NEEDHAM
ZONING BOARD OF APPEALS
AGENDA

THURSDAY, December 14, 2023 - 7:30PM

Charles River Room **Public Service Administration Building** **500 Dedham Avenue** **Needham, MA 02492**	**Also livestreamed on Zoom** **Meeting ID: 869-6475-7241** **To join the meeting click this link:** **https://us02web.zoom.us/j/86964757241**

1. **Minutes** Review and approve Minutes from November 16, 2023 meeting.

2. **7:30PM 30 Wilshire Park**
   Jeremy & Jessica Karlin, owners, applied for a Special Permit under Sections 1.4.6, and any other applicable section of the By-Law to alter, enlarge and extend a pre-existing, non-conforming single-family to allow the demolition of an existing deck and stairs and replace it with a basement and a family room above. The property is located at 30 Wilshire Park, Needham, MA in the Single-Residence B (SRB) District. (Continued from October 19, 2023)

3. **7:30PM 460 Hillside Avenue**
   Dish Wireless, LLC, applied to the Board of Appeals for a Special Permit under Sections 6.7.3.3 (b) (c) and any other applicable section of the By-Law to install as part of their wireless telecommunications network some of the following equipment: 3 antennas, 6 remote radio units, 3 junctions boxes, 3 fiber cables, and 3 power cables. The property is located at 460 Hillside Avenue, Needham, MA in the Industrial (I) District.

4. **7:45PM 320 Grove Street**
   Corbin Petro and Jessica Gelman, owners, applied to the Board of Appeals for a Variance under MGL 40A, Section 10, 4.2.3, and Section 7.5.3 and any other applicable section of the Needham By-Law to seek zoning relief to allow side setbacks of no less than 15 feet where 25 feet are allowed due to unusual soil, shape of topography of the land. This request is associated with the demolition and reconstruction of an existing non-conforming single family home. The property is located at 320 Grove Street, Needham, MA in the Single-Residence A (SRA) District.

5. **8:00PM 1688 Central Avenue**
   Holly Clarke, Gregg Darish, Robert DiMase, Matthew and Nicole Heideman, Carl Jonasson, Ann and Peter Lyons, and Eileen Sullivan, appellants, applied to the Board of Appeals for an Appeal of Building Inspector Decision (ABID) of Building Permit BC23-10079 issued to Matt Borrelli and Needham Enterprise LLC dated September 19, 2023, for the construction of a childcare facility. The ABID concludes that the Building Permit plans on file do not demonstrate that the construction, alteration or use as proposed complies with the Zoning By Laws as limited by the Dover Amendment MGL 40A, Section 3 The property is located at 1688 Central Street, Needham, MA in the Single-Residence A (SRA) District. (Continued from November 16, 2023)

Next ZBA Meeting – January 18, 2024

NEEDHAM
ZONING BOARD OF APPEALS
MINUTES
THURSDAY, November 16, 2023 - 7:30PM
Approved December 14, 2023

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Pursuant to notice published at least 48 hours prior to this date, a meeting of the Needham Board of Appeals was held in the Charles River Room, Public Services Administration Building, 500 Dedham Avenue, Needham and remotely on Zoom on Thursday, November 16, 2023 at 7:30 p.m.

BOARD MEMBERS PRESENT: Jonathan D. Tamkin, Chair, Howard S. Goldman, Vice-Chair, Peter Friedenberg and Valentina Elzon.

BOARD MEMBER(S) ABSENT: Nikolaos M. Ligris

STAFF PRESENT: Daphne M. Collins, Zoning Specialist.

Mr. Tamkin, Chair presided and opened the meeting at 7:30 p.m.

1. MINUTES OF OCTOBER 19, 2023

Mr. Goldman moved to approve the minutes of October 19, 2023. Mr. Friedenberg seconded the motion. The motion was unanimously approved.

2. Administrative Matters:

- **Valentina Elzon** – Mr. Tamkin welcomed and introduced Valentina Elzon, the new Associate Member appointed by the Select Board to fill the vacancy held by Mr. Ligris.

- **24 Webster Street** – Decision document executed.

- **Board Rules Article V, Section 2 – Withdrawal – Amendment**
  Mr. Goldman moved to adopt the written proposal to amend *Article V, Section 2 Withdrawal* of the Board Rules introduced at the meeting of October 19, 2023. Mr. Friedenberg seconded the motion. The motion was unanimously approved.

3. **CASE #1 30 WILSHIRE PARK CONTINUED TO DECEMBER 18, 2023**
   Mr. Goldman moved to accept the request to continue the public hearing to December 18, 2023 and for it to be the last continuance offered on the matter. Mr. Friedenberg seconded the motion. The motion was unanimously approved.

4. **CASE #2 1688 CENTRAL AVENUE CONTINUED TO DECEMBER 18, 2023**
   Mr. Tamkin designated Mr. Goldman to Chair the hearing, and appointed Mr. Friedenberg and Ms. Elzon to serve as Board members and subsequently left the meeting at 8:35 p.m.

The meeting adjourned at 10:30 p.m.

A summary of the discussions on each subject, a list of the documents and other exhibits used at the meeting, the decisions made, and the actions taken at each meeting, including a record of all votes, are set forth in a detailed decision signed by the members voting on the subject and filed with the Town Clerk.

The hearings can be viewed at http://www.needhamchannel.org/watch-programs/ and https://www.youtube.com/@TownofNeedhamMA/videos

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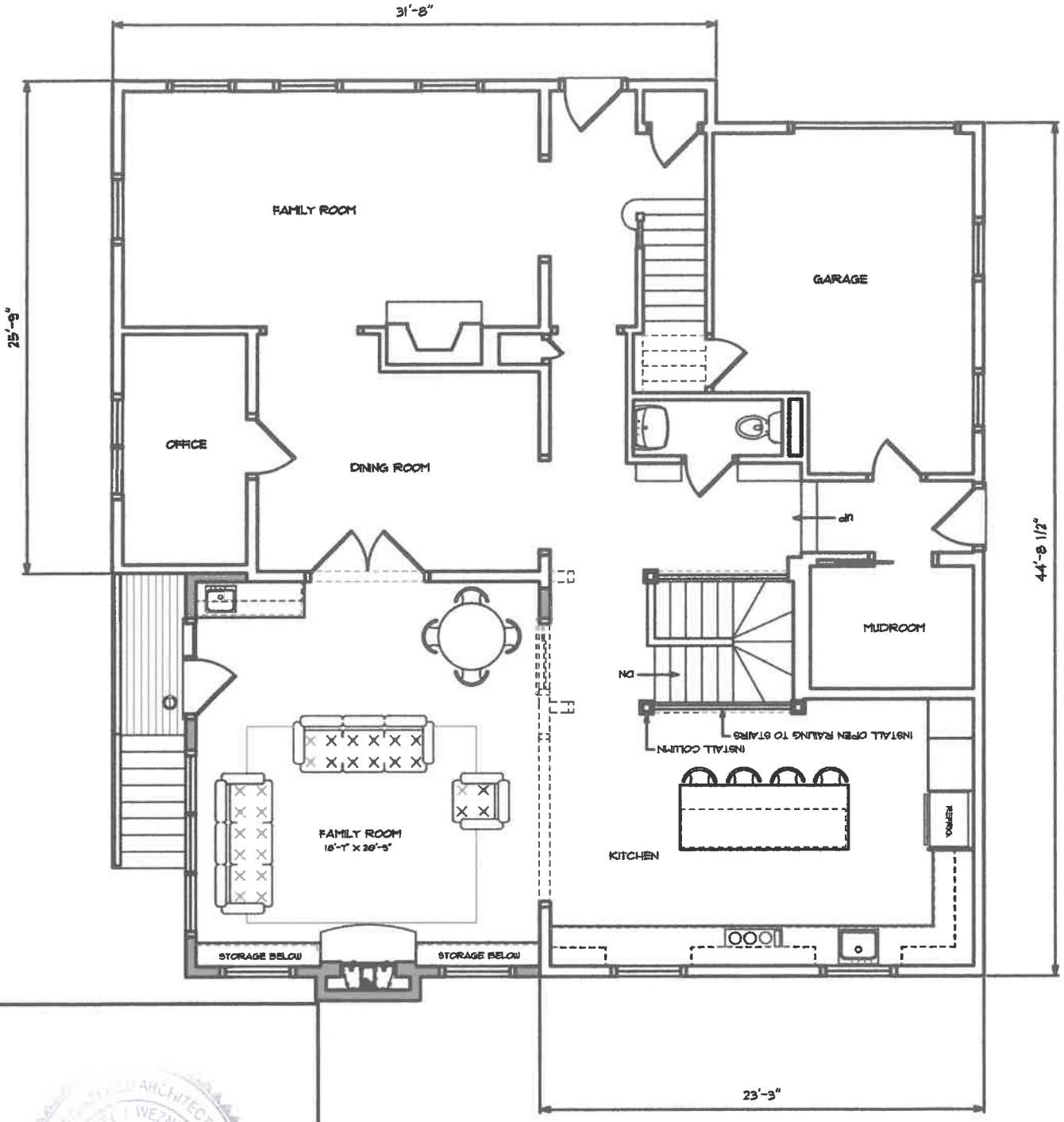
FIRST FLOOR



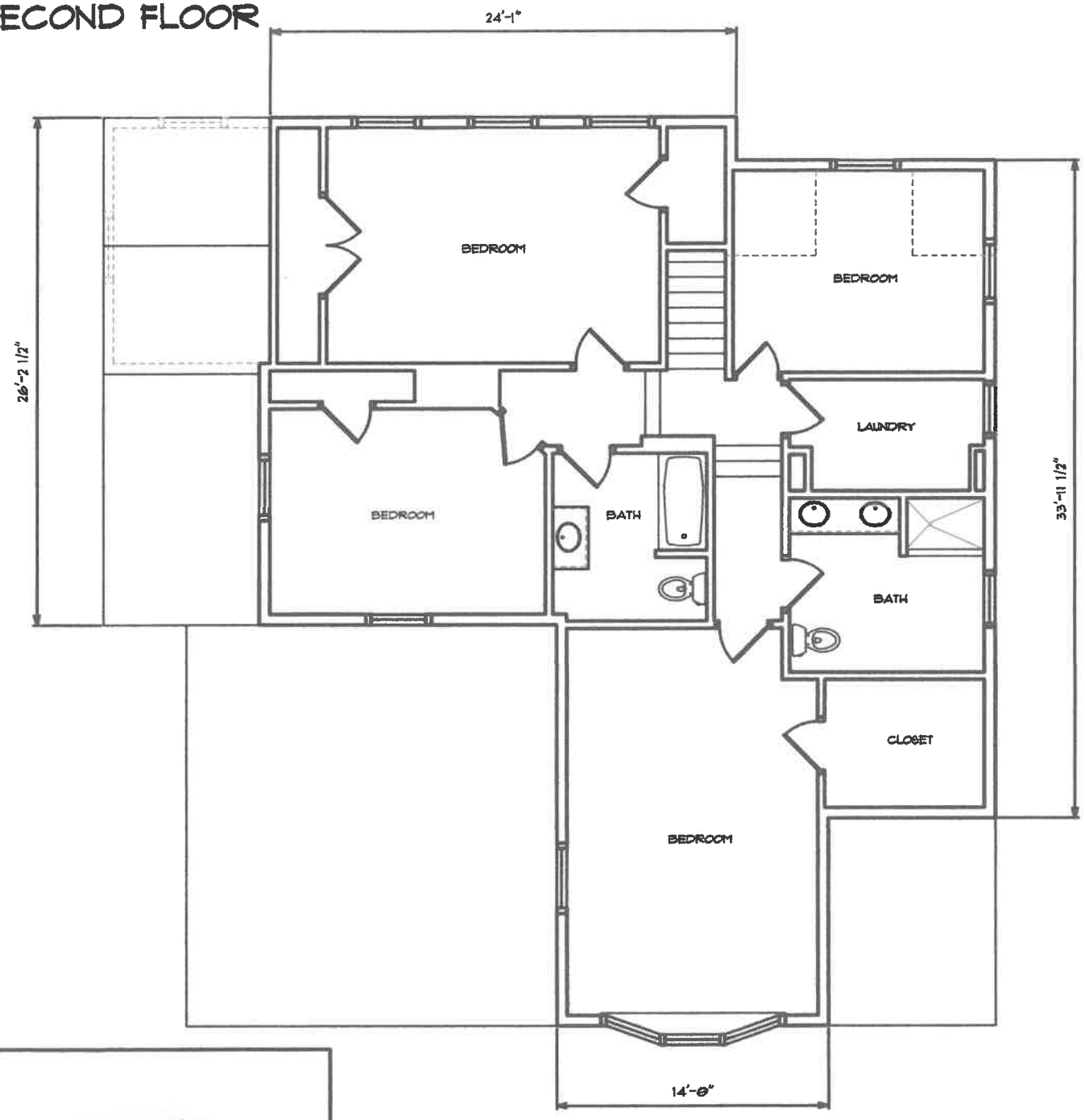
EXISTING 1ST FLOOR LIVING SPACE : 1,403.00 S.F.

ADDITIONAL SPACE : 385.00 S.F.

TOTAL 1ST FLOOR SPACE : 1,788.00 S.F.

30 WILSHIRE PARK, NEEDHAM, MA

SECOND FLOOR



EXISTING 2ND FLOOR LIVING SPACE : 1,214.00 S.F.

EXISTING 1ST FLOOR LIVING SPACE : 1,403.00 S.F.

ADDITIONAL SPACE : 385.00 S.F.

TOTAL FLOOR SPACE : 3,002.00 S.F.

(3,002 / 7,184) TOTAL FAR : .4178 (42%)

30 WILSHIRE PARK, NEEDHAM, MA

Daphne Collins

From: Joseph Prondak
Sent: Tuesday, December 5, 2023 4:22 PM
To: Daphne Collins
Subject: 30 Wilshire

Hello Daphne,

This email will serve to confirm that I reviewed the applicant's re-submittal and the existing and proposed FARs remain unchanged.

The existing home conforms with an FAR just under.38 and the proposal would bring the FAR to .42, creating a new non-conformity.

Sincerely,

Joe Prondak
Needham Building Commissioner
781-455-7550 x308

ZBA Application For Hearing

RECEIVED TOWN CLERK
NEEDHAM, MA 02492
2023 NOV 28 PM 4:30

Applicants must consult with the Building Inspector prior to filing this Application. *Failure to do so will delay the scheduling of the hearing.*

Applicant Information

Applicant Name	**DISH Wireless LLC**		Date: **11/20/23**
Applicant Address	**5701 South Santa Fe Blvd, Littleton, CO 80120**		
Phone		email	

Applicant is ☒Owner; ☐Tenant; ☐Purchaser; ☐Other_____

If not the owner, a letter from the owner certifying authorization to apply must be included

Representative Name	**Kris Kopycinski and Andrew Gorham**		
Address	**100 Apollo Dr, Suite 303, Chelmsford, MA 01824**		
Phone	**978-799-9520**	email	**agorham@nbcllc.com**

Representative is ☐Attorney; ☒Contractor; ☐Architect; ☐Other_____

Contact ☐Me ☒Representative in connection with this application.

Subject Property Information

Property Address	**460 Hillside Ave**		
Map/Parcel Number	**199/100.0-0003-0000.0**	Zone of Property	**Industrial**

Is property within 100 feet of wetlands, 200 feet of stream or in flood Plain?
☐Yes ☒No

Is property ☐Residential or ☒Commercial

If residential renovation, will renovation constitute "new construction"?
☐Yes ☐No

If commercial, does the number of parking spaces meet the By-Law requirement? ☒Yes ☐No
Do the spaces meet design requirements? ☒Yes ☐ No

Application Type (*select one*): ☒Special Permit ☐Variance ☐Comprehensive Permit ☐Amendment ☐Appeal Building Inspector Decision

ZBA Application For Hearing

Existing Conditions:
4 story commercial building. Existing Wireless Telecommunications Facility.
DISH Wireless to add to existing facility

Statement of Relief Sought:
Dish proposes to place 3 antennas, 6 RRUs, 3 junction box(s), 3 fiber cable(s),
at the 37/46 foot RAD. Dish will require a lease area for ground equipment.

Applicable Section(s) of the Zoning By-Law:
6.7.3.3

If application under Zoning Section 1.4 above, list non-conformities:

	Existing Conditions	Proposed Conditions
Use		
# Dwelling Units		
Lot Area *(square feet)*		
Front Setback *(feet)*		
Rear Setback *(feet)*		
Left Setback *(feet)*		
Right Setback *(feet)*		
Frontage *(feet)*		
Lot Coverage *(%)*		
FAR *(Floor area divided by the lot area)*		
Numbers must match those on the certified plot plan and supporting materials		

ZBA Application For Hearing

Date Structure Constructed including additions:	Date Lot was created:
1943	

Submission Materials	Provided
Certified Signed Plot Plan of Existing and Proposed Conditions *(Required)*	X
Application Fee, check made payable to the Town of Needham Check holders name, address, and phone number to appear on check and in the Memo line state: "ZBA Fee – Address of Subject Property" *(Required)*	X
If applicant is tenant, letter of authorization from owner *(Required)*	X
Electronic submission of the complete application with attachments *(Required)*	X
Elevations of Proposed Conditions *(when necessary)*	
Floor Plans of Proposed Conditions *(when necessary)*	

Feel free to attach any additional information relative to the application. Additional information may be requested by the Board at any time during the application or hearing process.

❖❖❖❖

I hereby request a hearing before the Needham Zoning Board of Appeals. I have reviewed the Board Rules and instructions.

I certify that I have consulted with the Building Inspector 9/28/23
date of consult

Date: 11/20/23 Applicant Signature Andrew Gorham

An application must be submitted to the Town Clerk's Office at townclerk@needhamma.gov and the ZBA Office at dcollins@needhamma.gov

NB+C™ TOTALLY COMMITTED.

Dear Needham Zoning Board of Appeals:

My name is Andrew Gorham, I work for Network Building + Consulting (NB+C), and we are applying for this special permit located at 460 Hillside Ave on behalf of DISH Wireless. To provide some context, in early 2020 T-Mobile and Sprint merged to become one company. The approval of such a merger was allowed by the FCC in large part due to DISH Wireless's indication that they would build out their own wireless broadband network, effectively becoming the fourth major nationwide carrier. DISH is currently in the process of building out its wireless telecommunications network, and the proposed site, to be located in the Town of Needham, is one of many sites that will support DISH Wireless's commitment to build a wireless network from the ground-up. This network is deployed with a systems architecture able to take full advantage of advances in wireless technology. The DISH Wireless OpenRAN network is a stand-alone virtualized wireless network, and the first of its kind: smarter, faster and more secure. Over the next decade, DISH Wireless's advanced network will improve connectivity across the United States, starting with the Town of Needham and the surrounding areas.

DISH will comply with all local, state, and federal regulations throughout the process of ultimately getting this site built. The maintenance schedule for the antennas and related equipment will be determined at a later date in time, once the site has been built out and is active.

For this particular site, we have identified this building as a strong candidate in part due to the various other carriers already located on the premises. Furthermore, please see in the supporting documents a portion of the signed DISH lease with Hillside Investment Group, LLC, signed by the manager Kenneth Shapiro, as well as the Letter of Authorization from Ken.

Please feel free to reach me at agorham@nbcllc.com with any questions, comments, or concerns.

Thank you for your time and consideration,
Andrew Gorham

dish wireless.™

DISH Wireless L.L.C. SITE ID:

BOBOS01058A

DISH Wireless L.L.C. SITE ADDRESS:

460 HILLSIDE AVENUE
NEEDHAM, MA 02494

MASSACHUSETTS CODE COMPLIANCE

ALL WORK SHALL BE PERFORMED AND MATERIALS INSTALLED IN ACCORDANCE WITH THE CURRENT EDITIONS OF THE FOLLOWING CODES AS ADOPTED BY THE LOCAL GOVERNING AUTHORITIES. NOTHING IN THESE PLANS IS TO BE CONSTRUED TO PERMIT WORK NOT CONFORMING TO THESE CODES:

CODE TYPE	CODE
BUILDING	MA STATE BUILDING CODE, 9TH EDITION (780 CMR)/2015 IBC W/ AMENDMENTS
MECHANICAL	MECHANICAL CODE 2015 OF MASSACHUSETTS/2015 IMC W/ AMENDMENTS
ELECTRICAL	MA ELECTRICAL CODE/2020 NEC W/ AMENDMENTS

SHEET INDEX

SHEET NO.	SHEET TITLE
T-1	TITLE SHEET
A-1	BUILDING PLAN
A-2	ANTENNA PLAN, ELEVATION AND SCHEDULE
A-3	BUILDING ELEVATION
A-4	EQUIPMENT PLATFORM AND H-FRAME DETAILS
A-5	EQUIPMENT DETAILS
A-6	EQUIPMENT DETAILS
E-1	ELECTRICAL/FIBER ROUTE PLAN AND NOTES
E-2	ELECTRICAL DETAILS
E-3	ELECTRICAL ONE-LINE & PANEL SCHEDULE
G-1	GROUNDING PLANS AND NOTES
G-2	GROUNDING DETAILS
G-3	GROUNDING DETAILS
RF-1	RF CABLE COLOR CODE
GN-1	LEGEND AND ABBREVIATIONS
GN-2	RF SIGNAGE
GN-3	GENERAL NOTES
GN-4	GENERAL NOTES
GN-5	GENERAL NOTES
GN-6	PMI CHECKLIST & NOTES
ST-1	CANISTER DETAILS
ST-2	CONNECTION DETAILS
ST-3	BILL OF MATERIALS

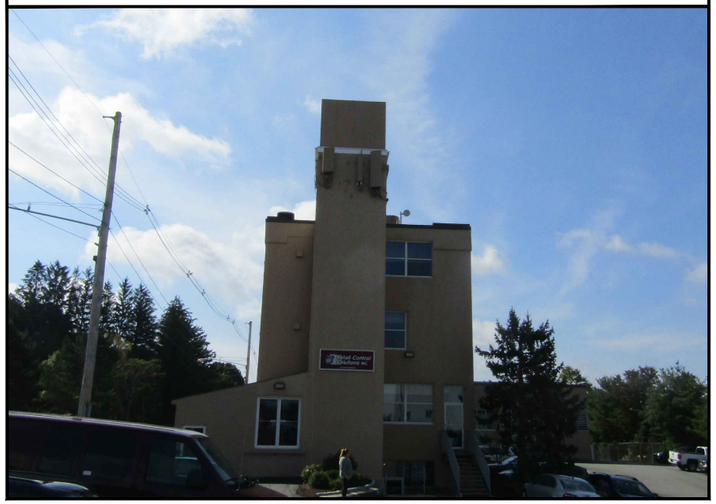
SCOPE OF WORK

THIS IS NOT AN ALL INCLUSIVE LIST. CONTRACTOR SHALL UTILIZE SPECIFIED EQUIPMENT PART OR ENGINEER APPROVED EQUIVALENT. CONTRACTOR SHALL VERIFY ALL NEEDED EQUIPMENT TO PROVIDE A FUNCTIONAL SITE. THE PROJECT GENERALLY CONSISTS OF THE FOLLOWING:

SECTOR SCOPE OF WORK:
- INSTALL (3) PROPOSED PANEL ANTENNAS (1 PER SECTOR)
- INSTALL (3) PROPOSED ANTENNA MOUNTS (1 PER SECTOR)
- INSTALL (2) PROPOSED ANTENNA CONCEALMENTS (1 PER BETA & GAMMA SECTORS)
- INSTALL PROPOSED JUMPERS
- INSTALL (6) PROPOSED RRUs (2 PER SECTOR)
- INSTALL (3) PROPOSED RRU MOUNTS (1 PER SECTOR)
- INSTALL (3) PROPOSED OVER VOLTAGE PROTECTION DEVICE (OVP) (1 PER SECTOR)
- INSTALL (3) PROPOSED DC POWER CABLES (1 PER SECTOR)
- INSTALL (3) PROPOSED FIBER TRUNKS (1 PER SECTOR)
- INSTALL PROPOSED CABLE TRAY

ROOFTOP SCOPE OF WORK:
- INSTALL (1) PROPOSED BBU IN CABINET
- INSTALL (1) PROPOSED EQUIPMENT CABINET
- INSTALL (1) PROPOSED NEMA 3 TELCO-FIBER BOX
- INSTALL (1) PROPOSED GPS UNIT

SITE PHOTO



UNDERGROUND SERVICE ALERT - 811 DIG SAFE
UTILITY NOTIFICATION CENTER OF MASSACHUSETTS
(888) 344-7233
WWW.DIGSAFE.COM

CALL 3 WORKING DAYS UTILITY NOTIFICATION PRIOR TO CONSTRUCTION

811

GENERAL NOTES

THE FACILITY IS UNMANNED AND NOT FOR HUMAN HABITATION. A TECHNICIAN WILL VISIT THE SITE AS REQUIRED FOR ROUTINE MAINTENANCE. THE PROJECT WILL NOT RESULT IN ANY SIGNIFICANT DISTURBANCE OR EFFECT ON DRAINAGE. NO SANITARY SEWER SERVICE, POTABLE WATER, OR TRASH DISPOSAL IS REQUIRED AND NO COMMERCIAL SIGNAGE IS PROPOSED.

11"x17" PLOT WILL BE HALF SCALE UNLESS OTHERWISE NOTED

CONTRACTOR SHALL VERIFY ALL PLANS, EXISTING DIMENSIONS, AND CONDITIONS ON THE JOB SITE, AND SHALL IMMEDIATELY NOTIFY THE ENGINEER IN WRITING OF ANY DISCREPANCIES BEFORE PROCEEDING WITH THE WORK.

SITE INFORMATION

PROPERTY OWNER:	KEW MANAGEMENT GROUP, LLC
ADDRESS:	460 HILLSIDE AVENUE NEEDHAM, MA 02494
TOWER TYPE:	ROOFTOP
TOWER CO SITE ID:	N/A
TOWER APP NUMBER:	N/A
COUNTY:	NORFOLK
LATITUDE (NAD 83):	42° 17' 28.352" N 42.291209 N
LONGITUDE (NAD 83):	71° 14' 10.971" W 71.236381 W
ZONING JURISDICTION:	TOWN OF NEEDHAM
ZONING DISTRICT:	OFFICE BUILDING – MFG
PARCEL NUMBER:	NEED-100-003
OCCUPANCY GROUP:	U
CONSTRUCTION TYPE:	II-B
POWER COMPANY:	EVERSOURCE/NSTAR
TELEPHONE COMPANY:	COMCAST

PROJECT DIRECTORY

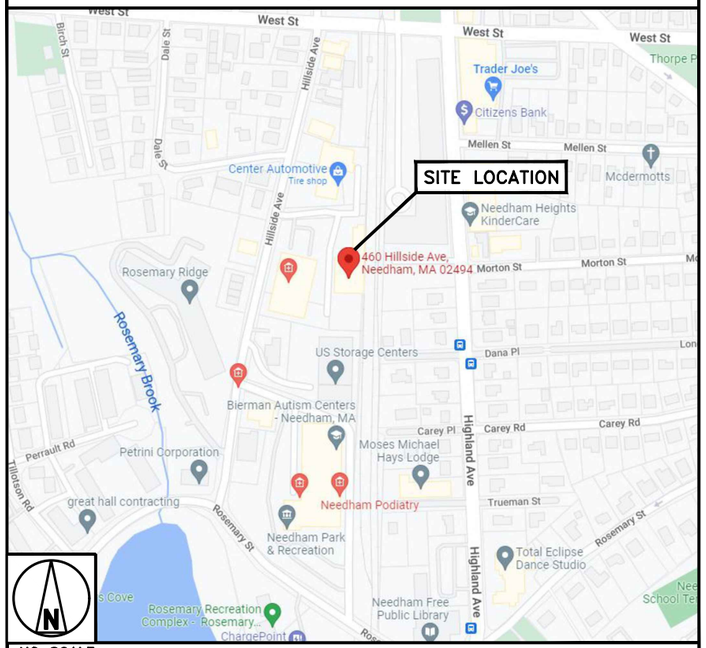
APPLICANT:	DISH Wireless L.L.C. 5701 SOUTH SANTA FE DRIVE LITTLETON, CO 80120
PROP. MANAGER:	KEW MANAGEMENT GROUP, LLC. 460 HILLSIDE AVENUE NEEDHAM, MA 02494 (781) 455-8222
SITE DESIGNER:	NB+C ENGINEERING SERVICES, LLC 100 APOLLO DRIVE, SUITE 303 CHELMSFORD, MA 01824 (978) 856-8308
SITE ACQUISITION:	ANDREW GORHAM AGORHAM@NBCLLC.COM
CONSTRUCTION MANAGER:	AARON CHANDLER AARON.CHANDLER@DISH.COM
RF ENGINEER:	SAMEER PARAKKAVETTY SAMEER.PARAKKAVETTY@DISH.COM

DIRECTIONS

DIRECTIONS FROM BOSTON, LOGAN AIRPORT:

DESTINATION IS APPROXIMATELY 20 MILES FROM AIRPORT. THIS ROUTE HAS TOLLS. GET ON I-90 W FROM TRANSPORTATION WAY (TAKE TED WILLIAMS TUNNEL = 13'-9" CLEARANCE). AT END OF TUNNEL, KEEP TO THE LEFT (WEST 90 WORCESTER). TAKE EXIT 123A (WALTHAM / PROVIDENCE RI) AND FOLLOW SIGNS TOWARD I-95 S (DEDHAM / PROVIDENCE RI). TAKE EXIT 35C (HIGHLAND AVE NEEDHAM). AT END OF OFFRAMP, TURN RIGHT ONTO HIGHLAND AVENUE. AFTER 0.7 MILES, TURN RIGHT ONTO WEST STREET. AFTER 500 FEET, TURN LEFT ONTO HILLSIDE AVENUE. AFTER 0.1 MILES, TURN LEFT INTO DRIVEWAY MARKED AS 464 HILLSIDE AVENUE. AFTER 200 FEET, TURN RIGHT. DESTINATION IS ON LEFT.

VICINITY MAP



N

NO SCALE

dish wireless.

5701 SOUTH SANTA FE DRIVE
LITTLETON, CO 80120

NB+C™ TOTALLY COMMITTED.

NB+C ENGINEERING SERVICES, LLC.

100 APOLLO DRIVE
SUITE 303
CHELMSFORD, MA 01824
(978) 856-8308

COMMONWEALTH OF MASSACHUSETTS
KRUPAKARAN KOLLENGODE VENUGOPAL
NO. 50019
REGISTERED PROFESSIONAL ENGINEER

IT IS A VIOLATION OF LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT.

DRAWN BY:	CHECKED BY:	APPROVED BY:
CSG	NSB	DRG

RFDS REV #: 1

CONSTRUCTION DOCUMENTS

SUBMITTALS

REV	DATE	DESCRIPTION
0	07/28/2023	ISSUED FOR REVIEW
1	08/30/2023	BILL OF MATERIALS

A&E PROJECT NUMBER

100753

DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

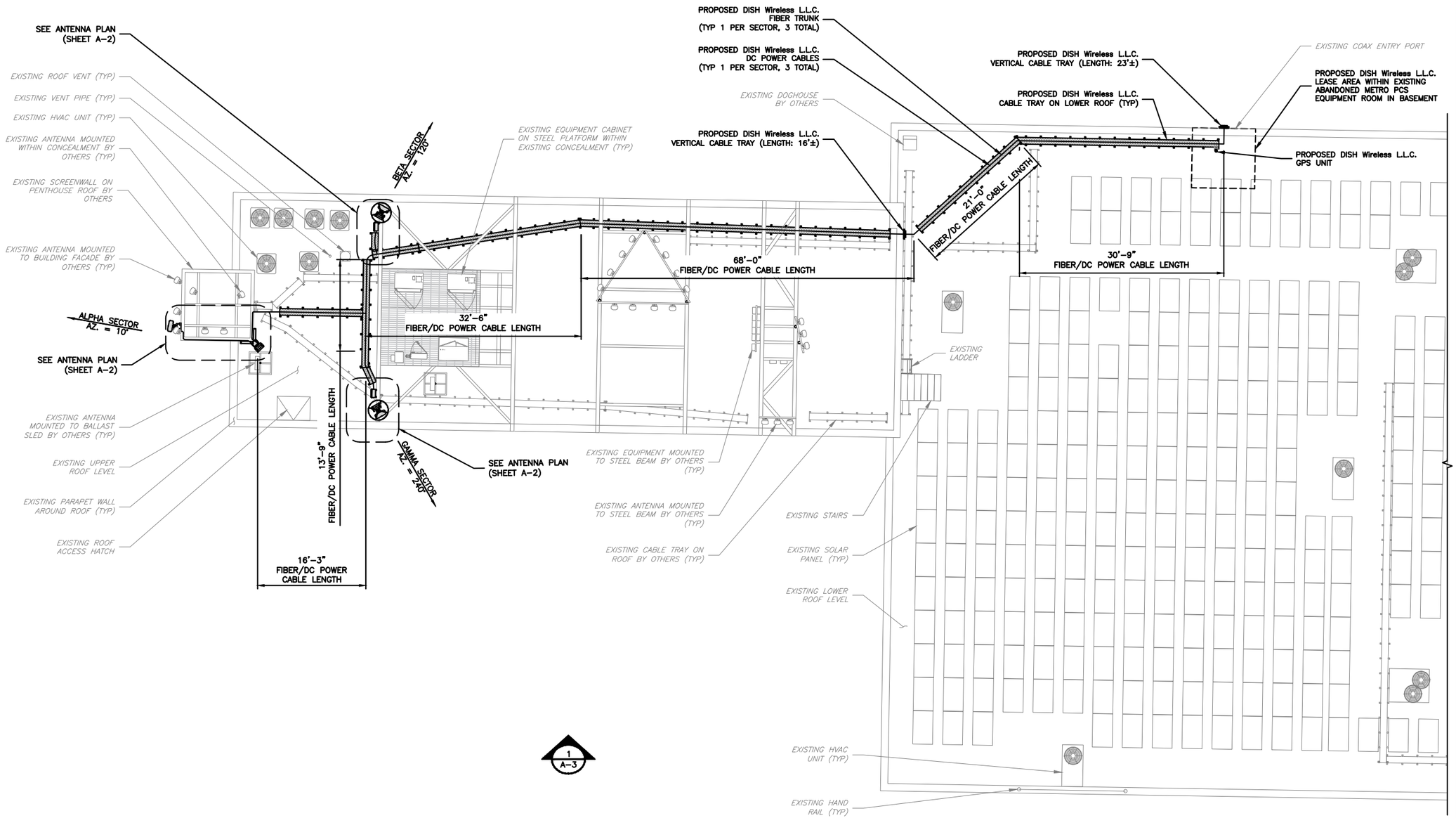
TITLE SHEET

SHEET NUMBER

T-1

NOTES

1. CONTRACTOR SHALL FIELD VERIFY ALL DIMENSIONS.
2. CONTRACTOR SHALL MAINTAIN A 10'-0" MINIMUM SEPARATION BETWEEN THE PROPOSED GPS UNIT, TRANSMITTING ANTENNAS AND EXISTING GPS UNITS.



BUILDING PLAN

8' 4' 0 8' 16'
1/8"=1'-0"

1

dish wireless.

5701 SOUTH SANTA FE DRIVE
LITTLETON, CO 80120

NB+C™
TOTALLY COMMITTED.

NB+C ENGINEERING SERVICES, LLC.

100 APOLLO DRIVE
SUITE 303
CHELMSFORD, MA 01824
(978) 856-8308

COMMONWEALTH OF MASSACHUSETTS
KRUPAKARAN KOLLENGODE VENUGOPAL
NO. 36019
REGISTERED PROFESSIONAL ENGINEER

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DRAWN BY:	CHECKED BY:	APPROVED BY:
CSG	NSB	DRG

RFDS REV #: 1

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A&E PROJECT NUMBER

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DISH Wireless L.L.C.
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BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

BUILDING PLAN

SHEET NUMBER

A-1

NOTES

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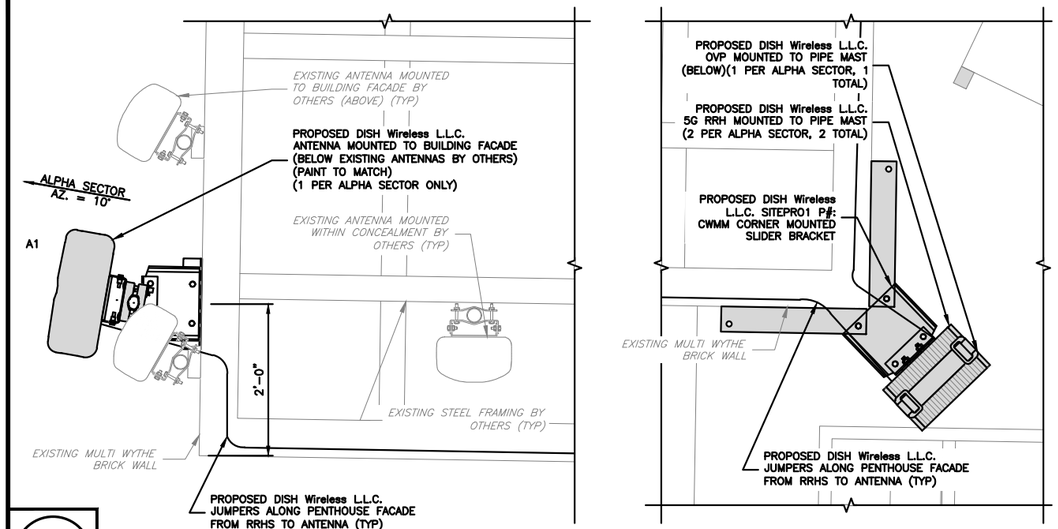
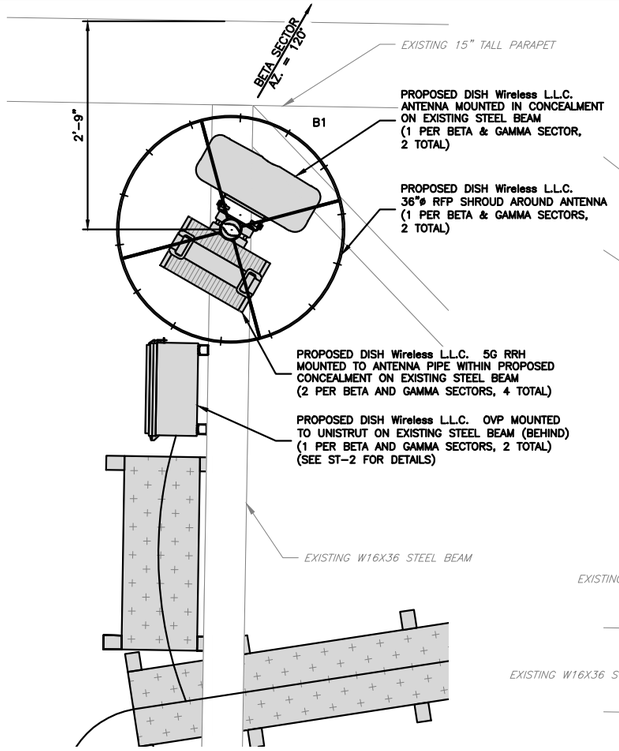
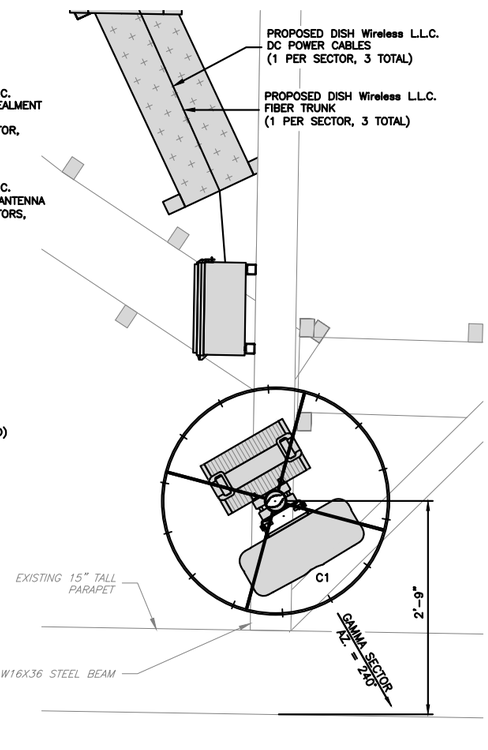


ALPHA SECTOR



BETA SECTOR

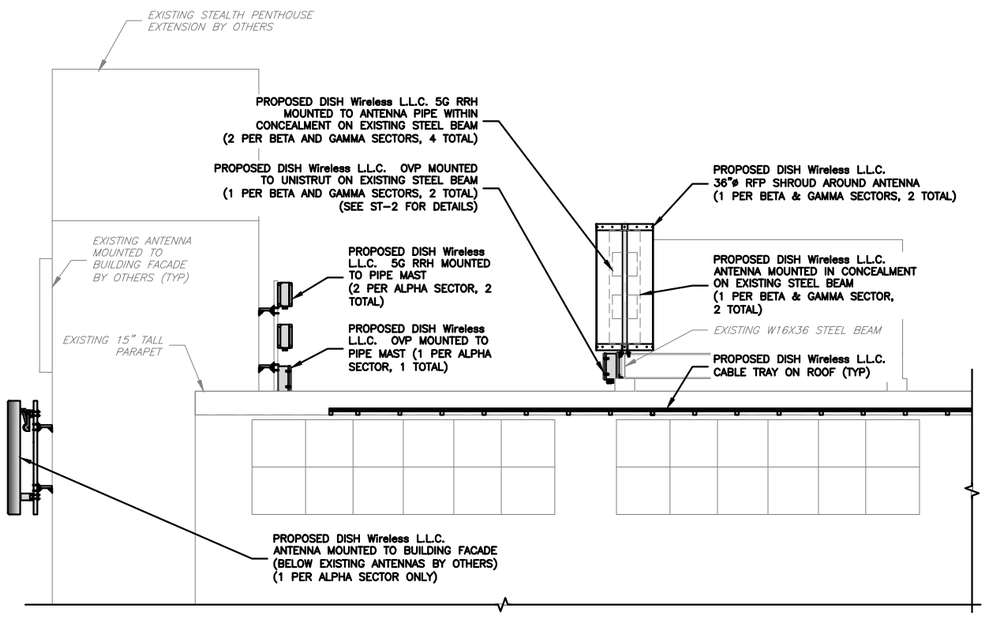


GAMMA SECTOR

ANTENNA PLANS

12" 6" 0 1' 2' 3' 4' 5' 6' 7'
3/8"=1'-0"

1



ANTENNA ELEVATION

12" 6" 0 1' 2' 3' 4' 5'
1/2"=1'-0"

2

SECTOR POS.	ANTENNA					TRANSMISSION CABLE	RRH			OVP
	EXISTING OR PROPOSED	MANUFACTURER – MODEL NUMBER	TECH	AZIMUTH	RAD CENTER	FEED LINE TYPE AND LENGTH	MANUFACTURER – MODEL NUMBER	TECH	POS.	MANUFACTURER MODEL
A1	PROPOSED	COMMSCOPE – FFVV-65B-R2	5G	10°	37'-0"	(1) 6AWG DC POWER CABLE AND (1) FIBER TRUNK (180'± LONG)	SAMSUNG – MID BAND SFG-ARR3KM01DI_RF4451D-70A	5G	A1	RAYCAP RDIDC-3045-PF-48
--	--	--	--	--	--		SAMSUNG – LOW BAND SFG-ARR3J601DI_RF4450T-71A	5G	A1	
--	--	--	--	--	--		--	--	--	
B1	PROPOSED	COMMSCOPE – FFVV-65B-R2	5G	120°	46'-0"	(1) 6AWG DC POWER CABLE AND (1) FIBER TRUNK (155'± LONG)	SAMSUNG – MID BAND SFG-ARR3KM01DI_RF4451D-70A	5G	B1	RAYCAP RDIDC-3045-PF-48
--	--	--	--	--	--		SAMSUNG – LOW BAND SFG-ARR3J601DI_RF4450T-71A	5G	B1	
--	--	--	--	--	--		--	--	--	
C1	PROPOSED	COMMSCOPE – FFVV-65B-R2	5G	240°	46'-0"	(1) 6AWG DC POWER CABLE AND (1) FIBER TRUNK (172'± LONG)	SAMSUNG – MID BAND SFG-ARR3KM01DI_RF4451D-70A	5G	C1	RAYCAP RDIDC-3045-PF-48
--	--	--	--	--	--		SAMSUNG – LOW BAND SFG-ARR3J601DI_RF4450T-71A	5G	C1	
--	--	--	--	--	--		--	--	--	

NOTES

1. CONTRACTOR TO REFER TO FINAL CONSTRUCTION RFDS FOR ALL RF DETAILS.
2. ANTENNA AND RRH MODELS MAY CHANGE DUE TO EQUIPMENT AVAILABILITY. ALL EQUIPMENT CHANGES MUST BE APPROVED AND REMAIN IN COMPLIANCE WITH THE PROPOSED DESIGN AND STRUCTURAL ANALYSES.

ANTENNA SCHEDULE

NO SCALE

3

dish wireless.

5701 SOUTH SANTA FE DRIVE
LITTLETON, CO 80120

NB+C™ TOTALLY COMMITTED.

NB+C ENGINEERING SERVICES, LLC.

100 APOLLO DRIVE
SUITE 303
CHELMSFORD, MA 01824
(978) 856-8308

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DRAWN BY:	CHECKED BY:	APPROVED BY:
CSG	NSB	DRG

RFDS REV #: 1

CONSTRUCTION DOCUMENTS

SUBMITTALS

REV	DATE	DESCRIPTION
0	07/28/2023	ISSUED FOR REVIEW
1	08/30/2023	BILL OF MATERIALS

A&E PROJECT NUMBER

100753

DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

ANTENNA PLAN, ELEVATION AND SCHEDULE

SHEET NUMBER

A-2

NOTES

1. CONTRACTOR SHALL FIELD VERIFY ALL DIMENSIONS.
2. CONTRACTOR SHALL MAINTAIN A 10'-0" MINIMUM SEPARATION BETWEEN THE PROPOSED GPS UNIT, TRANSMITTING ANTENNAS AND EXISTING GPS UNITS.

TOP OF HIGHEST APPURTENANCE
57'-6" AGL

EXISTING PENTHOUSE
49'-6" AGL

TOP OF PROPOSED DISH Wireless L.L.C. ANTENNA (BETA & GAMMA SECTORS)
49'-0" AGL

PROPOSED DISH Wireless L.L.C. ANTENNA (BETA & GAMMA SECTORS)
RAD CENTER @ 46'-0" AGL

EXISTING BUILDING PARAPET
40'-6" AGL

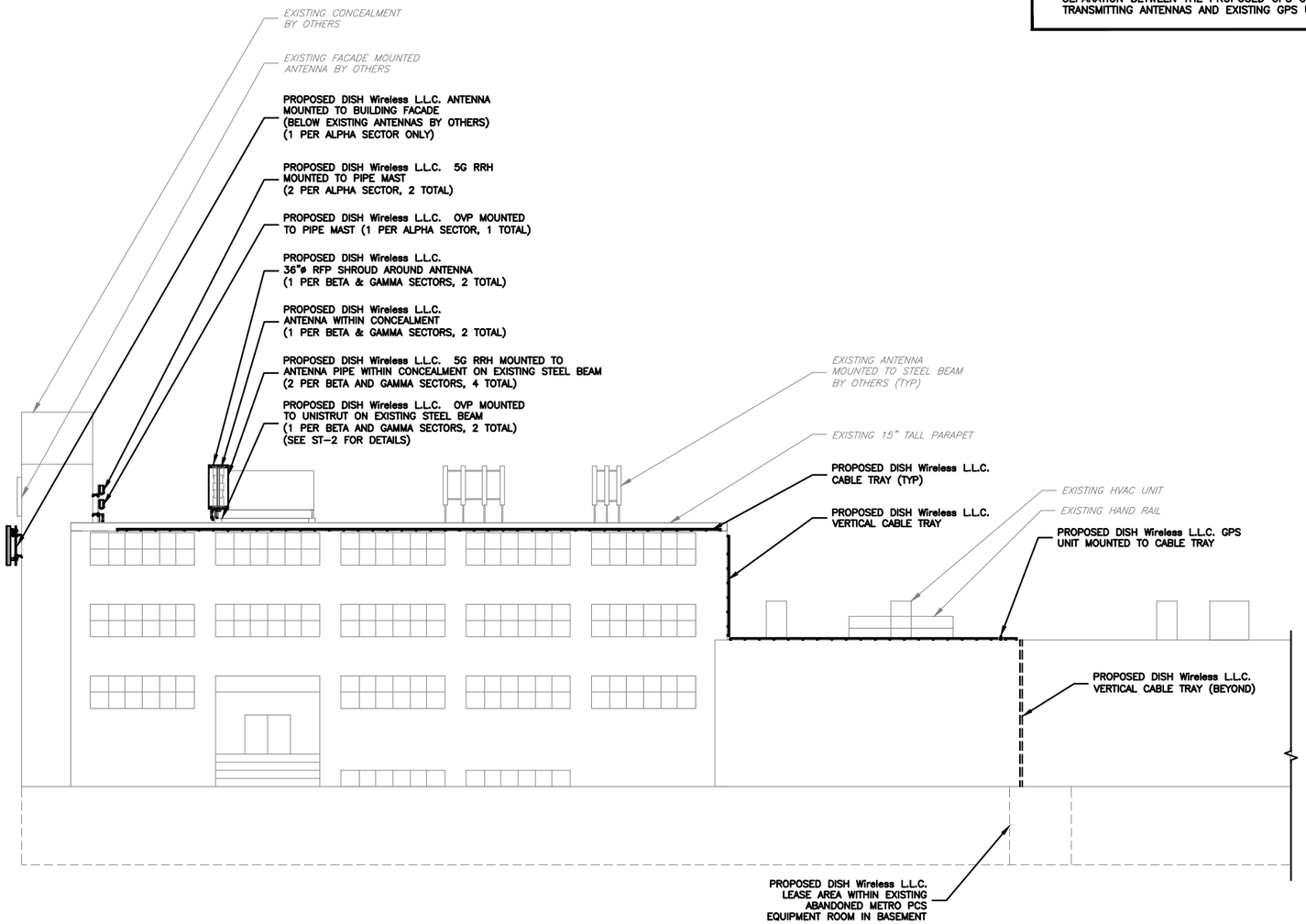
TOP OF PROPOSED DISH Wireless L.L.C. ANTENNA (ALPHA SECTOR ONLY)
40'-0" AGL

EXISTING BUILDING MAIN ROOF
39'-3" AGL

PROPOSED DISH Wireless L.L.C. ANTENNA (ALPHA SECTOR ONLY)
RAD CENTER @ 37'-0" AGL

EXISTING LOWER ROOF
22'-6" AGL

GROUND LEVEL
0'-0" AGL



BUILDING ELEVATION

12' 8' 4' 0 10' 20'
3/32"=1'-0"

1

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COMMONWEALTH OF MASSACHUSETTS
KRUPAKARAN KOLLENGODE
NO. 30019
REGISTERED PROFESSIONAL ENGINEER

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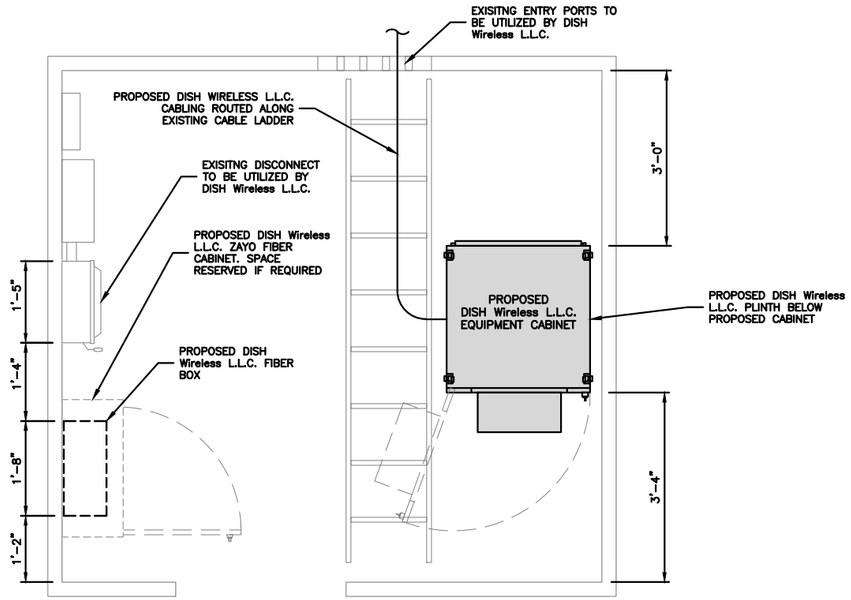
PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE
BUILDING ELEVATION

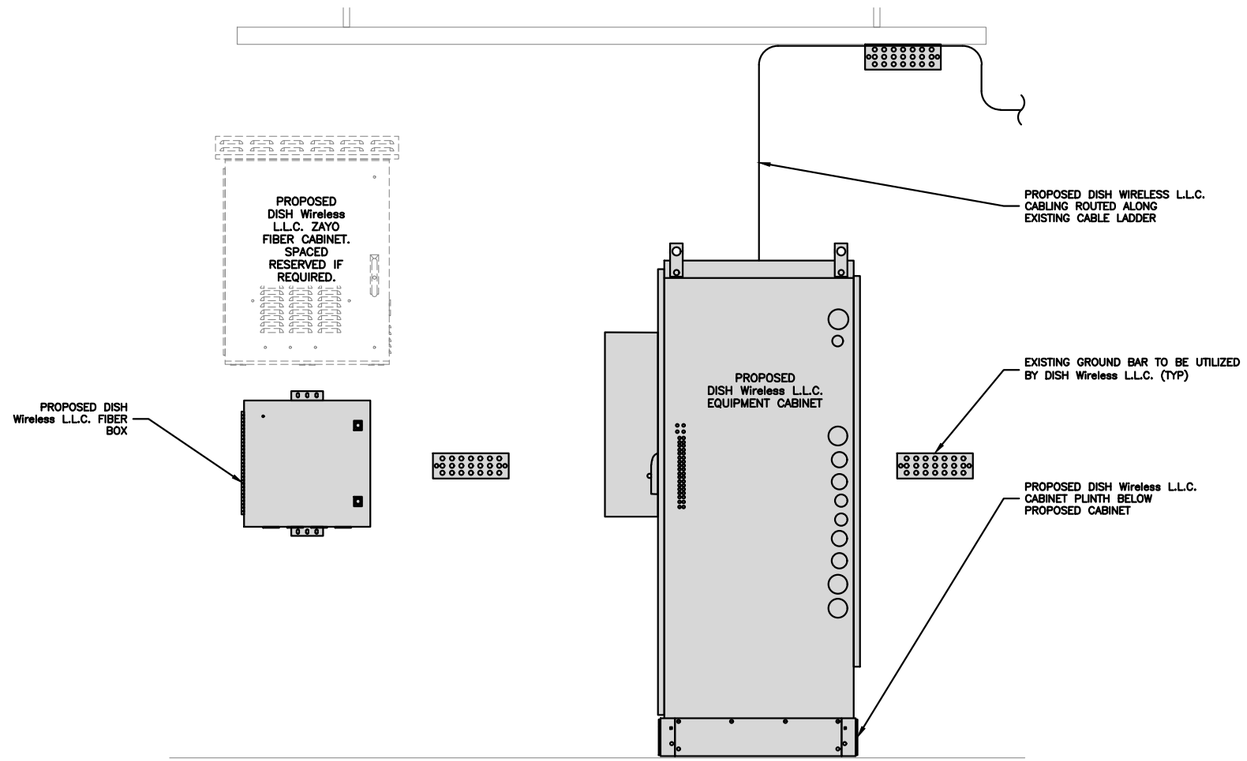
SHEET NUMBER
A-3



EQUIPMENT PLAN

12" 6" 0 1' 2' 3'
3/4"=1'-0"

1



EQUIPMENT ELEVATION

12" 9" 6" 3" 0 1' 2'
1"=1'-0"

3

dish wireless.

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LITTLETON, CO 80120

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COMMONWEALTH OF MASSACHUSETTS
KRUPAKIRAN KOLLIPARA
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RFDS REV #: 1

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DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

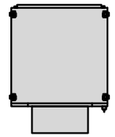
EQUIPMENT PLATFORM AND H-FRAME DETAILS

SHEET NUMBER

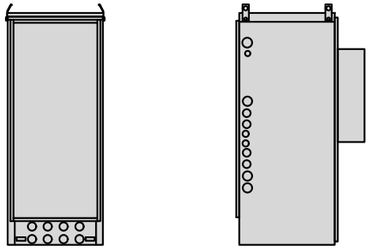
A-4

ENERSYS HVAC 2000005995

DIMENSIONS (HxWxD)	73"x30"x32"
POWER SYSTEM	-48V ALPHA/600A
HVAC	600W
TOTAL WEIGHT (EMPTY)	371 lbs



PLAN



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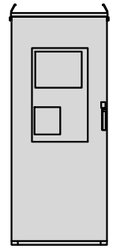
SIDE



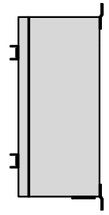
FRONT

CABINET DETAIL | NO SCALE | 1

CHARLES CFIT-PF2020DSH1 FIBER TELCO ENCLOSURE

ENCLOSURE DIMS (HxWxD)	20"x20"x9"
ENCLOSURE WEIGHT	20 lbs
MOUNTING	WALL
COMPLIANCE	TYPE 4

FRONT



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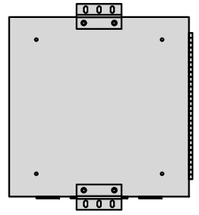

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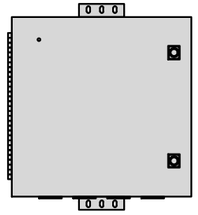


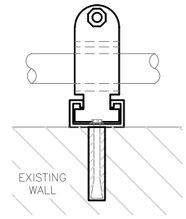
FRONT

FIBER TELCO ENCLOSURE DETAIL | NO SCALE | 2

CABLE WALL MOUNT SUPPORT

UNISTRUT TYPE	GRAINGER P1000T
UNISTRUT DIMENSIONS (HxWxL)	1 5/8"x 1 5/8"x 12"
WEIGHT/ VOLUME	1.85 LB PER FOOT
ULTIMATE LOAD CAPACITY	718.5 LB

NOTES:
1. ALL HARDWARE AND PARTS SHALL BE HOT DIPPED GALVANIZED WITH LOCK WASHERS AND HEAVY HEX NUTS.
2. VERTICAL CABLE MOUNT: 4'-0" MAX. UNISTRUT SEPARATION
3. HORIZONTAL CABLE MOUNT: 3'-0" MAX UNISTRUT SEPARATION



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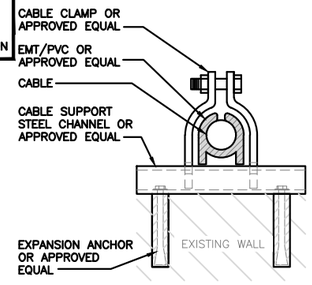


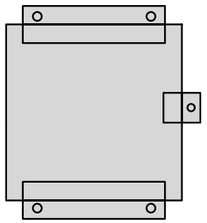
SIDE

CABLE WALL MOUNT SUPPORT DETAIL | NO SCALE | 3

LEVITON 1N240-21 SUBMETER

WATTAGE	3
AMPS	200
VOLTS AC	120, 208, 240
PHASE	1

PLAN



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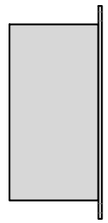

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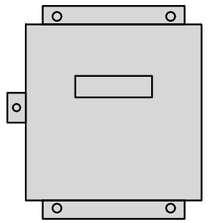
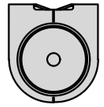


FRONT

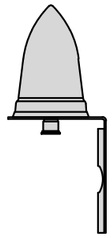
E-MON D-MON DETAIL | NO SCALE | 4

PCTEL GPSGL-TMG-SPI-40NCB

DIMENSIONS (DIAxH) MM/INCH	81x184mm 3.2"x7.25"
WEIGHT W/ACCESSORIES	075 lbs
CONNECTOR	N-FEMALE
FREQUENCY RANGE	1590 ± 30MHz



TOP



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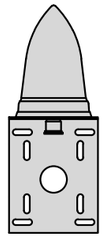
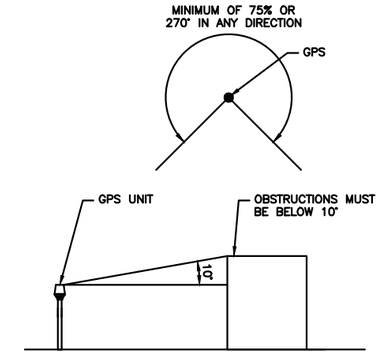


SIDE

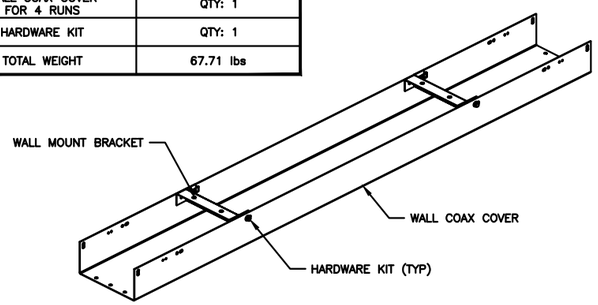
GPS DETAIL | NO SCALE | 5



GPS MINIMUM SKY VIEW REQUIREMENTS | NO SCALE | 6

COMMSCOPE COAX WALL SUPPORT MT-F1589

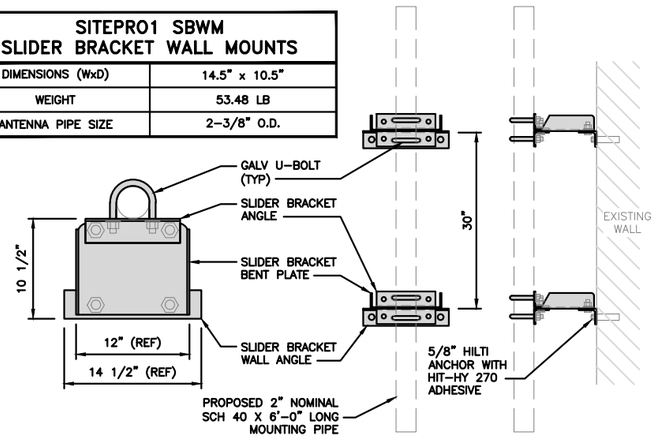
WALL MOUNT BRACKET (4 RUNS OF COAX)	QTY: 2
WALL COAX COVER FOR 4 RUNS	QTY: 1
HARDWARE KIT	QTY: 1
TOTAL WEIGHT	67.71 lbs



CABLE WALL SUPPORT | NO SCALE | 7

SITEPRO1 SBWM SLIDER BRACKET WALL MOUNTS

DIMENSIONS (WxD)	14.5" x 10.5"
WEIGHT	53.48 LB
ANTENNA PIPE SIZE	2-3/8" O.D.



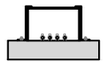
PLAN FRONT SIDE

ANTENNA WALL MOUNT DETAIL | NO SCALE | 8

COMMSCOPE RT-CB4D ROOFTOP COVER KIT

DIMENSIONS (HxWxL)	7"x 11.25"x 96"
WEIGHT/ VOLUME	85.98 LBS
CABLE RUN (QTY)	4

MOUNTING	NON-PENETRATING
INCLUDED PRODUCTS:	RTCB4D.01 CHANNEL (1)
	MT-F1598 SLEEPERS (3)
	RTCUH HARDWARE
	RTHC.01 HOLD-DOWN CLAMPS (6)



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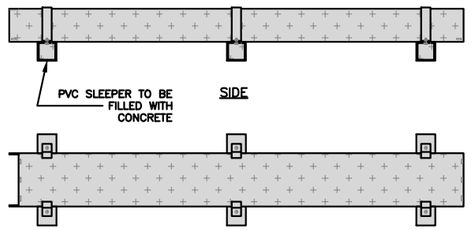

PLAN

ROOFTOP CABLE TRAY DETAIL | NO SCALE | 9

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RFDS REV #: 1

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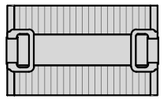
PROJECT INFORMATION
BOBOS01058A
460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE
EQUIPMENT DETAILS

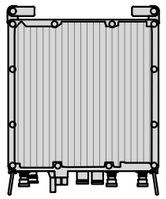
SHEET NUMBER
A-5

SAMSUNG – MID BAND
SFG–ARR3KM01DI_RF4451D–70A

DIMENSIONS (HxWxD)	15"x15"x8.9"
WEIGHT	61.3 lbs
CONNECTOR TYPE	4.3–10 RF CONNECTOR
INPUT VOLTAGE	–48VDC (–36 to 58 VDC)



PLAN



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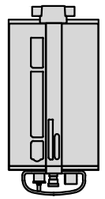

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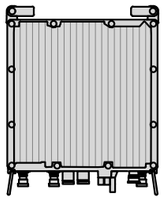
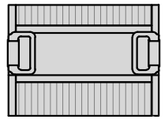


FRONT

RRH DETAIL | NO SCALE | 1

SAMSUNG – LOW BAND
SFG–ARR3J601DI_RF4450T–71A

DIMENSIONS (HxWxD)	15"x16.5"x11"
WEIGHT	94.6 lbs
CONNECTOR TYPE	4.3–10 RF CONNECTOR
INPUT VOLTAGE	–48VDC (–36 to 58 VDC)



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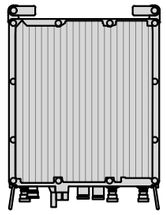

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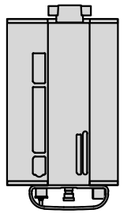

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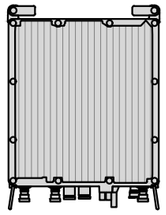
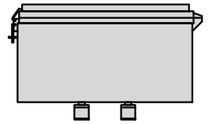


FRONT

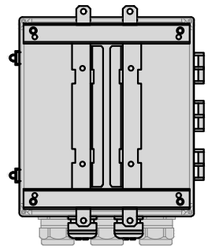
RRH DETAIL | NO SCALE | 2

RAYCAP RDIDC–3045–PF–48
SURGE PROTECTION DEVICE (OVP)

DIMENSIONS (HxWxD)	19.00"x16.21"x9.64"
WEIGHT	21 lbs



PLAN



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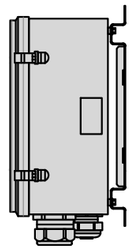

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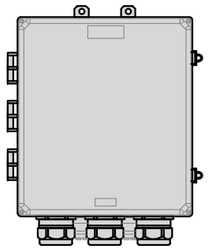
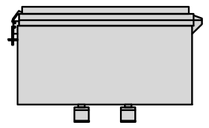


FRONT

SURGE PROTECTION DEVICE DETAIL (OVP) | NO SCALE | 3

RAYCAP RDIDC–3045–PF–48
SURGE PROTECTION DEVICE (OVP)

DIMENSIONS (HxWxD)	19.00"x16.21"x9.64"
WEIGHT	21 lbs



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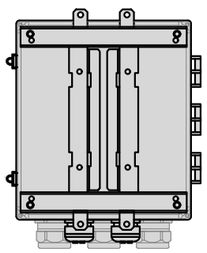

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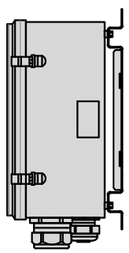

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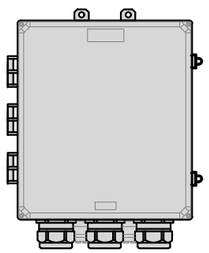


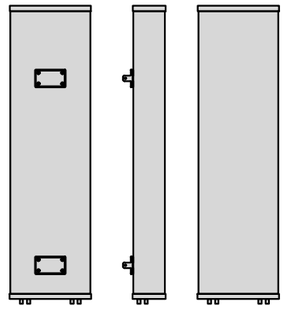
FRONT

SURGE PROTECTION DEVICE DETAIL (OVP) | NO SCALE | 4

COMMSCOPE
FFVV–65B–R2

DIMENSIONS (HxWxD)(MM/IN)	1828x498x197 72"x19.6"x7.8"
RF CONNECTOR INTERFACE	4.3–10 FEMALE
WEIGHT	70.8 lbs
WEIGHT WITH BRACKETS	98.1 lbs

PLAN



BACK

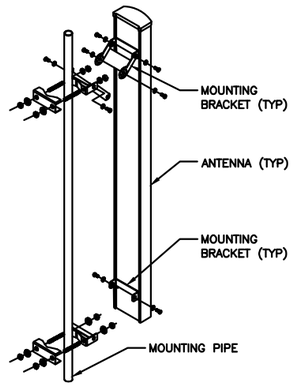
SIDE

FRONT

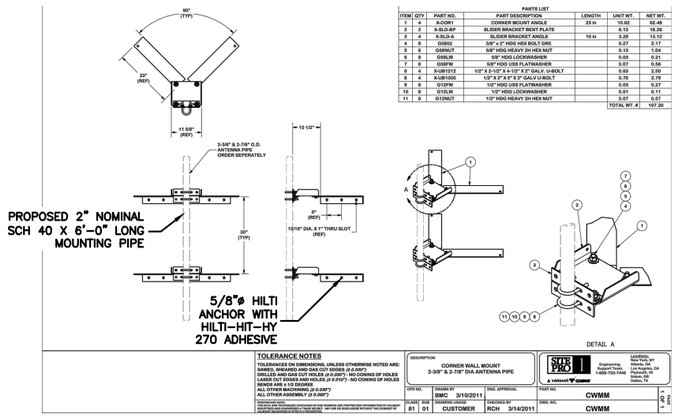
ANTENNA DETAIL | NO SCALE | 5

M04 MOUNTING BRACKET
HPA–33R–BUU–H4–K

WIDTH	5" (135mm)
DEPTH	2" (51mm)
HEIGHT	8" (213mm)
TOTAL WEIGHT (WITH BRACKETS)	1.5 LBS (15.50 Kg)
HOUSING MATERIAL	ASA/ABS/ALUMINUM
RADOME COLOR	LIGHT GRAY
CONNECTOR	1X8–PIN DAISY CHAIN



ANTENNA DOWNTILT MOUNTING DETAIL | NO SCALE | 6



PARTS LIST

ITEM	QTY	PART NO.	PART DESCRIPTION	LENGTH	UNIT WT.	NET WT.
1	4	X-CORI	CORNER MOUNT ANGLE	33 in	10.62	62.48
2	2	X-SLD-BP	SLIDER BRACKET BENT PLATE		8.13	16.26
3	4	X-SLD-A	SLIDER BRACKET ANGLE	10 in	3.28	13.12
4	8	G3932	5/8" x 2" HDG HEX BOLT GR5		0.27	2.17
5	8	G5952	5/8" HTG HEAVY 2H HEX NUT		0.13	1.04
6	8	G5957	5/8" HDG LOCKWASHER		0.03	0.21
7	8	G5956	5/8" HDG USS FLATWASHER		0.07	0.56
8	4	X-SBT310	1/2" X 3" HDG U-BOLT SAE J-429 U-BOLT		0.80	3.20
9	8	X-SBT310	1/2" X 3" X 6" SAE J-429 U-BOLT		0.80	6.39
10	8	G1279W	1/2" HDG USS FLATWASHER		0.05	0.77
11	8	G12LW	1/2" HDG LOCKWASHER		0.01	0.11
12	8	G12NUT	1/2" HDG HEAVY 2H HEX NUT		0.07	0.57
					TOTAL WT. #	107.20

TOLERANCE NOTES

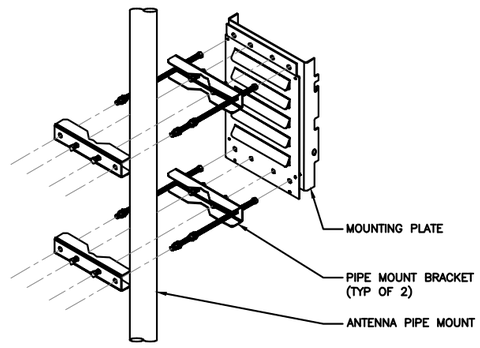
TOLERANCES ON DIMENSIONS, UNLESS OTHERWISE NOTED ARE: SAWED, SHEARED AND GAS CUT EDGES (Ø 0.030"). DRILLED AND GAS CUT HOLES (Ø 0.030"). NO CODING OF HOLES LASER CUT EDGES AND HOLES (Ø 0.010"). NO CODING OF HOLES ALL OTHER MACHINING (Ø 0.005"). ALL OTHER ASSEMBLY (Ø 0.060")

DESCRIPTION: CORNER WALL MOUNT 2-3/8" & 2-7/8" DIA ANTENNA PIPE

SITE PRO 1 — A VERTIKAM COMPANY — Engineering Support Team 1-855-753-7446 — Lewisville, TX / Des Plaines, IL / Los Angeles, CA / Atlanta, GA / Dallas, TX

ORD NO.	DRAWN BY	ENGR. APPROVAL	PART NO.	
	SMC 3/10/2011		CWMM	
CLASS	SUB	DESIGNED CHECK	CHECKED BY	DWG. NO.
01	01	CUSTOMER	RCH 3/14/2011	CWMM

CWMM DETAIL | NO SCALE | 7

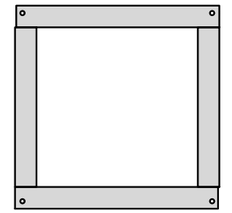


REMOTE RADIO MOUNT DETAIL | NO SCALE | 8

ENERSYS CABINET
6" PLINTH – 2000006059

DIMENSIONS (HxWxD)	6"x30"x30"
WEIGHT	TBD

NOTE: GASKET AND MOUNTING HARDWARE INCLUDED



PLAN

SIDE

FRONT/BACK

CABINET PLINTH DETAIL | NO SCALE | 9

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COMMONWEALTH OF MASSACHUSETTS — KRUPAKARAN KOLLENVEETTIL — NO. 30019 — REGISTERED PROFESSIONAL ENGINEER

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CONSTRUCTION DOCUMENTS

SUBMITTALS

REV	DATE	DESCRIPTION
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1	08/30/2023	BILL OF MATERIALS

A&E PROJECT NUMBER

100753

DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

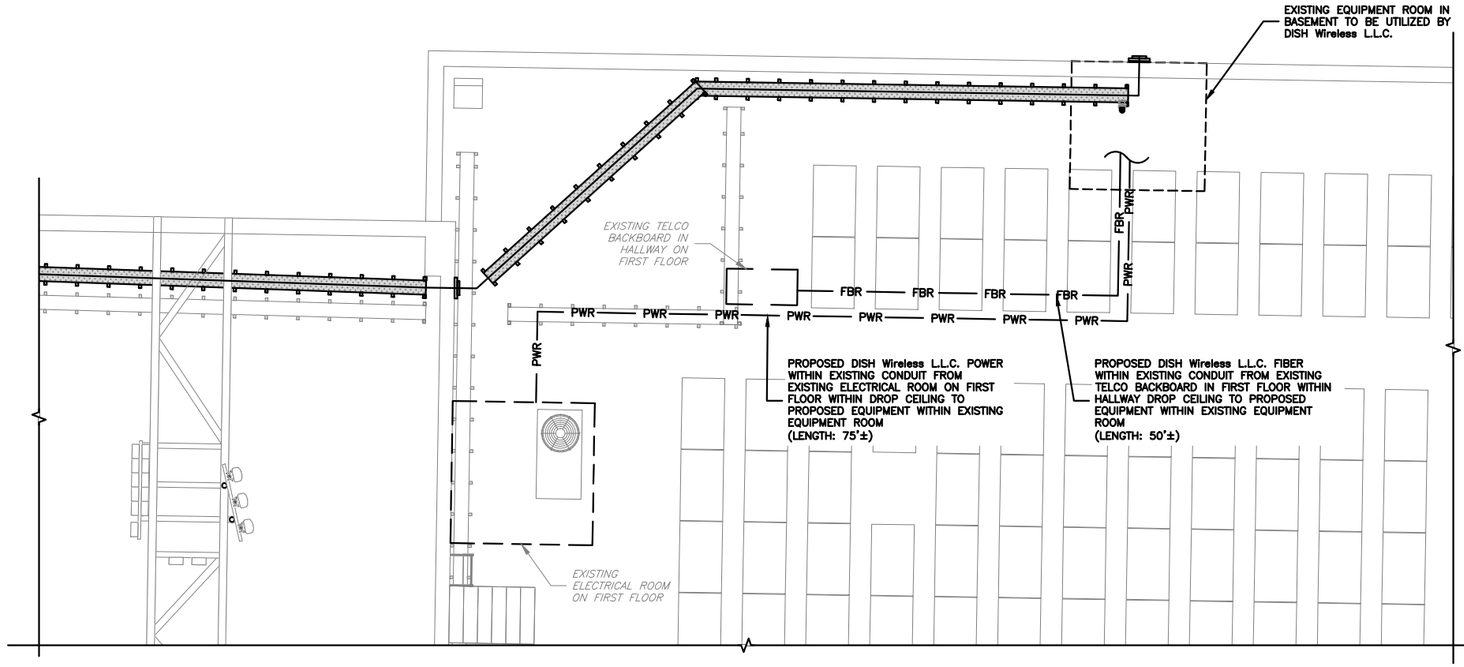
EQUIPMENT DETAILS

SHEET NUMBER

A-6

NOTE

1. CONTRACTOR SHALL FIELD VERIFY ALL DIMENSIONS.
2. UTILIZE EXISTING ABANDONED METROPCS CONDUITS WHERE AVAILABLE. REPLACE/INSTALL NEW CONDUIT SECTIONS AS NEEDED.
3. CONTRACTOR TO VERIFY WITH DISH Wireless L.L.C. C.M. THE LOCATION OF THE POWER AND FIBER SOURCE PRIOR TO CONSTRUCTION.



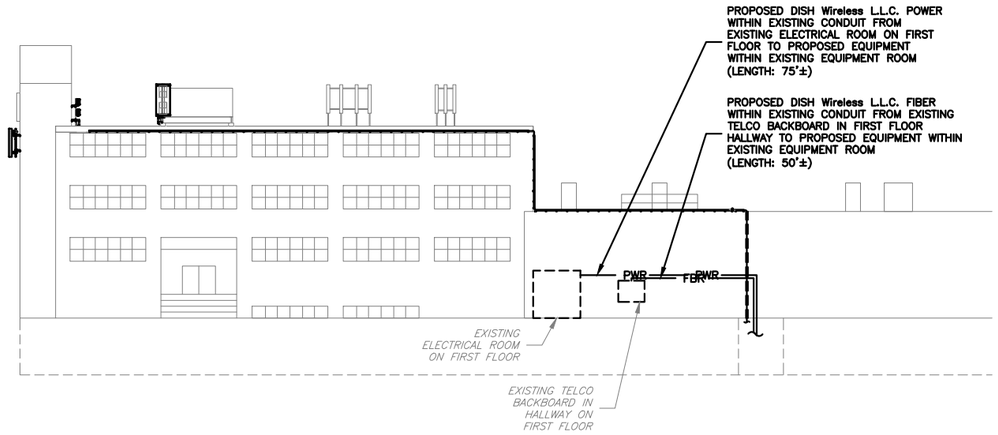
UTILITY ROUTE PLAN

12' 8' 4' 0 10' 20'
3/32"=1'-0"

1

NOTES

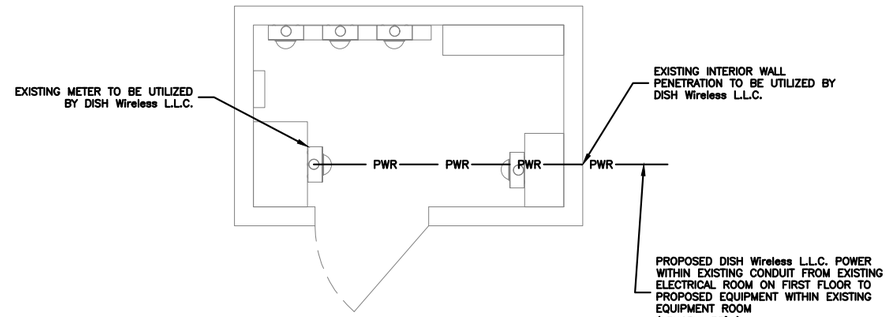
1. CONTRACTOR SHALL FIELD VERIFY ALL DIMENSIONS.
2. EXISTING METER AND DISCONNECT LOCATED IN THE ELECTRICAL ROOM IN THE BASEMENT. WILL NEED BUILDING MAINTENANCE FOR ROOM ACCESS



UTILITY ROUTE ELEVATION

16' 12' 8' 4' 0 16' 32'
1/16"=1'-0"

2



ELECTRICAL ROOM PLAN

12" 6" 0 1' 2' 3' 4' 5'
1/2"=1'-0"

3

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COMMONWEALTH OF MASSACHUSETTS
KRUPAKARAN KOLLENGODE VENUGOPAL
NO. 30019
REGISTERED PROFESSIONAL ENGINEER

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DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

ELECTRICAL/FIBER ROUTE PLAN AND NOTES

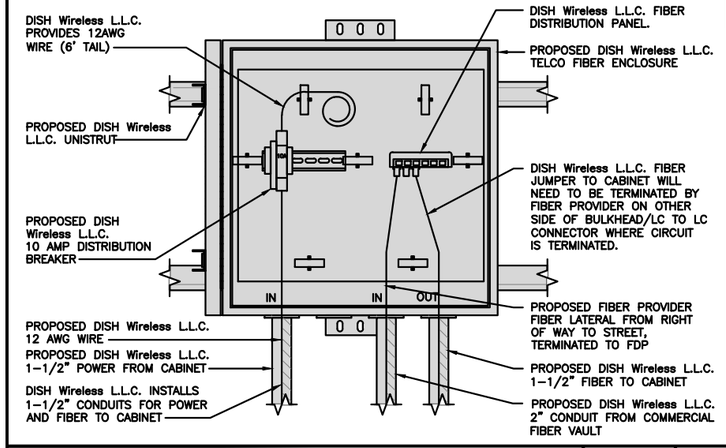
SHEET NUMBER

E-1

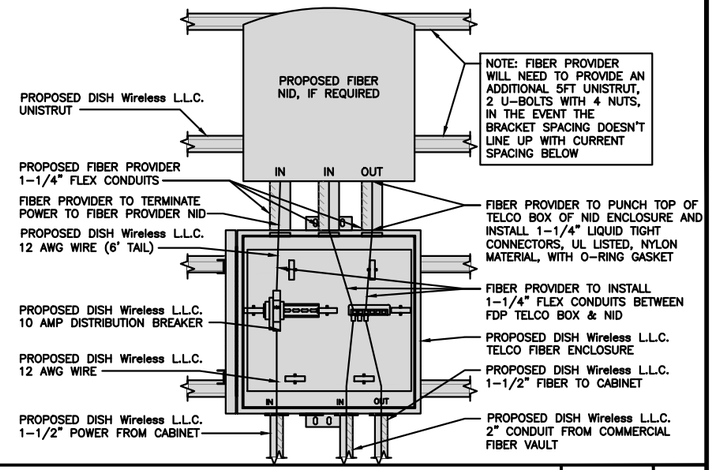
DC POWER WIRING SHALL BE COLOR CODED AT EACH END FOR IDENTIFYING +24V AND −48V CONDUCTORS. RED MARKINGS SHALL IDENTIFY +24V AND BLUE MARKINGS SHALL IDENTIFY −48V.

1. CONTRACTOR SHALL INSPECT THE EXISTING CONDITIONS PRIOR TO SUBMITTING A BID. ANY QUESTIONS ARISING DURING THE BID PERIOD IN REGARDS TO THE CONTRACTOR'S FUNCTIONS, THE SCOPE OF WORK, OR ANY OTHER ISSUE RELATED TO THIS PROJECT SHALL BE BROUGHT UP DURING THE BID PERIOD WITH THE PROJECT MANAGER FOR CLARIFICATION, NOT AFTER THE CONTRACT HAS BEEN AWARDED.
2. ALL ELECTRICAL WORK SHALL BE DONE IN ACCORDANCE WITH CURRENT NATIONAL ELECTRICAL CODES AND ALL STATE AND LOCAL CODES, LAWS, AND ORDINANCES. PROVIDE ALL COMPONENTS AND WIRING SIZES AS REQUIRED TO MEET NEC STANDARDS.
3. LOCATION OF EQUIPMENT, CONDUIT AND DEVICES SHOWN ON THE DRAWINGS ARE APPROXIMATE AND SHALL BE COORDINATED WITH FIELD CONDITIONS PRIOR TO CONSTRUCTION.
4. CONDUIT ROUGH-IN SHALL BE COORDINATED WITH THE MECHANICAL EQUIPMENT TO AVOID LOCATION CONFLICTS. VERIFY WITH THE MECHANICAL EQUIPMENT CONTRACTOR AND COMPLY AS REQUIRED.
5. CONTRACTOR SHALL PROVIDE ALL BREAKERS, CONDUITS AND CIRCUITS AS REQUIRED FOR A COMPLETE SYSTEM.
6. CONTRACTOR SHALL PROVIDE PULL BOXES AND JUNCTION BOXES AS REQUIRED BY THE NEC ARTICLE 314.
7. CONTRACTOR SHALL PROVIDE ALL STRAIN RELIEF AND CABLE SUPPORTS FOR ALL CABLE ASSEMBLIES. INSTALLATION SHALL BE IN ACCORDANCE WITH MANUFACTURER'S SPECIFICATIONS AND RECOMMENDATIONS.
8. ALL DISCONNECTS AND CONTROLLING DEVICES SHALL BE PROVIDED WITH ENGRAVED PHENOLIC NAMEPLATES INDICATING EQUIPMENT CONTROLLED, BRANCH CIRCUITS INSTALLED ON, AND PANEL FIELD LOCATIONS FED FROM.
9. INSTALL AN EQUIPMENT GROUNDING CONDUCTOR IN ALL CONDUITS PER THE SPECIFICATIONS AND NEC 250. THE EQUIPMENT GROUNDING CONDUCTORS SHALL BE BONDED AT ALL JUNCTION BOXES, PULL BOXES, AND ALL DISCONNECT SWITCHES, AND EQUIPMENT CABINETS.
10. ALL NEW MATERIAL SHALL HAVE A U.L. LABEL.
11. PANEL SCHEDULE LOADING AND CIRCUIT ARRANGEMENTS REFLECT POST-CONSTRUCTION EQUIPMENT.
12. CONTRACTOR SHALL BE RESPONSIBLE FOR AS-BUILT PANEL SCHEDULE AND SITE DRAWINGS.

ELECTRICAL NOTES | NO SCALE | 1



DARK TELCO BOX – INTERIOR WIRING LAYOUT | NO SCALE | 2



LIT TELCO BOX – INTERIOR WIRING LAYOUT (OPTIONAL) | NO SCALE | 3

NOT USED | NO SCALE | 4

NOT USED | NO SCALE | 5

NOT USED | NO SCALE | 6

NOT USED | NO SCALE | 7

NOT USED | NO SCALE | 8

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100753

DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

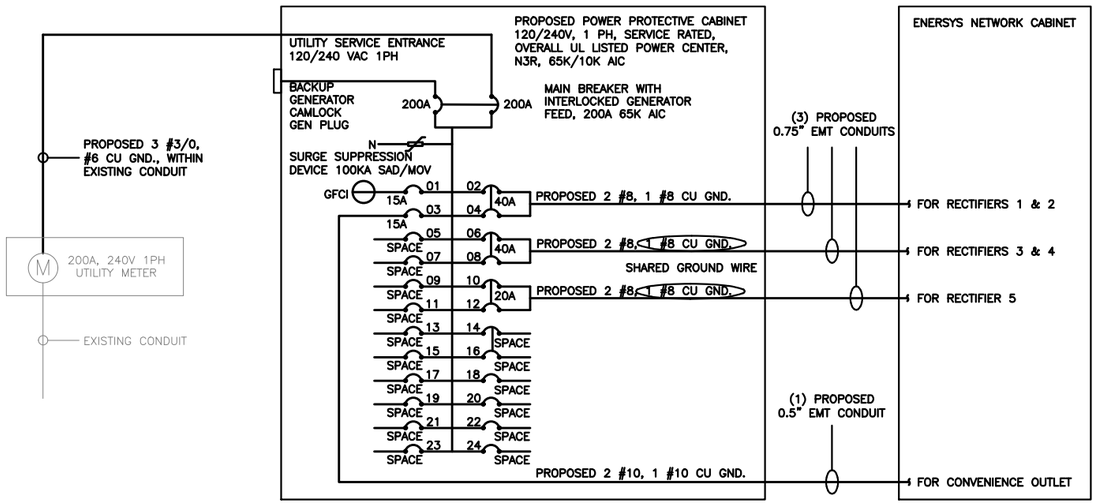
460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

ELECTRICAL DETAILS

SHEET NUMBER

E-2



NOTE:
BRANCH CIRCUIT WIRING SUPPLYING RECTIFIERS ARE TO BE RATED UL1015, 105°C, 600V, AND PVC INSULATED, IN THE SIZES SHOWN IN THE ONE-LINE DIAGRAM. CONTRACTOR MAY SUBSTITUTE UL1015 WIRE FOR THWN-2 FOR CONVENIENCE OUTLET BRANCH CIRCUIT.

