2&3), that the Committee would apply to the appeal of a Board decision.

760 CMR 56.05 Local Hearings: (4) Scope of Board Hearing (b) Commentary

Paragraph (2) pertains to elements of Burden of Proof, and paragraph (3) describes the elements of evidence to be considered under the headings of; health, safety, environment, and site design, and open space. They are not an a la carte menu of items to choose among – they are all to be considered with respect to factors that HAC directs this Board to consider. We will consider below evidence that has emerged in the course of the Board’s hearings in the order they are prescribed in the regulation.

**The weight of LOCAL CONCERNS**

**760 CMR 56.07 3(d) Health, Safety, and the Environment**

<b>760 CMR 56.07 3(d) Health, Safety, and the Environment, ¶ 3-5</b>	
<b>Regulation ¶</b>	<b>Relevant conditions and Hancock Village</b>
(3) Adequacy of water drainage arrangements;	<ul style="list-style-type: none"> <li>• Serious questions related to water drainage from the site persist and have <b>not been adequately addressed</b> by the low quality peer review.</li> <li>• Over 459 Brookline residents have petitioned for objective, high quality, independent review of the proposed drainage system.</li> <li>• Proposed drainage system requires <b>ongoing maintenance</b>. What <b>enforcement</b> will there be of proposed maintenance?</li> </ul>
(4) Adequacy of fire protection;	<p>The Fire Chief has noted that only one engine company is within the recommended response time of this proposed expansion. <b>Relying on mutual aid assistance of a neighboring town for fire safety is not planning for adequate fire protection.</b></p> <p>“Mutual Aid is not intended to relieve a local governmental unit from its responsibilities of providing adequate emergency services for all local emergencies, since all local governmental units should have their own first line of defense. <b>When a local governmental unit exhausts its resources, Mutual Aid can be activated,</b>” (<i>Massachusetts Fire &amp; EMS Mobilization Plan, Level of Response, p.17,emphasis supplied</i>). The Manual provides further that:“ The alarm or resource request [for aid] is triggered locally by the incident commander on the scene of an emergency,” i.e., Brookline Fire Dept. has to be "on the scene" in order to get help. Therefore no other town can be first responder or cover emergencies.</p> <ul style="list-style-type: none"> <li>• <b>Access to the large apartment building is problematic.</b> Russett Road is very narrow and may be impassable to a</li> </ul>

	<p>large emergency vehicle narrowed by snow accumulation and parked cars.</p> <ul style="list-style-type: none"> <li>• The ZBA suggested that – since existing Hancock Village units are currently deemed adequately protected – so proposed units must be as well. However, it is one thing to cope with the requirements of a residential development established in 1946 with suboptimal characteristics, but another to add hundreds of residences – further eroding the existing margin of safety which already concerns the Fire Chief.</li> </ul>
<p>(5) Adequacy of the Applicant's proposed arrangements for dealing with the traffic circulation within the site, and feasibility of arrangements which could be made by the municipality for dealing with traffic generated by the Project on adjacent streets;</p>	<ul style="list-style-type: none"> <li>• The proposal will more than double the number of dwelling units served by Russett Road.</li> <li>• The proposed traffic circulation arrangements do not address the very high traffic on Russett and Beverly on school day mornings. This traffic makes entry and exit from homes on these roads difficult under current conditions, and it will become substantially more difficult with the proposed development.</li> <li>• At a minimum, this project should be conditioned on securing vehicle access to VFW, and permitting emergency vehicle-only access to the Apartment Building via Ashville/Russett.</li> <li>• The applicant has proposed reducing Independence Drive from a 4 lane to a 2 lane road (at the point where the road becomes Brookline from Boston). With traffic already congested during commuter and school hours, the impact will be to choke flow by 50%, resulting in additional negative impact to the VFW Parkway and Putterham traffic circle.</li> </ul>

