

MEMORANDUM

DATE: DECEMBER 22, 2014

TO: ZONING BOARD OF APPEALS

FROM: WILLIAM PU, TMM, Pct. 16, abutter
STEVE CHIUMENTI, TMM, Pct. 16, abutter

RE: SUGGESTIONS CONCERNING DRAFT DECISION ON 40B AT HANCOCK VILLAGE

Dear Zoning Board of Appeals:

We write to comment on the ZBA's draft decision on the 40B proposal at Hancock Village. As pointed out in the ZBA's draft decision's Findings, the plan is inappropriate for the site. However, balancing this with the putative local need for affordable housing, the ZBA reached this preliminary decision to approve a plan that is only slightly smaller than originally proposed (decreases of 11.8%, 16%, 20%, and 6.3% in square feet, units, bedrooms, and parking, respectively). The ZBA has reached this decision despite input from nearly all Town Boards and other stakeholders in Brookline decrying this proposal, and without reducing the number of units through a thorough pro forma review of the financials that the developer claims has driven their requests for such a dense development. The result is a conceptual site design that does not differ in substance from the one that MassDevelopment rejected outright in 2011, and a project with such scope, massing, and increased density that it will forever alter South Brookline for the worse. We continue to hold that this development should be denied outright because the balancing test of local needs does not justify such an inappropriate development that destroys a historic resource and that will irreparably harm the Town and the neighborhood. At a minimum the ZBA should have negotiated to achieve greater reductions or performed a pro forma review.

The ZBA's draft decision indicates that it will approve the project with conditions rather than deny it. We do not believe that the ZBA's draft decision is in the best interests of the Town, nor does it best serve the local need for affordable housing. A far better project could have resulted under 40B.

If a ZBA approval with conditions is forthcoming, we have a number of concerns that should be considered:

1. The Town of Brookline and several abutters are co-plaintiffs in a lawsuit that is currently on Appeal in the courts. Issue of a building permit should be contingent upon the developer successfully having the lawsuit decided, with finality, in its favor. Towards this end we recommend that the language in **Appendix I** be added to the decision.

2. VFW Parkway Access: The Draft Decision asked that the Applicant take all possible steps to secure vehicular access onto VFW Parkway (#22). However, there is no consequence to the developer if the state does not grant access. Rather, the neighborhood will suffer.
 - One of the most pressing problems of the large apartment building is the increased traffic on Russett and other local roads. The ZBA discussed this at length with relationship to parking, but parking decreased by a mere 6.3%. This is not effective mitigation of the traffic problem.
 - It is fully within the purview of the ZBA to stipulate that a condition to construction is that the state grant full vehicular access from the apartment building onto VFW. In its deliberations the ZBA deemed such a condition as “unfair” but it is unclear why this subjective standard should be selectively applied here when the standard favors the developer. Many aspects of this project are “unfair” to most stakeholders except the applicant.
 - The state has mandated a local need for affordable housing; if this need is so pressing then the state would similarly permit access to VFW. However, it should not be the neighborhood that again pays for failure to gain VFW access.
3. Final dimensional plans are not yet available so that it is not yet possible to review many of the measurements. The ZBA should not make any decisions until such plans are available, and there should be a way for the public to comment on such measurements once they are available.
4. We are concerned by the lack of specifics to measure compliance with many conditions, and with lack of specified consequences for failure to comply. Some examples are cited below, although this is not a comprehensive list:

Housing

- *#9: All leases for the units in the Project shall include language stating that tenants may not use any rooms other than bedrooms for sleeping purposes. Living rooms or dining rooms may not be used as bedrooms.*
 - Lofts should also not be used as bedrooms.
 - No fine on either the landlord or the renter is specified so this provision is toothless.
 - It is essentially impossible to enforce this condition. Are there more enforceable standards that could be put in place to achieve this goal?
 - Is there a maximum of number of unrelated individuals who may co-inhabit a unit (based on number of bedrooms)?

Open Space and Landscaping

- *#17. Applicant shall submit final landscaping plans, including plans showing which trees and rock outcroppings will be preserved and what measures will be taken to ensure their preservation to the Assistant Director for Regulatory Planning for review and approval to determine whether they conform to the Conditions of this Decision and the landscaping plans (sheets numbered ___ of the Site Plans listed in Item 2 under Procedural History).*
 - This condition should be worded more clearly so that the final landscaping plans are mandated to conform to this Decision and to the

landscaping plans reviewed by the ZBA. That is not how it reads at present.