BREAKERS REQUIRED:
(2) 40A, 2P BREAKER - SQUARE D P/N:QO240
(1) 20A, 2P BREAKER - SQUARE D P/N:QO220
(1) 20A, 1P BREAKER - SQUARE D P/N:QO120

NOTES

THE ENGINEER OF RECORD HAS PERFORMED ALL REQUIRED SHORT CIRCUIT CALCULATIONS AND THE AIC RATINGS FOR EACH DEVICE IS ADEQUATE TO PROTECT THE EQUIPMENT AND THE ELECTRICAL SYSTEM.

THE ENGINEER OF RECORD HAS PERFORMED ALL REQUIRED VOLTAGE DROP CALCULATIONS AND ALL BRANCH CIRCUIT AND FEEDERS COMPLY WITH THE NEC (LISTED ON T-1) ARTICLE 210.19(A)(1) FPN NO. 4.

CONDUIT SIZING: AT 40% FILL PER NEC CHAPTER 9, TABLE 4, ARTICLE 358.
0.5" CONDUIT - 0.122 SQ. IN AREA
0.75" CONDUIT - 0.213 SQ. IN AREA
2.0" CONDUIT - 1.316 SQ. IN AREA
3.0" CONDUIT - 2.907 SQ. IN AREA

CABINET CONVENIENCE OUTLET CONDUCTORS (1 CONDUIT): USING THWN-2, CU.

#10 - 0.0211 SQ. IN X 2 = 0.0422 SQ. IN
#10 - 0.0211 SQ. IN X 1 = 0.0211 SQ. IN <GROUND
TOTAL = 0.0633 SQ. IN

0.5" EMT CONDUIT IS ADEQUATE TO HANDLE THE TOTAL OF (3) WIRES, INCLUDING GROUND WIRE, AS INDICATED ABOVE.

RECTIFIER CONDUCTORS (3 CONDUITS): USING UL1015, CU.

#8 - 0.0552 SQ. IN X 2 = 0.1103 SQ. IN
#8 - 0.0131 SQ. IN X 1 = 0.0131 SQ. IN <BARE GROUND
TOTAL = 0.1234 SQ. IN

0.75" EMT CONDUIT IS ADEQUATE TO HANDLE THE TOTAL OF (3) WIRES, INCLUDING GROUND WIRE, AS INDICATED ABOVE.

PPC FEED CONDUCTORS (1 CONDUIT): USING THWN, CU.

3/0 - 0.2679 SQ. IN X 3 = 0.8037 SQ. IN
#6 - 0.0507 SQ. IN X 1 = 0.0507 SQ. IN <GROUND
TOTAL = 0.8544 SQ. IN

3.0" SCH 40 PVC CONDUIT IS ADEQUATE TO HANDLE THE TOTAL OF (4) WIRES, INCLUDING GROUND WIRE, AS INDICATED ABOVE.

PPC ONE-LINE DIAGRAM — NO SCALE — 1

PROPOSED ENERSYS PANEL SCHEDULE

LOAD SERVED	VOLT AMPS (WATTS) L1	VOLT AMPS (WATTS) L2	TRIP	CKT #	PHASE	CKT #	TRIP	VOLT AMPS (WATTS) L1	VOLT AMPS (WATTS) L2	LOAD SERVED
PPC GFCI OUTLET	180		15A	1	A	2	40A	3840		ENERSYS ALPHA CORDEX
ENERSYS GFCI OUTLET		180	15A	3	B	4			3840	RECTIFIERS 1 & 2
-SPACE-				5	A	6	40A	3840		ENERSYS ALPHA CORDEX
-SPACE-				7	B	8			3840	RECTIFIER 3 & 4
-SPACE-				9	A	10	20A	1920		ENERSYS ALPHA CORDEX
-SPACE-				11	B	12			1920	RECTIFIER 5
-SPACE-				13	A	14				-SPACE-
-SPACE-				15	B	16				-SPACE-
-SPACE-				17	A	18				-SPACE-
-SPACE-				19	B	20				-SPACE-
-SPACE-				21	A	22				-SPACE-
-SPACE-				23	B	24				-SPACE-
VOLTAGE AMPS	180	180						9500	9500	
200A MCB, 1ϕ, 24 SPACE, 120/240V			L1		L2					
MB RATING: 65,000 AIC			9680		9680		VOLTAGE AMPS			
			81		81		AMPS			
			81				MAX AMPS			
			102				MAX 125%			

PANEL SCHEDULE — NO SCALE — 2

NOT USED — NO SCALE — 3

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PROJECT INFORMATION
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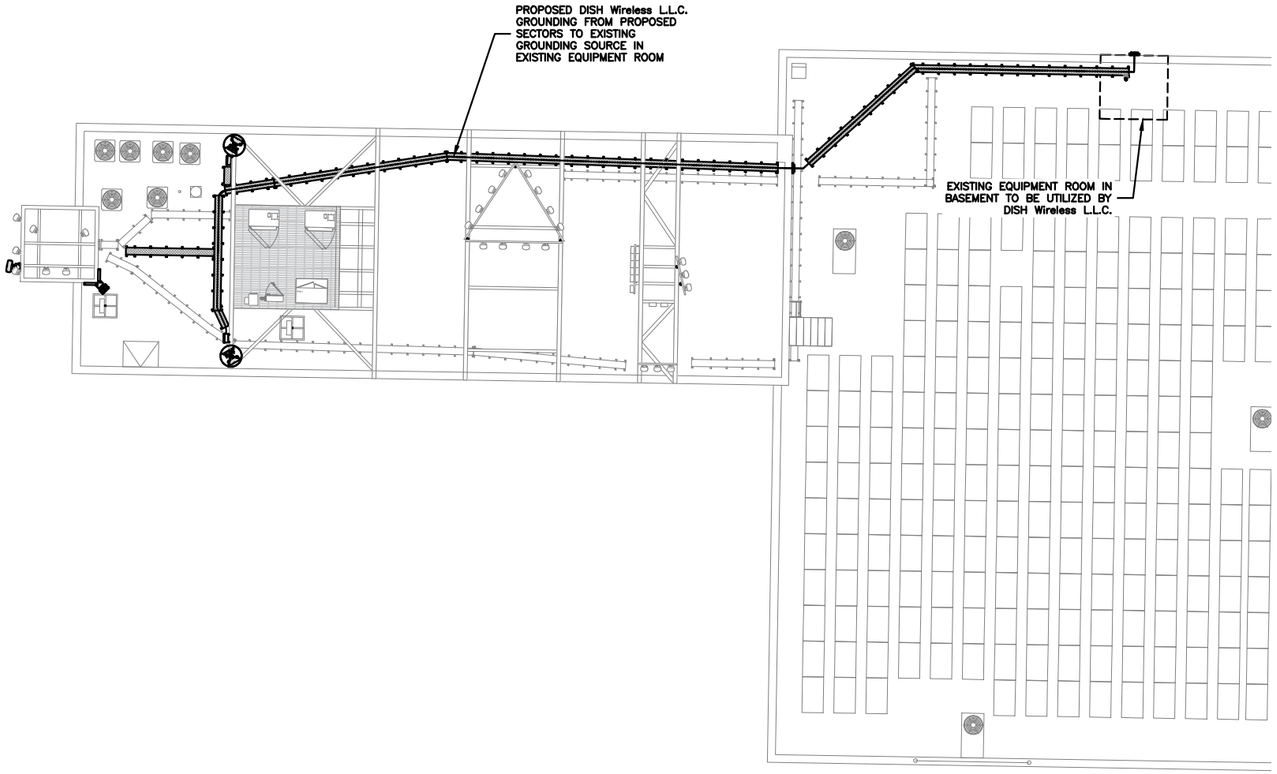
460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE
ELECTRICAL ONE-LINE & PANEL SCHEDULE

SHEET NUMBER
E-3



GROUNDING PLAN

4' 2' 0 4' 8'
1/4"=1'-0"

1

EXOTHERMIC CONNECTION

MECHANICAL CONNECTION

GROUND BUS BAR

GROUND ROD

TEST GROUND ROD WITH INSPECTION SLEEVE

#6 AWG STRANDED & INSULATED

#2 AWG SOLID COPPER TINNED

BUSS BAR INSULATOR

GROUNDING LEGEND

1. GROUNDING IS SHOWN DIAGRAMMATICALLY ONLY.
2. CONTRACTOR SHALL GROUND ALL EQUIPMENT AS A COMPLETE SYSTEM. GROUNDING SHALL BE IN COMPLIANCE WITH NEC SECTION 250 AND DISH Wireless L.L.C. GROUNDING AND BONDING REQUIREMENTS AND MANUFACTURER'S SPECIFICATIONS.
3. ALL GROUND CONDUCTORS SHALL BE COPPER; NO ALUMINUM CONDUCTORS SHALL BE USED.
4. NO EXOTHERMIC WELDING ON ROOFTOP

GROUNDING ROOFTOP KEY NOTES

(A) EXTERIOR GROUND RING: #2 AWG SOLID COPPER, BURIED AT A DEPTH OF AT LEAST 30 INCHES BELOW GRADE, OR 6 INCHES BELOW THE FROST LINE AND APPROXIMATELY 24 INCHES FROM THE EXTERIOR WALL OR FOOTING.

(B) ROOFTOP GROUND SYSTEM: THE GROUND SYSTEM USING MINIMUM #2 AWG SOLID COPPER CONDUCTORS.

(C) INTERIOR GROUND RING: #2 AWG STRANDED GREEN INSULATED COPPER CONDUCTOR EXTENDED AROUND THE PERIMETER OF THE EQUIPMENT AREA. ALL NON-TELECOMMUNICATIONS RELATED METALLIC OBJECTS FOUND WITHIN A SITE SHALL BE GROUNDED TO THE INTERIOR GROUND RING WITH #6 AWG STRANDED GREEN INSULATED CONDUCTOR.

(D) BOND TO INTERIOR GROUND RING: #2 AWG SOLID TINNED COPPER WIRE PRIMARY BONDS SHALL BE PROVIDED AT LEAST AT FOUR POINTS ON THE INTERIOR GROUND RING, LOCATED AT THE CORNERS OF THE BUILDING OR ROOM.

(E) GROUND ROD: UL LISTED COPPER CLAD STEEL. MINIMUM 1/2" DIAMETER BY EIGHT FEET LONG. GROUND RODS SHALL BE INSTALLED WITH INSPECTION SLEEVES. GROUND RODS SHALL BE DRIVEN TO THE DEPTH OF GROUND RING CONDUCTOR.

(F) CELL REFERENCE GROUND BAR (CRGB): POINT OF GROUND REFERENCE FOR ALL COMMUNICATIONS EQUIPMENT FRAMES. ALL BONDS ARE MADE WITH #2 AWG UNLESS NOTED OTHERWISE STRANDED GREEN INSULATED COPPER CONDUCTORS. BOND TO COMMON BUILDING GROUND SYSTEM WITH (2) #2 SOLID TINNED COPPER CONDUCTORS.

(G) HATCH PLATE GROUND BAR: BOND TO THE COMMON BUILDING GROUND SYSTEM WITH TWO #2 AWG STRANDED GREEN INSULATED COPPER CONDUCTORS. WHEN A HATCH-PLATE AND A CELL REFERENCE GROUND BAR ARE BOTH PRESENT, THE CRGB MUST BE CONNECTED TO THE HATCH-PLATE AND TO THE INTERIOR GROUND RING USING (2) TWO #2 AWG STRANDED GREEN INSULATED COPPER CONDUCTORS EACH.

(H) EXTERIOR CABLE ENTRY PORT GROUND BARS: LOCATED AT THE ENTRANCE TO THE CELL SITE ROOM. BOND TO GROUND RING WITH A #2 AWG SOLID TINNED COPPER CONDUCTORS WITH MECHANICAL CONNECTIONS.

(J) TELCO GROUND BAR: BOND TO BOTH CELL REFERENCE GROUND BAR OR EXTERIOR GROUND RING.

(K) FRAME BONDING: THE BONDING POINT FOR TELECOM EQUIPMENT FRAMES SHALL BE THE GROUND BUS THAT IS NOT ISOLATED FROM THE EQUIPMENTS METAL FRAMEWORK.

(L) INTERIOR UNIT BONDS: METAL FRAMES, CABINETS AND INDIVIDUAL METALLIC UNITS LOCATED WITH THE AREA OF THE INTERIOR GROUND RING REQUIRE A #6 AWG STRANDED GREEN INSULATED COPPER BOND TO THE INTERIOR GROUND RING.

(M) FENCE AND GATE GROUNDING: METAL FENCES SHALL BE BONDED TO THE COMMON BUILDING GROUND SYSTEM WITH A #2 AWG SOLID TINNED COPPER CONDUCTOR AT AN INTERVAL NOT EXCEEDING 25 FEET. BONDS SHALL BE MADE AT EACH GATE POST AND ACROSS GATE OPENINGS.

(N) EXTERIOR UNIT BONDS: METALLIC OBJECTS, EXTERNAL TO OR MOUNTED TO THE BUILDING, SHALL BE BONDED TO THE COMMON BUILDING GROUND SYSTEM. USING #2 TINNED SOLID COPPER WIRE

(P) ICE BRIDGE SUPPORTS: EACH ICE BRIDGE LEG SHALL BE BONDED TO THE GROUND RING WITH #2 AWG BARE TINNED COPPER CONDUCTOR. PROVIDE EXOTHERMIC WELDS AT BOTH THE ICE BRIDGE LEG AND BURIED GROUND RING.

(Q) DURING ALL DC POWER SYSTEM CHANGES INCLUDING DC SYSTEM CHANGE OUTS, RECTIFIER REPLACEMENTS OR ADDITIONS, BREAKER DISTRIBUTION CHANGES, BATTERY ADDITIONS, BATTERY REPLACEMENTS AND INSTALLATIONS OR CHANGES TO DC CONVERTER SYSTEMS IT SHALL BE REQUIRED THAT SERVICE CONTRACTORS VERIFY ALL DC POWER SYSTEMS ARE EQUIPPED WITH A MASTER DC SYSTEM RETURN GROUND CONDUCTOR FROM THE DC POWER SYSTEM COMMON RETURN BUS DIRECTLY CONNECTED TO THE CELL SITE REFERENCE GROUND BAR

(R) ROOFTOP COLLECTOR BUSS BAR IS TO BE MECHANICALLY BONDED TO COMMON BUILDING GROUND SYSTEM.

REFER TO DISH Wireless L.L.C. GROUNDING NOTES.

GROUNDING KEY NOTES

NO SCALE

2

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CONSTRUCTION DOCUMENTS

SUBMITTALS

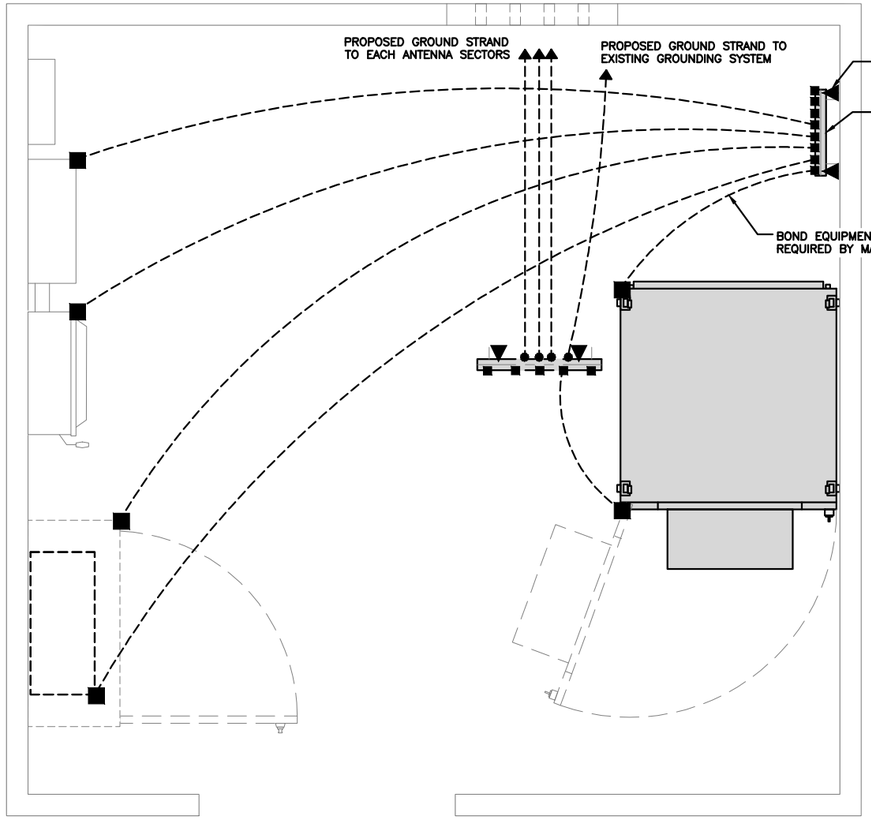
REV	DATE	DESCRIPTION
0	07/28/2023	ISSUED FOR REVIEW
1	08/30/2023	BILL OF MATERIALS

A&E PROJECT NUMBER
100753

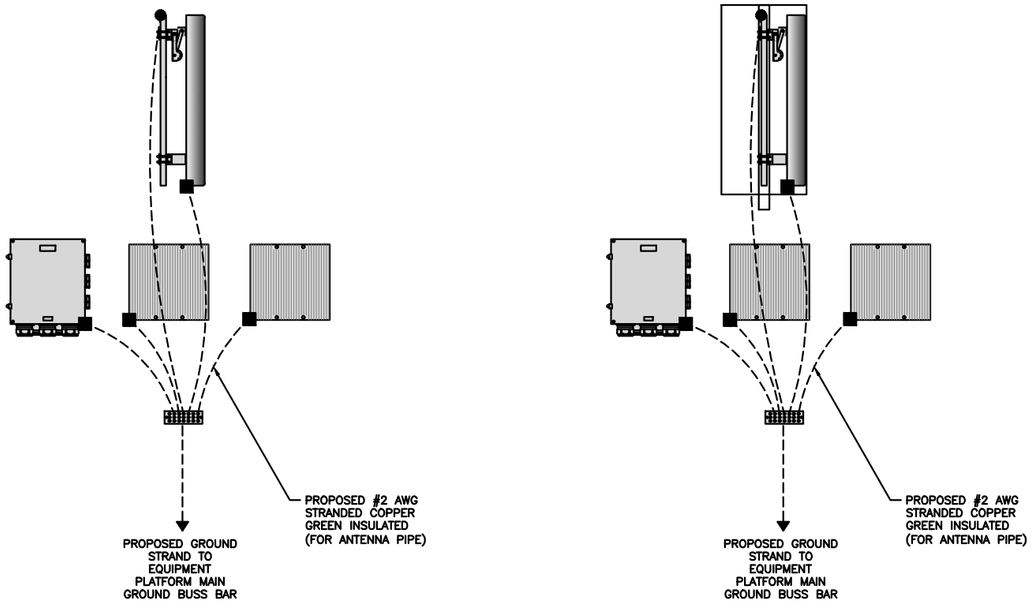
DISH Wireless L.L.C.
PROJECT INFORMATION
BOBOS01058A
460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE
GROUNDING PLANS AND NOTES

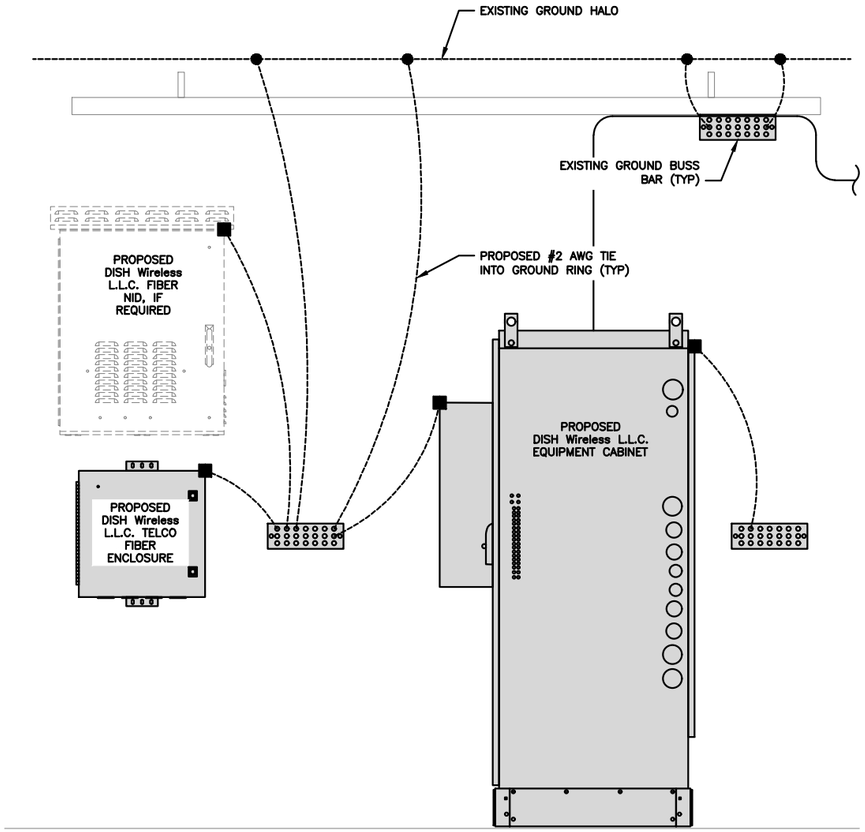
SHEET NUMBER
G-1



TYPICAL EQUIPMENT GROUNDING PLAN | NO SCALE | 1



TYPICAL ROOFTOP ANTENNA GROUNDING PLAN | NO SCALE | 2



H-FRAME GROUNDING DETAIL | NO SCALE | 3

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COMMONWEALTH OF MASSACHUSETTS
KRUPAKARAN KOLANDAIVEL
NO. 50019
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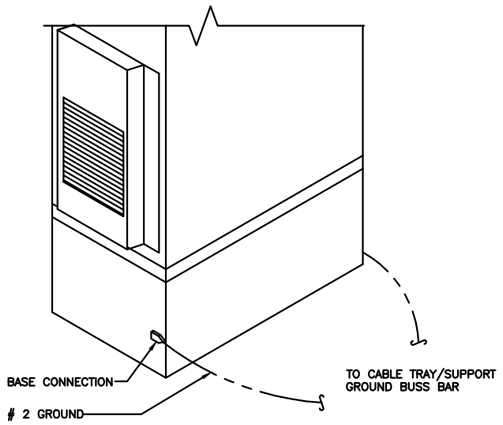
460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE
GROUNDING DETAILS

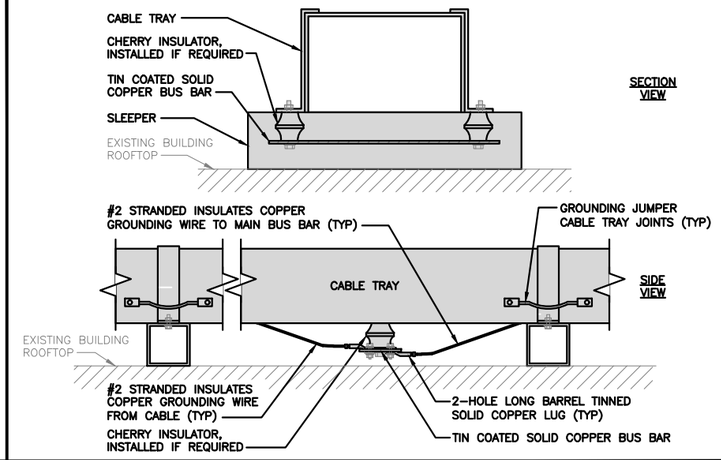
SHEET NUMBER
G-2

1. EXOTHERMIC WELD (2) TWO, #2 AWG BARE TINNED SOLID COPPER CONDUCTORS TO GROUND BAR. ROUTE CONDUCTORS TO BURIED GROUND RING AND PROVIDE PARALLEL EXOTHERMIC WELD.
2. ALL EXTERIOR GROUNDING HARDWARE SHALL BE STAINLESS STEEL 3/8" DIAMETER OR LARGER. ALL HARDWARE 18–8 STAINLESS STEEL INCLUDING LOCK WASHERS, COAT ALL SURFACES WITH AN ANTI–OXIDANT COMPOUND BEFORE MATING.
3. FOR GROUND BOND TO STEEL ONLY: COAT ALL SURFACES WITH AN ANTI–OXIDANT COMPOUND BEFORE MATING.
4. DO NOT INSTALL CABLE GROUNDING KIT AT A BEND AND ALWAYS DIRECT GROUND CONDUCTOR DOWN TO GROUNDING BUS.
5. NUT & WASHER SHALL BE PLACED ON THE FRONT SIDE OF THE GROUND BAR AND BOLTED ON THE BACK SIDE.
6. ALL GROUNDING PARTS AND EQUIPMENT TO BE SUPPLIED AND INSTALLED BY CONTRACTOR.
7. THE CONTRACTOR SHALL BE RESPONSIBLE FOR INSTALLING ADDITIONAL GROUND BAR AS REQUIRED.
8. ENSURE THE WIRE INSULATION TERMINATION IS WITHIN 1/8" OF THE BARREL (NO SHINERS).

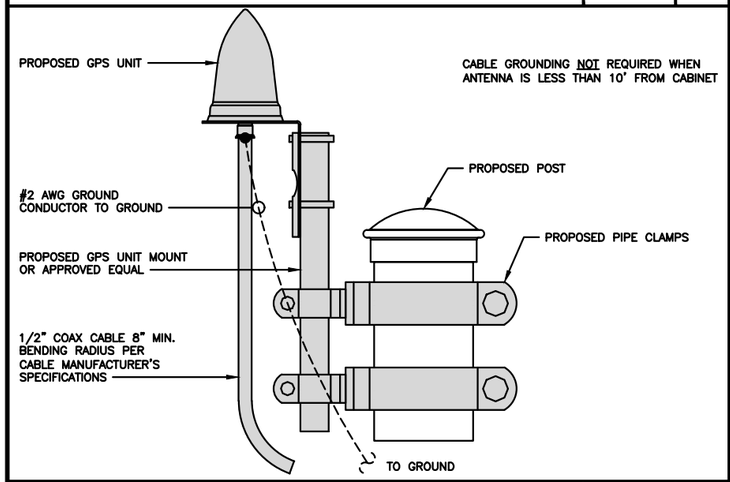
TYPICAL GROUNDING NOTES — NO SCALE — 1



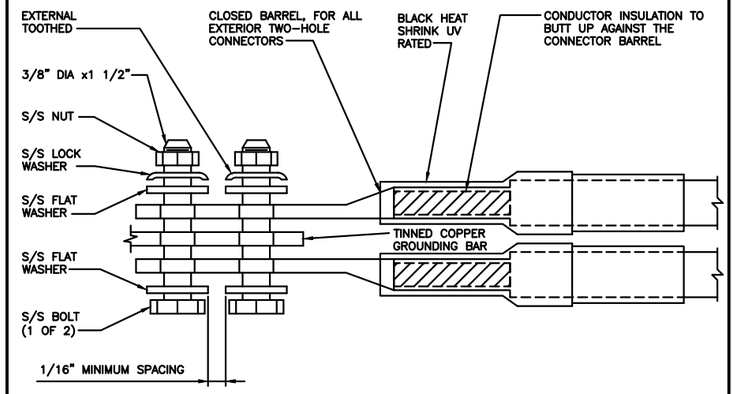
OUTDOOR CABINET GROUNDING — NO SCALE — 2



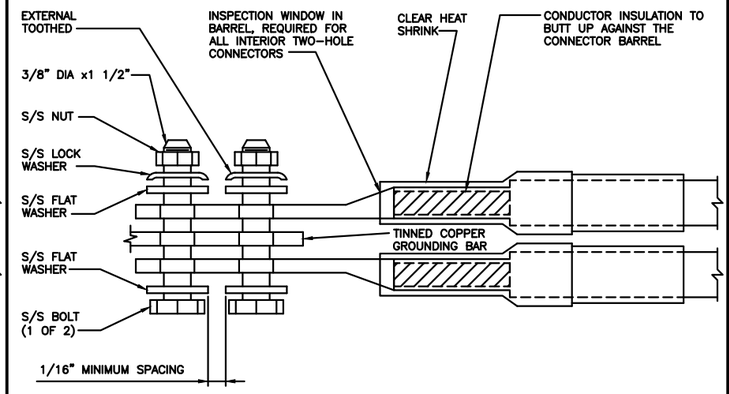
TYPICAL CABLE TRAY GROUND BUSS BAR — NO SCALE — 3



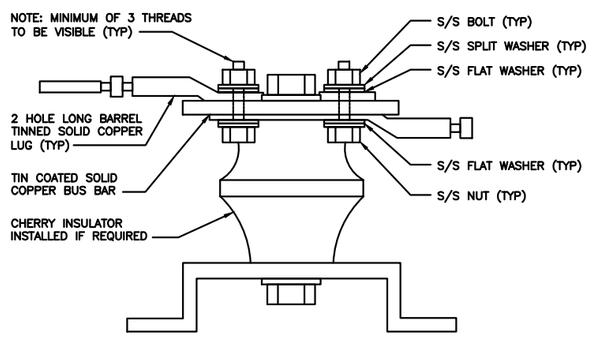
TYPICAL GPS UNIT GROUNDING — NO SCALE — 4



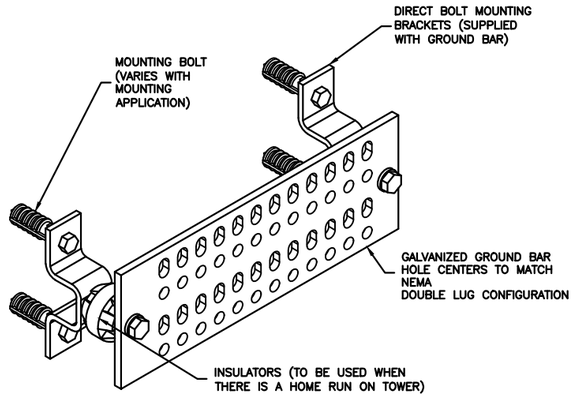
TYPICAL EXTERIOR TWO HOLE LUG — NO SCALE — 5



TYPICAL INTERIOR TWO HOLE LUG — NO SCALE — 6



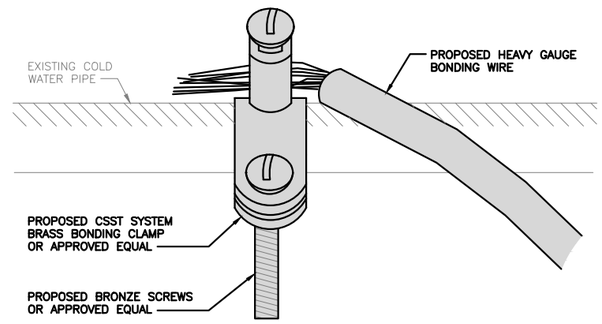
LUG DETAIL — NO SCALE — 7



GROUND BAR DETAIL — NO SCALE — 8

NOTE

REMOVE ANY PAINT ON PIPE OR FITTING SURFACE UNDER BONDING CLAMP.



TYPICAL COLD WATER CONDUIT GROUNDING DETAIL — NO SCALE — 9

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100753

DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

GROUNDING DETAILS

SHEET NUMBER

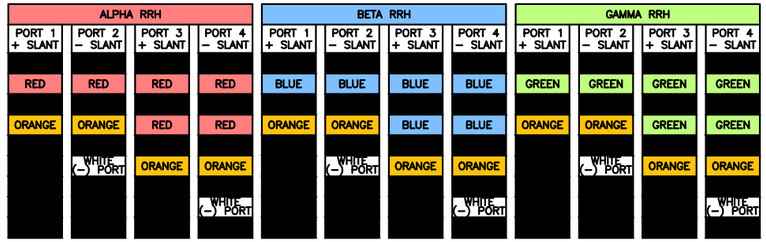
G-3

HYBRID/DISCREET CABLES

3/4" TAPE WIDTHS WITH 3/4" SPACING

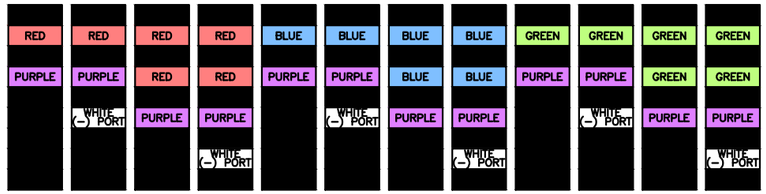
LOW-BAND RRH
(600 MHz N71 BASEBAND) +
(850 MHz N26 BAND) +
(700 MHz N29 BAND) – OPTIONAL PER MARKET

ADD FREQUENCY COLOR TO SECTOR BAND
(CBRS WILL USE YELLOW BAND)



MID-BAND RRH
(AWS BANDS N66+N70)

ADD FREQUENCY COLOR TO SECTOR BAND
(CBRS WILL USE YELLOW BANDS)



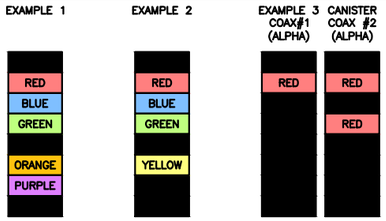
HYBRID/DISCREET CABLES

INCLUDE SECTOR BANDS BEING SUPPORTED ALONG WITH FREQUENCY BANDS.

EXAMPLE 1 – HYBRID, OR DISCREET, SUPPORTS ALL SECTORS, BOTH LOW-BANDS AND MID-BANDS.

EXAMPLE 2 – HYBRID, OR DISCREET, SUPPORTS CBRS ONLY, ALL SECTORS.

EXAMPLE 3 – MAIN COAX WITH GROUND MOUNTED RRHs.



FIBER JUMPERS TO RRHs

LOW-BAND HHR FIBER CABLES HAVE SECTOR STRIPE ONLY.

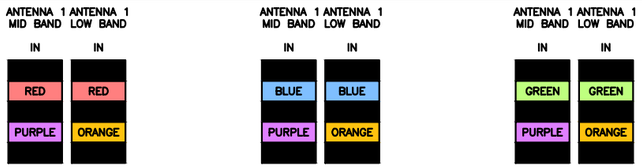
POWER CABLES TO RRHs

LOW-BAND RRH POWER CABLES HAVE SECTOR STRIPE ONLY

RET MOTORS AT ANTENNAS

RET CONTROL IS HANDLED BY THE MID-BAND RRH WHEN ONE SET OF RET PORTS EXIST ON ANTENNA.

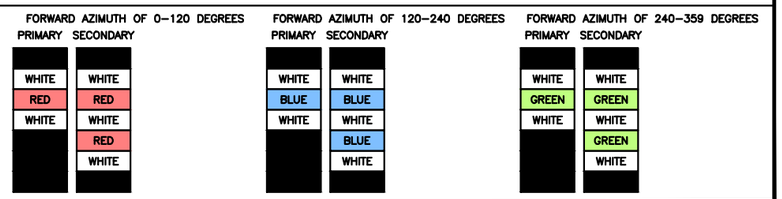
SEPARATE RET CABLES ARE USED WHEN ANTENNA PORTS PROVIDE INPUTS FOR BOTH LOW AND MID BANDS.



MICROWAVE RADIO LINKS

LINKS WILL HAVE A 1.5–2 INCH WHITE WRAP WITH THE AZIMUTH COLOR OVERLAPPING IN THE MIDDLE.
ADD ADDITIONAL SECTOR COLOR BANDS FOR EACH ADDITIONAL MW RADIO.

MICROWAVE CABLES WILL REQUIRE P-TOUCH LABELS INSIDE THE CABINET TO IDENTIFY THE LOCAL AND REMOTE SITE ID's.



LOW BANDS (N71+N26) OPTIONAL – (N29): ORANGE

AWS (N66+N70+H-BLOCK): PURPLE

CBRS TECH (3 GHz): YELLOW

NEGATIVE SLANT PORT ON ANT/RRH: WHITE

ALPHA SECTOR: RED

BETA SECTOR: BLUE

GAMMA SECTOR: GREEN

NOT USED

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100753

DISH Wireless L.L.C.
PROJECT INFORMATION
BOBOS01058A
460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE
RF
CABLE COLOR CODE

SHEET NUMBER
RF-1

LEGEND

EXOTHERMIC CONNECTION

MECHANICAL CONNECTION

BUSS BAR INSULATOR

CHEMICAL ELECTROLYTIC GROUNDING SYSTEM

TEST CHEMICAL ELECTROLYTIC GROUNDING SYSTEM — T

EXOTHERMIC WITH INSPECTION SLEEVE

GROUNDING BAR

GROUND ROD

TEST GROUND ROD WITH INSPECTION SLEEVE — T

SINGLE POLE SWITCH — $

DUPLEX RECEPTACLE

DUPLEX GFCI RECEPTACLE — GFCI

FLUORESCENT LIGHTING FIXTURE (2) TWO LAMPS 48–T8 — F

SMOKE DETECTION (DC) — SD

EMERGENCY LIGHTING (DC)

SECURITY LIGHT W/PHOTOCELL LITHONIA ALXW [illegible] K–SR4–120–PE–DDBTXD

WOOD/WROUGHT IRON FENCE — x x x x

WALL STRUCTURE

LEASE AREA

PROPERTY LINE (PL)

SETBACKS

ICE BRIDGE

CABLE TRAY

WATER LINE

UNDERGROUND POWER — W W W W W

UNDERGROUND TELCO — UGP UGP UGP UGP UGP

OVERHEAD POWER — UGT UGT UGT UGT UGT

OVERHEAD TELCO — OHP OHP OHP OHP

UNDERGROUND TELCO/POWER — OHT OHT OHT OHT

ABOVE GROUND POWER — UGT/P UGT/P UGT/P UGT/P

ABOVE GROUND TELCO — AGP AGP AGP AGP AGP

ABOVE GROUND TELCO/POWER — AGT AGT AGT AGT AGT

WORKPOINT — AGT/P AGT/P AGT/P AGT/P

SECTION REFERENCE — W.P. — XX / X–X

DETAIL REFERENCE — XX / X–X

ABBREVIATIONS

AB	ANCHOR BOLT
ABV	ABOVE
AC	ALTERNATING CURRENT
ADDL	ADDITIONAL
AFF	ABOVE FINISHED FLOOR
AFG	ABOVE FINISHED GRADE
AGL	ABOVE GROUND LEVEL
AIC	AMPERAGE INTERRUPTION CAPACITY
ALUM	ALUMINUM
ALT	ALTERNATE
ANT	ANTENNA
APPROX	APPROXIMATE
ARCH	ARCHITECTURAL
ATS	AUTOMATIC TRANSFER SWITCH
AWG	AMERICAN WIRE GAUGE
BATT	BATTERY
BLDG	BUILDING
BLK	BLOCK
BLKG	BLOCKING
BM	BEAM
BTC	BARE TINNED COPPER CONDUCTOR
BOF	BOTTOM OF FOOTING
CAB	CABINET
CANT	CANTILEVERED
CHG	CHARGING
CLG	CEILING
CLR	CLEAR
COL	COLUMN
COMM	COMMON
CONC	CONCRETE
CONSTR	CONSTRUCTION
DBL	DOUBLE
DC	DIRECT CURRENT
DEPT	DEPARTMENT
DF	DOUGLAS FIR
DIA	DIAMETER
DIAG	DIAGONAL
DIM	DIMENSION
DWG	DRAWING
DWL	DOWEL
EA	EACH
EC	ELECTRICAL CONDUCTOR
EL.	ELEVATION
ELEC	ELECTRICAL
EMT	ELECTRICAL METALLIC TUBING
ENG	ENGINEER
EQ	EQUAL
EXP	EXPANSION
EXT	EXTERIOR
EW	EACH WAY
FAB	FABRICATION
FF	FINISH FLOOR
FG	FINISH GRADE
FIF	FACILITY INTERFACE FRAME
FIN	FINISH(ED)
FLR	FLOOR
FDN	FOUNDATION
FOC	FACE OF CONCRETE
FOM	FACE OF MASONRY
FOS	FACE OF STUD
FOW	FACE OF WALL
FS	FINISH SURFACE
FT	FOOT
FTG	FOOTING
GA	GAUGE
GEN	GENERATOR
GFCI	GROUND FAULT CIRCUIT INTERRUPTER
GLB	GLUE LAMINATED BEAM
GLV	GALVANIZED
GPS	GLOBAL POSITIONING SYSTEM
GND	GROUND
GSM	GLOBAL SYSTEM FOR MOBILE
HDG	HOT DIPPED GALVANIZED
HDR	HEADER
HGR	HANGER
HVAC	HEAT/VENTILATION/AIR CONDITIONING
HT	HEIGHT
IGR	INTERIOR GROUND RING
IN	INCH
INT	INTERIOR
LB(S)	POUND(S)
LF	LINEAR FEET
LTE	LONG TERM EVOLUTION
MAS	MASONRY
MAX	MAXIMUM
MB	MACHINE BOLT
MECH	MECHANICAL
MFR	MANUFACTURER
MGB	MASTER GROUND BAR
MIN	MINIMUM
MISC	MISCELLANEOUS
MTL	METAL
MTS	MANUAL TRANSFER SWITCH
MW	MICROWAVE
NEC	NATIONAL ELECTRIC CODE
NM	NEWTON METERS
NO.	NUMBER
#	NUMBER
NTS	NOT TO SCALE
OC	ON–CENTER
OSHA	OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
OPNG	OPENING
P/C	PRECAST CONCRETE
PCS	PERSONAL COMMUNICATION SERVICES
PCU	PRIMARY CONTROL UNIT
PRC	PRIMARY RADIO CABINET
PP	POLARIZING PRESERVING
PSF	POUNDS PER SQUARE FOOT
PSI	POUNDS PER SQUARE INCH
PT	PRESSURE TREATED
PWR	POWER CABINET
QTY	QUANTITY
RAD	RADIUS
RECT	RECTIFIER
REF	REFERENCE
REINF	REINFORCEMENT
REQ'D	REQUIRED
RET	REMOTE ELECTRIC TILT
RF	RADIO FREQUENCY
RMC	RIGID METALLIC CONDUIT
RRH	REMOTE RADIO HEAD
RRU	REMOTE RADIO UNIT
RWY	RACEWAY
SCH	SCHEDULE
SHT	SHEET
SIAD	SMART INTEGRATED ACCESS DEVICE
SIM	SIMILAR
SPEC	SPECIFICATION
SQ	SQUARE
SS	STAINLESS STEEL
STD	STANDARD
STL	STEEL
TEMP	TEMPORARY
THK	THICKNESS
TMA	TOWER MOUNTED AMPLIFIER
TN	TOE NAIL
TOA	TOP OF ANTENNA
TOC	TOP OF CURB
TOF	TOP OF FOUNDATION
TOP	TOP OF PLATE (PARAPET)
TOS	TOP OF STEEL
TOW	TOP OF WALL
TVSS	TRANSIENT VOLTAGE SURGE SUPPRESSION
TYP	TYPICAL
UG	UNDERGROUND
UL	UNDERWRITERS LABORATORY
UNO	UNLESS NOTED OTHERWISE
UMTS	UNIVERSAL MOBILE TELECOMMUNICATIONS SYSTEM
UPS	UNITERRUPTIBLE POWER SYSTEM (DC POWER PLANT)
VIF	VERIFIED IN FIELD
W	WIDE
W/	WITH
WD	WOOD
WP	WEATHERPROOF
WT	WEIGHT

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COMMONWEALTH OF MASSACHUSETTS
KRUPAKARAN KOLLENGODE
NO. 36019
REGISTERED PROFESSIONAL ENGINEER

IT IS A VIOLATION OF LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT.

DRAWN BY:	CHECKED BY:	APPROVED BY:
CSG	NSB	DRG

RFDS REV #: 1

CONSTRUCTION DOCUMENTS

SUBMITTALS

REV	DATE	DESCRIPTION
0	07/28/2023	ISSUED FOR REVIEW
1	08/30/2023	BILL OF MATERIALS

A&E PROJECT NUMBER

100753

DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

LEGEND AND ABBREVIATIONS

SHEET NUMBER

GN-1

SIGN TYPES		
TYPE	COLOR	COLOR CODE PURPOSE
INFORMATION	GREEN	**"INFORMATIONAL SIGN"** TO NOTIFY OTHERS OF SITE OWNERSHIP & CONTACT NUMBER AND POTENTIAL RF EXPOSURE.
NOTICE	BLUE	**"NOTICE BEYOND THIS POINT"** RF FIELDS BEYOND THIS POINT MAY EXCEED THE FCC GENERAL PUBLIC EXPOSURE LIMIT. OBEY ALL POSTED SIGNS AND SITE GUIDELINES FOR WORKING IN RF ENVIRONMENTS. IN ACCORDANCE WITH FEDERAL COMMUNICATIONS COMMISSION RULES ON RADIO FREQUENCY EMISSIONS 47 CFR-1.1307(b)
CAUTION	YELLOW	**"CAUTION BEYOND THIS POINT"** RF FIELDS BEYOND THIS POINT MAY EXCEED THE FCC GENERAL PUBLIC EXPOSURE LIMIT. OBEY ALL POSTED SIGNS AND SITE GUIDELINES FOR WORKING IN RF ENVIRONMENTS. IN ACCORDANCE WITH FEDERAL COMMUNICATIONS COMMISSION RULES ON RADIO FREQUENCY EMISSIONS 47 CFR-1.1307(b)
WARNING	ORANGE/RED	**"WARNING BEYOND THIS POINT"** RF FIELDS AT THIS SITE EXCEED FCC RULES FOR HUMAN EXPOSURE. FAILURE TO OBEY ALL POSTED SIGNS AND SITE GUIDELINES FOR WORKING IN RF ENVIRONMENTS COULD RESULT IN SERIOUS INJURY. IN ACCORDANCE WITH FEDERAL COMMUNICATIONS COMMISSION RULES ON RADIO FREQUENCY EMISSIONS 47 CFR-1.1307(b)

SIGN PLACEMENT:

- RF SIGNAGE PLACEMENT SHALL FOLLOW THE RECOMMENDATIONS OF AN EXISTING EME REPORT, CREATED BY A THIRD PARTY PREVIOUSLY AUTHORIZED BY DISH Wireless L.L.C.
- INFORMATION SIGN (GREEN) SHALL BE LOCATED ON EXISTING DISH Wireless L.L.C EQUIPMENT.
  A) IF THE INFORMATION SIGN IS A STICKER, IT SHALL BE PLACED ON EXISTING DISH Wireless L.L.C EQUIPMENT CABINET.
  B) IF THE INFORMATION SIGH IS A METAL SIGN IT SHALL BE PLACED ON EXISTING DISH Wireless L.L.C H-FRAME WITH A SECURE ATTACH METHOD.
- IF EME REPORT IS NOT AVAILABLE AT THE TIME OF CREATION OF CONSTRUCTION DOCUMENTS; PLEASE CONTACT DISH Wireless L.L.C. CONSTRUCTION MANAGER FOR FURTHER INSTRUCTION ON HOW TO PROCEED.

NOTES:

1. FOR DISH Wireless L.L.C. LOGO, SEE DISH Wireless L.L.C. DESIGN SPECIFICATIONS (PROVIDED BY DISH Wireless L.L.C.)
2. SITE ID SHALL BE APPLIED TO SIGNS USING "LASER ENGRAVING" OR ANY OTHER WEATHER RESISTANT METHOD (DISH Wireless L.L.C. APPROVAL REQUIRED)
3. TEXT FOR SIGNAGE SHALL INDICATE CORRECT SITE NAME AND NUMBER AS PER DISH Wireless L.L.C. CONSTRUCTION MANAGER RECOMMENDATIONS.
4. CABINET/SHELTER MOUNTING APPLICATION REQUIRES ANOTHER PLATE APPLIED TO THE FACE OF THE CABINET WITH WATER PROOF POLYURETHANE ADHESIVE
5. ALL SIGNS WILL BE SECURED WITH EITHER STAINLESS STEEL ZIP TIES OR STAINLESS STEEL TECH SCREWS
6. ALL SIGNS TO BE 8.5"x11" AND MADE WITH 0.04" OF ALUMINUM MATERIAL

INFORMATION

This is an access point to an area with transmitting antennas.

Obey all signs and barriers beyond this point.
Call the DISH Wireless L.L.C. NOC at 1-866-624-6874

Site ID: _____

THIS SIGN IS FOR REFERENCE PURPOSES ONLY

NOTICE

Transmitting Antenna(s)

Radio frequency fields beyond this point MAY *EXCEED* the FCC Occupational exposure limit.

Obey all posted signs and site guidelines for working in radio frequency environments.

Call the DISH Wireless L.L.C. NOC at 1-866-624-6874 prior to working beyond this point.

Site ID: _____

dish

THIS SIGN IS FOR REFERENCE PURPOSES ONLY

CAUTION

Transmitting Antenna(s)

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Site ID: _____

dish

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WARNING

Transmitting Antenna(s)

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Call the DISH Wireless L.L.C. NOC at 1-866-624-6874 prior to working beyond this point.

Site ID: _____

dish

THIS SIGN IS FOR REFERENCE PURPOSES ONLY

RF SIGNAGE

dish wireless.

5701 SOUTH SANTA FE DRIVE
LITTLETON, CO 80120

NB+C TOTALLY COMMITTED.

NB+C ENGINEERING SERVICES, LLC.

100 APOLLO DRIVE
SUITE 303
CHELMSFORD, MA 01824
(978) 856-8308

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DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

RF SIGNAGE

SHEET NUMBER

GN-2

SITE ACTIVITY REQUIREMENTS:

1. NOTICE TO PROCEED – NO WORK SHALL COMMENCE PRIOR TO CONTRACTOR RECEIVING A WRITTEN NOTICE TO PROCEED (NTP) AND THE ISSUANCE OF A PURCHASE ORDER. PRIOR TO ACCESSING/ENTERING THE SITE YOU MUST CONTACT THE DISH Wireless L.L.C. AND TOWER OWNER NOC & THE DISH Wireless L.L.C. AND TOWER OWNER CONSTRUCTION MANAGER.

2. "LOOK UP" – DISH Wireless L.L.C. AND TOWER OWNER SAFETY CLIMB REQUIREMENT:

THE INTEGRITY OF THE SAFETY CLIMB AND ALL COMPONENTS OF THE CLIMBING FACILITY SHALL BE CONSIDERED DURING ALL STAGES OF DESIGN, INSTALLATION, AND INSPECTION. TOWER MODIFICATION, MOUNT REINFORCEMENTS, AND/OR EQUIPMENT INSTALLATIONS SHALL NOT COMPROMISE THE INTEGRITY OR FUNCTIONAL USE OF THE SAFETY CLIMB OR ANY COMPONENTS OF THE CLIMBING FACILITY ON THE STRUCTURE. THIS SHALL INCLUDE, BUT NOT BE LIMITED TO: PINCHING OF THE WIRE ROPE, BENDING OF THE WIRE ROPE FROM ITS SUPPORTS, DIRECT CONTACT OR CLOSE PROXIMITY TO THE WIRE ROPE WHICH MAY CAUSE FRICTIONAL WEAR, IMPACT TO THE ANCHORAGE POINTS IN ANY WAY, OR TO IMPEDE/BLOCK ITS INTENDED USE. ANY COMPROMISED SAFETY CLIMB, INCLUDING EXISTING CONDITIONS MUST BE TAGGED OUT AND REPORTED TO YOUR DISH Wireless L.L.C. AND DISH Wireless L.L.C. AND TOWER OWNER POC OR CALL THE NOC TO GENERATE A SAFETY CLIMB MAINTENANCE AND CONTRACTOR NOTICE TICKET.

3. PRIOR TO THE START OF CONSTRUCTION, ALL REQUIRED JURISDICTIONAL PERMITS SHALL BE OBTAINED. THIS INCLUDES, BUT IS NOT LIMITED TO, BUILDING, ELECTRICAL, MECHANICAL, FIRE, FLOOD ZONE, ENVIRONMENTAL, AND ZONING. AFTER ONSITE ACTIVITIES AND CONSTRUCTION ARE COMPLETED, ALL REQUIRED PERMITS SHALL BE SATISFIED AND CLOSED OUT ACCORDING TO LOCAL JURISDICTIONAL REQUIREMENTS.

4. ALL CONSTRUCTION MEANS AND METHODS; INCLUDING BUT NOT LIMITED TO, ERECTION PLANS, RIGGING PLANS, CLIMBING PLANS, AND RESCUE PLANS SHALL BE THE RESPONSIBILITY OF THE GENERAL CONTRACTOR RESPONSIBLE FOR THE EXECUTION OF THE WORK CONTAINED HEREIN, AND SHALL MEET ANSI/ASSE A10.48 (LATEST EDITION); FEDERAL, STATE, AND LOCAL REGULATIONS; AND ANY APPLICABLE INDUSTRY CONSENSUS STANDARDS RELATED TO THE CONSTRUCTION ACTIVITIES BEING PERFORMED. ALL RIGGING PLANS SHALL ADHERE TO ANSI/ASSE A10.48 (LATEST EDITION) AND DISH Wireless L.L.C. AND TOWER OWNER STANDARDS, INCLUDING THE REQUIRED INVOLVEMENT OF A QUALIFIED ENGINEER FOR CLASS IV CONSTRUCTION, TO CERTIFY THE SUPPORTING STRUCTURE(S) IN ACCORDANCE WITH ANSI/TIA–322 (LATEST EDITION).

5. ALL SITE WORK TO COMPLY WITH DISH Wireless L.L.C. AND TOWER OWNER INSTALLATION STANDARDS FOR CONSTRUCTION ACTIVITIES ON DISH Wireless L.L.C. AND TOWER OWNER TOWER SITE AND LATEST VERSION OF ANSI/TIA–1019–A–2012 "STANDARD FOR INSTALLATION, ALTERATION, AND MAINTENANCE OF ANTENNA SUPPORTING STRUCTURES AND ANTENNAS."

6. IF THE SPECIFIED EQUIPMENT CAN NOT BE INSTALLED AS SHOWN ON THESE DRAWINGS, THE CONTRACTOR SHALL PROPOSE AN ALTERNATIVE INSTALLATION FOR APPROVAL BY DISH Wireless L.L.C. AND TOWER OWNER PRIOR TO PROCEEDING WITH ANY SUCH CHANGE OF INSTALLATION.

7. ALL MATERIALS FURNISHED AND INSTALLED SHALL BE IN STRICT ACCORDANCE WITH ALL APPLICABLE CODES, REGULATIONS AND ORDINANCES. CONTRACTOR SHALL ISSUE ALL APPROPRIATE NOTICES AND COMPLY WITH ALL LAWS, ORDINANCES, RULES, REGULATIONS AND LAWFUL ORDERS OF ANY PUBLIC AUTHORITY REGARDING THE PERFORMANCE OF THE WORK. ALL WORK CARRIED OUT SHALL COMPLY WITH ALL APPLICABLE MUNICIPAL AND UTILITY COMPANY SPECIFICATIONS AND LOCAL JURISDICTIONAL CODES, ORDINANCES AND APPLICABLE REGULATIONS.

8. THE CONTRACTOR SHALL INSTALL ALL EQUIPMENT AND MATERIALS IN ACCORDANCE WITH MANUFACTURER'S RECOMMENDATIONS UNLESS SPECIFICALLY STATED OTHERWISE.

9. THE CONTRACTOR SHALL CONTACT UTILITY LOCATING SERVICES INCLUDING PRIVATE LOCATES SERVICES PRIOR TO THE START OF CONSTRUCTION.

10. ALL EXISTING ACTIVE SEWER, WATER, GAS, ELECTRIC AND OTHER UTILITIES WHERE ENCOUNTERED IN THE WORK, SHALL BE PROTECTED AT ALL TIMES AND WHERE REQUIRED FOR THE PROPER EXECUTION OF THE WORK, SHALL BE RELOCATED AS DIRECTED BY CONTRACTOR. EXTREME CAUTION SHOULD BE USED BY THE CONTRACTOR WHEN EXCAVATING OR DRILLING PIERS AROUND OR NEAR UTILITIES. CONTRACTOR SHALL PROVIDE SAFETY TRAINING FOR THE WORKING CREW. THIS WILL INCLUDE BUT NOT BE LIMITED TO A) FALL PROTECTION B) CONFINED SPACE C) ELECTRICAL SAFETY D) TRENCHING AND EXCAVATION E) CONSTRUCTION SAFETY PROCEDURES.

11. ALL SITE WORK SHALL BE AS INDICATED ON THE STAMPED CONSTRUCTION DRAWINGS AND DISH PROJECT SPECIFICATIONS, LATEST APPROVED REVISION.

12. CONTRACTOR SHALL KEEP THE SITE FREE FROM ACCUMULATING WASTE MATERIAL, DEBRIS, AND TRASH AT THE COMPLETION OF THE WORK. IF NECESSARY, RUBBISH, STUMPS, DEBRIS, STICKS, STONES AND OTHER REFUSE SHALL BE REMOVED FROM THE SITE AND DISPOSED OF LEGALLY.

13. ALL EXISTING INACTIVE SEWER, WATER, GAS, ELECTRIC AND OTHER UTILITIES, WHICH INTERFERE WITH THE EXECUTION OF THE WORK, SHALL BE REMOVED AND/OR CAPPED, PLUGGED OR OTHERWISE DISCONTINUED AT POINTS WHICH WILL NOT INTERFERE WITH THE EXECUTION OF THE WORK, SUBJECT TO THE APPROVAL OF DISH Wireless L.L.C. AND TOWER OWNER, AND/OR LOCAL UTILITIES.

14. THE CONTRACTOR SHALL PROVIDE SITE SIGNAGE IN ACCORDANCE WITH THE TECHNICAL SPECIFICATION FOR SITE SIGNAGE REQUIRED BY LOCAL JURISDICTION AND SIGNAGE REQUIRED ON INDIVIDUAL PIECES OF EQUIPMENT, ROOMS, AND SHELTERS.

15. THE SITE SHALL BE GRADED TO CAUSE SURFACE WATER TO FLOW AWAY FROM THE CARRIER'S EQUIPMENT AND TOWER AREAS.

16. THE SUB GRADE SHALL BE COMPACTED AND BROUGHT TO A SMOOTH UNIFORM GRADE PRIOR TO FINISHED SURFACE APPLICATION.

17. THE AREAS OF THE OWNERS PROPERTY DISTURBED BY THE WORK AND NOT COVERED BY THE TOWER, EQUIPMENT OR DRIVEWAY, SHALL BE GRADED TO A UNIFORM SLOPE, AND STABILIZED TO PREVENT EROSION AS SPECIFIED ON THE CONSTRUCTION DRAWINGS AND/OR PROJECT SPECIFICATIONS.

18. CONTRACTOR SHALL MINIMIZE DISTURBANCE TO EXISTING SITE DURING CONSTRUCTION. EROSION CONTROL MEASURES, IF REQUIRED DURING CONSTRUCTION, SHALL BE IN CONFORMANCE WITH THE LOCAL GUIDELINES FOR EROSION AND SEDIMENT CONTROL.

19. THE CONTRACTOR SHALL PROTECT EXISTING IMPROVEMENTS, PAVEMENTS, CURBS, LANDSCAPING AND STRUCTURES. ANY DAMAGED PART SHALL BE REPAIRED AT CONTRACTOR'S EXPENSE TO THE SATISFACTION OF OWNER.

20. CONTRACTOR SHALL LEGALLY AND PROPERLY DISPOSE OF ALL SCRAP MATERIALS SUCH AS COAXIAL CABLES AND OTHER ITEMS REMOVED FROM THE EXISTING FACILITY. ANTENNAS AND RADIOS REMOVED SHALL BE RETURNED TO THE OWNER'S DESIGNATED LOCATION.

21. CONTRACTOR SHALL LEAVE PREMISES IN CLEAN CONDITION. TRASH AND DEBRIS SHOULD BE REMOVED FROM SITE ON A DAILY BASIS.

22. NO FILL OR EMBANKMENT MATERIAL SHALL BE PLACED ON FROZEN GROUND. FROZEN MATERIALS, SNOW OR ICE SHALL NOT BE PLACED IN ANY FILL OR EMBANKMENT.

GENERAL NOTES:

1.FOR THE PURPOSE OF CONSTRUCTION DRAWING, THE FOLLOWING DEFINITIONS SHALL APPLY:

CONTRACTOR:GENERAL CONTRACTOR RESPONSIBLE FOR CONSTRUCTION

CARRIER:DISH Wireless L.L.C.

TOWER OWNER:TOWER OWNER

2. THESE DRAWINGS HAVE BEEN PREPARED USING STANDARDS OF PROFESSIONAL CARE AND COMPLETENESS NORMALLY EXERCISED UNDER SIMILAR CIRCUMSTANCES BY REPUTABLE ENGINEERS IN THIS OR SIMILAR LOCALITIES. IT IS ASSUMED THAT THE WORK DEPICTED WILL BE PERFORMED BY AN EXPERIENCED CONTRACTOR AND/OR WORKPEOPLE WHO HAVE A WORKING KNOWLEDGE OF THE APPLICABLE CODE STANDARDS AND REQUIREMENTS AND OF INDUSTRY ACCEPTED STANDARD GOOD PRACTICE. AS NOT EVERY CONDITION OR ELEMENT IS (OR CAN BE) EXPLICITLY SHOWN ON THESE DRAWINGS, THE CONTRACTOR SHALL USE INDUSTRY ACCEPTED STANDARD GOOD PRACTICE FOR MISCELLANEOUS WORK NOT EXPLICITLY SHOWN.

3. THESE DRAWINGS REPRESENT THE FINISHED STRUCTURE. THEY DO NOT INDICATE THE MEANS OR METHODS OF CONSTRUCTION. THE CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONSTRUCTION MEANS, METHODS, TECHNIQUES, SEQUENCES, AND PROCEDURES. THE CONTRACTOR SHALL PROVIDE ALL MEASURES NECESSARY FOR PROTECTION OF LIFE AND PROPERTY DURING CONSTRUCTION. SUCH MEASURES SHALL INCLUDE, BUT NOT BE LIMITED TO, BRACING, FORMWORK, SHORING, ETC. SITE VISITS BY THE ENGINEER OR HIS REPRESENTATIVE WILL NOT INCLUDE INSPECTION OF THESE ITEMS AND IS FOR STRUCTURAL OBSERVATION OF THE FINISHED STRUCTURE ONLY.

4. NOTES AND DETAILS IN THE CONSTRUCTION DRAWINGS SHALL TAKE PRECEDENCE OVER GENERAL NOTES AND TYPICAL DETAILS. WHERE NO DETAILS ARE SHOWN, CONSTRUCTION SHALL CONFORM TO SIMILAR WORK ON THE PROJECT, AND/OR AS PROVIDED FOR IN THE CONTRACT DOCUMENTS. WHERE DISCREPANCIES OCCUR BETWEEN PLANS, DETAILS, GENERAL NOTES, AND SPECIFICATIONS, THE GREATER, MORE STRICT REQUIREMENTS, SHALL GOVERN. IF FURTHER CLARIFICATION IS REQUIRED CONTACT THE ENGINEER OF RECORD.

5. SUBSTANTIAL EFFORT HAS BEEN MADE TO PROVIDE ACCURATE DIMENSIONS AND MEASUREMENTS ON THE DRAWINGS TO ASSIST IN THE FABRICATION AND/OR PLACEMENT OF CONSTRUCTION ELEMENTS BUT IT IS THE SOLE RESPONSIBILITY OF THE CONTRACTOR TO FIELD VERIFY THE DIMENSIONS, MEASUREMENTS, AND/OR CLEARANCES SHOWN IN THE CONSTRUCTION DRAWINGS PRIOR TO FABRICATION OR CUTTING OF ANY NEW OR EXISTING CONSTRUCTION ELEMENTS. IF IT IS DETERMINED THAT THERE ARE DISCREPANCIES AND/OR CONFLICTS WITH THE CONSTRUCTION DRAWINGS THE ENGINEER OF RECORD IS TO BE NOTIFIED AS SOON AS POSSIBLE.

6. PRIOR TO THE SUBMISSION OF BIDS, THE BIDDING CONTRACTOR SHALL VISIT THE CELL SITE TO FAMILIARIZE WITH THE EXISTING CONDITIONS AND TO CONFIRM THAT THE WORK CAN BE ACCOMPLISHED AS SHOWN ON THE CONSTRUCTION DRAWINGS. ANY DISCREPANCY FOUND SHALL BE BROUGHT TO THE ATTENTION OF CARRIER POC AND TOWER OWNER.

7. ALL MATERIALS FURNISHED AND INSTALLED SHALL BE IN STRICT ACCORDANCE WITH ALL APPLICABLE CODES, REGULATIONS AND ORDINANCES. CONTRACTOR SHALL ISSUE ALL APPROPRIATE NOTICES AND COMPLY WITH ALL LAWS, ORDINANCES, RULES, REGULATIONS AND LAWFUL ORDERS OF ANY PUBLIC AUTHORITY REGARDING THE PERFORMANCE OF THE WORK. ALL WORK CARRIED OUT SHALL COMPLY WITH ALL APPLICABLE MUNICIPAL AND UTILITY COMPANY SPECIFICATIONS AND LOCAL JURISDICTIONAL CODES, ORDINANCES AND APPLICABLE REGULATIONS.

8. UNLESS NOTED OTHERWISE, THE WORK SHALL INCLUDE FURNISHING MATERIALS, EQUIPMENT, APPURTENANCES AND LABOR NECESSARY TO COMPLETE ALL INSTALLATIONS AS INDICATED ON THE DRAWINGS.

9. THE CONTRACTOR SHALL INSTALL ALL EQUIPMENT AND MATERIALS IN ACCORDANCE WITH MANUFACTURER'S RECOMMENDATIONS UNLESS SPECIFICALLY STATED OTHERWISE.

10. IF THE SPECIFIED EQUIPMENT CAN NOT BE INSTALLED AS SHOWN ON THESE DRAWINGS, THE CONTRACTOR SHALL PROPOSE AN ALTERNATIVE INSTALLATION FOR APPROVAL BY THE CARRIER AND TOWER OWNER PRIOR TO PROCEEDING WITH ANY SUCH CHANGE OF INSTALLATION.

11. CONTRACTOR IS TO PERFORM A SITE INVESTIGATION, BEFORE SUBMITTING BIDS, TO DETERMINE THE BEST ROUTING OF ALL CONDUITS FOR POWER, AND TELCO AND FOR GROUNDING CABLES AS SHOWN IN THE POWER, TELCO, AND GROUNDING PLAN DRAWINGS.

12. THE CONTRACTOR SHALL PROTECT EXISTING IMPROVEMENTS, PAVEMENTS, CURBS, LANDSCAPING AND STRUCTURES. ANY DAMAGED PART SHALL BE REPAIRED AT CONTRACTOR'S EXPENSE TO THE SATISFACTION OF DISH Wireless L.L.C. AND TOWER OWNER

13. CONTRACTOR SHALL LEGALLY AND PROPERLY DISPOSE OF ALL SCRAP MATERIALS SUCH AS COAXIAL CABLES AND OTHER ITEMS REMOVED FROM THE EXISTING FACILITY. ANTENNAS REMOVED SHALL BE RETURNED TO THE OWNER'S DESIGNATED LOCATION.

14. CONTRACTOR SHALL LEAVE PREMISES IN CLEAN CONDITION. TRASH AND DEBRIS SHOULD BE REMOVED FROM SITE ON A DAILY BASIS.

dish wireless.

5701 SOUTH SANTA FE DRIVE
LITTLETON, CO 80120

NB+C™ TOTALLY COMMITTED.

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GENERAL NOTES

SHEET NUMBER

GN-3

CONCRETE, FOUNDATIONS, AND REINFORCING STEEL:

1. ALL CONCRETE WORK SHALL BE IN ACCORDANCE WITH THE ACI 301, ACI 318, ACI 336, ASTM A184, ASTM A185 AND THE DESIGN AND CONSTRUCTION SPECIFICATION FOR CAST-IN-PLACE CONCRETE.

2. UNLESS NOTED OTHERWISE, SOIL BEARING PRESSURE USED FOR DESIGN OF SLABS AND FOUNDATIONS IS ASSUMED TO BE 1000 psf.

3. ALL CONCRETE SHALL HAVE A MINIMUM COMPRESSIVE STRENGTH (f'c) OF 3000 psi AT 28 DAYS, UNLESS NOTED OTHERWISE. NO MORE THAN 90 MINUTES SHALL ELAPSE FROM BATCH TIME TO TIME OF PLACEMENT UNLESS APPROVED BY THE ENGINEER OF RECORD. TEMPERATURE OF CONCRETE SHALL NOT EXCEED 90°f AT TIME OF PLACEMENT.

4. CONCRETE EXPOSED TO FREEZE-THAW CYCLES SHALL CONTAIN AIR ENTRAINING ADMIXTURES. AMOUNT OF AIR ENTRAINMENT TO BE BASED ON SIZE OF AGGREGATE AND F3 CLASS EXPOSURE (VERY SEVERE). CEMENT USED TO BE TYPE II PORTLAND CEMENT WITH A MAXIMUM WATER-TO-CEMENT RATIO (W/C) OF 0.45.

5. ALL STEEL REINFORCING SHALL CONFORM TO ASTM A615. ALL WELDED WIRE FABRIC (WWF) SHALL CONFORM TO ASTM A185. ALL SPLICES SHALL BE CLASS "B" TENSION SPLICES, UNLESS NOTED OTHERWISE. ALL HOOKS SHALL BE STANDARD 90 DEGREE HOOKS, UNLESS NOTED OTHERWISE. YIELD STRENGTH (Fy) OF STANDARD DEFORMED BARS ARE AS FOLLOWS:

#4 BARS AND SMALLER 40 ksi

#5 BARS AND LARGER 60 ksi

6. THE FOLLOWING MINIMUM CONCRETE COVER SHALL BE PROVIDED FOR REINFORCING STEEL UNLESS SHOWN OTHERWISE ON DRAWINGS:

- CONCRETE CAST AGAINST AND PERMANENTLY EXPOSED TO EARTH 3"
- CONCRETE EXPOSED TO EARTH OR WEATHER:
- #6 BARS AND LARGER 2"
- #5 BARS AND SMALLER 1-1/2"
- CONCRETE NOT EXPOSED TO EARTH OR WEATHER:
- SLAB AND WALLS 3/4"
- BEAMS AND COLUMNS 1-1/2"

7. A TOOLED EDGE OR A 3/4" CHAMFER SHALL BE PROVIDED AT ALL EXPOSED EDGES OF CONCRETE, UNLESS NOTED OTHERWISE, IN ACCORDANCE WITH ACI 301 SECTION 4.2.4.

ELECTRICAL INSTALLATION NOTES:

1. ALL ELECTRICAL WORK SHALL BE PERFORMED IN ACCORDANCE WITH THE PROJECT SPECIFICATIONS, NEC AND ALL APPLICABLE FEDERAL, STATE, AND LOCAL CODES/ORDINANCES.

2. CONDUIT ROUTINGS ARE SCHEMATIC. CONTRACTOR SHALL INSTALL CONDUITS SO THAT ACCESS TO EQUIPMENT IS NOT BLOCKED AND TRIP HAZARDS ARE ELIMINATED.

3. WIRING, RACEWAY AND SUPPORT METHODS AND MATERIALS SHALL COMPLY WITH THE REQUIREMENTS OF THE NEC.

4. ALL CIRCUITS SHALL BE SEGREGATED AND MAINTAIN MINIMUM CABLE SEPARATION AS REQUIRED BY THE NEC.

4.1. ALL EQUIPMENT SHALL BEAR THE UNDERWRITERS LABORATORIES LABEL OF APPROVAL, AND SHALL CONFORM TO REQUIREMENT OF THE NATIONAL ELECTRICAL CODE.

4.2. ALL OVERCURRENT DEVICES SHALL HAVE AN INTERRUPTING CURRENT RATING THAT SHALL BE GREATER THAN THE SHORT CIRCUIT CURRENT TO WHICH THEY ARE SUBJECTED, 22,000 AIC MINIMUM. VERIFY AVAILABLE SHORT CIRCUIT CURRENT DOES NOT EXCEED THE RATING OF ELECTRICAL EQUIPMENT IN ACCORDANCE WITH ARTICLE 110.24 NEC OR THE MOST CURRENT ADOPTED CODE PRE THE GOVERNING JURISDICTION.

5. EACH END OF EVERY POWER PHASE CONDUCTOR, GROUNDING CONDUCTOR, AND TELCO CONDUCTOR OR CABLE SHALL BE LABELED WITH COLOR-CODED INSULATION OR ELECTRICAL TAPE (3M BRAND, 1/2" PLASTIC ELECTRICAL TAPE WITH UV PROTECTION, OR EQUAL). THE IDENTIFICATION METHOD SHALL CONFORM WITH NEC AND OSHA.

6. ALL ELECTRICAL COMPONENTS SHALL BE CLEARLY LABELED WITH LAMICOID TAGS SHOWING THEIR RATED VOLTAGE, PHASE CONFIGURATION, WIRE CONFIGURATION, POWER OR AMPACITY RATING AND BRANCH CIRCUIT ID NUMBERS (i.e. PANEL BOARD AND CIRCUIT ID'S).

7. PANEL BOARDS (ID NUMBERS) SHALL BE CLEARLY LABELED WITH PLASTIC LABELS.

8. TIE WRAPS ARE NOT ALLOWED.

9. ALL POWER AND EQUIPMENT GROUND WIRING IN TUBING OR CONDUIT SHALL BE SINGLE COPPER CONDUCTOR (#14 OR LARGER) WITH TYPE THHW, THWN, THWN-2, XHHW, XHHW-2, THW, THW-2, RHW, OR RHW-2 INSULATION UNLESS OTHERWISE SPECIFIED.

10. SUPPLEMENTAL EQUIPMENT GROUND WIRING LOCATED INDOORS SHALL BE SINGLE COPPER CONDUCTOR (#6 OR LARGER) WITH TYPE THHW, THWN, THWN-2, XHHW, XHHW-2, THW, THW-2, RHW, OR RHW-2 INSULATION UNLESS OTHERWISE SPECIFIED.

11. POWER AND CONTROL WIRING IN FLEXIBLE CORD SHALL BE MULTI-CONDUCTOR, TYPE SOOW CORD (#14 OR LARGER) UNLESS OTHERWISE SPECIFIED.

12. POWER AND CONTROL WIRING FOR USE IN CABLE TRAY SHALL BE MULTI-CONDUCTOR, TYPE TC CABLE (#14 OR LARGER), WITH TYPE THHW, THWN, THWN-2, XHHW, XHHW-2, THW, THW-2, RHW, OR RHW-2 INSULATION UNLESS OTHERWISE SPECIFIED.

13. ALL POWER AND GROUNDING CONNECTIONS SHALL BE CRIMP-STYLE, COMPRESSION WIRE LUGS AND WIRE NUTS BY THOMAS AND BETTS (OR EQUAL). LUGS AND WIRE NUTS SHALL BE RATED FOR OPERATION NOT LESS THAN 75° C (90° C IF AVAILABLE).

14. RACEWAY AND CABLE TRAY SHALL BE LISTED OR LABELED FOR ELECTRICAL USE IN ACCORDANCE WITH NEMA, UL, ANSI/IEEE AND NEC.

15. ELECTRICAL METALLIC TUBING (EMT), INTERMEDIATE METAL CONDUIT (IMC), OR RIGID METAL CONDUIT (RMC) SHALL BE USED FOR EXPOSED INDOOR LOCATIONS.

16. ELECTRICAL METALLIC TUBING (EMT) OR METAL-CLAD CABLE (MC) SHALL BE USED FOR CONCEALED INDOOR LOCATIONS.

17. SCHEDULE 40 PVC UNDERGROUND ON STRAIGHTS AND SCHEDULE 80 PVC FOR ALL ELBOWS/90s AND ALL APPROVED ABOVE GRADE PVC CONDUIT.

18. LIQUID-TIGHT FLEXIBLE METALLIC CONDUIT (LIQUID-TITE FLEX) SHALL BE USED INDOORS AND OUTDOORS, WHERE VIBRATION OCCURS OR FLEXIBILITY IS NEEDED.

19. CONDUIT AND TUBING FITTINGS SHALL BE THREADED OR COMPRESSION-TYPE AND APPROVED FOR THE LOCATION USED. SET SCREW FITTINGS ARE NOT ACCEPTABLE.

20. CABINETS, BOXES AND WIRE WAYS SHALL BE LABELED FOR ELECTRICAL USE IN ACCORDANCE WITH NEMA, UL, ANSI/IEEE AND THE NEC.

21. WIREWAYS SHALL BE METAL WITH AN ENAMEL FINISH AND INCLUDE A HINGED COVER, DESIGNED TO SWING OPEN DOWNWARDS (WIREMOLD SPECMATE WIREWAY).

22. SLOTTED WIRING DUCT SHALL BE PVC AND INCLUDE COVER (PANDUIT TYPE E OR EQUAL).

23. CONDUITS SHALL BE FASTENED SECURELY IN PLACE WITH APPROVED NON-PERFORATED STRAPS AND HANGERS. EXPLOSIVE DEVICES (i.e. POWDER-ACTUATED) FOR ATTACHING HANGERS TO STRUCTURE WILL NOT BE PERMITTED. CLOSELY FOLLOW THE LINES OF THE STRUCTURE, MAINTAIN CLOSE PROXIMITY TO THE STRUCTURE AND KEEP CONDUITS IN TIGHT ENVELOPES. CHANGES IN DIRECTION TO ROUTE AROUND OBSTACLES SHALL BE MADE WITH CONDUIT OUTLET BODIES. CONDUIT SHALL BE INSTALLED IN A NEAT AND WORKMANLIKE MANNER. PARALLEL AND PERPENDICULAR TO STRUCTURE WALL AND CEILING LINES. ALL CONDUIT SHALL BE FISHED TO CLEAR OBSTRUCTIONS. ENDS OF CONDUITS SHALL BE TEMPORARILY CAPPED FLUSH TO FINISH GRADE TO PREVENT CONCRETE, PLASTER OR DIRT FROM ENTERING. CONDUITS SHALL BE RIGIDLY CLAMPED TO BOXES BY GALVANIZED MALLEABLE IRON BUSHING ON INSIDE AND GALVANIZED MALLEABLE IRON LOCKNUT ON OUTSIDE AND INSIDE.

24. EQUIPMENT CABINETS, TERMINAL BOXES, JUNCTION BOXES AND PULL BOXES SHALL BE GALVANIZED OR EPOXY-COATED SHEET STEEL. SHALL MEET OR EXCEED UL 50 AND BE RATED NEMA 1 (OR BETTER) FOR INTERIOR LOCATIONS AND NEMA 3 (OR BETTER) FOR EXTERIOR LOCATIONS.

25. METAL RECEPTACLE, SWITCH AND DEVICE BOXES SHALL BE GALVANIZED, EPOXY-COATED OR NON-CORRODING; SHALL MEET OR EXCEED UL 514A AND NEMA OS 1 AND BE RATED NEMA 1 (OR BETTER) FOR INTERIOR LOCATIONS AND WEATHER PROTECTED (WP OR BETTER) FOR EXTERIOR LOCATIONS.

26. NONMETALLIC RECEPTACLE, SWITCH AND DEVICE BOXES SHALL MEET OR EXCEED NEMA OS 2 (NEWEST REVISION) AND BE RATED NEMA 1 (OR BETTER) FOR INTERIOR LOCATIONS AND WEATHER PROTECTED (WP OR BETTER) FOR EXTERIOR LOCATIONS.

27. THE CONTRACTOR SHALL NOTIFY AND OBTAIN NECESSARY AUTHORIZATION FROM THE CARRIER AND/OR DISH Wireless L.L.C. AND TOWER OWNER BEFORE COMMENCING WORK ON THE AC POWER DISTRIBUTION PANELS.

28. THE CONTRACTOR SHALL PROVIDE NECESSARY TAGGING ON THE BREAKERS, CABLES AND DISTRIBUTION PANELS IN ACCORDANCE WITH THE APPLICABLE CODES AND STANDARDS TO SAFEGUARD LIFE AND PROPERTY.

29. INSTALL LAMICOID LABEL ON THE METER CENTER TO SHOW "DISH Wireless L.L.C.".

30. ALL EMPTY/SPARE CONDUITS THAT ARE INSTALLED ARE TO HAVE A METERED MULE TAPE PULL CORD INSTALLED.

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CSG	NSB	DRG

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CONSTRUCTION DOCUMENTS

SUBMITTALS

REV	DATE	DESCRIPTION
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1	08/30/2023	BILL OF MATERIALS

A&E PROJECT NUMBER

100753

DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

GENERAL NOTES

SHEET NUMBER

GN-4

GROUNDING NOTES:

1. ALL GROUND ELECTRODE SYSTEMS (INCLUDING TELECOMMUNICATION, RADIO, LIGHTNING PROTECTION AND AC POWER GES'S) SHALL BE BONDED TOGETHER AT OR BELOW GRADE, BY TWO OR MORE COPPER BONDING CONDUCTORS IN ACCORDANCE WITH THE NEC.

2. THE CONTRACTOR SHALL PERFORM IEEE FALL-OF-POTENTIAL RESISTANCE TO EARTH TESTING (PER IEEE 1100 AND 81) FOR GROUND ELECTRODE SYSTEMS, THE CONTRACTOR SHALL FURNISH AND INSTALL SUPPLEMENTAL GROUND ELECTRODES AS NEEDED TO ACHIEVE A TEST RESULT OF 5 OHMS OR LESS.

3. THE CONTRACTOR IS RESPONSIBLE FOR PROPERLY SEQUENCING GROUNDING AND UNDERGROUND CONDUIT INSTALLATION AS TO PREVENT ANY LOSS OF CONTINUITY IN THE GROUNDING SYSTEM OR DAMAGE TO THE CONDUIT AND PROVIDE TESTING RESULTS.

4. METAL CONDUIT AND TRAY SHALL BE GROUNDED AND MADE ELECTRICALLY CONTINUOUS WITH LISTED BONDING FITTINGS OR BY BONDING ACROSS THE DISCONTINUITY WITH #6 COPPER WIRE UL APPROVED GROUNDING TYPE CONDUIT CLAMPS.

5. METAL RACEWAY SHALL NOT BE USED AS THE NEC REQUIRED EQUIPMENT GROUND CONDUCTOR. STRANDED COPPER CONDUCTORS WITH GREEN INSULATION, SIZED IN ACCORDANCE WITH THE NEC, SHALL BE FURNISHED AND INSTALLED WITH THE POWER CIRCUITS TO BTS EQUIPMENT.

6. EACH CABINET FRAME SHALL BE DIRECTLY CONNECTED TO THE MASTER GROUND BAR WITH GREEN INSULATED SUPPLEMENTAL EQUIPMENT GROUND WIRES, #6 STRANDED COPPER OR LARGER FOR INDOOR BTS; #2 BARE SOLID TINNED COPPER FOR OUTDOOR BTS.

7. CONNECTIONS TO THE GROUND BUS SHALL NOT BE DOUBLED UP OR STACKED BACK TO BACK CONNECTIONS ON OPPOSITE SIDE OF THE GROUND BUS ARE PERMITTED.

8. ALL EXTERIOR GROUND CONDUCTORS BETWEEN EQUIPMENT/GROUND BARS AND THE GROUND RING SHALL BE #2 SOLID TINNED COPPER UNLESS OTHERWISE INDICATED.

9. ALUMINUM CONDUCTOR OR COPPER CLAD STEEL CONDUCTOR SHALL NOT BE USED FOR GROUNDING CONNECTIONS.

10. USE OF 90° BENDS IN THE PROTECTION GROUNDING CONDUCTORS SHALL BE AVOIDED WHEN 45° BENDS CAN BE ADEQUATELY SUPPORTED.

11. EXOTHERMIC WELDS SHALL BE USED FOR ALL GROUNDING CONNECTIONS BELOW GRADE.

12. ALL GROUND CONNECTIONS ABOVE GRADE (INTERIOR AND EXTERIOR) SHALL BE FORMED USING HIGH PRESS CRIMPS.

13. COMPRESSION GROUND CONNECTIONS MAY BE REPLACED BY EXOTHERMIC WELD CONNECTIONS.

14. ICE BRIDGE BONDING CONDUCTORS SHALL BE EXOTHERMICALLY BONDED OR BOLTED TO THE BRIDGE AND THE TOWER GROUND BAR.

15. APPROVED ANTIOXIDANT COATINGS (i.e. CONDUCTIVE GEL OR PASTE) SHALL BE USED ON ALL COMPRESSION AND BOLTED GROUND CONNECTIONS.

16. ALL EXTERIOR GROUND CONNECTIONS SHALL BE COATED WITH A CORROSION RESISTANT MATERIAL.

17. MISCELLANEOUS ELECTRICAL AND NON-ELECTRICAL METAL BOXES, FRAMES AND SUPPORTS SHALL BE BONDED TO THE GROUND RING, IN ACCORDANCE WITH THE NEC.

18. BOND ALL METALLIC OBJECTS WITHIN 6 ft OF MAIN GROUND RING WITH (1) #2 BARE SOLID TINNED COPPER GROUND CONDUCTOR.

19. GROUND CONDUCTORS USED FOR THE FACILITY GROUNDING AND LIGHTNING PROTECTION SYSTEMS SHALL NOT BE ROUTED THROUGH METALLIC OBJECTS THAT FORM A RING AROUND THE CONDUCTOR, SUCH AS METALLIC CONDUITS, METAL SUPPORT CLIPS OR SLEEVES THROUGH WALLS OR FLOORS. WHEN IT IS REQUIRED TO BE HOUSED IN CONDUIT TO MEET CODE REQUIREMENTS OR LOCAL CONDITIONS, NON-METALLIC MATERIAL SUCH AS PVC CONDUIT SHALL BE USED. WHERE USE OF METAL CONDUIT IS UNAVOIDABLE (i.e., NONMETALLIC CONDUIT PROHIBITED BY LOCAL CODE) THE GROUND CONDUCTOR SHALL BE BONDED TO EACH END OF THE METAL CONDUIT.

20. ALL GROUNDS THAT TRANSITION FROM BELOW GRADE TO ABOVE GRADE MUST BE #2 BARE SOLID TINNED COPPER IN 3/4" NON-METALLIC, FLEXIBLE CONDUIT FROM 24" BELOW GRADE TO WITHIN 3" TO 6" OF CAD-WELD TERMINATION POINT. THE EXPOSED END OF THE CONDUIT MUST BE SEALED WITH SILICONE CAULK. (ADD TRANSITIONING GROUND STANDARD DETAIL AS WELL).