**760 CMR 56.07 3(e) Site and Building Design**

<p align="center"><b>760 CMR 56.07 3(e) Site and Building Design. ¶ 1-6</b></p>	
<p><b>Regulation ¶</b></p>	<p><b>Relevant conditions and Hancock Village</b></p>
<p>(1) Height, bulk, and placement of the proposed Project;</p>	<ul style="list-style-type: none"> <li>• The site of the proposed Project is poor. The Project is located on the portion of Hancock Village with the greatest potential impact on abutting property owners and on the historic design of the existing development. There are other areas of the Hancock Village site that could be used with less disruptive impact.</li> <li>• Apartment building:             <ul style="list-style-type: none"> <li>○ The height and bulk of the proposed apartment building is completely out of character for the surrounding neighborhood. It is nearly 2 football fields long and is the equivalent of 85+ residential homes.</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ The placement of the proposed apartment building, atop the highest point in the project magnifies the building's anomalous bulk. Specifically cited in MassDevelopment's initial rejection of the first 40B proposal, this poor design feature persist in the current project.</li> <li>● "Infill" buildings: <ul style="list-style-type: none"> <li>○ The "infill" buildings are located on a critical strip of greenspace. This greenspace is an integral part of the original "Garden Village" design of Hancock Village, providing public space and natural surroundings for many of the HV units. The greenspace was also consciously set aside as a boundary between the denser multifamily development (HV) and abutting single family homes.</li> </ul> </li> </ul>
(2) Physical characteristics of the proposed Project;	<ul style="list-style-type: none"> <li>○ Project will destroy the integrity of design which resulted in the present Hancock Village 2011 designation as "eligible" for listing in the National Register of Historic Places.</li> <li>○ In light of the proposed project, Hancock Village was identified by Preservation Massachusetts as one of the Commonwealth's ten "most endangered" historic resources (2014).</li> <li>○ The placement on puddingstone will require extensive blasting, endangering the safety of people and neighboring homes.</li> <li>○ This placement on puddingstone and need for extensive blasting will also raise the cost of the project immensely. This contributes to the scale of the project that is claimed to be needed for economic feasibility.</li> </ul>
(3) Height, bulk, and placement of surrounding structures and improvements;	Extensive roads and parking for the proposed units destroy nearly all useable greenspace.
(4) Physical characteristics of the surrounding land;	<ul style="list-style-type: none"> <li>● The surrounding land consists of poorly draining soil and extensive rock ledge. As a result, there is great concern over drainage problems that will arise from replacing the greenspace with impervious surfaces.</li> <li>● Tom Brady, Conservation Dept., noted that the puddingstone outcropping will not support tree growth. Screening of the apartment building with trees is not feasible.</li> </ul>
(5) Adequacy of parking arrangements;	<ul style="list-style-type: none"> <li>● Parking is more than adequate and poorly placed</li> <li>● It appears that the design will serve non-40B existing apartments.</li> </ul>

(6) Adequacy of open areas, including outdoor recreational areas, proposed within the project site.	<ul style="list-style-type: none"> <li>• There is little useable open area within the proposed project.</li> <li>• Instead, the project substantially destroys large areas of useable open space.</li> </ul>
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### 760 CMR 56.07 3(f) Open Space

760 CMR 56.07 3(f) Open Space ¶ 1-6	
Regulation ¶	Relevant conditions and Hancock Village
(1) Availability of existing Open Spaces, as defined in 760 CMR 56.02, in the municipality;	<ul style="list-style-type: none"> <li>• Nearest recreational open space is in Boston. There is <b>none</b> in Precinct 16 other than Baker School. (Developer has cited a golf course, a cemetery and Baker School.)</li> </ul>
(2) Current and projected utilization of existing Open Spaces and consequent need, if any, for additional Open Spaces, by the municipality's population <b>including occupants of the proposed housing;</b>	<ul style="list-style-type: none"> <li>• The project makes no provision for Open Space. This regulatory paragraph makes clear that the <b>impact on the renters of Hancock Village should be taken into account as well.</b></li> </ul>
(3) Relationship of the proposed site to any municipal open space or outdoor recreation plan officially adopted by the planning board, and to <b>any official actions to preserve Open Spaces</b> taken with respect to the proposed site by the town meeting or city council, prior to the date of the Applicant's initial submission. <b>The inclusion of the proposed site in any such open space or outdoor recreation plan shall create a presumption that the site is needed to preserve Open Spaces</b>	<ul style="list-style-type: none"> <li>• In 1946 the Planning Board and Town Meeting voted to amend zoning rules for development of HV, and set aside the green space as a buffer (original plan voted on by Town Meeting, 192 to 3). The greenspace was incorporated into the design of Hancock Village.</li> <li>• In November 2011, Town Meeting overwhelmingly voted to form a Neighborhood Conservation District at Hancock Village. This NCD preserves the green space that will be destroyed by the proposed project. NCD provisions voted on by Town Meeting (200 to 24) and approved by the Attorney General of the Commonwealth.</li> <li>• Further, the open space at Hancock Village is specifically referenced in the 2010 Brookline Open Space Plan as a large and significant parcel that should have priority for open space protection. The 2005-2015 Comprehensive Plan set a goal of "no net loss" of open space.</li> <li>• <b>The regulations therefore stipulate that these official actions create a presumption that the site is needed to preserve open spaces.</b></li> </ul>
(5) Current use of the proposed site and of land adjacent to the proposed site;	<ul style="list-style-type: none"> <li>• The site provides open space for the direct benefit of current residents of Hancock Village, as well as mitigation of impact on the adjacent neighborhood.</li> <li>• The proposed site is integral to the successful design of Hancock Village. The greenspace that will be destroyed by the proposed Project provides the communal space and</li> </ul>