- *#18. All exterior lighting on the Site shall be installed and maintained so that no direct light or glare shines on any street or nearby property and headlight glare from vehicles entering or leaving the Site or parking on the Site shall be shielded so as not to shine upon abutting or other nearby properties or streets.*
 - This condition needs to specify the enforcement and consequences of failing to adhere to this condition.

Traffic

- *#21 Transportation Access Plan. (iv). Expanding existing shuttle service.*
 - The decision currently requests increased shuttle service but does not indicate by how much. How will the adequacy of shuttle service be measured? How often will it be measured? What will be the penalty for providing inadequate shuttle service?
- *#21 Transportation Access Plan. (vi). Charging a fee for each parking space.*
 - Presumably this condition is made to reduce parking demand by making parking more expensive. If this is the goal, then the condition should specify how much of a fee to charge, how levy of the fee will be enforced, and what the penalty will be for failure to meet the condition. The fees should be dedicated for use to implement other aspects of the transportation access plan, e.g. the shuttle service.

Stormwater.

- *#33. Applicant shall take water quality samples... If the results indicate cross-contamination between the sewer and stormwater system, further investigation and mitigation shall be required as directed by the Commissioner of Public Works.*
 - When and how often will these samples be taken? Will the results be public? Who will pay for mitigation?

Infrastructure.

- *#37: The following portions of the Project shall be and shall remain forever private and the Town shall not have, now or ever, any legal responsibility for their operation, maintenance or repair....*
 - The ZBA is approving a stormwater system that requires ongoing maintenance for its function. Its function is required to prevent excessive runoff onto abutting properties or into the Hoar Sanctuary. Therefore the developer must have an obligation to maintain this system, and the Town must play a role in enforcement and monitoring to make sure that it performs adequately, both after construction and in perpetuity. (Discussed in more detail below under Stormwater).
 - Another public health issue that affects the tenants of Hancock Village and the neighbors is trash. This is a chronic problem at Hancock Village, which the developer has not adequately responded to despite citations from public health officials. Therefore the stipulation about trash for the new development needs to specify that there will not be excess trash accumulating around dumpsters, and specify a punitive fine for infractions that escalates with repeated infractions.

5. Traffic.

- The draft decision should more explicitly include the Transportation Board for traffic concerns that affect public ways.
- *#19(d). There shall be STOP signs (R1-1 series) and STOP pavement line markings on the driveways connecting to Independence Drive.*
 - There should be no left turns allowed from these driveways onto Independence, at least during peak traffic hours. A left turn onto Independence would be dangerous for pedestrians and motorists alike.

6. Stormwater.

- The stormwater management plan was highly controversial and we remain skeptical that it will adequately prevent increased flooding of abutting properties. A petition with 450 signatories asking for *independent* review of the proposed system was not followed by the ZBA. Therefore we request that the ZBA condition the development on a post-construction assessment of the effectiveness of the stormwater management plan. The assessment should compare current and post-construction conditions. The study should be paid for by funds from the developer and held in escrow, analogous to the post-construction traffic study. The study should be performed by an independent consultant hired by the town who has full access to the development now and after construction. The condition should include specifics of what would need to be done should the stormwater management plan not perform as proposed.
- A weakness of the stormwater management plan is that it requires regular maintenance for its proper function. This suggests that (a) there should be a plan in place to monitor maintenance to make sure it is adequate, and (b) there should be a plan in place to perform ongoing measurement of the stormwater management system, and specifics about penalties that would be levied should the system not perform as specified. This should continue in perpetuity.

7. Historic Preservation.

- Hancock Village is a valuable historic resource. It is eligible for the National Register and it was named as one of Massachusetts' 10 most endangered historic resources by Preservation Massachusetts. Notably, Hancock Village's value as a historic resource was not listed as a Finding although this represents an important factor that should be accounted for in "balancing" local concerns and local needs.
- *#36. Contemporaneously with sending or receiving any and all correspondence with the Massachusetts Historical Commission or the Massachusetts Secretary of Energy & Environmental Affairs concerning the Project, Applicant shall provide the Board and the Brookline Preservation Commission with copies.*
 - This condition has no impact. It merely states that the developer will let the town know about correspondence with Massachusetts Historical Commission (MHC) or the Massachusetts Secretary of Energy & Environmental Affairs.
 - We propose that this condition be strengthened along these lines: "No site work or construction may commence and no building permits may issue unless and until the Applicant provides evidence of all necessary

filings and approvals under the Massachusetts Environmental Policy Act (MEPA) and MHC requirements. These filings include a Project Notification Form with the MHC as required by applicable law and with MEPA if so required.

We hope that the ZBA will reconsider its decision. At a minimum, if an approval with conditions is forthcoming then we hope that the ZBA will incorporate our recommended modifications into the final decision.

Appendix I

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.