21. BUILDINGS WHERE THE MAIN GROUNDING CONDUCTORS ARE REQUIRED TO BE ROUTED TO GRADE, THE CONTRACTOR SHALL ROUTE TWO GROUNDING CONDUCTORS FROM THE ROOFTOP, TOWERS, AND WATER TOWERS GROUNDING RING, TO THE EXISTING GROUNDING SYSTEM, THE GROUNDING CONDUCTORS SHALL NOT BE SMALLER THAN 2/0 COPPER. ROOFTOP GROUNDING RING SHALL BE BONDED TO THE EXISTING GROUNDING SYSTEM, THE BUILDING STEEL COLUMNS, LIGHTNING PROTECTION SYSTEM, AND BUILDING MAIN WATER LINE (FERROUS OR NONFERROUS METAL PIPING ONLY). DO NOT ATTACH GROUNDING TO FIRE SPRINKLER SYSTEM PIPES.

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RFDS REV #: 1

CONSTRUCTION DOCUMENTS

SUBMITTALS

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A&E PROJECT NUMBER

100753

DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

GENERAL NOTES

SHEET NUMBER

GN-5

PMI CHECKLIST

CONSTRUCTION/INSTALLATION INSPECTIONS AND TESTING REQUIRED	REPORT ITEM
PRE-CONSTRUCTION	
X	PMI CHECKLIST DRAWING
N/A	EOR APPROVED SHOP DRAWINGS
N/A	FABRICATION INSPECTION
N/A	FABRICATOR CERTIFIED WELD INSPECTION
N/A	MATERIAL TEST REPORT (MTR)
N/A	FABRICATOR NDE INSPECTION
N/A	NDE REPORT OF MONOPOLE BASE PLATE (AS REQUIRED)
X	PACKING SLIPS
ADDITIONAL TESTING AND INSPECTIONS:	
CONSTRUCTION	
X	CONSTRUCTION INSPECTIONS
N/A	FOUNDATION INSPECTIONS
N/A	CONCRETE COMP. STRENGTH AND SLUMP TESTS
N/A	POST INSTALLED ANCHOR ROD VERIFICATION
N/A	BASE PLATE GROUT VERIFICATION
N/A	CONTRACTOR'S CERTIFIED WELD INSPECTION
N/A	EARTHWORK: LIFT AND DENSITY
N/A	ON SITE COLD GALVANIZING VERIFICATION
N/A	GUY WIRE TENSION REPORT
X	GC AS-BUILT DOCUMENTS
ADDITIONAL TESTING AND INSPECTIONS:	
POST-CONSTRUCTION	
X	PMI INSPECTOR REDLINE OR RECORD DRAWING(S)
N/A	POST INSTALLED ANCHOR ROD PULL-OUT TESTING
X	PHOTOGRAPHS
ADDITIONAL TESTING AND INSPECTIONS:	

NOTE: X DENOTES A DOCUMENT NEEDED FOR THE PMI REPORT
N/A DENOTES A DOCUMENT THAT IS NOT REQUIRED FOR THE PMI REPORT

POST MODIFICATION INSPECTION NOTES:

GENERAL

1. THE POST MODIFICATION INSPECTION (PMI) IS A VISUAL INSPECTION OF TOWER MODIFICATIONS AND A REVIEW OF CONSTRUCTION INSPECTIONS AND OTHER REPORTS TO ENSURE THE INSTALLATION WAS CONSTRUCTED IN ACCORDANCE WITH THE CONTRACT DOCUMENTS, NAMELY THE MODIFICATION DRAWINGS, AS DESIGNED BY THE ENGINEER OF RECORD (EOR).
2. THE PMI IS TO CONFIRM INSTALLATION CONFIGURATION AND WORKMANSHIP ONLY AND IS NOT A REVIEW OF THE MODIFICATION DESIGN ITSELF, NOR DOES THE PMI INSPECTOR TAKE OWNERSHIP OF THE MODIFICATION DESIGN. OWNERSHIP OF THE STRUCTURAL MODIFICATION DESIGN EFFECTIVENESS AND INTEGRITY RESIDES WITH THE EOR AT ALL TIMES.
3. ALL PMI'S SHALL BE CONDUCTED BY A PMI INSPECTOR THAT IS APPROVED TO PERFORM ELEVATED WORK FOR NB+C ENGINEERING SERVICES, LLC.
4. TO ENSURE THAT THE REQUIREMENTS OF THE PMI ARE MET, IT IS VITAL THAT THE GENERAL CONTRACTOR (GC) AND THE PMI INSPECTOR BEGIN COMMUNICATING AND COORDINATING AS SOON AS A PO IS RECEIVED. IT IS EXPECTED THAT EACH PARTY WILL BE PROACTIVE IN REACHING OUT TO THE OTHER PARTY. IF CONTACT INFORMATION IS NOT KNOWN, CONTACT YOUR NB+C POINT OF CONTACT (POC).
5. REFER TO CCR-01 : CONTRACTOR CLOSEOUT REQUIREMENTS FOR FURTHER DETAILS AND REQUIREMENTS.

CORRECTION OF FAILING PMI'S

1. IF THE MODIFICATION INSTALLATION WOULD FAIL THE PMI ("FAILED PMI"), THE GC SHALL WORK WITH THE ENGINEER OF RECORD TO COORDINATE A REMEDIATION PLAN IN ONE OF TWO WAYS:
   - CORRECT FAILING ISSUES TO COMPLY WITH THE SPECIFICATIONS CONTAINED IN THE ORIGINAL CONTRACT DOCUMENTS AND COORDINATE A SUPPLEMENT PMI.
   - OR, WITH EOR'S APPROVAL, THE GC MAY WORK WITH THE EOR TO RE-ANALYZE THE MODIFICATION/REINFORCEMENT USING THE AS-BUILT CONDITION.

REQUIRED PHOTOS

1. THE GENERAL CONTRACTOR IS REQUIRED TO PROVIDE THE FOLLOWING PHOTOGRAPHS AT A MINIMUM:
   - PRE-CONSTRUCTION GENERAL SITE CONDITION
   - SITE PLACARD WITH DISH SITE NAME
   - PHOTOGRAPHS DURING THE REINFORCEMENT MODIFICATION CONSTRUCTION/ERECTION AND INSPECTION
     - RAW MATERIALS
     - PHOTOS OF ALL CRITICAL DETAILS
     - BOLT INSTALLATION AND TORQUE
     - FINAL INSTALLED CONDITION
     - PHOTOS SHALL HAVE MEASURING TAPES AND CALIPERS TO CONFIRM ALL DIMENSIONS RELATED TO THE MODIFICATION
     - PHOTOS SHALL IDENTIFY THE SECTOR AND MOUNT POSITION
   - POST CONSTRUCTION PHOTOGRAPHS
     - FINAL INFIELD CONDITION
2. PHOTOS OF ELEVATED MODIFICATIONS TAKEN FROM THE GROUND SHALL BE CONSIDERED INADEQUATE.
3. CONTRACTOR IS RESPONSIBLE FOR ENSURING THAT THE PHOTOGRAPHS CONFIRM THE MOUNT MODIFICATION WAS COMPLETED PER THESE DRAWINGS, TO INCLUDE ALL DIMENSIONS AND CONNECTIONS OF MOUNT MEMBERS AND CONNECTIONS TO THE SUPPORTING STRUCTURE.
4. CONTRACTOR SHALL NOTIFY THE EOR OF ANY ISSUES THAT MAY AFFECT THE PERFORMANCE OF THE MOUNT, INCLUDING SAFETY ISSUES, VARIANCES IN LOADING CONDITIONS FROM THE CONSTRUCTION DRAWINGS, ETC.
5. AS-BUILT CD RED LINES SHALL INCLUDE CONTRACTOR'S NAME, PREPARER'S SIGNATURE, AND DATE.

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100753

DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

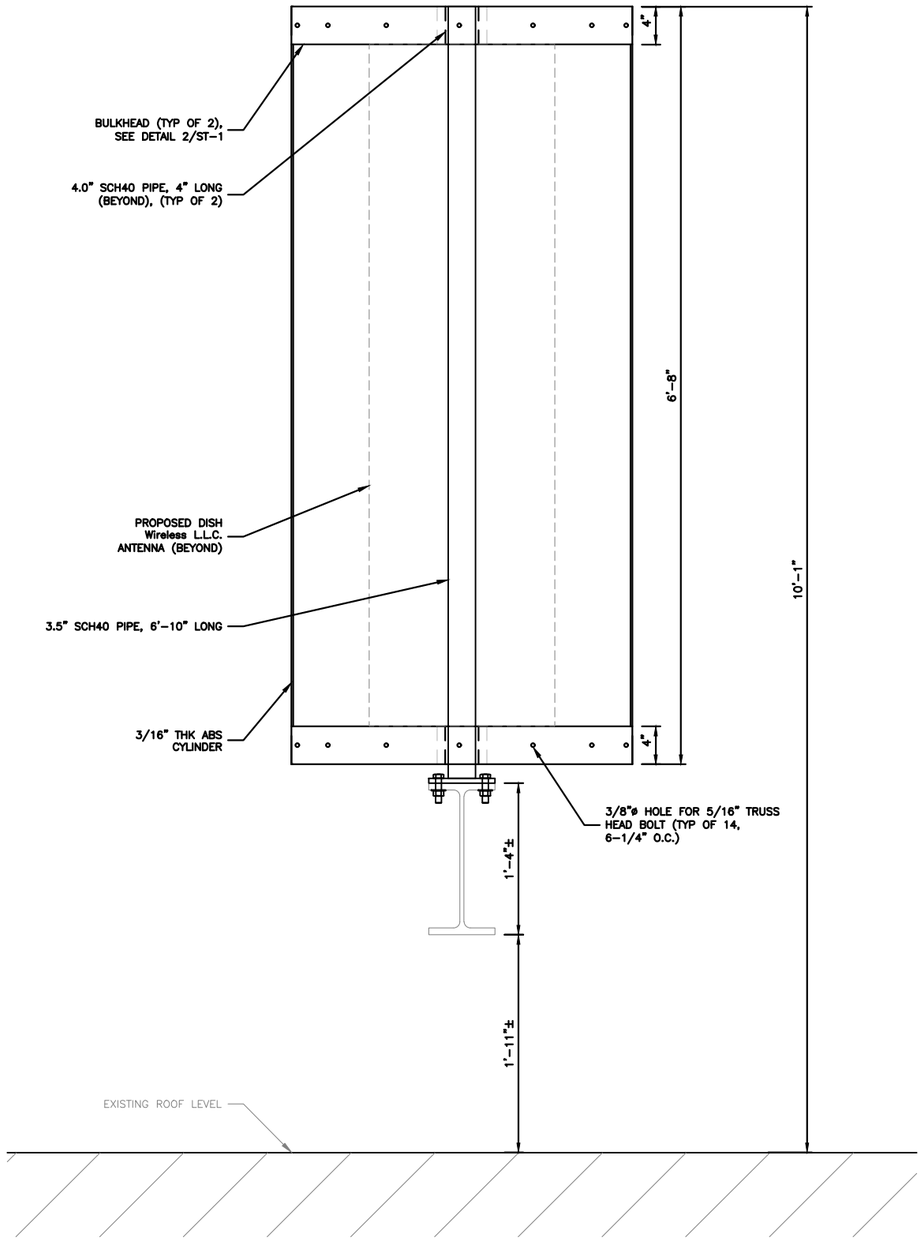
460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

PMI CHECKLIST & NOTES

SHEET NUMBER

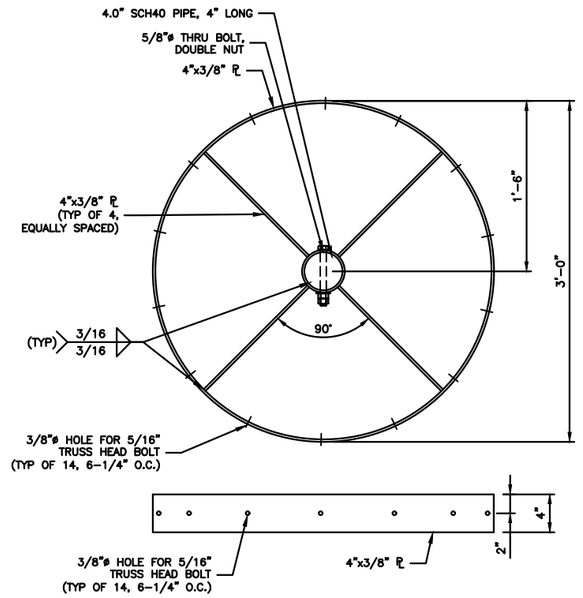
GN-6



SMALL CANISTER ASSEMBLY DETAIL

12" 9" 6" 3" 0 1'
1 1/2"=1'-0"

1

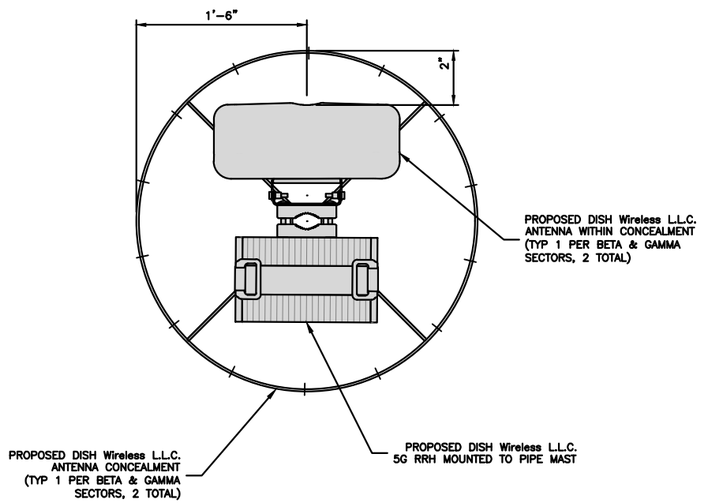


BULKHEAD DETAIL

12" 9" 6" 3" 0 1'
1 1/2"=1'-0"

2

1
ST-1



OVERALL CONCEALMENT PLAN

12" 9" 6" 3" 0 1'
1 1/2"=1'-0"

3

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COMMONWEALTH OF MASSACHUSETTS
KRUPAKARAN KOLLENGODE VENUGOPAL
NO. 30019
REGISTERED PROFESSIONAL ENGINEER

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PROJECT INFORMATION

BOBOS01058A

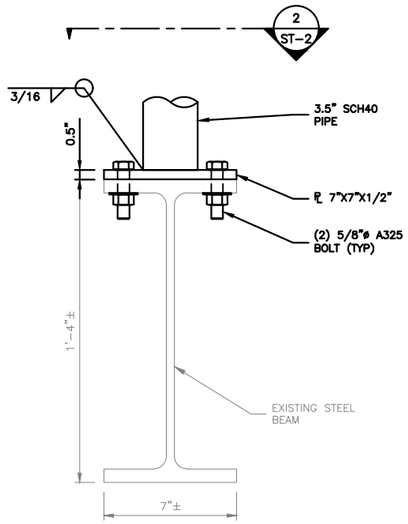
460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

CANISTER DETAILS

SHEET NUMBER

ST-1



CONNECTION DETAIL

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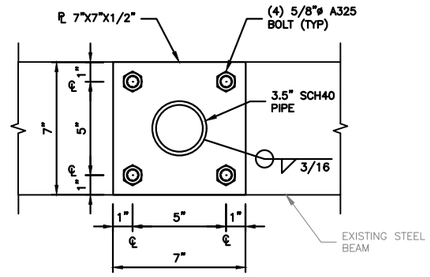
3"=1'-0"

1



CONNECTION DETAIL

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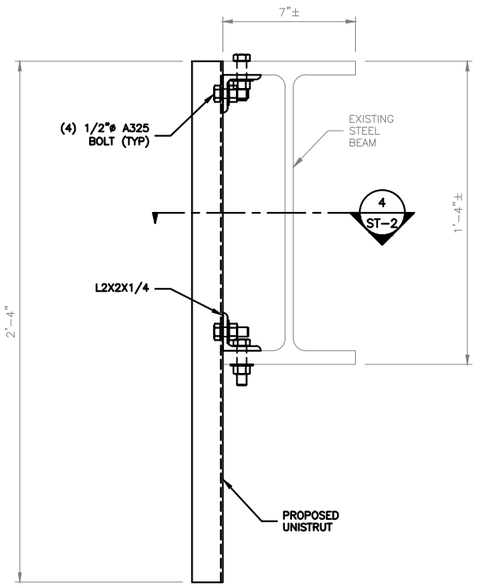
2



OVP ATTACHMENT TO BEAM DETAIL

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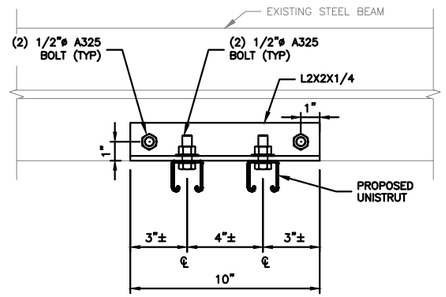

CONNECTION DETAIL

12" 9" 6" 3" 0
3"=1'-0"

4

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COMMONWEALTH OF MASSACHUSETTS
KRUPAKARAN KOLLENGODE VENKATESAN
NO. 30019
REGISTERED PROFESSIONAL ENGINEER

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DISH Wireless L.L.C.
PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

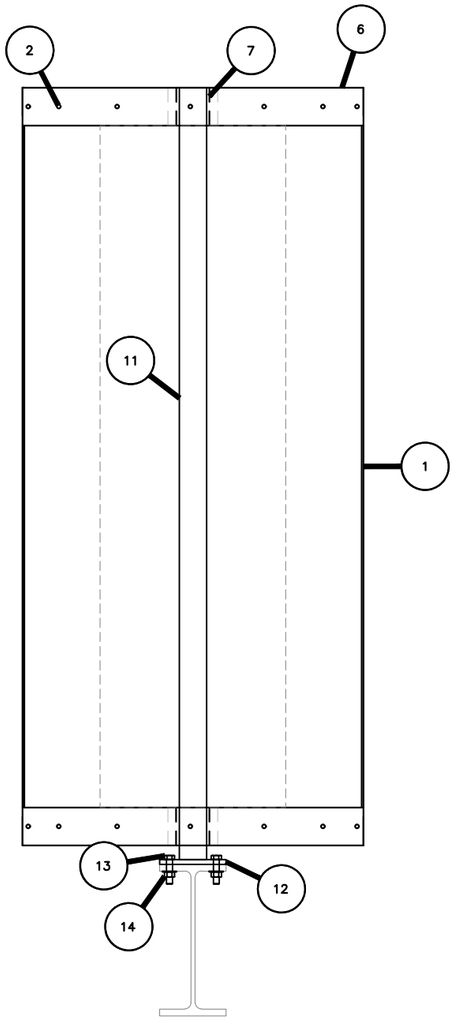
SHEET TITLE

CONNECTION DETAILS

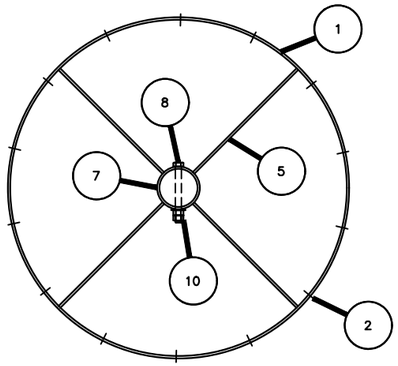
SHEET NUMBER

ST-2

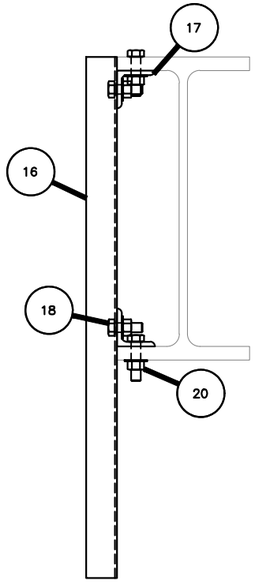
ITEM #	DESCRIPTION	SIZE	LENGTH	Part Number	QTY
1	ABS Cylinder	6'-8"x3/16"	9'-5"	N/A	1
2	Truss Head Bolt	5/16"Ø	1"	N/A	28
3	Washer	5/16"Ø	N/A	N/A	28
4	Hex Nut	5/16"Ø	N/A	N/A	28
5	Steel Plate	4"x3/16"	1'-3 1/2"	N/A	8
6	Steel Plate	4"x3/16"	9'-5"	N/A	2
7	Steel Pipe	4" Nom.	4"	N/A	2
8	Bolt, Thru	5/8"Ø	6 1/2"	N/A	2
9	Washer	5/8"Ø	N/A	N/A	2
10	Hex Nut	5/8"Ø	N/A	N/A	4
11	SCH40 Steel Pipe	3-1/2" Nom.	6'-10"	N/A	1
12	Steel Plate	7"x7"x1/2"	N/A	N/A	1
13	A325 Bolt	5/8"Ø	3"	N/A	4
14	A325 Washer	5/8"Ø	N/A	N/A	4
15	A325 Hex Nut	5/8"Ø	N/A	N/A	4
16	P1000 Unistrut	1-5/8"x1-5/8"	2'-4"	N/A	2
17	Steel Angle	2"x2"x1/4"	10"	N/A	2
18	A325 Bolt	1/2"Ø	2"	N/A	8
19	A325 Washer	1/2"Ø	N/A	N/A	8
20	A325 Hex Nut	1/2"Ø	N/A	N/A	8
Quantities specified are for one concelamnt/sector					



CONCEALMENT ELEVATION



BULKHEAD PLAN



CONNECTION DETAIL

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PROJECT INFORMATION

BOBOS01058A

460 HILLSIDE AVENUE
NEEDHAM MA, 02494

SHEET TITLE

BILL OF MATERIALS

SHEET NUMBER

ST-3

Site Name: BOBOS01058A
Wireless Communication Facility
460 Hillside Avenue
Needham, MA 02494

Photograph Information:
View 2-Parking Loop
View from the West
Showing the Existing Site

NB C
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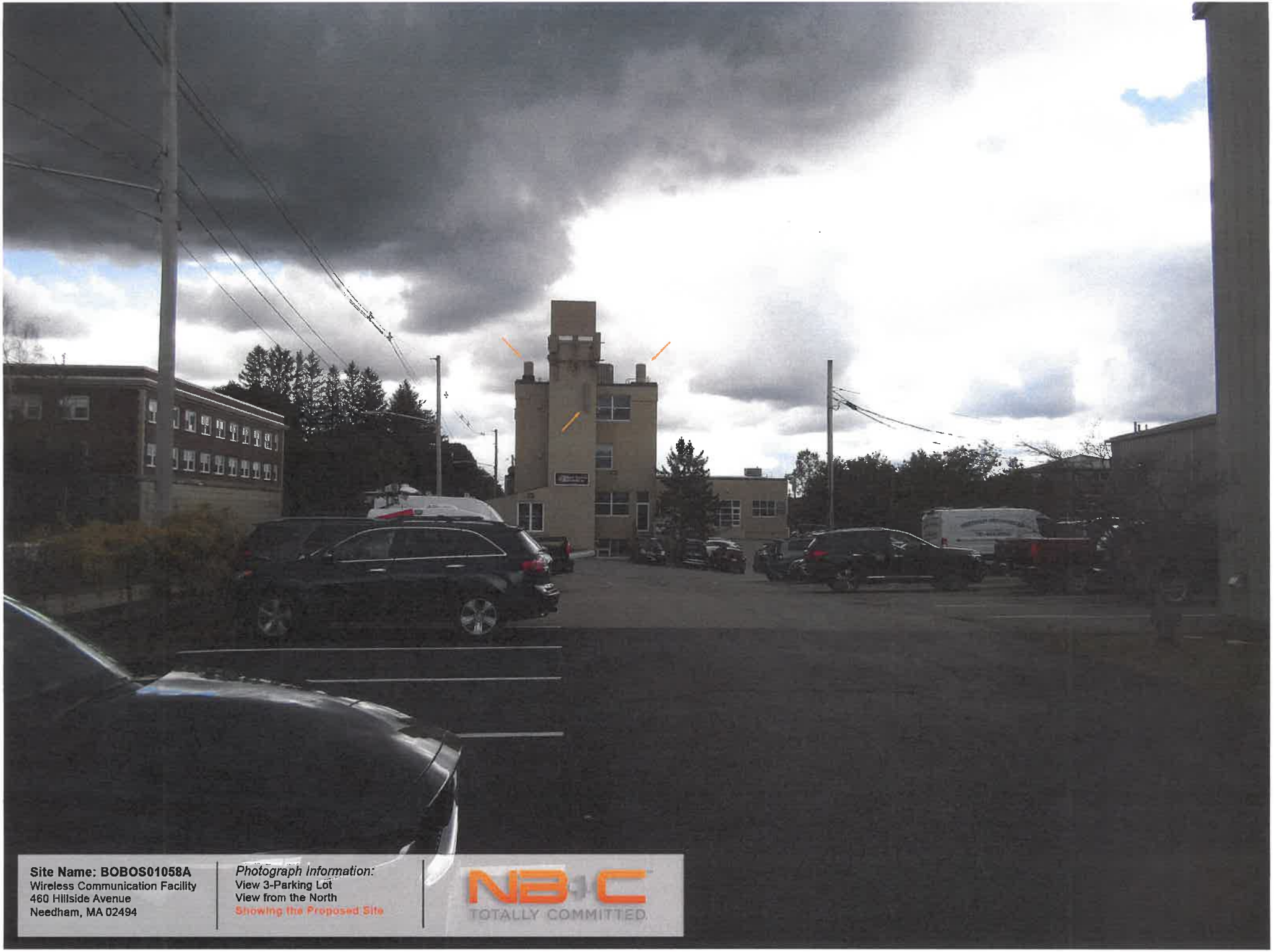
Site Name: BOBOS01058A
Wireless Communication Facility
460 Hillside Avenue
Needham, MA 02494

Photograph Information:
View 2-Parking Loop
View from the West
Showing the Proposed Site

NB C
TOTALLY COMMITTED.



Site Name: BOBOS01058A
Wireless Communication Facility
460 Hillside Avenue
Needham, MA 02494

Photograph Information:
View 3-Parking Lot
View from the North
Showing the Proposed Site

NB+C
TOTALLY COMMITTED

View 3
View 1
View 2
Site
Hillside Ave
Highland Ave
Dale St
Mellen St
Morton St
Hildreth Pl
Gentle Giant Moving Company
Center Automotive
Needham Family Day Care
Citizens
Webster Bank
Citigroup Technology
Village Club
Bussmore Construction
Purple Carrot
Beth Israel Deaconess-Needham
BOBOS01058A
Location Map
- not visible
- visible

Site Name: BOBOS01058A
Wireless Communication Facility
460 Hillside Avenue
Needham, MA 02494

Photograph Information:
View 1-Parking Loop
View from the Northeast
Showing the Existing Site

NB+C
TOTALLY COMMITTED

Site Name: BOBOS01058A
Wireless Communication Facility
460 Hillside Avenue
Needham, MA 02494

Photograph Information:
View 1-Parking Loop
View from the Northeast
Showing the Proposed Site

NB+C
TOTALLY COMMITTED

RF DESIGN SHEET

Issue Date	8/2/2023
Revision	2

RFDS Status	Final
Created By	Parakkavetty, Sameer [Outlook]

SITE INFORMATION	
DISH Site Number	BOBOS01058A
DISH Site Name	0
Prequal Asset ID	
AOI	BOS
PEA	7
Latitude	42.291209
Longitude	-71.236381
Address	460 Hillside Avenue
City	Needham Heights
State	MA
ZIP Code	02494
County	Norfolk
Rad Center (ft)	37/46
RAD Confirmed	***No Confirmed RAD***
Structure Type	Rooftop

PROJECT ASSIGNMENTS	
Market Manager	Bradford Rainey
Site Development Mgr.	Gregory Costello
RF Engineer	Sameer Parakkavetty
Site Acq Specialist/Develop. Cord.	Julie Charest /
SAQ Vendor/A&E Vendor	
Asset Owner/Asset #	Private Owner /
Construction Mgr. (Lead/Field)	Aaron Chandler / Armelindo Shahaj
Contractor (General/Tower/Civil)	/ /
Power Company / Transport Provider	EVERSOURCE NSTAR / COMCAST

EMERGENCY CONTACT INFORMATION	
Name	Temporary Emergency Line
Phone	866-624-6874

LEASE AREA	
Dimensions (ft.)	
Type	Steel Platform
Baseband Cabinet	Charles(Amphenol)-H/EX
Dimensions (in)	32" x 32.1" x 74"
Baseband	gNB-CU
Generator Required	
Make/Model	

DESIGN COMMENTS
CM to finalize cable lengths.

DISH Network Confidential

RF EQUIPMENT INFORMATION

Issue Date/Revision	8/2/2023	**Revision:**	2	**Latitude**	42.291209
Site ID	BOBOS01058A			**Prequal Asset ID**	
Site Address	460 Hillside Avenue, Needham Heights MA 02494			**SOW / RF Comments**	Dish proposes to place 3 antennas, 6 RRUs, 3 junction box(s), 3 fiber cable(s), and 3 (power/hybrid) cable(s), at the 37/46 foot RAD. Dish will require a lease area for ground equipment. CM to finalize cable lengths.
Structure Type	Rooftop				
sectors >20' apart?	*Yes*	*Confirmed RAD?*	*No Confirmed RAD* 37/46		

	Sector 1 (alpha)			Sector 2 (beta)			Sector 3 (gamma)		
ANTENNA									
Antenna Mount Position	1	2	3	1	2	3	1	2	3
Antenna ID		1			2			3	
Manufacturer		Commscope			Commscope			Commscope	
Model Number		FFVV-65B-R2			FFVV-65B-R2			FFVV-65B-R2	
Dimensions H x W x D (in)		72.0" x 19.6" 7.8"			72.0" x 19.6" 7.8"			72.0" x 19.6" 7.8"	
Weight (lbs.)		70.8			70.8			70.8	
TX Power Output (watts)		40000			40000			40000	
ERP (dBm)		76.02			76.02			76.02	
RAD Centerline Height (ft.)		37			46			46	
Azimuths (True North)		10°			120°			240°	
Mech Down Tilt		0°			0°			0°	
Default Mount		Generic							
LOW BAND/RADIO #1									
Manufacturer		Samsung			Samsung			Samsung	
Model Number		RF4450t-71A			RF4450t-71A			RF4450t-71A	
Dimensions H x W x D (in.)		16.5" x 15.0" x 11.0"			16.5" x 15.0" x 11.0"			16.5" x 15.0" x 11.0"	
Weight (lbs.)		94.58			94.58			94.58	
Location		Cabinet			Cabinet			Cabinet	
Band		n71 |			n71 |			n71 |	
Quantity		1			1			1	
Port Assignment		Port 1-4			Port 1-4			Port 1-4	
Elec Down Tilt		2°			2°			2°	
MID BAND/RADIO #2									
Manufacturer		Samsung			Samsung			Samsung	
Model Number		RF4451d-70A			RF4451d-70A			RF4451d-70A	
Dimensions H x W x D (in)		15.0" x 15.0" x 8.9"			15.0" x 15.0" x 8.9"			15.0" x 15.0" x 8.9"	
Weight (lbs.)		61.3			61.3			61.3	
Location		Cabinet			Cabinet			Cabinet	
Quantity		1			1			1	
Band		n70 |n66			n70 |n66			n70 |n66	
Port Assignment		Port 5-8			Port 5-8			Port 5-8	
Elec Down Tilt		2°			2°			2°	
OVP (Junction Box)									
Manufacturer		Raycap			Raycap			Raycap	
Model Number		RDIDC-3045-PF-48			RDIDC-3045-PF-48			RDIDC-3045-PF-48	
Dimensions H x W x D (in.)		18.97" x 16.21" x 9.64"			18.97" x 16.21" x 9.64"			18.97" x 16.21" x 9.64"	
Weight (lbs.)		21			21			21	
Quantity		1			1			1	
LINE DETAILS									
Line Type	Power	Fiber		Power	Fiber		Power	Fiber	
Manufacturer	NWS	NWS		NWS	NWS		NWS	NWS	
Model Number	DC-D06C06-XXXFT_6AWG	FT-LCULCU-D8SMA-XXXFT		DC-D06C06-XXXFT_6AWG	FT-LCULCU-D8SMA-XXXFT		DC-D06C06-XXXFT_6AWG	FT-LCULCU-D8SMA-XXXFT	
Diameter (O.D. in.)	0.938"	0.33"		0.938"	0.33"		0.938"	0.33"	
Weight (lbs. per ft.)	.582 lbs/ft	TBD		.582 lbs/ft	TBD		.582 lbs/ft	TBD	
Quantity	1	1		1	1		1	1	
Approx. Cable Length	180	180		155	155		172	172	
OTHER EQUIPMENT									
Type of Equipment									
Manufacturer									
Model Number									
Dimensions H x W x D (in)									
Weight (lbs.)									
Equipment Location									
Quantity									

Frequencies	n29	n66	n70	n71
Downlink (TX)	-	|2160 - 2170| |2180 - 2200|	|1995 - 2020|	|642 - 652|
Uplink (RX)	-	|1760 - 1770|	|1700 - 1710|	|688 - 698|

TOWN OF NEEDHAM, MASSACHUSETTS
PUBLIC WORKS DEPARTMENT
500 Dedham Avenue, Needham, MA 02492
Telephone (781) 455-7550 FAX (781) 449-9023

December 5th, 2023

Needham Zoning Board of Appeals
Needham Public Safety Administration Building
Needham, MA 02492

RE: Case Review-Special Permit
460 Hillside Ave - Special Permit

Dear Members of the Board,

The Department of Public Works has completed its review of the above referenced special permit to allow the addition of telecommunication equipment on the roof of the building and seeking relief to zoning bylaw sec 6.7.3.3.

The documents submitted for review are as follows:

- Application for Special Permit dated 11/20/23;
- Letter to ZBA from George Giunta Jr., Esq. dated 7/18/22;
- Plan Set for Dish Wireless prepared by NB+C Engineering date 7/26/23 consisting of 33 Sheets

Our comments and recommendations are as follows:

- We have no comment or objection to the Special Permit

If you have any questions regarding the above, please contact our office at 781-455-7538.

Truly yours,

Thomas A Ryder
Town Engineer

tryder

PLANNING & COMMUNITY DEVELOPMENT
PLANNING DIVISION

December 5, 2023

Mr. Jonathan Tamkin, Chair, and Members
Zoning Board of Appeals
Public Services Administration Building
500 Dedham Avenue
Needham, MA 02492

Dear Mr. Tamkin and Members of the Zoning Board of Appeals:

At its meeting of December 5, 2023, the Planning Board reviewed the applications to be heard by the Board of Appeals on December 14, 2023, and made the following recommendations:

1. **30 Wilshire Park –**Jeremy & Jessica Karlin, owners, applied for a Special Permit under Sections 1.4.6, and any other applicable section of the By-Law to alter, enlarge and extend a pre-existing, non-conforming single-family to allow the demolition of an existing deck and stairs and replace it with a basement and a family room above. The property is located at 30 Wilshire Park, Needham, MA in the Single-Residence B (SRB) District.

   The Planning Board previously commented on this application by letter dated October 3, 2023. The comments were as follows: The subject proposal will require a variance. The property is currently conforming as to FAR at .37. In the SRB district the maximum permissible FAR is .38. The addition as proposed creates a noncompliant FAR of .42. This change is not permissible by special permit and will require a variance. Section 1.4.6 of the By Law states as follows: "*The issuance of a special permit hereunder shall not authorize the violation of any dimensional, parking or intensity regulations with which the structure or use was therefore in conformity."* The Planning Board further notes that the ZBA should ensure that the proposal meets the Stormwater By-Law. (This was a vote of 3-0, as Planning Board Chair Adam Block recused himself).

2. **460 Hillside Avenue** - Dish Wireless, LLC, applicant, applied to the Board of Appeals for a Special Permit under Sections 6.7.3.3 (b) (c) and any other applicable section of the By-Law to install as part of their wireless telecommunications network some of the following equipment: 3 antennas, 6 remote radio units, 3 junctions boxes, 3 fiber cables, and 3 power cables. The property is located at 460 Hillside Avenue, Needham, MA in the Industrial (I) District.

   The Planning Board makes NO COMMENT.
   (This was a vote of 4-0, as Planning Board Member Jeanne S. McKnight recused herself).

3. **320 Grove Street** - Corbin Petro and Jessica Gelman, owners, applied to the Board of Appeals for a Variance under MGL 40A, Section 10, 4.2.3, and Section 7.5.3 and any other applicable section of the Needham By-Law to seek zoning relief to allow side setbacks of no less than 15 feet where 25 feet are allowed due to unusual soil, shape of topography of the land. This request is associated with the demolition and reconstruction of an existing non-conforming single family home.

   The Planning Board makes NO COMMENT.

4. **1688 Central Avenue -** Holly Clarke, Gregg Darish, Robert DiMase, Matthew and Nicole Heideman, Carl Jonasson, Ann and Peter Lyons, and Eileen Sullivan, appellants, applied to the Board of Appeals for an Appeal of Building Inspector Decision (ABID) of Building Permit BC23-10079 issued to Matt Borrelli and Needham Enterprise LLC dated September 19, 2023, for the construction of a childcare facility. The ABID concludes that the Building Permit plans on file do not demonstrate that the construction, alteration or use as proposed complies with the Zoning By-Laws as limited by the Dover Amendment MGL 40A, Section 3. The property is located at 1688 Central Street, Needham, MA in the Single-Residence A (SRA) District.

   The Planning Board previously commented on this application by letter dated November 7, 2023. The comments were as follows:
   The Planning Board makes NO COMMENT.
   (This was a vote of 3-0, as Planning Board Vice-Chair Natasha Espada and Planning Board Member Paul S. Alpert recused themselves).

NEEDHAM PLANNING BOARD

Lee Newman

Lee Newman

Director of Planning and Community Development

Daphne Collins

From: John Schlittler
Sent: Monday, December 4, 2023 4:13 PM
To: Daphne Collins
Subject: RE: 460 Hillside Avenue - ZBA Administrative Review - Due December 5, 2023

My only question is whether the antennas or other equipment would interfere with public safety radio operations. Thanks

From: Daphne Collins <dcollins@needhamma.gov>
Sent: Wednesday, November 29, 2023 1:45 PM
To: Joseph Prondak <jprondak@needhamma.gov>; Tara Gurge <TGurge@needhamma.gov>; John Schlittler <JSchlittler@needhamma.gov>; Thomas Ryder <tryder@needhamma.gov>; Justin Savignano <jsavignano@needhamma.gov>; Tom Conroy <TConroy@needhamma.gov>; Donald Anastasi <DAnastasi@needhamma.gov>; Jay Steeves <steevesj@needhamma.gov>; Ronnie Gavel <rgavel@needhamma.gov>
Subject: 460 Hillside Avenue - ZBA Administrative Review - Due December 5, 2023

Good Afternoon All-

460 Hillside Ave – Dish Wireless, LLC, applied to install as part of their wireless telecommunications network some of the following equipment: 3 antennas, 6 remote radio units, 3 junctions boxes, 3 fiber cables, and 3 power cables. The property is located at 460 Hillside Avenue, Needham, MA in the Industrial (I) District.

Applicable Zoning By-Law – 6.7.3.3 (a)(b)

Attached please find the application with its associated back-up documents for your information and review.

I appreciate your comments no later than **December 5, 2023** to allow time for the applicant to respond prior to the hearing.

If you have any questions, feel free to contact me.

Thank you,
Daphne

Daphne M. Collins
Zoning Specialist

Phone 781-455-7550, x 261
Web https://www.needhamma.gov/
https://needhamma.gov/1101/Board-of-Appeals
www.needhamma.gov/NeedhamYouTube

Town of Needham
Planning and Community Development
500 Dedham Avenue
Needham, MA 02492

Regular Office Hours: Mon-Wed 8:30am – 5:00pm
Remote Hours: Thurs 8:30am-5:00pm

Daphne Collins

From: Tom Conroy
Sent: Tuesday, December 5, 2023 3:00 PM
To: Daphne Collins
Subject: RE: 460 Hillside Avenue - ZBA Administrative Review - Due December 5, 2023

Hi Daphne,
Fire approves.

Thomas M. Conroy
Fire Chief - Needham Fire Department
tconroy@needhamma.gov
Ph (781) 455-7580

From: Daphne Collins <dcollins@needhamma.gov>
Sent: Tuesday, December 5, 2023 9:34 AM
To: Jonathan D. Tamkin (jtamkin@tamkinhochberg.com) <jtamkin@tamkinhochberg.com>; Tara Gurge <TGurge@needhamma.gov>; Thomas Ryder <tryder@needhamma.gov>; Justin Savignano <jsavignano@needhamma.gov>; Tom Conroy <TConroy@needhamma.gov>; Donald Anastasi <DAnastasi@needhamma.gov>; Jay Steeves <steevesj@needhamma.gov>; Ronnie Gavel <rgavel@needhamma.gov>
Subject: FW: 460 Hillside Avenue - ZBA Administrative Review - Due December 5, 2023

Good Morning-
Friendly reminder that ZBA Comments are due today.
Thank you,
Daphne

Daphne M. Collins
Zoning Specialist

Phone 781-455-7550, x 261
Web https://www.needhamma.gov/
https://needhamma.gov/1101/Board-of-Appeals
www.needhamma.gov/NeedhamYouTube

Town of Needham
Planning and Community Development
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From: Daphne Collins
Sent: Wednesday, November 29, 2023 1:45 PM
To: Joseph Prondak <jprondak@needhamma.gov>; Tara Gurge <TGurge@needhamma.gov>; John Schlittler <JSchlittler@needhamma.gov>; Thomas Ryder <tryder@needhamma.gov>; Justin Savignano <jsavignano@needhamma.gov>; Tom Conroy <TConroy@needhamma.gov>; Donald Anastasi

Town of Needham
Building Department
500 Dedham Ave.
Needham, MA 02492

Tel.781-455-7550 x 308

December 5, 2023

Town of Needham / Zoning Board of Appeals
500 Dedham Ave.
Needham, MA. 02492

Re: Application review for the December Hearing

460 Hillside Avenue

Dear Board Members,

The applicant, Dish Wireless LLC is seeking to install telecommunications equipment on the exterior of the building at 460 Hillside Avenue. The proposal includes one wall mounted antenna and 2 roof mounted antenna (3 total). The roof mounted antennae are to be enclosed by a cylindrical shroud, along with typical related equipment.

The property is located within and Industrial Zoning District. Section 6.7.3.1 (e) and (f) of the Zoning Bylaw, Wireless Communications Facilities, Uses as of Right, allows:

1. Roof mounted antennae are allowed if they are not more than 10' high and are set back a distance from the edge of the roof at least the distance equal to their height. In this case, these (2) antennae are 8 feet high but setback only 2.9 feet from the roof edge. Therefore, these are only allowed upon issuance of a Special Permit as provided for in Section 6.7.3.3, part (b), roof mounted equipment not otherwise allowed in Section 6.7.3.1 (f).

2. Wall mounted antennae that do not extend above the face of the wall, do not obscure any architectural feature and are either concealed behind existing architectural features or are painted to match the color of the façade on which it is mounted. This (1) antenna is located below the top of the wall and is proposed to be painted to match the facade and is therefore allowed as a matter of right.

Please contact my office with any questions.

Joe Prondak
Building Commissioner
Town of Needham

Daphne Collins

From: Tara Gurge
Sent: Tuesday, December 5, 2023 10:48 AM
To: Daphne Collins
Subject: RE: 460 Hillside Avenue - ZBA Administrative Review - Due December 5, 2023

Daphne –

The Public Health Division conducted our Zoning Board review of Dish Wireless, LLC, installation of additional equipment as part of their wireless telecommunications network, at their property located at **#460 Hillside Avenue.** See comment noted below:

- Please ensure that this additional equipment does not cause any risk of Public Health Safety or Nuisance concerns. As long as this applicant meets all required local Building/Zoning, Fire and all Federal Communications Commission (FCC) requirements, then we have no further comments at this time.

Please let us know if you have any follow-up questions or if you need any additional information from us on those requirements.

Thanks,

TARA E. GURGE, R.S., C.E.H.T., M.S. (she/her/hers)
ASSISTANT PUBLIC HEALTH DIRECTOR
Needham Public Health Division
Health and Human Services Department
178 Rosemary Street
Needham, MA 02494
Ph- (781) 455-7940; Ext. 211/Fax- (781) 455-7922
Mobile- (781) 883-0127
Email - tgurge@needhamma.gov
Web- www.needhamma.gov/health

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2011 OCT -3 AM 10: 17

TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS

Verizon Wireless
Record owner: Hillside Investment Group
460 Hillside Ave., Map 100, Parcel 3

September 15, 2011

Upon the application **Bell Atlantic Mobile of MA Corp, Ltd. (Verizon Wireless), 400 Friberg Parkway, Westborough MA 01581,** tenant, for a special permit under Sections 6.7, 6.7.3.3, 6.7.5, 1.4.6, 4.6.1, 3.2.1, 7.5.2 and any other applicable Sections of the By-Law to permit the modification of or amendment to an existing Special Permit granted on April 25, 2007, and related findings and/or determinations for the removal of 12 antennas and replacement of 12 new antennas with similar dimensions at the same height and with 6 new cables. The property in question is **460 Hillside Avenue, Needham,** in the Industrial District. A public hearing was held in the Charles River Room, Public Services Administration Building, 500 Dedham Avenue, Needham, MA, on Thursday, September 15, 2011 at 7:30 PM, pursuant to notice thereof, published in a local newspaper and mailed to all parties of interest.

Documents of Record:

- Application Packet, received August 22, 2011 containing:
  1. Memo supporting the application signed and submitted by James A. Valeriani, attorney for the applicant, dated August 22, 2011;
  2. Application signed by James A. Valeriani, attorney for the applicant, and stamped by the Town Clerk on August 22, 2011;
  3. Design Review Board application, approved with conditions, 3 pages;
  4. C-1 460 Hillside Ave. Roof Plan & Partial Elevation, signed and stamped by Bradford A. Mills RPE, dated August 12, 2011;
  5. Google Map of 460 Hillside Ave. with antennae site located with an arrow;
  6. Letter supporting the application signed by Ken Shapiro, Authorized Agent for the property owner, dated July 7, 2011;
  7. 460 Hillside Ave. commercial property record card;
  8. April 25, 2007 decision issued by the Zoning Board of Appeals to Bell Atlantic Mobile of Massachusetts;
  9. HBX-9014DS-T2M Product Specifications;
  10. LNX-6514DS-VTM Product Specification;
  11. Original Plan Submitted for 2007 ZBA Approval, T-1 Title Sheet,

Needham Heights, signed and stamped by Ronald J. Jackman, dated January 31, 2007;
12. Original Plan Submitted for 2007 ZBA Approval, A-1 Roof Plan, Needham Heights, signed and stamped by Ronald J. Jackman, dated January 31, 2007;
13. Original Plan Submitted for 2007 ZBA Approval, A-2 Elevation, Needham Heights, signed and stamped by Ronald J. Jackman, dated January 31, 2007;
14. Original Plan Submitted for 2007 ZBA Approval, C-1, Roof Plan, Needham Heights, stamped by Douglas A. Stephens, PLS, dated January 31, 2007.

- Received prior to September 15, 2011 hearing:
  1. Certified abutters list;
  2. 460 Hillside Ave. title confirming ownership of the property by Hillside Investment Group, LLC, represented by Kenneth Shapiro;
  3. 460 Hillside Ave. Norfolk County Registry of Deeds land abstract confirming ownership of the property by Hillside Investment Group, LLC, represented by Kenneth Shapiro.

- Received at the September 15, 2011 hearing;
  1. Memo re: installation of radio base station antennas and associated equipment comprising an antenna substitution for the Verizon Wireless Personal Wireless Services facility located at 460 Hillside Avenue in Needham, MA, signed and submitted by Donald L. Haes, JR., Ph.D., CHP, dated September 12, 2011.

September, 2011

The Board included Jon D. Schneider, Chairman; Peter Friedenberg, Associate Member; and Gregory J. Condon, Associate Member. Appearing before the Board was Jim Valeriani, attorney for the applicant. Mr. Schneider opened the hearing at 8:00 PM by reading the notice of hearing. The Planning Board had no comment.

Mr. Valeriani presented his case. The Board issued a special permit in 2007 to mount antennas on the roof of the industrial building at 460 Hillside Ave. Verizon Wireless wishes to modify the permit by replacing 12 of the antennas with 12 new antennas for their 4G service. Three of the new antennas will be six feet long, but the applicant does not believe that it is a noticeable difference from the current four foot long antennas. The Design Review Board agreed, but requested that the antennas be painted to match the building.

Mr. Schneider asked if they had a report regarding compliance of the radio frequencies with FCC guidelines. Mr. Valeriani replied that they will be similar to the existing frequencies. All frequencies are well within the ranges set by the federal communications commission. There will be no increase in emissions due to this modification. Mr. Valeriani read the conclusion of a report, and then submitted a copy.

Mr. Schneider stated that the Zoning By-Law also calls for a report from a structural engineer. Mr. Valeriani replied that the facility is attached to the building itself by a steel mount and that newly stamped engineering plans will be provided during the process of acquiring a building permit. The changes are so minimal that the wind loading will not change, and the increase in weight is negligible. Mr. Schneider stated that, although a structural report is usually submitted, to the Board, he is willing to have the report submitted to the Building Inspector in this case due to the minimal nature of the changes.

Mr. Schneider invited the public to come forward. None did so.

Mr. Valeriani stated that the construction process will take a few days, will be carried out during business hours, and will likely be completed before the end of the year.

At 8:07 Mr. Friedenberg moved to grant an amendment to the existing special permit subject to the condition imposed by the Design Review Board that the antennas be painted to match the building, and provided that a certification as to the structural capacity be provided to the Building Inspector. Mr. Condon seconded the motion. The Board voted unanimously in favor.

Decision:

On the basis of the evidence presented at the hearing, the Board makes the following findings:

1. The premises is located in the Industrial District and improved with a three story office building. In its decision dated April 28, 2005, the Board found that the building is 40 feet 8 inches in height which exceeds the current limitation of 40 feet. In addition, there is an extended elevator shaft that extends an additional 9 feet 8 inches bringing the total height of the building to 50 feet 4 inches. The building exceeds the current height limit, was constructed prior to the adoption of the height limitation in the District and constitutes a lawful nonconforming building.

2. The applicant currently has twelve existing antennas on the roof of the building together with related transmitters, cable connections and equipment inside the building as authorized by a special permit dated April 25, 2007. The applicant proposes to install replacements antennas with related cables to enable new 4G service. Nine of the new antennas will be 4 ft in height, the same as existing antennas, and three will be 6 ft in height.

3. The applicant is licensed by the Federal Communications Commission to construct and operate a wireless telecommunications network.

4. The applicant has submitted an affidavit of a radio frequency consultant that the radio frequency energy will comply with the FCC limits for the public and with FCC standards on interference.

5. The applicant will submit a structural analysis to the Building Inspector certifying as to the structural safety of the installation.

6. The proposed installation is consistent with the policies set forth in Section 6.7.1 of the Zoning By-law including maximizing the use of existing buildings, encouraging co-location of equipment and concealing new equipment and the criteria set forth in Section 6.7.5 of the Zoning By-law.

7. The proposed installations is consistent with the general purposes of the Zoning By-law, is designed in a manner compatible with the existing natural features of the site, is compatible with the characteristics of the surrounding area and does not have a demonstrable adverse impact on the surrounding area.

8. The issuance of a special permit will not result in the violation of any dimensional, parking or intensity regulation with which the structure was theretofore in conformity.

9. The proposed installation will not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

10. The applicant has complied with Section 6.7 of the Zoning By-law by obtaining the approval of the Design Review Committee.

On the basis of the foregoing findings, following due and open deliberation, upon motion duly made and seconded, the Board by unanimous vote, grants the applicant a Special Permit under Section 1.4.6 and Section 6.7.3.3(b) of the Zoning By-law to install replacement antennas and related cables on the roof of the existing building at 460 Hillside Avenue, substantially in accordance with the plans dated August 12, 2011 certified by Bradford A. Mills, Registered Professional Engineer, submitted with the application and subject to the conditions that:

a) the applicant shall submit a structural analysis to the Building Inspector in a form satisfactory to the Building Inspector as a condition to obtaining a building permit:

b) the new equipment shall be painted as required by the approval of the Design Review Committee.

Jon D. Schneider, Chairman

Peter Friedenberg, Member (Associate)

Gregory Condon, Associate Member

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NEEDHAM, MA 02492

2008 JUL 14 PM 4:30

TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS
METROPCS MASSACHUSETTS LLC
JUNE 19, 2008

Upon the application of MetroPCS Massachusetts LLC, 205 Billerica Road, Chelmsford, MA, tenant, to the Board of Appeals for a special permit under Sections 1.4.6, 4.6.1, 6.7.3.1(e), 6.7.5, 7.5.2, and any applicable section of the By-law for rooftop wireless communication antenna and equipment in the Industrial District at 460 Hillside Avenue, a public hearing was held at the Needham Public Library, 1139 Highland Avenue, Needham, MA, the on Thursday, June 19, 2008, in the evening, pursuant to notice thereof published in a local newspaper and mailed to all parties in interest.

Filed with the application was a packet entitled "Project Narrative: MetroPCS Massachusetts LLC, Application for Special Permit to alter a Preexisting Nonconforming Structure" by MetroPCS, dated April 4, 2008. The Planning Board issued "No Comment" in its letter dated June 17, 2008. Appearing on the application was Mike Walsh of J. Lee Consulting, Inc., 132 Central Street, Suite 203C, Foxborough, MA. Associate Member Gregory J. Condon replaced Jonathan D. Tamkin, who was absent.

Mr. Walsh stated that MetroPCS Massachusetts, LLC (the "Applicant"), seeks permission to colocate three panel antennas encased in a fiberglass cylinder, mounted at the side of the elevator penthouse plus one E911Global Positioning System antenna. Mr. Walsh referred to this mounting proposal as an improved design over what was submitted to Design Review. Mr. Walsh stated that he will return to the Design Review Board to gain approval for the changed plan "MetroPCS, 460 Hillside, 'Zoning'": T-1, Z-1, and Z-2, dated June 18, 2008. Walsh stated that the Applicant has a signed lease, dated May 1, 2008, and provided a copy of the lease to the Board.

Mr. Walsh stated that there would be a condenser sited by the railroad tracks, and that all the mechanicals would be located in the interior of the building. The proposed antennas are separated from the antennas of the other carriers sited at the property.

No one appeared in opposition to the proposal. The hearing closed, and the Board proceeded to deliberate.

DECISION:

On the basis of the evidence presented at the hearing on the application of Metro PCS Massachusetts LLC (the "applicant") for a special permit under Section 6.7.3.3, 6.7.5, 1.4.6, 4.6.1, 3.2.1 and 7.5.2 of the Zoning By-law to permit wireless telecommunications rooftop installation in Industrial District at 460 Hillside Avenue, the Board makes the following findings:

1. The premises is located in the Industrial District and improved with a three story office building. In its decision dated April 28, 2005, the Board found that the building is 40 feet 8 inches in height which exceeds the current limitation of 40 feet. In addition, there is an extended elevator shaft that extends an additional 9 feet 8 inches bringing the total height of the building to 50 feet 4 inches. The building exceeds the height limit, was constructed prior to the adoption of the height limitation in the District and constitutes a lawful nonconforming building.

2. The Applicant proposes to mount a canister containing three antennas on the extended elevator shaft at a centerline of 57 feet above ground level with coaxial cable running to an equipment cabinet in the basement.

3. The proposed installation is consistent with the policies set forth in Section 6.7.1 of the Zoning By-law including maximizing the use of existing buildings, encouraging co-location of equipment and concealing new equipment and the criteria set forth in Section 6.7.5 of the Zoning By-law.

4. The proposed installations is consistent with the general purposes of the Zoning By-law, is designed in a manner compatible with the existing natural features of the site, is compatible with the characteristics of the surrounding area and does not have a demonstrable adverse impact on the surrounding area.

5. The Applicant obtained approval of the Design Review Committee, but made minor changes that require a further approval.

6. The issuance of a special permit will not result in the violation of any dimensional, parking or intensity regulation with which the structure was theretofore in conformity.

7. The proposed installation will not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

On the basis of the foregoing findings, following due and open deliberation, upon motion duly made and seconded, the Board by unanimous vote, grants the applicant a Special Permit under Section 1.4.6 and Section 6.7.3.3(b) of the Zoning By-law to install communications equipment on the roof of the existing building at 460 Hillside Avenue, substantially in accordance with the drawings prepared by Applicant revised 6/16/08

referring to the site and submitted at the hearing, subject to final approval by the Design Review Committee.

Michael A. Crowe, Chairman

Jon D. Schneider, Member

Gregory J. Condon, Associate Member

460 Hillside Ave.

2007 MAY 17 PM 1:59

TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS
APRIL 25, 2007

BELL ATLANTIC MOBILE OF MASSACHUSETTS
dba VERIZON WIRELESS

Upon the application of Bell Atlantic Mobile of Massachusetts d/b/a Verizon Wireless, c/o Dalmus, 400 Friberg Parkway, Westborough, MA, tenant, to the Board of Appeals for a special permit under Sections 6.7.3.3, 6.7.5, 1.4.6, 4.6.1, 3.2.1 and 7.5.2 to permit wireless telecommunication rooftop installation in Industrial District at 460 Hillside Avenue, a public hearing was held at the John Eliot School, 135 Wellesley Street, Needham, MA on Wednesday, April 25, 2007, in the evening, pursuant to notice thereof published in a local newspaper and mailed to all parties in interest.

Filed with the application was "Application for a Special Permits and Findings and Determinations to Co-locate roof-Mounted Antennas and accompanying Wireless Communication Equipment on an Existing Commercial Building Located at 460 Hillside Avenue in the Industrial District", prepared by Kristine E. Kraushaar, Robinson & Cole LLP, One Boston Place, Boston, MA, dated March 27, 2007. Submitted on April 11, 2007, was a facsimile copy of Design Review Board approval, dated April 2, 2007.

Appearing before the Board was Kristine E. Kraushaar and Michael Giaimo, of Robinson and Cole, with Luis Teves RFE, Ram Satyaprasad, and David Tivnan representing Verizon. Ms. Kraushaar stated that they received approval from Design Review on April 2, 2007. Mr. Tivnan stated that the generator will be installed to insure coverage 24-hour per day coverage, and that the generator is regular protocol for the carrier. Condensers will be sited on concrete pads by other existing condensers, which are sited beyond the Southeast corner of the building. These condensers are separated from the MBTA train tracks by an existing fence. The generator is approximately 5 feet by 10 feet, which is less than 100 square feet. The generators are guaranteed not to explode, and have safety features as utilized in residential or hospital zones. They do have sound proofing, and are very quiet.

The 12 panel array of antennas will be sited toward the center of the roof at 460 Hillside (the "Premises"). Remote testing will take place approximately once per week. The testing will take place during the daytime hours in order to minimize potential residential disruption.

Mr. Giaimo stated that there is currently no federal requirement to provide annual reports to the Town. He stated that the network and site is regularly monitored. The Board expressed the need to insure compliance with the FCC and OSHA guidelines for Uncontrolled/public area, which would include limited access, and hazard warning signage at the access point to the rooftop of the Premises.

No one appeared in opposition to the proposal. The Planning Board letter of

9. The proposed installation will not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

On the basis of the foregoing findings, following motion duly made and seconded, after due and open deliberation, the Board by unanimous vote grants the Applicant a special permit under Section 1.4.6 and Section 6.7.3(b) of the Zoning By-law to install telecommunications equipment on the roof of the existing building at 460 Hillside Avenue substantially in accordance with drawings prepared by Bay State Design dated 01.31.07, revised 03.27.07, submitted with the application and subject to the following conditions:

(a) The Applicant shall comply with the provisions of Section 6.7.5 (where applicable) 6.7.8 and 6.7.9 of the Zoning By-law with respect to the installation and maintenance of the equipment; and

(b) The Applicant shall comply with the conditions imposed by the Design Review Board, if any.

Michael A. Crowe, Chairman

Jon D. Schneider, Member

Jonathan Tamkin, Member

460 Hillside Ave.

RECEIVED TOWN CLERK
NEEDHAM, MA 02492
2006 JUN 30 PM 4:59

TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS

JUNE 14, 2006

OMNIPOINT COMMUNICATIONS, INC.

Upon the application of Omnipoint Communications, Inc., 50 Vision Blvd, East Providence, RI, tenant, to the Board of Appeals for a Special Permit under Sections 1.4.6, 4.6.1, 6.7.3.1(e), 6.7.5, 7.5.2, and any applicable section of the By-law for rooftop wireless communication antenna and equipment in the Industrial District at 460 Hillside Avenue a public hearing was held at the Stephen Palmer Senior Center, 83 Pickering Street, Needham, MA on Wednesday, June 14, 2006 at the John Eliot School, 135 Wellesley Avenue, Needham, in the evening, pursuant to notice thereof published in a local newspaper and mailed to all parties in interest.

Filed with the application was a packet of information entitled "Application for Site Plan Review and Special Permit to alter a Preexisting Nonconforming Structure for a Wireless Communication Facility", for 460 Hillside Avenue, prepared by Craig M. Tateronis, Esq., Prince. Lobel, Glovsky & Tye LLP, 100 Cambridge Street, Suite 2200, Boston, MA, dated May 4, 2006. Design Review approved the proposal, with conditions, on June 2, 2004.

Appearing before the Board was Attorney Robert Scarpello of Prince, Lobel, Glovsky & Tye, LLP, 100 Cambridge Street, Suite 2200, Boston, MA, representing Omnipoint Communications, Inc., 50 Vision Blvd, East Providence, RI (the "Applicant"). Attorney Scarpello stated that the Applicant is licensed with the FCC and requests permission to alter a preexisting nonconforming structure by installing an antenna on the roof of the building. The existing building was constructed in 1925, and is 52 feet tall at the heighest point, where the maximum allowable height is 40 feet. The existing building is located next to the MBTA train tracks, and currently has antennas from various wireless carriers situated on the roof top.

The proposed three-panel antenna will be housed within a canister, at a centerline height of 57 feet, 1 inch, extending approximately seven feet, four inches above the height of the building. Associated equipment will be housed in an equipment cabinet. Mr. Scarpello stated that the proposal will not be any more detrimental to the neighborhood than the existing building with antennae. The canister will have a color and texture to match the existing building and camouflage the antennae. The site was chosen for service to customers, as well as meeting the By-law recommendation for colocation of antenna sites.

No one appeared in favor of, or in opposition to, the application. The Planning Board letter dated June 9, 2006 was read into the record. The hearing closed at 8:20 p.m., and the Board proceeded to deliberate.

DECISION:

On the basis of the evidence presented at the hearing on the application of Omnipoint Communications, Inc. (the "Applicant") for a special permit under Section 1.4.6, 4.6.1, 6.7.3.1(e), 6.7.5, 7.5.2 and any applicable section of the Zoning By-law to allow telecommunications equipment on the rooftop in an Industrial District at 460 Hillside Avenue (the "Premises"), the Board makes the following findings:

1. The Premises is located in the Industrial District and improved with a three story office building. In its decision dated April 28, 2005, the Board found that the building is 40 feet 8 inches in height, which exceeds the current limitation of 40 feet. In addition, there is an extended elevator shaft that extends an additional 9 feet 8 inches bringing the total height of the building to 50 feet 4 inches. The plans submitted by the Applicant indicated that the roof of the building is 42 feet in height and the extended elevator shaft is 52 feet in height. In either event, the building exceeds the height limit, was constructed prior to the adoption of the height limitation in the District and constitutes a lawful nonconforming building.

2. The Applicant proposes to mount a canister containing three antennas to the extended elevator shaft that will extend approximately 8 feet above the existing structure and to construct an equipment cabinet that will extend approximately 8 feet above the existing roof line.

3. The proposed installation is consistent with the policies set forth in Section 6.7.1 of the Zoning By-law including maximizing the use of existing buildings, encouraging co-location of equipment and concealing new equipment and the criteria set forth in Section 6.7.5 of the Zoning By-law.

4. The proposed installations is consistent with the general purposes of the Zoning By-law, is designed in a manner compatible with the existing natural features of the site, is compatible with the characteristics of the surrounding area and does not have a demonstrable adverse impact on the surrounding area.

5. The Applicant has complied with Section 6.7.6 of the Zoning By-law by obtaining approval from the Design Review Board.

6. The issuance of a special permit will not result in the violation of any dimensional, parking or intensity regulation with which the structure was theretofore in conformity.

7. The proposed installation will not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

On the basis of the foregoing findings, following due and open deliberation, upon motion duly made and seconded, the Board by unanimous vote, grants the Applicant a

Special Permit under Section 1.4.6 and Section 6.7.3(b) of the Zoning By-law to install communications equipment on the roof of the existing building at 460 Hillside Avenue, substantially in accordance with the drawings prepared by Westcott and Mapes, Inc. submitted with the application and subject to the following conditions:

a) The Applicant shall comply with the provisions of Section 6.7.5 (where applicable), 6.7.8 and 6.7.9 of the Zoning By-law with respect to the installation and maintenance of the equipment.

b) The Applicant shall comply with the condition imposed by the Design Review Committee, on June 2, 2004, that the structures be painted gray.

Michael A. Crowe, Chairman

Jon D. Schneider, Member

Jonathan D. Tamkin, Member

RECEIVED TOWN CLERK
NEEDHAM, MA 02492
2005 MAY 20 AM 11:56

TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS
APRIL 28, 2005

NEW CINGULAR WIRELESS PCS LLC

Upon the application of New Cingular Wireless PCS LLC, 580 Main Street, Bolton, MA, tenant, to the Board of Appeals for a Special Permit under Section 1.4.6 of the Zoning By-law to allow telecommunication equipment on rooftop in the Industrial District at 460 Hillside Avenue, a public hearing was held at the John Eliot School, 135 Wellesley Avenue, Needham, MA on Thursday, April 28, 2005 in the evening, pursuant to notice thereof published in a local newspaper and mailed to all parties in interest.

Received with the application was a letter from Steven R. Kinley of Clough Harbour & Associates LLP, 313 Littleton Road, Chelmsford, MA, dated March 9, 2005, six sheets with site, structural and building information entitled "Cingular Wireless: Needham-Hillside Ave" dated 3-03-05, a letter dated March 30, 2005 from Steven R. Kinley with a supplemental packet, including Needham Design Review sheet, site photographs, Kathrein Antenna information, and coverage with and without proposed site.

Appearing before the Board was Scott Lacey of Anderson & Kreiger. He stated that New Cingular Wireless PCS LLC (the "Applicant") plans to attach 4 antennae to the façade at 460 Hillside Avenue (the " Premises"), with four on a 'sled' on the rooftop. These would be approximately nine feet tall, and set back nine feet from the roof edge, complying with rooftop installation. Ancillary equipment will be stored in the basement. Mr. Lacey stated that they have approval from the Design Review Board.

This request is before the Board of Appeals due to the fact that the building is nonconforming due to the height at 40' 8''. Mr. Lacey stated that the building was constructed in 1925, which predates the current zoning requirements, and is therefore a grandfathered nonconformity.

Received and entered into the record was a phone call from Pat Droney, 100 Rosemary Way, expressing concern about health issues related to the tower. Mr. Lacey stated that there will be no associated health problems with the antennae. The FCC has strict standards regarding emissions under the Telecommunications Act. Mr. Lacey stated that the DPH no longer reviews the antennas due to the stringent standards imposed by the FCC.

The Planning Board letter of April 28, 2005 stated "No Comment". No one appeared in favor or opposition to the proposal. The hearing closed at 7:55 p.m., and the Board proceeded to deliberate.

DECISION:

On the basis of the evidence presented at the hearing on the application of New Cingular Wireless PCS LLC (the "applicant") for a special permit under Section 1.4.6 or other applicable section of the Zoning By-law to allow telecommunications equipment on the rooftop in an Industrial District at 460 Hillside Avenue, the Board makes the following findings:

1. The premises is located in the Industrial District and improved with a three-story office building. The building is 40 feet 8 inches in height, which exceeds the current limitation of 40 feet. In addition, there is an exterior elevator shaft that extends an additional 9 feet 8 inches above the Premises, bringing the total height of the building to 50 feet 4 inches. However, the building was constructed in 1925, prior to the adoption of the height limitation in the District, and constitutes a lawful nonconforming building.

2. The applicant proposes to mount equipment on the roof, that will extend less than 10 feet above the roofline, and to mount antennae equipment on the elevator shaft. This meets the Design requirements of Section 6.7.6 of the By-law.

3. The proposed installation is consistent with the policies set forth in connection with the adoption of the Wireless Communications Facilities Towers Overlay District including maximizing the use of existing buildings and concealing new equipment. This installation meets all the requirements of Section 6.7.3.1(e) of the Zoning By-law.

4. The issuance of a special permit will not result in the violation of any dimensional, parking or intensity regulation with which the structure was theretofore in conformity.

5. The proposed installation will not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

6. This permit is issued to the Applicant only, and may not be transferred, set over, or assigned by the Applicant to any other person or entity without prior written approval of the Board of Appeals following such hearing and notice, if any, as the Board, in its exclusive discretion, shall deem due and sufficient.

On the basis of the foregoing findings, following due and open deliberation, upon motion duly made and seconded, the Board by unanimous vote, grants the Applicant a

Special Permit under Section 1.4.6 of the Zoning By-law to install communications equipment on the roof of the existing building at 460 Hillside Avenue, substantially in accordance with the drawings dated March, 2005 submitted with the application.

Michael A. Crowe, Chairman

Jon D. Schneider, Member

Jonathan D. Tamkin, Member

TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS
MARCH 21, 2002

'02 APR 26 P1:36

NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC.

Upon the application of Nextel Communications of the Mid-Atlantic, Inc., 40 Hartwell Avenue, Lexington, MA 02421, (the "applicant") to the Board of Appeals for a Special Permit under Section 6.7.3.1 (e) (b) of the Zoning By-law to allow installation of a wireless communication facility, façade and roof mounted, which does not meet the setback requirement at 460 Hillside Avenue, a public hearing was held at the Stephen Palmer Senior Center, 83 Pickering Street, Needham, MA on Thursday, February 21, 2002 in the evening pursuant to notice thereof published in a local newspaper and mailed to all persons in interest.

The Board received a facsimile transmission from the Applicant dated February 21, 2002 requesting a continuation.. The Board therefore announced to the public that the continuation for the matter was set for March 21, 2002 at the Stephen Palmer Senior Center. Public notice was posted at the Town Clerk's office.

On March 21, 2002 the Board received a facsimile transmission from the Applicant requesting a withdrawal of the application without prejudice. At 8:15pm, the Board entered into the record the letter received from the Applicant. The Board, upon motion duly made and seconded, unanimously voted to allow the application to be withdrawn without prejudice.

William J. Tedoldi, Chairman

Michael A. Crowe, Member

Jon D. Schneider, Member

BOA/460 HILLSIDE AVENUE
LEGAL NOTICE
TOWN OF NEEDHAM
BOARD OF APPEALS
NOTICE OF HEARING

Public notice is hereby given that **Nextel Communications of the Mid-Atlantic, Inc., 40 Hartwell Avenue, Lexington, MA 02421,** tenant, has made an application to the Board of Appeals for a special permit under Section 6.7.3.1(e)(b) of the Zoning By-law to allow installation of wireless communication facility, facade and roof mounted, which does not meet setback requirement at **460 Hillside Avenue.**

Upon said notice, a public hearing will be held at the **Stephen Palmer Senior Center, 83 Pickering Street, Needham, MA** on **Thursday, February 21, 2002** in the evening **at 7:30 pm,** at which place and time all persons interested may appear and be heard.

AD#780988
Needham Times 2/7, 2/14/02

RECEIVED
TOWN CLERK
NEEDHAM

'01 MAY -3 A11 :13

TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS
APRIL 19, 2001

JAMES J. PALLOTTA

Upon the application of James J. Pallotta, 61 Bristol Road, Wellesley, MA, tenant, to the Board of Appeals for a special permit under Section 3.2.1 of the Zoning By-law for the storage of vehicles, namely, antiques and collectible pieces at 460 Hillside Avenue, with no work to be performed on the premises nor sales or exhibition, a public hearing was held at the Stephen Palmer Senior Center, 83 Pickering Street, Needham, Mass. on Thursday, April 19, 2001, in the evening pursuant to notice thereof published in a local newspaper and mailed to all parties in interest.

Appearing on behalf of the applicant was Enrique Bellido, Lexington Avenue, Needham. He stated that the proposed arrangements are strictly for storage and all vehicles will be stored inside; no provisions are being made for a museum. Mr.Bellido plans to secure a permit from the Fire Department prior to the storage. He informed the Board that there will be approximately 20 vehicles stored inside.

Appearing with questions was Al Mendelssohn, 168 Pine Grove Street who owns a parcel near the premises and a new office building is planned for this site. He was concerned about water overflows reaching his property that might contain gasoline or oils leaking from the vehicles. He asked that some consideration for containment be written in the conditions of the special permit.

No one appeared in opposition. A letter from the Planning Board dated April 17, 2001, stated that it makes no comment. The hearing closed at 8:00 p.m. and the Board proceeded to vote.

Decision

On the basis of the evidence presented at the hearing on the application of James J. Pallotta (the "applicant") for a special permit under Section 3.2.1 of the Zoning By-law for the storage of vehicles, namely antique and collectible pieces, at 460 Hillside Avenue with no work to be performed on the premises nor sales or exhibitions, the Board makes the following findings:

TOWN OF NEEDHAM
BOARD OF APPEALS
NOTICE OF HEARING

Public notice is hereby given that James J. Pallotta, 61 Bristol Road, Wellesley, MA, tenant, has made application to the Board of Appeals for a special permit under Section 3.2.1 of the Zoning By-law for the storage of vehicles, namely, antiques and collectible pieces at 460 Hillside Avenue, with no work to be performed on the premises nor sales or exhibition.

Upon said notice, a public hearing will be held at the Stephen Palmer Senior Center, 83 Pickering Street, Needham, Mass. on Thursday, April 19, 2001, in the evening at 7:30 p.m. at which place and time all interested parties may attend and be heard.

Needham Times
4/5,4/12/01

1. The premises is located in the Industrial Zone where a "commercial garage for the storage or repair of vehicles" and the "private parking of vehicles for compensation" are permitted upon issuance of a special permit.

2. The applicant proposes to store a collection of antique automobiles in the basement of the premises. The applicant does not intend to perform work on the premises, make sales on the premises, or exhibit the collection on the premises.

3. The proposed use is consistent with the general purposes of the Zoning By-law.

On the basis of the foregoing findings, following motion duly made and seconded, after due and open deliberation, the Board by unanimous vote grants the applicant a special permit under Section 3.2.1 for the storage of antique vehicles and collectible pieces at 460 Hillside Avenue subject to the following conditions:

1. No repair work is to be performed on the premises.

2. No sales or exhibitions are to take place on the premises.

3. Any oil or gas spill must be contained within the premises and shall not be transmitted through any drainage line, sump pump or other means to town sewage or to the adjacent properties.

William J. Tedoldi, Chairman

Michael A. Crowe, Member

Jon D. Schneider, Member

TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS
AUGUST 21, 1997

Received Town Clerk
97 SEP -3 AM 8:20

NEEDHAM CHILDREN'S MUSEUM

Upon the application of Needham Children's Museum, 460 Hillside Avenue, Needham, Massachusetts, tenant, to the Board of Appeals for a special permit under Section 5.1.1.5 of the Zoning By-law to waive strict adherence to the requirements of Sections 5.1.2 and 5.1.3 and under Section to allow more than one non-residential use for property located at 460 Hillside Avenue, a public hearing was held at the Stephen Palmer Senior Center, 83 Pickering Street, Needham, Mass. on Thursday, August 21, 1997, in the evening pursuant to notice thereof published in a local newspaper and mailed to all persons in interest.

Chairman Tedoldi requested associate member Susan Glazer to serve in place of member Jon Schneider who was absent.

Appearing on behalf of the applicant was Robert Ernst, chairman of the building committee. He stated that the applicant has been waiting for a recommendation from the Planning Board as to the number of parking spaces required by the By-law for museum parking. After a study it made, the Planning Board recommended a total of 12-14 spaces, depending on the number of employees. It based this number on one parking space for every 250 square feet. Since this number exceeds the number of spaces the former tenant had, the applicant is asking for a waiver from the parking requirements.

In answer to a query from the Board as to the other occupants of the building at 460 Hillside Avenue, Mr. Ernst stated that there are several tenants including Riverside Community Mental Health, Needham Guidance Clinic, an electrical contractor, Asquith Corporation, Retail Control Solutions, an advertising agency as well as warehouse space. All parking spaces are in common with one another and there are no designated parking spaces for a particular business. The building contains approximately 40,000 square feet of space: warehouse--24,000 square feet and offices--14,000 square feet. Mr. Nielsen, owner of the building, stated that the occupancy permit calls for 63 spaces and the plot plan shows 65 spaces.

Mr. Ernst stated that the museum is moving into quarters recently vacated by Creative Movement Center which had 6-7 spaces; the Museum use would be less intense than the former tenant. Mr. Ernst presented to the Board several photographs of the premises as well as a parking space log taken recently of vacant parking spaces at varied times throughout the day.

TOWN OF NEEDHAM
BOARD OF APPEALS
NOTICE OF HEARING

Public notice is hereby given that **Needham Children's Museum, 460 Hillside Ave., Needham, Mass.**, tenant, has made application to the Board of Appeals for a special permit under Section 5.1.1.5 of the Zoning By-law to waive strict adherence to the requirements of Sections 5.1.2 (parking) and 5.1.3 (design) and under Section 3.2.1 to allow more than one non-residential use for property located at **460 Hillside Avenue.**

Upon said application, a public hearing will be held at the **Stephen Palmer Senior Center, 83 Pickering Street, Needham, Mass. on Thursday, August 21, 1997** in the evening at 9:00 p.m. at which place and time all persons interested may appear and be heard.

Needham Times
8/7, 8/14/97

Mr. Ernst continued that the use of the museum would be that of walk-through exhibit space. He stated that the hours of operation would be 10:00 a.m. to 5:00 p.m. Monday through Thursday; Friday 10:00 a.m. to 8:00 p.m.; Saturday 10:00 a.m. to 5:00 p.m.; and Sunday, noon to 5:00 p.m. He pointed out that the weekend would have the heaviest use, however, it should be busy from 2:30 p.m. to 5:00 p.m. through the week.

Mr. Nielsen stated that the parking area will be re-striped. Mr. Ernst summed up his comments by stating that the applicant is requesting a waiver from the parking requirements of 6-8 spaces.

Appearing in favor were Holly Rose, president of Creative Movement Center, who stated there never was a problem with parking, when she was a tenant, with the other uses on the property; Mindy Pasco-Anderson, a member of the Board of the Needham Heights Neighborhood Association who stated that the Board voted in support of the application. No one appeared in opposition. The Planning Board was unable to make a recommendation inasmuch as it will not be meeting before the time of this hearing. The hearing closed at 9:55 p.m. and the Board proceeded to deliberate.

Decision

On the basis of the evidence presented at the hearing on the application by the Needham Children's Museum (the "applicant") for a special permit under Section 5.1.1.5 of the Zoning By-law to waive strict adherence to the requirements of Section 5.1.2 (parking) and 5.1.3 (design) and under Section 3.2.1 to allow more than one non-residential use for property located at 460 Hillside Avenue, the Board makes the following findings:

1. The applicant proposes to operate a children's museum in the area of a multi-tenanted building at 460 Hillside Avenue. The area of the building in which the museum will be located previously contained the Creative Movement Center which, according to its director, is a more intensely used program for children. Other uses in the building include approximately 24,000 sq. ft. of warehouse space and approximately 14,000 sq.ft. of office space. The building abuts the MBTA tracks. Access to the site is via a long driveway from Hillside Avenue.

2. There is a common parking area for 65 cars along the front edge of the site; 63 spaces are required for the current uses. Many of the parking spaces are not used. The applicant submitted survey information as evidence of this fact, indicating that there would be sufficient parking available for the proposed museum.

3. The Planning Board has determined that the proposed museum use will require 12-14 parking spaces. Since the previous Creative Movement use had 6 assigned parking spaces, the proposed deficiency will be 6-8 parking spaces.

4. The hours of operation of the museum will be 10 a.m. to 5 p.m. Monday through Thursday and Saturday; 10 a. m. to 8 p.m. Friday; and noon to 5 p.m. on Sunday. It is anticipated that the peak periods will be on the weekend days when the other building tenants will be closed for business.

5. Any incremental increase in traffic on Hillside Avenue as a result of the operation of the proposed museum will be negligible and will be during off-peak hours.

6. The proposed children's museum will be replacing another child oriented business which has existed safely on the premises and harmoniously with other tenants in the building for many years.

7. The proposed use of the premises by the applicant as described above is in harmony with the general purpose and intent of the Zoning By-law.

On the basis of the foregoing findings after due and open deliberation following a motion duly made and seconded, the Board, by unanimous vote, grants the applicant a special permit to waive the parking and design requirements and to allow more than one non-residential use in the building at 460 Hillside Avenue to operate a children's museum as described in the findings above, subject to the following conditions:

1. The applicant may use the premises to operate a children's museum pursuant to this special permit from 10 a.m. to 5 p.m. Monday through Thursday and Saturday; 10 a.m. to 8 p.m. on Friday; and noon to 5 p.m. on Sunday.

2. This special permit may not be transferred, set over, or assigned without the prior written approval of the Board, upon such notice and hearing as the Board in its discretion shall deem necessary or appropriate.

William J. Tedoldi, Chairman

Michael A. Crowe, Member

Susan M. Glazer

Susan M. Glazer, Associate Member

RECEIVED
TOWN CLERK
NEEDHAM

'91 AUG 14 P1:18

TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS
JULY 16, 1991

CREATIVE MOVEMENT CENTER, INC.

Upon the application of Creative Movement Center, Inc., 1329 Highland Avenue, Needham, Massachusetts, tenant, to the Board of Appeals for special permits under 1) Section 3.2 of the Zoning By-law to allow the operation of a school for exercise and gymnastics for children, and 2) Section 3.2 of the Zoning By-law to permit more than one use in a non-residential building at 460 Hillside Avenue, a public hearing was held at the Town Hall, Needham, Massachusetts on Tuesday, July 16, 1991 in the evening pursuant to notice thereof published in a local newspaper and mailed to all parties in interest.

Chairman Henkoff requested associate member Janice Hunt to serve in place of member Andrew Frieze who was absent.

Present on behalf of the applicant was Holly Pelletier, President and Treasurer of Creative Movement Center, Inc. and Benedict Horowitz, Esq., 281 Chestnut Street, Needham, Mass. Mr. Horowitz presented to the Board a "Memorandum in Support of Application for the Issuance of a Special Permit, 460 Hillside Avenue." He also presented a letter dated July 8, 1991 from Gary W. Petrini, owner of the locus, stating his intent to enter into a lease with the applicant.

Mr. Horowitz stated that the applicant has been conducting the school at 1329 Highland Avenue for the past eleven years and now seeks a larger space with better access and parking. The new location, which in the past has been used as a warehouse, will provide 2950 square feet of space and a parking lot containing 56 parking spaces for the entire building. At the present time there is another tenant in the building, Industrial Careers Institute. Creative Movement Center, Inc. will be the second business use in the non-residential building.

Ms. Pelletier explained her program to the Board. She stated that classes operate Monday through Friday from 9:00 a.m. to 5:00 p.m. and on Saturday from 8:30 a.m. to 12:30 p.m. During the weekday there are four classes in the morning and four classes in the afternoon with 8-12 students average in each class. There are two teachers on the premises at all times and one office person.

TOWN OF NEEDHAM
BOARD OF APPEALS
NOTICE OF HEARING

Public notice is hereby given that **Creative Movement Center, Inc., 1329 Highland Avenue, Needham, MA,** tenant, has made application to the Board of Appeals for a special permit under Section 3.2 of the Zoning By-law to permit more than one use in a non-residential building at **460 Hillside Ave.**

Upon said application, a public hearing will be held at the **Town Hall, Needham, MA on Tuesday, July 16, 1991** in the evening at **7:50 p.m.** at which time and place all persons interested may appear and be heard.

ID No. 157845
(DT 7/1, 7/8/91)

TOWN OF NEEDHAM
BOARD OF APPEALS
NOTICE OF HEARING

Public notice is hereby given that **Creative Movement Center, Inc., 1329 Highland Avenue, Needham, MA,** tenant, has made application to the Board of Appeals for a special permit under Section 3.2 of the Zoning By-law to permit more than one use in a non-residential building at **460 Hillside Ave.**

Upon said application, a public hearing will be held at the **Town Hall, Needham, MA on Tuesday, July 16, 1991** in the evening at **7:50 p.m.** at which time and place all persons interested may appear and be heard.

ID No. 157845
(DT 7/1, 7/8/91)

Ms. Pelletier also stated that most students are dropped off, that there are carpools and that there is traffic in and out all during the day. She

stated that the owner of the locus will assign her as many parking spaces as needed.

In answer to a query from the Board she stated that she does not require a license to operate from the State.

No one appeared in favor or in opposition to the application. A letter from the Planning Board dated July 12, 1991 stated that it makes no comment on the application. The hearing closed at 8:40 p.m. and the Board proceeded to deliberate.

Decision

1) Special Permit under Section 3.2 to Allow the Operation of A School

On the basis of the evidence presented at the hearing on the application by Creative Movement, Inc. for a special permit under Section 3.2 of the Zoning By-law to allow the operation of a school for exercise and gymnastics for children at 460 Hillside Avenue, the Board makes the following findings:

1. The school for exercise and gymnastics for children will occupy approximately 3000 square feet in a building presently used for equipment storage, maintenance, warehouse and industrial training.

2. The number of students at any particular time will be from 8 to 12 between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday and between the hours of 8:30 a.m. and 12:30 p.m. on Saturday. The school will not be open on Sundays. The children's ages will range from 8 months to 2nd grade levels.

3. Vehicles enter the premises from Hillside Avenue via a private way (Easy Street) which is dead-end and which affords a safe off-street drop-off and pick-up capability for the approximately 80% of children who are transported by parents or assigned adults.

4. There are 58 parking spaces allocated for use which is considered sufficient for the present level of tenancy in the premises.

5. The use of the premises as above described is in harmony with the general purposes and intent of the By-law.

On the basis of the foregoing findings, in open session, and by unaminous vote after motion duly made and seconded, the Board grants the applicant a special permit under Section 3.2 of the Zoning By-law to allow the operation of a school for exercise and gymnastics for children at 460 Hillside Avenue.

2) Special Permit under Section 3.2 for More than One Use in a Non-Residential Building

On the basis of the evidence presented at the hearing on the application by Creative Movement Center, Inc. for a special permit under Section 3.2 of the Zoning By-law to permit more than one use in a non-residential building at 460 Hillside Avenue, the Board makes the following findings:

1. Section 3.2 of the Zoning By-law requires a special permit to allow more than one use in a non-residential building.

2. The findings in the above decision for a special permit under Section 3.2 of the Zoning By-law to allow the operation of a school for exercise and gymnastics for children at 460 Hillside Avenue are herein incorporated by reference.

3. The use of the building by the petitioner is not detrimental to the other uses and is in compliance with all the other requirements of the By-law.

On the basis of the foregoing findings, in open session, and by unanimous vote after motion duly made and seconded, the Board grants the applicant a special permit under Section 3.2 of the Zoning By-law to permit more than one use in a non-residential building at 460 Hillside Avenue.

Hertz N. Henkoff, Chairman

William J. Tedoldi, Member

Janice G. Hunt

Janice Hunt, Associate Member

TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS
JUNE 20, 1989

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NEEDHAM

'89 JUL 24 A8:34

INDUSTRIAL CAREERS INSTITUTE

Upon the application of Industrial Careers Institute, c/o Junction Commercial Service, 40 Clyde Street, Needham, MA, tenant, to the Board of Appeals for a special permit under Section 3.2 of the Zoning By-law to allow a private (trade) school with a maximum enrollment of 20 students at any one time at 460 Hillside Avenue, a public hearing was held at the Town Hall, Needham, Massachusetts on Tuesday, June 20, 1989 in the evening pursuant to notice thereof published in a local newspaper and mailed to all interested parties.

Appearing with Nicholas Distaso and Albert Goodrow, principals, was Frank Segal, Esq., Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, One Financial Center, Boston, Massachusetts.