	<p>natural setting that were focal points of the “Garden Village” style. Destruction of this greenspace will irreversibly damage this important historical resource.</p>
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**The financial feasibility of accommodating the Project, particularly with respect to construction of school and fire department facilities, is a valid Local Concern in light of the unavailability of developable useable space in Brookline.**

FINIANCIAL FEASIBILITY -

We have covered the burden of proof for the Board’s denial or approval with conditions without mentioning conditions regarding the project’s burden on the Town’s services. It has been stated repeatedly that no such conditions or considerations are allowed. That’s not exactly what the regulation states.

56.07(2)(b) Burden of Proof for the Board’s case provides as follows:

56.07 Criteria for Housing Appeals Committee Decisions

(2) Burdens of Proof.

(b) Board's Case.

4. In the case of either a denial or an approval with conditions, if the denial or conditions are based upon the inadequacy of existing municipal services or infrastructure, the Board shall have the burden of proving that the installation of services adequate to meet local needs is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly.

Here the fact of cost of services, pending override even before we consider what this project will do to the Town is not exactly germane (even suggestion that we are just required to build schools, fire stations, etc.).

What is germane is WHERE? Where in Precinct 16 where there is no open space? We would like to know – really – now. The school superintendent LUPINI and others have said that we are already challenged in planning for the presently foreseeable school population.

Exactly what property exists on which Brookline can be building schools, fire stations, etc. that would be available and financially feasible. Brookline is “built out.”

That is a – topographical – environmental – physical constraint that we face even now, and it is a legitimate Local Concern.

**Site limitations, particularly with respect to traffic, make it essential that the commencement of construction should be conditioned on obtaining *advance* approvals from State agencies for direct access to major roads, etc.**

If the project is approved with conditions, they should address all Local Concerns. Contrary to some representations in these hearings that the project may not be conditioned on state agencies regarding traffic changes, for example, the regulation provides that:

56.05(8)(c) Approval with conditions:

The Board, in its decision, may make a Comprehensive Permit subject to any of the following conditions or requirements: . . .

4. the securing of the approval of any state or federal agency with respect to the Project which the Applicant must obtain before building, provided, however, that the Board shall not delay or deny an application on the grounds that any state or federal approval has not been obtained. . . .

The Board may not delay or deny an application on the precondition of state approval, but the Board can and should condition any construction on first obtaining state approval, for example, of any traffic adjustments the Board requires to address a Local Concern, such as egress to VFW as the Fire Chief indicated as a safety consideration.

**Considering the present status of the *Town of Brookline, et al v Massachusetts Development and CHR*, this Board should review the validity of the PEL and find it invalid on the basis of MaDev's own internal memorandum and draft rejection letter of February, 2014.**

We have followed carefully the structure of the "new" 2008 regulations. It is important to bear in mind that some case law was decided before the regulations were rewritten in 2008. Case law earlier than 2008 does not necessarily "interpret" current regulation.

For example, the Marion case was decided in 2007. The court considered a suit in the matter while it was still pending in HAC. Not unsurprisingly, the Court dismissed on the grounds that the plaintiff had not exhausted its administrative appeal rights.

In 2008, the HAC rewrote the regulations to eliminate any opportunity to review issuance of a PEL. Therefore there are no administrative appeal rights under the new regulation.

Accordingly, *Brookline, et al* brought suit for review of the PEL in court.

Since under the new regulation there is no administrative appeal, in our view the suit was timely. Nevertheless the judge decided to follow *Marion* – which means at this stage in the litigation that Judge Brady held that the Zoning Board has the right to review the PEL.

MaDev had prepared to reject the project on the grounds of massing, building size, loss of greenspace – all factors essentially true for the current project.

We will recommend that this Board determine that in its view the PEL is invalid, and cite the internal memo and rejection letter that MaDev had originally written.

Thank you.