Mr. Segal stated that the private trade school will teach heating, ventilation and air conditioning. The two principals have been in the business of servicing HVAC equipment for over 13 years and would now like to establish a school in the basement of the building at 460 Hillside Avenue. Mr. Segal continued that they will occupy 3,000 s.f. of space and will have 13 designated parking spaces for their exclusive use. Mr. Segal stated that there is enough parking for 50 vehicles on site.

The applicant stated that the owner of the locus will renovate the space to provide a classroom and a shop area. Mr. Segal stated that most of the classes will be held in the evening from 6:00 p.m. to 9:30 p.m. but that if the demand is there, classes will be held during the day from 9:00 a.m. to 4:00 p.m. Mr. Segal stated that class size is determined by the Department of Education and is based on square footage of space for the school.

No one appeared in favor or in opposition to the application; Elvira Palmerio, 245 Hunnewell Street was present. Chairman Henkoff read into the record a letter from the Planning Board dated June 16, 1989 which stated: "The Planning Board has no objection to the requested special permit, however, it suggests that the Board of Appeals assure itself that provisions of the Off-street Parking Requirements under Section 5.1.1, Applicability, and particularly Subsections 5.1.1.5 and 5.1.1.6 are not triggered by the proposed use of the premises." The hearing closed at 8:40 p.m.

TOWN OF NEEDHAM
BOARD OF APPEALS
NOTICE OF HEARING

Public notice is hereby given that **Industrial Careers Institute, c/o Junction Commercial Service, 40 Clyde Street, Needham, MA**, tenant, has made application to the Board of Appeals for a special permit under Section 3.2 of the Zoning By-law to allow a private (trade) school with a maximum enrollment of 20 students at any one time at **460 Hillside Avenue.**

Upon said application, a public hearing will be held at the **Town Hall, Needham, MA on Tuesday, June 20, 1989** in the evening at 7:40 p.m. at which time and place all persons interested may appear and be heard.

(DT)Ju1.8

Decision

On the basis of the evidence presented at the hearing on the application of Industrial Careers Institute (the "applicant") for a special permit under Section 3.2 of the Zoning By-law to allow a private (trade) school at 460 Hillside Avenue, Needham, the Board makes the following findings:

1. Section 3.2 requires a special permit to allow a private school in a business district.

2. The trade school will be located in an existing building at 460 Hillside Avenue and will occupy approximately 3000 square feet. It will teach servicing of heating, ventilating and air conditioning equipment (HVAC).

3. The maximum student size for any class will be 20 students as limited by the Massachusetts Department of Education which is the licensing board. The class size is restricted based on the state classroom standards for the space available to be used by the trade school.

4. The site contains 50 parking spaces, 13 of which will be designated for the trade school. This parking space allocation is sufficient to meet the requirements of Section 5.1.2 part 12 which would require one space for each two students.

5. The hours of operation will be from 9:00 a.m. to 4:00 p.m. if demand develops, but expectations are that the prime demand will occur during the evening hours and as such, the school's prime hours of operation will be between 6:00 p.m. and 9:30 p.m. weekdays.

6. No abutters or other interested persons appeared to comment on the application. The Planning Board indicated no objections.

7. The issuance of a special permit will not be detrimental to the Town or to the general character and visual appearance of the surrounding neighborhood and abutting uses and is consistent with the intent of the Zoning By-law.

On the basis of the foregoing findings, by unanimous vote after motion duly made and seconded, the Board grants the applicant a special permit under Section 3.2 of the Zoning By-law to allow a portion of the building at 460 Hillside Avenue to be used for the operation of a private trade school with a maximum enrollment of 20 students at one time.

Herbert N. Henkoff, Chairman

Andrew D. Frieze, Member

John H. Cogswell, Associate Member

ZBA Application For Hearing

Applicants must consult with the Building Commissioner prior to filing this Application. *Failure to do so will delay the scheduling of the hearing.*

Applicant Information

Applicant Name	Corbin Petro and Jessica Gelman		Date: 11/28/23
Applicant Address	320 Grove Street, Needham, MA 02492		
Phone	617-792-4840	email	Corbin.petro@gmail.com
Applicant is ☑ Owner; ☐Tenant; ☐Purchaser; ☐Other_____ If not the owner, a letter from the owner certifying authorization to apply must be included			
Representative Name			
Address			
Phone		email	

RECEIVED TOWN CLERK NEEDHAM, MA 02492 2023 NOV 28 PM 4:31

Subject Property Information

Property Address	320 Grove Street, Needham, MA 02492		
Map/Parcel Number	220/03	Zone of Property	SRA

Is property within 100 feet of wetlands, 200 feet of stream or in flood Plain?
☑ Yes ☐No

Is property ☑ Residential or ☐Commercial

If residential renovation, will renovation constitute "new construction"?
☑ Yes ☐No

If commercial, does the number of parking spaces meet the By-Law requirement? ☐Yes ☐No
Do the spaces meet design requirements? ☐Yes ☐ No

Application Type (*select one*): ☐Special Permit ☑ Variance

ZBA Application For Hearing

Existing Conditions: 3,291sf single-Family, 2-story brick colonial with an attached 2-car garage located
on 204,803sf of an irregular lot in both Needham and Wellesley. The structure is located in the
50' foot wetland buffer zone and the majority of the property contains protected wooded wetlands, wildlife habitat and an intermittent stream. The house flooded currently creating a mold hazard.

Statement of Relief Sought: To demolish and reconstruct a single-family home with 3 car garage, land-
scaped with permeable hardscape and mitigation planting required by CC. Seeking a variance to
preserve the allowable 15' side setbacks enjoyed prior to 2017 zoning amendment due to unusual soil and shape of the topography of the land.

Applicable Section(s) of the Zoning By-Law:
4.2.3, MGL40A, Section 10 and 7.5.3

If application under Zoning Section 1.4 above, list non-conformities:

	Existing Conditions	Proposed Conditions
Use	**Res**	**Res**
# Dwelling Units	**1**	**1**
Lot Area *(square feet)*	**204803**	**204803**
Front Setback *(feet)*	**N/A**	**N/A**
Rear Setback *(feet)*	**95.4**	**84.7**
Left Setback *(feet)*	**15**	**17.5**
Right Setback *(feet)*	**20.7**	**15.3**
Frontage *(feet)* (in Wellesley 79.42')*	**n/a***	**n/a***
Lot Coverage *(%)*	**n/a**	**n/a**
FAR *(Floor area divided by the lot area)*	**n/a**	**n/a**
Numbers must match those on the certified plot plan and supporting materials		

ZBA Application For Hearing

Date Structure Constructed including additions:	Date Lot was created:
1981	02/20/1968

Submission Materials	Provided
Certified Signed Plot Plan of Existing and Proposed Conditions *(Required)*	yes
Application Fee, check made payable to the Town of Needham *(Required)*	yes
If applicant is tenant, letter of authorization from owner *(Required)*	n/a
Elevations of Proposed Conditions *(when necessary)*	yes
Floor Plans of Proposed Conditions *(when necessary)*	yes

Feel free to attach any additional information relative to the application. Any memorandum or supplemental materials should be filed 48 hours before the hearing. Additional information may be requested by the Board at any time during the application or hearing process.

I hereby request a hearing before the Needham Zoning Board of Appeals. I have reviewed the Board Rules and instructions.

I certify that I have consulted with the Building Commissioner – 11/12/2013

☑ I will represent myself; or

Name_____ will represent me in connection with the application.

Date:__11/28/2023_____ Applicant Signature_____

An application must be submitted to the Town Clerk's Office at townclerk@needhamma.gov and the ZBA Office at dcollins@needhamma.gov

November 21, 2023

Town of Needham
Zoning Board of Appeals
Needham, Massachusetts 02492

Attn: Daphne M. Collins, Zonning Specialist

Re: Corbin Petro & Jessica Gelman, 320 Grove St, Needham, MA Variance Request

Dear Members of the Needham Board of Appeals,

We have been residents of Needham since February 2013 when we bought our home at 320 Grove St. When we purchased our home, it was **fully conforming** by law until the large house zoning amendment of June 2017. Given events that have rendered our house a threat to our public health and safety, these regulations have created a significant hardship and we are requesting a variance.

By way of background, there has been one previous owner of our house and, while they sent their kids to Wellesley schools, we love the town of Needham. Our property abuts wetlands and our property is more than 4.6 acres. Our 2 boys are at Newman Elementary. We have found the town welcoming to us as two married women and are active in the community, especially with youth sports as coaches.

We love that our home is surrounded by conservation lands. We love nature, the occasional deer, turkey, and quiet - and we enjoy going on adventures with our boys and teaching them about nature. When we moved, we were unaware of the many decades of flooding that existed. Our lovely backyard turns into a pond several times each spring and fall. Over the years, we've called on both Wellesley and Needham fire departments when the water threatened to breach our home. While stressful and frustrating, our home wasn't impacted until **July 2021** when the water breached our **finished basement** and we had 6 inches of water for 4 days.

The damage from the water was significant, both to our house and to us mentally. While we restored our basement at meaningful costs to us, we have ongoing worry about mold, especially with aging parents who have severe allergies and who visit us often. We invested in an engineering analysis to determine the best mitigation strategies to keep our home and health safe. We also have intense stress and anxiety at any rainstorm as we fear flooding and more disruption and damage.

The water issues have gotten progressively worse with new construction and development surrounding the property. We understand by review of public records that there were major concerns by the previous owners and neighbors when Beard Way was developed, largely due to the water issues. Properties being subdivided, like at 390 Grove St in recent years have only exacerbated the water issues. New development, in addition to poor maintenance and an inadequate discharge drain pipe that was built on private property (302 Grove St), put much of this out of our control.

We love our home and want to remain living here for many years to come. Our home is not a teardown - we've lived here for 10 years and remodeled it during that time. However, with health and safety as a concern, we feel the only choice we have to stay here is to replace our home with one on higher ground,

farther from the water/wetlands, and built with the waterproofing and technology required to keep the home safe. As nature lovers and with an appreciation for conservation, we made a commitment to invest in modifications that improve the current footprint and impact to wetlands, and the plan we submitted to ZBA for consideration was approved by the Conservation Commission in July 2023.

The plan approved by the Conservation Commission and that we have submitted for consideration by the ZBA includes building a new home. The new home has setbacks previously allowed in the SRA district, which were 15 feet as the home was built in 1981, before the new regulations from June 2017, when new setback limits were established. The current home at 320 Grove St has setbacks of 15ft and 20ft, on the left hand and right hand sides, respectively. The new home proposal has setbacks of 17ft and 15ft on the left hand and right hand sides, respectively. **Notably, the shortest distance between the proposed house and the house next door (306 Grove St, Wellesley) is approximately 55ft** because of the unusual shape of the lot, which adheres to the spirit of the regulations to ensure space between each home.

We believe the new home will significantly improve the property and neighborhood, and have full support of our neighbors to the right at 330 Grove St and to the left at 306 Grove St (we own this property, which is fully in Wellesley). When we embarked on this process in October 2022, we received assurances from the former building commissioner that we were **entitled by right** to the 15ft setbacks. It was these assurances that were the key criteria we used to develop our plan and decision to stay at the property. We understand now that a different interpretation of the regulations stands and so are requesting a variance.

We are requesting a variance based on Needham bylaw 7.5.3 and Massachusetts General Laws, c.40A, Section 10, which provides that variances may be granted when:

"owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law. "

Applying the criteria of Chapter 40A, Section 10, the first question is whether there exist circumstances relating to the soil conditions, shape, or topography of the Premises or structures that especially affect the Premises but not generally the zoning district in which it is located.

The current non-conforming lot abuts wetlands and has a triangle-shaped lot that narrows as you move away from the wetlands. Our lot is 4.6 acres, plus a small portion in Wellesley, the vast majority of which is not buildable because of an intermittent stream, wetlands, woods and wildlife habitat. As we aimed to improve the property and preserve the wetlands, we moved our house forward. As we do that, the shape of the lot gets smaller, making the buildable lot by right essentially non-existent. With the approval from the Conservation Commission to build within the 25ft buffer zone, we have a buildable lot but require this variance. We meet the criteria for a variance as we have unusual soil conditions given our proximity to wetlands and an unusual shape with the triangle-shaped lot.
No other property in our area has such an unusual shape or limitations.

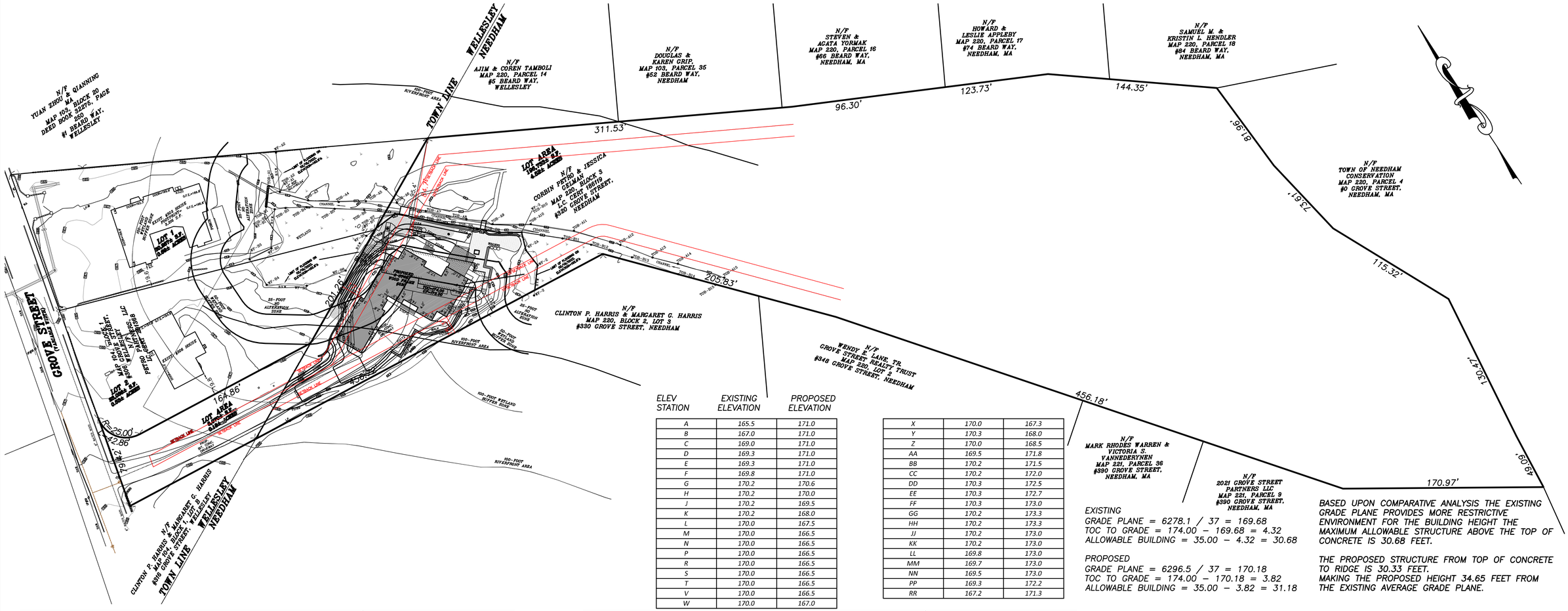
The next question pursuant to Chapter 40A, Section 10 is whether a literal enforcement of the provisions of the By-Law would involve substantial hardship, financial or otherwise. In this case, application of the By-Law to the Premises would render it non-buildable; yet the current house has existed on it for over 40 years. This would render the Premises unusable for any material purpose. As our current house is a risk to our public health, we have faced considerable hardship as we seek to create a livable home on our non-conforming lot. There is little doubt that this inflicts a tremendous hardship on our family, as we have lived at the property for 11 years and wish to continue living at the property in a manner safe for our two young sons and with frequent visits from older family members heavily impacted by mold allergies.

The last question to be asked pursuant to Chapter 40A, Section 10 is whether the requested relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the by-law. In this case, the Premises has existed as a separate lot with an existing home for approximately 43 years. At present, minimal change is proposed for the lot itself, and no change is being proposed for its use. Therefore, issuance of a variance to allow for a new build that improves the wetlands conditions, overall neighborhood, and enables the family to live in a home not threatened by water damage does not present any apparent detriment and further does not nullify or substantially derogate from the intent or purpose of the By-Law.

We thank you for your consideration and hope that you will respect the setbacks that we have enjoyed since we purchased the house.

Respectfully,

Corbin Petro & Jessica Gelman



ELEV STATION	EXISTING ELEVATION	PROPOSED ELEVATION
A	165.5	171.0
B	167.0	171.0
C	169.0	171.0
D	169.3	171.0
E	169.3	171.0
F	169.8	171.0
G	170.2	170.6
H	170.2	170.0
J	170.2	169.5
K	170.2	168.0
L	170.0	167.5
M	170.0	166.5
N	170.0	166.5
P	170.0	166.5
R	170.0	166.5
S	170.0	166.5
T	170.0	166.5
V	170.0	166.5
W	170.0	167.0
X	170.0	167.3
Y	170.3	168.0
Z	170.0	168.5
AA	169.5	171.8
BB	170.2	171.5
CC	170.2	172.0
DD	170.3	172.5
EE	170.3	172.7
FF	170.3	173.0
GG	170.2	173.3
HH	170.2	173.3
JJ	170.2	173.0
KK	170.2	173.0
LL	169.8	173.0
MM	169.7	173.0
NN	169.5	173.0
PP	169.3	172.2
RR	167.2	171.3

EXISTING
GRADE PLANE = 6278.1 / 37 = 169.68
TOC TO GRADE = 174.00 – 169.68 = 4.32
ALLOWABLE BUILDING = 35.00 – 4.32 = 30.68

PROPOSED
GRADE PLANE = 6296.5 / 37 = 170.18
TOC TO GRADE = 174.00 – 170.18 = 3.82
ALLOWABLE BUILDING = 35.00 – 3.82 = 31.18

BASED UPON COMPARATIVE ANALYSIS THE EXISTING GRADE PLANE PROVIDES MORE RESTRICTIVE ENVIRONMENT FOR THE BUILDING HEIGHT THE MAXIMUM ALLOWABLE STRUCTURE ABOVE THE TOP OF CONCRETE IS 30.68 FEET.

THE PROPOSED STRUCTURE FROM TOP OF CONCRETE TO RIDGE IS 30.33 FEET.
MAKING THE PROPOSED HEIGHT 34.65 FEET FROM THE EXISTING AVERAGE GRADE PLANE.

ZONING INFORMATION: SINGLE RESIDENCE A (SRA)

	REQUIRED	EXISTING	PROPOSED
MINIMUM LOT AREA	43,560 SF.	204,803 SF.	204,803 SF.
MINIMUM LOT FRONTAGE	150 FEET.	N/A FEET.	N/A FEET
MINIMUM FRONT SETBACK	30 FEET.	N/A.	N/A
MINIMUM SIDE YARD	25 FEET*.	15.0 FEET*.	17.5 FEET*
		20.7 FEET.	15.3 FEET*
MINIMUM REAR YARD	15 FEET.	95.4 FEET.	84.7 FEET
MAXIMUM BUILDING HEIGHT	35 FEET	30± FEET.	34.65 FEET
MAXIMUM BUILDING HEIGHT	2 1/2 STORIES.	2 1/2 STORIES.	2 1/2 STORIES

COMMONWEALTH OF MASSACHUSETTS
BRADLEY J. SIMONELLI
#47581
REGISTERED PROFESSIONAL LAND SURVEYOR

GRAPHIC SCALE
40 0 20 40 80

EXISTING SITE DETAIL

PROPOSED SITE DETAIL

ZONING BOARD OF APPEALS
PLAN OF LAND
320 GROVE STREET
NEEDHAM, MASS.

TOWN OF NEEDHAM
MAP 220 PARCEL 03

NORFOLK COUNTY
REGISTRY OF DEEDS
LAND COURT OF MASSACHUSETTS
CERTIFICATE NO. 84800
LAND COURT PLAN 8450E

CORBIN PETRO &
JESSICA GELMAN
320 GROVE STREET
WELLESLEY, MA

Field Resources, Inc.
LAND SURVEYORS

NOVEMBER 10, 2023 SCALE 1"=40'

P.O. BOX 324
AUBURN, MA

281 CHESTNUT ST.
NEEDHAM, MA.
781 444 5936

office@fieldresources.net

117–23

REFER TO DEP FILING FOR SPECIFIC INFORMATION ABOUT STORMWATER AND EROSION CONTROL

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mckay architects

New Residence
320 Grove
Needham, MA

August 16, 2023

GENERAL NOTES

General:
1. The governing building code for the design and construction is the Massachusetts State Building Code for 1& 2 family dwellings (9th edition).
2. Architectural drawings shall be used in conjunction with structural, mechanical, electrical and shop drawings.
3. The contractor shall confirm all dimensions and notify architect of any discrepancies, ambiguities, or inconsistences prior to proceeding with the work. The contractor shall also notify the architect, prior to proceeding with the work, if any construction needs to be adjusted due to field conditions.
4. An assumption has been made that the elevation difference between the garage slab and the first floor is 24" the general contractor shall notify the architect if this is inconsistent with the site conditions prior to beginning construction.
5. All flashing in contact with pressure treated lumber shall be corrosion resistant.
6. All ductwork and hot water piping shall be insulated and where necessary, a vapor barrier for the ductwork will be provided to prevent condensation.
7. All chimneys to be constructed so the top of the flue is 2'-0" above any roof/wall within 10'-0".
8. Provide continuous pitch break vents at all roof/wall intersections where soffit vents are installed.

Dimensions:
1. Dimensions standards within the documents are as follows unless otherwise noted:
   a. Dimensions to exterior walls are from outside face of a stud or concrete wall
   b. Dimensions at windows and exterior doors represents a dimension to the center of that opening from the center of another opening or the outside face of a stud or concrete wall.
   c. Interior dimensions at stud walls represents a dimension to the middle of the stud (unless interior wall is also an exterior wall, then dimension is to face of stud).
2. Interior dimensions at stairs represents a dimension to the finished face of the stair.
3. Dimensions/locations of walls enclosing tub/shower units, pre-manufactured fireplaces and all other built-ins must be confirmed with the fixture manufacturer for the required RO and attachment.
4. Dimensions depicting the building height, shown of the architectural and structural drawings are for the building and building components only. The overall building height depicted is from the 1st floor deck. The owner/G.C. is responsible for coordinating and establishing the grade relative to the 1st floor, to ensure compliance with zoning and building code height requirements.
5. All dimensions from existing surfaces are from face of existing surface.
6. Closet doors that are not dimensioned are typically centered within the closet.
7. All other doors that are not dimensioned are typically 4" to 6" (depending on the finish casing width) from face finish to the door opening on the butt side.
8. Dimensions locating cased openings are typically dimensioned to the center of that opening unless otherwise noted.

Stairways/Balconies:
1. Stairways shall not be less than 3'- 0" in clear width at all points above the permitted handrail height and below the required headroom height. Maximum riser height shall be 8 ¼", minimum tread depth shall be 4" with nosing not to exceed 1 ¼". Wider treads shall have a min depth equal to the straight run tread depth at a distance of 12" from the narrower side with a min. tread depth of 3" at any point. Minimum headroom shall be 6' 6" measured vertically from the sloped plane adjoining the tread nosing or from the floor surface of a landing or platform.
2. Handrails shall be provided on at least one side of each continuous run of treads or flight of stairs with 4 or more risers. Minimum height shall not be less than 34" with a maximum not to exceed 38". Handrails shall be continuous for the full length of the flight.
3. Guardrails, 36" minimum in height, shall be installed in floor, porch, and/or balcony area more than thirty (30) inches above a floor or grade below. Guardrails on open sides of stairs, with a total rise of more than thirty (30) inches above a floor or grade below, shall be not less than 34" in height measured vertically from the nosing of the treads. The maximum clear opening between rails, balusters, and floors shall not exceed four (4) inches.

Exception:
1. The triangular openings formed by the riser, tread and bottom rail of a guard at the open side of a stairway may be of such a size that a six inch (6) sphere cannot pass through. Openings for required guards on the sides of stair treads shall not allow a sphere 4-3/8 inches to pass through.

4. An insulated door shall be provided at the top of unfinished basement stairs or insulate the walls and the underside of stairs and provide an insulated door at the bottom of basement stairs.
5. An insulated door shall be provided at the top of attic stairs or insulate the walls and underside of stairs and provide an insulated door at the bottom of attic stairs. Emergency escape and rescue openings.

Emergency Escape and Rescue Openings/Exterior Windows and Doors:
1. Window sizes shown on the drawings are based generically and the owner (or general contractor where applicable) shall choose the final manufacturer. Window sizes shall be verified by the general contractor prior to ordering rough opening sizes shall be provided by the manufacturer.
2. Basements, habitable attics and every sleeping room shall have at least one operable emergency escape and rescue opening. Where basements contain more than one sleeping room, each shall have an emergency escape and rescue opening but adjoining areas shall nor require one. Emergency escape and rescue openings shall meet the following criteria:
   a. Sill height shall not be more than 44 inches above the floor.
   b. Where a door having a threshold below the adjacent ground elevation is used as an emergency escape and rescue opening and is provided with a bulkhead enclosure, the bulkhead shall provide direct access to the basement and when the bulkhead is fully opened it shall provide the minimum net clear opening of 5.7 square feet.
   c. Emergency escape and rescue openings with a sill elevation below the adjacent ground elevation shall be provided with a window well with a minimum horizontal area of 9 square feet and a minimum horizontal projection of 36". The window well shall allow the emergency escape and egress opening to be fully opened.
   d. All emergency escape and rescue openings shall have a minimum net clear opening of 5.7 square feet.

Exceptions:
1. Grade floor openings shall have a minimum net clear opening of 5.0 square feet
2. Double hung windows used for emergency escape shall be permitted to have a new clear opening of 3.3 square feet provided that at least one operable sash meets the minimum height and width requirements and operations constraints.

   e. The minimum net clear opening shall be 24 inches x 20 inches in either direction
   f. Emergency escape and rescue openings shall be operational from the inside without the use of key's or tools
   g. In dwelling units, where the opening of an operable window is located more than 72 inches above the finished grade or surface below, the lowest part of the clear opening of the window shall be a minimum of 24 inches above the finished floor of the room in which the window is located. Operable sections of windows shall not permit openings that allow passage of a 4 inch diameter sphere where such openings are located within 24 inches of the finished floor.

Exceptions:
1. Windows whose openings will not allow a 4 inch diameter sphere to pass through the opening when the opening is in its largest opened position
2. Openings that are provided with window fall prevention devices that comply with section R6123.
3. Openings that are provided with fall prevention devices that comply with ASTM F2040.
4. Windows that are provided with openings limiting devices that comply with section R6124.

Egress:
1. Stairways, ramps, exterior exit balconies, hallways and doors shall meet all minimum egress requirements.
2. All required exits shall be positively anchored to the primary structure to resist both vertical and lateral forces.
3. Enclosed accessible space under stairs shall have walls, under stair surface and any soffits protected on the enclosed side with ½" gypsum board.
4. Hallways shall be minimum of 3 feet clear
5. Egress from dwelling units shall be by means of two exit doors. The minimum normal width of at least one of the required exit doors shall be not less than 36" with a nominal height shall of six feet eight inches and side hinged. All other required exit doors shall not be less than 32" in nominal width or six feet eight inches in nominal height and may be sliding or side-hinged.
6. Egress through an attached garage is permitted provided that the attached garage is also provided with a 32" exit door
7. All other exterior doors in excess of the two required exit doors are not required to comply with these minimum dimensions.
8. All interior doors providing access to habitable rooms shall have a nominal width of 30 inches and nominal height of six feet 6 inches except bathrooms which are permitted to be 24 inches in nominal width.
9. A floor or landing shall be provided on each side of an exterior door. The width of each landing shall not be less than the door served and have a minimum dimension of 36 inches measured in the direction of travel.

Minimum Room Requirements:
1. Habitable rooms, hallways, corridors, bathrooms, toilet rooms, laundry rooms and basements shall have a ceiling height of not less than seven (7) feet measured from the finish floor to the lowest projection from the ceiling
   Exceptions:
   1. Beams and girders spaced not less than four (4) feet on center may project not more than six (6) inches below the required ceiling height
   2. Ceilings in basements without habitable space may project to within six feet eight inches of the finished floor except that beams, girders, ducts and other obstructions may project to within six feet four inches of the finished floor.
   3. Not more than 50% of the required floor area of a room is permitted to have a sloped ceiling less than seven feet in height with no portion of the required floor area less than five feet in height.
   4. Bathrooms shall have a minimum ceiling height of six feet eight inches over the fixture and at the front clearance area for the fixtures. A shower or tub with a showerhead shall have a minimum ceiling height of six feet eight inches above a minimum 30" X 30" area at the showerhead.

2. Every dwelling shall have at least one habitable room with a gross floor area of at least 150 square feet
3. Other habitable rooms shall have a floor area of not less than 70 square feet except kitchens
4. Habitable rooms shall not be less than seven feet in any horizontal except kitchens
5. Portions of a room with a sloping ceiling measuring less than five (5) feet or a furred ceiling measuring less than seven (7) shall not be considered as contributing to the minimum required habitable area for that room.

Roofing and Siding:
1. Provide continuous 3' 0" wide fiberglass reinforced, bituthene, ice and water shield at all roof edges, centered on all valleys and at roof wall intersections carried 1' 0" up the wall (refer to manufacturers installation instructions).
2. Provide aluminum step flashing at roof/wall and roof/chimney intersections.
3. Provide aluminum flashing over all window and doors head trim and at the connection between all exterior walls and exterior decks.
4. Provide continuous soffit vents or continuous venter drip edge at all soffit overhangs
5. Provide15" felt under all roof shingles (unless specified otherwise).
6. Provide continuous ridge vents (unless specified as otherwise). See building elevation for extent.
7. All gutters and downspouts to be prefinished alum. Color to be selected by owner.

Light/Ventilation and Insulation:
1. All habitable rooms shall be provided with aggregate glazing of not less than 8% of the floor area being ventilated.
   Exceptions:
   a. The glazed areas need not be openable when the opening is not required to be an emergency escape and rescue opening and an approved mechanical ventilation system is provided capable of producing 0.35 air exchange per hour in the room or a whole-house mechanical ventilation system is installed capable of supplying outdoor ventilation air of 1.5 CFM per occupant with 2 for the first bedroom and one for every additional bedroom.
   b. The glazed areas need not be provided in rooms where the above exception is met and artificial light is provided capable of producing an average illumination of six foot candles over the area of the room at a height of 30 inches.
2. All bathrooms, water closet compartments and other similar rooms shall be provided with aggregate glazing area of not less than three square feet, ½ of which must be openable.

   Exception:
   a. The glazed area shall not be required where artificial light and a mechanical ventilation system are provided. Ventilation air from the space shall be exhausted directly to the outside.

3. Attic ventilation with a ceiling vapor barrier, provide at least one (1) square foot of free area for each three hundred (300) square feet of ceiling area.
4. Attic ventilation without a ceiling ventilation vapor barrier, provide at least one (1) square foot of free area for each one hundred-fifty (150) square feet of ceiling area.
5. The contractor is responsible to provide a moisture barrier and properly insulate all walls and ceilings to air leakage into unconditioned spaces.
6. If mechanical, electrical or plumbing equipment is to be placed in attics, eves, overhangs and other similar unconditioned, uninsulated spaces, the contractor is responsible to provide a proper enclosure, insulation, direct ventilation, etc. to avoid moisture, condensation, freeze thaw, ice damming, and other similar issues.

Plumbing:
1. All sanitary lines within walls and floors adjoining living spaces are to be sound insulated.
2. All plumbing within wall or floor cavities which border unconditioned spaces are to be insulated and on the warm side of the cavity insulation to avoid freezing.

Smoke and Carbon Monoxide Detectors/Alarms:
1. Combination smoke and carbon monoxide alarms are acceptable provided said alarms have simulated voice and tone alarms the clearly distinguish between the two types of emergencies. If combination alarms are to be used than all required criteria for smoke and carbon monoxide detectors need to be met.
2. Fire departments are required to inspect, upon sale or transfer, all dwelling units for required smoke and carbon monoxide detectors.
3. Consumers shall check with local building and/or fire officials for accepted alarm types and locations for proper installation in accordance with all applicable codes and regulations.

Smoke Alarms/Detectors:
1. All one and two family dwellings shall be equipped with a household fire warning system. All devices shall be installed and maintained in accordance with all applicable codes, manufacturers instructions and listing criteria.
2. Smoke detectors are required to be permanently wired to an AC primary power source and shall have secondary (standby) power supplied from monitored batteries.
3. Where more than one smoke detector is required, all required detectors shall be installed so that the activation of any detector shall cause the alarm in all required smoke detectors in the dwelling unit to sound (min. 85 dba at 10 feet, 75 dba in bedrooms)
4. Smoke detectors shall be provided in the following locations:
   a. In the immediate vicinity of bedrooms
   b. In all bedrooms
   c. In each story of a unit (including basements & cellars) For each 1,200 sq.ft or part thereof
   d. Near the base of all stairs where such stairs lead to another occupied floor
5. Photo electric smoke detectors are required if located within 20 feet of a kitchen or bathroom
6. When one or more sleeping rooms are added or created to an existing dwelling, the entire building shall be provided with smoke detectors designed and located as required for new dwellings.

Carbon Monoxide Alarms/Detectors:
1. All one and two family dwellings shall be equipped with a household carbon monoxide warning system. All devices shall be installed and maintained in accordance with all acceptable codes, manufacturers instruction and listing criteria.
2. Carbon monoxide detectors shall be located on every level of the dwelling unit including basements and cellars (but not including crawl spaces and uninhabitable attics).
3. All alarm-sounding appliances shall have a minimum rating of 85 dba at 10 feet

Heat Detectors:
1. Heat detectors shall be installed in any integral or attached garage to the main house
2. A new addition attached garage to an existing dwelling installed in accordance with all applicable criteria. If the existing dwelling contains a fire detection system that is compatible with the garage heat detector, the garage heat detector shall be interconnect to the existing dwelling fire detection system. If the detector is not compatible than the detector shall be connected to a sounder or compatible heat detector containing a sounding device, located in the dwelling unit and within 20 feet of the nearest door to the garage
3. For flat-finished garage ceilings, the detector shall be located on or near the center of the garage ceiling. For vaulted/ slopped ceilings, the detector shall be placed in the approximate center of the vaulted space.
4. The required heat detector shall be listed for and required to be interconnected to all smoke detectors of the required household fire alarm system, such that the activation of the heat detector will activate all of the audible alarms of the household fire alarm system throughout the dwelling.

Sprinklers:
1. All one and two-family dwellings having an aggregate area greater than 14,400 square feet, including basements, but not including garages and unfinished attics shall be equipped with an automatic sprinkler system and shall be installed in accordance with NFPA 13D.

GRAPHIC SYMBOLS

- 3 / A-3.1 — BUILDING CROSS SECTION
- 1 — DOOR NUMBER
- 106 — ROOM NUMBER
- A — WINDOW NUMBER
- ELEVATION DESIGNATION
- 5 / A-3.3 — SECTION REFERENCE
- NEW DOOR TO BE INSTALLED
- EXISTING DOOR TO REMAIN
- PARTITION TYPE
- NEW CONSTRUCTION
- EXISTING CONSTRUCTION
- DEMO CONSTRUCTION

CODE

GOVERNMENT BUILDING CODE

THE MASSACHUSETTS BUILDING CODE, 9TH EDITION

MATERIAL SYMBOLS

- BLOCKING
- CONCRETE
- EARTH
- BATT INSULATION
- GRAVEL
- WOOD
- DRYWALL
- TILE

ABBREVIATIONS

@	AT
AFF	ABOVE FINISH FLOOR
ATTEN	ATTENUATING
BLDG	BUILDING
CH	CEILING HEIGHT
CL	CENTER LINE
CLR	CLEAR
COL	COLUMN
CONC	CONCRETE
CONT	CONTINUOUS
CPT	CARPET
CT	CERAMIC TILE
DIM	DIMENSION
DWG(S)	DRAWING(S)
EA	EACH
EIFS	EXT INSUL. FINISH SYSTEM
ELEC	ELECTRICAL
ELEV	ELEVATION
EQ	EQUAL
EWC	ELECTRICAL WATER COOLER
EXT	EXTERIOR
FC	FIRE CODE/FIRE CORE
FD	FLOOR DRAIN
FEC	FIRE EXTINGUISHER CABINET
FF	FINISHED FLOOR
FFE	FINISHED FLOOR ELEVATION
FIN	FINISH
FFL	FLUORESCENT LIGHTING
FOF	FACE OF FINISH
FOC	FACE OF CONCRETE
FOS	FACE OF STUD
FRT	FIRE RETARDANT TREATED
GC	GENERAL CONTRACTOR
GL	GLASS OR GLAZING
GWB	GYPSUM WALL BOARD
HC	HOLLOW CORE
HDWR	HARDWARE
HM	HOLLOW METAL
HOR	HORIZONTAL
HT	HEIGHT
HVAC	HEATING, VENT, A/C
HWH	HOT WATER HEATER
INSUL	INSULATION
INT	INTERIOR
L	LENGTH
LAV	LAVATORY
LH	LEFT HAND(ED)
MAX	MAXIMUM
MECH	MECHANICAL
MFR	MANUFACTURER
MD	MEDIUM DENSITY
MIN	MINIMUM
MO	MASONRY OPENING
MTL	METAL
NIC	NOT IN CONTRACT
NL	NIGHT LIGHT
NOM	NOMINAL
NTS	NOT TO SCALE
OC	ON CENTER
OD	OUTSIDE DIAMETER
OH	OPPOSITE HANDED
PLAM	PLASTIC LAMINATE
PLYWD	PLYWOOD
PT	PRESSURE TREATED
PR	PAIR
PT	PAINTED
QT	QUARRY TILE
R	RISER
RAD	RADIUS
REQ	REQUIRED
REF	REFERENCE
REV	REVISION(S)
RH	RIGHT HAND(ED)
RO	ROUGH OPENING
RTU	ROOF TOP UNIT
SA	SOUND ATTENTION BATTS
SD	SMOKE DETECTORS
SIM	SIMILAR
SPEC	SPECIFICATION
SQ	SQUARE
SQ FT	SQUARE FEET
SS	STAINLESS STEEL
STL	STEEL
STN	STAIN
SV	SHEET VINYL
T	TREAD
THK	THICKNESS
TP	TOILET PAPER DISPENSER
TYP	TYPICAL
UNO	UNLESS NOTED OTHERWISE
VCT	VINYL COMPOSITION TILE
VIF	VERIFY IN FIELD
VTR	VENT THROUGH ROOF
W/	WITH
WC	WATER CLOSET
WD	WOOD
X-REF	CROSS REFERENCE

DRAWING INDEX

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T-1.2	Zoning Compliance Sheet
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A-1.2	First Floor Plan
A-1.3	Second Floor Plan
A-1.4	Attic Floor Plan
A-1.5	Roof Plan
A-1.6	Solar
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S-1.5	Roof Framing Plan

New Residence

320 Grove Street
Needham, MA

OWNER

mckay architects

35 Bryant Street
Dedham, MA 02026

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REGISTERED ARCHITECT — MICHAEL L. McKAY — NO. AR 8947 — COMMONWEALTH OF MASSACHUSETTS

REV #	DATE	ISSUANCE
1	11/03/22	First Draft
2	11/22/22	Second Draft
3	11/29/22	Third Draft
4	02/23/23	Fourth Draft
5	07/21/23	Fifth Draft
6	08/16/23	Sixth Draft

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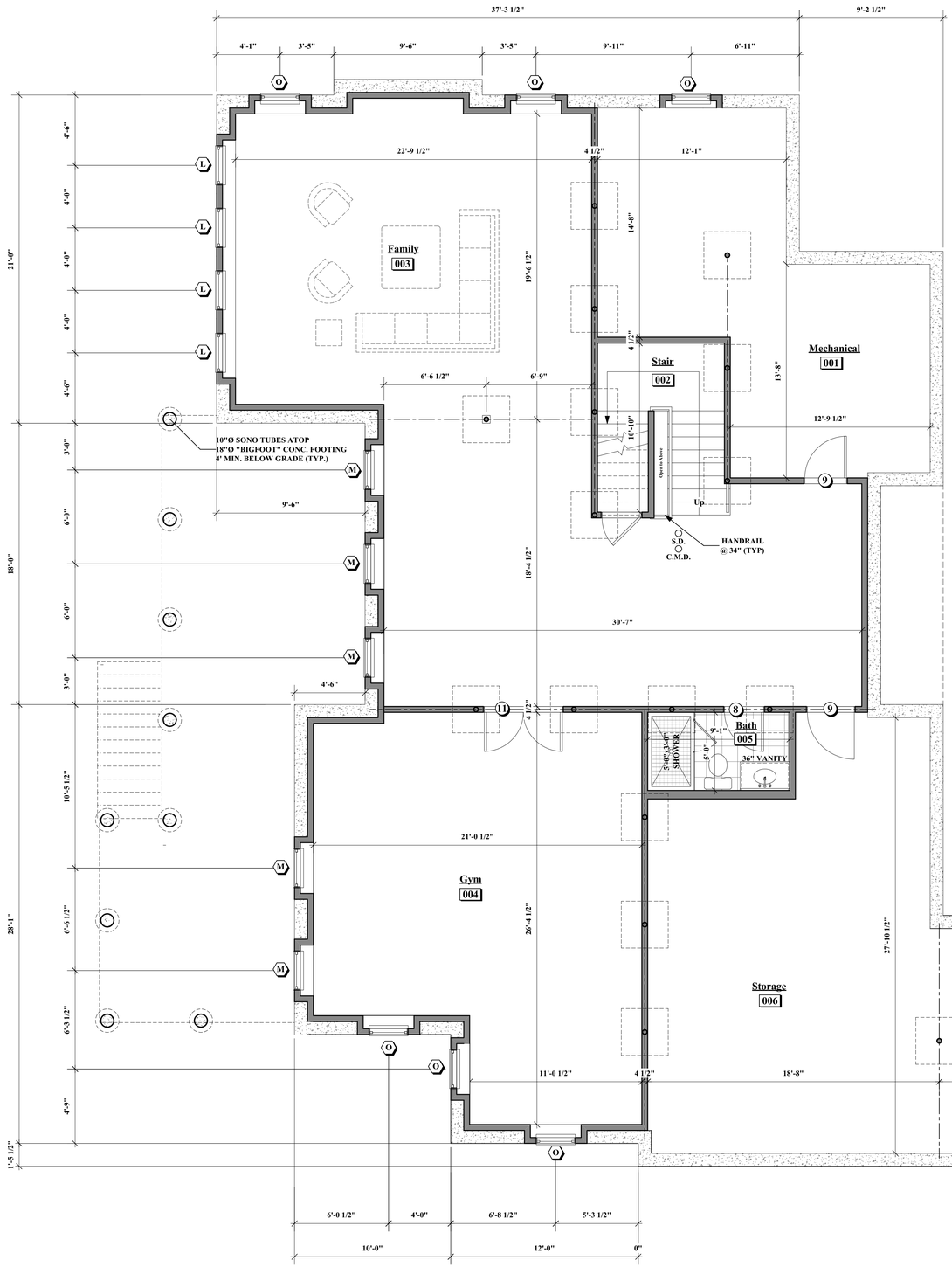
Title Sheet

JOB NO	
DATE	02/23/23
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

T-1.1



1 A-1.1 Basement Floor Plan
1/4" = 1'-0"

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Basement Floor Plan

JOB NO	
DATE	02/23/23
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

A-1.1

SQUARE FOOTAGE:	
GROSS	3831 SF
LIVING	2949 SF
GARAGE	882 SF

1 A-1.2 **First Floor Plan**
1/4" = 1'-0"

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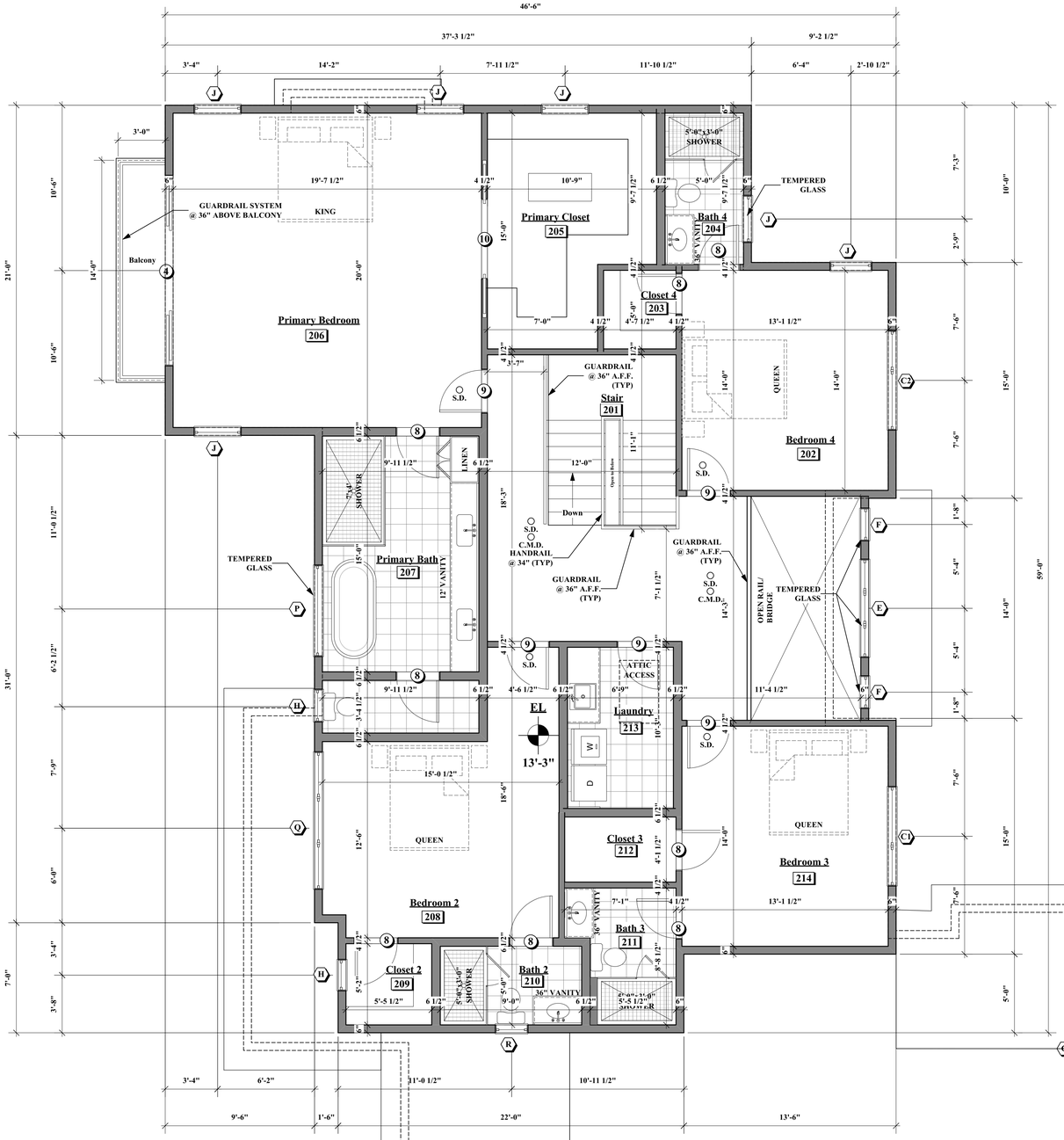
First Floor Plan

JOB NO	
DATE	02/23/23
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

A-1.2



SQUARE FOOTAGE:	
GROSS	3172 SF
LIVING	2188 SF
STAIRS/BASKETBALL:	984 SF

1 A-1.3 **Second Floor Plan**
1/4" = 1'-0"

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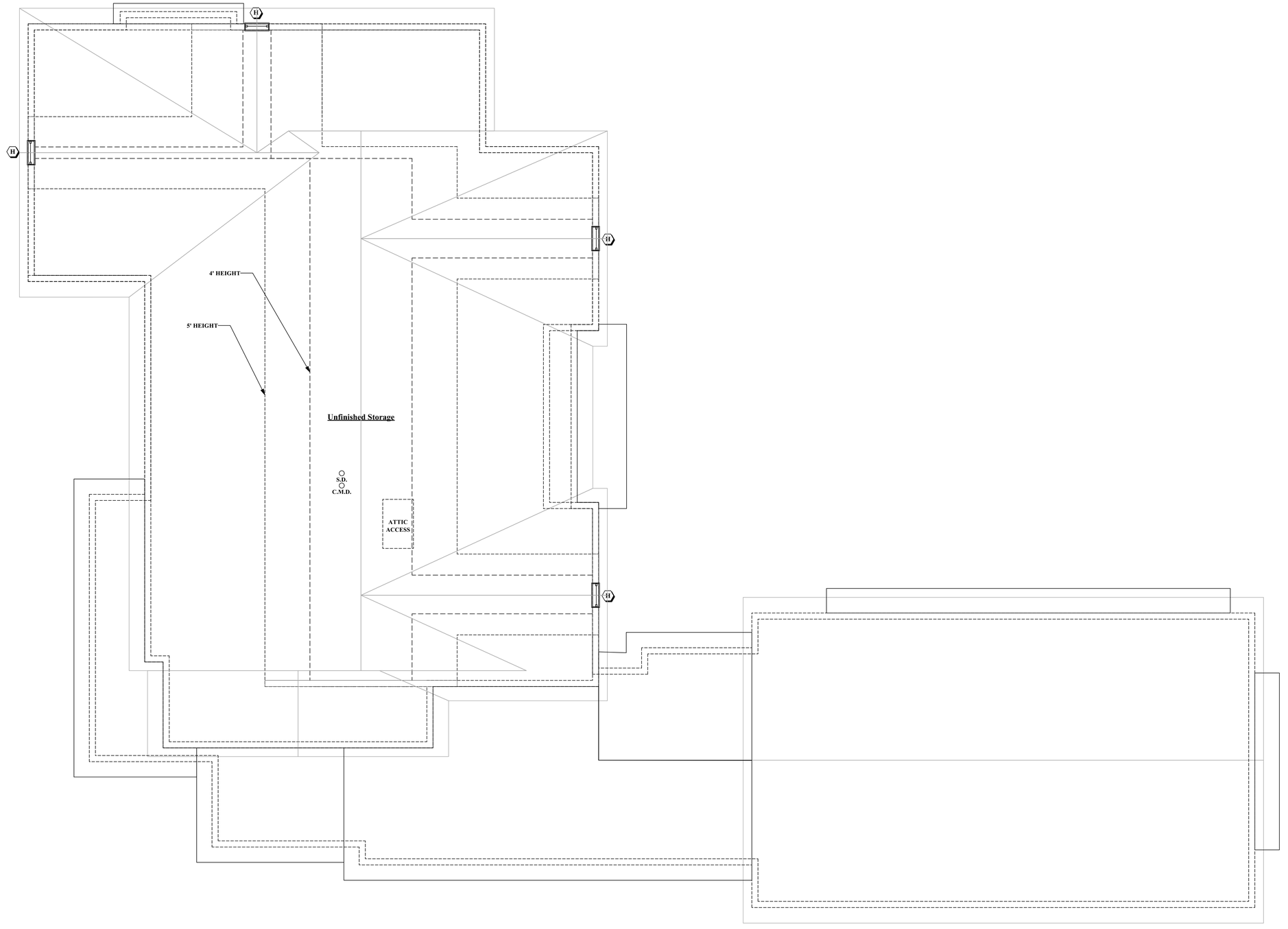
Second Floor Plan

JOB NO	
DATE	02/23/23
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

A-1.3



1 / A-1.4 **Attic Floor Plan**
1/4" = 1'-0"

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Attic Plan

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DATE	02/23/23
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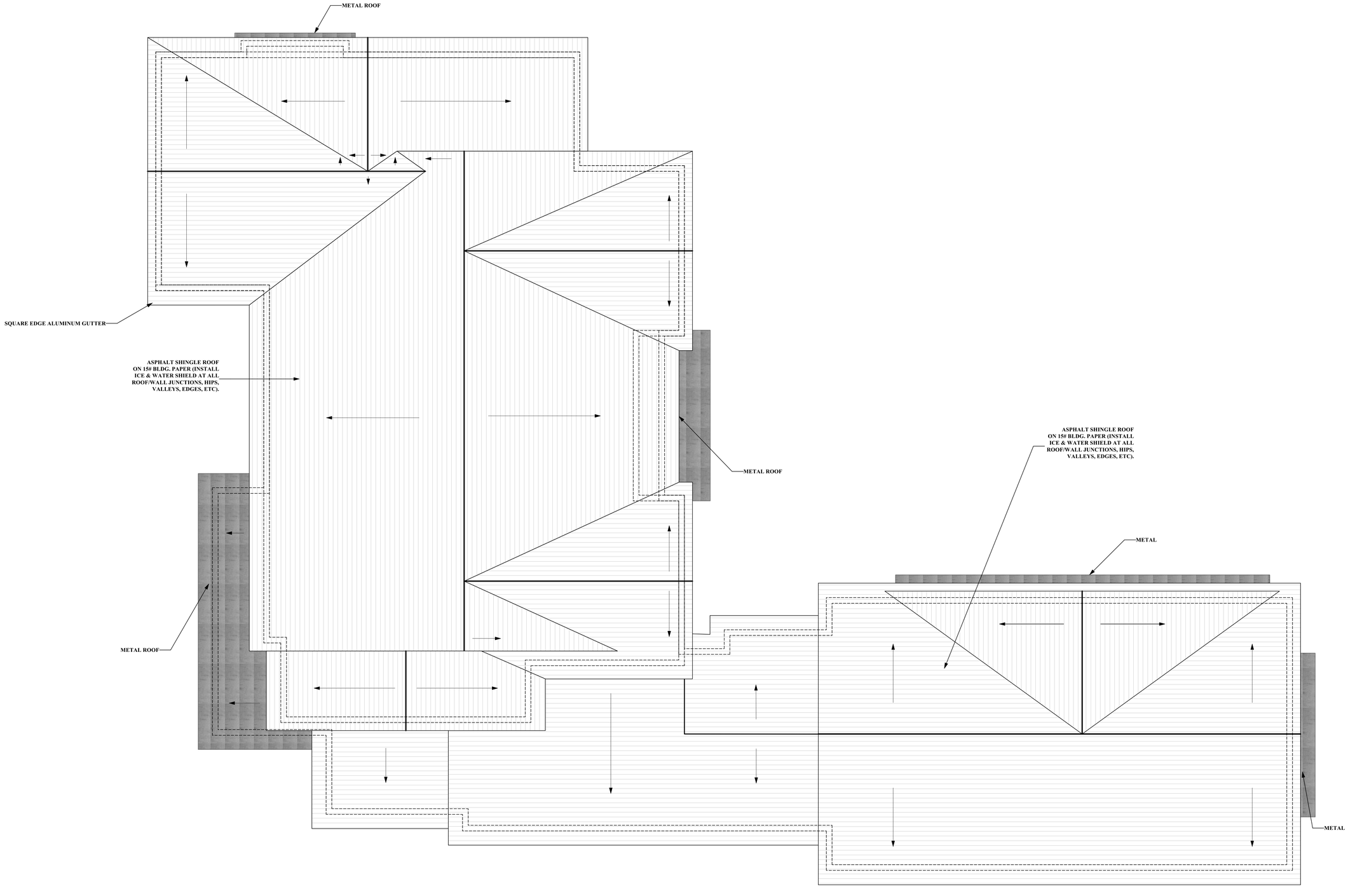
CKD BY	MLM
SCALE	AS NOTED

A-1.4



1 / A-1.5 **Roof Plan**
1/4" = 1'-0"

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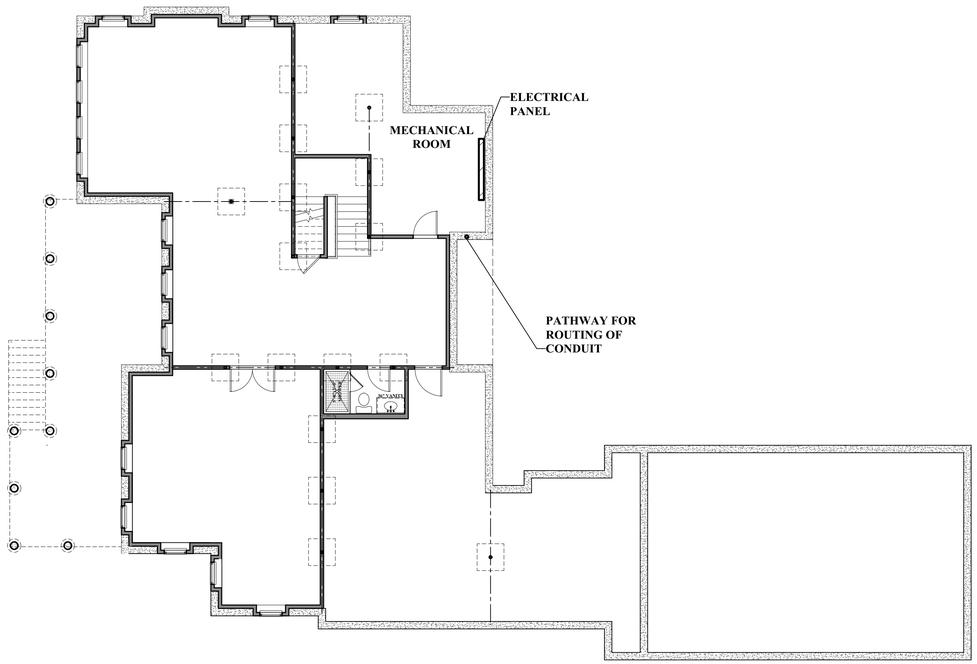
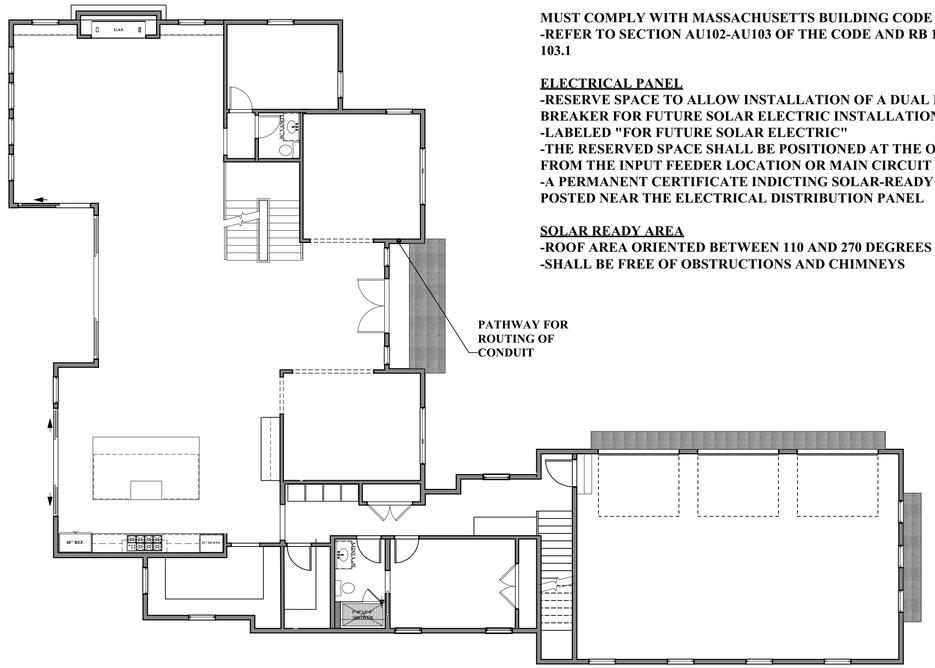
Roof Plan

JOB NO	
DATE	02/23/23
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

A-1.5



1 A-1.1 **Basement Floor Plan**
1/8" = 1'-0"

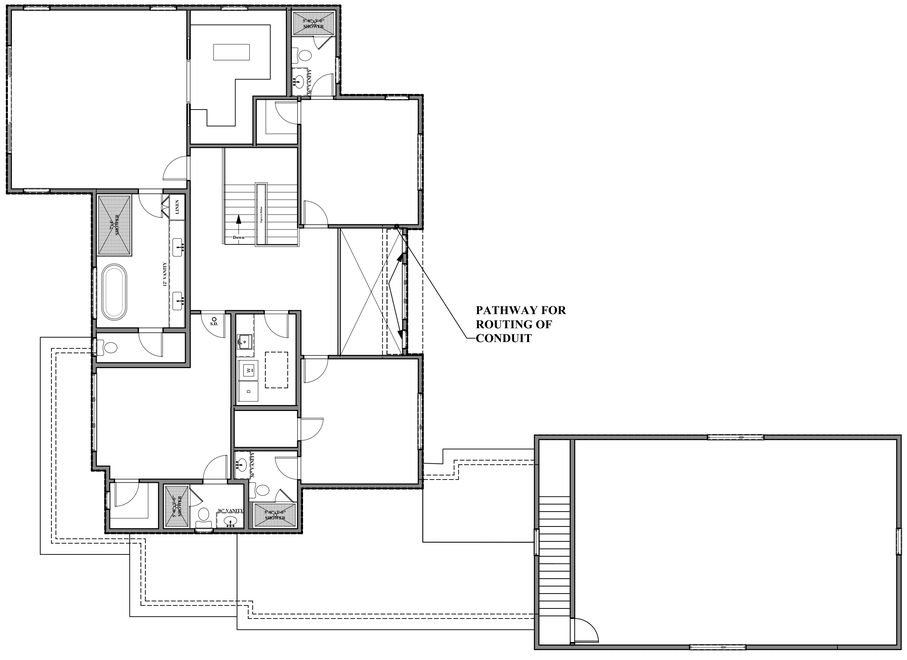


1 A-1.2 **First Floor Plan**
1/8" = 1'-0"

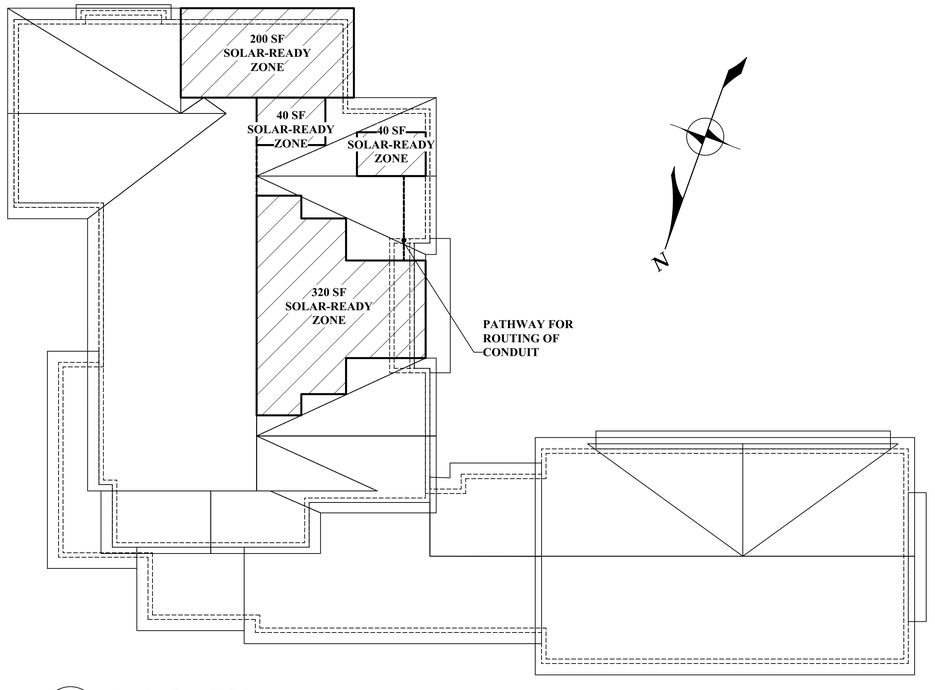
MUST COMPLY WITH MASSACHUSETTS BUILDING CODE
-REFER TO SECTION AU102-AU103 OF THE CODE AND RB 103.5, 8, 9 & RB 103.1

ELECTRICAL PANEL
-RESERVE SPACE TO ALLOW INSTALLATION OF A DUAL POLE CIRCUIT BREAKER FOR FUTURE SOLAR ELECTRIC INSTALLATION
-LABELED "FOR FUTURE SOLAR ELECTRIC"
-THE RESERVED SPACE SHALL BE POSITIONED AT THE OPPOSITE END FROM THE INPUT FEEDER LOCATION OR MAIN CIRCUIT LOCATION
-A PERMANENT CERTIFICATE INDICTING SOLAR-READY ZONE SHALL BE POSTED NEAR THE ELECTRICAL DISTRIBUTION PANEL

SOLAR READY AREA
-ROOF AREA ORIENTED BETWEEN 110 AND 270 DEGREES OF TRUE NORTH
-SHALL BE FREE OF OBSTRUCTIONS AND CHIMNEYS



1 A-1.3 **Second Floor Plan**
1/8" = 1'-0"



1 A-1.4 **Attic/Roof Plan**
1/8" = 1'-0"

New Residence

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Needham, MA

OWNER

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Dedham, MA 02026
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REGISTERED ARCHITECT — MICHAEL L. MCKAY — NO. AR 6947 — COMMONWEALTH OF MASSACHUSETTS

REV #	DATE	ISSUANCE
1	11/03/22	First Draft
2	11/22/22	Second Draft
3	11/29/22	Third Draft
4	02/23/23	Fourth Draft
5	07/21/23	Fifth Draft
6	08/16/23	Sixth Draft

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Solar

JOB NO	
DATE	02/23/23
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

A-1.6

1 / A-2.1 Front Elevation
1/4" = 1'-0"

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Front Elevation

JOB NO	
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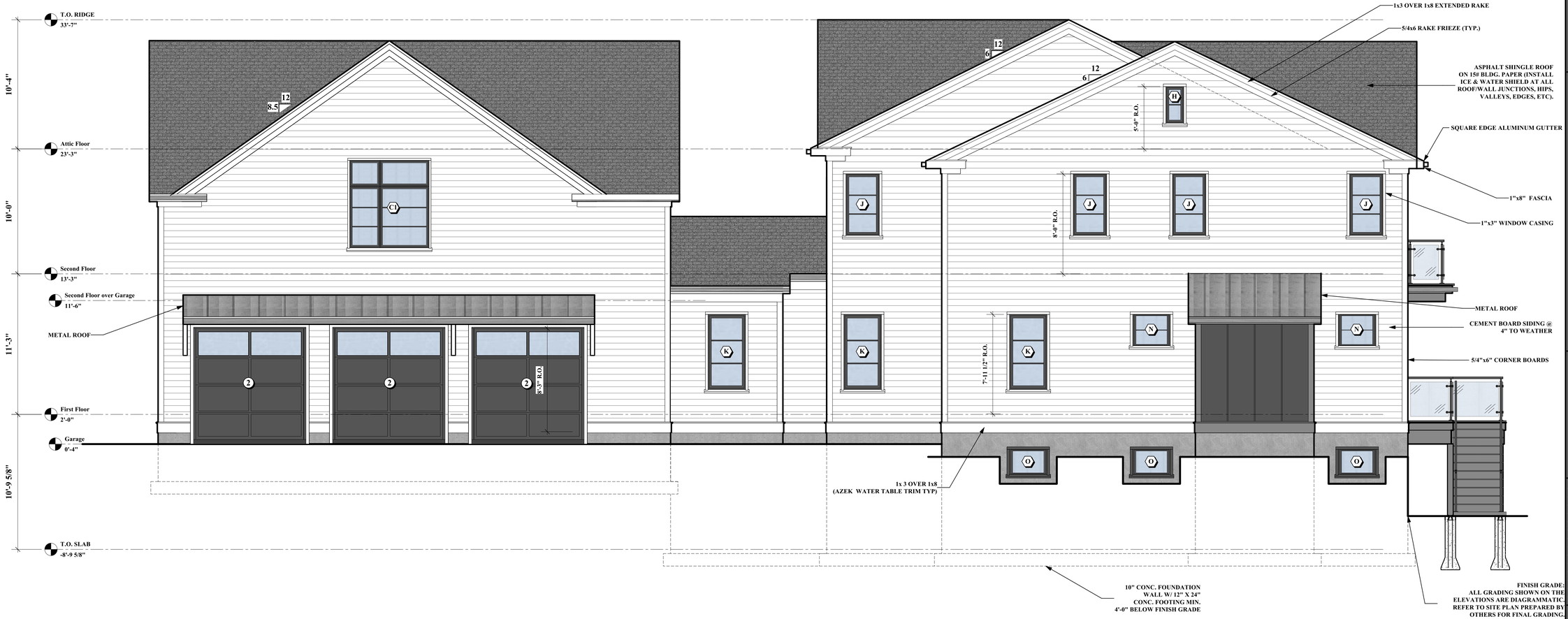
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

A-2.1



1 / A-2.2 Right Side Elevation
1/4" = 1'-0"

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Right Side Elevation

JOB NO	
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CKD BY	MLM
SCALE	AS NOTED

A-2.2

1 / A-2.3 Rear Elevation
1/4" = 1'-0"

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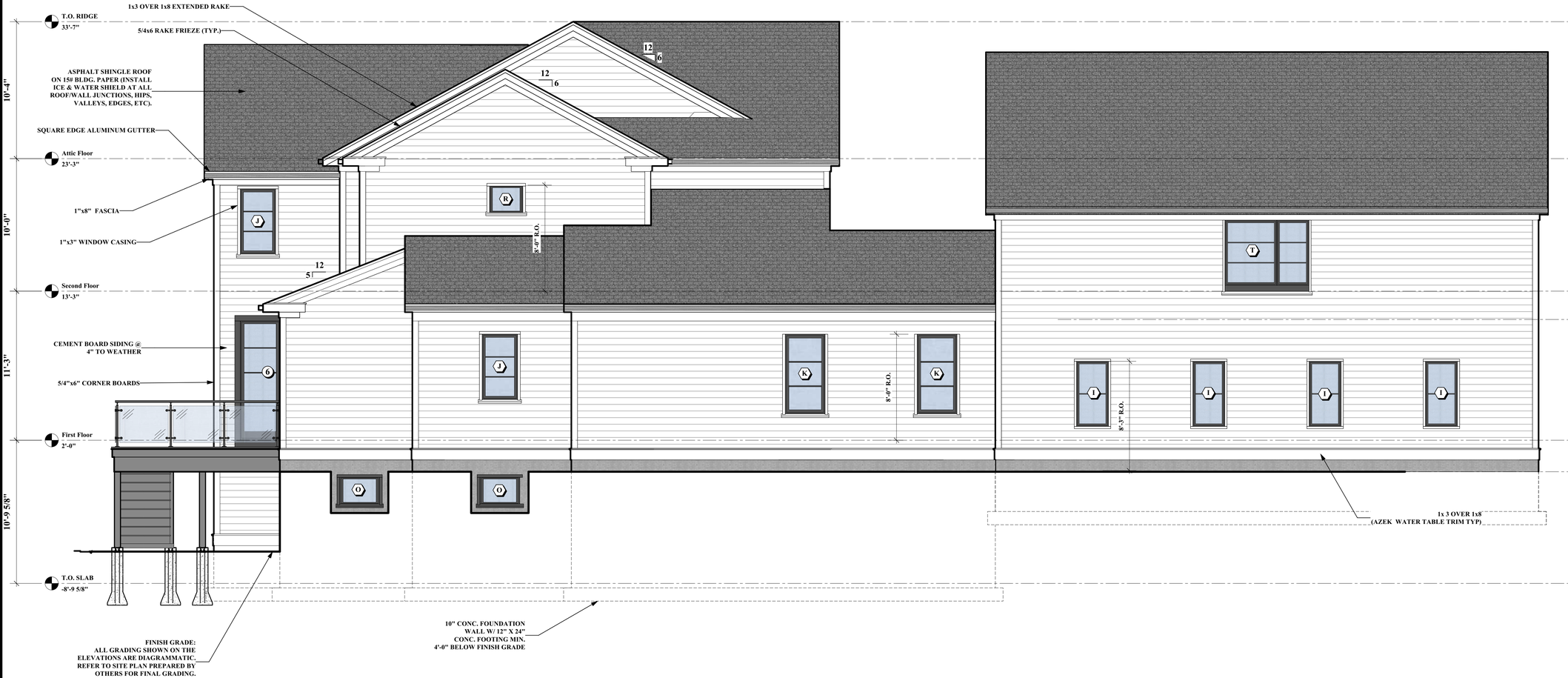
Rear Elevation

JOB NO	
DATE	02/23/23
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

A-2.3



1 / A-2.4 Left Side Elevation
1/4" = 1'-0"

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11'-9"
Second Floor over Garage

REGISTERED ARCHITECT
MICHAEL L. MCKAY
NO. 6947
COMMONWEALTH OF MASSACHUSETTS

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Left Side Elevation

JOB NO	
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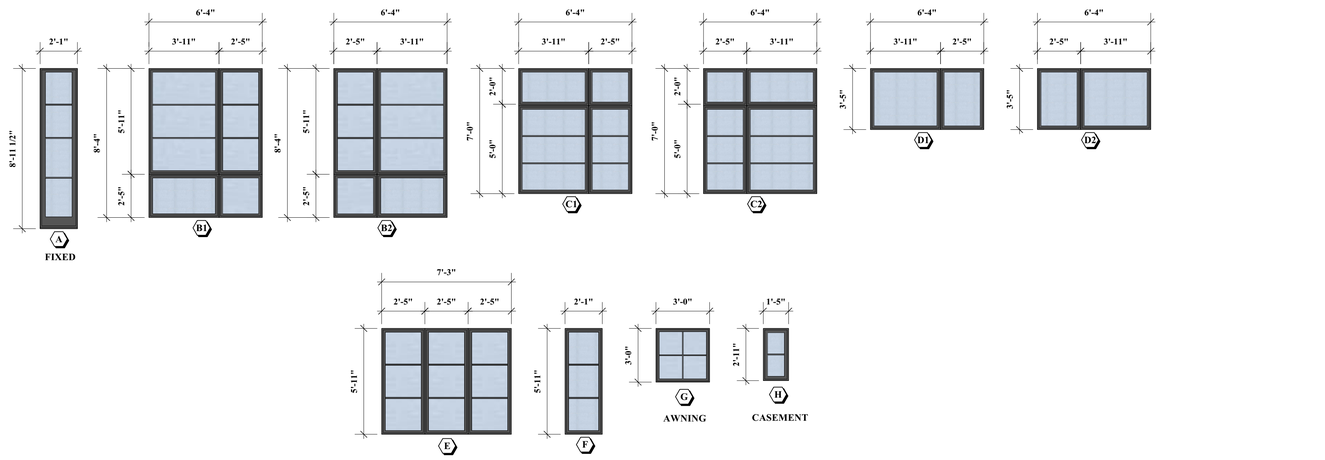
CKD BY	MLM
SCALE	AS NOTED

A-2.4

WINDOW SCHEDULE



SHOP DRAWINGS OF WINDOWS ARE TO BE PROVIDED PRIOR TO ORDERING.

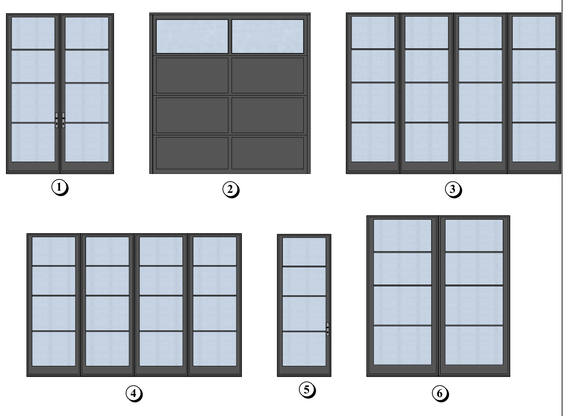
ALL WINDOWS AND PATIO DOORS ARE TO BE MANUFACTURED BY PELLA WINDOWS OR OWNER APPROVED EQUAL. PROVIDE SIMULATED DIVIDED LITE PATTERNS AS INDICATED. ALL UNITS ARE TO BE BLACK CLAD. UNITS ARE TO HAVE 6 5/16" JAMB THICKNESS & WHITE HARDWARE WITH FACTORY PROVIDED SCREENS. INTERIOR OF UNIT IS TO BE FACTORY PRIMED WHITE. PATIO DOORS ARE TO HAVE LOCKING HARDWARE PROVIDED WITH SCREEN DOOR UNITS. ALL GLAZING IS TO BE LOW-E INSULATED GLASS WITH U-VALUE OF .30 OR BETTER.

DOOR SCHEDULE

DOOR NO.	LOCATION / TYPE	SIZE	DETAILS HEAD	DETAILS JAMB	REMARKS
1	EXTERIOR / (ENTRY)	(2) 3'-0"x9'-0"	WOOD	WOOD	PAIR
2	EXTERIOR / (GARAGE)	9'-0"x9'-0"	WOOD	WOOD	GARAGE OVERHEAD
3	EXTERIOR / (TYP)	12'-0"x8'-0"	WOOD	WOOD	SLIDER
4	EXTERIOR / (PRIMARY BED)	12'-0"x8'-0"	WOOD	WOOD	SLIDER
5	EXTERIOR / (GUEST BED)	3'-0"x8'-0"	WOOD	WOOD	
6	EXTERIOR / (FAMILY)	8'-0"x9'-0"	WOOD	WOOD	SLIDER
7	INTERIOR / GARAGE	3'-0"x8'-0"	WOOD	WOOD	"C" LABEL DOOR
8	INTERIOR / (TYP)	2'-6"x8'-0"	WOOD	WOOD	
9	INTERIOR / (TYP)	2'-8"x8'-0"	WOOD	WOOD	
10	INTERIOR / (TYP)	(2) 2'-6"x8'-0"	WOOD	WOOD	BI-PARTING POCKET
11	INTERIOR / (TYP)	(2) 2'-6"x8'-0"	WOOD	WOOD	PAIR
12					
13					
14					
15					
16					
17					
18					
19					

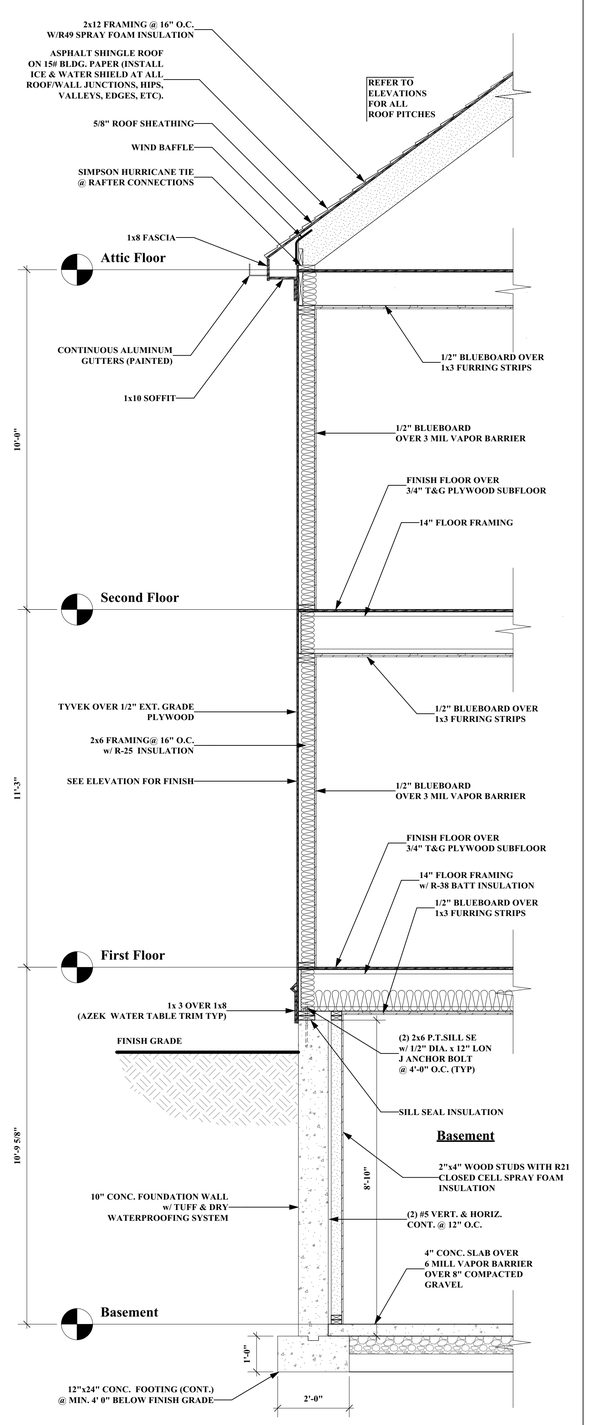
NOTE:

SHOP DRAWINGS OF DOORS ARE TO BE PROVIDED PRIOR TO ORDERING.



FINISH SCHEDULE

ROOM NO.	ROOM NAME	FLOOR	BASE	WALLS NORTH	WALLS EAST	WALLS SOUTH	WALLS WEST	CEILING	REMARKS
001	UNFINISHED/MECHANICALS								
002	STAIR	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
003	LOWER FAMILY	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
004	GYM	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
005	BATH	TILE	WOOD	GWB	GWB	GWB	GWB	GWB	
006	UNFINISHED / STORAGE								
101	FOYER	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
102	STAIR	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
103	LIVING	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
104	OFFICE	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
105	POWDER	TILE	WOOD	GWB	GWB	GWB	GWB	GWB	
106	FAMILY	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
107	KITCHEN	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
108	PANTRY	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
109	DINING	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
110	MUD ROOM	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
111	BATH	TILE	WOOD	GWB	GWB	GWB	GWB	GWB	
112	GUEST BEDROOM	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
113	3 CAR GARAGE			GWB	GWB	GWB	GWB	GWB	5/8" TYPE "X" GWB
114	SITTING ROOM	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
115	BAKERS KITCHEN	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
201	STAIR	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
202	BEDROOM 4	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
203	CLOSET 4	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
204	BATH 4	TILE	WOOD	GWB	GWB	GWB	GWB	GWB	
205	PRIMARY CLOSET	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
206	PRIMARY BEDROOM	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
207	PRIMARY BATH	TILE	WOOD	GWB	GWB	GWB	GWB	GWB	
208	BEDROOM 2	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
209	CLOSET 2	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
210	BATH 2	TILE	WOOD	GWB	GWB	GWB	GWB	GWB	
211	BATH 3	TILE	WOOD	GWB	GWB	GWB	GWB	GWB	
212	CLOSET 3	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	
213	LAUNDRY	TILE	WOOD	GWB	GWB	GWB	GWB	GWB	
214	BEDROOM 3	WOOD	WOOD	GWB	GWB	GWB	GWB	GWB	



1 / A-3.2 Typical Section
1/2" = 1'-0"

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Schedules and Typical Section

JOB NO	
DATE	02/23/23
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

A-3.1

General Notes Design Loads
Massachusetts state building code code regulation 780 CMR 51.00 9th edition

1. Floor live loads: residential: 40 PSF
2. Ground snow load (PG): 40 PSF
3. Wind load basic wind speed (exposure C)- 127 MPH
4.Temporary shores shall be designed, erected, supported, braced, and maintained by the contractor to support safely all dead loads presently carried by the structural work being shored, and any construction live loads.
5. All dimensions, elevations, shelves, beam pockets, cut-outs, underground utilities, piers, footings, slabs, and all other items shall be fully coordinated with civil, geotechnical, mechanical, architectural and all other trades' drawings prior to construction

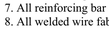
Foundation Plan:
Scale:1/4" = 1'-0"

Foundation Plan Notes:
1. T.O. First floor sub floor shall be called elevation 0'-0"
2. All dimensions, elevations, shelves, beam pockets, cut-outs, underground utilities, piers, footings, slabs, and all other items shall be fully coordinated with civil, geotechnical, mechanical, architectural and all other trades' drawings prior to construction.
3. See general notes for additional foundation information & specifications.

Foundation Notes:
1. All topsoil, subsoil, and oil containing organic or unsuitable bearing material shall be cleared from the building footprint.
2. All soil supported footings shall be founded upon compacted natural subgrade or compacted bank run gravel fill with a bearing capacity of at least 3000 PSF. Soil bearing capacity shall be verified by a professional engineer registered in the project state.
3. G.C. shall be responsible for determining the site's suitability to support the building. Furthermore, the G.C. shall be responsible for constructing the building and surrounding site/subgrade in strict accordance with this requirement.
4. All footings shall extend at least 48" below finished grade. G.C. shall coordinate all proposed grades prior to construction.
5. Bedrock/ Ledge shall be excavated a minimum of 4" below bottom of footing elevation and covered with a layer of compacted gravel.
6. Soil shall be compacted to not less than 95% of maximum dry density per ASTM D1557 in lifts not to exceed 6" loose depth.
7. Backfill symmetrically against all foundation walls in increments not to exceed 2 feet maximum differential.
8. See plumbing and electrical drawings for under floor systems and special granular fill material requirements.
9. No footings or slabs shall be poured into or against subgrade containing free water or ice.
10. All slabs-on-grade shall be placed on a layer of compacted fine granular fill under a 10 MIL. Poly vapor retarder. Coordinate additional subgrade preparation requirements with civil and/or geotechnical engineers of record.
11. All slabs-on-grade shall be placed on a vapor barrier on a 6" compacted gravel base.
12. Forces due to hydrostatic pressure have not been considered in the design of the foundation for this structure. It is the responsibility of the General Contractor/owner to confirm with a geotechnical engineer, civil engineer, or other qualified design professional to ensure hydrostatic forces do not exist.
13. General Contractor shall coordinate all insulation, drainage, damp-proofing and water-proofing details with Architect of record.
14. A modified proctor test shall be performed by a soils testing lab on each type of soil to be compacted.
15. Field density tests shall be performed by an independent soils testing lab to verify compaction. A copy of all test reports shall be filed with the Architect of record.

Concrete Notes:
1. All footing and wall concrete shall have a compressive strength of not less than 4000 PSI at 28 days (entrained air content between 4.5% and 7%)
2. All interior slab concrete shall have a compressive strength of not less than 3000 PSI at 28 days and contain no air entrainment.
3. All exterior slab concrete shall have a compressive strength of not less than 4000 PSI at 28 days (entrained air content between 4.5% and 7%).
4. All concrete shall contain an approved water-reducing admixture.
5. No calcium chloride shall be used in any concrete.
6. All reinforcing bars shall be ASTM A-615 grade 60 unless noted otherwise.
7. All reinforcing bar splices shall conform to requirements of ACI 318, but in no case shall they be less than 2'-0" or 48xDIA.
8. All welded wire fabric shall conform to ASTM A-185, Fy=60 KSI
9. All welded wire fabric shall be lapped two (2) full mesh panels at sides and ends and be securely wired together.
10. See architectural drawings for type and location of all floor finishes, floor depressions and cut outs.
11. Coordinate all foundation penetrations with Architect, plumbing, mechanical, electrical contractors and local agencies.
12. All concrete shall be detailed, formed, handled, placed, and protected in accordance with procedures and guidelines prescribed in the latest edition of "building code requirements for reinforced concrete" ACI-318, manual of standard practice for reinforced concrete structures, ACI-201, and ACI-305/306 guides for hot/cold weather concreting.
13. General Contractor shall carefully coordinate all form-work, rebar placement, concrete mix design, and concrete placement to ensure accurate and complete concrete distribution throughout. All precautions, shall be taken to avoid "honeycombing" and voids in concrete foundation. Techniques, such as pre-staging concrete vibrators in congested areas, modified concrete mix designs to promote complete distribution, etc. shall be employed at the contractor's discretion.
14. Concrete voids and excessive "honey-combing" shall be documented and reported to the Architect of record for analysis and preparation of a repair method. Parging, Dry-packing, and "floating" the adjacent slab to fill voids are un-acceptable methods of repair for filling significant voids.
15. G.C. shall coordinate all concrete finishes with Architect of record. All concrete that shall be considered architecturally exposed shall be poured and finished in a manner which will produce the desired architectural finish. G.C. shall coordinate the concrete mix design (I.E. self-consolidating concrete), rebar placement, and methods of vibration to produce a fully consolidated concrete pour fee of voids and/or "honey-combing".
16. Checked shop drawings (5 sets) showing reinforcing details, including steel sizes, spacing and placement, shall be submitted by the contractor for approval prior to fabrication. The General Contractor must review the shop drawings prior to submission to the Architect of record. All copies of the shop drawing submittals shall bear a dated and signed shop drawing stamp which documents the General Contractor's approval.
17. A mix design (5 copies) shall be submitted for approval for each type of concrete. Mix design submittal shall include historical break data for each mix of concrete.
18. A set of four (4) concrete tests cylinders shall be taken by an independent concrete testing lab on each day when concrete placement exceeds 5 cubic yards. One cylinder shall be broken at 7 days, two at 28 days, and one at 56 days. A copy of all test reports shall be filed with the Architect of record.

First Floor Framing:
Scale:1/4" = 1'-0"

Plan Notes:
1. #J-#K Jack and King studs shall be same dimensional stud lumber as adjacent studs. (i.e. 2J-2K means 2 full-height king studs with 2 jack studs supporting the header)
2. 

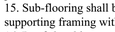
- indicates Simpson Strong-Tie type hanger required at beam connection. All Simpson hangers shall be installed per manufacturer's specifications with the maximum fastener size and quantity.
3. "Lally Column" all lally columns shall be filled solid with concrete. Provide 1/2" thick "Springfield" cap and base plates at all lally columns.
4. Unless otherwise notes on plans, all headers over door and window openings shall be supported on ea. end by a single jack stud ganged to a double king stud.
5. Beams and columns on plan marked "P.T." denote pressure treated or wolmanized lumber.
6. Refer to general notes for further requirements.
7. All full-height columns which pass through floor or ceiling framing systems shall be fully blocked and tied into that framing to effectively brace the column in both directions.
8. All platform framed posts, walls, and/or beam loads shall be transferred to supports below with cripple studs, "squash blocks", and/or full-depth solid blocking.
9. All multi-ply wood and/or engineered members shall be ganged together in accordance with manufacturer's requirements and prevailing state building code.
10. Refer to general notes and prevailing state building code for connections not specifically specified on plans.
11. Member layout depicted on this plan is intended as a general guide to framing. The exact framing layout, material take-off, and framing method shall be closely coordinated wit the architectural and structural drawings and ultimately determined by the General Contractor. Any substantial change in framing method/layout shall be reported to Architect of record.
12. All dimensions, elevations, shelves, beam pockets, cut-outs, underground utilities, piers, footings, slabs, and all other items shall be fully coordinated with civil, geotechnical, mechanical, architectural, and all other trades' drawings prior to construction.
13. All trim, soffits, rakes, eaves, brackets, gutters, corbels, build-outs, pad-outs, and all other applied architectural features and embellishments be the responsibility of others and fully coordinated with the Architect of record.

General Notes Pre-Engineered Wood Trusses:
1. Wood trusses shall be designed per the "design specification for metal plate connected wood trusses," published by the truss plate institute.
2. All roof trusses and overhanging wood members shall be held down with uplift anchors per truss manufacturer's requirements.
3. Wood truss fabricator shall submit to the Architect for approval prior to fabrication, shop drawings bearing seal and signature of the design professional engineer, registered in the state of Massachusetts. Shop drawings shall be reviewed and approved by the General Contractor prior to submitting to Architect. Shop drawings shall include but are not limited to: truss layout plan; truss detail sheets showing configuration, dimensions, loads, member sizes, and grades, member forces, connection plate sizes, permanent bracing requirements, uplift anchorage hardware (specified by truss designer), etc.
4. Truss designer shall include all loads required by the Massachusetts state building code and all further requirements included in the structural and architectural contract documents. Additional requirements may include, but are not limited to additional design loads due to wind and/or earthquake, snow drifting, point loads and/or additional loading from other framing members, special top chord slope requirements for drainage etc. truss designer shall carefully coordinate all loads due to mechanical equipment and plumbing fixtures with the G.C., Architect, and mechanical design.
5. Truss designer shall design, manufacture, and furnish all floor trusses which meet a live load deflection criteria of L/600 and all roof trusses which meet a total load deflection criteria of the lesser of ¾" or L/360 unless specifically approved otherwise.
6. Wood truss erector shall be responsible for design and installation of all temporary erection bracing.
7. Truss spacing shown in structural engineering plans are for reference only. General Contractor shall refer to approved truss shop drawings for actual truss layout and spacing (for both bidding and construction purposes).
8. Truss layout and design shall be coordinated with the mechanical equipment layout.

Structural Lumber, Engineered Lumber:
1. All material and workmanship shall be in accordance with the latest edition of "timber construction standards" of the American Institute of Timber Construction and the "National Design Specification for Stress-Grade Lumber and its Fastenings" of the National Forest Products Association.
2. The minimum grades and design values required for conventional, structural lumber shall be:
3. Studs: construction grade spruce-pine-fir, FC= 1000 PSI, E=1,300,000 PSI
4. Joists/Rafters/Beams: spruce-pine-fir No.2, FB=875 PSI, E=1,400,000 PSI
5. Pressure treated lumber: Southern Pine No.1, E=1,400,000 PSI
6. All exterior wall studs shall be at least 2x6 @ 16" O.C. unless noted otherwise. Furthermore, all wall studs adjacent to steel columns shall be fastened to face of column with Hilti X-U powder driven fasteners @ 16" O.C.
7. All multiple member beams and headers shall be supported on not less than an equal number of studs at each end, unless noted otherwise.
8. Wood columns made with three or more wood studs shall be nailed together with 16d nails. Nail spacing shall be in 2 rows, spaced 8" O.C. from both sides staggered 4" apart.
9. Unless otherwise noted, all exterior openings shall have not less than one jack stud and two full height studs at each side of the opening. All interior bearing wall openings shall have not less than two jack studs and one full height stud at each side of the opening unless noted otherwise.
10. All conventional lumber roof rafters shall have a Simpson Uplift Anchor at each bearing location. Use Simpson LSSU Skewed and/ or Sloped Hangers at each rafter as required. Provide and install 1.25"x20 GA ridge straps (10) 8d nails) at all conventional rafter pairs (or approved substitution).
11. Flush framing shall be supported by joist hangers designed for the full capacity of the supported member.
12. Provide and install double floor joists or properly designed trusses under all partitions running parallel to span.
13. All wood in contact with concrete or masonry shall be pressure treated with preservative.
14. Exterior wall sheathing shall be minimum 15/32 APA structural I rated sheathing or exterior grade. Sheathing shall be nailed with 8d nails not less than 6" O.C. on all panel edges. All wall horizontal panel edges within 48" of building corners must be blocked and nailed. Sheathing panels shall be installed to span across floor levels (centered on band joist) to achieve continuous uplift load path from roof to foundation.
15. Sub-flooring shall be ¾" tongue & groove APA Structural I Rated Sheathing exposure I unless noted otherwise. Fasten sub-floor to supporting framing with industry standard sub-floor adhesive and 8d nails @ 6" O.C.
16. Roof sheathing on flat roofs shall be minimum ¾" T&G APA Structural I Rated Sheathing.
17. Roof sheathing on non-curved sloping framing shall be minimum 5/8" T&G APA structural I rated sheathing.
18. Roof sheathing on flat roofs and non-curved sloping framing shall be nailed with 8d nails not more than 6" O.C. on all supported panel edges. Nails shall be spaced 4" O.C. in areas within 48" of ridges, hips, rakes, and eaves.
19. Roof sheathing on curved framing members shall be three layers on ¼" APA Rated Plywood sheathing with end and side joists staggered between successive layers. Each layer of sheathing shall be fastened to the supporting framing with 8d rink-shank nails @ 12" O.C. all nails shall be staggered between nails from successive layers.
20. Solid blocking shall be provided at ridges and eaves to support and fasten panel edges in all circumstances for all roof types where standard framing does not provide substrate for continuous panel edge support and fastening.
21. Engineered lumber supplier shall submit to the engineer of record for approval, shop drawings for all engineered lumber and I-Joists. Shop drawings shall include but are not limited to: Framing layout plan, member sizes, nailing patterns for multiple members, bearing lengths, connection hangers, blocking bridging, and squash blocks.
22. Laminated Veneer Lumber (LVL), Laminated Strand Lumber (LSL) and Parallel Strand Lumber (PSL) shall be versa-lam by boise cascade or equal.
23. LVL and PSL beams shall have the following minimum properties: FB=3100 PSI, FT= 2150 PSI, FC=750 PSI, FC= 3000 PSI, FV= 285 PSI, E=2,000,000 PSI
24. PSL columns/posts shall have the following minimum properties: FB=2650 PSI, FT=1650 PSI, FC=750 PSI, FC= 3000 PSI, FV=285 PSI, E=1,700,000 PSI
25. LVL's and PSL's shall be free of finger joints, scarf joints or mechanical connections for the full length of the member.
26. Adhesive used shall be waterproof, meeting the requirements of ASTM D-2559-76.
27. All Simpson Connectors (hangers, straps, uplift connectors, post caps, etc.) shall be coated with z-max corrosion resistance or approved substitute.
28. All fasteners in contact with pressure-treated lumber shall be certified for use with the preservative treatment used.
29. All fasteners exposed to moisture, expected condensation, pressure treated lumber, and/or the weather shall be made from non-corrosive materials or coated with an approved anti-corrosive coating certified and approved for use with the materials to be fastened.
30. All porch roof and floor beams shall be fastened to resist uplift loads with Simpson 20GA coil straps. Straps shall be centered over the top of the beam and bent down along both sides of post. Fasten straps with IOD nails through all available nail holes.
31. All ceiling framing (including truss bottom chords) adjacent to exterior walls shall be framed in order to brace the exterior walls against lateral movements. Coordinate all ceiling framing with Architect of record.
32. At all over framed roof conditions framed with conventional lumber, provide & install continuous 2x8 cleat fastened through sheathing and into each roof rafter with (2) #10 decking screws. Fasten over-framed rafters to cleat with (4) 16d toe-nails and single #10 decking screw through top of rafter.

Second Floor & Low Roof Framing
Scale:1/4" = 1'-0"

Plan Notes:
1. #J-#K jack and king studs shall be same dimensional stud lumber as adjacent studs. (i.e. 2J-2K means 2 full-height king studs with 2 jack studs supporting the header).

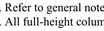
2. 

- indicates Simpson Strong-Tie type hanger required at beam connection. All Simpson hangers shall be installed per manufacturer's specifications with the maximum fastener size and quantity.
3. "Lally Column" all lally columns shall filled solid with concrete. Provide ½" thick "Springfield" cap and base plates at all lally columns.
4. Unless otherwise noted on plans, all headers over door and window openings shall be supported on ea. end by a single jack stud ganged to a double king stud.
5. Beams and columns on plan marked "P.T." denote pressure treated or wolmanized lumber.
6. Refer to general notes for further requirements.
7. All full-height columns which pass through floor or ceiling framing systems shall be fully blocked and tied into that framing to effectively brace the column in both directions.
8. All platform framed posts, walls, and/or beam loads shall be transferred to supports below with cripple studs, "squash blocks" and/or full-depth solid blocking.
9. All multi-ply wood and/or engineered members shall be ganged together in accordance with manufacturer's requirements and prevailing State Building Code.
10. Refer to general notes and prevailing State Building Code for connections not specifically specified on plans.
11. Member layout depicted on this plan is intended as a general guide to framing. The exact framing layout, material take-off, and framing method shall be closely coordinated with the architectural and structural drawings and ultimately determined by the General Contractor. Any substantial change in framing method/layout shall be reported to Architect of record.
12. All dimensions, elevations, shelves, beam pockets, cut-outs, underground utilities, piers, footings, slabs, and all other items shall be fully coordinated with civil, geotechnical, mechanical, architectural and all other trades' drawings prior to construction.
13. All trim, soffits, rakes, eaves, brackets, gutters, corbels, build-outs, pad-outs, and all other applied architectural features and embellishments be the responsibility of others and fully coordinated with the Architect of record.

Structural Steel Notes:
1. All detailing, fabrication and erection shall conform to the AISC specifications and codes, latest edition.
2. All wide flange section structural beams (W) shall be ASTM A992 Fy=50 KSI. Base plates, channels, angles, and misc. structural steel shall be ASTM A-36, Fy= 36 KSI. All square and rectangular hollow structural sections (HSS) shall be ASTM A-500 grade B FY minimum 46 KSI.
3. All anchor bolts and threaded rods shall conform to the requirements of ASTM F1554 and A307.
4. All bolts, nuts, and washers shall conform to the requirements of ASTM A-325 for ¾" diameter high strength bolts unless noted otherwise.
5. All welding electrodes shall be E7OXX.
6. All welding shall be done by certified welders and shall conform to the AWS "code for ARC and gas welding in building construction", latest edition.
7. No connection shall consist of less than two ¾" diameter bolts or welds developing a minimum of 10,000 pounds unless noted otherwise.
8. All fillet welds shall be a minimum of ¼" unless noted otherwise.
9. All welds shall be visually inspected and all full penetration welds shall be inspected by ultra-sonic testing.
10. An independent steel testing agency shall perform all inspection and testing. The structural steel fabricator and erector shall schedule all work to allow the above testing requirements to be completed. A copy of all test reports shall be filed with the Architect.
11. The contractor shall be responsible for the control of all erection procedures and sequences with relation to temperature differentials and stability.
12. After fabrication, all steel, except that to be galvanized shall be cleaned of all rust, loose mill scale and other foreign materials and receive one coat of approved primer paint or approved prefatory application specified by the corrosion inhibiting coating manufacturer.
13. The fabricator shall furnish checked shop and erection drawings and obtain approval prior to fabricating and structural steel.
14. Cuts, holes, openings, etc. required in structural steel members for the work of other trades shall be shown on shop drawings for structural steel and shall be made in the shop. Burning of holes or cuts in structural steel members in the field will not be permitted except by written permission from the structural engineer of record.
15. Full moment connections shall be designed and detailed to develop the full capacity of the members being connected.
16. Submit shop drawings for review and approval prior to construction.

Upper Roof Framing
Scale: ¼" = 1'- 0"

Plan Notes:
1. #J-#K jack and king studs shall be same dimensional stud lumber as adjacent studs. (e.e.2J-2K means 2 full height king studs with 2 jack studs supporting the header).

2. 

- indicates Simpson Strong-Tie type hanger required at beam connection. All Simpson hangers shall be installed per manufacturer's specifications with the maximum fastener size and quantity.
3. "Lally Column"- All lally columns shall be filled solid with concrete. Provide ½" thick "Springfield" cap and base plates at all lally columns.
4. Unless otherwise noted on plans, all headers over door and window openings shall be supported on ea. end by a single jack stud ganged to a double king stud.
5. Beams and columns on plan marked "P.T." denote pressure treated or wolmanized lumber.
6. Refer to general notes for further requirements.
7. All full-height columns which pass through floor or ceiling framing systems shall be fully blocked and tied into that framing to effectively brace the column in both directions.
8. All platform framed posts, walls, and/or beam loads shall be transferred to supports below with cripple studs, "squash blocks", and/or full-depth solid blocking.
9. All multi-ply wood and/or engineered members shall be ganged together in accordance with manufacturer's requirements and prevailing State Building Code.
10. Refer to general notes and prevailing State Building Code for connections not specifically specified on plans.
11. Member layout depicted on this plan is intended as a general guide to framing. The exact framing layout, material take-off, and framing method shall be closely coordinated with the architectural and structural drawings and ultimately determined by the General Contractor. Any substantial change in framing method/layout shall be reported to Architect of record.
12. All dimensions, elevations, shelves, beam pockets, cut-outs, underground utilities, piers, footings, slabs, and all other items shall be fully coordinated with civil, geotechnical, mechanical, architectural and all other trades' drawings prior to construction.
13. All trim, soffits, rakes, eaves, brackets, gutters, corbels, build-outs, pad -outs, and all other applied architectural features and embellishments be the responsibility of others and fully coordinated with the Architect of record.

First Floor Shear Walls
Scale: ¼" = 1'-0"

Holdown Notes:
1. All threaded rod holdowns shall be fastened to concrete foundations with Hilti Hit Hy 200 EPOXY system installed in strict accordance with manufacturer's requirements.
2. All multi-ply wall studs fastened to holdowns shall be ganged together in accordance with building code and general notes.
3. Where upper wall is not in line with lower wall, "STI" strap holdowns shall be extended through floor sheathing and fastened to beams/blocking below. Strap may be extended down and bent around underside of framing as required. See typical shearwall details for further information.
4. All dimensions, elevations, shelves, beam pockets cut-outs, underground utilities, piers, footings, slabs, and all other items shall be fully coordinated with civil, geotechnical, mechanical, architectural and all other trades' drawings prior to construction.

Second Floor Shear Walls
Scale: ¼" = 1'-0"

Holdown Notes:
1. All threaded rod holdowns shall be fastened to concrete foundations with Hilti Hit Hy 200 EPOXY system installed in strict accordance with manufacturer's requirements.
2. All multi-ply wall studs fastened to holdowns shall be ganged together in accordance with building code and general notes.
3. Where upper wall is not in line with lower wall, "STI" strap holdowns shall be extended through floor sheathing and fastened to beams/blocking below. Strap may be extended down and bent around underside of framing as required. See typical shearwall details for further information.
4. All dimensions, elevations, shelves, beam pockets cut-outs, underground utilities, piers, footings, slabs, and all other items shall be fully coordinated with civil, geotechnical, mechanical, architectural and all other trades' drawings prior to construction.

New Residence

320 Grove Street
Needham, MA

OWNER

mckay architects
35 Bryant Street
Dedham, MA 02026
p: 781.326.5400
www.mckayarchitects.net

REGISTERED ARCHITECT MICHAEL L. MCKAY NO. AR 8947 COMMONWEALTH OF MASSACHUSETTS

REV #	DATE	ISSUANCE
1	11/03/22	First Draft
2	11/22/22	Second Draft
3	11/29/22	Third Draft
4	02/23/23	Fourth Draft
5	07/21/23	Fifth Draft
6	08/16/23	Sixth Draft

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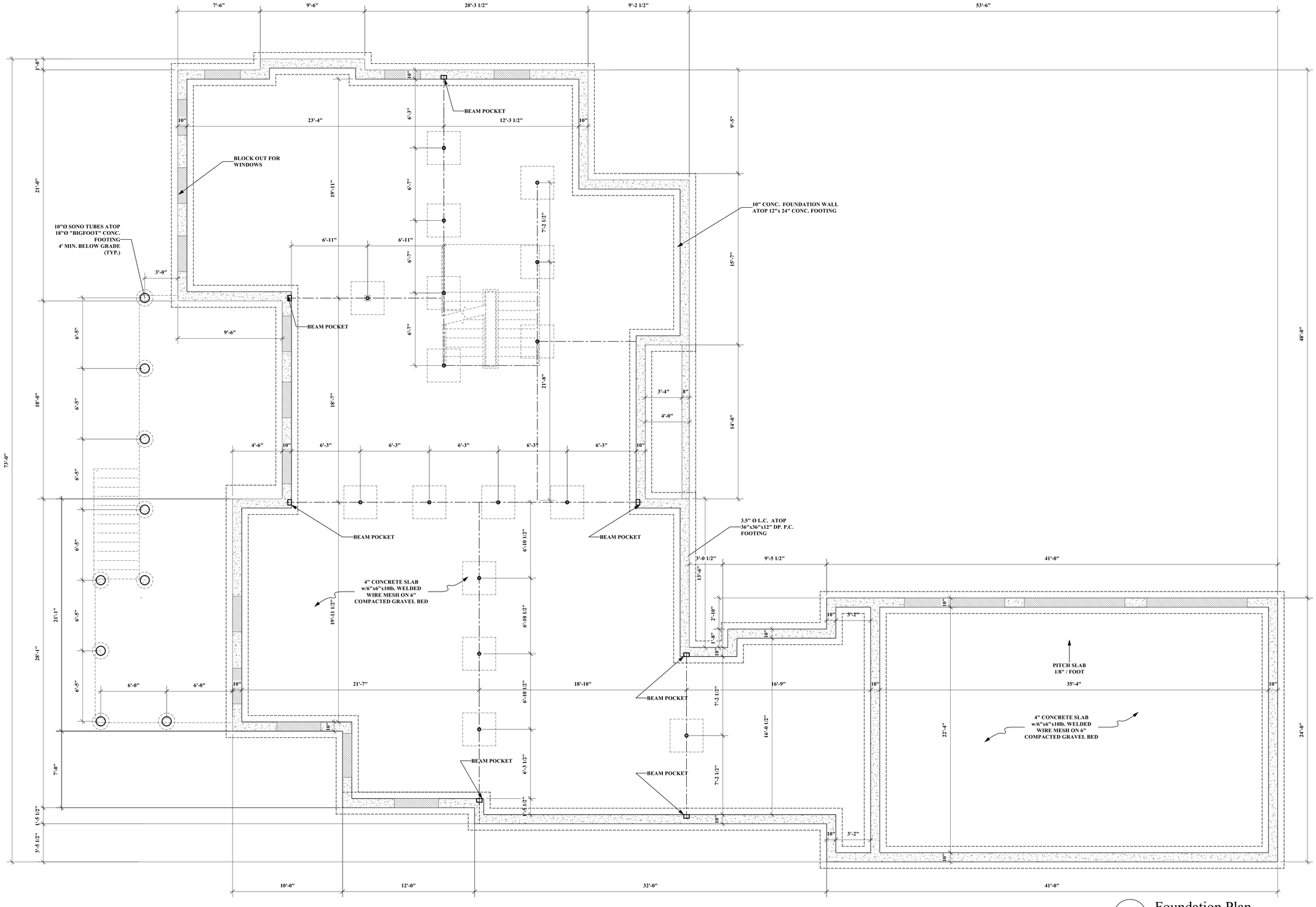
Contractor to verify all information and dimensions in the field prior to start of construction and is to notify McKay Architects of any discrepancies

Structural Notes

JOB NO	
DATE	02/23/23
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

S-0.1



1 / S-1.1 Foundation Plan
1/4" = 1'-0"

New Residence

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Foundation Plan

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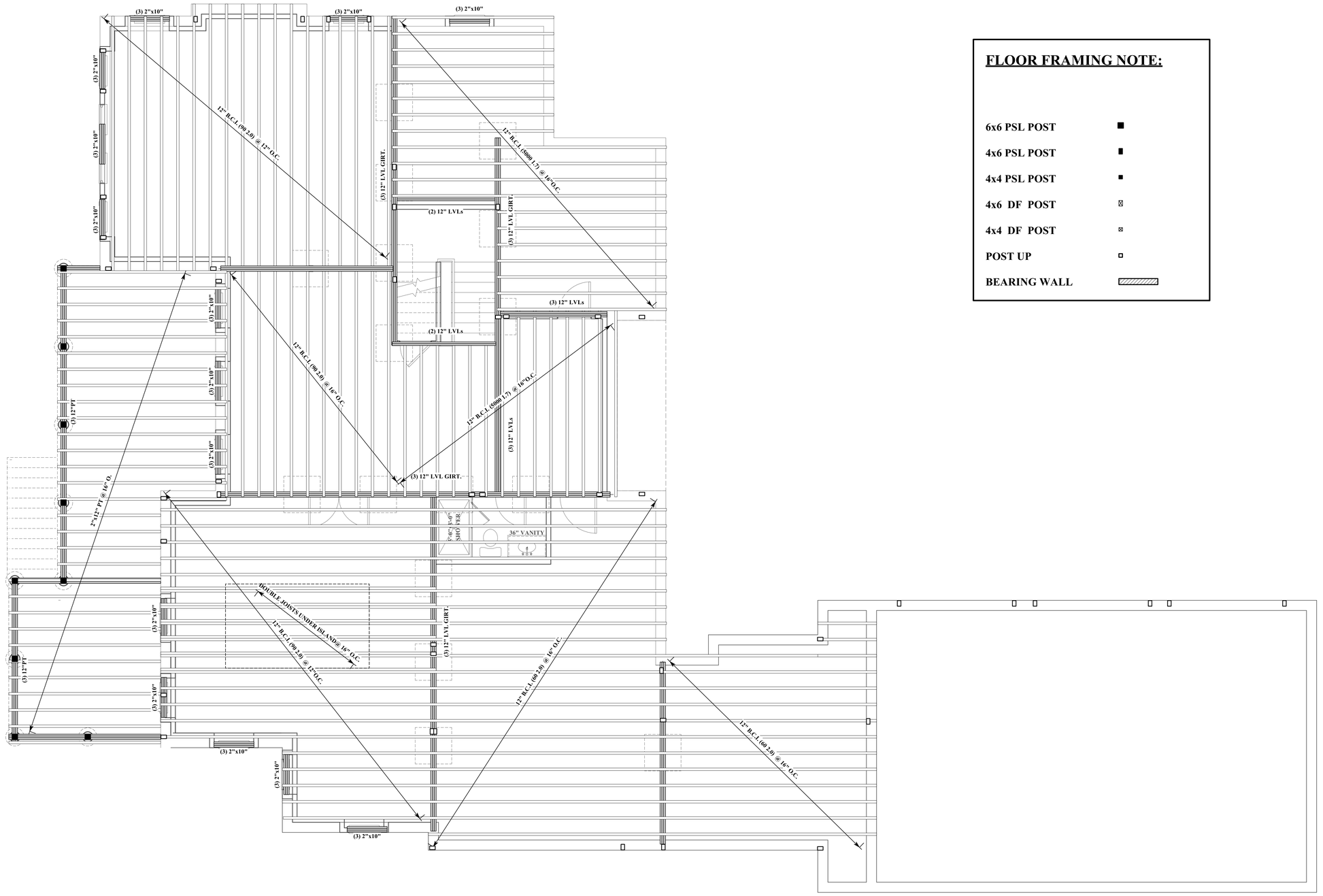
SCALE	AS NOTED

S-1.1


(3) 2"x10"
(3) 2"x10"
(3) 2"x10"
12" B.C.I. (90 2.0) @ 12" O.C.
(3) 12" LVL GIRT.
12" B.C.I. (6000 1.7) @ 16" O.C.
(2) 12" LVLs
(3) 12" LVLs
(2) 12" LVLs
12" B.C.I. (90 2.0) @ 16" O.C.
12" B.C.I. (6000 1.7) @ 16" O.C.
(3) 12" LVL GIRT.
2"x12" PT @ 16" O.C.
5'-0" x 3'-0" SHO. FIRE
36" VANITY
DOUBLE JOISTS UNDER ISLAND @ 16" O.C.
12" B.C.I. (90 2.0) @ 12" O.C.
(3) 12" LVL GIRT.
12" B.C.I. (60 2.0) @ 16" O.C.
12" B.C.I. (60 2.0) @ 16" O.C.
(3) 2"x10"
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(3) 12" PT
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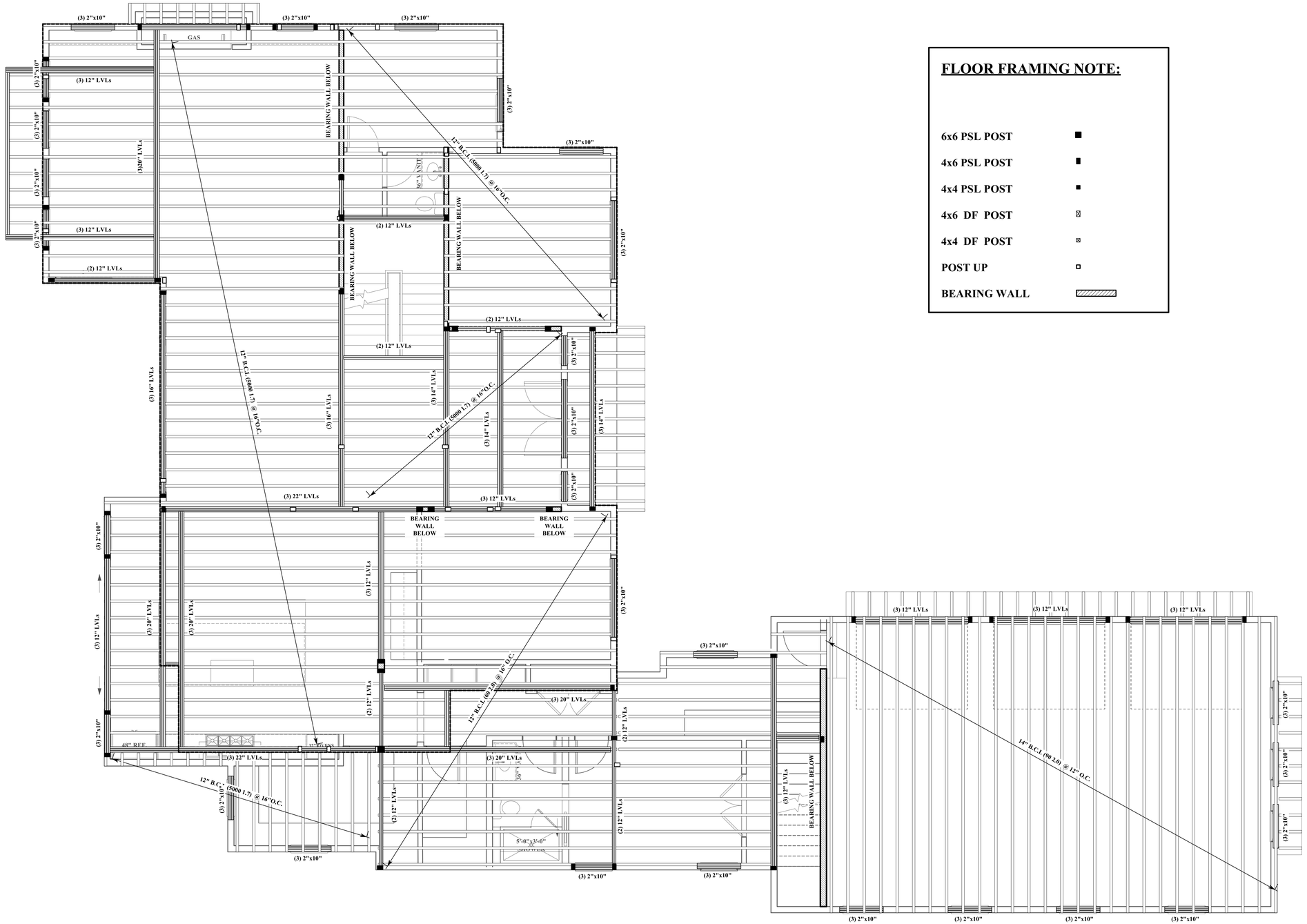

FLOOR FRAMING NOTE:

6x6 PSL POST	■
4x6 PSL POST	▮
4x4 PSL POST	▪
4x6 DF POST	⊠
4x4 DF POST	⊠
POST UP	▫
BEARING WALL	▨

1 S-1.3 Second Floor Framing Plan
1/4" = 1'-0"

New Residence

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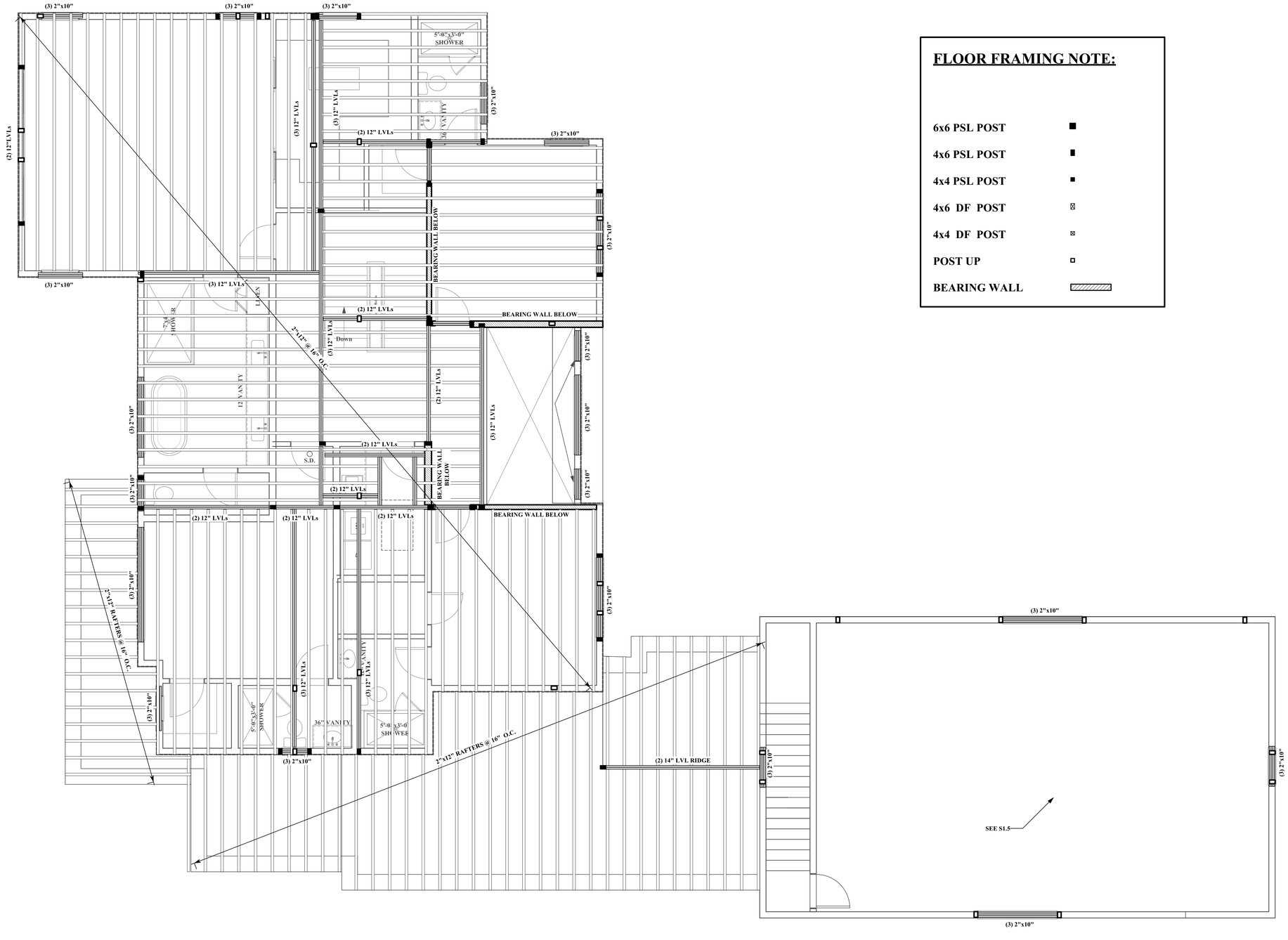
Second Floor Framing Plan

JOB NO	
DATE	02/23/23
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

S-1.3



FLOOR FRAMING NOTE:

6x6 PSL POST	■
4x6 PSL POST	▮
4x4 PSL POST	▪
4x6 DF POST	⊠
4x4 DF POST	⊠
POST UP	▫
BEARING WALL	▨

1 / S-1.4 Attic Floor Framing Plan
1/4" = 1'-0"

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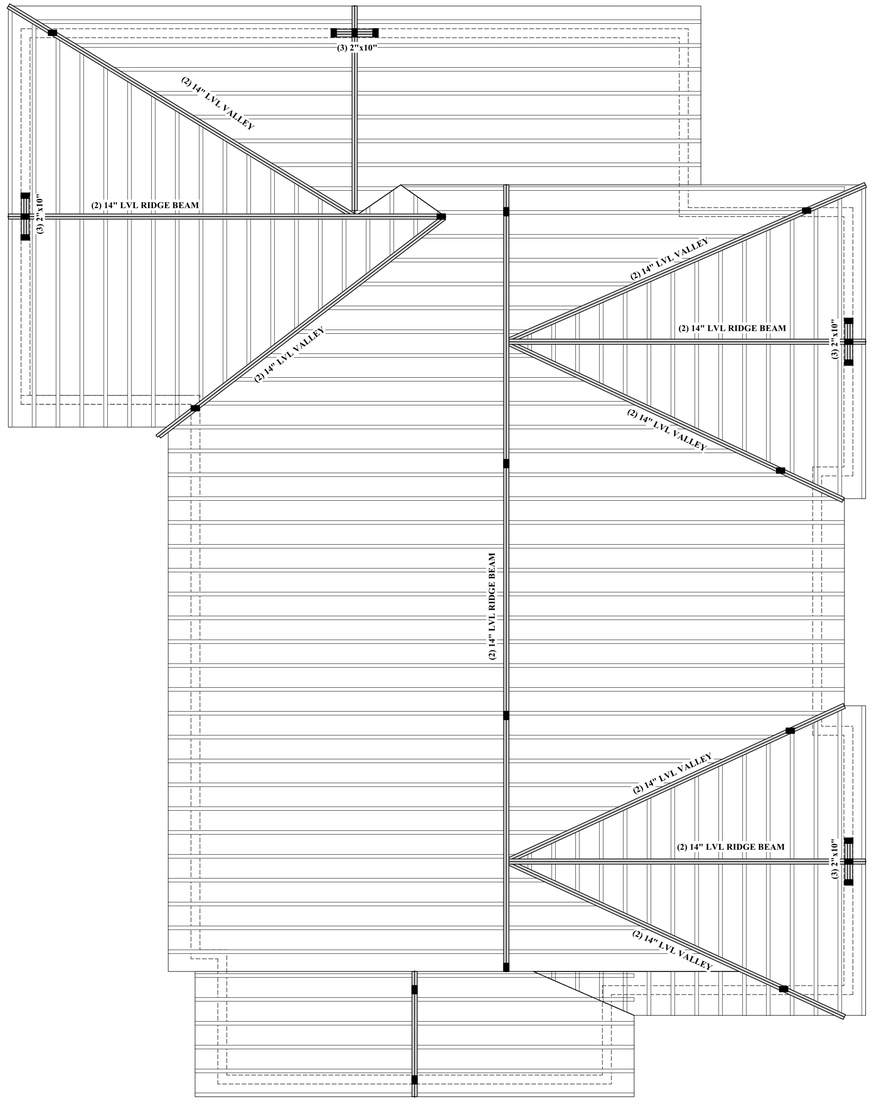
Attic Floor Framing Plan

JOB NO	
DATE	02/23/23
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

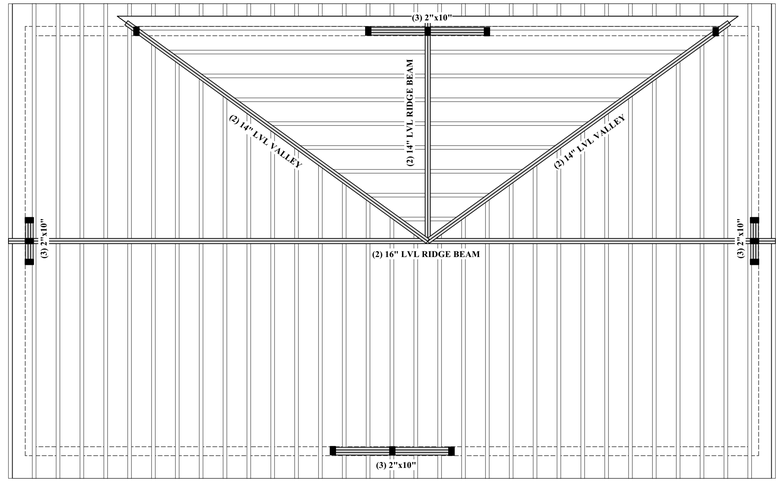
S-1.4



ROOF FRAMING NOTE:

ALL RAFTERS TO BE 2x12 @ 16" O.C.
w/2x10 COLLAR TIES @ 16" O.C. (U.N.O.)

6x6 PSL POST	■
4x6 PSL POST	▮
4x4 PSL POST	▪
4x6 DF POST	⊠
4x4 DF POST	⊠
POST UP	▫
BEARING WALL	▨



1 / S-1.5 Roof Framing Plan
1/4" = 1'-0"

New Residence

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REGISTERED ARCHITECT
MICHAEL L. MCKAY
NO. AR 8947
COMMONWEALTH OF MASSACHUSETTS

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Roof Framing Plan

JOB NO	
DATE	02/23/23
DWG BY	
CKD BY	MLM
SCALE	AS NOTED

S-1.5

PLANNING & COMMUNITY DEVELOPMENT
PLANNING DIVISION

December 5, 2023

Mr. Jonathan Tamkin, Chair, and Members
Zoning Board of Appeals
Public Services Administration Building
500 Dedham Avenue
Needham, MA 02492

Dear Mr. Tamkin and Members of the Zoning Board of Appeals:

At its meeting of December 5, 2023, the Planning Board reviewed the applications to be heard by the Board of Appeals on December 14, 2023, and made the following recommendations:

1. **30 Wilshire Park –**Jeremy & Jessica Karlin, owners, applied for a Special Permit under Sections 1.4.6, and any other applicable section of the By-Law to alter, enlarge and extend a pre-existing, non-conforming single-family to allow the demolition of an existing deck and stairs and replace it with a basement and a family room above. The property is located at 30 Wilshire Park, Needham, MA in the Single-Residence B (SRB) District.

   The Planning Board previously commented on this application by letter dated October 3, 2023. The comments were as follows: The subject proposal will require a variance. The property is currently conforming as to FAR at .37. In the SRB district the maximum permissible FAR is .38. The addition as proposed creates a noncompliant FAR of .42. This change is not permissible by special permit and will require a variance. Section 1.4.6 of the By Law states as follows: "*The issuance of a special permit hereunder shall not authorize the violation of any dimensional, parking or intensity regulations with which the structure or use was therefore in conformity."* The Planning Board further notes that the ZBA should ensure that the proposal meets the Stormwater By-Law. (This was a vote of 3-0, as Planning Board Chair Adam Block recused himself).

2. **460 Hillside Avenue** - Dish Wireless, LLC, applicant, applied to the Board of Appeals for a Special Permit under Sections 6.7.3.3 (b) (c) and any other applicable section of the By-Law to install as part of their wireless telecommunications network some of the following equipment: 3 antennas, 6 remote radio units, 3 junctions boxes, 3 fiber cables, and 3 power cables. The property is located at 460 Hillside Avenue, Needham, MA in the Industrial (I) District.

   The Planning Board makes NO COMMENT.
   (This was a vote of 4-0, as Planning Board Member Jeanne S. McKnight recused herself).

3. **320 Grove Street** - Corbin Petro and Jessica Gelman, owners, applied to the Board of Appeals for a Variance under MGL 40A, Section 10, 4.2.3, and Section 7.5.3 and any other applicable section of the Needham By-Law to seek zoning relief to allow side setbacks of no less than 15 feet where 25 feet are allowed due to unusual soil, shape of topography of the land. This request is associated with the demolition and reconstruction of an existing non-conforming single family home.

   The Planning Board makes NO COMMENT.

4. **1688 Central Avenue -** Holly Clarke, Gregg Darish, Robert DiMase, Matthew and Nicole Heideman, Carl Jonasson, Ann and Peter Lyons, and Eileen Sullivan, appellants, applied to the Board of Appeals for an Appeal of Building Inspector Decision (ABID) of Building Permit BC23-10079 issued to Matt Borrelli and Needham Enterprise LLC dated September 19, 2023, for the construction of a childcare facility. The ABID concludes that the Building Permit plans on file do not demonstrate that the construction, alteration or use as proposed complies with the Zoning By-Laws as limited by the Dover Amendment MGL 40A, Section 3. The property is located at 1688 Central Street, Needham, MA in the Single-Residence A (SRA) District.

   The Planning Board previously commented on this application by letter dated November 7, 2023. The comments were as follows:
   The Planning Board makes NO COMMENT.
   (This was a vote of 3-0, as Planning Board Vice-Chair Natasha Espada and Planning Board Member Paul S. Alpert recused themselves).

NEEDHAM PLANNING BOARD

Lee Newman

Lee Newman

Director of Planning and Community Development

TOWN OF NEEDHAM, MASSACHUSETTS
PUBLIC WORKS DEPARTMENT
500 Dedham Avenue, Needham, MA 02492
Telephone (781) 455-7550 FAX (781) 449-9023

December 5th, 2023

Needham Zoning Board of Appeals
Needham Public Safety Administration Building
Needham, MA 02492

RE: Case Review-Variance
320 Grove Street- Variance

Dear Members of the Board,

The Department of Public Works has completed its review of the above referenced variance for the proposed 2 Story wood framed new construction home.

The documents submitted for review are as follows:

- Application for Special Permit dated 11/28/23;
- Cover letter prepared by applicant dated 11/21/23
- Certified Plot Plan by Field Resources Dated 11/10/23
- 320 Grove Street New Residence prepared by McKay Architects consisting of 19 sheets date 8/16/23

Our comments and recommendations are as follows:

- Due to the risk of flooding in the area, along with the low-lying topography of the lot, it is strongly advised to delete the finished basement portion of the project.

- There is no reference to a civil engineer on record for the proposed grading or storm water plan. Applicants must submit stamped engineered storm water plan before the building permit is issued.

- In accordance with the Town of Needham Stormwater Bylaw, the proposed plan must include stamped drainage calculations and stormwater plan with adequate infiltration system, to store/infiltrate 1" of runoff off for the proposed impervious areas. The plans should be revised prior to receiving a building permit that shows the required storm water system.

- In accordance with the Town of Needham Stormwater Bylaw, the proposed new structure requires erosion control measures. The plans should be revised prior to receiving a building permit that show erosion controls at the work zone.

If you have any questions regarding the above, please contact our office at 781-455-7538.

Truly yours,

Thomas A Ryder
Town Engineer

TOWN OF NEEDHAM
CONSERVATION DEPARTMENT
Public Services Administration Building
500 Dedham Avenue
Needham, MA 02492

TEL: (781) 455-7550 x248

TO: Zoning Board of Appeals

FROM: Debbie Anderson, PWS, Director of Conservation

DATE: December 5, 2023

SUBJECT: Variance Application
Map 220, Parcel 3
320 Grove Street

The Conservation Department is in receipt of the Variance application for the ("subject property") project site referenced above, as it relates to the jurisdiction of the Needham Conservation Commission (NCC). The NCC's jurisdiction is established under the Massachusetts Wetlands Protection Act ("WPA"; MGL Ch. 131 S. 40) and the Town of Needham Wetlands Protection Bylaw ("Bylaw"; Needham General Bylaws Section 6).

The Applicant previously submitted a Notice of Intent for the proposed improvements to the subject property. On July 27, 2023, the Conservation Commission issued an Order of Conditions (OOC) approving the proposed project. The OOC (attached) includes several special conditions related to the construction.

The majority of this property is located on the opposite side of the stream channel located to the rear of the existing house and due to the forested/wetland nature of that portion of the property, it would be considered wildlife habitat that connects to the adjacent Conservation Commission owned property. The Conservation Commission would not approve of the necessary crossing over the stream to access the wooded/wetland portion of the property for development. In short, any development, from a Conservation Commission point of view is required to leave the natural areas untouched.

Should you have any questions, please do not hesitate to contact me or Clayton Hutchinson in the Conservation Department.

TOWN OF NEEDHAM
CONSERVATION DEPARTMENT
Public Services Administration Building
500 Dedham Avenue
Needham, MA 02492

VIA CERTIFIED MAIL & EMAIL
7016 3010 0001 0243 2141

To: Brian Nelson, P.E.
MetroWest Engineering, Inc.
75 Franklin Street
Framingham, MA. 01702

From: Debbie Anderson, Director of Conservation

Re: 320 Grove Street; Order of Conditions
DEP File #234-908

Date: July 27, 2023

I have enclosed both an original and a copy of the Order of Conditions issued by the Needham Conservation Commission for the proposed project at 320 Grove Street. **The original must be recorded at the Norfolk County Registry of Deeds, and proof of recording must be provided to the Conservation Department prior to the start of work.**

Please remember that at the completion of the project a Certificate of Compliance must be requested, approved by the Conservation Commission and recorded in the Registry of Deeds to remove the encumbrance placed on the property title by the Order of Conditions.

If you have any questions, please contact our office at (781) 455-7550 x 248.

Thank you.

cc: Brian Nelson (bnelson@mwengineering.com)
Jessica Gelman (corbin.petro@gmail.com)
MA Department of Environmental Protection
Building (via email)
File

Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

WPA Form 5 – Order of Conditions

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

Provided by MassDEP:
234-908
MassDEP File #

eDEP Transaction #

Needham
City/Town

A. General Information

Please note: this form has been modified with added space to accommodate the Registry of Deeds Requirements

Important: When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.

1. From: Needham
Conservation Commission

2. This issuance is for (check one): a. ☒ Order of Conditions b. ☐ Amended Order of Conditions

3. To: Applicant:

Jessica/Corbin	Gelman/Petro
a. First Name	b. Last Name

c. Organization

320 Grove Street
d. Mailing Address

Needham	MA	02492
e. City/Town	f. State	g. Zip Code

4. Property Owner (if different from applicant):

a. First Name	b. Last Name

c. Organization

d. Mailing Address

e. City/Town	f. State	g. Zip Code

5. Project Location:

320 Grove Street	Needham
a. Street Address	b. City/Town
220	3
c. Assessors Map/Plat Number	d. Parcel/Lot Number

Latitude and Longitude, if known: 42.16'43" N (d. Latitude) -71.17'12" W (e. Longitude)

Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands
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A. General Information (cont.)

6. Property recorded at the Registry of Deeds for (attach additional information if more than one parcel):

Norfolk	186119
a. County	b. Certificate Number (if registered land)
c. Book	d. Page

7. Dates:

May 25, 2023	July 13, 2023	July 27, 2023
a. Date Notice of Intent Filed	b. Date Public Hearing Closed	c. Date of Issuance

8. Final Approved Plans and Other Documents (attach additional plan or document references as needed):

Proposed Site Plan, 320 Grove Street in Wellesley/Needham, Mass."
a. Plan Title

MetroWest Engineering, Inc.	Robert A. Gemma, P.E., P.L.S.
b. Prepared By	c. Signed and Stamped by
June 28, 2023	1" = 20'
d. Final Revision Date	e. Scale

See Exhibit A
f. Additional Plan or Document Title — g. Date

B. Findings

1. Findings pursuant to the Massachusetts Wetlands Protection Act:

Following the review of the above-referenced Notice of Intent and based on the information provided in this application and presented at the public hearing, this Commission finds that the areas in which work is proposed is significant to the following interests of the Wetlands Protection Act (the Act). Check all that apply:

a. ☒ Public Water Supply b. ☐ Land Containing Shellfish c. ☒ Prevention of Pollution
d. ☒ Private Water Supply e. ☐ Fisheries f. ☒ Protection of Wildlife Habitat
g. ☒ Groundwater Supply h. ☒ Storm Damage Prevention i. ☒ Flood Control

2. This Commission hereby finds the project, as proposed, is: (check one of the following boxes)

Approved subject to:

a. ☒ the following conditions which are necessary in accordance with the performance standards set forth in the wetlands regulations. This Commission orders that all work shall be performed in accordance with the Notice of Intent referenced above, the following General Conditions, and any other special conditions attached to this Order. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, these conditions shall control.

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B. Findings (cont.)

Denied because:

b. ☐ the proposed work cannot be conditioned to meet the performance standards set forth in the wetland regulations. Therefore, work on this project may not go forward unless and until a new Notice of Intent is submitted which provides measures which are adequate to protect the interests of the Act, and a final Order of Conditions is issued. **A description of the performance standards which the proposed work cannot meet is attached to this Order.**

c. ☐ the information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the interests identified in the Wetlands Protection Act. Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides sufficient information and includes measures which are adequate to protect the Act's interests, and a final Order of Conditions is issued. **A description of the specific information which is lacking and why it is necessary is attached to this Order as per 310 CMR 10.05(6)(c).**

3. ☐ Buffer Zone Impacts: Shortest distance between limit of project disturbance and the wetland resource area specified in 310 CMR 10.02(1)(a) — 1-foot (a. linear feet)

Inland Resource Area Impacts: Check all that apply below. (For Approvals Only)

Resource Area	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
4. ☐ Bank	a. linear feet	b. linear feet	c. linear feet	d. linear feet
5. ☐ Bordering Vegetated Wetland	a. square feet	b. square feet	c. square feet	d. square feet
6. ☐ Land Under Waterbodies and Waterways	a. square feet	b. square feet	c. square feet	d. square feet
	e. c/y dredged	f. c/y dredged		
7. ☐ Bordering Land Subject to Flooding	a. square feet	b. square feet	c. square feet	d. square feet
Cubic Feet Flood Storage	e. cubic feet	f. cubic feet	g. cubic feet	h. cubic feet
8. ☐ Isolated Land Subject to Flooding	a. square feet	b. square feet		
Cubic Feet Flood Storage	c. cubic feet	d. cubic feet	e. cubic feet	f. cubic feet
9. ☐ Riverfront Area	a. total sq. feet	b. total sq. feet		
Sq ft within 100 ft	c. square feet	d. square feet	e. square feet	f. square feet
Sq ft between 100-200 ft	g. square feet	h. square feet	i. square feet	j. square feet

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B. Findings (cont.)

Coastal Resource Area Impacts: Check all that apply below. (For Approvals Only)

	Proposed Alteration	Permitted Alteration	Proposed Replacement	Permitted Replacement
10. ☐ Designated Port Areas	Indicate size under Land Under the Ocean, below			
11. ☐ Land Under the Ocean	a. square feet	b. square feet		
	c. c/y dredged	d. c/y dredged		
12. ☐ Barrier Beaches	Indicate size under Coastal Beaches and/or Coastal Dunes below			
13. ☐ Coastal Beaches	a. square feet	b. square feet	c. nourishment cu yd	d. nourishment cu yd
14. ☐ Coastal Dunes	a. square feet	b. square feet	c. nourishment cu yd	d. nourishment cu yd
15. ☐ Coastal Banks	a. linear feet	b. linear feet		
16. ☐ Rocky Intertidal Shores	a. square feet	b. square feet		
17. ☐ Salt Marshes	a. square feet	b. square feet	c. square feet	d. square feet
18. ☐ Land Under Salt Ponds	a. square feet	b. square feet		
	c. c/y dredged	d. c/y dredged		
19. ☐ Land Containing Shellfish	a. square feet	b. square feet	c. square feet	d. square feet
20. ☐ Fish Runs	Indicate size under Coastal Banks, Inland Bank, Land Under the Ocean, and/or inland Land Under Waterbodies and Waterways, above			
	a. c/y dredged	b. c/y dredged		
21. ☐ Land Subject to Coastal Storm Flowage	a. square feet	b. square feet		
22. ☐ Riverfront Area	a. total sq. feet	b. total sq. feet		
Sq ft within 100 ft	c. square feet	d. square feet	e. square feet	f. square feet
Sq ft between 100-200 ft	g. square feet	h. square feet	i. square feet	j. square feet

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B. Findings (cont.)

* **#23.** If the project is for the purpose of restoring or enhancing a wetland resource area in addition to the square footage that has been entered in Section B.5.c (BVW) or B.17.c (Salt Marsh) above, please enter the additional amount here.

23. ☐ Restoration/Enhancement *:

a. square feet of BVW | b. square feet of salt marsh

24. ☐ Stream Crossing(s):

a. number of new stream crossings | b. number of replacement stream crossings

C. General Conditions Under Massachusetts Wetlands Protection Act

The following conditions are only applicable to Approved projects.

1. Failure to comply with all conditions stated herein, and with all related statutes and other regulatory measures, shall be deemed cause to revoke or modify this Order.
2. The Order does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights.
3. This Order does not relieve the permittee or any other person of the necessity of complying with all other applicable federal, state, or local statutes, ordinances, bylaws, or regulations.
4. The work authorized hereunder shall be completed within three years from the date of this Order unless either of the following apply:
   a. The work is a maintenance dredging project as provided for in the Act; or
   b. The time for completion has been extended to a specified date more than three years, but less than five years, from the date of issuance. If this Order is intended to be valid for more than three years, the extension date and the special circumstances warranting the extended time period are set forth as a special condition in this Order.
   c. If the work is for a Test Project, this Order of Conditions shall be valid for no more than one year.
5. This Order may be extended by the issuing authority for one or more periods of up to three years each upon application to the issuing authority at least 30 days prior to the expiration date of the Order. An Order of Conditions for a Test Project may be extended for one additional year only upon written application by the applicant, subject to the provisions of 310 CMR 10.05(11)(f).
6. If this Order constitutes an Amended Order of Conditions, this Amended Order of Conditions does not extend the issuance date of the original Final Order of Conditions and the Order will expire on _____ unless extended in writing by the Department.
7. Any fill used in connection with this project shall be clean fill. Any fill shall contain no trash, refuse, rubbish, or debris, including but not limited to lumber, bricks, plaster, wire, lath, paper, cardboard, pipe, tires, ashes, refrigerators, motor vehicles, or parts of any of the foregoing.

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C. General Conditions Under Massachusetts Wetlands Protection Act

8. This Order is not final until all administrative appeal periods from this Order have elapsed, or if such an appeal has been taken, until all proceedings before the Department have been completed.

9. No work shall be undertaken until the Order has become final and then has been recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of the registered land, the Final Order shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is done. The recording information shall be submitted to the Conservation Commission on the form at the end of this Order, which form must be stamped by the Registry of Deeds, prior to the commencement of work.

10. A sign shall be displayed at the site not less then two square feet or more than three square feet in size bearing the words,

    "Massachusetts Department of Environmental Protection" [or, "MassDEP"]

    "File Number 234-908 "

11. Where the Department of Environmental Protection is requested to issue a Superseding Order, the Conservation Commission shall be a party to all agency proceedings and hearings before MassDEP.

12. Upon completion of the work described herein, the applicant shall submit a Request for Certificate of Compliance (WPA Form 8A) to the Conservation Commission.

13. The work shall conform to the plans and special conditions referenced in this order.

14. Any change to the plans identified in Condition #13 above shall require the applicant to inquire of the Conservation Commission in writing whether the change is significant enough to require the filing of a new Notice of Intent.

15. The Agent or members of the Conservation Commission and the Department of Environmental Protection shall have the right to enter and inspect the area subject to this Order at reasonable hours to evaluate compliance with the conditions stated in this Order, and may require the submittal of any data deemed necessary by the Conservation Commission or Department for that evaluation.

16. This Order of Conditions shall apply to any successor in interest or successor in control of the property subject to this Order and to any contractor or other person performing work conditioned by this Order.

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C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

17. Prior to the start of work, and if the project involves work adjacent to a Bordering Vegetated Wetland, the boundary of the wetland in the vicinity of the proposed work area shall be marked by wooden stakes or flagging. Once in place, the wetland boundary markers shall be maintained until a Certificate of Compliance has been issued by the Conservation Commission.

18. All sedimentation barriers shall be maintained in good repair until all disturbed areas have been fully stabilized with vegetation or other means. At no time shall sediments be deposited in a wetland or water body. During construction, the applicant or his/her designee shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The applicant shall immediately control any erosion problems that occur at the site and shall also immediately notify the Conservation Commission, which reserves the right to require additional erosion and/or damage prevention controls it may deem necessary. Sedimentation barriers shall serve as the limit of work unless another limit of work line has been approved by this Order.

19. The work associated with this Order (the "Project")
    (1) ☐ is subject to the Massachusetts Stormwater Standards
    (2) ☒ is NOT subject to the Massachusetts Stormwater Standards

    If the work is subject to the Stormwater Standards, then the project is subject to the following conditions:

    a) All work, including site preparation, land disturbance, construction and redevelopment, shall be implemented in accordance with the construction period pollution prevention and erosion and sedimentation control plan and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Construction General Permit as required by Stormwater Condition 8. Construction period erosion, sedimentation and pollution control measures and best management practices (BMPs) shall remain in place until the site is fully stabilized.

    b) No stormwater runoff may be discharged to the post-construction stormwater BMPs unless and until a Registered Professional Engineer provides a Certification that:
    i. all construction period BMPs have been removed or will be removed by a date certain specified in the Certification. For any construction period BMPs intended to be converted to post construction operation for stormwater attenuation, recharge, and/or treatment, the conversion is allowed by the MassDEP Stormwater Handbook BMP specifications and that the BMP has been properly cleaned or prepared for post construction operation, including removal of all construction period sediment trapped in inlet and outlet control structures;
    ii. as-built final construction BMP plans are included, signed and stamped by a Registered Professional Engineer, certifying the site is fully stabilized;
    iii. any illicit discharges to the stormwater management system have been removed, as per the requirements of Stormwater Standard 10;

C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

iv. all post-construction stormwater BMPs are installed in accordance with the plans (including all planting plans) approved by the issuing authority, and have been inspected to ensure that they are not damaged and that they are in proper working condition;

v. any vegetation associated with post-construction BMPs is suitably established to withstand erosion.

c) The landowner is responsible for BMP maintenance until the issuing authority is notified that another party has legally assumed responsibility for BMP maintenance. Prior to requesting a Certificate of Compliance, or Partial Certificate of Compliance, the responsible party (defined in General Condition 18(e)) shall execute and submit to the issuing authority an Operation and Maintenance Compliance Statement ("O&M Statement) for the Stormwater BMPs identifying the party responsible for implementing the stormwater BMP Operation and Maintenance Plan ("O&M Plan") and certifying the following:

i.) the O&M Plan is complete and will be implemented upon receipt of the Certificate of Compliance, and

ii.) the future responsible parties shall be notified in writing of their ongoing legal responsibility to operate and maintain the stormwater management BMPs and implement the Stormwater Pollution Prevention Plan.

d) Post-construction pollution prevention and source control shall be implemented in accordance with the long-term pollution prevention plan section of the approved Stormwater Report and, if applicable, the Stormwater Pollution Prevention Plan required by the National Pollution Discharge Elimination System Multi-Sector General Permit.

e) Unless and until another party accepts responsibility, the landowner, or owner of any drainage easement, assumes responsibility for maintaining each BMP. To overcome this presumption, the landowner of the property must submit to the issuing authority a legally binding agreement of record, acceptable to the issuing authority, evidencing that another entity has accepted responsibility for maintaining the BMP, and that the proposed responsible party shall be treated as a permittee for purposes of implementing the requirements of Conditions 18(f) through 18(k) with respect to that BMP. Any failure of the proposed responsible party to implement the requirements of Conditions 18(f) through 18(k) with respect to that BMP shall be a violation of the Order of Conditions or Certificate of Compliance. In the case of stormwater BMPs that are serving more than one lot, the legally binding agreement shall also identify the lots that will be serviced by the stormwater BMPs. A plan and easement deed that grants the responsible party access to perform the required operation and maintenance must be submitted along with the legally binding agreement.

f) The responsible party shall operate and maintain all stormwater BMPs in accordance with the design plans, the O&M Plan, and the requirements of the Massachusetts Stormwater Handbook.

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C. General Conditions Under Massachusetts Wetlands Protection Act (cont.)

g) The responsible party shall:
1. Maintain an operation and maintenance log for the last three (3) consecutive calendar years of inspections, repairs, maintenance and/or replacement of the stormwater management system or any part thereof, and disposal (for disposal the log shall indicate the type of material and the disposal location);
2. Make the maintenance log available to MassDEP and the Conservation Commission ("Commission") upon request; and
3. Allow members and agents of the MassDEP and the Commission to enter and inspect the site to evaluate and ensure that the responsible party is in compliance with the requirements for each BMP established in the O&M Plan approved by the issuing authority.

h) All sediment or other contaminants removed from stormwater BMPs shall be disposed of in accordance with all applicable federal, state, and local laws and regulations.

i) Illicit discharges to the stormwater management system as defined in 310 CMR 10.04 are prohibited.

j) The stormwater management system approved in the Order of Conditions shall not be changed without the prior written approval of the issuing authority.

k) Areas designated as qualifying pervious areas for the purpose of the Low Impact Site Design Credit (as defined in the MassDEP Stormwater Handbook, Volume 3, Chapter 1, Low Impact Development Site Design Credits) shall not be altered without the prior written approval of the issuing authority.

l) Access for maintenance, repair, and/or replacement of BMPs shall not be withheld. Any fencing constructed around stormwater BMPs shall include access gates and shall be at least six inches above grade to allow for wildlife passage.

Special Conditions (if you need more space for additional conditions, please attach a text document):

See Exhibit A for Findings and Conditions adopted under the MA Wetlands Protection Act (M.G.L. Ch. 131 S. 40) and the Needham General Wetlands Protection Bylaw (Article 6).

20. For Test Projects subject to 310 CMR 10.05(11), the applicant shall also implement the monitoring plan and the restoration plan submitted with the Notice of Intent. If the conservation commission or Department determines that the Test Project threatens the public health, safety or the environment, the applicant shall implement the removal plan submitted with the Notice of Intent or modify the project as directed by the conservation commission or the Department.

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D. Findings Under Municipal Wetlands Bylaw or Ordinance

1. Is a municipal wetlands bylaw or ordinance applicable? ☒ Yes ☐ No

2. The Needham (Conservation Commission) hereby finds (check one that applies):

   a. ☐ that the proposed work cannot be conditioned to meet the standards set forth in a municipal ordinance or bylaw, specifically:

   1. Municipal Ordinance or Bylaw | 2. Citation

   Therefore, work on this project may not go forward unless and until a revised Notice of Intent is submitted which provides measures which are adequate to meet these standards, and a final Order of Conditions is issued.

   b. ☒ that the following additional conditions are necessary to comply with a municipal ordinance or bylaw:

   Needham Wetlands Protection Bylaw (1. Municipal Ordinance or Bylaw) | Article 6 (2. Citation)

3. The Commission orders that all work shall be performed in accordance with the following conditions and with the Notice of Intent referenced above. To the extent that the following conditions modify or differ from the plans, specifications, or other proposals submitted with the Notice of Intent, the conditions shall control.

   The special conditions relating to municipal ordinance or bylaw are as follows (if you need more space for additional conditions, attach a text document):

See Exhibit A for Findings and Conditions adopted under the MA Wetlands Protection Act (M.G.L. Ch. 131 S. 40) and the Needham General Wetlands Protection Bylaw (Article 6).

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E. Signatures

This Order is valid for three years, unless otherwise specified as a special condition pursuant to General Conditions #4, from the date of issuance.

7/27/23
1. Date of Issuance

Please indicate the number of members who will sign this form.
This Order must be signed by a majority of the Conservation Commission.

6
2. Number of Signers

The Order must be mailed by certified mail (return receipt requested) or hand delivered to the applicant. A copy also must be mailed or hand delivered at the same time to the appropriate Department of Environmental Protection Regional Office, if not filing electronically, and the property owner, if different from applicant.

Signature	Printed Name
David Herer	David Herer
Sue Barber	Sue Barber
	Fred ~~Modor~~ Moder
	Reade Everett
Peter Oehlkers	Peter Oehlkers
Alison Richardson	Alison Richardson
Polina Safran	Polina Safran

☐ by hand delivery on

Date

☒ by certified mail, return receipt requested, on

7/27/23
Date

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F. Appeals

The applicant, the owner, any person aggrieved by this Order, any owner of land abutting the land subject to this Order, or any ten residents of the city or town in which such land is located, are hereby notified of their right to request the appropriate MassDEP Regional Office to issue a Superseding Order of Conditions. The request must be made by certified mail or hand delivery to the Department, with the appropriate filing fee and a completed Request for Departmental Action Fee Transmittal Form, as provided in 310 CMR 10.03(7) within ten business days from the date of issuance of this Order. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellant.

Any appellants seeking to appeal the Department's Superseding Order associated with this appeal will be required to demonstrate prior participation in the review of this project. Previous participation in the permit proceeding means the submission of written information to the Conservation Commission prior to the close of the public hearing, requesting a Superseding Order, or providing written information to the Department prior to issuance of a Superseding Order.

The request shall state clearly and concisely the objections to the Order which is being appealed and how the Order does not contribute to the protection of the interests identified in the Massachusetts Wetlands Protection Act (M.G.L. c. 131, § 40), and is inconsistent with the wetlands regulations (310 CMR 10.00). To the extent that the Order is based on a municipal ordinance or bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.

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G. Recording Information

Prior to commencement of work, this Order of Conditions must be recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Final Order shall also be noted in the Registry's Grantor Index under the name of the owner of the land subject to the Order. In the case of registered land, this Order shall also be noted on the Land Court Certificate of Title of the owner of the land subject to the Order of Conditions. The recording information on this page shall be submitted to the Conservation Commission listed below.

Needham
Conservation Commission

Detach on dotted line, have stamped by the Registry of Deeds and submit to the Conservation Commission.

To:

Needham
Conservation Commission

Please be advised that the Order of Conditions for the Project at:

320 Grove Street
Project Location

234-908
MassDEP File Number

Has been recorded at the Registry of Deeds of:

Norfolk
County

Book

Page

for:
Property Owner

and has been noted in the chain of title of the affected property in:

Book

Page

In accordance with the Order of Conditions issued on:

Date

If recorded land, the instrument number identifying this transaction is:

Instrument Number

If registered land, the document number identifying this transaction is:

Document Number

Signature of Applicant

Massachusetts Department of Environmental Protection
Bureau of Resource Protection - Wetlands

Request for Departmental Action Fee Transmittal Form

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:

Provided by DEP

A. Request Information

1. Location of Project

a. Street Address

b. City/Town, Zip

c. Check number

d. Fee amount

Important: When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.

2. Person or party making request (if appropriate, name the citizen group's representative):

Name

Mailing Address

City/Town

State

Zip Code

Phone Number

Fax Number (if applicable)

3. Applicant (as shown on Determination of Applicability (Form 2), Order of Resource Area Delineation (Form 4B), Order of Conditions (Form 5), Restoration Order of Conditions (Form 5A), or Notice of Non-Significance (Form 6)):

Name

Mailing Address

City/Town

State

Zip Code

Phone Number

Fax Number (if applicable)

4. DEP File Number:

B. Instructions

1. When the Departmental action request is for (check one):

☐ Superseding Order of Conditions – Fee: $120.00 (single family house projects) or $245 (all other projects)

☐ Superseding Determination of Applicability – Fee: $120

☐ Superseding Order of Resource Area Delineation – Fee: $120

Massachusetts Department of Environmental Protection
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Request for Departmental Action Fee Transmittal Form

Massachusetts Wetlands Protection Act M.G.L. c. 131, §40

DEP File Number:

Provided by DEP

B. Instructions (cont.)

Send this form and check or money order, payable to the *Commonwealth of Massachusetts,* to:

Department of Environmental Protection
Box 4062
Boston, MA 02211

2. On a separate sheet attached to this form, state clearly and concisely the objections to the Determination or Order which is being appealed. To the extent that the Determination or Order is based on a municipal bylaw, and not on the Massachusetts Wetlands Protection Act or regulations, the Department has no appellate jurisdiction.

3. Send a **copy** of this form and a **copy** of the check or money order with the Request for a Superseding Determination or Order by certified mail or hand delivery to the appropriate DEP Regional Office (see https://www.mass.gov/service-details/massdep-regional-offices-by-community).

4. A copy of the request shall at the same time be sent by certified mail or hand delivery to the Conservation Commission and to the applicant, if he/she is not the appellant.

ORDER OF CONDITIONS
DEP FILE NO. 234-908
EXHIBIT A

Project: The project will consist of the demolition of the existing single-family house and construction of a new single-family house with attached garages, driveway, hardscape and landscape areas, stormwater management system, supporting utilities and mitigation planting area. The work is located within the 100-foot Buffer Zone to Bordering Vegetated Wetlands and the Bank of an intermittent stream. Portions of a proposed porous pavement patio, deck and mitigation plantings will be located within the 25-foot Buffer Zone.

Applicant: Jessica Gelman & Corbin Petro
320 Grove Street
Needham, MA 02492

Owner: Same

Location: 320 Grove Street (Assessors Map 220 Lot 3)

Documents of Record:

- WPA Form 3 – Notice of Intent and supporting documents received May 25, 2023.
- Needham Wetlands Protection Bylaw Application for a Permit received May 25, 2023.
- Plan entitled: "Existing Conditions Plan, 310/320 Grove Street in Wellesley/Needham, Mass.", prepared by MetroWest Engineering, Inc., signed and stamped by Robert A. Gemma, P.E., P.L.S., dated 5/19/2023, final revision date 6/28/2023.
- Plan entitled: "Proposed Layout Plan, 320 Grove Street in Wellesley/Needham, Mass.", prepared by MetroWest Engineering, Inc.., signed and stamped by Robert A. Gemma, P.E., P.L.S., dated 5/19/2023, final revision date 6/28/2023.
- Plan entitled: "Proposed Site Plan, 320 Grove Street in Wellesley/Needham, Mass.", prepared by MetroWest Engineering, Inc.., signed and stamped by Robert A. Gemma, P.E., P.L.S., dated 5/19/2023, final revision date 6/28/2023.
- Plan entitled: "Details Plan, 320 Grove Street in Wellesley/Needham, Mass.", prepared by MetroWest Engineering, Inc.., signed and stamped by Robert A. Gemma, P.E., P.L.S., dated 5/19/2023, final revision date 6/28/2023.
- Document titled: "Request for Waiver of Local Bylaw Fee, 320 Grove Street, Needham", prepared by Brian Nelson, P.E., Metro West Engineering, Inc., dated July 3, 2023
- Document titled "Hydrologic Analysis, Proposed Site Development, 320 Grove Street, Needham/Wellesley, MA", prepared by MetroWest Engineering, Inc., dated May 2023.

FINDINGS OF FACT:

The Applicant's are proposing to tear down an existing 2,102 square foot single family house on a 4.7 acre property located in both Needham and Wellesley. Approximately 8,070 square feet of the property is located in Wellesley. The house is located in Needham but is accessed by a driveway located in Wellesley. The existing house has been plagued by water flooding into the basement due to drainage issues created by the undersized drainage pipe that receives the flow from the intermittent stream. The flooding has created a health hazard due to growth of mold.

The construction of the new house will reduce the amount of impervious area within the 25-foot Buffer Zone by 1,501 square feet and within the 50-foot Buffer Zone by 512 square feet. The total increase in impervious area within the 100-foot Buffer Zone is 1,148 square feet. The Applicant will be removing two (2) trees for the project and is proposing installation of two (2) red maple (*Acer rubrum*) trees and sixteen (16) native shrubs to meet the Conservation Commission *Guidelines for Reviewing Tree Removal Projects*.

The project includes installation of a subsurface stormwater management infiltration system. An Operations and Maintenance (O&M) plan will be implemented to maintain the intended post-construction functions and operations of the infiltration chambers, to be signed by the property owners upon or before a Certificate of Compliance is requested.

Proposed work within the 25-foot Buffer Zone includes installation of a portion of a porous paver patio and a deck within the footprint of the existing deck and patio. Details of the proposed porous paver patio and the construction of the deck are included on the approved "Details" plan. These uses within the 25-foot Buffer Zone are permitted as discussed in the:

"Town of Needham Wetlands Protection Regulations, Article 6", 2.06 Land Within 100 feet of a Water Body, Waterway, Bank, or Vegetated Wetland (The Buffer Zone):

(3) Performance Standards

The performance standards listed below are critical to the protection of the Interests of the Bylaw. These include short- and long-term protection of the wildlife habitat capacity and water quality within the adjacent Water Body, Waterway, Bank, or Vegetated Wetland, as well as the wildlife habitat present within the Buffer Zone and adjacent resources.

(a) No construction within 25 feet of the limit of Bank or Vegetated Wetland ("The 25-Foot Buffer Zone") may be permitted. Construction is here defined to include (but not limited to) all new roadways, driveways, buildings, decks (except as in (b) below), clearing and grading, stormwater detention basins, and point-source discharges. Any construction within the Buffer Zone must be designed to preserve a minimum of 25 feet of undisturbed natural vegetation and soils adjacent to a Vegetated Wetland or Bank.

(b) Work within 25 feet of the limit of Bank or Vegetated wetland may be permitted when the work consists of:

- *removing existing structures;*
- *planting native tree, shrub, or herbaceous species;*
- *removing invasive plant species and restoring native vegetation;*
- *adding a deck or patio to a dwelling, where no new impervious surfaces are proposed and the work area is existing lawn.*

A Waiver from strict compliance with the Regulations for work within the wetland and 25-foot Buffer Zone to Bordering Vegetated Wetlands is required. The Needham Wetlands Protection Bylaw Regulations, Section 1.11, allows the Commission to consider granting a waiver when, in the judgment of the Commission, the action will serve a substantial public interest and the following criteria are met: (a) there are no practicable alternatives to the proposed action; (b) alteration of the resource area has been minimized to the greatest extent practicable; and (c) compensatory or mitigating measures are taken, even at an off-site location, to protect the public interest in the Protected Resource Area to be removed, filled, dredged, built upon, or altered.

The Commission finds of the proposed work to occur within the 25-foot Buffer Zone that (1) there are no practicable alternatives to the proposed project that will decrease impacts to the resource areas; (2) alterations have been minimized to the maximum extent practicable; and (3) the proposed mitigation planting area within the 25-foot Buffer Zone, removal of existing impervious area from the 25-foot Buffer Zone and installation of stormwater infiltration chambers will contribute to the interests of the Needham Wetlands Protection Bylaw. The Commission therefore grants a Waiver for the proposed work.

The Applicant has requested a Waiver of the Waiver Fee for work located in the 25-foot Buffer Zone. The Commission finds that the Waiver of the Waiver Fee is appropriate.

The Commission finds that the work can be conditioned to protect the Interests of the MA Wetlands Protection Act and the Needham Wetlands Protection Bylaw.

SPECIAL CONDITIONS:

GENERAL

1. Except where modified by the following conditions, all work shall be performed in accordance with the plans and the Notice of Intent referenced above.
2. The Needham Conservation Commission and Needham Conservation Department staff reserve the right to enter upon the premises to inspect the work for compliance with the Order of Conditions.
3. The Contractor and/or Applicant may be fined for any applicable non-compliance with the conditions contained herein. This may include a non-criminal penalty of up to $200.00 per day, per violation issued under the Needham Wetlands Protection Bylaw.
4. If any change is intended to be made in the work permitted hereunder, the Applicant shall submit a written request to the Commission with plans that reflect the proposed changes. The Commission shall review said request and plans, and may require the applicant to submit a request for amendment to the Order of Conditions. No changes shall be made prior to said written request to the Commission and approval thereof. Failure to comply with this condition shall be deemed a violation of the Order and may result in the issuance of non-criminal penalties of up to $200 per day.
5. If any change is made, altered or revised without prior approval of the Commission, or if erosion, siltation or other adverse impact to the Resource occurs, the Commission may impose additional conditions as necessary to protect the interests of the Wetlands Protection Act and the Town of Needham Wetlands Protection Bylaw.

PRE-CONSTRUCTION

6. **Prior to commencing any activity subject to this Order, the Applicant and contractor(s) shall meet with the Conservation Commission or their designee at the project site to review this Order of Conditions. At (or prior to) this meeting the applicant shall submit evidence that this Order has been filed at the Registry of Deeds. At the meeting, the DEP file number sign and erosion control barrier will be available for inspection by the Conservation Commission or their designee. Failure to schedule the pre-construction meeting may results in Enforcement action and fines.**
7. **Prior to installation, a soil test pit shall be excavated in the areas of the proposed system and a certified, competent soils professional shall determine if the areas will adequately infiltrate, as proposed in the application. The certified, competent soils professional shall thereafter submit documentation to the Conservation Commission either verifying that the proposed infiltration area will function as intended or proposing an alternative means to recharge runoff.**
8. A copy of the approved plans, the Notice of Intent, and this Order of Conditions must be provided to the Contractor prior to the commencement of work.
9. Any person performing work on the activity that is the subject of this Order of Conditions is individually responsible for understanding and complying with the requirements of this Order and Needham's Wetlands Protection Bylaw and Regulations. The Applicant must provide the Commission with the name, address, e-mail and telephone number of the person responsible for site supervision and compliance with this Order. Such person shall have authority, among other things, to receive comments from the Conservation Commission and/or their Agent, and to direct any contractor working on the site to take measures to control erosion and sedimentation or otherwise protect the Resource Area, and to order all or any portion of the work to cease.
10. A sign shall be displayed at the site not less than two square feet or more than three square feet in size bearing the words "Massachusetts Department of Environmental Protection (or, "MassDEP") File Number 234-908." Such sign shall be located as to be visible to the public. The sign shall NOT be affixed to a living tree.
11. Erosion controls shall be installed at the limit of work as shown on the approved plan, and in accordance with the manufacturer instructions. Any substitute erosion control barrier must be approved by the

Conservation Commission or their designee prior to installation. Hay bales are not an approved barrier due to the presence of weed seeds. The contractor shall install a protective device within any catch basins that are within 100-feet of the project site. No work may proceed until the Conservation Commission or their Agent has inspected and approved the installation of the erosion control barrier.

12. The Applicant shall notify the Conservation Office at least 3 business days before any work begins (781-455-7550 x 248 or conservation@needhamma.gov).

CONSTRUCTION

13. In the event that dewatering is necessary to complete construction in any areas, the Contractor shall provide to the Conservation Department a dewatering plan which specifies means and methods of dewatering, including location of discharge points outside of resource areas.
14. No work, disturbance or alteration shall occur on the Resource Area side of the erosion controls which shall serve as the limit of work. No heavy equipment may operate beyond the limit of work at any time.
15. The Applicant shall remove all silt caught by the erosion control barrier periodically. In no event shall the silt be allowed to collect to a height greater than six inches.
16. The erosion control barrier must be regularly inspected by the Applicant and be continually maintained in good condition until all upgradient areas have been permanently stabilized with vegetation or other approved means and all construction is completed. No erosion controls may be removed without the approval of the Conservation Commission or their designee.
17. At no time shall silt or sediment be allowed to enter the resource area. The Commission must be notified within 24 hours if any silt or sediment enters any resource area or drainage system.
18. No fueling or maintenance of vehicles shall be allowed within the 100-foot Buffer Zone.
19. Any stockpiled soil or similar material must be enclosed within an erosion control barrier or covered by a secured tarp to prevent erosion or siltation into the Resource Area or undisturbed Buffer Zone.
20. No construction materials, debris, leaves, or other materials shall be deposited, intentionally or unintentionally, within Resource Areas or downgradient of the limit of work.
21. In the event that earthwork ceases for more than 30 days, all exposed soils must be stabilized with a temporary vegetative cover, straw mulch, or other method of erosion control accepted by the Massachusetts Department of Environmental Protection.

PLANTING WORK AND MONITORING

22. The planting plan submitted by the Applicant includes the installation of eight (8) sweet pepperbush (*Clethra alnifolia*), and eight red osier dogwood (*Cornus sericea*) shrubs, two (2) red maple (*Acer rubrum*) trees a minimum of 2.5" caliper and twenty-five (25) cinnamon fern within a 1,380 square foot area. Plants shall be installed in accordance with the approved planting plan.
23. Required mitigation planting areas within the 25-foot Buffer Zone shall be maintained in perpetuity in their predominantly natural condition (i.e., mowing is prohibited). **This condition shall survive the issuance of a Certificate of Compliance.**
24. The Applicant shall submit notification to the Conservation Department of the mitigation planting work within 30 days of its completion or additional monitoring time may be required before a Certificate of Compliance is issued.
25. Following completion of work, all mitigation plantings shall be monitored for a period of two years. Annual reports documenting the condition of the plantings shall be submitted during each of the two years of required monitoring. The monitoring reports shall document the health of all plantings and document the overall survival rate. For an individual planting to be considered alive, it must be documented to have at least 85% live wood. The name and qualifications of the restoration monitor shall be submitted to the Commission with each annual report. Annual monitoring reports shall be submitted no later than December 1st of each year. Failure to submit annual reports shall constitute a

violation of the Order of Conditions and the Owner of the property shall be subject to enforcement action, including fines in the amount of $200 per day.

26. At the completion of the two-year monitoring period and following submission of the required reports, the Commission will evaluate whether the plantings adequately comply with this Order of Conditions. In order to be considered successful, the plantings shall have a minimum 75% survival rate.

POST-CONSTRUCTION

27. An Operation and Maintenance (O&M) Plan must be submitted prior to or with the submission of a Request for Certificate of Compliance and must be signed by the property owner. The O&M Plan shall be followed to maintain the intended post-construction functions and operations of the infiltration chambers.

28. A Certificate of Compliance Request shall be submitted in writing on WPA Form 8A. An As-Built plan showing all structures, grading and plantings, signed and stamped by a Professional Engineer or Registered Land Surveyor, must be submitted to the Commission at the time a Certificate of Compliance is requested. This plan shall be accompanied by a separate certificate signed by a Registered Surveyor or Professional Engineer stating that all work has been completed strictly in accordance with the Order of Conditions. If such work has not been so completed, this Certificate must describe any deviations from the plans as approved by the Commission.

29. It shall be presumed that any work or alteration, which includes, but is not limited to, building, grading, clearing, dumping of leaves or other landscaping debris or other materials, mowing or in any way disturbing the areas protected by the Act and By-law that is inconsistent with, or not specifically authorized by, this Order of Conditions shall require the filing of a new Notice of Intent, and the issuance of an Order of Conditions from the Conservation Commission. **This condition shall survive the issuance of a Certificate of Compliance.**

Daphne Collins

From: John Schlittler
Sent: Tuesday, December 5, 2023 11:24 AM
To: Daphne Collins
Subject: RE: 320 Grove Street - ZBA Administrative Review - Due December 5, 2023 -FINAL

Police has no issues

From: Daphne Collins <dcollins@needhamma.gov>
Sent: Tuesday, December 5, 2023 9:36 AM
To: Joseph Prondak <jprondak@needhamma.gov>; Thomas Ryder <tryder@needhamma.gov>; Tara Gurge <TGurge@needhamma.gov>; John Schlittler <JSchlittler@needhamma.gov>; Tom Conroy <TConroy@needhamma.gov>; Donald Anastasi <DAnastasi@needhamma.gov>; Jay Steeves <steevesj@needhamma.gov>; Ronnie Gavel <rgavel@needhamma.gov>; Deb Anderson <andersond@needhamma.gov>; Clayton Hutchinson <chutchinson@needhamma.gov>
Subject: FW: 320 Grove Street - ZBA Administrative Review - Due December 5, 2023 -FINAL

Good Morning All-
Friendly reminder ZBA Administrative Review comments are due today.
Thank you,
Daphne

Daphne M. Collins
Zoning Specialist

Phone 781-455-7550, x 261
Web https://www.needhamma.gov/
https://needhamma.gov/1101/Board-of-Appeals
www.needhamma.gov/NeedhamYouTube

Town of Needham
Planning and Community Development
500 Dedham Avenue
Needham, MA 02492

Regular Office Hours: Mon-Wed 8:00am – 5:00pm
Remote Hours: Thurs 8:00am-5:00pm

From: Daphne Collins
Sent: Wednesday, November 29, 2023 9:04 PM
To: Joseph Prondak <jprondak@needhamma.gov>; Thomas Ryder <tryder@needhamma.gov>; Tara Gurge <TGurge@needhamma.gov>; John Schlittler <JSchlittler@needhamma.gov>; Tom Conroy <TConroy@needhamma.gov>; Donald Anastasi <DAnastasi@needhamma.gov>; Jay Steeves <steevesj@needhamma.gov>; Ronnie Gavel <rgavel@needhamma.gov>; Deb Anderson <andersond@needhamma.gov>; Clayton Hutchinson <chutchinson@needhamma.gov>
Subject: FW: 320 Grove Street - ZBA Administrative Review - Due December 5, 2023 -FINAL

Good Evening Folks-
Please use this attached *320 Grove Street – Application AR final* when reviewing and making comments for the ZBA.
The previous version had a draft document.
My apologies for any confusion.

Daphne Collins

From: Tara Gurge
Sent: Tuesday, December 5, 2023 11:36 AM
To: Daphne Collins
Subject: RE: 320 Grove Street - ZBA Administrative Review - Due December 5, 2023 -FINAL

Daphne –

The Public Health Division conducted our Zoning Board review for the property located at **#320 Grove Street.** See comments noted below:

- Prior to the proposed house demolition, the owner must apply for the Public Health Division Demolition review online, via the Towns ViewPoint Cloud online permitting system. See direct link to this permit review application- https://needhamma.viewpointcloud.com/categories/1073/record-types/1006508. This form will need to be completed along with the uploading of the required supplemental report documents for our review and approval (as noted on the form.) **PLEASE NOTE**: Pest control reports, along with the asbestos sampling reports, etc., must be uploaded to our online system for review and approval, prior to the issuance of a Demolition permit by the Building Department.

- On-going pest control must be conducted during demolition AND on-going pest control must be conducted throughout construction.

Please let us know if you have any follow-up questions or if you need any additional information from us on those requirements.

Thanks,

TARA E. GURGE, R.S., C.E.H.T., M.S. (she/her/hers)
ASSISTANT PUBLIC HEALTH DIRECTOR
Needham Public Health Division
Health and Human Services Department
178 Rosemary Street
Needham, MA 02494
Ph- (781) 455-7940; Ext. 211/Fax- (781) 455-7922
Mobile- (781) 883-0127
Email - tgurge@needhamma.gov
Web- www.needhamma.gov/health

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Daphne Collins

From: Tom Conroy
Sent: Tuesday, December 5, 2023 3:02 PM
To: Daphne Collins
Subject: RE: 320 Grove Street - ZBA Administrative Review - Due December 5, 2023 -FINAL

Hi Daphne,
Fire approves.

Thomas M. Conroy
Fire Chief - Needham Fire Department
tconroy@needhamma.gov
Ph (781) 455-7580

From: Daphne Collins <dcollins@needhamma.gov>
Sent: Tuesday, December 5, 2023 9:36 AM
To: Joseph Prondak <jprondak@needhamma.gov>; Thomas Ryder <tryder@needhamma.gov>; Tara Gurge <TGurge@needhamma.gov>; John Schlittler <JSchlittler@needhamma.gov>; Tom Conroy <TConroy@needhamma.gov>; Donald Anastasi <DAnastasi@needhamma.gov>; Jay Steeves <steevesj@needhamma.gov>; Ronnie Gavel <rgavel@needhamma.gov>; Deb Anderson <andersond@needhamma.gov>; Clayton Hutchinson <chutchinson@needhamma.gov>
Subject: FW: 320 Grove Street - ZBA Administrative Review - Due December 5, 2023 -FINAL

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Daphne

Daphne M. Collins
Zoning Specialist

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Town of Needham
Building Department
500 Dedham Ave.
Needham, MA 02492

Tel.781-455-7550 x 308

December 5, 2023

Town of Needham / Zoning Board of Appeals
500 Dedham Ave.
Needham, MA. 02492

Re: Application review for the December Hearing

320 Grove Street

Dear Board Members,

The applicants, Corbin Petro and Jessica Gelman are proposing to demolish an existing single-family home and build a new single-family home at their property, 320 Grove Street.

The property lies in an SRA Zoning District. The lot could be considered non-conforming with respect to frontage as the lot fronts in Wellesley with only 79.42 lineal feet of frontage when 150 feet is normally required, although the bylaw is not specific for lots that front in another municipality. The existing home is considered pre-existing, non-conforming with respect to side setbacks of 15 feet on the left side and 20.7' on the right side, when 25' on each side is now required.

This proposal seeks to build this new home at a distance of 17.5 feet from the left side line and 15.3 feet from the right side line. Whereas Section 4.2.3 of the Zoning Bylaw, Table of (dimensional) Regulations requires 25' setbacks from each sideline in the case of new construction, the Building Permit has been denied. The applicants have the right to seek relief in the form of a variance from the Zoning Board of Appeals.

While it has been noted that the applicants stated that this proposal was located on the site with the verbal approval of the prior Building Commissioner, staff and I were unable to find a path to move it forward. Otherwise, this office has no objection to the proposal.

Sincerely,

Joe Prondak
Building Commissioner
Town of Needham

Daphne Collins

From: Tom Conroy
Sent: Tuesday, December 5, 2023 3:02 PM
To: Daphne Collins
Subject: RE: 320 Grove Street - ZBA Administrative Review - Due December 5, 2023 -FINAL

Hi Daphne,
Fire approves.

Thomas M. Conroy
Fire Chief - Needham Fire Department
tconroy@needhamma.gov
Ph (781) 455-7580

From: Daphne Collins <dcollins@needhamma.gov>
Sent: Tuesday, December 5, 2023 9:36 AM
To: Joseph Prondak <jprondak@needhamma.gov>; Thomas Ryder <tryder@needhamma.gov>; Tara Gurge <TGurge@needhamma.gov>; John Schlittler <JSchlittler@needhamma.gov>; Tom Conroy <TConroy@needhamma.gov>; Donald Anastasi <DAnastasi@needhamma.gov>; Jay Steeves <steevesj@needhamma.gov>; Ronnie Gavel <rgavel@needhamma.gov>; Deb Anderson <andersond@needhamma.gov>; Clayton Hutchinson <chutchinson@needhamma.gov>
Subject: FW: 320 Grove Street - ZBA Administrative Review - Due December 5, 2023 -FINAL

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Daphne

Daphne M. Collins
Zoning Specialist

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Sent: Wednesday, November 29, 2023 9:04 PM
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Daphne Collins

From: Timothy McDonald
Sent: Monday, December 4, 2023 11:12 PM
To: Daphne Collins; Howard Goldman
Cc: Tara Gurge; Timothy McDonald
Subject: RE: 1688 Central Avenue

Hi Howard and Daphne.

The Public Health Division and the Board of Health will provide no further official comments on 1688 Central Avenue.

I will only add that the Public Health Division approved a septic permit for the property on Monday November 20th; the Board of Health was informed of the pending application and did hear an informal presentation from concerned neighbors at its meeting on Friday November 17th but chose to take no action.

At its September meeting, the Board of Health had an extensive discussion about public health legal and regulatory powers and under which circumstances the protection of the public's health trumps something like personal property rights. The gist of that discussion was that if the BOH was to intervene using its regulatory powers, it would do so based upon documentation and evidence (like MA DEP reports or environmental spill notifications, or official write-ups from Needham Fire or Public Health about an on-scene investigation of chemical exposures), not based upon anecdotal reports and old photographs. The BOH's discussion with two legal experts is included in the meeting minutes, available here.

If you have questions or want to discuss further, I'm happy to set up a quick call or a Zoom meeting.

Thanks,
TMM

Timothy Muir McDonald
He/Him/His (What's this?)

Director, Needham Department of Health & Human Services

Rosemary Recreation Complex
178 Rosemary Street
Needham, MA 02494

Public Health Division Office: 781-455-7940
Public Health Division Fax: 781-455-7922
Email: tmcdonald@needhamma.gov

Follow Needham Public Health on Twitter!

From: Daphne Collins <dcollins@needhamma.gov>
Sent: Tuesday, November 21, 2023 4:15 PM
To: Howard Goldman <hgoldman@goldmanpease.com>

Board of Health
Meeting Minutes
DRAFT

Date: September 8, 2023

Location: via Zoom

Members: Tejal K. Gandhi, MD, MPH Chair; Kathleen Ward Brown, ScD, Member; Edward Cosgrove, PhD, Member; Robert A. Partridge, MD, MPH, Member; Stephen Epstein, MD, MPP, Member

Staff Present: Tara Gurge, Assistant Director of Public Health; Tiffany (Zike) Benoit, Assistant Director of Public Health; Sainath Palani; Kerry Dunnell; Samantha Menard; Julie McCarthy; Taleb Abdelrahim; Ginnie Chacon-Lopez; Lydia Cunningham; Lynn Schoeff.

Also Present: Cheryl Sbarra, J.D., Executive Director and Senior Staff Attorney (Massachusetts Association of Health Boards); Christopher Heep, Town Counsel; Justin McCullen; and John Portman

Welcome & Public Comment Period
Dr. Gandhi called the meeting to order at 9:00AM and initiated a roll call. Present were Dr. Gandhi – Y, Dr. Epstein – Y, Dr. Brown – Y, Dr. Partridge – Y, Dr. Cosgrove – Y.

According to Chapter 107 of the Acts of 2022, as an act relative to extending certain states of emergency accommodations, as passed by the General Court, and signed into law by Acting Governor Karyn Polito, on July 16 2022, revised Section 20 of Chapter 20, the Acts of 2021. In so doing, provided modifications to the Massachusetts Open Meeting Law, which allow for flexibility to hold remote only, and hybrid meetings, while preserving public access and, where appropriate, public participation. Currently, that additional flexibility will expire on March 31, 2025, unless additional legislative action occurs. As part of today's hybrid meeting, all votes will occur via roll call.

Doug Fox requested that the Board consider putting regulations in place for outside dining to allow dogs. There is not a dog park close to downtown, and it would be nice to allow this for owners. This could also be helpful to restaurants. Establishments generally have to apply and show which areas on the site would allow this. Needham currently only allows service dogs.

The Board discussed asking surrounding communities about their experiences.

Review of Minutes – (July 14, 2023)
Upon motion duly made by Dr. Cosgrove, and seconded by Dr. Epstein, it was voted to approve the minutes of July 14, 2023, as submitted. Motion passed: Dr. Gandhi – A, Dr. Epstein – A, Dr. Brown – Y, Dr. Partridge – Y, Dr. Cosgrove – Y.

Legal Discussion of Board of Health Powers

Town Counsel Christopher Heep explained that the Board has received correspondence regarding environmental testing of 1688 Central Avenue, where there is a proposed childcare facility. This proposal is currently in litigation. He stated that he has not found a clear basis in regulations or statute for the Board to take action on this and require environmental testing. The concerns expressed should be handled by the State. The Planning Board permit has been overturned by the Land Court, including a condition urged to be included by this Board.

Dr. Epstein stated that he would like the Board to take whatever actions it can regarding this item.

Cheryl Sbarra, J.D., Executive Director, and Senior Staff Attorney of the Massachusetts Association of Health Boards stated that she spoke with the Timothy McDonald on this item and the Board can continue to act in its discretionary function. The Board's job is compliance, not punishment. If mitigation is required on this site, 6"-12" of soil cover will likely be needed and the developer is willing to do so. This would lead to compliance.

Dr. Brown stated that she does not believe the Board should continue to pursue this item. The Board previously looked to find an LSP (licensed site professional) to review the developer's work, but no LSP could be found to do the work.

Dr. Epstein asked what will happen if the developer chooses not to add the soil cover. Ms. Sbarra stated that the State could then be contacted to review this.

Holly Clarke, 1652 Central Avenue, expressed concern regarding digging that may occur on the site before the fill is placed. Ms. Clarke said that this site was run as a demolition company for years and there are legitimate concerns from abutters. Evidence has been presented to the Board to show this. The Board of Health should protect the health of Needham and the children who may eventually be using this site. Under Chapter 111, Section 131, the Board of Health can examine to prevent nuisance or source of illness. There is a statutory basis for the Board to continue to look into this item. Ms. Clarke asked the Board to continue to address concerns regarding this property.

Ms. Gurge noted that this property plans to connect to municipal sewer, as long as it is available on the street.

Dr. Gandhi stated that digging on this site appears to be under the jurisdiction of DEP. Staff have spoken to DEP regarding this item. The Board agreed to draft a letter to DEP and the Building Department regarding these concerns.

Biosafety Committee Introduction

Justin McCullen and John Portman introduced themselves to the Board as applicants for the resident positions on the Biosafety Committee. The Board thanked the applicants for their interest.

Ms. McCarthy noted that staff have worked to amend the online biosafety permit.

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TOWN OF NEEDHAM
MASSACHUSETTS

BOARD OF APPEALS

Appeal of Building Inspector Decision

Holly Clark, Gregg Darish, Robert DiMase, Matthew & Nicole Heidenman, Carl Jonasson, Ann & Peter Lyons, and Eileen Sullivan, Appellants

Needham Enterprises, LLC, Owner

1688 Central Avenue
Building Permit #BC-23-10079
Map 213, Page 199
October 19, 2023

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Holly Clarke, Gregg Darish, Robert DiMase, Matthew and Nicole Heideman, Carl Jonasson, Ann and Peter Lyons, and Eileen Sullivan, appellants, applied to the Board of Appeals for an Appeal of Building Inspector Decision (ABID) of Building Permit BC23-10079 issued to Matt Borrelli and Needham Enterprise LLC dated September 19, 2023, for the construction of a childcare facility at 1688 Central Avenue. The ABID asserts that the Building Permit plans on file do not demonstrate that the construction, alteration or use as proposed complies with the Zoning By Laws, as limited by the Dover Amendment MGL 40A, Section 3. The property is located at 1688 Central Street, Needham, MA in the Single-Residence A (SRA) District. A hybrid public hearing was held in person in the Charles River Room, Public Services Administration Building, 500 Dedham Avenue, Needham, MA, on Thursday, November 16, 2023 at 7:45 p.m and livestreamed on Zoom ID number 869-6475-7241.

Documents of Record:

- 1688 Central Avenue, Notice of Appeal Building Permit #BC-23-10079 prepared by C. Dylan Sanders, Beveridge & Diamond, Clerk stamped October 19, 2023.
- Application for Hearing, Clerk stamped October 23, 2023.
- 1688 Central Avenue, Major Project Site Plan Review Decision, Planning Board, March 1, 2022

- Needham Enterprises, LLC v Needham Planning Board, Memorandum of Decision, Commonwealth of Massachusetts, Land Court, Department of the Trial Court, dated August 15, 2023.
- Letter with Exhibits 1-4 from Evans Huber, Frieze Cramer Rosen & Huber, dated November 13, 2023.
- Erosion Control Plans prepared by Glosa Engineering, Inc., stamped by Registered Engineer, dated November 9, 2023.
- Memorandum with Exhibits 1-20 from Appellants submitted November 13, 2023.
- Letter from Joe Prondack, Building Commissioner, dated November 8, 2023.
- Letter from Planning Board, prepared by Lee Newman, Director Planning and Community Development, January 4, 2022.
- Email from Tara Gurge, Assistant Public Health Director, November 7, 2023.
- Emails from Chief Tom Conroy, Fire Department, November 7, 2023.
- Letter from Thomas A. Ryder, Town Engineer, dated November 8, 2023 and email dated November 15, 2023..
- Email from Kimberly Grasso, November 7, 2023.
- Email from Alan Langsner, November 13, 2023.
- Email from Patricia Falcao, November 13, 2023.
- Email from Leon Shaigorodsky, November 12, 2023.
- Email from Meredith Fried, November 13, 2023.
- Email from Karen Langsner, November 13, 2023.
- Email from Robert Onofrey, November 14, 2023.
- Email from Andrea Dannenberg, November 14, 2023.
- Email from Norman MacLeod, November 13, 2023.
- Email from Stanley Keller, November 14, 2023.
- Email from Mike Grasso, November 15, 2023.
- Email from Randy Hammer, November 15, 2023.
- Email from Sally McKechnie, November 15, 2023.
- Email from Robert Dimase, November 16, 2023.
- Letter from Evan Gould, November 13, 2023.
- Email from Dustin Pevear, November 16, 2023.
- Choose Safe Places for Early Care and Education Guidance Manual, April 2017.
- GIS Views of Property 1999, 2009, 2011-12, 2013, 2019.
- Transcript Needham Enterprises, LLC vs. Needham Planning Board, et al., Status Conference before the Honorable Jennifer S. D. Roberts, August 22, 2023.
- Email from Timothy McDonald, Director, Department of Health and Human Services, December 4, 2023.

November 16, 2023

Prior to the opening of the Public Hearing, Jonathan D. Tamkin, Chair, recused himself and designated Mr. Goldman to Chair the hearing and appointed Mr. Friedenberg and Ms. Elzon to serve as members. Mr. Tamkin left the meeting and premises at 7:35 p.m.

Mr. Goldman opened the hearing at 7:45 p.m. by reading the public notice.

C. Dylan Sanders, attorney representing the Appellants, noted he represented nine individuals composed of seven families. He identified that all the Appellants are direct abutters or neighbors to the property. He acknowledged that the Appellants agree that a day care facility can be built in this residential area. Their objection are to the issuance of the Building Permit, the design, the siting and bulk of the proposed project in their residential neighborhood. He noted that the neighborhood had concerns about the Planning Board's Site Plan Decision but did not appeal or reject it. They felt the conditions imposed by the Planning Board protected the neighborhood.

Mr. Sanders reported that the Appellants are appealing the Building Inspector's Decision based on the following:

- The issuance of the Building Permit is premature as the project is still the subject of a judicial appeal. The neighbors' appeal is pending in Land Court. The decision of this appeal may be a retrial of the Site Plan Review Decision and may affirm the Planning Board's Decision with all or some of the conditions.
- The project does not have a Site Plan Approval from the Planning Board as required in the By Law.
- The developer is not entitled to a building permit. He may apply for one.
- The project proposes two non-residential buildings on the lot in violation of Section 3.2.1 of the By Law associated with the 4,800 square foot barn.
- The Building Permit did not include a stormwater management plan and erosion control plan required by Section 5.3.2 of the By Law. Mr. Sanders acknowledged that both plans have since been filed. He argued they were insufficient to protect during construction and future uses.
- No landscape plan to provide an at least 25-foot-wide landscape transition and screening between institutional use and residential use was submitted as required by Section 4.2.14 of the By Law.
- There are environmental concerns regarding potential releases of hazardous materials associated with the prior uses at the site which included an excavation company, refuse yard, race cars assembly and repairs, and landscaping company. The Health Department requested a license site professional ("LSP") be engaged to assess the site and provide a report. Mr. Sanders requested that the conditions established in the Site Plan Review be included as part of an amended Building Permit if the permit is not denied.
- Section 5.3.5 of the By Law regarding Traffic studies and mitigation plans conditioned in the Site Plan Review should be included as part of an amended Building Permit. He felt it would be easy to incorporate as the Owner was agreeable to these conditions in the Site Plan Review.
- Section 5.3.4 of the By Law regarding Lighting Mitigation Measures conditioned in the Site Plan Review should be continued if the Building Permit is upheld.

Mr. Sanders said that the project would negatively affect the neighborhood due to the additional traffic generated by the project on an already busy street; the lack of soil and erosion mitigation plan; no conditions to address the environmental concerns during and post construction; the small front setback; the allowance of a second non-residential structure on the lot; and the Building Inspector issuing a Building Permit on a project that is currently under appeal.

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Joe Prondak, Building Commissioner, reported that he issued a Building Permit, based on the following and in consultation with the Town Attorney:

- it is not the Town responsibility to curtail the developer from building the project due to a pending appeal. The developer is proceeding at his own risk should the appeal prevail.
- the developer did go through a Site Plan process as required by the Town By Law. The Site Plan was appealed and annulled by the Court.
- The developer has been made aware that the barn can only be used accessory to the childcare facility. Protected by the Dover Amendment, childcare use is permissible in the residential zone and as such it is entitled to an accessory use. There is nothing that limits the size of an accessory structure. If the developer were to use the structure for anything other than accessory to childcare, they would be in violation of the Zoning By Law and the Building Department has authority and remedies to cure that violation. Mr. Friendenberg asked what the mechanism for enforcement was if there was a violation of the accessory use. Mr. Prondak stated he had the enforcement authority to cite the violation with a process in place to bring the violation into compliance.
- The developer submitted a Storm Water Management Plan as required under the Storm Water By Law which showed significant drainage and underground storage in the parking area and hard surface areas of the project. The mandate for the Storm Water By Law is to protect the Charles River from storm water discharge as mandated by the federal Clean Water Act. However, based on the plan there is no runoff to the adjacent properties because of this project.
- The Landscape Plan required under the By Law is not permitted under the Dover Amendment. Open Space is not tied to landscaping. The Dover Amendment only allows for reasonable regulation pertaining to building coverage, bulk, height, parking requirements and open space. Open space refers to non-built areas. Mr. Goldman asked the Building Commissioner what his rationale was for determining that Landscape was different than Open Space. Mr. Prondak responded that Open Space is an area that does contain a building. The By Law was silent on the definition of Open Space.
- There is no Building Department jurisdictional regulations pertaining to contaminations. This is the purview of the Health Department. They reviewed this issue and their concerns were addressed in a condition of the Site Plan Review which was annulled by the Court. Mr. Goldman noted that in materials prepared by the Appellants they indicated that the Health Department had concerns in 2021. Mr. Prondak reported that the Health Department was consulted as part of the Building Permit application process under the Viewpoint Cloud which they approved.
- The Dover Amendment does not allow the inquiry of traffic concerns or mitigations. However, Mr. Prondak did review an independent traffic study for the project which indicated that the drop-off and pick-up was staggered over a two-hour period and there was a queuing lane on the property to accommodate 10 to 12 cars. Mr. Prondak felt that traffic was sufficiently addressed and that that the project did not generated traffic that would significantly impact the flow of traffic.
- The Dover Amendment does not allow for issues regarding lighting. However, lighting spill onto adjacent properties are easily addressed, controlled and remedied if issues come up. Mr. Friedenberg inquired if lighting was included in the plans reviewed. Mr. Prondak

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replied that a lighting plan was included but he did not review it.

Ms. Elzon asked if the number of parking was sufficient for the project. Mr. Prondak noted the By Law is silent on the parking number requirement for childcare use. When silent, the By Law allows the Building Inspector to use the recommended parking calculations based on the *ITE Parking Generation Manual, 2nd Edition* which for chilcare is 8 parking spaces plus 1 for every 40 students, plus 1 space each for the of maximum staff on duty. For 115 students and 18 teachers the parking requirement is 29 spaces (8+3+18=29). The project includes 30 on-site spaces which satisfies the requirement of the By Law.

Evans Huber, attorney representing the developer and recipient of the Building Permit, noted that under Section 7.2.1 of the By Law no Building Permit shall be issued until the proposed construction complies with all aspects of the By Law. The only issue before the Board was whether the Building Permit was issued in violation of a specific Town By Law. Appellants need to identify a specific By-Law provision which is being violated.

Mr. Huber argued that the issues of concern by the Appellants are issues addressed by a Site Plan Review which is outside the jurisdiction of the Board and is the sole authority of the Planning Board. The Planning Board conducted a Site Plan Review which Land Court found impermissible.

Mr. Huber disagreed that the project violated Section 5.3.5 of the By Law. This section refers to the protection of pedestrian and vehicular movement *"within the site and egressing from it, through the selection of egress points and provisions for adequate sight distances."* This By Law does not address off site traffic issues such as traffic on Central Avenue, police detail, or changing timing of street lights at intersections.

Mr. Huber noted that the Town By Law under Section 3.2.1, which does not allow for more than one non-residential use on a lot, is not in violation because of the Barn. Consistent with prior Planning Board Decisions, Mr. Huber noted that Temple Beth Shalom and Temple Aliayah house multiple uses – a place of worship and childcare - because they are exempt protected under the Dover Amendment. In both locations, multiple uses on a single lot in a residential area was allowed.

Mr. Friendenberg asked if he thought there was a difference in use and structure. Mr. Huber did not think there was a difference based on the Town's practice and case law, i.e, Petrucci v. Bd of Appeals of Westwood where the Court found the prohibition of multiple uses and buildings impermissible with regard to childcare because of the Dover Amendment.

Mr. Huber noted that the barn qualified under Section 1.3 of the By Law as an accessory structure and use as it will be incidental, subordinate, and customary to the principal use. In court, Pat Day, the Director of the Needham Childcare Center, stated that the current program uses 2,000 square feet of storage space; and Marc Gluesing, architect, stated that the proposed childcare building was designed with minimal storage space because of the barn was going to provide storage for the childcare facility. Nothing in the By Law refers to the size of an accessory building. Both David Roche, the prior Building Commissioner and Mr. Prondak found

the barn not be in violation of the By Law.

Mr. Huber reported the permit complied with the Stormwater By Law Section 5.3.2. The developer submitted a Storm Water Management Plan signed and stamped by a MA Certified Civil Engineer which was found to be in adequate and compliance by the Building Commissioner. This plan was also reviewed by the Engineering Department; and a Town Peer reviewer under the Site Plan Review process.

There was discussion regarding the process where the Appellants could provide evidence of the inadequacy of the Storm Water Management Plan. Mr. Huber said that at a post successful Appeal in Land Court before Land Court. Mr. Huber noted that the Storm Water Management Plan as well as other issues were presented at the Planning Board Site Plan Review public hearings.

Mr. Huber noted that landscaping is not listed as a reasonable area of review under the Dover Amendment therefore it is not a permissible area of regulation under Section 4.2.14.1 of the By Law. He objected that Open Space and Landscaping were the same and concurred with the Building Inspector's definition of Open Space. Mr. Huber reported that the Landscape Plan was reviewed three times and approved by the Design Review Board. Mr. Friedenberg asked what binds the developer to build the Landscape Plan. Mr. Huber responded that the developer intends to build the Landscape Plan as submitted and presented to the Planning Board.

Mr. Goldman asked if there were any objection for the Board to imposed conditions regarding this issue. Mr. Huber said there would be no objections for the Landscape Plan. However, the Board does not have the authority to impose conditions. Mr. Goldman asked if there could be consensus for agreed conditions: landscape plan and erosion control plan. Mr. Huber noted that the developer will be implementing the erosion control plans approved by the Engineering Department.

Mr. Huber reported that the on-site parking provided meets the established Town's parking formula for childcare programs established in Section 5.1.2 of the By Law which is calculated as follows: 8 parking spaces plus 1 for every 40 students, plus 1 space each for the of maximum staff on duty. The program will operate with 115 students and 18 employees, the parking requirement is 29 spaces (8+3+18=29). The project includes 30 on-site spaces which satisfies the requirement of the By Law. GPI, the Town's peer reviewer retained by the Planning Board, noted that the 30 parking spaces were sufficient and more than satisfied the average parking demand established by *ITE Parking Generation Manual, 4th Edition.*

Mr. Huber reported that the building permit meets Section 5.3.4 of the By Law. A Lighting Plan was submitted which meets the requirements, although lighting is not included in the Dover Amendment permissible regulations for review. There will be no light spillage off site.

Mr. Huber noted Town By Law does not require a Construction Management Plan. None was submitted and no By Law was violated.

Regarding contamination, there is no By Law that regulates this. If there are any contaminations,

the avenue for addressing that is through the Mass Department of Environmental Protection (DEP). Mr. Huber did not believe the Board had the authority to revoke the Building Permit based on this.

Mr. Goldman asked if Mr. Huber had any concerns about the hazardous materials at the site with a childcare use. Mr. Huber responded that the developer contracted a Licensed Site Professional (LSP) advise the developer. The LSP determined there was no visible evidence of hazardous materials on site. If volatile organic compounds (VOC) are involved, DEP's remediation is to cap it with an impervious area and any pervious area are to be covered by 12" of clean fill. The developer is planning to cover the pervious areas accessible to the children with 12" of clean fill.

Mr. Goldman inquired if there was a report from the LSP? Mr. Huber said there was no report and that the LSP only provided consultation. Mr. Huber noted that the developer will be capping the impervious area and any pervious area accessible to children are to be covered by 12" of clean fill regardless of the status of the property.

Comments were received from the following:

- The Engineering Department had no issues with the storm water plan and requested an erosion control plan through Viewpoint Cloud. They had no issues with the issuance of the building permit.
- The Fire Department had no issues.
- The Health Department had no further comments on this proposed development.
- The Planning Board had no comment.
- The Building Department denied the request to revoke or suspend the Building Permit #BC-23-10079. (*See Building Commissioner's testimony above*.)
- Karen Lagsner had concerns with environmental and traffic issues.
- Alan Lagsner had concerns with the siting, environmental, traffic and bike safety.
- Robert Onofrey had concerns with contaminations, traffic and front setback.
- Andrea Dannenberg supports the denial of the building permit.
- Norman MacLeod supported the implementation Planning Board's Decision.
- Sharon and Evan Gold had concerns about traffic, pedestrian/bicycle safety and emergency access.
- Mike Grasso had concerns about environmental issues.
- Leonard Shaigorodsky had concerns about traffic.
- Patricia Falco had concerns commercial facility in a residential neighborhood and about traffic.
- Meredith Fried opposed the Building Permit and had concerns about traffic and environmental issues.
- Kim Grasso had traffic concerns.
- Robert DiMase had siting, environmental, traffic concerns, barn, lighting and screening.
- Stanley Keller opposed the issuance of the Building permit without consideration of an Appeal and had concerns about traffic, and pedestrian safety.
- Sally McKechnie opposed the issuance of the Building Permit.
- Randy Hammer opposed the issuance of the Building Permit and had concerns about environmental, traffic and parking.

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- Dustin Pevear was concerned about traffic and siting.

The meeting was open to public comments:

Carolyn Reulback, 45 Longfellow Road, associated with the Needham Childcare Center, asked that time limit on how long people talk and courtesy be observed. Mr. Goldman asked how long should the limit be? She proposed a three-minute limit as public comments have been as long as 45 minutes and individuals associated with the Needham Childcare Center were attacked through social media. She was in support of the Building Permit.

Joe Abruzese, 30 Bridle Trail Road, made a presentation regarding setbacks and number of buildings on the site. With the exception of Temple Aliyah, all the uses are residential. Central Avenue is a two lane road without shoulders or sidewalks. He noted that the residential front setbacks in the neighborhood averages 105 feet. Temple Aliyah is setback at 213 feet. He thought the proposed 10,000 square foot building and the 4,000 square foot barn should be setback further than the proposed 64' proposed which meets the minimum 35' front setback for SRA. He proposed an alternative setback of 150' to 200'. He thought providing a larger front setback for the childcare facility would provide for safety and allow for larger driveway for childcare traffic to queue up inside the property instead of waiting on Central Avenue.

Mr. Abruzese challenged that the barn was not originally planned as accessory to the childcare. Mr. Abruzese provided a video clip from a Planning Board Zoom public hearing where Mr. Huber acknowledged that he was unaware of the use limitation of the barn if protection of the Dover Act was sought. Once made aware of this limitation the barn use was limited in support of the childcare use. Mr. Abruzese believed the barn is being used as a pawn to protect the back of the property for a future use. He was in support of a single building, single use setback further on the property. The size to be 10,000 or 12,000 feet. He felt the developed could pursue other option on the site. Mr. Goldman said the jurisdiction of the Board is limited and Mr. Abruzese's vision for the property is beyond the scope of the Board.

Mr. Huber clarified that originally the developer wanted to use the barn for the childcare and for his use. However, in seeking the protection of the Dover Act, the developer agreed that the barn's use would be limited in support of the childcare facility. Under oath, Pat Day and Marc Gluesing testified that the barn will be used in support of the childcare use and for no other purpose.

Nicole Heiderman, 1708 Central Avenue, is the direct abutter to 1688 Central Avenue. She feels that the character of the neighborhood is being negatively affected by having a childcare facility next door. She had concerned about change in her view by the removal of trees, construction site and the childcare. She was concerned about the increase in traffic created by the childcare facility and the safety of her children as the wait for their school bus. She felt a compromise and reasonable restrictions could be arrived at. She was concerned about the environmental impact from the prior uses on the lot and the lack of environmental tests. She was in support of testing. She was also concerned about environmental issues during construction.

Robert Dimase, 1681 Central Avenue, a direct abutter across the street. He was concerned about

the increase in traffic from the childcare use on Central Avenue, the lighting spill from the project and was concerned about the installation of a possible septic system.

Kristy Thompson, 50 Windsor Road, is a neighbor and a researcher in the field of environmental toxicology. She says there is little knowledge on the impact of toxicants on epigenetics. She reported that the neighbors looked at the GIS Mapping data base history of the property based on CDC's *Choose Safe Places for Early Care and Education Manual, April 2017* from 1999 to 2019. These GIS maps indicate auto repair, junk yards, and storage containers at the site which could be sources of contaminations. She was concerned about the disturbed soil from the construction.

Holly Clark, 1652 Central Avenue, is an abutter to Temple Aliyah. She felt that Section 3.2.1 of the By Law which limits one non-residential building permits reasonable review under the Dover Amendment under bulk and open space. She though the Board should consider the Planning Board's Site Plan Review. Mr. Goldman responded that the Land Court has determined the Site Plan Review is null. She disagreed. She thought the barn was outside the Dover Amendment protection and that the By Law was clear about only one non-residential building is allowed. Mr. Goldman asked if her concerns would be alleviated if the two buildings were connected. She thought the density of the property was out of character with the neighborhood. She was concerned about being able to access the south bound lane on Central Avenue with the increase of traffic generated by the childcare program. Ms. Clark reported that the Site Plan Review conditioned traffic mitigation such a timing of traffic lights on Central Avenue, police detail at the driveway, and a traffic study to be conducted after 4 weeks of operation. In addition, there would be an enrollment cap of 115 students to manage traffic and parking concerns. She thought landscaping and lighting was important to mitigating bulk. She'd like to see the lighting and landscaping plans be implemented and for the building to be set back.

Gregg Darish, 43 Country Way, is an abutter. He thought the project will negatively impact the character of the neighborhood. He questioned the intentions of the developer. The Appellants sought legal representation when the Planning Board's attorney said in court he did not represent the abutters. Mr. Darish said the judge told the neighbors that they could plead their case before the Board. Because of all the prior users at the site, he was concerned about the environmental issues. Mr. Darish questioned why a site test recommended by the Board of Health conditioned in the Site Plan Review was no longer necessary. Mr. Friedenberg clarified that the Board was reviewing whether the issued Building Permit was in conformance with zoning, and that there are other Agencies that deal with this issue. Mr. Friedenberg asked if anyone had contacted DEP or asked the Health Department to contact DEP. Mr. Goldman reiterated that the Board's jurisdiction is limited. Mr. Darish urged that the Board suspend the building permit so that testing can be conducted.

Margaret Abruzese, 30 Bridle Trail Road, questioned whether the use of a building is lawful if the use of the building use is not identified in the plan. She provided a transcript of the Status Conference where the judge explained what the intent of her Decision was. She noted that the judge did not agree with Mr. Huber's request for language that would describe the developer as entitled to a building permit rather than entitled to apply for a building permit.

Ms. Abruzese did not think the submitted single page Stormwater and Erosion Control Plans met the Needham By Law requirements.

The zoning By Laws are meant to protect the safety and health of Needham residents therefore mitigation and environmental concerns would be appropriate and should be addressed.

Ms. Abruzese thought governing use and governing configuration are different matters. Having two large buildings on a single lot could be viewed largely as a commercial childcare complex in a residential neighborhood.

Ms. Abruzese thought that the Health Department's Comment that they had no further comments may mean that the have no further comments from the ones they expressed to the Planning Board and they still have those concerns. Ms. Abruzese said they are scheduled to go before the Board of Health on Friday. Mr. Goldman said to take their concerns to the Board of Health and if the Board of Health meant they have concerns to please make those clear and available to the Board.

Mr. Freidenberg moved to continue the Public Hearing to December 14th at 8:00 p.m. in the Charles River Room, Public Services Administration Building, 500 Dedham Avenue, Needham, MA. The meeting with livestreamed on Zoom. Ms. Elzon seconded the motion. The motion was unanimously approved.

The meeting adjourned at 10:30 p.m.

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I. Cases Allowing the Application of Local Bylaws to MGL Ch 40a s.3 Uses

Rogers v Norfolk, 432 Mass.374 (2000)

- All zoning bylaws are presumptively valid; applicant has the burden to prove that bylaw impermissibly restricts the protected use s.3. (p 379, 383)
- Two-part test for applying local zoning bylaws to childcare uses: determine whether bylaw furthers a legitimate municipal interest and rationally relates to that interest, or whether it acts impermissibly to restrict the establishment of childcare facilities in the town, and so is unreasonable. Review the bylaw's application to the particular facts to assure that any restrictions to the individual childcare user are outweighed by the importance of the municipal interest addressed by the bylaw.
- Towns may properly consider the potential negative impacts of child care facilities as a commercial use on residential neighborhoods, and may address those impacts through control or mitigation of size, traffic, signage, noise, outside activities and other concerns.
- The town may consider screening, landscaping and driveway layout to protect the valid municipal interest in preserving the character and appearance of the neighborhood and mitigate adverse consequences of a child care use. (p 384)
- Religious and educational uses have broader and different protections under s.3 than commercial child care facilities have under s.3. (p.381-382) (noting that the footprint restriction enforceable against a child care facility would not be enforceable against religious or educational users running a child care program as a part of their religious or educational mission).

Trustees of Tufts College v. Medford, 415 Mass. 753 (1993)

- Explicitly affirms the authority of municipalities to apply all zoning requirements to protected uses.
- Uniformity Act, MGL ch 40a s.4, requires all bylaws to be applied to protected uses, not just bylaws specifically addressed to those uses.
- Burden is on the developer challenging the application of a local bylaw to prove the application is unreasonable.
- "Reasonableness" is determined on an individual case by case basis.
- Proof that a local zoning law could accomplish its purpose if drafted in other terms does not establish the regulation is unreasonable. (p 760)
- The ease of compliance with a zoning bylaw may require a protected user's compliance.
- Recognizes the need to consider traffic and parking both on site and on adjacent streets in regulating projects; setback impacts and improves safety around project.

Campbell v. City Council of Lynn, 415 Mass, 772 (1993)

- All zoning bylaws must be applied uniformly, towns cannot grant blanket exemptions from the zoning bylaws to protected uses. (p 778)
- Towns can enforce zoning bylaws and even refuse a building permit where the failure of a s.3 user to comply with a bylaw raises safety concerns. (Note 9).

- Parking may be limited to onsite parking.

Primrose School Franchising Co. V. Natick, MISC 12-459243 (Land Court, 2015)

Good example of conditions applicable to childcare user: including off site road improvements to address traffic; lighting and hours of operation; rear of parcel to remain as open space; snow plan; dumpster location and trash pickup during normal business hours.

Walker Realty LLC v Acton, Misc 12-459564 (Land Ct, 2014)

- Landscaping is an appropriate means of mitigating negative impacts of proposed child care facility on the character of the neighborhood.
- Traffic impact on the surrounding area is an appropriate consideration by the town.
- Permissible ways to address traffic concerns include limiting the building size, using traffic lights and requiring police presence during peak hours.

Southern New England Conference Assn of Seventh-Day Adventists v Burlington, 21 Mass. App. Ct. 701 (1986)

Example of how health, safety and environmental regulations are not preempted by s.3.

- Section 3 was not intended to override wetlands protections included in state laws or local zoning bylaws. (p 704-707)

Petrucci v Board of Appeals of Westwood, 45 Mass. App. Ct. 818 (1998) (Pre-*Rogers v Norfolk)*

- Town could not prohibit childcare facilities as a second use in preexisting building on a residential property.
- Request was for a change in use of a single existing structure so that barn could become the child care facility itself, rather than a request to build a new building and to keep the barn on a single lot in the face of an explicit bylaw which prohibits multiple non-residential buildings in a single lot in a residential district.
- Court applies local dimensional bylaws and the fact-specific balancing test established in *Tufts v. Medford*, 415 Mass. 753 (1993) and finds in the case's particular circumstances, enforcing the bylaw would not actually serve the municipal interests. (The circa 1840 historically significant barn was worthy of preservation, compliance would require relocation which would compromise its architectural and building integrity and increase cost. Importantly, the resulting destruction of the surrounding mature trees and dense foliage would in fact be contrary to the legitimate municipal concerns for safety, aesthetics and privacy served by the setback and height requirements in the by-law.) (p 826-7)
- Notes the difference between regulations of use and regulations of structures. (p 824)

Regis College v. Weston 462 Mass. 280 (2012)

Section 3 only applies to protected uses and may not be used as a pretext for unrelated purposes

- Dover Amendment has "common sense limits" and applies **only** where "the bona fide goal" is the protected use. (p 285)

- Credibility determination may be required to ascertain if the proposal claiming status as a protected use will in fact be used for that claimed protected purpose. (p 294)
- Regis College could not shield a luxury apartment development from zoning requirements by simply claiming a minimal educational component to its project. (p 287-291)
- Recognizes "...the protection afforded by the Dover Amendment can be financially advantageous to the landowner. Because the statutory purpose of preventing local discrimination against educational uses is only furthered if the intended use of the land is in fact educational, the term "educational purposes" should be construed so as to minimize the risk that Dover Amendment protection will improperly be extended to situations where form has been elevated over substance..." (p 289)

Kirker v. Board of Appeals of Raynham, 33 Mass. App. Ct, 111 (1992)

- Credibility assessments can be made to determine whether s.3 is being used as a pretext to attain some other purpose.
- Town may first determine the true purpose of the proposed building to determine if s. 3 applies.

II. **Cases Supporting the Building Permit Is Premature**

Berkshire Power Dev. Inc. v. Zoning Bd. Of Appeals of Agawam, 43 Mass. App. Ct, 828 (1997)

- Allows abutters to proceed with an appeal from trial court judgment after ZBA declines to do so, and upholds the denial of the requested special permit and refusal to grant permission to build.

Stevens v. Zoning Bd. Of Appeals of Bourne, 97 Mass. App. Ct. 713 (2020)

- Abutter not bound by the town's settlement agreement, regarding action brought by building inspector to enforce zoning against a landowner, where abutter not party to that suit, and upholding ZBA decision in abutter's favor enforcing the zoning bylaw as originally applied by the building inspector. (p 715)
- Holding the abutter, a party in interest, to the town's settlement would deprive him of due process because there would have been no notice or opportunity to be heard as required by c.40A. (p 716)

III. **Cases On Other Issues**

Harvard v. Maxant, 360 Mass. 432 (1971)

Provides definition of "accessory building" and "accessory use".

Muldoon v. Planning Bd. Of Marblehead, 72 Mass. App. Ct. 372 (2008)

- Site plan review and conditions are permissible means of reasonably regulating permitted use.
- Under site plan review, Town can impose stricter conditions than the minimum requirements set forth in other sections of the bylaw. (i.e. Town could impose a setback greater than the minimum setback called for in the dimensional bylaws).

White v. Armour, 16 LCR 748 (MA, 2008) (attached to earlier filing)

- Applies site plan review to a s.3 protected use (interior of single-family residence). (p 751-752)
- Finds that site plan review *triggered by the size of the project* is a regulation of the external impact of the size and is thus a permissible regulation concerning the bulk of structures within the proviso of s.3. (p 751)

432 Mass. 374
Supreme Judicial Court of
Massachusetts,
Norfolk.

Kristen M. ROGERS
v.
TOWN OF NORFOLK & another.[1]

Submitted Feb. 7, 2000.
|
Decided Aug. 29, 2000.

Synopsis

Owner who sought to use single-family residence with "footprint" of approximately 3,200 square fee as child care facility sought declaration that town's zoning bylaw imposing "footprint" limitation of 2,500 square feet on a child care facility was invalid. Following bench trial, the Superior Court Department, Norfolk County, Paul A. Chernoff, J., concluded that bylaw was facially valid, but invalid as applied to owner's proposed use. Town appealed and Supreme Judicial Court transferred case from Appeals Court on its own initiative. The Supreme Judicial Court, Greaney, J., held that: (1) bylaw was facially valid under statute exempting child care facilities from local zoning ordinances except for reasonable regulations concerning bulk and height of structures, but (2) bylaw was invalid as applied to owner's proposed use of residence.

Affirmed.

Ireland, J., filed dissenting opinion in which Spina, J., joined.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****1143 *374** Thomas J. Carey, Jr., Boston, for the plaintiff.

George A. Hall, Jr., Cambridge, for the defendants.

Present: MARSHALL, C.J., ABRAMS, GREANEY, IRELAND, SPINA, & COWIN, JJ.

Opinion

GREANEY, J.

We transferred this case to this court on our own motion to decide whether a provision of the zoning bylaw of the town of Norfolk that restricts the so-called footprint of a child care facility to 2,500 square feet is valid in light of G.L. c. 40A, § 3, third par., which limits a municipality's ****1144** ability to subject child care operations to requirements contained in zoning ***375** ordinances and bylaws.[2] The plaintiff proposed to convert her single-family residence in Norfolk, which has a "footprint" of approximately 3,200 square feet, into a child care facility. We conclude that the questioned provision is valid on its face, but that, as applied to the child care facility that the plaintiff intends to set up, the provision presents problems that should be resolved in her favor to allow the use.

The background of the case is as follows.[3] The plaintiff is a well-credentialed early childhood educator, who has owned and

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operated two group child care centers, one in Millis (licensed for thirty-nine children) since 1986, and one in Medway (licensed for sixty-nine children) since 1990.[4] After receiving requests to consider opening a child care center in Norfolk, the plaintiff began looking for a possible site in the town.

The plaintiff selected (and jointly purchased with her husband) property at 197 Seekonk Street, in Norfolk, with the intention of operating a child care facility on the premises. The plaintiff's property is located in the R–3 district of the residential zone,[5] and contains 58,791 square feet, which exceeds the minimum R–3 lot size of 55,000 square feet. The structures on the property include a one-story residence that has an attached ***376** garage and sunroom. The total footprint[6] of the residence, including the attached garage and sunroom, is 3,169 square feet. The property also contains a two-story garage and a two-story barn, both of which are detached.

The residence is located in the rear portion of the property, with the barn and detached garage on the right. The principal entrance faces the rear of the lot. A U-shaped drive circles the residence, and there is a curb cut at each end of the drive. With the exception of the back of the premises, the residence is screened by trees, by the other structures on the land, ****1145** and, to some extent, by existing topography. The closest neighboring residences are 140 feet, 155 feet, and 170 feet away. The residence was originally built as a dog kennel, and later was converted into a single-family residence. Due to the original design of the residence, the rooms are unusually large.

The plaintiff indicated that she and her husband purchased the property because many of its features, including its circular drive, large rooms in a single-story residence,[7] and exterior buffers, provided a good setting for child care. In the residence, only about 1,700 square feet can qualify as usable child care space under the office of child care services licensing guidelines, which is enough to serve approximately forty-five children at a time.[8]

***377** Norfolk's schedule of uses allows child care facilities in all of the town's districts. The zoning bylaw defines a "child care facility" as "[a] day care center or school age child care program as those terms are defined in G.L. c. 28A, Section 9[9]; provided that the ground area covered by the BUILDING in which such business is located does not exceed 2,500 square feet." The term "ground area" is synonymous with footprint. Members of the planning board of Norfolk, who were on the board at the time that the zoning bylaw was amended to include this definition, testified (and the judge accepted their testimony) that the purpose of the footprint limitation was to allow child care facilities, but to regulate their size to ensure consistency with the size of residential structures. (It is important to state here that ninety-five per cent of the town is residentially zoned, and, of the approximate 2,300 houses in Norfolk, the "footprint" of the average sized house is a little under 1,700 square feet.) Because the footprint of the plaintiff's residence (3,169 square feet) exceeded the footprint permitted for child care facilities in the zoning bylaw (2,500 square feet), the plaintiff was informed by the building commissioner, and, subsequently, the zoning board of appeals, that she could not obtain a building permit, or other zoning

approval, to use her residence as a child care facility.

The plaintiff commenced an action in the Superior Court, which, as far as now relevant, sought a declaratory judgment that the provision of the zoning bylaw imposing a footprint limitation on a child care facility was unlawful. After a bench trial, a judge in the Superior Court concluded that the provision was facially valid, but invalid as applied to the plaintiff's proposed use. This appeal followed. The sole issue concerns the validity of the footprint provision in the bylaw in light of G.L. c. 40A, § 3, third par.

1. Although we have never examined G.L. c. 40A, § 3, third par., we have had occasion to interpret analogous language, set forth in G.L. c. 40A, § 3, second par., inserted by St.1975, c. 808, § 3 (Dover Amendment), affording educational and ***378** religious institutions protection from local zoning regulation. See *Campbell v.* ****1146** *City Council of Lynn,* 415 Mass. 772, 616 N.E.2d 445 (1993); *Trustees of Tufts College v. Medford,* 415 Mass. 753, 616 N.E.2d 433 (1993). In *Trustees of Tufts College v. Medford, supra* at 757–758, 616 N.E.2d 433, we held that "[l]ocal zoning requirements adopted under the proviso [amendment allowing 'reasonable regulations'] to the Dover Amendment which serve legitimate municipal purposes sought to be achieved by local zoning, such as promoting public health or safety, preserving the character of an adjacent neighborhood, or one of the other purposes sought to be achieved by local zoning as enunciated in St.1975, c. 808, § 2A, see *MacNeil v. Avon,* 386 Mass. 339, 341, 435 N.E.2d 1043 (1982), may be permissibly enforced, consistent with the Dover Amendment, against [a protected] use ... so long as the provision is shown to be related to a legitimate municipal concern, and its application bears a rational relationship to the perceived concern. On the other hand, a zoning requirement that results in something less than nullification of a proposed educational use may be unreasonable within the meaning of the Dover Amendment." (Citations omitted.) A Dover Amendment type analysis, like that used in the *Tufts* decision and related cases, as encapsulated in the quotation from *Tufts,* formed the basis of the judge's decision. We agree that such an analysis is appropriate here.

The plaintiff argues that the footprint limitation is facially invalid, because the limitation unlawfully discriminates against child care facilities, in contradiction of the language and purpose of G.L. c. 40A, § 3, third par. She may prove this claim by showing that the provision either prohibits, or requires a special permit (or other local approval) for, child care facilities, a matter not in issue, or that the provision acts in such a way as to nullify the protection granted by G.L. c. 40A, § 3, third par., to child care facilities, the precise matter in issue. See *Trustees of Tufts College v. Medford, supra* at 758, 765, 616 N.E.2d 433; *The Bible Speaks v. Board of Appeals of Lenox,* 8 Mass.App.Ct. 19, 32–33, 391 N.E.2d 279 (1979).

The plaintiff's contention is based on the principle that a court may strike down Norfolk's "use specific" provision as facially invalid, if, after some showing by her that the provision imposes a greater restriction on

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child care facilities than on other uses, Norfolk fails to offer a reason for the disparate treatment satisfactory to the court, even though the reason is well established as a justification for the exercise of local zoning ***379** regulation. This approach is wrong. A challenged provision in a zoning bylaw is presumptively valid, and a challenger bears the burden to prove otherwise. See *Johnson v. Edgartown,* 425 Mass. 117, 121, 680 N.E.2d 37 (1997). There is no basis to assume that G.L. c. 40A, § 3, third par., was intended to grant child care facilities such a measure of heightened protection that Norfolk is required to prove that the footprint provision was not intended to be discriminatory. Nothing in the language of G.L. c. 40A, § 3, third par., requires local officials to treat a child care facility the same as a residential use, or makes unlawful the adoption of a provision in a zoning bylaw that differentiates between building coverage requirements applicable to child care facilities and other uses. Indeed, there is indication that the Legislature, in enacting G.L. c. 40A, § 3, second par., authorized municipalities to impose regulatory measures on educational and religious uses, in order to protect the character and well-being of established neighborhoods, as long as "the regulation will not seriously jeopardize the mission of the protected institutions." 1972 House Doc. No. 5009. See *Trustees of Tufts College v. Medford, supra* at 770, 616 N.E.2d 433 (Appendix). Further, the Legislature contemplated that a municipality could permissibly adopt zoning restrictions specifically tailored to the protected use. As is stated in the legislative report that gave rise to the power of a municipality to regulate a use protected by the Dover Amendment: "Ideally, [municipal restriction] should be accomplished by adopting regulations specifically designed to apply to uses protected ****1147** by the Dover Amendment located in otherwise restricted zones, thus avoiding the problem of attempting to apply the *same* bulk regulations to the protected uses as ordinarily apply to other permitted uses in the zone" (emphasis original). *Id.* at 771, 616 N.E.2d 433. In the absence of clear legislative directive to the contrary, a court should not stray from the mandates of settled law and strip a zoning provision of its presumption of validity because the provision imposes greater restrictions on child care facilities than on other uses.

The proper test for determining whether the provision in issue contradicts the purpose of G.L. c. 40A, § 3, third par., is to ask whether the footprint restriction furthers a legitimate municipal interest, and its application rationally relates to that interest, or whether it acts impermissibly to restrict the establishment of child care facilities in the town, and so is unreasonable. The provision is facially valid under this test. The judge properly ***380** concluded, on the only evidence before him, that the purpose of the provision was to ensure that the size of child care facilities did not detract from Norfolk's predominantly residential character by inserting in residential zones particularly large structures. As both parties acknowledge preservation of the residential character of neighborhoods is a legitimate municipal purpose to be achieved by local zoning control. See *Trustees of Tufts College v. Medford, supra* at 757–758, 616 N.E.2d 433. In view of the fact that ninety-five per cent of the land in Norfolk is residentially zoned, the provision clearly is a reasonable

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accommodation between the need to establish child care facilities and the need to preserve the predominant nature of Norfolk's residential zones, a matter of serious concern to the town.[10] See *id.* at 760, 616 N.E.2d 433. The provision focuses on the fact that child care facilities are commercial enterprises, and thereby have a greater potential than residential uses to disrupt, or detract from, the town's tranquility. A child care facility of larger dimensions will likely generate more traffic and create more noise, all of which may have greater impact on a town composed mainly of single-family homes.

We reject the plaintiff's assertion that restricting a child care facility to a structure with a footprint equal to, or less than, 2,500 square feet, unreasonably prohibits the use of buildings in Norfolk for child care facilities, and so nullifies the protection granted by G.L. c. 40A, § 3, third par. There are two principal reasons why this claim is rejected. First, ninety per cent of the 2,300 residences in Norfolk fit within the footprint restriction (the footprint of the average sized property is a little under 1,700 square feet)[11] and, as has been indicated, ninety-five per cent of the town's land is residentially zoned. Second, in the ***381** zones other than residential (business, commercial, and "health maintenance and professional office"), which comprise the remaining five per cent of the land in Norfolk, the provision in issue does not prohibit the operation of a child care facility in a building having a footprint equal to, or less than, 2,500 square feet. Moreover, ****1148** the uses allowed by Norfolk's zoning bylaw in the town's nonresidential zones are of a type that would ordinarily not be expected to contain, or be suitable for, a child care facility. Included among these uses are bus or railway stations; restaurants; retail stores; office buildings; manufacturing facilities; and service establishments like beauty salons, dry cleaners, and various kinds of repair shops. The provision does not prohibit new construction of a child care facility in any zone. Thus, the factual, on the ground, character of Norfolk's residences and structures allows for child care facilities in virtually all of the town's buildings where a child care use would be expected or feasible. Because child care facilities by their nature are different from churches or educational institutions, and may tend to be more ubiquitously located, it cannot be persuasively argued that a regulation that permits such facilities in all but a small fraction of the town's buildings, is unlawful. Finally, the provision could not be enforced to prevent a child care facility in a church or educational institution, which are separately protected by the provisions of G.L. c. 40A, § 3, second par., for all uses related to their primary missions.

We reject the contention in the dissent that there is no reasonable justification for the footprint restriction, because it does not serve the stated purpose of preserving the rural character of residential neighborhoods. The dissent reasons, in effect, that the provision is invalid because it is both over, and under, inclusive. First, the dissent objects to the fact that the provision applies to all of Norfolk's use districts, and concludes that the goal of preservation of residential zones is not served by applying a dimensional regulation to commercial or business zones. The dissent also finds fault with the provision because it does not apply to other uses in the residential zone. It proceeds on the assumption that the

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goal of preserving the rural character of residential zones is not met by restricting the footprint of only child care facilities while at the same time allowing structures ***382** not used for child care purposes to exceed the footprint restriction imposed on child care facilities.

Both generalizations are inaccurate. Large structures on land zoned for commercial or business uses might very well have a negative impact on an adjacent residential neighborhood, especially if the neighborhood were physically surrounded by commercial or business districts. In addition, there are valid aesthetic reasons why the town might desire to restrict the size of a child care facility, but not other uses, within its residential districts. A child care facility is, after all, a commercial use, and the only commercial use allowed within the town's residential districts.

Further, the hypothetical problems envisioned by the dissent raise only chimerical situations. Our holding will have no effect on the status and rights of churches or educational institutions that, as we have indicated, are separately protected by legislation and established case law. Thus, it makes no sense to suggest that the town might impose small footprint requirements on churches or schools just to keep residential neighborhoods "rural." Of equally dubious relevance are the following statements in the dissent: "whether the size or style of a structure conforms to the aesthetics of the neighborhood is unrelated to the use of that structure. If indeed footprint limitations equal 'ruralness,' then all structures in the neighborhood that is sought to be preserved should be similarly limited." *Post* at 387–388, 734 N.E.2d at 1151–1152. Ignoring the non sequiturs implicit in the statements, we emphasize that the whole point of Norfolk's provision is to allow the presence of a single type of commercial use in residential neighborhoods, where the footprints of virtually all existing structures are 2,500 square feet or less, thus tending to mitigate the effects that the commercial use will have on the neighborhoods by reason of size, traffic, signage, noise, outside activities and the like (all these considerations being common to child care facilities). The plaintiff has made no showing that child care facilities ****1149** cannot be established in buildings in Norfolk within the footprint requirement, and what may go on in other buildings in other zones is beside the point. The dissent overlooks the fact that the exercise of zoning authority calls for balancing rights or privileges of use with the character of neighborhoods, a task which necessarily calls into play issues of size, location, setback, traffic, and the sundry other matters addressed in local land use and zoning bylaws and ordinances. The fact that, in the dissent's opinion, Norfolk could have ***383** enacted a provision that would have better served the town's interests, has no place in an analysis, under G.L. c. 40A, § 3, third par., of the validity of the provision that Norfolk chose to adopt. See *Trustees of Tufts College v. Medford,* 415 Mass. 753, 760, 616 N.E.2d 433 (1993).

In sum, the provision is presumed to be valid, and the plaintiff must demonstrate that it is not.[12] The test is not the other way around. The provision is within the authority granted to a municipality by the Legislature in G.L. c. 40A, § 3, third par., and in conformance with the legislative suggestion that

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municipalities design regulations that specifically apply to Dover Amendment uses as distinguished from more general restrictions that apply to all uses including Dover Amendment uses. We conclude that the provision was validly adopted to protect and preserve the residential character of Norfolk and that it is not repugnant to G.L. c. 40A, § 3, third par.

2. We turn now to the plaintiff's claim that the provision is unreasonably restrictive as applied to her property, keeping in mind that the pertinent language of § 3, third par., seeks to strike a balance between preventing local discrimination against child care facilities and respecting legitimate municipal concerns. See *Trustees of Tufts College v. Medford, supra* at 757, 616 N.E.2d 433. "[T]he question of the reasonableness of a local zoning requirement, as applied to a proposed [exempt] use, will depend on the particular facts of each case. Because local zoning laws are intended to be uniformly applied, an [applicant] will bear the burden of proving that the local requirements are unreasonable as applied to its proposed project. The [applicant] might do so by demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the [applicant's property], without appreciably advancing the municipality's legitimate concerns. Excessive cost of compliance with a requirement imposed [by the zoning ordinance] ... without significant gain in terms of municipal concerns, might also qualify as unreasonable regulation ***384** of an [exempt] use." *Id.* at 759–760, 616 N.E.2d 433. In addition, in determining the reasonableness of a zoning provision, we may inquire whether "the requirement[ ] sought to be applied ... take[s] into account the special characteristics of [the exempt] use." *Id.* at 758–759 n. 6, 616 N.E.2d 433. A practical examination of this case leads to the conclusion that the provision is unreasonable as applied to the plaintiff's property.

The plaintiff proposes to use an existing residential structure that, the judge (who may have taken a view of the property)[13] concluded, conforms to the styles and character of residences in the area. The ****1150** lot is a spacious 58,791 square feet, and the residence is screened (with the exception of the back) by trees, two other structures on the lot, and by topography. The adjacent neighbors are, respectively, 140 feet, 155 feet, and 170 feet away. Unique characteristics of the property, including a one-story structure with large rooms for functional utility and handicapped accessibility, curb cuts for a circular driveway for ease of egress and fire safety, make it ideal for child care use. All generally applicable zoning requirements have been met. While compliance with the provision is technically possible, if the porch and the garage were removed, the uncontested evidence is that elimination of the garage would affect the structural integrity of the building,[14] and would serve no useful purpose. Norfolk's interest in preserving the residential appearance of its neighborhoods is legitimate, but the use of the plaintiff's residence for a child care facility would not affect the aesthetic appearance of the neighborhood in a manner that the bylaw was intended to discourage.

The defendants do not correctly apply our decision in *Trustees of Tufts College v. Medford, supra,* when they assert that a court may not grant an exemption to the provision without ***385** particularized evidence that no other options (for example, use of the two-story barn on the property; construction of a conforming one-story facility on the property; or, the availability of an alternative property in the town) were available for the plaintiff's proposed child care facility. The central question is whether application of the footprint requirement to the plaintiff's proposed project furthers a legitimate municipal concern to a sufficient extent to warrant requiring the plaintiff to alter her plans. *Id.* at 764, 616 N.E.2d 433. "Particularized proof" as to cost of compliance is not required in every case. As we made clear in the language of the *Tufts* decision, *id.* at 759–760, 616 N.E.2d 433, set forth above, proof of cost of compliance is only one way to show the unreasonableness of applying an otherwise valid regulation to a particular property.[15] See *Campbell v. City Council of Lynn,* 415 Mass. 772, 778, 616 N.E.2d 445 (1993). When the record satisfactorily demonstrates, as it does here, that the application of the footprint requirement to the plaintiff's property would significantly impede the use of the premises as a child care facility, while not substantially advancing a valid goal of Norfolk's zoning regulation, the provision is unreasonable as applied.[16] See *id.* at 779, 616 N.E.2d 445.

Judgment affirmed.

IRELAND, J. (dissenting, with whom SPINA, J., joins).

Because Norfolk's bylaw subjects child care uses to a more restrictive footprint limitation than other uses, and because Norfolk does so in the absence of any reasonable basis for such discriminatory ****1151** treatment, the bylaw "nullif[ies] the protection granted by G.L. c. 40A, § 3, third par., to child care facilities," *ante* at 378, 734 N.E.2d at 1146, and is therefore facially invalid. I therefore respectfully dissent.

***386** The court states that the appropriate test to determine the facial validity of Norfolk's bylaw is "whether the footprint restriction furthers a legitimate municipal interest, and its application rationally relates to that interest, or whether it acts impermissibly to restrict the establishment of child care facilities in the town, and so is unreasonable." *Ante* at 379, 734 N.E.2d at 1147. In light of the purpose of G.L. c. 40A, § 3, third par., which was to encourage the availability of child care facilities, see *Petrucci v. Board of Appeals of Westwood,* 45 Mass.App.Ct. 818, 822–823 n. 7, 702 N.E.2d 47 (1998), I believe that test is incomplete. In keeping with the purpose of the statute, a municipality should not be able to discriminate against child care uses of property unless there is a reasonable basis for the discriminatory treatment. Thus, a bylaw that is specific to child care uses and subjects the use to more restrictive regulation than other uses permitted in the zone, without a reasonable justification for that discriminatory treatment, should be invalidated. Cf. *Trustees of Tufts College v. Medford,* 415 Mass. 753, 757, 616 N.E.2d 433 (1993) (Dover Amendment intended to "strike a balance between preventing local

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discrimination against an educational use ... and honoring legitimate municipal concerns"); *The Bible Speaks v. Board of Appeals of Lenox,* 8 Mass.App.Ct. 19, 30–31, 391 N.E.2d 279 (1979) (consistent with G.L. c. 40A, § 3, town may regulate bulk of buildings and impose dimensional and parking requirements, but may not "through the guise of regulating bulk and dimensional requirements under the enabling statute, proceed to 'nullify' the use exemption").

Applying the above analysis, I conclude that the Norfolk bylaw discriminates against child care uses and that Norfolk has not offered a reasoned basis for that discriminatory treatment. First, as Norfolk's 2,500 square foot limitation applies only to child care uses, Norfolk's bylaw is use specific. Second, the bylaw subjects child care uses to discriminatory treatment. Norfolk limits child care facilities to buildings with footprints of 2,500 square feet or less, and this limitation applies across all of Norfolk's use districts. No other use is subjected to such a universal and uniform limitation. Of the thirteen various residential, business, commercial, and health maintenance and professional office use districts in Norfolk, only districts B–1, C–1, and C–4, have any footprint restrictions. These restrictions are substantially larger and most are subject to override by a ***387** special permit process.[1] As far as the justification for the bylaw, the trial judge found, and Norfolk does not dispute, that the purpose of the bylaw was to "protect[ ] and preserv[e] the rural character and aesthetics of Norfolk's residential zones."

I agree that the preservation of the aesthetic qualities of a residential neighborhood is not, by itself, an unreasonable basis for a discriminatory bylaw. However, Norfolk should be required to offer some reasonable basis for restricting the ****1152** footprint of only child care facilities. Norfolk should be required to offer some rational reason why limiting the size of only structures used for child care facilities will preserve the rural character of its residential neighborhoods, while at the same time allowing larger structures used for other purposes. In my view, only if there is some rational reason why limiting the size of *only* child care facilities, and not other buildings, preserves the rural character and aesthetics of the town can the bylaw survive.

I conclude that Norfolk has not offered a rational reason for its discriminatory treatment of child care facilities. First, the goal of preservation of the rural character of the residential zones is generally not served by applying a dimensional regulation to commercial or business zones. Second, whether the size or style of a structure conforms to the aesthetics of the neighborhood ***388** is unrelated to the use of that structure. If indeed footprint limitations equal "ruralness," then all structures in the neighborhood that is sought to be preserved should be similarly limited.

The court states that child care facilities would conceivably generate more traffic and more noise, thus disrupting residential neighborhoods. However, the Legislature was presumably aware of this when it enacted the law permitting child care facilities to operate as of right in every zone. Furthermore, if limiting traffic and noise by limiting the size of a structure is a reasonable basis for discriminating against the protected

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use, then what is to prevent a community from enacting an even smaller footprint restriction. Under the court's reasoning, as long as one or more structures in the community is not excluded from use by the bylaw, or as long as there is one or more buildable lots in the community, see *ante* at 380 n. 11, 734 N.E.2d at 1147 n. 11, then the bylaw would be facially valid. Although property owners may always challenge the validity of a bylaw as applied to their particular proposed facility, I cannot agree that requiring them to resort to the courts in almost every instance accords with the intent of the Legislature in enacting G.L. c. 40A, § 3, third par.

Furthermore, under the court's logic, churches and schools, which are at least as disruptive to a residential zone as a child care facility, may similarly be limited and for the same reason. This, I believe, is directly contrary to our case law. In *Sisters of the Holy Cross of Mass. v. Brookline,* 347 Mass. 486, 494, 198 N.E.2d 624 (1964), interpreting the precursor to G.L. c. 40A, § 3, second par., we stated that we thought "it unlikely that the Legislature would exempt religious and educational institutions from local regulations of use and at the same time permit this exemption to be virtually nullified by a requirement that such institutions construct their buildings on dimensions applicable to single family houses." If a community may not impose the *same* residential dimensional regulations to educational and religious uses, which are protected to the same extent as child care uses, why should a community be permitted to impose more restrictive dimensional regulations?[2]

Because Norfolk has not offered a reasonable justification for ***389** a bylaw that discriminates against child care uses of property, I would hold the bylaw facially invalid.

All Citations

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Footnotes

1 The zoning board of appeals of Norfolk.

2 General Laws c. 40A, § 3, third par., reads as follows:

> "No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk

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and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements."

[3] The judge made findings of fact and rulings of law. His findings include some, but not all, of the information now recounted. That information is based on undisputed documentary and other evidence.

[4] License capacity refers to the maximum number of children permitted on the premises at any one time by the office of child care services, the State agency charged with providing licenses for child care centers. G.L. c. 28A, § 4 (*c*); 102 Code Mass. Regs. § 1.03(2) (1997). Depending on the needs of the families a child care center serves (full-time or part-time day care), a child care center's license capacity may differ from the number of children the center actually serves.

[5] The town has three residential districts, R–1, R–2, and R–3. The residential district comprises ninety-five per cent of the town's land. The remaining five per cent of the land in Norfolk is divided into three other districts, the business district, the commercial district, and the "health maintenance and professional office" (HM & PO) district. There are four business districts, numbered B–1 through B–4, and five commercial districts, numbered C–1 through C–5.

[6] The term "footprint" is defined in the Norfolk zoning bylaw as "[t]he land area occupied by BUILDINGS or STRUCTURES, at the surface of the ground, excluding open porches." The term "building" is defined as "[a]ny STRUCTURE used or intended for supporting or sheltering any use or occupancy. Any such STRUCTURES which share a common wall, but are located on separate LOTS, shall be considered to be separate BUILDINGS." The term "structure" is defined in the bylaw as "[a]ny construction, erection, assemblage or other combination of materials upon the land, necessitating pilings, footings or a foundation for attachment to the land, including swimming pools."

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7 The plaintiff testified that a residence having a single story, as opposed to two or more stories, was preferable to house a child care facility because, pursuant to the office of child care services regulations concerning compliance with the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. (1994) (ADA), if a day care facility cannot locate all of its programs on the first floor of the facility, then the facility must make its second floor accessible to children with disabilities. While the plaintiff testified that ADA compliance, with respect to a multi-level building, would be "more difficult and less desirable for safety reasons, for access reasons," she furnished no evidence concerning the possible costs related to such compliance.

8 The office of child care services requires that a group day care center "have a minimum of 35 square feet of activity space per child, exclusive of hallways, lockers, wash and toilet rooms, isolation rooms, kitchens, closets, offices or areas regularly used for other purposes." 102 Code Mass. Regs. § 7.25(5) (1997)102 Code Mass. Regs. § 7.25(5) (1997).

9 General Laws c. 28A, § 9, provides particularized definitions for the terms "[d]ay care center" and "[s]chool age child care program." The definitions, which we need not repeat here, apply to the plaintiff's proposed use.

10 An examination of the Norfolk zoning bylaw discloses other footprint restrictions that evidence a local concern for regulating the size of structures. In the C–1 district, for example, all uses, except religious, educational, agricultural, farmers' markets, and open space, village greens and squares, must have a building with a minimum footprint of 2,000 square feet. In both the C–1 and C–4 districts, no building footprint, other than manufacturing or offices, may exceed 50,000 square feet. In the B–1 district, all uses are subject to a footprint restriction of less than or equal to 8,000 square feet, with the exception of grocery and variety stores (45,000 square feet) and municipal buildings (20,000 square feet). In addition, convenience stores, by definition, are uniformly limited to structures with "gross floor area" (measured slightly differently from footprint) of less than 5,000 square feet.

11 If the record established, for example, that none or few of the buildings in Norfolk had a footprint equal to, or less than, 2,500 square feet, and there were no or few buildable lots in the town, then we could conclude that the effect of the provision would be to prohibit

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child care uses, rendering the provision facially invalid.

12 The plaintiff has fallen far short of showing that the provision was either intended to discriminate against child care facilities, or has that practical effect. The fact that no new child care facilities have been established in Norfolk since the provision was adopted affords no basis for a court to declare the provision invalid, in the absence of a specific showing that conforming properties are unavailable, or that State and Federal requirements, coupled with the restriction, make the establishment of child care facilities in conforming properties economically unfeasible.

13 The record indicates that the judge was requested, and agreed, to take a view of the plaintiff's property, although the record does not confirm that he did so. A view, while it does not constitute evidence, would be of importance in a case such as this, particularly with regard to the feasibility of the property's modification to meet the footprint restriction.

14 The garage and the residence sit on a rectangular slab of concrete, and are covered by one roof. The plaintiff testified that the removal of the garage would "have butchered" the residence, and the removal of both the garage and sunroom would be costly. The plaintiff did not testify as to, or offer other evidence of, the potential costs of this option, but common sense dictates that removing attached portions of a residence may impair the integrity of the over-all structure.

15 If the plaintiff proposed to construct a building with a footprint in excess of 2,500 square feet, our concerns for the need for particularized proof of costs of compliance, as expressed in *Trustees of Tufts College v. Medford,* 415 Mass. 753, 763, 616 N.E.2d 433 (1993), would be relevant.

16 We reject the defendants' claim that the judge did not make the proper findings to support his conclusion that the bylaw is unreasonable as applied to the plaintiff. The judge's conclusion, was based, as is ours, on a practical examination of the application of the provision to the uncontested facts in the record concerning the nature of the plaintiff's property. As has been stated above, a specific finding in this case that the application of

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the provision would prevent the development of a child care facility on the property was not required.

[1] The bylaws provide for the following footprint size limitation in the B–1 district:

> "No Building FOOTPRINT, other than a GROCERY STORE, Municipal BUILDING, or VARIETY STORE, shall exceed 8,000 square feet except by Special Permit. No GROCERY STORE or VARIETY STORE FOOTPRINT shall exceed 45,000 square feet except by Special Permit. No municipal BUILDING FOOTPRINT shall exceed 20,000 square feet except by Special Permit. Upon issuance of a Special Permit from the Zoning Board of Appeals, no building FOOTPRINT other than a GROCERY STORE, Municipal BUILDING or VARIETY STORE shall exceed 15,000 square feet, no Municipal BUILDING FOOTPRINT shall exceed 30,000 square feet, and no GROCERY STORE OR VARIETY STORE FOOTPRINT shall exceed 50,000 square feet."

The bylaws provide for the following footprint size limitation in the C–1 and C–4 districts:

> "No BUILDING FOOTPRINT, other than MANUFACTURING or Offices, shall exceed 50,000 square feet except by Special Permit by the Zoning Board of Appeals."

[2] I recognize that communities may, and are encouraged to, enact bylaws that apply specifically to child care, or other protected uses. I do not think, however, that communities may discriminate against a protected use in the absence of a reasonable basis for the discrimination. See 1972 House Doc. No. 5009; *Trustees of Tufts College,* v. *Medford,* 415 Mass. 753, 771, 616 N.E.2d 433 (1993) (Appendix) (stating that municipalities should adopt regulations "specifically designed to apply to uses protected by the Dover Amendment located in otherwise restricted zones, thus avoiding the problem of attempting to apply the *same* bulk regulations to the protected used as ordinarily apply to other permitted uses in the zone" [emphasis original]).

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415 Mass. 753
Supreme Judicial Court of
Massachusetts,
Suffolk.
TRUSTEES OF TUFTS COLLEGE
v.
CITY OF MEDFORD.

Argued March 2, 1993.
|
Decided July 9, 1993.

Synopsis
College brought action challenging application of dimensional, parking, and loading-space requirements of zoning ordinance to several construction projects. The Land Court, Suffolk County, Robert V. Cauchon, J., decided that ordinance could not for most part be validly applied to projects in question, and city appealed. The Appeals Court, 33 Mass.App.Ct. 580, 602 N.E.2d 1105, modified judgment, and further review was sought. The Supreme Judicial Court, Greaney, J., held that: (1) under reasonable construction of ordinance's definition of "lot," requirement regarding number of parking spaces could be applied to proposed library addition; (2) college failed to establish that application of ordinance provisions dealing with loading spaces and setbacks would be unreasonable; and (3) city could not be prospectively enjoined from applying ordinance to future construction projects in core area of campus or to future projects such as those that resulted in college's suit.

Affirmed as amended in part, vacated in part.

O'Connor, J., concurred in part, dissented in part, and filed opinion.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****435 *753** Eric W. Wodlinger, Boston (Robert J. Blumsack, City Sol., with him), for defendant.

Daniel J. Gleason, Boston (Donald R. Peck & Edward C. Mendler, with him), for plaintiffs.

***754** David R. Rodgers & Jeffrey Swope, Boston, for Association of Independent Colleges and Universities in Massachusetts, amicus curiae, submitted a brief.

John A. Pike, Boston, for Abstract Club & another, amici curiae, submitted a brief.

****436** Before LIACOS, C.J., and WILKINS, ABRAMS, NOLAN, LYNCH, O'CONNOR and GREANEY, JJ.

Opinion

GREANEY, Justice.

This case concerns whether dimensional, parking and loading space requirements of the Medford zoning ordinance (ordinance) can be applied to several construction projects planned by Tufts College.[1] After a trial on a complaint brought in the Land Court by Tufts under G.L. c. 240, § 14A (1990 ed.), a judge of that court decided that the ordinance requirements could not, for the most part, be validly applied to Tufts'

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projects consistent with G.L. c. 40A, § 3, second par., as inserted by St.1975, c. 808, § 3 (generally referred to as the Dover amendment).[2] Medford appealed. The Appeals Court, relying on Medford's interpretation of the ordinance requirements and concessions made by Medford, determined that the judgment should be modified to permit application to Tufts' projects of some of the provisions. 33 Mass.App.Ct. 580, 602 N.E.2d 1105 (1992). We granted further appellate review. We agree with the Appeals Court that modification of the judgment is appropriate.

***755** The projects as to which there remains controversy[3] are a 96,000 square foot addition to the Wessell Library (Wessell), Tufts' undergraduate library, and a multi-level parking garage which is planned on the site of an existing building on the southern side of Boston Avenue. The garage will provide parking spaces initially for 290 vehicles with an ability to be expanded to 530 spaces. Both projects will be located in the core, or Hill, area of Tufts' campus, on land zoned by Medford for "Apartment–2 Residential" use. Tufts also sought a determination that requirements of the ordinance could not be applied to future, as yet unspecified, projects in the core area of its campus.

The requirements of the ordinance that remain at issue provide for: (1) a front-yard setback dependent on the size of the building and calculated by a formula (§ 6.3.5[c]); (2) one loading space (twelve feet in width and thirty feet in length) for each 50,000 square feet of new construction (§§ 5.3, 10.41 and 10.45);[4] and (3) one parking space for each 750 square feet of ****437** new construction which must be located ***756** either on the same lot as the new construction or within 200 feet thereof (§§ 5.3, 10.2 and 10.24). The ordinance defines the term "lot" as a duly recorded parcel of land which is commonly owned and has definite boundaries and is not divided by a street (§ 3.30).[5]

Application of these requirements to the Wessell addition would require Tufts to provide 130 new parking spaces on the Wessell lot (or within 200 feet thereof). Assuming that the ordinance could be construed as treating each building on the campus as occupying a separate lot, see note 5 *supra,* the Land Court judge interpreted the parking requirement as necessitating "postage stamp" parking lots adjoining each project Tufts might undertake in the core area of its campus. The judge considered this requirement to be incompatible with the character of the Tufts campus. In the judge's opinion, the proposed Boston Avenue garage provided a reasonable solution to the parking problem faced by Tufts, but it was not a solution permitted under the ordinance. The judge also concluded that Wessell did not need two additional loading spaces. He therefore ruled that provisions of the ordinance requiring off-street parking and loading spaces "did not rise to the level of 'reasonable regulations' within the meaning of G.L. c. 40A, § 3, and, accordingly, [were] inapplicable to Tufts' use of its land in Medford."

The ordinance also requires a fifty-foot setback from Boston Avenue for the new parking garage (§ 6.3.5[c]). Tufts proposes a thirty-foot setback for the garage. "The evidence was to the effect that there is no absolute physical impediment to constructing

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a garage of the planned dimensions with a setback of fifty feet, but the cost will be increased because of the sharply rising slope of the land behind the ***757** garage and because of the need that will be created to support the foundation of another building, a power plant, situated on the same hillside. No estimate of the expected cost increase was put in evidence....” 33 Mass.App.Ct. at 585, 602 N.E.2d 1105. The Land Court judge, who took a view of the campus, noted that the topography of the land at the proposed garage site might warrant the grant of a variance under G.L. c. 40A, § 10, from the setback requirement. Based on a need for a solution to a serious parking problem facing Tufts, and apparently assuming that the garage might not be built if the setback requirement was enforced, the judge concluded that full setback would unreasonably interfere with the use of Tufts' land. He declared, therefore, that the setback requirement could not be enforced. Finally, the judge extended his conclusion that the various requirements of the ordinance that were in contention could not be applied to any future construction that might be undertaken by Tufts in the core area of the campus, and, in a postjudgment order (entered on Tufts' request), the judge defined the area of Tufts that he considered to constitute the “core campus.”

1. *The Dover Amendment.* We first discuss generally applicable legal principles. The Dover Amendment bars the adoption of a zoning ordinance or by-law that seeks to prohibit or restrict the *use* of land for educational purposes. However, a proviso to the statute authorizes a municipality to adopt and apply “reasonable regulations” concerning bulk, dimensions, open space and parking, to land and structures for which an educational use is proposed. The whole of the Dover Amendment, as it presently stands, seeks to strike a balance between preventing local discrimination against an educational use, see *Newbury Junior College v. Brookline,* 19 Mass.App.Ct. 197, 205, 472 N.E.2d 1373 (1985), and honoring legitimate municipal concerns that typically find expression in local zoning ****438** laws. This case requires us to address that balance in practical terms.

Local zoning requirements adopted under the proviso to the Dover Amendment which serve legitimate municipal purposes sought to be achieved by local zoning, such as promoting ***758** public health or safety, preserving the character of an adjacent neighborhood, or one of the other purposes sought to be achieved by local zoning as enunciated in St.1975, c. 808, § 2A, see *MacNeil v. Avon,* 386 Mass. 339, 341, 435 N.E.2d 1043 (1982), may be permissibly enforced, consistent with the Dover Amendment, against an educational use. See *Radcliffe College v. Cambridge,* 350 Mass. 613, 215 N.E.2d 892 (1966); *The Bible Speaks v. Board of Appeals of Lenox,* 8 Mass.App.Ct. 19, 31, 391 N.E.2d 279 (1979) (a building inspector may properly deny permits to an educational institution for a structure that does not comply with “reasonable regulations”). See also *Southern New England Conference Ass'n of Seventh–Day Adventists v. Burlington,* 21 Mass.App.Ct. 701, 710, 490 N.E.2d 451 (1986) (local zoning law protecting wetlands applied to property protected by Dover Amendment). The *Radcliffe College* case suggests that a local zoning provision that requires an educational institution to adapt plans for the use of its land may be enforced,

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so long as the provision is shown to be related to a legitimate municipal concern, and its application bears a rational relationship to the perceived concern. On the other hand, a zoning requirement that results in something less than nullification of a proposed educational use may be unreasonable within the meaning of the Dover Amendment. See *Radcliffe College v. Cambridge, supra,* 350 Mass. at 619, 215 N.E.2d 892 (concluding that a parking requirement could be applied, but suggesting that future application might be unreasonable if the result would require the educational institution to provide more parking spaces "than could in reason be deemed necessary to take care of the cars brought to the [area] by the use made of it by the college").[6]

***759** What we have said thus far suggests that the question of the reasonableness of a local zoning requirement, as applied to a proposed educational use, will depend on the particular facts of each case. Because local zoning laws are intended to be uniformly applied, an educational institution making challenges similar to those made by Tufts will bear the burden of ****439** proving that the local requirements are unreasonable as applied to its proposed project. The educational institution might do so by demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution's campus, without appreciably advancing the municipality's legitimate concerns.[7] Excessive cost of compliance with a requirement imposed on an educational institution, without significant ***760** gain in terms of municipal concerns, might also qualify as unreasonable regulation of an educational use. We reject the suggestion that only local zoning requirements drafted specifically for application to educational uses are reasonable within the scope of the Dover Amendment. Nothing in that statute mandates the adoption of local zoning laws which are tailored specifically to educational uses. See Report, *supra* at 26 (observing that *ideally* regulations should be specifically adapted to educational uses). Similarly, proof that a local zoning law could accomplish its purpose if it were drafted in terms other than those chosen will not suffice to establish that the municipality's choice of regulation is unreasonable.[8] See *Moss v. Winchester,* 365 Mass. 297, 299, 311 N.E.2d 555 (1974).

The Appeals Court observed in this case that the Dover Amendment is intended to encourage "a degree of accommodation between the protected use ... and matters of critical municipal concern ...." (citations omitted). 33 Mass.App.Ct. at 584, 602 N.E.2d 1105. We agree with this observation, but add that such an accommodation cannot be achieved by insisting that an educational institution seek a variance to obtain permission to complete its project.[9] *Radcliffe College v. Cambridge, supra,* 350 Mass. at 619, 215 N.E.2d 892, citing *Russell v. Zoning Bd. of Appeals of Brookline,* 349 Mass. 532, 535, 209 N.E.2d 337 (1965). Additionally, a court may consider a municipality's proper concession, such as was made here in the course of litigation, that a particular requirement ***761** of its zoning law is unreasonable as applied to a proposed educational use. Apart from any concession, the remaining requirements of the local zoning law, if otherwise reasonable, would still apply. *Doliner v. Town Clerk of Millis,* 343 Mass. 10, 15, 175 N.E.2d 925 (1961)

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(zoning by-law provisions treated as separable). *Attorney Gen. v. Dover,* 327 Mass. 601, 608, 100 N.E.2d 1 (1951). We now consider application of the ordinance's requirements to Tufts' projects in light of these principles and the Appeals Court's modification of the Land Court judgment.

2. *Wessell addition. a. Parking.* The Appeals Court modified the judgment by deleting therefrom language that declared the ordinance's parking requirements inapplicable to the Wessell addition. As the basis for so doing, the Appeals Court agreed with Medford's contention that the ordinance's definition of the term "lot," see note 5 *supra,* could be construed as treating discrete areas of Tufts' core campus, bounded by streets, as single commonly owned lots. Under this interpretation, the proposed Boston Avenue garage and Wessell would occupy the same lot. The parking that will be provided by the garage (a minimum of 290 spaces) more than satisfies the ordinance's requirement that Tufts, in conjunction with the Wessell addition, provide a minimum of 130 new ****440** parking spaces on the lot containing Wessell.

A court should construe a local zoning requirement "in a manner which sustains its validity," *Doliner v. Town Clerk of Millis, supra,* 343 Mass. at 15, 175 N.E.2d 925, if this can be done without straining the common meaning of the terms employed. *Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham,* 382 Mass. 283, 290, 415 N.E.2d 840 (1981). *Hall v. Zoning Bd. of Appeals of Edgartown,* 28 Mass.App.Ct. 249, 254, 549 N.E.2d 433 (1990). The ordinance's definition of lot logically applies to the part of the Tufts campus in which Wessell is situated and the parking garage will be located.[10]

***762** Based on this interpretation, Tufts has not shown that the parking requirements of the ordinance are unreasonable as applied to the Wessell addition. It was properly found in the Land Court that there is a serious parking problem on Tufts' core campus and on public streets adjacent thereto. Parking, as it affects physical conditions on and around an educational use, is a legitimate municipal concern and a proper subject of local zoning regulation. *Radcliffe College v. Cambridge, supra,* 350 Mass. at 617 & n. 4, 215 N.E.2d 892. Compliance by Tufts with the parking requirements of the ordinance "would not require a greater number of spaces than could in reason be deemed necessary to take care of the cars brought to the [area] by the use made of it by the college." *Id.* at 619, 215 N.E.2d 892. While Tufts might prefer to defer addressing the parking problem, the ordinance's requirements can be satisfied by the construction of the parking garage, a use of Tufts' land recommended to the college by its consultants and found to be reasonable by the Land Court judge. We therefore agree with the Appeals Court that the requirements concerning parking are reasonable as applied to Tufts' campus, and that Medford can require Tufts to construct the Boston Avenue parking garage (or some equivalent which satisfies the ordinance's requirements) as a condition to building the Wessell addition.

b. *Loading spaces.* The Land Court judge concluded that deliveries to Wessell would not be sufficient in number to justify the two additional loading spaces required by the ordinance. He determined, therefore, that the loading space requirements of the ordinance

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could not reasonably be applied to the Wessell addition. The Appeals Court revised this portion ***763** of the judgment because of "the ease with which compliance [with the loading space requirements can be] achieved." 33 Mass.App.Ct. at 586, 602 N.E.2d 1105. Tufts contends that the notion of "ease of compliance" is foreign to Dover Amendment jurisprudence. We disagree.

On this aspect of the appeal, the Appeals Court simply expressed, in different terms, the principle that the burden of proving a local zoning requirement unreasonable under the Dover Amendment falls on the educational institution challenging the requirement. When compliance will involve no significant cost or other hardship to an educational institution, and does not interfere to any appreciable extent with the institution's plans, the institution has failed to make out a case that the requirement, as ****441** applied, is unreasonable.[11]

3. *Parking garage.* The Appeals Court also deleted the portion of the judgment that declared the ordinance's setback requirement inapplicable to construction of the Boston Avenue garage. As noted, the evidence was that the parking garage could be constructed with the fifty-foot setback required by the ordinance, but that compliance with the ordinance would increase the cost of the project. No estimate of the amount of the increase was put in evidence by Tufts. Medford, on the other hand, demonstrated that Boston Avenue, a major public way, has only one traffic lane in each direction and is heavily travelled, particularly at rush hours. The fifty-foot setback will permit vehicles easier access to the garage reducing congestion and enhancing safety. With no particularized evidence in this case as to the cost and difficulty of compliance that can be measured against Medford's legitimate concerns as to traffic congestion and safety, the Land ***764** Court judge lacked an appropriate basis for the conclusion that Tufts had proved the setback requirement unreasonable as applied to construction of the parking garage. 33 Mass.App.Ct. at 585, 602 N.E.2d 1105.[12]

4. *Future projects.* We also agree with the Appeals Court's decision to modify the judgment by deleting therefrom language declaring that Medford cannot apply ordinance requirements to future construction projects in the core area of Tufts' campus or to future projects similar to Wessell, Olin, or the parking garage. Whether requirements of a local zoning law are reasonable cannot be decided in the abstract. The central question is whether application of the requirements to a specific project in a particular setting furthers legitimate municipal concerns to a sufficient extent to warrant requiring an educational institution, a use granted special protected status by the Dover Amendment, to alter its development plans. As the Appeals Court correctly stated, this "is essentially a fact-based determination, one that cannot properly be made for possible future construction projects not detailed in the evidence." 33 Mass.App.Ct. at 583, 602 N.E.2d 1105.

Tufts argues nonetheless that the Appeals Court's deletion from the judgment of references to future, speculative projects is inconsistent with the scope of ***765** G.L. c. 240, § 14A,[13] the statute that confers ****442** authority on the Land Court to pass on the

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validity of local zoning requirements. This argument misconstrues the nature of the showing an educational institution must make to prevail when seeking a determination under G.L. c. 240, § 14A, as to the reasonableness of applying a local zoning law to its property.

A local zoning law that improperly restricts an educational use by invalid means, such as by special permit process, may be challenged as invalid in all circumstances. In this case, for example, the Land Court judge properly declared invalid the site plan and special permit requirements of the ordinance as to present *and* future, unspecified projects on the Tufts campus. *The Bible Speaks v. Board of Appeals of Lenox, supra,* 8 Mass.App.Ct. at 32–33, 391 N.E.2d 279. The Appeals Court correctly did not disturb this aspect of the judgment. The other requirements of the ordinance (parking, setback and dimensional regulations) challenged by Tufts do not facially discriminate against educational uses and are presumptively valid under the proviso to the Dover Amendment. The relief sought by Tufts pursuant to G.L. c. 240, § 14A, was a determination that, *as applied,* ***766** the regulations were unreasonable. As has been said, like certain other kinds of challenges to the applicability of a local zoning law, this relief presents a question that can be properly resolved only by reference to specific facts. See *Sinn v. Selectmen of Acton,* 357 Mass. 606, 610, 259 N.E.2d 557 (1970) (validity of exemption of all municipal uses from use regulations "can be determined only by examining its application in particular cases"); *Aronson v. Sharon,* 346 Mass. 598, 603, 195 N.E.2d 341 (1964) (whether by-law is sustainable exercise of municipality's police powers or a deprivation of private property without compensation "often depends upon the facts of the particular case"). See *Southern New England Conference Ass'n of Seventh–Day Adventists v. Burlington,* 21 Mass.App.Ct. 701, 710, 490 N.E.2d 451 (1986). There the Appeals Court declined to rule whether boundary established by wetlands by-law was valid as applied to the church's land, stating: "In the absence of any evidence bearing on the issue of the lawfulness of the application of the by-law to set the wetlands boundary, any attempt at decision on this record would require speculation and would be unfair to one party or the other." The Appeals Court properly concluded that the Land Court's rulings embodied in the judgment as to future, unspecified, projects of Tufts lacked a proper factual foundation, and that such projects were not an appropriate subject for relief pursuant to G.L. c. 240, § 14A.

5. *Disposition.* The judgment is amended, in numbered paragraph 2, by striking the words, "and any other future structures or additions which may be similarly situated," and by striking numbered paragraphs 3, 4, and 5. The judgment is also amended to declare that the parking requirements of the ordinance are not invalid, and that as applied to Wessell these requirements can be met by construction of the requisite number of spaces in the proposed Boston Avenue parking garage or by an equivalent solution which satisfies the requirements. As so amended, the judgment is affirmed. The order defining the phrase "core campus" is vacated.

So ordered.

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***767** O'CONNOR, Justice (concurring in part and dissenting in part).

Statute 1950, c. 325, § 1, entitled "An Act prohibiting discriminatory zoning by-laws and ordinances," amended ****443** G.L. c. 40, § 25, a predecessor of G.L. c. 40A, § 3, by adding the following words: "No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid." In *Attorney Gen. v. Dover,* 327 Mass. 601, 100 N.E.2d 1 (1951), the court held that a town of Dover zoning by-law prohibiting the erection, alteration, or use of a building in a residential district for a sectarian educational use was invalid under St.1950, c. 325, § 1. That act subsequently became known as the Dover Amendment. *The Bible Speaks v. Board of Appeals of Lenox,* 8 Mass.App.Ct. 19, 27 n. 10, 391 N.E.2d 279 (1979). Statute 1950, c. 325, § 1, was susceptible to an interpretation that would invalidate any zoning ordinance or by-law (regulation) that would have imposed on a sectarian, educational use any requirement concerning bulk and height of structures, yard size, lot area, setback, open space, building coverage or parking area. Indeed, that construction appears to have been urged by the plaintiff, and accepted by the Land Court judge, in *Radcliffe College v. Cambridge,* 350 Mass. 613, 614, 215 N.E.2d 892 (1966) ("The college claims to be exempt from art. VII, § 2 [an ordinance requiring off-street parking], by reason of G.L. c. 40A, § 2, as amended through St.1959, c. 607, § 1, which provides 'that no ordinance or by-law which prohibits or limits the use of land for any church or other religious purpose or for any educational purpose which is religious, sectarian, denominational or public shall be valid' ").

By St.1975, c. 808, § 3, the Legislature struck out G.L. c. 40A and inserted a new chapter 40A in its place. The new c. 40A provides in relevant part, "No zoning ordinance or by-law shall ... prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious ***768** sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." That provision, were it to be construed without reference to the proviso, would present the same ambiguity that was present in the Dover Amendment, St.1950, c. 325, § 1. Absent the proviso, the language of the statute could fairly be construed to mean that any requirement as to bulk and height of structures, yard size, lot area, setback, open space, building coverage or parking area, imposed on parcels of land devoted to religious or educational uses, is unauthorized. The obvious purpose of the proviso is to make clear that such requirements, if not intentionally or in practical effect discriminatory against the protected uses, and if rationally related to the purposes of zoning regulations enumerated in St.1975, c. 808, § 2A, are authorized, valid, and enforceable

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without reference to the use to which a particular parcel is put.[1] [2]

**444 *769 Nothing in G.L. c. 40A suggests that the Legislature intended to discriminate *in favor* of religious and educational uses. Yet, if the court is right in concluding that, in certain circumstances, a trial judge or appellate court must exempt a parcel, which is devoted to a protected use, from zoning regulations that are binding on parcels devoted to all other uses, such discrimination results. Surely, if parcels not committed to protected uses must comply with zoning regulations concerning off-street parking, setback of buildings, lot area and the like, regardless of the difficulty of compliance, but an educational institution is exempt if it demonstrates that "compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the institution's campus, without appreciably advancing the municipality's legitimate concerns," or that compliance would result in "excessive cost ... without significant gain in terms of municipal concerns," as the court states, *ante* at 439, discrimination occurs of a type that is the reverse of the discrimination targeted by the Dover Amendment.

General Laws c. 40A, § 3, is clear. No zoning ordinance or by-law may "prohibit, regulate or restrict the use of land or structures for ... educational purposes on land owned or leased by ... a nonprofit educational corporation" like Tufts College, but "such land or structures may be subject to reasonable regulations [that is, reasonable regulations, although not mandated, are authorized, and such land or structures are subject to them] concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." Nothing in chapter 40A authorizes a judge or a court to declare facially reasonable nondiscriminatory regulations inapplicable to a particular parcel, or to exempt a particular parcel from them, whenever the judge or court, acting as a master planner, decides that the "application of the requirements to a specific project in a particular setting *770 [would not] further[ ] legitimate municipal concerns to a sufficient extent to warrant" application and enforcement of the regulations. *Ante* at 441.

The challenged requirements of the ordinance in this case are reasonable. They do not discriminate against statutorily protected land uses either by expressed intention or in practical operation. The ordinance is use-neutral. Furthermore, the ordinance is rationally related to legitimate municipal zoning objectives. No one appears to contend otherwise. In my view, contrary to the thrust of the court's opinion, the court would have no right to declare the challenged requirements inapplicable to the Tufts College property. For that reason, and not for the reasons articulated by the court, I am satisfied that the challenged requirements apply in this case. Accordingly, to the extent that the court orders numbered paragraphs 3, 4 and 5 struck from the judgment, thereby achieving that result, I concur with the order. However, because the order striking language from paragraph 2 of the judgment is premised incorrectly, I believe, on the idea that future applicability of the challenged regulations must depend on facts yet to be developed and on a "balancing" of the extent of the imposition on the use represented

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thereby compared to municipal concerns, I dissent from the court's order insofar as it strikes language from paragraph 2 of the judgment.

APPENDIX.

HOUSE—No. 5009

"1. *Dover Amendment.* It is unfortunate that the present state of the law is such that some communities may have legitimate doubts about the validity of regulations which would impose reasonable controls on institutions presently covered by the Dover amendment. The Department would encourage the use of such control where essential to the well-being of the adjacent neighborhood, and where the regulation will not seriously jeopardize the mission of the protected institutions. ****445** Thus, the Department proposes to clarify the present language so as to achieve the aims of the general court in passing the original amendment while at the same time precluding unwise restrictions on the power of the communities to regulate the land use activities of churches and educational institutions. The proposed ***771** language, for example, would specifically authorize the imposition of reasonable regulations concerning density or intensity of occupancy, bulk and height [of] structures, yards and setbacks, as well as limitations upon the location of accessory uses which traditionally have tended to be detrimental to adjacent property. Ideally, this should be accomplished by adopting regulations specifically designed to apply to uses protected by the Dover Amendment located in otherwise restricted zones, thus avoiding the problem of attempting to apply the *same* bulk regulations to the protected uses as ordinarily apply to other permitted uses in the zone. For example, instead of attempting to apply residential dimensional regulations to churches or schools located in a residential zone (See, *Sisters of the Holy Cross v. Town of Brookline,* 347 Mass. 486 [198 N.E.2d 624] (1964)) the by-law or ordinance should establish dimensional regulations specifically applicable to churches or schools located in such zones."

All Citations

415 Mass. 753, 616 N.E.2d 433, 84 Ed. Law Rep. 430

Footnotes

1 Tufts' campus is partly located in the city of Somerville. Somerville was originally named as a defendant in Tufts' action, but Tufts and Somerville arrived at an agreement with regard to the construction that will occur in Somerville. The remaining matters affect the projects

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planned for the Medford portion of the campus.

[2] The pertinent provisions of G.L. c. 40A, § 3 (1990 ed.), read as follows: "No zoning ordinance or by-law ... shall ... regulate or restrict the use of land or structures for religious purposes or for educational purposes ... by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." The history of the special zoning status granted to educational and religious uses of land is recounted in *The Bible Speaks v. Board of Appeals of Lenox,* 8 Mass.App.Ct. 19, 27 n. 10, 391 N.E.2d 279 (1979).

[3] Several matters that were the subject of controversy in the Land Court are no longer at issue. The ordinance contains a provision that requires site plan review in conjunction with an application for a special permit for projects having a significant impact on Medford. Relying on *The Bible Speaks v. Board of Appeals of Lenox, supra,* the Land Court judge concluded that the site plan review and special permit requirements of the ordinance could not be applied to Tufts' projects. Medford does not dispute this point.

Prior to trial, Medford granted Tufts a variance from the ordinance's parking and loading space requirements as to the construction of the Olin Language and Culture Center (Olin), a new classroom building. The Land Court decision nonetheless provided that the ordinance's parking and loading space requirements were inapplicable to Olin. Medford does not challenge this ruling.

Tufts also contested the application of dimensional and parking requirements to a proposed addition to its Cousens Gymnasium and Hamilton Pool facility. The judge concluded that the requirements could be applied to this project. Tufts no longer questions this conclusion.

[4] A loading space is a striped-in area of pavement, adjacent to a building, reserved for trucks and other vehicles making deliveries to the building. The purpose of loading spaces is to provide off-street access to a delivery site and thus alleviate traffic congestion that may result when vehicles, particularly trucks, block busy streets while trying to make deliveries.

[5] The ordinance also provides (§ 6.24[a]) that buildings on the same lot "shall not be less

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than the same distance from one another as if they were on separate lots." The Land Court judge found that application of this provision would necessitate drawing imaginary "lot lines" on Tufts' campus for purposes of calculating the required distance between buildings. Medford has conceded that this provision is unreasonable as applied to the construction of Olin, Wessell, and the Boston Avenue parking garage.

[6] The legislative history supports the conclusion that G.L. c. 40A, § 3, second par., is intended to incorporate the principles enunciated in *Sisters of the Holy Cross v. Brookline,* 347 Mass. 486, 198 N.E.2d 624 (1964), and in *Radcliffe College v. Cambridge,* 350 Mass. 613, 215 N.E.2d 892 (1966). In the Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act (Jan.1972) (Report), which preceded enactment of the present Zoning Act, the statutory protection accorded educational uses was considered. See Report, 1972 House Doc. No. 5009. As to the then existing law, it was said (at p. 21) that "the scope of the [educational use protection], as presently worded, would seem to depend on whether or not the application of bulk regulations to the institution within the ambit of its protection has the effect of defacto prohibition on use as opposed to a channeling effect where alternative educational ... uses are available." With regard to proposed § 3, the Report (at p. 26) "encourag[ed] the use of [reasonable bulk, dimensional and parking] control[s] where essential to the well-being of the adjacent neighborhood, and where the regulation will not seriously jeopardize the mission of the protected institutions."

In maintaining that facially neutral zoning requirements automatically can be applied to an educational use, the dissent, *post,* fails to take into account this legislative history, and the cases cited above, which St.1975, c. 808, § 3, was intended to codify. See *Newbury Junior College v. Brookline,* 19 Mass.App.Ct. 197, 199 n. 4, 472 N.E.2d 1373 (1985); *The Bible Speaks v. Board of Appeals of Lenox,* 8 Mass.App.Ct. 19, 29, 391 N.E.2d 279 (1979) (St.1975, c. 808, c. 3, synthesizes Dover amendment and case law construing it). The *Radcliffe College* and *Sisters of the Holy Cross* cases plainly provide that facially neutral requirements cannot be applied to educational uses without further inquiry into the outcome produced by such an application. Particularly where the requirements sought to be applied do not take into account the special characteristics of an educational use (such as on-campus living and dining arrangements and the need for large classroom and library buildings), as is the case here, application of the requirements to the property of an educational institution may be inappropriately restrictive. If the approach suggested by the dissent is followed, a set of facially neutral zoning requirements could be adopted that would, in practice, prevent almost any educational use of land.

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[7] For example, a showing that the parking requirements of the ordinance, as applied, would necessitate that Tufts pave over significant open areas of the campus, would demonstrate the unreasonableness of the ordinance in view of the fact that construction of the proposed garage will provide an adequate solution to the parking problem.

[8] For example, the fact that the Medford ordinance might alleviate the parking problem on and around the Tufts campus by means of a regulation based on the size of the student population does not prove that requiring additional parking in association with new construction is an unreasonable means of addressing an existing parking deficiency.

[9] However, if a variance is granted at the request of an educational institution, and not challenged by an aggrieved party within the time period permitted by statute, the variance cannot thereafter be attacked as improper. See *O'Blenes v. Zoning Bd. of Appeals of Lynn,* 397 Mass. 555, 492 N.E.2d 354 (1986); *Bjornlund v. Zoning Bd. of Appeals of Marshfield,* 353 Mass. 757, 231 N.E.2d 365 (1967).

[10] Tufts suggests that another provision of the ordinance, (§ 7.51) which limits structures that may be built in a rear yard, prohibits more than one major structure on a single lot, and therefore forecloses application of the ordinance's definition of "lot" to areas of Tufts' campus already containing numerous major structures. As a matter of construction, we are not persuaded by Tufts' position. The provision in question must be read in conjunction with § 6.24(a), see note 5 *supra,* which *permits* multiple structures on a single lot. We think that § 7.51 only limits structures that can be built within the rear yard setback requirement imposed by the ordinance. More to the point, the record contains no evidence that Medford has invoked § 7.51 as a basis for blocking construction of the addition to Wessell or the parking garage. Thus, we do not have occasion to construe this provision, or to consider its reasonableness, as applied to Tufts' projects. See *Doliner v. Town Clerk of Millis, supra,* 343 Mass. at 10, 14–15, 175 N.E.2d 925.

[11] *Tisbury v. Martha's Vineyard Comm'n,* 27 Mass.App.Ct. 1204, 544 N.E.2d 230 (1989), relied on by Tufts, is not to the contrary. In *Tisbury,* the evidence established that requiring compliance with by-law provisions governing the size of oil tanks would, in practice, prohibit the landowners from using their property for agricultural purposes (also protected

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by G.L. c. 40A, § 3). In other words, application of the by-law provisions would nullify a protected use. This is clearly distinguishable from a situation in which compliance does not encroach to any appreciable extent on an educational institution's right to set its own priorities for the use of its land.

12 The Appeals Court went on to observe that, although Tufts had not proved the ordinance unreasonable for purposes of the Dover Amendment, it might nonetheless be entitled under G.L. c. 40A, § 10, to a variance from the setback requirement because of the topography of the Boston Avenue site. It is obvious that the Appeals Court's conclusion that the setback requirement was reasonable did not rest on the possible availability of a variance for the structure. The Appeals Court properly observed that, even though Tufts had failed to prove the setback ordinance unreasonable as applied to the parking garage (for the reasons explained above), the particular characteristics of the lot might nonetheless entitle Tufts to obtain a variance. See *Josephs v. Board of Appeals of Brookline,* 362 Mass. 290, 285 N.E.2d 436 (1972) (variance granted due in part to sloping lot and increased cost of compliance); *Broderick v. Board of Appeal of Boston,* 361 Mass. 472, 280 N.E.2d 670 (1972) (same). Tufts thus has an independent means of seeking relief from application of the setback provision if it chooses to pursue the point.

13 In full, G.L. c. 240, § 14A, as amended by St.1975, c. 808, § 5, provides: "The owner of a freehold estate in possession in land may bring a petition in the land court against a city or town wherein such land is situated, which shall not be open to objection on the ground that a mere judgment, order or decree is sought, for determination as to the validity of a municipal ordinance, by-law or regulation, passed or adopted under the provisions of chapter [40A] or under any special law relating to zoning, so called, which purports to restrict or limit the present or future use, enjoyment, improvement or development of such land, or any part thereof, or of present or future structures thereon, including alterations or repairs, for determination of the extent to which any such municipal ordinance, by-law or regulation affects a proposed use, enjoyment, improvement or development of such land by the erection, alteration or repair of structures thereon or otherwise as set forth in such petition. The right to file and prosecute such a petition shall not be affected by the fact that no permit or license to erect structures or to alter, improve or repair existing structures on such land has been applied for, nor by the fact that no architects' plans or drawings for such erection, alteration, improvement or repair have been prepared. The court may make binding determinations of right interpreting such ordinances, by-laws or regulations whether any consequential judgment or relief is or

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could be claimed or not."

[1] The court incorrectly states, *ante* at —— n. 6, that "[i]f the approach suggested by the dissent is followed, a set of facially neutral zoning requirements could be adopted that would, in practice, prevent almost any educational use of land." To the contrary, if the approach suggested by the dissent were to be followed, zoning regulations, such as those at issue in *Sisters of the Holy Cross of Massachusetts v. Brookline,* 347 Mass. 486, 198 N.E.2d 624 (1964), that would "in practice, prevent almost any educational use of land" would, for that very reason, be discriminatory against a protected use, and would therefore be unauthorized (invalid).

[2] The court also states, *ante* at 438 n. 6, that "[i]n maintaining that facially neutral zoning requirements automatically can be applied to an educational use, the dissent fails to take into account" Report, 1972 House Doc. No. 5009. It is true that I do not consider that piece of legislative history significant. "Only if the statute is ambiguous, or couched in terms that suggests that [the court] do so, [does the court] look beyond the express statutory language." *Pobieglo v. Monsanto Co.,* 402 Mass. 112, 116, 521 N.E.2d 728 (1988). Neither condition for looking beyond the express statutory language is present here. However, even if one were to consider Report, 1972 House Doc. No. 5009, it would not suggest that the Legislature intended by St.1975, c. 808, § 3, to discriminate *in favor* of protected uses with respect to parking and setback and similar restrictions. The relevant recommendation contained in the Report at page 26 may be found in the appendix to this opinion.

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415 Mass. 772
Supreme Judicial Court of
Massachusetts, Essex and Suffolk.
John CAMPBELL & others[1]
v.
CITY COUNCIL OF LYNN & others[2]
(and a companion case[3]).

Argued Sept. 14, 1992.
|
Decided July 9, 1993.

Synopsis
Neighbors sought review of grant of special permit for use of property as group home for elderly, mentally ill residents. The Superior Court, Suffolk County, John T. Ronan, J., upheld special permit. Neighbors subsequently sought review of grant of building permit for alterations on premises. The Land Court, Marilyn M. Sullivan, J., upheld building permit. Neighbors appealed both judgments. The Appeals Court, Brown, J., 32 Mass.App.Ct. 152, 586 N.E.2d 1009, affirmed. Appeal was taken. The Supreme Judicial Court, Greaney, J., held that: (1) statute exempting property used for educational purposes from zoning regulation authorized grant of building permit, despite noncompliance with general bulk and dimensional requirements; (2) owners of premises could not be compelled to seek variance or permit for prior nonconforming structures; and (3) remand was required to determine whether compliance with zoning requirements for off-street parking could be demanded, without nullifying protected educational use.

Superior Court judgment affirmed; Land Court judgment vacated and remanded.

Wilkins, J., filed opinion dissenting in part in which Lynch, J., joined.

O'Connor, J., filed separate dissenting opinion.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****446 *773** George E. Richardson, Boston, for plaintiffs.

Michael J. Barry, City Sol., for City Council of Lynn & another, submitted a brief.

Before ***772** LIACOS, C.J., and WILKINS, ABRAMS, NOLAN, LYNCH, O'CONNOR and GREANEY, JJ.

Opinion

GREANEY, Justice.

This case concerns the use of land and a building at 12 Morris Street in Lynn (premises), as a group residence for fifteen elderly, mentally ill persons. The premises are located in a business zone which does not allow a group residence as of right. The Lynn city council (council) granted a special permit under § 18 of the Lynn zoning ordinance (ordinance) authorizing the premises to be used as a group residence, and the Lynn zoning board of appeals (board) rejected an appeal by the plaintiffs which sought to revoke the building permit issued

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by the building commissioner for alterations to the premises. These decisions were challenged by the plaintiffs in separate actions in the Superior Court (special permit), and Land Court (building permit). Judgments were entered in those actions upholding the respective decisions of the council and the board. The Appeals Court affirmed both judgments, concluding that: (1) ***774** the proposed use of the premises was lawful because of the special permit and the fact that the group residence constituted a use for an educational purpose protected by G.L. c. 40A, § 3, (1990 ed.); (2) that statute conferred on the Lynn zoning officials discretion not to apply any provisions ****447** of the ordinance concerning bulk, dimensional and parking requirements that might otherwise pertain to the premises; and (3) adequate findings had been made under G.L. c. 40A, and the ordinance, to support the various decisions under review. See 32 Mass.App.Ct. 152, 586 N.E.2d 1009 (1992). We granted further appellate review only to examine the issues connected to the second point. We conclude that the bulk and dimensional requirements cannot be applied to the premises. We also conclude that the matter of off-street parking should be reconsidered by the board.

The premises include a three-story, twenty-seven room building on a 3,947 square foot parcel of land situated in a business zone which allows residential uses by special permit. Next to the premises is a lot containing a house which is used as a single family residence. The premises had been used as a convent housing nuns. When the convent ceased operations, the premises were acquired by the defendants Thomas B. Goff, Jr., and James P. Lyons (owners), who proposed to use the premises for the group residence previously described. The premises would be leased to the Greater Lynn Senior Services, a nonprofit corporation which, together with the Department of Mental Health, would provide staffing and support services to the residents.

With this use in mind, the owners applied to the council and received a special permit to operate a group residence in a business zone. The permit was subject to the conditions noted below.[4] The plaintiffs commenced an action in the Superior Court contending that the council had exceeded its authority in granting the special permit and asking that it be ***775** annulled. After trial, a judge of the Superior Court upheld the grant of the special permit and also concluded that, because the premises were to be used for an educational purpose, they were "exclude[d] from local control" under G.L. c. 40A, § 3, second par.

Subsequently, the owners obtained a building permit from the Lynn building commissioner to make alterations to the premises. The plaintiffs next sought to have the commissioner revoke the building permit, claiming, among other things, that the premises were not in compliance with certain general bulk, dimensional and parking requirements of the ordinance. The commissioner refused relief, and his decision was upheld by the board. The plaintiffs thereafter filed a complaint in the Land Court seeking to have the board's decision annulled. A record was prepared, and cross-motions for summary judgment were filed. A judge of the Land Court determined that there were no material issues of fact in dispute and allowed the motions of the board and the owners for summary judgment. Judgment

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entered dismissing the plaintiffs' appeal of the board's decision. As has been indicated, the judgments of the Superior and Land Courts were affirmed by the Appeals Court.

1. The special permit granted by the city council did not have the effect of relieving the owners from compliance with the general bulk, dimensional and parking requirements of the ordinance. It appears that the special permit may have been sought, and obtained, before it occurred to anyone that the group residence might constitute a use for an educational purpose protected under G.L. c. 40A, § 3, second par.[5] The permit was granted pursuant to the provisions in G.L. c. 40A, § 9, and § 18 of the ordinance, to authorize a *use* which required special permission from the council before it could be maintained in a business zone. The special permit could not effectively resolve compliance with other requirements ***776** of the ordinance. See ****448** *SMI Investors (Delaware), Inc. v. Planning Bd. of Tisbury,* 18 Mass.App.Ct. 408, 413–414, 466 N.E.2d 525 (1984).

2. General Laws c. 40A, § 3, second par., as inserted by St.1975, c. 808, § 3 (generally referred to as the Dover Amendment), provides, in part, as follows:

> "No zoning ordinance or by-law shall ... prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic ... provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements."

The Appeals Court's affirmance of the Superior Court judgment, see 32 Mass.App.Ct. at 153–155, 586 N.E.2d 1009 and our limitation of the issues to be considered by this court, establishes that the use of the premises as a group residence for elderly, mentally ill persons is a protected use for an educational purpose within the meaning of § 3 above. The Superior Court did not address the question of the application of any of the ordinance's general bulk, dimensional and parking requirements to the premises. That question was taken up in the Land Court. In the order granting the motions for summary judgment of the board and the owners, the Land Court judge noted that the Lynn zoning officials (the building commissioner and board) had not "attempted to apply the general [bulk, dimensional, and parking] provisions of the ordinance to the site." The judge reviewed the case law interpreting the Dover Amendment, and, based on the cases and the language of the statute, stated that "[i]t is clear from [§ 3] that ... application [of general regulations] is permissive at best and suspect at worst." The judge then ruled that "the site is free from the

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provisions of the [z]oning [o]rdinance." The judge ***777** appears to have reasoned that the zoning officials could lawfully grant a building permit to further the use of the premises for an educational purpose, despite the fact that the premises did not comply with general bulk, dimensional, and parking requirements, where application of those requirements would prevent the use and impermissibly nullify the protection granted to it by G.L. c. 40A, § 3, second par. We conclude that the judge's decision was correct with respect to the bulk and dimensional requirements of the ordinance,[6] but ***778** that the record lacks sufficient ****449** information to decide the applicability of the parking requirements.

The Appeals Court, in upholding the decision of the Land Court, reasoned that the word "may" in the proviso to G.L. c. 40A, § 3, second par., conferred absolute discretion on the zoning officials to disregard general requirements of the ordinance that would normally apply to the premises. 32 Mass.App.Ct. at 156–157, 586 N.E.2d 1009. This conclusion is wrong because the law does not go this far. Local zoning requirements are meant to be applied uniformly, *Trustees of Tufts College v. Medford,* 415 Mass. 753, 616 N.E.2d 433 (1993), and consequently, local officials may not grant blanket exemptions from the requirements to protected uses. The officials may, however, on an appropriate showing, decide that facially reasonable zoning requirements concerning bulk and dimension cannot be applied to an educational use occupying a particular site because application of the requirements would improperly nullify the protection granted to the use, or because compliance with the requirements would significantly impede an educational use, in either instance without appreciably advancing municipal goals embodied in the local zoning law.[7] *Id.,* 415 Mass. at 757–61, 616 N.E.2d 433. This, in substance, was the basis of the decision by the Lynn zoning officials when they granted the building permit requested by the owners.

If a decision like the one made here is challenged by abuttors or neighbors, in the position of the plaintiffs, a judge must decide whether the action taken by the local zoning officials was justified under G.L. c. 40A, § 3, second par. This ***779** will often be a fact-based inquiry. *Trustees of Tufts College v. Medford,* 415 Mass. at 759–60, 616 N.E.2d 433. In this case, however, the facts with respect to the bulk and dimensional requirements are undisputed. In connection with their motion for summary judgment in the Land Court, the plaintiffs filed an affidavit simply alleging that the premises do not comply with the various requirements of the ordinance.[8] It is clear from the plaintiffs' affidavit, and from the record, that the premises cannot be made to conform to any applicable bulk or dimensional requirements because the building occupies most of a small (3,947 square foot) lot. This conclusion makes it evident that, apart from the difficulty of analogizing the proposed use to any use regulated in the ordinance, see note 8 *supra,* the application of the bulk and dimensional requirements referred to by the plaintiffs, in the manner urged by them, would effectively deny the use of the premises for any conceivable educational purpose with no valid goal of municipal zoning regulation being served thereby. Further, contrary to the plaintiffs' position, the owners cannot be compelled to seek a

variance in order to have their educational use. See note 7 *supra.* We therefore agree with the Land Court judge that the case presents a situation where local zoning officials correctly decided that the general bulk and dimensional requirements of the ordinance could not be properly applied because their application would contradict the protection granted by ****450** G.L. c. 40A, § 3, second par., to an educational use.[9]

***780** The situation may be different with respect to the ordinance's off-street parking requirements. The ordinance appears to require that the premises have a minimum number of off-street parking spaces that conform to certain design standards. The record does not disclose whether the requirements can be met. (In connection with this aspect of the case, it will be recalled that the council required in the special use permit that the owners develop an off-street parking plan. See note 4, *supra.*) In the materials before the Land Court judge, Lynn zoning officials have taken no clear position regarding the off-street parking issue. Adequate off-street parking, of course, can be a valid concern to municipalities, and it is a matter of regulation authorized by the proviso to § 3, second par. See *Radcliffe College v. Cambridge,* 350 Mass. 613, 617–618, 215 N.E.2d 892 (1966). We conclude that the record is insufficient to determine whether compliance with any applicable off-street parking requirements can be demanded. Accordingly, the question of off-street parking must be re-examined in light of the principles expressed in *Trustees of Tufts College v. Medford, supra,* and this opinion.

3. *Disposition.* The judgment in the Superior Court is affirmed. The judgment in the Land Court is vacated. The rulings in the Land Court that the bulk and dimensional requirements of the ordinance cannot be applied to the premises are affirmed. The case is to be remanded by the Land Court to the board which is to consider the applicability to the premises of any off-street parking requirements in ***781** the ordinance. The Land Court is to retain jurisdiction after that matter is considered by the board for the entry of a new judgment consistent with this opinion.

So ordered.

WILKINS, Justice, dissenting in part, with whom LYNCH, J., joins.

In joining in the court's opinion in *Trustees of Tufts College v. Medford,* 315 Mass. at 753, 616 N.E.2d 433 (1993), I have agreed that a user of property for educational purposes may do so in contravention of an area, setback, parking, or similar local zoning requirement only if it proves that the local zoning regulation is unreasonable in its specific application to the proposed use. Thus I applaud the court's decision to send the matter of off-street parking back for a determination whether it would be unreasonable to require the educational user to adhere to off-street parking requirements. The failure of the court to do the same as to the Lynn ordinance's bulk and dimensional requirements is an unfortunate inconsistency.[1]

****451** Despite the court's assertion that the

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local zoning officials have already decided in substance that application of the bulk and dimension requirements is unreasonable (*Campbell v. City Council of Lynn, ante* at 778–781, 616 N.E.2d at 449–450), they have done no ***782** such thing.[2] The test of reasonableness in this situation requires attention to factors not yet considered by any fact finder. Setback requirements and limits on the bulk of a structure on a lot have valid and reasonable municipal purposes. There is no demonstration in this case that the educational lessee could not reasonably find some conforming premises in Lynn for its purposes. If there are other premises reasonably available, it would be consistent with the object of § 3 to apply the Lynn bulk and dimensional requirements to the premises. The court's view that it is obvious that, as applied in this case, the bulk and dimensional requirements are unreasonable on their face ignores the balancing of interests that the *Tufts College* case calls for.

If, as the court strives to explain in note 9, 415 Mass. at 779, 616 N.E.2d 433, the rule it adopts does not grant a roving license to protected religious and educational users to ignore bulk and dimension requirements, that right to rove is hedged by the necessity of determining reasonableness "on the particular facts of each case." *Id.,* citing *Trustees of Tufts College v. Medford, supra.* The particular facts in this case are that the protected user is only a prospective lessee, that there has been no fact determination concerning "local zoning requirements raised safety concerns" (*Campbell v. City Council of Lynn, supra* at 450), that there has been no attention given to alternate sites, and that the need to rely on § 3 may be obviated by the fact that the proposed use may not even be a change in the nonconforming use (*id.* at n. 6).

The court rightly perceives that Lynn's off-street parking requirements have not been subject to appropriate analysis ***783** on the particular facts of this case. The same analysis is needed of the bulk and dimensional requirements.

O'CONNOR, Justice, dissenting.

A Land Court judge affirmed a decision of the Lynn zoning board of appeals which upheld the issuance of a building permit authorizing the defendant owners to "make certain changes to the premises, including changing doors and windows, enlarging closets and adding an elevator." *Ante* at 448 n. 6. The only issue on appeal is whether the judge was right. Unlike the court, I believe that the judge erred.

It is clear, and no one contends otherwise, that the premises enjoyed nonconforming status. General Laws c. 40A, § 6 (1990 ed.), provides in relevant part that "[p]re-existing nonconforming structures ... may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority [here the Lynn zoning board of appeals] ... that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use[1] to the ****452** neighborhood." There has been no finding by the Lynn zoning board of appeals that the changes the owners wish to make to the structure "shall not be substantially more detrimental than the existing nonconforming

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[structure] to the neighborhood." Therefore, the issuance of the building permit should not have been upheld. Because such a finding is a prerequisite to the grant of a building permit, the case should be remanded by the Land Court to the Lynn zoning board of appeals for the board to consider whether such a finding is ***784** appropriate. The question to be considered is not concerned with the use of the premises but only with whether the structure with the proposed physical changes will be substantially more detrimental to the neighborhood than the structure in its present condition. *Willard v. Board of Appeals of Orleans,* 25 Mass.App.Ct. 15, 22–23, 514 N.E.2d 369 (1987).[2]

The court states, *ante* at 448 n. 6, that "[t]his case was decided in the Land Court solely on the basis of G.L. c. 40A, § 3, second par., without reference to the possible application of [G.L. c. 40A,] § 6," and therefore the court confines its inquiry to the issues under G.L. c. 40A, § 3, second par. According to the Land Court judge's memorandum of decision, the plaintiffs argued in that court that a finding under G.L. c. 40A, § 6, is required. The plaintiffs have made the same argument on appeal and, in my view, they are correct and the case should be decided on that basis.

Confining its inquiry to the issues under G.L. c. 40A, § 3, the court states that local officials may, "on an appropriate showing, decide that facially reasonable zoning requirements concerning bulk and dimension cannot be applied to an educational use occupying a particular site because application of the requirements would improperly nullify the protection granted to the use, or because compliance with the requirements would significantly impede an educational use, in either instance without appreciably advancing municipal goals embodied in the local zoning law." *Ante* at 449. The court states that, when the decision of the local authorities is challenged, "a judge must decide whether the action taken by the local zoning officials was justified under G.L. c. 40A, § 3, second par. This will often be a fact-based inquiry. *Trustees of Tufts College v. Medford,* [315 Mass. at 778–79, 616 N.E.2d 433]." For the several reasons I expressed in my separate opinion in the *Tufts* case, I do not agree that judges are empowered by G.L. c. 40A to declare that zoning regulations, which are ***785** reasonable on their face and would apply to a particular parcel of land or structure if the land or structure were devoted to a use not protected by G.L. c. 40A, § 3, are not equally applicable in a case in which their application would diminish or impede or prevent a "protected" use. One might reasonably wonder what is the source of a judge's or appellate court's authority to rule that, even though c. 40A, § 3, provides that a municipality may adopt reasonable zoning regulations and land or structures devoted to protected uses shall be subject to them, particular land or structures, in given circumstances, shall not be subject to them.

Nothing in G.L. c. 40A, § 3, suggests that, if the small lot involved in this case had not had nonconforming status, a religious or educational institution, with judicial approval, could have purchased the lot and totally covered it with a church or school on the ground that such lot coverage is essential to the protected use. Yes, churches and schools are protected uses, but the court

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misunderstands the degree of protection the statute provides. By the express terms of the statute, the protection is limited by its being subject to reasonable regulations. A municipality may not discriminate against such uses, but it need not discriminate in favor of them. According to the plain language of G.L. c. 40A, § 3, a municipality may not exclude protected uses from its jurisdiction, but it may adopt reasonable dimensional-type zoning regulations ****453** to which protected and unprotected uses alike shall be subject.

Of course it is true, as the court states at the conclusion of its footnote 6, *ante* at 448, that since the court has "conclude[d] that the owners are entitled to a measure of relief based on § 3 ... [t]here is ... no reason to require them to recommence proceedings under § 6...." The court, however, should not have concluded that the owners are exempt under § 3 from the requirements of the Lynn zoning ordinance, which are nondiscriminatory and rationally related to the lawful purposes of zoning regulations enumerated in St.1975, c. 808, § 2A. The court should hold that the owners are exempt from those requirements only if they ***786** can meet the conditions set forth in G.L. c. 40A, § 6, relative to nonconforming structures.

All Citations

415 Mass. 772, 616 N.E.2d 445, 84 Ed. Law Rep. 442

Footnotes

1 Nine other residents of Lynn who live near the premises.

2 Thomas C. Goff, Jr., and James P. Lyons, the owners of the premises.

3 The companion case was brought in the Land Court by eight of the plaintiffs in the Superior Court action against the Lynn zoning board of appeals and the owners, Goff and Lyons. The cases were consolidated on appeal. In discussing the trial court actions, we refer to the neighbors as plaintiffs without differentiating one group of plaintiffs from the other.

4 The conditions were (1) that the residence be for Lynn residents only, (2) that forty per cent of the fifteen units be reserved for West Lynn residents, (3) that the city council's committee on housing review the property in one year, and (4) that an off-street parking plan be developed.

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5 As a general rule, a municipality cannot condition the use of property for an educational purpose on the grant of a special permit. See *Trustees of Tufts College v. Medford,* 415 Mass. 753, 755 n. 3, 616 N.E.2d 433, 436 n. 3 (1993); *The Bible Speaks v. Board of Appeals of Lenox,* 8 Mass.App.Ct. 19, 32–34, 391 N.E.2d 279 (1979).

6 The problem in this case arises principally from the fact that the premises are nonconforming. Because a large twenty-seven room structure occupies a small (3,947 square foot) lot, the premises cannot be made to comply with bulk and dimensional requirements. This fact holds true no matter what use is made of the existing structure. In view of the nonconforming nature of the premises, the problems in the case might have been more easily resolved under G.L. c. 40A, § 6 (1990 ed.). That statute excuses an unaltered nonconforming structure (a structure in existence prior to enactment of a local zoning law) from compliance with the law. The owners sought a building permit to make certain changes to the premises, including changing doors and windows, enlarging closets and adding an elevator. No inquiry was made as to whether these changes were sufficient to take the premises outside of the protection granted by § 6 to a nonconforming structure. See *Crawford v. Building Inspector of Barnstable,* 356 Mass. 174, 176–178, 248 N.E.2d 488 (1969) (enclosing outside porch was minor alteration that could be made as of right to nonconforming structure; decided under prior G.L. c. 40A, § 5).

Section 6 also allows changes, extensions, and structural alterations to a prior nonconforming structure or use in certain defined circumstances with the approval of local zoning officials. Local officials could not deny the owners the right to use the premises for educational purposes. If the proposed alterations could not be made as of right under § 6, the owners could nonetheless seek the requisite determination by zoning officials that the proposed alterations to the structure should be permitted because the result would not be substantially more detrimental to the neighborhood than the existing nonconforming structure. See *Willard v. Board of Appeals of Orleans,* 25 Mass.App.Ct. 15, 20–21, 514 N.E.2d 369 (1987).

We understand Justice O'Connor to maintain in his dissent, *post,* that the owners must obtain the building permit necessary for their plans by proceeding under G.L. c. 40A, § 6, because, in his view, G.L. c. 40A, § 3, cannot be read to exempt the structure from the relevant dimensional and parking requirements. We disagree with this contention. This case was decided in the Land Court solely on the basis of G.L. c. 40A, § 3, second par., without reference to the possible application of § 6, and the record is not sufficient to permit resolution of the case under § 6. We conclude that the owners are entitled to a

measure of relief based on § 3. There is therefore no reason to require them to recommence proceedings under § 6, and to suffer the delays and costs that would be associated with such a course.

7 The plaintiffs have suggested that the owners' sole recourse in this case is to seek a variance for use of the building. Variances may only be granted in limited circumstances specified by G.L. c. 40A, § 10 (1990 ed.), having to do with the soil conditions, shape or topography of the locus. See *Guiragossian v. Board of Appeals of Watertown,* 21 Mass.App.Ct. 111, 115, 485 N.E.2d 686 (1985). In *Trustees of Tufts College v. Medford, supra,* 315 Mass. at 760, 616 N.E.2d 433, we rejected a contention that an educational use claiming an inability to comply with a local zoning law must obtain a variance to proceed with its proposed project.

8 In taking this position, the plaintiffs have some difficulty in classifying the group residence for the purpose of determining which requirements in the ordinance might apply. The plaintiffs, at various points, have referred to the requirements concerning apartment houses, elderly housing projects, hospitals, nursing homes and convalescent homes as possibly applicable to the premises. The group residence cannot be classified as any of these.

9 Our decision does not imply that any nonconforming structure for which an educational use is proposed will necessarily be free from the bulk and dimensional requirements of a local zoning law. "[T]he question of the reasonableness of a local zoning requirement, as applied to a proposed educational use, will depend on the particular facts of each case ... [and] an educational [use challenging such requirements] will bear the burden of proving that the local requirements are unreasonable as applied to its proposed project." *Trustees of Tufts College v. Medford, supra,* 315 Mass. at 759, 616 N.E.2d 433. Local zoning officials properly could refuse a building permit for alterations to a nonconforming structure where, for example, the failure to meet local zoning requirements raised safety concerns.

One other observation, in response to Justice O'Connor's dissent, is appropriate. It is unlikely that an educational user proposing to build a new structure on a single small lot could argue successfully that dimensional, coverage and parking requirements would be unreasonable as applied to the property. As Justice Wilkins suggests, see *post* at 452, in these circumstances, local officials might be warranted in requiring that an educational

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user seek an alternative site.

[1] The court seems to endorse the idea that a municipal permit grantor, without a hearing and without any written findings of fact, could grant a building permit to use or erect a structure in violation of the provisions of a local zoning regulation by simply concluding that application of the local zoning regulation to a proposed educational use was unreasonable. I think, on the contrary, that a local official should have no such authority and should deny such a permit application, thereby requiring the applicant to seek relief from the local board of appeals or to commence an action under G.L. c. 240, § 14A (1990 ed.), as Tufts College did in the related case decided today.

This case is relatively rare in the courts' experience with G.L. c. 40A, § 3 (1990 ed.). It does not concern land already owned by a religious or educational entity that wants to use it in a way inconsistent with local zoning requirements. It concerns a proposed new use by a tenant educational user on premises not owned or to be owned by an educational entity.

[2] The findings of fact of the Lynn zoning board of appeals consist of one sentence that rejects the challenge to the building permit on the basis that a Superior Court judge "has held that the subject premises enjoys the exemption set forth in [G.L. c. 40A, § 3] because of its educational purposes." The words "reasonable" and "unreasonable" are not mentioned.

The Land Court's order allowing summary judgment was not based on a determination that there was no dispute of material fact on the unreasonableness of the bulk and dimension requirements, an issue on which the landowner had the burden of proof.

[1] The concluding portion of the quoted provision must be read as follows: "shall not be substantially more detrimental than the existing nonconforming *structure* or use to the neighborhood" (emphasis added). *Willard v. Board of Appeals of Orleans,* 25 Mass.App.Ct. 15, 21, 514 N.E.2d 369 (1987). This statute presents "one of those rare instances in which a court must overcome its reluctance to supply a word or words which were not employed by the Legislature (see, e.g., *Murray v. Board of Appeals of Barnstable,* 22 Mass.App.Ct. 473, 479, 494 N.E.2d 1364 [1986]) in order to render a statute intelligible and so effectuate its obvious intent." *Id.*

[2] If the proposed changes are limited to windows, doors, and the interior of the structure, it

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is difficult to see how they would be more detrimental to the neighborhood than the structure in its present state. *Ante* at 448, n. 6.

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Massachusetts Land Court.
Department of the Trial Court.

PRIMROSE SCHOOL FRANCHISING CO. and Joyce Wendler, Executrix of the Estate of Helen L. Naylor and Heir under the Will of Helen L. Naylor, Plaintiffs,
v.
TOWN OF NATICK; Michael J. Hickey, Jr., Scott W. Landgren, Robert E. Havener, Paul T. Mulkerron, and Kathryn M. Coughlin, Members of the Zoning Board of Appeals of the Town of Natick, Defendants,
and
David F. Porter and Elizabeth M. Porter, Plaintiffs,
v.
Town of Natick; Michael J. Hickey, Jr., Scott W. Landgren, Robert E. Havener, Paul T. Mulkerron and Kathryn M. Coughlin, Members of the Zoning Board of Appeals of the Town of Natick, Defendants.

Nos. 12 MISC 459243(AHS), 14 MISC 481100(AHS).
|
May 29, 2015.

DECISION

ALEXANDER H. SANDS III, Justice.

***1** The above-captioned actions represent a dispute as to a proposal (the "Project") of Case 1 Plaintiffs Primrose School Franchising Company ("Primrose") and Joyce Wendler, Executrix of the Estate of Helen L. Naylor and Heir under the Will of Helen L. Naylor ("Wendler") (together, the "Developers") to construct a child care facility (the "Facility") in Natick, Massachusetts.

The Developers commenced Case 1 against Defendants (in both Case 1 and Case 2) Town of Natick (the "Town") and Members of the Zoning Board of Appeals of the Town of Natick (the "ZBA") (together, "Defendants")) by filing an unverified complaint on February 10, 2012, by which they sought (a) a determination, pursuant to G.L. c. 240, § 14A, as to the validity of certain provisions of the Town's Zoning Bylaws (the "Bylaws"), and as to the extent to which such provisions affect the construction of the Facility; and (b) to appeal, pursuant to G.L. c. 40A, § 17, a decision ("ZBA Decision 1") of the ZBA dated December 12, 2011, which had denied the Developers' application for three special permits (the "Special Permits")[1] and their request for a finding pursuant to G.L. c. 40A, § 6 (the "Section 6 Finding") that the Facility could be constructed as a conforming building on a non-conforming lot.[2] A case management conference in Case 1 was held

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on March 5, 2012. On August 23, 2012, the Abutters filed a motion to intervene in Case 1, which was denied by order dated August 31, 2012.

On October 1, 2012, the Developers moved for summary judgment in Case 1, which was supported by a memorandum of law and affidavit of Curt Van Emon (business consultant). Defendants filed their opposition to the Developers' motion on November 1, 2012, which was supported by a memorandum of law, affidavit of Patrick Reffett ("Reffett") (the Town's Community Development Director), and correspondence from Natick residents. On November 13, 2012, the Developers filed their reply memorandum, and on November 20, 2012, Defendants filed a supplementary opposition brief. On December 3, 2012, the Developers filed a motion to strike Paragraphs 6–17 of Reffett's affidavit, as well as the Communications. On January 25, 2013, Defendants filed their opposition this motion to strike. A hearing on both motions was held on January 30, 2013, and, at that time the matter was taken under advisement.

By decision dated June 17, 2013 ("Land Court Decision 1"), this court held as follows:

(a) that the Bylaws may require a special permit for construction of the Facility within the RSAD;

(b) that the Bylaws may require a special permit for construction of the Facility within the APD;

(c) that the Bylaws may require a special permit for construction of the Sign;

(d) that frontage and lot width requirements, as they relate to traffic and access concerns, are reasonable regulations, as applied to the Facility;

(e) that the Facility may be subject to a finding, pursuant to G .L. c. 40A, § 6 and Section V.2 of the Bylaws, that it will not be substantially more detrimental than the existing structure, but that such a finding must be applied reasonably; and,

***2** (f) that the ZBA could not outright deny the proposed use in the Facility, but that the ZBA could apply reasonable conditions to such use.

Accordingly, the court remanded the issue of the Special Permits to the ZBA for a new hearing consistent with Land Court Decision 1.

Following the remand of Case 1 to the ZBA, on November 18, 2013, the ZBA voted ("ZBA Decision 2") to grant the Special Permits, subject to fifteen conditions. In response, the Developers filed an unverified second amended complaint in Case 1 on January 7, 2014, by which they sought, pursuant to G.L. c. 240, § 14A, G.L. c. 40A, § 17, and G.L. c. 185, §§ 1(p), 1 (j½), (a) a judicial determination with respect to certain provisions of the Bylaws, and (b) to appeal ZBA Decision 2.

After ZBA Decision 2 was issued, two local abutters (Case 2 Plaintiffs David F. Porter ("David") and Elizabeth M. Porter (together, the "Abutters")) commenced Case 2 by filing an unverified complaint on January 8, 2014, by which they also sought to appeal ZBA Decision 2 pursuant to G.L. c. 40A, § 17.

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By this appeal, the Abutters sought not to prevent the commencement of the Project entirely, but rather to object to the alleged laxness of the conditions imposed on the Project pursuant to ZBA Decision 2. On January 27, 2014, the Developers moved to intervene in Case 2 and to consolidate Cases 1 and 2, which motion was allowed by order dated February 20, 2014.

On July 31, 2014, the Developers filed a motion for summary judgment in both Case 1 and Case 2, which was supported by a memorandum of law and a transcript of David's deposition testimony. On August 20, 2014, the Abutters filed their opposition to the Developers' summary judgment motion. On August 29, 2014, Defendants filed their own opposition to the Developers' motion, as well as a cross-motion for summary judgment, which was supported by a memorandum of law and affidavits of Reffet and Kien Y. Ho, P.E. ("Ho") (an engineer with Beta Group, Inc.). On September 15, 2014, the Developers filed their reply brief on the motions for summary judgment. A hearing was held on both motions was held on October 23, 2014, and both motions were taken under advisement at that time.

Based upon the documents and affidavits annexed to the parties' summary judgment briefs, and based upon the prior findings set forth in Land Court Decision 1, I find that the following material facts are not in dispute:

1. Wendler is the owner of the property known as and located at 294–296 North Main Street, in Natick, Massachusetts ("Locus"), which is the proposed location for the Project. Primrose is a corporation organized under the laws of Georgia, which is in the business of educational child care. Primrose entered into a purchase and sale agreement with Wendler to purchase Locus (which contains two lots), and it plans to merge the two lots comprising Locus (defined, *infra,* as Lot 1 and Lot 2), which, when combined, would comprise approximately 132,420 square feet in area.

***3** 2. Locus is situated on the westerly side of North Main Street ("Route 27")—which is a two-lane, bidirectional public roadway—approximately 0.6 miles south of Route 30 in Wayland, Massachusetts and approximately 0.8 miles north of Route 9. Route 27 is thirty-two feet wide at the site of Locus. There are two schools located approximately 0.40 and 0.66 miles from Locus, respectively, and Route 27 is a primary route for parents picking up and dropping off their children and attending events at these schools.[3] There is a marked, paved shoulder of approximately three to four feet in width along both sides of Route 27.

3. Locus consists of two lots ("Lot 1" and "Lot 2"), each of which contains a single-story, single family residence, as well as accessory structures. Lot 1 is 2.278 acres in area and Lot 2 is 0.762 acres in area; together, Lots 1 and 2 are 3.04 acres in area. Lot 1 fronts on Route 27, and has 83.4 feet of frontage thereon; Lot 2 does not have frontage on Route 27, but it is benefitted by an easement over Lot 1 to access Route 27. Lot 2 abuts Lot 1 on a portion of the south side of Lot 1. Lot 1 has a lot width of 71.9 feet at its narrowest point (i.e., the portion of the lot leading to the frontage on Route 27). Pursuant to the Bylaws, Locus is located in the RSAD and the APD.

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4. For lots within the RSAD, the Bylaws require frontage of 110 feet and lot width of 82.5 feet. With respect to lot width, the Bylaws state that "no portion of the lot between the dwelling or other primary structure and the street line of the front yard shall have a width, where width is defined as the shortest distance between the side lot lines, that is less than three quarters of the minimum required frontage."

5. Pursuant to the Project, Primrose proposes to raze the existing structures on Lots 1 and 2, and to construct the Facility on Locus to accommodate 189 school-aged children and forty employees. The Facility, as proposed, will be a 1.5 story building with approximately 12,000 square feet of gross floor area. The Facility will comply with all dimensional requirements of the Bylaws with respect to height, setbacks, and building coverage. Primrose intends to use the Facility to provide day care to infants and children, and to conduct an instructional after-school program for school-aged children.[4] Access to the Facility, as proposed, will be through an unsignaled driveway from Route 27.

6. Pursuant to Bylaws § V–H D. 1(a) 1, the faces of accessory signs in the RSAD must be smaller than one square foot. However, pursuant to Bylaws § V–H E. 4, the ZBA is authorized:

> [to] grant a special permit for a sign not complying with the provisions of [the Bylaws,] if it determines that the particular sign will be in harmony with the general purpose and intent of this section[,] will not be injurious to the neighborhood in which such sign or signs are to be located nor to traffic and safety conditions therein, nor otherwise detrimental to the public safety and welfare ...

***4** 7. As part of the Project, Primrose proposes to construct the Sign, which, as proposed, would be larger than one square foot.[5]

8. On April 7, 2011, Primrose filed with the ZBA applications for the Special Permits and the Section 6 Finding (the "Permit Applications"). In response to these applications, the ZBA held a five-session public hearing on the Permit Applications, which commenced on May 9, 2011, and was continued to June 20, 2011, September 12, 2011, September 19, 2011, and November 7, 2011 -on which date the ZBA closed the hearing.

9. Over the course of such public hearing sessions, the ZBA heard testimony from Primrose, its attorney, members of the community, and an attorney (Caren Schindel) who represented a large group of parties opposed to the Project. The ZBA also received and reviewed numerous plans, reports, memoranda, and other evidence, and heard testimony for a total of sixteen hours. During the course of these hearings, Primrose submitted revised lighting and landscaping plans. Primrose did not propose to scale down the size of the Facility, and it did not agree to install a traffic signal or to discuss such matters with the Massachusetts Department of Transportation ("MassDOT").

10. On December 12, 2011, the ZBA voted

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unanimously (5–0) to deny the Permit Applications, and thereafter filed ZBA Decision 1 with the Town Clerk on January 26, 2012 in accordance with the ZBA's vote .[6]

11. In response to the Developers' appeal of ZBA Decision 1, this court issued Land Court Decision 1, in which the court ruled, *inter alia,* that by outright denying the Permit Applications, the ZBA nullified the zoning protections afforded to child care facilities under G.L. c. 40A § 3 (the "Dover Amendment").[7] As such, the court remanded the matter to the ZBA to hold a public hearing for the purpose of determining reasonable conditions to be imposed upon the approval of the Permit Applications. On November 18, 2013, the ZBA voted (4–0, with one abstention) to grant the Permit Applications, subject to fifteen conditions specified in ZBA Decision 2, which was filed with the Natick Town Clerk on December 20, 2013. The fifteen conditions set forth in ZBA Decision 2 (respectively, "Condition 1" through "Condition 15") are as follows:

1. One free standing sign limited to the design and size and lighting style provided to the Board....

2. An additional stop sign and opposing "keep right" sign on the raised center island....

3. Off-site Route 27 road improvements including any resurfacing, restriping and pole relocation to include a left turn lane from northbound lane off Route 27 into the site as shown ... to Natick ZBA....

4. Limitation of enrolled population to a maximum of 152 students with hours of operation from 6:00 a.m. to 6:30 p.m. Lighting (other than security) and in accordance with Town bylaws not to exceed 30 minutes before or after closing.

5. Payment of $19,680 for off-site improvements to improve the intersections at Evergreen and Pine Streets payable to the Town of Natick at the time of permitting.

***5** 6. Special Permits approved for this site to be used for a child care center as proposed do not run with the land, rather any modifications or changes in use or Special Permit holder must be presented to the Natick ZBA for further review and approval.

7. All HVAC and mechanical structures mounted and maintained interior to the structure.

8. All snow to remain on-site or trucked to an approved offsite location, and not forced onto abutting land or into the right of way.

9. Dumpster located on-site and properly screened by fencing and secured as shown on plans submitted, and pick up and drop off during normal business hours.

10. On-site activities after hours for special events will be controlled and limited by the applicant.

11. Driveway striped "no parking" along fire lane access; 18–20 employee parking spaces to be located on the northerly side of the property.

12. Porous pavement to be used in the driveway and parking areas.

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13. Delivery of supplies only during normal business hours.

14. Rear of the parcel to remain as open space.

15. Incorporate by reference any other applicable conditions by other municipal boards or departments with jurisdiction; permit or license approval of same.

12. On January 7, 2014, the Developers appealed ZBA Decision 2 to this court in Case 1. On January 8, 2014, the Abutters appealed ZBA Decision 2 in Case 2. On February 20, 2014, the court allowed the Developers' motion to intervene in Case 2 and to consolidate Cases 1 and 2.

13. The Abutters reside at 293 North Main Street, Natick, Massachusetts, which is located across Route 27 from Locus. As their house is directly across Route 27 from the proposed driveway leading to the Facility, the Abutters are concerned about increased traffic in front of their house. The Abutters submitted no expert testimony or traffic study as to the traffic impact the Project would have on their property. In his deposition, David was unable to identify any specific harm that traffic would cause to his own property; rather, he discussed alleged prior traffic incidents unrelated to Locus or the Abutters, and stated that "[a]nything that affects the neighborhood affects my wife and myself".[8]

14. The Abutters also expressed concerns about artificial light from the Sign (which David claimed "would aggravate me a little bit"). The Abutters submitted no expert evidence as to this claimed harm. In his deposition testimony, David acknowledged that the Porters were unaware of what hours the Sign would be illuminated and the direction in which light from the Sign would shine. He also acknowledged that the Sign would be located more than 110 feet from his house. He further acknowledged that the Abutters' property is located in a mixed use area, and that multiple other properties (including a nearby Dairy Queen restaurant that he owns) maintains illuminated signs.

15. The Abutters also expressed concerns about increased noise (from children playing) that "may" emanate from the Project. The Abutters submitted no expert evidence as to this claimed harm. With respect to noise, David acknowledged that the playground on Locus would be located on the far side of the Facility from the Abutters' property.[9] He also acknowledged that any such noise would not significantly affect his property, and stated that his concerns were related not to his own property, but rather to "the neighborhood. I'm not specifically talking about me."[10]

***6** 16. In connection with their application for approval of the Project, the Developers retained Vanasse & Associates, Inc. ("Vanasse") to conduct two traffic studies (the "Traffic Studies")—the first in May of 2011 ("Traffic Study 1") and the second in October of 2013 ("Traffic Study 2"). Traffic Study 1 found, *inter alia,* as follows:

(a) that weekday average vehicle volume along Route 27 is 16,272 vehicles, including 1,222 vehicles per hour during the weekday morning peak hour (8:00 a.m. to 9:00 a.m.) and 1,314 vehicles during the weekday evening peak hour (4:00 p.m. to 5:00 p.m.);

(b) that, during the morning peak hour (8:00 a.m. to 9:00 a.m.), the Facility would

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generate 151 new trips per hour, based on 80 vehicles entering Locus and 71 vehicles exiting Locus; and,

(c) that, during the weekday evening peak hour (4:00 p.m. to 5:00 p.m.), the Facility would generate 155 new trips per hour, based on 73 vehicles entering Locus and 82 vehicles exiting Locus.

17. After the Developers submitted Traffic Study 1 to the Town, Reffett arranged for Beta Group, Inc. ("Beta") to peer review Traffic Study 1, as well as Primrose's special permit site plans for Locus. Beta provided certain recommendations to Primrose as to supplementation and expansion of Traffic Study. Vanasse implemented Beta's recommendations in Traffic Study 2, which confirmed the prior findings of Traffic Study 1, and concluded that (a) the Project design would provide safe ingress and egress to and from Locus, (b) the Project would cause no unsafe driving conditions along Route 27, and (c) the expected traffic volume would not increase as a result of the Project.

18. By letter (the "Peer Review") dated October 15, 2013, Ho (an engineer employed by Beta) noted that Traffic Study 2 had implemented Beta's prior recommendations. Further, Ho opined (a) that "[t]here are sufficient sight distances (>400 feet) approaching the site driveway in both directions", (b) that "there does not appear to be a safety issue in the study area", (c) that appropriate local data (as well as that from MassDOT) was considered in connection with the Traffic Studies, (d) that the trip generation methodology of the Traffic Studies was appropriate, (e) that "[t]he driveway does not meet any of the signal warrants based on the vehicular volumes"[11], and (f) that "[t]he site plan shows an adequate snow storage area". On the basis of these findings, Ho stated that Traffic Study 1, as supplemented by Traffic Study 2, "provides a more accurate depiction of the traffic impact of the proposed development." Ho also confirmed these findings in his affidavit.

19. Although Ho did not disagree with the findings of the Traffic Studies, he did recommend that a northbound left turn lane be installed on Route 27 at the proposed location of the Locus driveway intersection to "prevent northbound through traffic from being blocked by vehicles waiting to turn left into the site." Reffett testified that no MassDOT approval would be required for this proposed turn lane, and submitted a MassDOT jurisdiction map indicating that the relevant area of Route 27 is not within MassDOT's jurisdiction.

***7** Summary judgment is appropriate where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. *E.g., Cassesso v. Comm'r of Corr.,* 390 Mass. 419, 422, 456 N.E.2d 1123 (1983); *Cmty. Nat'l Bank v. Dawes,* 369 Mass. 550, 553, 340 N.E.2d 877 (1976); Mass. R. Civ. P. 56(c).

The Developers argue that Condition 3 (which requires installing a left turn lane), Condition 4 (which, *inter alia,* caps enrollment at the Facility), and Condition 15 (which "[i]ncorporate[s] by reference any other applicable conditions by other municipal boards or departments with jurisdiction; permit or license approval of same") should be altered or stricken from

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ZBA Decision 2. In addition, the Developers challenge the standing of the Abutters in Case 2. The Abutters allege that they would be uniquely affected by the Facility due to lighting, traffic, and noise. Additionally, the Abutters claim that Defendants' issuance of ZBA Decision 2 was arbitrary and capricious.

The Developers' Challenge to Conditions in ZBA Decision 2

The court's review of the facts at issue and determinations of the ZBA is de novo; as such, the findings and determination of the ZBA are accorded no evidentiary value. *E.g.* *Josephs v. Bd. of App. of Brookline,* 362 Mass. 290, 295, 285 N.E.2d 436 (1972). Nonetheless, the court's review is "circumscribed: the decision of the [ZBA] cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Roberts v. Sw. Bell Mobile Sys., Inc.,* 429 Mass. 478, 486, 709 N.E.2d 798 (1999) (quotations omitted); *see also* *Britton v. Zoning Bd. of App. Of Gloucester,* 59 Mass.App.Ct. 68, 73, 794 N.E.2d 1198 (Mass.App.Ct.2003) ("a highly deferential bow [is due] to local control over community planning").

In sum, the court's task is "to ascertain whether the reasons given by the [ZBA to impose the conditions set forth in ZBA Decision 2] had a substantial basis in fact, or were ... mere pretexts for arbitrary action or veils for reasons not related to the purposes of the zoning law." *Vazza Props., Inc. v. City Council of Woburn,* 1 Mass.App.Ct. 308, 312, 296 N.E.2d 220 (Mass.App.Ct.1973); *see also* *Britton,* 59 Mass.App.Ct. at 74–75, 794 N.E.2d 1198 (the local board's decision must be supported by a rational view of the facts).

A. ***Condition 3 (The Left Turn Lane Requirement)***

Condition 3 of ZBA Decision 2 requires the Developers to install a northbound left turn lane on Route 27 into Locus to alleviate some of the anticipated increases in traffic that could result when the Facility begins to operate. Despite the fact that the Developers' Traffic Studies suggest that there would be no significant increase in traffic, they have nonetheless agreed to make any necessary road alterations on Route 27—so long as the approval process for doing so is not unduly onerous.[12] Notwithstanding this commitment, the Developers object to Condition 3 based upon their concern that they would be unable to comply with Condition 3 if they are unable to obtain approval for the turn lane from the relevant approving body. They further object to the "vague" language of Condition 3, which was silent on as to which authority's permission would be required in order to construct the left-turning lane.

***8** The Developers' concern here is not entirely unfounded, since—as this court has previous stated—it would be unfair to sanction the Developers for their inability to comply with Condition 3 if they proved unable to obtain the necessary permits to do so—a process over which they likely have little to no control. *E.g., Mehr v. Bd. Of App.*

of Hinsdale, 15 LCR 235, 238 n. 11 (Mass. Land Ct.2007)*E.g., Mehr v. Bd. Of App. of Hinsdale,* 15 LCR 235, 238 n. 11 (Mass. Land Ct.2007) ("It would be unfair to sanction the applicant for a special permit for improper actions taken by the special permit granting authority over which the applicant has no control." (citing *Zuckerman v. Zoning Bd. of App. of Greenfield,* 394 Mass. 663, 667, 477 N.E.2d 132 (1985))). Here, however, the relevant portion of Route 27 on which the required turn lane would be constructed is under the sole jurisdiction of the Town—not the Massachusetts Department of Public Works ("MassDPW"), MassDOT, or any other statewide governing authorities. This is conclusively established by a MassDOT jurisdiction map, which indicates that MassDOT does not have the authority to maintain Route 27 in Natick. Moreover, at the summary judgment hearing, Defendants acknowledged that they have the sole authority to maintain Town roads—including Route 27.

Of course, it remains true that the Developers must receive approval from the Town in order to commence the work of implementing Condition 3; however, Defendants, by conditioning their approval of the Project upon Condition 3, have made it clear that they are amenable to such work being conducted.[13] Condition 3 should therefore be amended in this regard.[14] Accordingly, since there appears to be no serious impediment to the Developers' compliance with Condition 3, as amended, I find that Condition 3 is reasonable.

B. *Condition 4 (Maximum Enrollment Capacity)*

Pursuant to Condition 4, Defendants required, *inter alia,* the Developers to cap maximum student enrollment at the Facility to 152 students, down from the proposed limit of 189. Citing the Dover Amendment, the Developers claim that the ZBA lacked the authority to impose, as a condition of allowing the Project, a cap upon enrollment of students at the Facility.[15] Based upon Defendants' framing of Condition 4 as an "access related condition[ ]", it is clear that the intention of Condition 4 was to limit the number of vehicle trips coming and going from Locus. Defendants cite this court's discussion of frontage and dimensional requirements in Land Court Decision 1, and argue that "this Court [*sic*] endorsed the imposition of access related conditions under the aegis of the Dover Amendment."

The Dover Amendment was enacted in order to protect institutions that are dedicated to education—whether in a secular or a religious context. Given this mandate, the Dover Amendment exempted qualified educational institutions from zoning requirements that would otherwise purport to restrict the use of land for educational purposes or to expand such use. However, the Dover Amendment does countenance local zoning authorities retaining certain limited authority to regulate Dover Amendment facilities, but only under the limited circumstances enumerated by the Dover Amendment. To wit, the Town may impose "reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." G.L. c. 40A, § 3, ¶ 3.

***9** Based upon the clear language of G.L. c. 40A, § 3, ¶ 3, this court, in Land Court Decision 1, noted that imposing reasonable frontage and lot size requirements was within the authority of the ZBA. However, G.L. c. 40A, § 3, ¶ 3 is silent as to issues relating to site access and vehicular traffic. Moreover, the statute is clear that such regulations may apply only to the "land and structures" to be used in connection with the Dover Amendment facility. *Id.* Thus, Defendants' broad suggestion that this court "endorsed the imposition of access related conditions under the aegis of the Dover Amendment" is mistaken.[16]

While local zoning authorities may apply limited restrictions to the "land and structures" used in connection with a Dover Amendment facility, authority to regulate the actual use of said facility is vested in the Massachusetts Department of Early Education Care ("MassEEC"). *See* G.L. c. 15D, §§ 2(c), 6(a). Pursuant to G.L. c. 15D, §§ 3(a), 8(a), the Massachusetts Board of Early Education and Care is charged with promulgating regulations for MassEEC's governance of Dover Amendment facilities. *See generally* 606 Mass.Code Regs. 7.01–7.14. With respect to the number of students an approved child care facility may house, MassEEC regulations provide as follows:

> Programs will be licensed for the maximum number of children who may be in the care of educators at any one time, taking into consideration the size and layout of the physical facility, the number and qualifications of educators, the equipment and resources available to the children, the individual needs and characteristics of the children served, and the building certificate capacity, if applicable.

606 Mass.Code Regs. 7.03(2). Thus, even under MassEEC's power to regulate the number of students enrolled in an educational facility, traffic and site access are not enumerated concerns upon which enrollment may be limited. Rather, such limits must be based on the capacity of the Facility itself, which the ZBA has (conditionally) approved. If MassEEC were to determine that the Facility is insufficient to house the number of students proposed by the Developers, then MassEEC (but not the ZBA) could cap enrollment; even in that case, however, such cap could not be based on traffic and/or access to Locus.

In view of the foregoing, G.L. c. 40A, § 3, ¶ 3 did not give the ZBA authority to limit the amount of students that the Facility may house as a means of reducing vehicular traffic to and from Locus .[17] As such, I find that Condition 4 is unreasonable to the extent that it purports to condition approval of the Project upon a cap in the maximum number of enrollees in the Facility.

C. *Condition 15 (Requiring Compliance With "Any Other Applicable Conditions")*

The final condition that the Developers challenge is Condition 15, which requires compliance with "any other applicable

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conditions by other municipal boards or departments with jurisdiction, permit, or license approval of same." The Developers contend that Condition 15 should be deemed "void for vagueness", since it is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, thereby allowing untrammeled [administrative] discretion ... and arbitrary and capricious decisions in violation of the due process clause of the Fourteenth Amendment ... and of Art. 10 of the Massachusetts Declaration of Rights." *Bd. of App. of Hanover v. Hous.App. Comm'n,* 363 Mass. 339, 363–64, 294 N.E.2d 393 (1973). Defendants claim that, in fact, Condition 15 "reflects compliance with local law, by incorporating reference to other applicable conditions by other Town boards or departments with jurisdiction, licenses, or approvals."

***10** Despite Defendants' seemingly bona fide intentions to simply hold the Developers to the conditions of other related municipal boards or departments, Condition 15 is simply not a coherent and discernible representation of this intent. The very purpose of a zoning decisions (such as ZBA Decision 2) is to inform the parties as to their rights and responsibilities—not to perplex them with opaque, catch-all provisions. To that end, the "void for vagueness" doctrine exists to prevent zoning authorities from imposing arbitrary conditions that leave applicants unsure as to whether they are in compliance therewith due to a lack of clarity therein. *E.g.,* *Grayned v. City of Rockford,* 408 U.S. 104, 108–109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("It is a basic principle of due process that an enactment is void for vaguness if its prohibitions are not clearly defined.").

By conditioning zoning approval upon the Developers' compliance with "any other applicable conditions", the ZBA puts the Developers into a position wherein they would be in ongoing jeopardy of losing zoning approval for the Project even after construction of the Facility commences (or even completes). In theory, this open-ended requirement could be used to deprive the Developers of zoning approval for the Project if, at any point in the future, they were to fall afoul of any municipal regulation imposed upon their use of Locus—no matter the duration of such violation or whether it were to be cured. Furthermore, Condition 15 is superfluous, because the Developers remain obligated to comply with any such regulations as would be applicable to their use of Locus, irrespective of whether Condition 15 were imposed or not. Accordingly, I find that Condition 15 is void for vagueness and is therefore unreasonable.

The Abutters' Standing

Whether or not a party is "aggrieved" determines whether that party has standing to challenge a zoning decision. *E.g.,* *Marashlian v. Zoning Bd. of App. of Newburyport,* 421 Mass. 719, 721, 660 N.E.2d 369 (1996); *see also* G.L. c. 40A, § 17. A party is presumed to be "aggrieved", within the meaning of G.L. c. 40A, § 17, if it is a "party in interest"—a term defined as "the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters

within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list....” G.L. c. 40A, § 11; *see also Marotta v. Bd. of App. of Revere,* 336 Mass. 199, 204, 143 N.E.2d 270 (1957); *Murray v. Bd. of App. of Barnstable,* 22 Mass.App.Ct. 473, 476, 494 N.E.2d 1364 (1986). Here, because the Abutters reside directly across Route 27 from Locus, I find that they are “part [ies] in interest” under G.L. c. 40A, § 17, and therefore are entitled to a presumption of standing in Case 2.

However, even if a party is presumed to have standing under G.L. c. 40A, § 17, this presumption is rebuttable. *E.g., Standerwick v. Zoning Bd. of App. of Andover,* 447 Mass. 20, 33, 849 N.E.2d 197 (2006) (“Once a defendant challenges the [abutter’s] standing and offers evidence to support the challenge ... the jurisdictional issue is to be decided on the basis of the evidence with no benefit to the [abutter] from the presumption.” (quotation omitted)); *see also Marinelli v. Board of App. of Stoughton,* 440 Mass. 255, 258, 797 N.E.2d 893 (2003) (defendant must proffer evidence “warranting a finding contrary to the presumed fact [of standing]”).

***11** Once a party has successfully rebutted the presumption of standing, “the burden rests with the [abutter] to prove standing, which requires that the [abutter] establish—by direct facts and not by speculative personal opinion—that his injury is special and different from the concerns of the rest of the community.” *Standerwick,* 447 Mass. at 33, 849 N.E.2d 197 (quotation omitted); *see also id* . at 34, 849 N.E.2d 197 (“[The] presumption does not shift the burden of proof; it is a rule of evidence that aids the party bearing the burden of proof in sustaining that burden by ‘throw[ing] upon his adversary the burden of going forward with evidence.’ “ (quoting *Epstein v. Boston Hous. Auth.,* 317 Mass. 297, 302, 58 N.E.2d 135 (1944))). To assert a plausible claim, a “plaintiff must put forth credible evidence to substantiate his allegations.” *Marashlian,* 421 Mass. at 721, 660 N.E.2d 369. Such credible evidence consists of:

> both a quantitative and a qualitative component.... Quantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the plaintiff has made. Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board’s action. Conjecture, personal opinion, and hypothesis are therefore insufficient.
>
> *Butler v. City of Waltham,* 63 Mass.App.Ct. 435, 441, 827 N.E.2d 216 (2005)

In sum, if the presumption of standing is rebutted, “individual ... property owners acquire standing by asserting a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest.” *Harvard Sq. Def. Fund, Inc. v. Planning Bd. of Cambridge,* 27 Mass.App.Ct. 491, 492–93, 540 N.E.2d 182, *rev. denied,* 405 Mass. 1204, 542 N.E.2d 602 (1989); *see also Barvenik v. Bd. of*

Aldermen of Newton, 33 Mass.App.Ct. 129, 132, 597 N.E.2d 48 (1992) (plaintiff must establish a special and particular injury based upon direct facts), *abrogated on other grounds by Marashlian,* 421 Mass. at 724, 660 N.E.2d 369; *Butler,* 63 Mass.App.Ct. at 440, 827 N.E.2d 216 (same). If the abutter is unable to do so, his or her objection must be dismissed for lack of standing. is unable to offer evidence that tends to show that the plaintiff's injury is unique, the case will not proceed on the merits. *See Marinelli,* 440 Mass. at 258, 797 N.E.2d 893.

The three harms relative to standing that the Abutters have raised are potential traffic congestion (and, by implication, "public safety"), increased noise, and production of artificial light by the Sign. The Developers have submitted the testimony of Reffett, as well as the Traffic Studies and the Peer Review, to demonstrate that, in fact, the Abutters would not be adversely affected by the Project. The Developers also cite David's deposition testimony, which, they claim, demonstrates that even David's own testimony demonstrates the Abutters' lack of standing.

The Traffic Studies and the Peer Review constitute expert evidence strongly suggesting that the traffic impact of the Project on Route 27 will be minimal and that there will be no realistic safety concerns—provided the left turn lane the Developers have agreed to install (and which ZBA Decision 2 mandates) is installed. With respect to artificial light from the Sign, the Developers note that David's own testimony establishes that the Abutters are only minimally aware of the effect that the Sign would have; further, the Developers point out that, pursuant to Condition 4 of ZBA Decision 2, the Sign may be lit only until 7:00 P.M.—thus, for a large part of the year, the Sign will be lit only during daylight hours. With respect to noise from children playing, the Developers point to David's testimony, wherein David acknowledged that noise was not a significant concern for his own property, and that his concerns were related not to his own property, but rather to "the neighborhood."[18] Further, the Developers note that the playground would be located on the far side of the Facility from the Abutters' property, and would have a minimal impact thereupon—which David also acknowledged.

***12** In sum, I find that the Developers have rebutted the Abutters' presumption of standing. Thus, the burden of demonstrating that the Project would uniquely affect the Abutters themselves (and their property) falls to the Abutters. I will address each of their three concerns (*i.e.,* traffic, noise, and artificial light) in turn.

A. *Traffic and Safety*

It is undisputed that traffic will increase to some degree surrounding Locus during the hours of operation. However, that does not necessarily mean that such traffic would be the basis upon which the Project should noDt go forward. *E.g., Am. Can Co. v. Milk Control Bd.,* 313 Mass. 156, 160, 46 N.E.2d 542 (1943) ("Doubtless not every person whose interests may be in some remote way injuriously affected ... is ... a person 'aggrieved.' "). Determining whether a

project will adversely affect traffic conditions is a highly complicated endeavor, so determining "[t]raffic impact is a matter of expert testimony." *Hilltop Gardens Inv., LLC v. JMK Dev.,* LLC 13 LCR 202, 206 (Mass. Land Ct.2005)*Hilltop Gardens Inv., LLC v. JMK Dev.,* LLC 13 LCR 202, 206 (Mass. Land Ct.2005).

Here, the Abutters submitted no expert testimony or traffic study as to the potential impact that traffic could cause to their property. When pressed to identify a specific harm that traffic would cause to the Abutters' property, David was unable to do so, so he instead discussed several alleged traffic incidents that were unrelated to the Abutters or their property; he further stated that "[a]nything that affects the neighborhood affects my wife and myself".

Especially in the absence of any expert evidence as to traffic impact, the Abutters' failure to identify any actual harm that traffic could cause specifically to their property is fatal to their claim of harm. Moreover, in the face of two Traffic Studies and the Peer Review (all of which found minimal impact to traffic and no safety issues) the Abutters' claims are simply too speculative to form the basis for standing. Thus, I find that the Abutters have failed to demonstrate that they have standing on the basis of the potential traffic impact of the Project on their specific property.[19]

B. ***Noise***

The next harm that the Abutters allege is that children playing on the proposed playground on Locus would cause unwanted noise. As noted, *supra,* with respect to traffic, while some increased noise from developing Locus would seem to be inevitable, that does not necessarily mean that such noise should be the basis upon which the Project should not go forward. *E.g., Am. Can Co.,* 313 Mass. at 160, 46 N.E.2d 542.

Here, as with traffic impacts, the Abutters submitted no expert evidence of any kind suggesting that noise levels will be disruptive to their Property. Rather, the Abutters only offered David's testimony, in which he opined that children playing "may" cause noise. However, he acknowledged that the playground on Locus would be located on the far side of the Facility from the Abutters' property, and that any such noise would not significantly affect his property. Further, he stated that, in fact, his concerns as to noise were related not to his own property, but rather to "the neighborhood. I'm not specifically talking about me."[20]

***13** Especially in the absence of any expert evidence as to noise impact, the Abutters' failure to identify any actual harm that noise could cause specifically to their property is, once again, fatal to their claim of harm. Moreover, in the face of two Traffic Studies and the Peer Review (all of which found minimal impact to traffic and no safety issues) the Abutters' claims are simply too speculative to form the basis for standing. Even if the Abutters' concerns as to noise were well-articulated, it must be noted that the Facility will be in operation almost exclusively during regular business hours ("6:00 a.m. to 6:30 p.m.") only, and after hours use of the Facility must be strictly

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limited—as specified by ZBA Decision 2 (Conditions 4 and 10). Thus, there is no reasonable expectation that the Project will produce any appreciable amount of noise at times where quiet would be expected. Moreover, Locus and the Abutters' property are both located along Route 27, a state highway, which itself would likely be the source of far more noise than children playing on the far side of the Facility.

Thus, it appears that even David acknowledges that the noise impact on the Abutters' property will be minimal at best, and that the Abutters themselves would not be uniquely affected by noise. Accordingly, I find that the Abutters have failed to demonstrate that they have standing on the basis of the potential noise of the Project on their specific property.

C. ***Artificial Light***

The next harm that the Abutters allege is that the artificially lit Sign (which, as proposed, would sit at the intersection of the Locus driveway and Route 27) would adversely affect their property—which David claimed "would aggravate me a little bit". In his deposition testimony, however, David acknowledged that the Porters were not even aware of what hours the Sign would be illuminated and the direction in which light from the Sign would shine. He also acknowledged that multiple other properties in the area (including a nearby Dairy Queen restaurant that he owns) maintain illuminated signs, and that the Sign would be located more than 110 feet from his house.

Even if the Abutters had articulated concrete concerns as to artificial light, these concerns prove to be unfounded, since, pursuant to Condition 4 of ZBA Decision 2, lighting for the Project (except for security) will be permitted only until 7:00 P.M. Thus, the Sign will be lit almost exclusively during daylight hours only, during which time there is simply no reasonable expectation that the Project will produce any appreciable amount of artificial light at times that would meaningfully affect the Abutters or their property. Even if light from the Sign did actually affect the Abutters, the Abutters have not demonstrated that such increased artificial light (to the extent it would exist at all) would uniquely affect them. Rather, all the Abutters offer is that "[a]nything that affects the neighborhood affects [them]".

***14** In sum, therefore, the Abutters' concerns as to artificial light from the Sign are not only speculative and unspecific to the Abutters themselves, their concerns prove to be unfounded. Accordingly, I find that the Abutters have failed to demonstrate that they have standing on the basis of the potential artificial light from the Sign on their specific property. Further, having found that the Abutters have failed to demonstrate harms relating to all three of the harms they claimed (*i.e.,* traffic, noise, and artificial light), I find that they lack standing to appeal ZBA Decision 2.

The Abutters' Objections to ZBA Decision 2

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Notwithstanding the court's finding that the Abutters lack standing, I will nonetheless discuss the substance of their objections to ZBA Decision 2, since, as the finding of no standing should suggest, even if the court had found standing, the Abutters' objections to ZBA Decision 2 fail on the merits for the same reason as their claims to standing likewise fail, since the alleged harms claimed by the Abutters are unsupported by the factual record and/or would not apply specifically to the Abutters and their property.[21]

In their summary judgment brief, the Abutters note that they are "acutely aware" of the Dover Amendment, and they acknowledge that the use of Locus for a day care facility cannot be disallowed outright by the ZBA (as found in Land Court Decision 1). Rather, they object that the conditions imposed by the ZBA "are unreasonably lax and do not go far enough in protecting [the Abutters'] property from excessive noise, traffic and light as well as the threat to public safety." They also claim, in passing, that the size of the Facility "is not in keeping with the residential flavor of their neighborhood"—a claim that is not supported by any evidence in the record, including David's testimony. Yet, despite the fact that ZBA Decision 2 sets forth fifteen specific conditions designed to protect the community and to minimize the effect of the Project upon its neighbors, the Abutters offer no concrete suggestion as to what conditions upon the Project they would find to be satisfactory; rather, they note only that they would prefer for the Facility to be "much smaller".

As discussed, *supra,* each of the concerns claimed by the Abutters (*i.e.,* noise, traffic/safety, and light) rest entirely on their own speculation as to the effect the Project may have. No expert evidence was submitted to support these claims in any way, nor is there anything in the record to suggest that these claimed harms would affect the Abutters uniquely. Indeed, David's testimony suggests that the Abutters commenced this appeal of ZBA Decision 2 out of an interest to protect what they see as the adversely affected interests of "the neighborhood". They may even have brought this case upon the inducement of a non-party who himself lacked standing to bring it. Even if the Abutters had articulated concrete, non-speculative concerns as to impacts of the Project specifically upon the Abutters' property, without any expert evidence, David's testimony, by itself, is simply insufficient to substantiate these claimed harms in the face of the expert evidence submitted by the Developers. Moreover, the Abutters fail to demonstrate that conditioning approval of the Project on a reduction in size of the facility would actually address their claimed harms.

***15** In sum, it is clear that the Abutters' claim that the ZBA acted wantonly and arbitrarily in declining to issue further use restrictions upon the Project has no legal merit. Thus, even if they did have standing to appeal ZBA Decision 2, their appeal of same would be dismissed on the merits.

Conclusion

Based on the foregoing, the Developers' motion for summary judgment is hereby

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ALLOWED to the extent (a) that ZBA Decision 2 is overturned insofar as it imposed the portion of Condition 4 purporting to cap enrollment at the Facility and Condition 15, and (b) that the Abutters lack standing in Case 2, which is therefore **DISMISSED,** with prejudice. Defendants' cross-motion for summary judgment is **ALLOWED** solely to the extent that Condition 3 in ZBA Decision 2 is upheld, as amended.

Judgment in Case 1 and Case 2 to enter accordingly.

JUDGMENT

The above-captioned actions represent a dispute as to a proposal (the "Project") of Case 1 Plaintiffs Primrose School Franchising Company ("Primrose") and Joyce Wendler, Executrix of the Estate of Helen L. Naylor and Heir under the Will of Helen L. Naylor ("Wendler")[1] (together, the "Developers") to construct a child care facility (the "Facility") in Natick, Massachusetts.

The Developers commenced Case 1 against Defendants (in both Case 1 and Case 2) Town of Natick (the "Town") and Members of the Zoning Board of Appeals of the Town of Natick (the "ZBA") (together, "Defendants")) by filing an unverified complaint on February 10, 2012, by which they sought (a) a determination, pursuant to G.L. c. 240, § 14A, as to the validity of certain provisions of the Town's Zoning Bylaws (the "Bylaws"), and as to the extent to which such provisions affect the construction of the Facility; and (b) to appeal, pursuant to G.L. c. 40A, § 17, a decision ("ZBA Decision 1") of the ZBA dated December 12, 2011, which had denied the Developers' application for three special permits (the "Special Permits")[2] and their request for a finding pursuant to G.L. c. 40A, § 6 (the "Section 6 Finding") that the Facility could be constructed as a conforming building on a non-conforming lot.[3] A case management conference in Case 1 was held on March 5, 2012. On August 23, 2012, the Abutters filed a motion to intervene in Case 1, which was denied by order dated August 31, 2012.

On October 1, 2012, the Developers moved for summary judgment in Case 1, which was supported by a memorandum of law and affidavit of Curt Van Emon (business consultant). Defendants filed their opposition to the Developers' motion on November 1, 2012, which was supported by a memorandum of law, affidavit of Patrick Reffett ("Reffett") (the Town's Community Development Director), and correspondence from Natick residents. On November 13, 2012, the Developers filed their reply memorandum, and on November 20, 2012, Defendants filed a supplementary opposition brief. On December 3, 2012, the Developers filed a motion to strike Paragraphs 6–17 of Reffett's affidavit, as well as the Communications. On January 25, 2013, Defendants filed their opposition this motion to strike. A hearing on both motions was held on January 30, 2013, and, at that time the matter was taken under advisement.

***16** By decision dated June 17, 2013 ("Land

Court Decision 1"), this court held as follows:

(a) that the Bylaws may require a special permit for construction of the Facility within the RSAD;

(b) that the Bylaws may require a special permit for construction of the Facility within the APD;

(c) that the Bylaws may require a special permit for construction of the Sign;

(d) that frontage and lot width requirements, as they relate to traffic and access concerns, are reasonable regulations, as applied to the Facility;

(e) that the Facility may be subject to a finding, pursuant to G.L. c. 40A, § 6 and Section V.2 of the Bylaws, that it will not be substantially more detrimental than the existing structure, but that such a finding must be applied reasonably; and,

(f) that the ZBA could not outright deny the proposed use in the Facility, but that the ZBA could apply reasonable conditions to such use.

Accordingly, the court remanded the issue of the Special Permits to the ZBA for a new hearing consistent with Land Court Decision 1.

Following the remand of Case 1 to the ZBA, on November 18, 2013, the ZBA voted ("ZBA Decision 2") to grant the Special Permits, subject to fifteen conditions. In response, the Developers filed an unverified second amended complaint in Case 1 on January 7, 2014, by which they sought, pursuant to G.L. c. 240, § 14A, G.L. c. 40A, § 17, and G.L. c. 185, §§ 1(p), 1 (j½), (a) a judicial determination with respect to certain provisions of the Bylaws, and (b) to appeal ZBA Decision 2.

After ZBA Decision 2 was issued, two local abutters (Case 2 Plaintiffs David F. Porter ("David") and Elizabeth M. Porter (together, the "Abutters")) commenced Case 2 by filing an unverified complaint on January 8, 2014, by which they also sought to appeal ZBA Decision 2 pursuant to G.L. c. 40A, § 17. By this appeal, the Abutters sought not to prevent the commencement of the Project entirely, but rather to object to the alleged laxness of the conditions imposed on the Project pursuant to ZBA Decision 2. On January 27, 2014, the Developers moved to intervene in Case 2 and to consolidate Cases 1 and 2, which motion was allowed by order dated February 20, 2014.

On July 31, 2014, the Developers filed a motion for summary judgment in both Case 1 and Case 2, which was supported by a memorandum of law and a transcript of David's deposition testimony. On August 20, 2014, the Abutters filed their opposition to the Developers' summary judgment motion. On August 29, 2014, Defendants filed their own opposition to the Developers' motion, as well as a cross-motion for summary judgment, which was supported by a memorandum of law and affidavits of Reffet and Kien Y. Ho, P.E. ("Ho") (an engineer with Beta Group, Inc.). On September 15, 2014, the Developers filed their reply brief on the motions for summary judgment. A hearing was held on both motions was held on October 23, 2014, and both motions were taken under advisement at that time.

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***17** The court has issued a decision ("Land Court Decision 2") as of today's date. In accordance with Land Court Decisions 1 and 2, it is hereby:

ORDERED and **ADJUDGED** that the Bylaws may require a special permit for construction of the Facility within the RSAD;

ORDERED and **ADJUDGED** that the Bylaws may require a special permit for construction of the Facility within the APD;

ORDERED and **ADJUDGED** that the Bylaws may require a special permit for construction of the Sign;

ORDERED and **ADJUDGED** that frontage and lot width requirements, as they relate to traffic and access concerns, are reasonable regulations, as applied to the Facility;

ORDERED and **ADJUDGED** that the Facility may be subject to a finding, pursuant to G.L. c. 40A, § 6 and Section V.2 of the Bylaws, that it will not be substantially more detrimental than the existing structure, but that such a finding must be applied reasonably; and,

ORDERED and **ADJUDGED** that the ZBA could not outright deny the proposed use in the Facility, but that the ZBA could apply reasonable conditions to such use; and,

ORDERED and **ADJUDGED** that, as amended (*see, infra,* n. 5), Condition 3[4] is reasonable[5]; and,

ORDERED and **ADJUDGED** that Condition 4[6] is unreasonable to the extent that it purports to condition approval of the Project upon a cap in the maximum number of enrollees in the Facility; and,

ORDERED and **ADJUDGED** that Condition 15[7] is void for vagueness and is therefore unreasonable; and,

ORDERED and **ADJUDGED** that the Abutters are "part[ies] in interest" under G.L. c. 40A, § 17, and therefore are entitled to a presumption of standing in Case 2; and,

ORDERED and **ADJUDGED** that the Developers have rebutted the Abutters' presumption of standing; and,

ORDERED and **ADJUDGED** that the Abutters have failed to demonstrate that they have standing on the basis of the potential traffic impact of the Project on their specific property[8]; and,

ORDERED and **ADJUDGED** that the Abutters have failed to demonstrate that they have standing on the basis of the potential noise of the Project on their specific property; and,

ORDERED and **ADJUDGED** that the Abutters have failed to demonstrate that they have standing on the basis of the potential artificial light from the Sign on their specific property; and,

ORDERED and **ADJUDGED** that because the Abutters have failed to demonstrate harms relating to all three of the harms they claimed (*i.e.,* traffic, noise, and artificial light), the Abutters lack standing to appeal ZBA Decision 2; and,

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ORDERED and **ADJUDGED** that the Developers' motion for summary judgment is hereby **ALLOWED** to the extent (a) that ZBA Decision 2 is overturned insofar as it imposed the portion of Condition 4 purporting to cap enrollment at the Facility and Condition 15, and (b) that the Abutters lack standing in Case 2; and,

***18 ORDERED** and **ADJUDGED** that Case 2, is hereby **DISMISSED,** with prejudice; and,

ORDERED and **ADJUDGED** that Defendants' cross-motion for summary judgment is **ALLOWED** solely to the extent that Condition 3 in ZBA Decision 2 is upheld, as amended.

All Citations

Not Reported in N.E.3d, 2015 WL 3477072

Footnotes

1 The Developers were required to seek the Special Permits because the Facility would be located in a "Residence Single A" zoning district (the "RSAD") and an overlaying Aquifer Protection District (the "APD"); the Developers also sought permission to construct illuminated signage (the "Sign") as an accessory to the Facility.

2 The Developers filed an amended complaint on February 14, 2012 to correct misspellings of the parties' names.

3 Neither of these schools abuts Route 27, but Route 27 is a primary route for parents to and from the schools.

4 Pursuant to the Table of Uses in the Bylaw, Use 49, "[l]icensed nursery school[s] or other use for the day care of children, but not including day or summer private camps operated for profit" are permitted within the RSAD.

5 The exact dimensions of the Sign are not in the record, but the parties agree that the face of the Sign, as proposed, would be larger than one square foot.

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6 At the ZBA hearing on December 12, 2011, Defendant ZBA Member Robert Havener ("Havener") made an unsuccessful motion to approve the Permit Applications "subject to all crafted conditions, and [to] find that the proposal, as conditioned, would not be substantially more detrimental to the neighborhood than what is existing." ZBA Decision 1 listed eight "principal conditions" that would have been imposed if this motion had been successful. Havener's motion was not seconded by any member of the ZBA. He then made a second motion that the Facility, which would "serve 189 children and accommodate 40 staff persons, with all of its related adverse traffic, safety, aesthetic, and other impacts, will be substantially more detrimental to the neighborhood." Upon this second motion, the ZBA voted unanimously to deny the Permit Applications.

7 Pursuant to Paragraph 3 of the Dover Amendment:

> No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

8 In his deposition testimony, David acknowledged that he had received the assistance of a member of the Natick Planning Board who lived nearby, and who "disagreed with the [ZBA]'s decision to grant the special permits." Based upon David's description of this Planning Board member, it does not appear that such member would qualify as an "aggrieved party" (*see* discussion, *infra*), which thus likely explains why he did not bring this appeal himself. David further noted that around 300 neighbors had been in contact with respect to appealing ZBA Decision 2, but that he was the only party who actually filed an appeal—a course of action that he acknowledged "[m]aybe [ ] wasn't a good decision."

9 David also acknowledged that he owns and operates a Dairy Queen restaurant about 300 yards from Locus, which he expects children at the Facility will likely patronize.

10 The Abutters also noted, in passing, in their summary judgment brief, that the Facility would not be in keeping with the "residential flavor" of the neighborhood. However, they submitted no evidence whatsoever (not even testimony by David) with respect to this

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issue. In fact, David's own testimony suggests the opposite, as he acknowledged that multiple other businesses (including his own business) operate in the vicinity of the Abutters' property and maintain illuminated signage.

11 In other words, traffic volume and road conditions would not necessitate the installation of a new traffic signal.

12 In addition, Reffett recommended to the Developers that they should construct the requested lane. To make this improvement, the Developers would have to widen Route 27 in the vicinity of Locus in order to construct the left turn lane into Locus.

13 This is further suggested in Defendants' summary judgment brief, in which they describe construction of the left turn lane as not only a "reasonable" condition, but also something that is "necessary for safety and access purposes", and which "can be accommodated ... in the vicinity of the Site." These statements are now of record, so for the Town to change course and deny approval to construct the very turn lane it required as a condition of approval would be patently unreasonable.

14 Specifically, to ensure that the Developers are able to comply with Condition 3, the ZBA shall revise Condition 3 to reflect the fact that the Town has sole jurisdiction over the relevant section of Route 27, and that the Town will allow this improvement to be made.

15 The Developers do not object to the restrictions on the Facility's hours of operation or lighting imposed by Condition 4, only the enrollment cap.

16 Also, therefore, Defendants' citation of *Capobianco v. Zoning Bd. of App. of Natick,* 14 LCR 354, 357, 2006 WL 1739924 (Mass. Land Ct.2006)—in which the court upheld the ZBA's imposition of limits (alleged to be arbitrary) on the number of units in a multi-family dwelling—is inapposite.

17 Moreover, even if Condition 4 had been within the power of the ZBA to impose, based

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upon the Traffic Studies and Peer Review (discussed, *infra*), it appears that, in fact, traffic and safety are not expected to be significant concerns. This only further indicates that Condition 4 would have been unreasonable even if were not ultra vires.

18 Indeed, David's testimony suggests that, in fact, the Abutters (who, as direct abutters, have a presumption of standing) may have brought this case upon the inducement of a disgruntled member of the Natick Planning Board who was dissatisfied with ZBA Decision 2, but who himself lacked standing to appeal same. David further acknowledged that bringing this case at all "[m]aybe [ ] wasn't a good decision."

19 It should be noted that, in Land Court Decision 1, I found that traffic impacts might be a significant issue. However, that decision was issued without the benefit of the supplementation of Traffic Study 1 by Traffic Study 2, the Peer Review, and Ho's affidavit testimony. Upon this evidence now before the court, it appears that the Abutters' concerns about traffic and safety turn out not to be reasonably grounded.

20 David also acknowledged that his nearby business will likely benefit from children enrolled in the Facility.

21 It should be noted that the Developers do not challenge twelve of the fifteen conditions imposed by ZBA Decision 2. The Abutters challenge ZBA Decision 2 in its entirety, on the alleged basis that its conditions are too lax.

1 Wendler is the owner of the property known as and located at 294–296 North Main Street, in Natick, Massachusetts ("Locus"), which is the proposed location for the Project.

2 The Developers were required to seek the Special Permits because the Facility would be located in a "Residence Single A" zoning district (the "RSAD") and an overlaying Aquifer Protection District (the "APD"); the Developers also sought permission to construct illuminated signage (the "Sign") as an accessory to the Facility.

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[3] The Developers filed an amended complaint on February 14, 2012 to correct misspellings of the parties' names.

[4] Condition 3 is defined in Land Court Decision 2 as the third condition imposed pursuant to ZBA Decision 2, which states as follows: "[o]ff-site Route 27 road improvements including any resurfacing, restriping and pole relocation to include a left turn lane from northbound lane off Route 27 into the site as shown ... to Natick ZBA...."

[5] To ensure that the Developers are able to comply with Condition 3, the ZBA shall revise Condition 3 to reflect the fact that the Town has sole jurisdiction over the relevant section of Route 27, and that the Town will allow this improvement to be made.

[6] Condition 4 is defined in Land Court Decision 2 as the fourth condition imposed pursuant to ZBA Decision 2, which states as follows: "[l]imitation of enrolled population to a maximum of 152 students with hours of operation from 6:00 a.m. to 6:30 p.m. Lighting (other than security) and in accordance with Town bylaws not to exceed 30 minutes before or after closing."

[7] Condition 15 is defined in Land Court Decision 2 as the fifteenth condition imposed pursuant to ZBA Decision 2, which states as follows: "[i]ncorporate by reference any other applicable conditions by other municipal boards or departments with jurisdiction; permit or license approval of same."

[8] In connection with their application for approval of the Project, the Developers retained Vanasse & Associates, Inc. to conduct two traffic studies (the "Traffic Studies")—the first in May of 2011 ("Traffic Study 1") and the second in October of 2013 ("Traffic Study 2"). Peer review of the Traffic Studies was performed by Beta Group, Inc. ("Beta"), as confirmed by letter (the "Peer Review") of Ho (an engineer employed by Beta) dated October 15, 2013.

In Land Court Decision 1, this court found that traffic impacts might be a significant issue. However, that decision was issued prior to Traffic Study 2, the Peer Review, and Ho's affidavit testimony. Upon this evidence now before the court, it now appears that the

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Abutters' concerns about traffic turn out not to be reasonably grounded.

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2014 WL 6662213
Only the Westlaw citation is currently available.
Massachusetts Land Court.
Department of the Trial Court.

WALKER REALTY, LLC, Plaintiff,
v.
TOWN OF ACTON, Massachusetts; and Cara Voutselas, Kenneth Kozik, and Marilyn Peterson, Members of the Board of Appeals of the Town of Acton, Massachusetts, Defendants.

No. 459564.
|
Nov. 25, 2014.

DECISION

ALEXANDER H. SANDS, III, Justice.

***1** Plaintiff Walker Realty, LLC ("Walker" or "Plaintiff"), filed its unverified Complaint in 09 MISC 405389 (the "2009 Complaint") on July 9, 2009, (1) pursuant to G.L. c. 40A, § 17, appealing a decision of Defendant Board of Appeals of the Town of Acton (the "ZBA") which denied Walker's development and use of its property located at 348–352 Main Street, Acton, MA (the "Original Parcel") as a child care facility to be operated by Next Generation Children's Center ("NGCC") (the "Project"), and (2) pursuant to G.L. c. 240, § 14A, seeking a declaratory judgment concerning the applicability and enforcement of certain provisions of the Acton Zoning By-law (the "Bylaw") to the Project, based on G.L. c. 40A, § 3 (the "Dover Amendment").[1] Defendants Town of Acton (the "Town") and the ZBA (together, "Defendants") filed an Answer on September 1, 2009. A case management conference was held on September 22, 2009. A pre-trial conference was held on November 14, 2011. On January 23, 2012, the parties filed a Joint Motion to Reschedule Trial.

Walker filed its unverified Complaint in 12 MISC 459564 (the "2012 Complaint") on February 17, 2012, (1) pursuant to G.L. c. 240, § 14A, seeking a declaratory judgment concerning the applicability and enforcement of certain provisions of the Bylaw to a revised version of the Project (the "Amended Project"), based on the Dover Amendment, which proposed a child care facility on the Original Parcel and on an adjoining parcel located at 354–364 Main Street, Acton, MA (the "Kennedy Parcel," together with the Original Parcel, the "Combined Parcel"), and (2) pursuant to G.L. c. 40A, § 17, appealing a decision of the ZBA denying Walker's development and use of the Combined Parcel for the Amended Project.[2] Defendants filed an Answer on March 14, 2012.

On October 1, 2012, Walker filed its Motion for Partial Summary Judgment on Complaint for Declaratory Judgment relative to the Amended Project (12 MISC 459564), together with Statement of Material Facts, Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary

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Judgment, Affidavits of Robert Walker and Katie L. Enright, and Appendix of Exhibits.[3] On November 6, 2012, Defendants filed Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment and Cross–Motion for Partial Summary Judgment, together with Town's Appendix. On November 21, 2012, Walker filed its Reply. A Summary Judgment hearing was held on February 4, 2013. By decision dated July 10, 2013 ("Land Court Decision 1"), this court found 1) Walker is not entitled to an eight-year zoning freeze relative to the Zoning Amendment (hereinafter defined) as applied to the Michele Circle Plan (hereinafter defined), 2) the Planning Board is still "processing" the Michele Circle Plan and Walker is currently still entitled to a zoning process freeze, 3) the 1,000 square foot NFA requirement in the Bylaw applies to the Original Parcel i.e. the land shown on the Isaac Davis Circle Plan (hereinafter defined) and the Michele Circle Plan, provided that the Michele Circle Plan is endorsed by the Planning Board before June 24, 2015, 4) at this juncture, this court offers no opinion regarding the reasonableness of the 1,000 square foot NFA requirement in the pre-Zoning Amendment version of the Bylaw, 5) this court has no jurisdiction to make any ruling relative to the 2012 Site Plan (hereinafter defined), 6) Walker is left with four options in its quest to proceed with the Project or the Amended Project: Walker may proceed in litigating the 2009 ZBA Decision (hereinafter defined), Walker could proceed in litigating the 2012 ZBA Decision (hereinafter defined) relative to the 2011 Site Plan (hereinafter defined), or Walker may accept the 2012 Site Plan as interpreted by the 2012 Zoning Determination (hereinafter defined), or Walker may start from scratch and propose another amended version of the Project, and 7) Walker's Motion for Partial Summary Judgment is DENIED.

***2** A pre-trial conference was held on January 27, 2014. A site view and the first day of trial at the Concord District Court was held on May 21, 2014. At that time the parties filed a Stipulation of Facts. The second and third day of trial were held on May 22 and May 23, 2014, at the Land Court in Boston. Post trial briefs were filed with this court on July 31, 2014, and at that time the matter was taken under advisement.

Testimony for Plaintiff was given by Katie Enright (civil engineer), Donna Kelleher (principal of NGCC) ("Kelleher"), and Robert Michaud (civil engineer-traffic) (includes rebuttal). Testimony for Defendants was given by Terry Szold (civil engineer), Robert Nagi (traffic engineer) (includes rebuttal), and Roland Bartl (Acton Planning Director). There were twenty-two exhibits submitted into evidence.

Based on the sworn pleadings, the evidence submitted at trial, and the reasonable inferences drawn therefrom, I find the following material facts (some facts are taken from Land Court Decision 1.)

1. Walker is a limited liability company with a principal office at 2 LAN Drive, Westford, MA. Walker is a developer of real estate and child care facilities for use by NGCC. NGCC, located in Sudbury, MA, operates ten child care facilities in Massachusetts and each facility is licensed and regulated as a "day care center" by the Commonwealth of Massachusetts Department of Early Education and Care.

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2. In 2008, Walker purchased the Original Parcel for its intended use as a NGCC child care center.[4] The Original Parcel consisted of approximately 2.4 acres. Walker razed the two existing single family homes on the Original Parcel subsequent to its purchase. The Original Parcel is abutted on one side by the Route 2 corridor and is located across the street from the westbound on/off ramp of Route 2.

3. The Original Parcel is located in the residential R–2 Zoning District ("R–2"). The Bylaw provides that a "Child Care Facility" is permitted as of right and is not subject to site plan approval within R–2. Defendants do not contest the Project's classification as either a day care center or a child care center, which uses benefit from certain protections from zoning under G.L. c. 40A, § 3 (the Dover Amendment).

4. In addition to dimensional requirements applicable to all structures within R–2, the 2009 version of the Bylaw imposed certain other dimensional requirements on child care facilities within R–2: minimum open space (not including outdoor play area) of thirty-five percent (35%); a maximum floor area ratio (FAR) of. 10; and a maximum net floor area (NFA) of 1,000 square feet.[5] The FAR restriction applies to the entire property and the NFA applies only to the square footage of all floor areas of a building, which is the outline of the total area surrounded by the exterior walls of a building.[6]

5. On March 23, 2009 Walker submitted a site plan and a formal request for a zoning determination to the Town of Acton Zoning Enforcement Officer, Scott Mutch ("Mutch"). The site plan submitted for review was entitled, "Next Generation Children's Center–Site Plan, dated March 14, 2009," prepared by Hancock Associates (the "2009 Site Plan"). The 2009 Site Plan proposed a two-story childcare building, a storage shed, a play yard, parking for seventy-seven vehicles, additional handicap parking spaces, pedestrian walkways, landscaped areas, snow storage areas, and an on-site septic system (the Project).

***3** 6. By letter dated March 26, 2009 (the "2009 Zoning Determination"), Mutch determined that the 2009 Site Plan was not in compliance with the Bylaw with respect to FAR and NFA. The 2009 Zoning Determination stated that the 2009 Site Plan provided FAR of .23 (greater than the maximum FAR of .10), and NFA of 23,085 square feet (greater than the maximum NFA of 1,000 square feet.[7]

7. With respect to parking, the 2009 Zoning Determination also indicated that the 2009 Site Plan did not comply with section 6.7.1 of the Bylaw that required a maximum of forty parking spaces per parking lot and a distance of thirty feet between parking cells. The 2009 Site Plan also did not comply with section 6.7.7 of the Bylaw that required a minimum of 10% of the interior parking area consist of landscaped island area. With respect to access, the 2009 Zoning Determination indicated that the 2009 Site Plan did not comply with section 6.7.3 of the Bylaw, which required that "each lot may have one access driveway through its frontage which shall be 24 feet wide."[8] The 2009 Site Plan shows the driveway having a width of fifty (50) feet at its intersection with Main Street. Moreover, the 2009 Zoning Determination

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stated that the 2009 Site Plan, which depicted an interior driveway of twenty-four feet, did not comply with section 6.7.4 of the Bylaw, which stated "interior driveways shall be at least 20 feet wide for two-way traffic."

8. On April 6, 2009, Walker filed with the Town Clerk an appeal to the ZBA of the 2009 Zoning Determination pursuant to G.L. c. 40A, § 8. Hearings were held before the ZBA on May 4, 2009, and June 1, 2009. On June 25, 2009, the ZBA issued a decision denying Walker's appeal and upholding in part the 2009 Zoning Determination (the "2009 ZBA Decision"), a certified copy of which was filed with the Town Clerk on June 25, 2009. Walker appealed the 2009 ZBA Decision to the Land Court on July 9, 2009.

9. The 2009 ZBA Decision stated that, as it related to the 2009 Site Plan and the Original Parcel, "the Board found that the four parking and driveway regulations ... Sections 6.7.1, 6.7.7, 6.7.3, and 6.7.4[9]—would be unreasonable as applied to the proposed facility." The 2009 ZBA Decision further stated, "[t]he Board found that the NFA limit of 1,000 square feet would be unreasonable as applied to the proposed facility. It would effectively prohibit any child care at the Property, and is unduly restrictive where the Property is almost 2 ½ acres."[10] However, the ZBA "found that the FAR limit of. 10 is reasonable as applied to the proposed facility, which would have an FAR exceeding .20 (or .154, if hallways should be excluded from NFA as Walker Realty asserted) ..." The ZBA refused to waive the FAR requirement and found that the FAR limit under the particular circumstances "significantly advances several of the Town's planning and zoning interests."[11]/[12]

10. On May 21, 2009, Walker filed a preliminary subdivision plan (the "Preliminary Subdivision Application") of a proposed two-lot subdivision on the Original Parcel entitled Isaac Davis Circle (the "Isaac Davis Circle Plan"). By decision dated June 16, 2009, and filed with the Town Clerk on June 28, 2009, the Acton Planning Board (the "Planning Board") approved the preliminary Isaac Davis Circle Plan.

***4** 11. In 2009, the Town initiated a proposed amendment to section 5 .3.9 of the Bylaw regulating NFA for child care facilities. A public hearing on the proposed zoning amendment was scheduled to be held on June 2, 2009. At a special Town Meeting held on June 23, 2009, the Town voted to amend section 5.3.9 of the Bylaw to increase the maximum NFA for a child care facility from 1,000 square feet to 2,500 square feet (the "Zoning Amendment").

12. On December 18, 2009 Walker submitted another subdivision plan for the Original Property for a subdivision renamed as Michele Circle (the "Michele Circle Plan").[13] By Decision dated July 20, 2010, and filed with the Town Clerk on July 28, 2010, the Planning Board approved the Michele Circle Plan (the "Subdivision Approval"). Section 4 of the Subdivision Approval stated, "Appeals, if any, shall be made pursuant to MGL, Ch. 41, S. 81–BB and shall be filed within 20 days after the date of the filing this Decision with the Town Clerk." Section 5 of the Subdivision Approval stated, "This document stating the decision of the Board shall serve as the Certificate of the Board's Action to be filed with the Town Clerk pursuant to MGL, Ch. 41, S. 81–U."

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13. The Subdivision Approval required Walker to make nineteen revisions to the Michele Circle Plan prior to its endorsement. Section 3.4.4 of the Subdivision Approval stated, "[the Subdivision Approval] shall expire if not endorsed on the Plan within 180 days from date that this decision has been filed with the Town Clerk." The date for endorsement was extended by the Planning Board to June 24, 2011. The Michele Circle Plan has never been endorsed by the Planning Board or recorded at the Registry.

14. In 2011, Walker entered into a contract to buy a 2.25 acre parcel of land directly abutting the Original Parcel (i.e. the Kennedy Parcel). By deed dated September 5, 2012, and recorded with the Registry at Book 59949, Page 358, Walker took title to the Kennedy Parcel. The Kennedy Parcel contains a pre-existing nonconforming commercial use, the Kennedy & Company Landscaping Nursery and Garden Center ("the Kennedy Nursery").

15. On December 5, 2011, Walker submitted a site plan dated December 2, 2011 (the "2011 Site Plan") and a formal request for a zoning determination concerning the proposed structures on said plan. The 2011 Site Plan proposed construction of a NGCC child care center on the Combined Parcel consisting of approximately 4.6 acres. The 2011 Site Plan proposed a single-story building consisting of approximately 19,460 square foot NFA (the child care facility) and a second building consisting of 600 square foot NFA (a building to house the landscaping nursery use) (the Amended Project). The open space on the Combined Parcel was calculated to be approximately 30%.[14] The Amended Project would house approximately 262 children. The Combined Parcel would contain three access curb cuts on Main Street, two to access the child care facility and one to access the landscaping nursery building.

***5** 16. By letter dated December 20, 2011 (the "2011 Zoning Determination"), Mutch determined that the 2011 Site Plan did not comply with the Bylaw. Specifically, the 2011 Zoning Determination stated that the 2011 Site Plan did not comply with the (newly enacted) 2,500 square foot maximum NFA requirement of the Bylaw, the 35% open space requirement, the twenty-four foot access driveway requirement (section 6.7.3 of the Bylaw), and the 10% island parking landscape requirement (section 6.7.7 of the Bylaw).

17. On December 21, 2011, Walker timely appealed the 2011 Zoning Determination to the ZBA. A hearing was held on January 11, 2012 to discuss the matter. On January 31, 2012, the ZBA issued a decision denying Walker's appeal and upholding in part the 2011 Zoning Determination (the "2012 ZBA Decision"), a certified copy of which was filed with the Town Clerk on or about January 31, 2012. Walker appealed the 2012 ZBA Decision to the Land Court on February 17, 2012.

18. The 2012 ZBA Decision stated that "applying the 24–foot maximum access driveway requirement ... to this proposed facility would be unreasonable ... The Board also found that it would be unreasonable to apply the minimum open space requirement of 35% once the perimeter buffer area and play areas are included." The 2012 Zoning

Decision also stated, "[t]he lot, as proposed, would have ... a FAR of .10," which complies with the Bylaw.

19. As it related to the NFA limit of 2,500 square feet, the ZBA found that it was reasonable to apply this requirement to the 2011 Site Plan. In this regard, the 2012 ZBA Decision stated:

> Although Walker Realty relied on the state requirement for space per child as an explanation as to why it exceeds the maximum NFA, Walker Realty also stated that it is providing more space per child and amenities than required by state law [a minimum of thirty-five square ft./child] ... Moreover, the Board also found that applying the NFA limit to this facility significantly advances several of the Town's planning and zoning interests.

The planning and zoning interests that the 2012 ZBA Decision refers to are "traffic safety impact," the "aesthetic appearance of the neighborhood," and the belief that the area surrounding the Amended Project is a "gateway to the residential areas and the Acton Center Historic District."

20. On February 13, 2012, Walker submitted a third site plan (the "2012 Site Plan") and a third request for a zoning determination to Mutch. The 2012 Site Plan depicted the exact same twostory structure, parking, and drive-way layout as the 2009 Site Plan (all on the Original Parcel); however, the 2012 Site Plan contained the additional Kennedy Parcel to satisfy the FAR violation of the 2009 Site Plan. The proposed structures on the 2012 Site Plan were the main day care center building consisting of 18,460 square feet spread throughout two floors, a shed consisting of 576 square feet, and a building on the Kennedy Parcel consisting of 600 square feet. The 2012 Site Plan depicted a FAR of .096, less than the maximum FAR of .10. The 2012 Site Plan complied with all dimensional requirements in the Bylaw except for the NFA requirement.

***6** 21. By letter dated May 2, 2012 (the "2012 Zoning Determination"), Mutch determined that the 2012 Site Plan did not comply with the Bylaw. Mutch determined that the 2012 Site Plan violated the parking and access provisions in the Bylaw for the same reasons as he had initially indicated in the 2009 Zoning Determination (see, *supra,* Fact 6). Mutch also determined that the 2012 Site Plan did not comply with Section 5.3.9 of the Bylaw relative to NFA. Mutch noted that the NFA of approximately 19,741.89 square feet spread throughout two floors, as shown on the 2012 Site Plan, would not comply with either the NFA requirement of 1,000 square feet (pre-Zoning Amendment) or 2,500 square feet (post-Zoning Amendment). Mutch made no observation relative to FAR. Walker never appealed the 2012 Zoning Determination to the ZBA.

22. The Combined Parcel is abutted on two sides by residential properties, but is also

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bordered by the intersection of Route 2 and Main Street, a more commercialized area. Adjacent to the property is the Kennedy Nursery. On the opposite side of Main Street from the Amended Project is the Acton Animal Hospital (the "Animal Hospital"), and a little further to the east, the Acton Public Safety Facility (the "Public Safety Facility").

23. The Commonwealth of Massachusetts requires that a child care facility has thirty-five square feet per child as a minimum. This would allow seventy-one students at minimum square feet per child to meet the NFA requirement under the Bylaw.[15] The 2009, 2011, and 2012 ZBA Zoning Determinations all found that the Project and Amended Project exceeded the state minimum. Additionally, the Amended Project's building plans call for preschool rooms of 805–820 square feet, toddler rooms of roughly 480 square feet, and infant rooms of about 455 square feet, each of which exceed the state minimum by 15%, 52%, and 86% respectively.

24. The Town testified that the NFA meets certain requirements relating to legitimate municipal concerns. Chiefly amongst those concerns is the Town's interest in preserving the zone's role as the "gateway" to the historic district of the Town. The Town firmly believes that the Amended Project will impair the aesthetic quality of the area if it is allowed to proceed in its current form.

25. Both parties agree that the "gateway" concept is a recognized planning concept. A gateway is essentially a line of demarcation between one zoning area and another. However, each party has a conflicting view about whether or not the area where the Amended Project is located is actually a gateway to the residential community. Walker asserts that the area has a commercial character, while the Town asserts that the area constitutes the line of demarcation between commercial and residential zoning.

26. In an R–2 zoning district, the minimum lot size is 20,000 square feet. The Kennedy Parcel contains 2.25 acres, or 98,010 square feet. The Combined Parcel contains 4.6 acres, or 200,376 square feet.

***7** 27. Two separate traffic studies were conducted by Walker, the first in 2008 and the second in 2014 ("the 2008 study" and "the 2014 study," respectively).[16] The 2008 study looked at the interchange of Main Street and Route 2, the eastbound and westbound interchanges, respectively. The 2014 study expanded upon the first, but delved deeper into preliminary mitigation efforts. Namely, it detailed the composition of the driveway leading to Kennedy Nursery as a right-in, right-out only driveway to alleviate any traffic concerns.[17]

Both studies consisted of manual counts at peak commuter hours at both interchanges, and in the vicinity of the site based on the traffic outlook of other comparable businesses on the Route 2 corridor. The studies showed that two-thirds of the trips to and from the Amended Project will be oriented in a southwest direction, with the remaining one-third of trips oriented to the northeast.

28. A computer model was conducted by Walker as a supplement to each study. Both parties agree that the computer model

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displays the Amended Project operating at level-of-service ("LOS") F, which equates to egress delays in excess of fifty seconds.[18] However, disagreement exists between the parties as to whether or not the computer model is an accurate reflection of how the Amended Project will actually operate. Namely, Walker believes that the LOS will operate at a level closer to C. Walker's traffic expert bases this evidence on empirically collected data for delays for left-turn movements along other locations on Route 27 to evaluate whether the computer model accurately portrays the traffic conditions along the corridor.

29. Walker has not been asked for, and has not provided any traffic mitigation measures for the Amended Project. Specifically, it has not proposed any separate turning lanes, road widening, or any other improvements on Main Street to accommodate the Amended Project.

30. There are several pre-existing nonconforming commercial structures in the vicinity of the Amended Project (The Animal Hospital, Kennedy Nursery, and the Public Safety Facility). Additionally, there is a large commercial zone, Kelly's Corner, within a quarter mile west of the Amended Project. Kelly's Corner consists of medical offices, restaurants, retail stores, and other commercial establishments.

31. The Combined Parcel is located adjacent to a major thoroughfare, Route 2, and traverses a busy main road, Route 27 (Main Street), which connects the center of Acton to Route 2. Thus, the Combined Parcel (and the building, if built) is clearly visible from both Route 2 and Route 27. To access the Amended Project from Route 2 eastbound, a driver must use the exit ramp that feeds directly onto Route 27 and immediately turn left into the parking lot. To access it from Route 2 westbound, a driver must use the exit ramp, turn left onto Route 27, and then turn left into the parking lot.

Plaintiff has chosen to litigate the 2012 ZBA Decision relative to the 2011 Site Plan. The main issue in the case at bar is whether the NFA of 2,500 square feet is reasonable under the Dover Amendment as it relates to safety and aesthetics. However, there are several other issues that Plaintiff argues.

***8** First, Plaintiff proposes that Defendants should be judicially estopped from preventing Plaintiff from building the Amended Project because they have purportedly contradicted themselves by modifying the Bylaw during the procession of this instant case.

Plaintiff additionally advances the notion that the vicinity surrounding the Amended Project does not act as a "gateway" to the historic town center and residential areas, in conflict with Defendants assertions that it does. Defendants also believe that the aesthetics of the area will be adversely affected, since the Amended Project does not conform to the size or style of the houses in the vicinity.

Moreover, Plaintiff suggests to the court that no dire traffic ramifications will be exacerbated as a proximate result of the construction of the Amended Project. On the contrary, Defendants maintain the position that the Amended Project will provoke many adverse traffic consequences such as increased driver frustration and excess traffic

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build-ups on the Route 2 ramps.

Finally, Plaintiff argues that the NFA is a uniformity issue because child care facility use is the only R–2 use limited by NFA under the Bylaw. Defendants argue that there is no uniformity issue. I shall examine each issue in turn.

I. Judicial Estoppel

Walker proposes a theory of law, "judicial estoppel," that purports to preclude the Town from modifying its Bylaw. Namely, Walker is under the impression that the Town has essentially contradicted itself by shifting the NFA limitation from 1,000 square feet to 2,500 square feet during the procession of the instant case. Walker goes so far as to say that the Town did so with the intention of "obtaining [an] unfair advantage in a forum provided for suitors seeking justice."

Judicial estoppel, or "preclusion of inconsistent positions," *Fay v. Fed. Nat'l Mortg. Ass'n,* 419 Mass. 782, 787 (1995), is an equitable doctrine that "precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding." *Blanchette v. School Comm. of Westwood,* 427 Mass. 176, 184 (1998). It is applied in cases when "intentional self-contradiction is being used as a means of obtaining an unfair advantage in a forum provided for suitors seeking justice." *Patriot Cinemas v. Gen. Cinema Corp.,* 834 F.2d 208, 212 (1st Cir.Mass.1987).

Walker contends that the Town's behavior is reflective of the type of self-contradiction that judicial estoppel seeks to preclude. However, whether or not the NFA limitation is 1,000 or 2,500 square feet is immaterial. Even with the increase of 1,500 square feet, the Amended Project still exceeds the maximum NFA nearly eightfold. Notwithstanding the fact that Walker has satisfied the FAR requirement per the Town's request, it remains in non-compliance with the NFA. Walker alleges that the Town has been "inconsistent" in its application of the Bylaw because it shifted the maximum NFA requirement from 1,000 square feet to 2,500 square feet and still maintains that the Amended Project is not in compliance with the dimensional requirements even though Walker has conformed to the FAR requirement.

***9** Walker is primarily troubled by the fact that the square footage of the Amended Project is nearly double that of the Project and still does not comply with the Bylaw. However, the increase in area from 2.5 acres to 4.7 acres does not change the reasonableness of the NFA limitation as Walker suggests it should. The purchase of an additional 2.2 acres was Walker's attempt at conforming to the FAR requirement. But they are still in non-compliance with the NFA limitation.

Thus, Walker's insistence that the Town has been contradictory in its application of the Bylaw is inapplicable to the case at bar, and I find that the Town should not be judicially estopped from claiming that the NFA is reasonable.

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II. Reasonableness of the NFA

It is a firmly established practice in the law of zoning that each and every case is to be evaluated on a "case-by-case" basis due to their intensive facts. *Trustees of Tufts College v. City of Medford,* 415 Mass. 753, 759–760 (1993). This case is no anomaly; and it becomes imperative to look closely at the Dover Amendment under G.L. c. 40A, § 3 in order to make a just determination insofar as it pertains to the parties.

G.L. c. 40A, § 3. States as follows:

> No zoning ... bylaw ... shall prohibit or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. As used in this paragraph, the term "child care facility" shall mean a day care center or a school age child care program, as those terms are defined in [G.L. c. 15D, § 1A].

The Bylaw states that a child care facility is a use as of right in an R–2 zone, where the Amended Project is located, and thus such use cannot be denied. Consequently, no special permit is required to build a childcare center regardless of whether the property is situated in a residentially zoned area. Notwithstanding this lax requirement found within § 3, construction of childcare centers are subject to, *inter alia,* reasonable regulations concerning bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking, and building coverage requirements.

NFA is the total square footage of all floor areas of a building including basement and other storage areas, but not including stairways, elevator wells, rest rooms, common hallways and building service areas. The purpose of the NFA in the Bylaw is not made explicit, nor is the rationale behind the NFA limit. The Bylaw allows an NFA of 2,500 square feet, an increase of 1,500 square feet from the initial limit of 1,000 square feet. The Amended Project has an NFA of 19,460 square feet. The issue, then, is whether the Bylaw NFA of 2,500 square feet is reasonable, and the burden of proof in that regard is on Walker. It has generally been held that the intent of the statute defining reasonableness is "to strike a balance between preventing local discrimination against a ... use and honoring legitimate municipal concerns that typically find expression in local zoning laws." *Tufts,* 415 Mass. at 757.

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***10** The Combined Parcel contains roughly 200,000 square feet, which is ten times the minimum lot size. The Amended Project has no problem meeting the lot coverage area or the FAR requirement. Walker argues that the NFA is unreasonable based on the size of the lot, and the ZBA argues that the NFA is not based on the size of the lot. Both parties cite *Rogers v. Town of Norfolk,* 432 Mass. 374 (2000), a case with the same legal issue as the case at bar, i.e. whether a NFA of 2,500 sq. ft. was reasonable as applied to a child care facility under the Dover Amendment. *Rogers* states,

> The proper test for determining whether the provision in issue contradicts the purpose of G.L. c. 40A, § 3, third par., is to ask whether the footprint restriction furthers a legitimate municipal interest, and its application rationally relates to that interest, or whether it acts impermissibly to restrict the establishment of child care facilities in the town, and so is unreasonable. The provision is facially valid under this test. The judge properly concluded, on the only evidence before him, that the purpose of the provision was to ensure that the size of child care facilities did not detract from Norfolk's predominantly residential character by inserting in residential zones particularly large structures. As both parties acknowledge, preservation of the residential character of neighborhoods is a legitimate municipal purpose to be achieved by local zoning control.

The Town has three primary rationales behind the invocation of a 2,500 square foot NFA limitation. First, they believe that the aesthetic character of the neighborhood adjacent to the Amended Project will be adversely affected. In the 2012 ZBA Decision, the ZBA cites *Rogers* and states that the aesthetic appearance of the neighborhood will be affected in a manner that the Bylaw was intended to discourage.

Second, they are convinced that the area where the Amended Project is located is a "gateway" to the town's historic center (located over a half mile from the Amended Project), and that applying the NFA limit will preserve the character of the area as a "gateway."

Last, they are under the impression that heavy traffic will result if the Amended Project is constructed.

Each of these three concerns are rooted in the belief that imposing an NFA limitation will act as an alleviation measure. In regard to aesthetics, the NFA will prevent Walker from building what the Town believes to be an

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obtrusive structure in a residential area. As it pertains to the gateway, imposing the NFA limit will disallow Walker from creating a structure that will adversely affect the gateway between commercial and residential zones. Finally, as it relates to traffic, the NFA limit will allow the Town to maintain a reasonable flux of traffic during peak hours.

Although the Supreme Judicial Court ("SJC") in *Rogers* found that the Bylaw provision relating to the NFA was facially valid, because it was intended to protect a legitimate municipal interest, i.e. preservation of the residential character of neighborhoods, in the case at bar we must look to the residential character of the particular neighborhood surrounding the Amended Project. There is a difference between Acton and Norfolk. Whereas the evidence in *Rogers* showed that Norfolk was 95% residential, the evidence in the case at bar shows that the Amended Project, though in a residential neighborhood, is surrounded by commercial structures and areas nearby, including Kelly's Corner, the Animal Hospital, and the Public Safety Facility. The Town maintains the stance that these structures are more reminiscent of the adjacent residential structures, and thus, the purpose of the NFA is to disallow commercial structures from being constructed that do not conform to the character of the area.

***11** Notwithstanding the fact that the SJC found the bylaw facially valid in *Rogers,* it also found that the NFA provision was unreasonable as applied to the plaintiff's property. The SJC ultimately held that the cost of compliance with the bylaw would create an undue burden and significantly impede the use of the premises as a childcare facility, while not substantially advancing a valid goal of Norfolk's zoning regulation. *Id.* at 385.

On its face, the presence of the commercial structures in the immediate area of the Amended Project strengthen Walker's argument that the Amended Project is a suitable use-and surely it is, so long as it complies with the reasonable regulations prescribed by the Bylaw. As was discussed, *supra,* the Dover Amendment expressly allows for reasonable regulations of bulk and height. *G.L.* c. 40A, § 3.

In the case at bar, the Amended Project is in a residential area that conforms to the styles and character of the area. Although the building itself may not completely resemble the adjacent residential structures, the Amended Project is a building that will not be displeasing to the eye considering the commercial character that the area already possesses. The Amended Project is next to a Route 2 corridor. Kelly's Corner houses grocery stores, retail stores, and restaurants just a quarter of a mile west of the Amended Project. Also of note is the fact that the Combined Parcel is, for lack of a better word, enormous. At over 200,000 square feet, the Amended Project itself will be a fraction of the entire area of the Combined Parcel. As is such, the opportunities for landscaping of the area are boundless-and in doing so, Walker will be able to mitigate some of the aesthetic concerns that the town raises, *infra.*

It is also certain that the owners of NGCC would be unable to operate an economically viable childcare center if they are to keep within the NFA. The primary distinction

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between the owners in *Rogers* and the owners of NGCC is that the NGCC owners have a tried and true method on which they base each one of their childcare centers. They have an exemplary reputation within the daycare community and promise to uphold that reputation with the eventual construction of the Amended Project. If they are to conform to the 2,500 square foot limitation that the Town has imposed, they will simply be unable to operate a profitable childcare center. Testimony from Kelleher revealed that, of all of her schools, her smallest one, which includes children of all ages, is 12,000 square feet.[19] She acknowledged that all of her daycare centers operate above the minimum square footage of thirty-five square feet per child, per classroom, so as to accommodate for the distinct needs of each child. For example, infants are cared for in a crib room and older students in separate rooms. This is done in order to separate particular age groups so that the children are meshing with other children of their own age. In addition, while crib rooms are not required by law, Kelleher believes that they are important to preserve safety and a comfortable environment for younger children.

***12** Of considerable importance in the case at bar is the notion that the thirty-five square feet per child is a state *minimum,* not a state suggestion, of adequate size. Based upon the size of the Combined Parcel and the projected number of children, the state minimum would allow a building size of 9,170 square feet. As Kelleher notes, it is paramount that children in her schooling system receive spacial amenities that transcend the state minimum so that each child's needs are seamlessly accommodated.

At this time, it is inappropriate for this court to set a specific threshold for what constitutes a "reasonable regulation" as it pertains to the Bylaw's NFA without a remand. The Amended Project has complied with all other dimensional requirements after the ZBA found them unreasonable, such as FAR, parking area and driveway requirements, and open space requirements. It will be helpful, however, to proceed with discussion of the three interests (character of the neighborhood, gateway, and traffic) that the Town raises relative to a NFA limitation.

A. Character of the Neighborhood

Under *Rogers,* character of a neighborhood is a ZBA stated municipal interest. *Id.* at 378. This is evident throughout the Bylaw in various sections, where the character of the neighborhood is oft mentioned as a zoning concern.

In *Petrucci v. Board of Appeals,* 45 Mass.App.Ct. 818, 822 (1998), the plaintiff sought to convert her two story barn into a childcare center, but due to the 2,500 square foot NFA limit, she could not do so without relocating the barn or making some other structural modification that would result in a significant financial burden. The Appeals Court ultimately ruled in her favor, stating that the financial burden on the plaintiff outweighed the proposed modifications. *Id.* at 827.

As is evinced by the *Petrucci* ruling, maintaining the look of the neighborhood is a

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legitimate town interest. Safety, aesthetics, and privacy would all be negatively affected by the conversion of Petrucci's barn. However, in the present case, the Town has failed to demonstrate that safety and aesthetics will be pejoratively influenced if the Amended Project is constructed.

Walker contends that the character of the area where the Combined Parcel is located bears more resemblance to that of a commercial area, while the Town points out that the pre-existing commercial structures in the area, the Kennedy Nursery, the Public Safety Facility, and the Animal Hospital, resemble houses, have very little visual impact on the area, and pose no traffic concerns during peak hours. In addition, in its 2012 ZBA Decision, the ZBA concluded that the aesthetic appearance would be adversely affected because the Amended Project would resemble a large office building, despite the fact that the Amended Project is a single-story building.

As the Town rightly indicates, Walker has the burden to prove that the Bylaw does not have a rational relationship to the Town's perceived concerns. It has met that burden.

***13** The SJC has previously stated that "the [Dover Amendment] focuses on the fact that child care facilities are commercial enterprises, and thereby have a greater potential than residential uses to disrupt, or detract from, the town's tranquility." *Rogers,* 432 Mass. at 380. However, it is unequivocal that the mission of a childcare is a noble and necessary cause for the furtherance of the education of today's youth-the very reason that the Dover Amendment exists. This is evidenced by the fact that the Town even admitted that the NFA limitation was too low in the 2009 ZBA Decision. In addition, NGCC has a very good reputation within the childcare community, and seeks to further that reputation after construction of the Amended Project.

Furthermore, a childcare center is an "of right" building in residential areas. The Town cannot deny the construction of the Amended Project, only subject it to reasonable conditions. Although the Bylaw raises issues with the Amended Project being built in its currently proposed state, a childcare center remains a permissible use under the Dover Amendment regardless of the zoning configuration. Additionally, because Walker has gone to great lengths to attempt to remedy the Town's concerns by expanding the original lot into a much larger Combined Parcel, they have indicated that they want to make efforts to mitigate any possible disturbances that the Amended Project may provoke. Walker shall continue to propose and go forward with mitigation efforts such as screening in order to address the Town's aesthetic concerns. Additionally, Walker should consider decreasing the size of the building pursuant to the guidelines set forth, *infra,* in the conclusion.

As a result of the foregoing, it appears that the character of the neighborhood directly adjacent to the Amended Project is more reminiscent of a mixed commercial area rather than a residential area-a more than appropriate venue for the construction of a childcare center.

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B. Gateway

Of chief concern to the Town is the preservation of this particular zoning district as a "gateway" to the historic town center. Though the historic center of Acton is a half mile from the proposed building site, the Town is under the impression that the erection of the Amended Project in its currently planned state will tarnish the residential complexion of the area. Whereas the Kennedy Nursery and the Animal Hospital conform to the Town's conception of a building suitable for the area, they are staunch in their conviction that a roughly 20,000 square foot daycare center will adversely affect their vision of a gateway to the historic town center. To substantiate their point, they have indicated in the 2012 ZBA Decision that applying the NFA limit to the facility preserves the character of Main Street as the gateway to the residential areas and the historic town center.

The Town has not sufficiently demonstrated that the location of the Amended Project is a gateway to the residential areas of Acton because they have failed to distinguish between a traditionally residential area and a residentially zoned area with a commercial character. The Town wrongfully assumes that the building of a non-complying childcare center will "obliterate the demarcation" of the residential and commercial areas alongside Route 2. In reality, the Amended Project is already located in an area that resembles a commercial zone, and as a single-story building, it will not make the area look any more commercial than it already is. The Kennedy Nursery, Animal Hospital, and Public Safety Facility are pre-existing, non-conforming uses that have been located in the area for many years. Moreover, the commercial Route 2 exit ramp leads directly to the Amended Project. Even though the Town has found the existence of the structures in the area to be appropriate, they are nevertheless commercial uses that attest to the fact that the zone is commercial as well as residential.

***14** In regard to the gateway issue, it is unnecessary to make a determination, because there is no explicitly defined area here. Depending on which direction a person drives from, it can be regarded as a gateway to a commercial or a residential zone.

C. Traffic Issue

In addition to the aesthetic concerns that the Town holds, the Town is also troubled by the excess traffic build-up that the Amended Project will create during peak rush hour. The ZBA is primarily concerned with the driver frustration and risky driving that may result if the Amended Project is constructed as proposed. The 2,500 square foot NFA limit is their effort to counter such issues from manifesting.

Citing *Rogers,* the Town asserts that "a child care facility of larger dimensions will likely generate more traffic and create more noise, all of which may have greater impact on a town composed mainly of single-family homes." *Rogers,* 472 Mass. at 380. In contrast to *Rogers,* the town in the present case, Acton, is not of the same residential make-up as Norfolk, which is comprised of 95% residential housing. Acton, on the

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contrary, has a much greater concentration of commercial area due to its relative proximity to the Route 2 corridor, a major highway that runs from the Berkshires to Boston. Both parties agree that the computer model of the traffic study displays the Amended Project operating at LOS F, which equates to delays in ingress/egress in excess of fifty seconds. As mentioned above, LOS is a quantified level of delay associated with a particular movement, including left, right, and through movements, *inter alia.* Notwithstanding the agreement between the parties, Walker believes that the computer model over-exaggerates, and that in reality, the location would operate at LOS C during the hours of 7–10 AM and 3–6 PM ("peak hours"), which is a delay of roughly twenty seconds.

While the degree of traffic is unknown in actuality because the LOS measurement is based upon a computer model, Walker's expert opines that the measured results in both the 2008 study for the eastbound ramp and the 2014 study for the westbound ramp indicate that the actual delays fall below the estimate in the computer model. He bases this evidence on empirically collected data for delays for left-turn movements among other locations on Route 27 to evaluate whether the model accurately portrays the traffic conditions along the corridor. In this regard, Walker's expert understands the computer model to be less accurate than the existing conditions at adjacent, comparable buildings on Route 27 and Route 2–the likes of which includes retail stores and restaurants. In his opinion, the NGCC driveways will never operate at a LOS greater than C, even during peak hours.

In its 2012 ZBA Decision, the ZBA found that, given the Amended Project's close proximity to the Public Safety Building entrance, safety may be adversely impacted in the area. Meanwhile, with Walker's computer model as evidence, the Town's expert was firm in his belief that drivers taking left-turns both into and out of the main driveway will have to wait up to sixty-three seconds before being able to turn successfully, which would constitute LOS F. He also noted that Walker has not provided any traffic mitigation measures for the Amended Project. Specifically, Walker has not proposed any separate turning lanes, road widening, or any other improvements on the main road to accommodate the facility. However, there is no evidence that would suggest that Walker was even told of the necessity to provide traffic mitigation efforts. Moreover, the Town did not conduct their own traffic study-something that may have helped the Town to ascertain the most accurate insight into this traffic issue-but only critiqued Walker's.

***15** Although it is impossible to anticipate what the traffic situation will look like without the Amended Project actually being erected, I have not heard enough testimony to indicate that a significant traffic problem will exist if mitigation efforts are proposed. A more thorough proposal for traffic alleviation is necessary before any more work is conducted by Walker, but the traffic issue does not ultimately preclude Walker from construction the Amended Project because the Dover Amendment disallows the Town from forbidding the construction of a childcare center subject to reasonable regulations.

In regard to mitigation efforts, the Town shall

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confer with Walker about their proposals in relation to traffic matters within their control. DOT has jurisdiction over both the Kennedy driveway and the southern driveway leading to the Amended Project. However, there are ample suggestions that the Town can present to Walker about how to dispose of some of the lingering traffic concerns-road widening, separate turning lanes, police presence during peak hours, and/or the addition of a traffic signal are just a few to name. Certainly, some of these measures may be subject to DOT approval, so it is imperative to do further research before engaging in any affirmative steps. Thus, the parties shall consult among themselves to determine what appropriate steps shall be taken to mitigate any traffic ramifications that may result after the construction of the Amended Project.

III. Uniformity issue

Both parties agreed at the beginning of the trial that the uniformity issue has been disposed of, and thus I will not make a ruling on it.

Conclusion

It is axiomatic that the Dover Amendment allows for the construction of childcare centers in residential zones. Thus, as it applies to this case, 2,500 square feet is unreasonable as it pertains to the Amended Project specifically, considering the character of the area and its relative location to a major commercial area. Based upon the large size of the Combined Parcel, it would be prudent for the Town to consider a NFA comparable to Walker's smaller schools (12,000 sq. ft.). The basis for this recommendation derives from the information presented to this court in regard to other NGCC schools in operation in other towns. No NGCC building, sans an infant-only school, is under 12,000 square feet. Each of these operations were looked favorably upon by their respective town zoning boards, and all of them exceed the state minimum of thirty-five square feet per child. With such an immense lot size, the Combined Parcel could easily house a building of at least 9,170 square feet (the state minimum). It would be inappropriate to limit Walker to this standard given the NGCC mission of giving children adequate space.

Furthermore, the Town has unsuccessfully swayed this court as to their arguments about the character of the neighborhood and the traffic issues that may arise. They have failed to prove that the area where the Amended Project is being constructed is a "gateway" to the residential area of Acton. Unlike Norfolk in *Rogers,* Acton is not comprised of 95% residential zoning. In addition, as mentioned prior, the Amended Project is located in an area (the intersection of Route 2 and Main Street) that has been traditionally commercialized notwithstanding its current zoning configuration.

***16** As it relates to the traffic issue, the Town's study is inconclusive as to the effects that traffic will have in the area surrounding the Amended Project. Although they have produced a computer model that purports to show that the area will operate at LOS F, Walker's expert uses concrete data from

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other businesses on the corridor that it will operate at LOS C. This, together with mitigation measures, does not appear to be a substantial enough issue for the Town to prevent an "of right" daycare from being erected in a residential zone.

Because a childcare center is a protected Dover Amendment use subject to reasonable regulations (ie. traffic mitigation, screening), the Town cannot deny the construction of the Amended Project. Thus, I will remand this matter to the ZBA to have further discussions with Walker about what will be a more appropriately sized building.

I remand this case to the ZBA for further discussion between the parties about an appropriate NFA limitation, taking mitigation matters into account. I shall retain jurisdiction of this matter pending the remand process.

The parties shall inform the court of the date of the ZBA remand hearing and the date of the ZBA decision.

Judgment shall issue after a resolution of the remand.

All Citations

Not Reported in N.E.3d, 2014 WL 6662213

Footnotes

1 Walker challenges the applicability of Section 5.3.9 of the Bylaw (relating to FAR, defined, *infra*) as it relates to the Project.

2 Walker challenges the applicability of Section 5.3.9 of the Bylaw (relating to NFA, defined, *infra)* as it relates to the Project.

3 This motion for partial Summary Judgment addressed only the count relative to G.L. c. 40A, § 17 and other procedural issues, and did not address the count pursuant to G.L. c. 240A, § 14 relative to the Dover Amendment.

4 The Original Parcel was conveyed to Walker by three deeds recorded at the Southern Middlesex Registry of Deeds (the "Registry") at Book 50746, Page 581 (348 Main Street), Book 50967, Page 87 (350 Main Street), and Book 50967, Page 193 (352 Main Street).

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[5] Under Section 1.3.8 of the Bylaw, NFA is the total square footage of all floor areas of a building including basement and other storage areas, but not including stairways, elevator wells, rest rooms, common hallways and building service areas. Under Section 1.3.9, FAR is the ratio of the sum of the NFA of all buildings on a lot to the developable lot area.

[6] In this effect, FAR is a quantifiable measure of lot size, whereas NFA is a measure of building size. The NFA of a building includes the square foot measurement of each floor except for bathrooms, stairwells, common hallways, and designated mechanical apparatuses.

[7] The 2009 Site Plan indicated an open space of 39% (greater than the required 35%).

[8] Section 6.7.4 continues, "each LOT may have one ACCESS driveway ... which shall be 24 feet wide, unless, in the opinion of the Special Permit Granting Authority (if the parking area is related to a permitted USE for which a site plan or other special permit is required) or the Zoning Enforcement Officer (for other parking areas), a wider and/or greater number of ACCESS driveways is necessary ..."

[9] The 2009 ZBA Decision stated that the 2009 Site Plan complied with section 6.7.4 of the Bylaw.

[10] This is in comparison to the language of the 2012 ZBA Decision, which stated that "child care facilities should be roughly equivalent in size to the other buildings in the district [roughly 2,500 square feet] ... Applying the NFA limit thereby preserves the residential appearance and harmony." However, the 2012 ZBA Decision fails to factor in the sizes of the adjacent commercial buildings, to wit, the Public Safety Facility, Kennedy's Nursery, and the Animal Hospital, which are of a larger size than the abutting residential buildings. Furthermore, it is unknown to the court as to the square footage of all of these locales.

[11] More specifically, the ZBA concluded by a 3–0 vote that the 2009 Zoning Determination should be upheld as it relates to the .10 FAR requirement; however, by the same 3–0 vote, the ZBA overturned the portion of the 2009 Zoning Determination that was based on the

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Bylaw's parking and driveway design (sections 6.7.1, 6.7.7, 6.7.3, 6 .7.4) and the NFA limit.

12 On July 9, 2009, Walker filed its Complaint in 09 MISC 405389 challenging the 2009 ZBA Decision and the reasonableness of the .10 FAR as applied to a child care facility on the Original Parcel.

13 Isaac Davis Way is a gated neighborhood behind the Property where the Isaac Davis Plan gets its name from. The Michele Circle Plan refers to the 2009 plan that expanded upon the Isaac Davis Plan and preceded the 2011 Plan. It does not include the Kennedy Parcel.

14 The 2011 Site Plan also proposed four parking cells with a total of 92 parking spaces and two access drives. One of the parking cells will have twenty-six spaces, which triggered section 6 .7.7 of the Bylaw requiring a 10% landscaped area, which is not provided on the 2011 Site Plan. Each access driveway as shown on the 2011 Site Plan is also wider than the twenty-four foot maximum mandated by section 6.7.3 of the Bylaw.

15 The Amended Project, calling for 252 children, would require an NFA of 9,170 square feet to meet the state-mandated minimum of square feet/child.

16 The Town did not conduct its own traffic studies.

17 Both parties agree that Massachusetts Department of Transportation ("DOT") has jurisdiction over the Kennedy driveway and the southern driveway of the Amended Project, subject to a special permitting process.

18 LOS is a quantified level of delay associated with a particular movement, including left, right, and through movements, *inter alia.* LOS A represents delays between zero and five seconds, and LOS F represents delays greater than fifty seconds. Between each designation is a sliding scale between five and fifty seconds, ranging from A–F.

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19 The school in Natick is 12,000 square feet, and is a pre-existing structure. All other NGCC buildings are new developments. In Westford, there are two schools-one 7,000 square feet, and one 12,000 square feet-but the 7,000 square foot building caters only to infants and toddlers.

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21 Mass.App.Ct. 701
Appeals Court of Massachusetts, Suffolk.

The SOUTHERN NEW ENGLAND CONFERENCE ASSOCIATION OF SEVENTH–DAY ADVENTISTS
v.
TOWN OF BURLINGTON.

Argued Jan. 9, 1986.
|
Decided March 18, 1986.
|
Further Appellate Review Denied May 2, 1986.

Synopsis
The Land Court, Suffolk County, William I. Randall, J., upheld local zoning bylaw classifying as wetland property on which church sought to construct building and parking area, and church appealed. The Appeals Court, Greaney, C.J., held that: (1) statutory prohibition against local zoning law regulating or restricting use of land or structures for religious purpose did not exempt religious use from lawful wetlands control under local zoning bylaw, and (2) bylaw's wetlands boundary determination prevailed over bylaw's general reference to Wetlands Protection Act.

Ordered accordingly.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****452 *701** Andrew McGinnis, Belmont, for plaintiff.

Elizabeth A. Lane, Boston, for defendant.

Before GREANEY, C.J., and GRANT and ARMSTRONG, JJ.

Opinion

GREANEY, Chief Justice.

The Southern New England Conference Association of Seventh-Day Adventists (church) wishes to construct ***702** a building, with related parking area, on land that the town of Burlington (town) classifies as wetland under its zoning by-law. The church was denied the special permit required by the wetlands provisions of the town's zoning by-law (wetlands by-law). The church filed an action in the Land Court pursuant to G.L. c. 240, § 14A, and c. 185, § 1 (*j* 1/2), seeking a determination that the second paragraph of G.L. c. 40A, § 3, as appearing in St.1975, c. 808, § 3, which prohibits a local zoning by-law from "regulat[ing] or restrict[ing] the use of land or structures for religious ... purposes" renders the church exempt from the town's wetlands by-law. Alternatively, the church sought to invalidate the town's classification of its land as wetlands. A judge of the Land Court concluded: (1) that G.L. c. 40A, § 3, did not exempt the church from the town's wetlands by-law and (2) that the town's classification of the church's land under the by-law was valid.

The case was presented on a statement of

agreed facts and exhibits. In 1978, the church purchased an approximately two-acre undeveloped parcel of land located in a **453 residential district of the town. The parcel is roughly rectangular in shape and is bordered on the southeast by Wilmington Road, a public way, on the northeast by several residences, and on the northwest and southwest by land and a transmission line owned by Boston Edison Company.[1] A brook meanders through the middle of the property. In 1979, the town amended its zoning by-law to superimpose a wetlands district over the zoning districts in the area. By means of § 8.2.2 of the by-law, the town classified wetlands as follows: "all lands shown with the boundaries designated as wetlands on the Topographic Sheets, Town of Burlington entitled Wetlands 1977. These maps, as may be amended from time to time, are hereby made a part of this By-law. The wetlands have been delineated in accordance with the definitions in Chapter 131, Section 40 of the Massachusetts General Laws."[2] Virtually the entire front portion of the parcel *703 is classified as wetland on the town's 1977 topographic sheets. The back third of the parcel is largely outside the wetlands district, and the parties agree that the middle third of the parcel (through which the brook passes) constitutes wetlands as such lands are defined in G.L. c. 131, § 40, as appearing in St. 1974, c. 818, § 1. (The shaded area on sketch A depicts the wetlands district and its contours as they relate to the church's land.) There is no procedure in the by-law by which a landowner can appeal from the town's inclusion of land within a wetlands district. Permissible uses within the wetlands district are limited by § 4.4.0 of the by-law to uses compatible with wetlands, and exclude any buildings except "[s]tructures for essential services" by special permit.

As required by the by-law, the church submitted a site plan to the town's planning board for the construction on the parcel of its building with related parking area. In October, 1982, the planning board withheld approval because the church's plan violated the wetlands by-law. In November, 1982, the church, at its own expense, retained the firm of consulting engineers which had prepared the original 1977 topographic sheets to resurvey the parcel. After additional survey work, that firm concluded that the original topographic sheet "does not accurately depict the exact location and configuration of the 'existing brook' on the face of the earth." The firm recommended that the boundary line of the wetlands be relocated approximately 150 feet back from the front of the parcel toward the brook. A second plan was prepared (shown on sketch B appended to this opinion) which shows three boundaries on the parcel: the original wetlands boundary as shown in the 1977 topographic sheets; the wetlands boundary established in November, 1982, after the parcel had been resurveyed; and *704 the 100-foot boundary for the "buffer zone" designated by 310 Code Mass.Regs. § 10.04 (1983).[3] According to **454 the engineering firm, the new "map [sketch B] generally delineates the location of [the] 'existing brook,' the 'wetland boundary,' and the boundary of the 'bordering' lands which are within 100 feet of the wetland, and thus under the jurisdiction of [G.L. c.] 131, [§] 40, and associated administrative rules." The parties have stipulated that the front portion of the parcel "is not wet by the statutory definition [in G.L. c. 131, § 40] but a major portion of it is within the overlay [w]etland [d]istrict as shown on the [t]opographical

[s]heets referenced in [§] 8.2 of the [b]y-law."[4]

The church applied for placement of the wetlands boundary at the line established by the November, 1982, survey. An article for presentation to the town meeting to relocate the boundary was prepared. The planning board and conservation commission recommended passage of the article. On January 10, 1983, the town meeting refused to take any action under the article. This lawsuit ensued.

1. The church maintains that it is exempt from the wetlands by-law of Burlington because of the provisions of the second paragraph of G.L. c. 40A, § 3, as appearing in St. 1975, c. 808, § 3. That provision reads, in pertinent part, as follows: "No zoning ordinance or by-law shall regulate or restrict ... the use of land or structures for religious purposes ... provided, however, that such land or structures may be subject to reasonable ***705** regulations concerning the bulk and height of structures and determining yard sizes, lot area, set backs, open space, parking and building coverage requirements." The church considers the provision's literal language as precluding any regulation of land or structures intended for religious use (except for reasonable dimensional restrictions), leaving its land subject to regulation only under G.L. c. 131, § 40, the Wetlands Protection Act, and associated administrative regulations.[5] The church concedes that the town may regulate its land by lawful wetlands restrictions promulgated in the form of a general by-law. See *Lovequist v. Conservation Commn. of Dennis,* 379 Mass. 7, 12, 393 N.E.2d 858 (1979). However, the church urges that the town lacked the power to adopt a zoning by-law which regulates its use of the land as wetlands because any such power is expressly denied to the town by G.L. c. 40A, § 3.

The two laws—the Wetlands Protection Act and G.L. c. 40A, § 3—address differing, non-competing, interests. Section 3 codifies the case law interpreting its statutory predecessor, the so-called Dover amendment, G.L. c. 40, § 25, as appearing in St. 1950, c. 325, § 1. See *Attorney Gen. v. Dover,* 327 Mass. 601, 100 N.E.2d 1 (1951); *Sisters of the Holy Cross v. Brookline,* 347 Mass. 486, 198 N.E.2d 624 (1964); *The Bible Speaks v. Board of Appeals of Lenox,* 8 Mass.App.Ct. 19, 391 N.E.2d 279 (1979). Cf. *Commissioner of Code Inspection of Worcester v. Worcester Dynamy, Inc.,* 11 Mass.App.Ct. 97, 413 N.E.2d 1151 (1980); *Newbury Junior College* ***706** *v. Brookline,* 19 Mass.App.Ct. 197, 472 N.E.2d 1373 (1985). The amendment insures that a municipality will not express "preferences as to what kind of ... religious denominations it will welcome," *The* ****455** *Bible Speaks v. Board of Appeals of Lenox, supra,* 8 Mass.App.Ct. at 33, 391 N.E.2d 279, by providing that religious uses can be placed at suitable sites in a community, subject only to reasonable dimensional regulations.

The Wetlands Protection Act, G.L. c. 131, § 40, has no concern for particular land uses. That act has the broader purpose of protecting wetlands from the destructive intrusion usually associated with Twentieth Century development. In preserving land, the act is use-neutral—if a parcel has been properly denominated wetlands, all use is barred (or limited to activities compatible with the

wetlands) without regard for the type of use intended, the propriety of the use in other circumstances or the identity of the landowner.[6] This is accomplished by the creation of wetlands (or similar conservancy) protection districts which transcend zoning district boundaries. All activities within the protected district inimical to the wetlands are prohibited, even though the activities might otherwise be permitted on the parcel or elsewhere in the district in which it lies.

In this context a municipality's power to protect wetlands becomes apparent. That power is shared jointly with the Commonwealth, and a municipality may impose more stringent controls than those established by G.L. c. 131, § 40, and, in proper cases, may even "prohibit outright any disturbance of covered lands." *Lovequist v. Conservation Commn. of Dennis,* 379 Mass. at 15, 393 N.E.2d 858. In conferring authority on a municipality to preserve its wetlands, either by means of zoning power, see *Fogelman v. Chatham,* 15 Mass.App.Ct. 585, 588, 446 N.E.2d 1112 (1983), ***707** and cases cited, or by means of general legislative power, see *Lovequist v. Conservation Commn. of Dennis, supra,* 379 Mass. at 12, 393 N.E.2d 858, we think the Legislature recognized that the substantive validity of any local wetlands regulation should not turn on which of the two forms of regulation is chosen, so long as the dominant purpose of the local by-law is the proper protection of wetlands values. It follows that the Legislature did not intend that § 3 of c. 40A exempt a religious use from lawful wetlands control under a local zoning by-law.[7]

2. We turn to the question of the classification of the land by the town. As previously noted, an article submitted by the church to the town meeting on January 10, 1983, to relocate the wetland boundary to the line designated "wetland boundary November, 1982" on sketch B was rejected by the town.

****456** The church argues about the meaning and effect to be given to the town meeting vote. It characterizes the problem as "a mapping error" and maintains that the last sentence in § 8.2.2 of the by-law (referring to wetlands in terms of the definitions in G.L. c. 131, § 40) is the governing standard. The church reasons that by choosing "the convenience of doing nothing," ***708** the town, in effect, adopted a different standard for the church's land from that which is used for similar districts elsewhere in the town. As a consequence, the church suggests that the wetlands boundary which encompasses its land is invalid because the town has set that boundary in an arbitrary manner. The church concludes that the town's failure to adopt the by-law amendment required the court to enforce the boundary most favorable to the landowner.

We do not think the case should turn on the proceedings at the January 10, 1983, town meeting. At the meeting, the town simply voted not to establish a new boundary for the wetlands district which includes the church's land. We know that the town meeting had before it a report from the planning board (see the third paragraph of G.L. c. 40A, § 5) concurred in by the conservation commission, that recommended passage of the article. We also know from the statement of agreed facts that when the article came up "abutters spoke in opposition." We have no knowledge of what may have motivated the town meeting to reject the article.

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Notwithstanding the planning board's report, the voters may have considered conditions actually existing, or likely to exist, on the parcel which might properly render the portion in controversy subject to wetlands protection. Or the voters may have chosen to reject the article because of irrelevant considerations. The reasons for their action are immaterial. The vote rejecting the article constitutes the deliberative act of a legislative body. A court will not set such a vote aside, even if it could be shown (which it has not been) that the vote may have been influenced by mistaken beliefs. See *Knowles v. Codex Corp.,* 12 Mass.App.Ct. 493, 498, 426 N.E.2d 734 (1981). See also *Hebb v. Lamport,* 4 Mass.App.Ct. 202, 206–207, 344 N.E.2d 899 (1976). The net result of the vote was to leave § 8.2.2 intact. Section 8.2.2 of the by-law meant the same thing the day after the town meeting as it did the day before.

Proper resolution of the case, therefore, does not depend on the meaning to be ascribed to the town meeting's action in 1983 but rather on the interpretation to be given to § 8.2.2. By its references to the 1977 topographic sheets as establishing the wetland boundaries, and to the delineation of wetlands in ***709** accordance with the definitions in G.L. c. 131, § 40, the provision "in certain aspects lacks precision and verbal consistency." *Lapierre v. Massachusetts Commn. Against Discrimination,* 354 Mass. 165, 174, 236 N.E.2d 192 (1968). We must construe the provision to effectuate the town's intent in adopting the by-law. See *Industrial Fin. Corp. v. State Tax Commn.,* 367 Mass. 360, 364, 326 N.E.2d 1 (1975).

We think that the part of the by-law which specifically provides that the wetlands boundaries are as they appear on the topographical sheets prevails over the general reference to G.L. c. 131, § 40. As such, the boundary established by the 1977 topographic sheet establishes the relevant wetlands boundary under the by-law. This construction is supported by § 8.2.1 of the by-law, see note 2, *supra,* which indicates that the by-law seeks, among other goals, to preserve water courses "*and their adjoining lands*" (emphasis supplied), and to protect land "against the hazards of flooding and contamination."[8] It is perhaps unfortunate ****457** that, as we have noted, the by-law contains no provision for appeal from a wetlands boundary determination.

What has been said thus far covers the facial validity and meaning of § 8.2.2. The remaining question concerns the power of the town to regulate the church's land under § 8.2.2 by a wetlands boundary that appears to encompass a considerable portion of dry land located in the front third of the parcel. That portion exceeds, by at least forty feet, the 100 foot buffer zone for wetlands in which State law permits some construction subject to approval by the local conservation commission, see note 3, *supra.* The consideration that the by-law has a wider sweep than the State law on the subject is not decisive, however. As previously noted, protection of wetlands is a valid objective ***710** of local zoning by-laws, see *Fogelman v. Chatham,* 15 Mass.App.Ct. at 588, 446 N.E.2d 1112, and cases cited, and a municipality can adopt more stringent wetlands controls than those established in the Wetlands Protection Act. See *Lovequist v. Conservation Commn. of Dennis,* 379 Mass. at 15, 393 N.E.2d 858. In general, a wetlands zoning by-law will be

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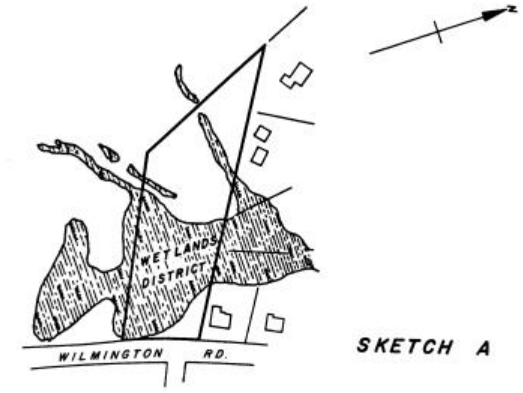
held valid if there is a substantial relation between it and the furtherance of any of the objectives of wetlands protection. *Fogelman v. Chatham, supra,* 15 Mass.App.Ct. at 588, 446 N.E.2d 1112.

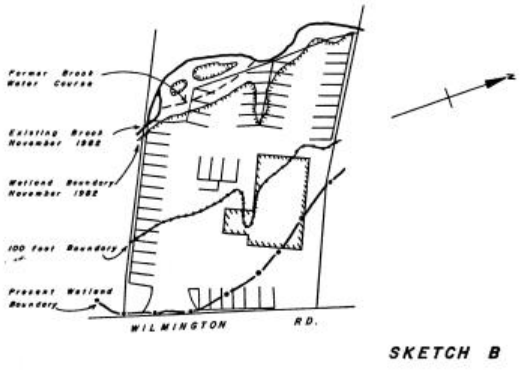
The question comes down to whether the boundary established by the by-law is valid, *as applied* to the church's land, that is, Does the by-law have the required relationship with a reasonable purpose of wetlands protection? The church argues that the by-law is defective in this respect and, as a result, its application to the church's parcel is arbitrary. However, there is nothing in the statement of agreed facts or in the exhibits which provides a factual basis for an informed decision of this question. The record is concerned only with the general condition of the parcel, its remapping, and other events leading up to the presentation of the article to the town meeting. In the absence of any evidence bearing on the issue of the lawfulness of the application of the by-law to set the wetlands boundary, any attempt at decision on this record would require speculation and would be unfair to one party or the other.[9] Under G.L. c. 240, § 14A, and c. 185, § 1(*j* 1/2), the church, of course, has the right in this action to seek a determination of the validity of the by-law as applied to its land. The portion of the amended judgment which could be taken as deciding that issue appears to have been entered prematurely.

The first paragraph of the amended judgment is affirmed. The church may move in the Land Court to secure a determination of the validity of § 8.2.2 of the by-law as applied to its land. If such a motion is made, the second paragraph of the amended judgment is to be vacated and, after such further ***711** proceedings as may be appropriate, a new judgment is to be entered on that question. If no motion is brought by the church within thirty days from the date of our rescript, the second paragraph of the amended judgment is to be affirmed.

So ordered.



SKETCH A



SKETCH B

All Citations

21 Mass.App.Ct. 701, 490 N.E.2d 451

Footnotes

[1] The parcel is shown on sketch A attached to this opinion.

[2] Section 8.2.1 sets forth the purpose of the wetlands by-law as follows:

"[T]o preserve and protect the water bodies, water courses and wetlands in the Town of Burlington and their adjoining lands.

"To protect the health and safety of persons and property against the hazards of flooding and contamination.

"To preserve and maintain the groundwater table for water supply purposes.

"To protect the natural environment.

"To conserve the watershed area of the Town of Burlington for the health, safety, and welfare of the public."

[3] Under this regulation, promulgated by the Department of Environmental Quality Engineering, a "buffer zone" is defined as "that area of land extending one hundred (100) feet horizontally outward from the boundary of any area specified in 310 CMR 10.02(1)(a)." The latter regulation defines the areas subject to the protection of the Wetlands Protection Act, and includes banks bordering on any stream. Under 310 Code Mass.Regs. § 10.02(2)(b) (1983), any activity within the "buffer zone" requires the filing of a "Notice of Intent" with the local conservation commission, and compliance with the procedures specified in 310 Code Mass.Regs. § 10.03 (1983), to obtain a permit to proceed with the work. The provision for a "buffer zone" does not appear in G.L. c. 131, § 40, and is a creation of the department in aid of its administrative implementation of the Wetlands Protection Act.

[4] It is also agreed that, as presently sited, a portion of the church's project is within the buffer zone and that the western corner of the proposed parking area is in the middle of the brook.

[5] In view of G.L. c. 131, §§ 40 and 40A, and 310 Code Mass.Regs. § 10, et seq. (1983), the

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church appears to agree that it would have to file a "Notice of Intent" with the conservation commission of Burlington and obtain a permit from the commission to construct its project on the land contained within the 100 foot buffer zone. At one point, the church had obtained a permit from the commission to proceed with its project subject to the commission's "Order of Conditions [under] Wetlands Protection Act." The church, nevertheless, could not proceed because of the use limitations imposed on the entire wetlands district by § 4.4.0 of the by-law. If the church's argument as to the G.L. c. 40A, § 3, is rejected, and if the problem with the placement of the wetlands district boundary is eventually resolved, the church, in view of an error in its original plans which placed part of its project in the brook, see note 4, *supra,* will have to proceed anew with the siting of its project and with obtaining appropriate wetlands approvals.

6 The sweep and neutrality of the act can be seen in the provision of G.L. c. 131, § 40, that "[n]o person" shall disturb a wetland without proper permission. The term "person" is broadly defined in § 40 to "include any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the commonwealth or political subdivision thereof, administrative agency, public or quasi-public corporation or body, or any other legal entity or its legal representative, agents or assigns." This definition plainly includes the church.

7 It cannot be said that anything in the *Attorney Gen. v. Dover* decision, *supra,* or in the *Sisters of the Holy Cross v. Brookline* decision, *supra,* the two leading cases on the meaning of what is now § 3 of c. 40A, contemplated that the religious use exemption should apply to wetlands protection. These cases were decided seventeen and three years, respectively, before the 1967 enactment of the Wetlands Protection Act.

Further support for the conclusion that § 3 was not intended to override local wetlands protection by means of a zoning by-law can be discerned from the last sentence of the first paragraph of § 3 of c. 40A, and from the eighteenth paragraph of c. 131, § 40, as appearing in St. 1975, c. 363, § 2, dealing with the preservation of agricultural uses. These passages appear to reflect a desire on the Legislature's part to strike a balance between competing preservation policies (i.e., those of conserving agricultural lands while preserving wetlands). The laws appear to insure minimum regulation of agricultural lands but render encroachment of these lands onto wetlands subject to State scrutiny. There is no similar exemption for religious uses, and the church's desire to erect its building and attendant parking lot presents no such competing preservation interest. Finally, there is nothing in the history of c. 40A, § 3, which suggests an intention on the part of the

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Legislature to permit a religious organization to make use of a given parcel when no other person or organization would be permitted to use the same parcel for any purpose.

8 In arriving at this construction, we have not placed reliance on the action of the town meeting because of the settled rule of statutory construction that rejection of a proposed by-law amendment has little or no bearing on the proper interpretation of an existing by-law. See *Framingham Clinic v. Zoning Bd. of Appeals of Framingham,* 382 Mass. 283, 295, 415 N.E.2d 840 (1981). See also 2A Sutherland, Statutory Construction § 48.18 (4th ed. 1984 and 1985 Supp.); Dickerson, The Interpretation and Application of Statutes 179–183 (1975).

9 The church maintains that, in these circumstances, we should enforce a boundary that is most favorable to the landowner. The case law does not favor such a result, see *Turnpike Realty Co. v. Dedham,* 362 Mass. 221, 223, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108, 93 S.Ct. 908, 34 L.Ed.2d 689 (1973), and the other cases cited by the church do not support the conclusion the church advances.

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45 Mass.App.Ct. 818
Appeals Court of Massachusetts, Suffolk.

Joseph M. PETRUCCI
v.
BOARD OF APPEALS OF WESTWOOD.

No. 97–P–1057.
|
Argued May 27, 1998.
|
Decided Nov. 30, 1998.

Synopsis
Property owner challenged decision by Board of Appeals of Westwood denying his application for building permit to renovate and use barn on lot zoned for "single residence" as child care facility. The Land Court Department, Suffolk County, Leon J. Lombardi, J., ordered board to issue the requested building permit. Board appealed. The Appeals Court, Laurence, J., held that: (1) proposed use of barn as child care facility qualified for statutory child care facility exemption, and (2) evidence established that imposition of town's dimensional setback and height zoning requirements on proposed use of barn was unreasonable.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

**48 *818 Thomas P. McCusker, Jr., Boston, for defendant.

Mark Bobrowski, Foxboro, for plaintiff.

Before BROWN, GREENBERG and LAURENCE, JJ.

Opinion

LAURENCE, Justice.

Joseph Petrucci and six family members reside in his home on a 53,000 square foot lot in Westwood's "single residence" zoning district. In 1995, he proposed to establish a child care facility in a barn located on his property. After interior renovations to the barn that would leave its exterior and footprint unchanged, the facility would serve forty-seven children daily and be staffed by six adults. The Westwood building *819 commissioner (commissioner) denied Petrucci's application for a building permit to begin the renovations. The denial was affirmed by the Westwood board of appeals (board), which agreed with the commissioner that Petrucci **49 was not entitled to the "child care facility exemption" he was relying on under G.L. c. 40A, § 3, third par., because the proposed use was not properly either "primary, accessory or incidental."[1] Following Petrucci's appeal pursuant to G.L. c. 40A, § 17, a Land Court judge agreed with Petrucci that the claimed exemption for a child care facility under § 3 applied and granted him partial summary judgment allowing the desired use.

The judge remanded the matter to the

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commissioner for review of Petrucci's application on the issue of the applicability of the "reasonable regulations" that the statute permits municipalities to impose on such a facility (see note 1, *supra*). The commissioner thereafter rejected the application because the barn failed to comply with the zoning by-law's rear yard, side yard, and height requirements. The board again affirmed the commissioner. After trial on the issue of the reasonableness of applying those regulations to the proposed project, the Land Court judge again upheld Petrucci, ruling that the imposition of the town's dimensional restrictions was unreasonable and ordering the board to issue the requested building permit. On the board's appeal, we affirm.

1. *Applicability of the § 3 exemption.* The commissioner initially denied Petrucci's application on his view that the proposed use "would result in the establishment of two princip[al] uses" on the property and was "not clearly accessory or incidental to a residential use." The board concurred, ***820** because the proposed facility "was so intensive" as to constitute a primary use of the property, and it could find "no authority" for "two ... primary uses [to] ... be situated on one property." The board further determined that the facility was not sufficiently "subordinate and related to the primary [residential] use of the property ... [to] be construed [as] ... accessory or incidental." The judge concluded that the board's reasoning was legally erroneous. He observed that nothing in the zoning by-law prohibited either child care facilities or the existence of more than one primary or principal use on a lot. He noted that the by-law even appeared to contemplate the possibility of multiple primary uses.[2]

The judge's chief basis for endorsing Petrucci's reliance on the § 3 exemption, however, was his rejection of the board's restrictive construction of the statute. The board focused (both below and here) on the words "primary, accessory or incidental" in the third paragraph of § 3. It contended that the difference between those terms and the language of the immediately preceding (second) paragraph of § 3, providing a zoning exemption for educational or religious uses,[3] betokened a much narrower exemption intended by the Legislature for child care facilities.

The board's argument runs thus: Whereas the exemption of the second paragraph of § 3 speaks broadly and generally of "use for ****50** religious ... or for educational purposes," the third paragraph requires that the child care facility "use" be either "primary, accessory or incidental." Each of those words must be read literally so as to give them their customary meaning. ***821** Since the principal use of the Petrucci property is already residential, the child care facility cannot be a "primary" use, because "[i]t is ... clear that you cannot have two primary uses [of the property] either under the by-law or by definition."[4] Nor can the facility pass muster as an "accessory" or "incidental" use under the zoning decisions construing those terms, which hold that such a use not only must be minor in significance to the primary use but also must have a normal or customary subordinate relationship to that use. Compare *Harvard v. Maxant,* 360 Mass. 432, 438, 275 N.E.2d 347 (1971); *Henry v. Board of Appeals of Dunstable,* 418 Mass. 841, 844–846, 641 N.E.2d 1334 (1994); *Gallagher v. Board of Appeals of Acton,* 44 Mass.App.Ct. 906, 907, 687

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N.E.2d 1277 (1997); *Maselbas v. Zoning Bd. of Appeals of N. Attleborough*, 45 Mass.App.Ct. 54, 56–57, 694 N.E.2d 1314 (1998). Given the size of the facility (six adults and forty-seven children) in relation to the several Petrucci family members already there engaged in "typical family" residential living, it will be so comparatively large, intensive, and separate an operation as to be neither accessory nor incidental.[5]

Assuming, without deciding, that the proposed child care facility cannot be deemed "accessory" or "incidental" to a residential use, we nonetheless conclude that the board was wrong and the judge correct in determining that the facility qualified for the exemption of the third paragraph of G.L. c. 40A, § 3. We need look no further than the language of the statute, which states that a zoning by-law may not "prohibit, or ***822** require a special permit for, the use of ... structures, or the expansion of existing structures, for the primary ... purpose of operating a child care facility." Petrucci's proposal falls squarely within that injunction. His existing structure, the barn, will be used (whether or not expanded) for the primary, indeed the sole, purpose of housing a child care facility operation; it cannot, therefore, be prohibited or subject to special permit requirements.[6]

Even were the board correct in its assertion that the Westwood by-law does not permit multiple primary uses on a single lot, such a prohibition is exactly what the statute declares impermissible with respect to child care facilities. The board's reiterated assertions that the exemption applies only where the child care facility can be characterized as the sole primary use "of the property" overlook the second half of the disjunctive statutory phrase, "use of land or structures." The board thereby runs afoul of *Watros v. Greater Lynn Mental Health & Retardation Assn., Inc.*, 421 Mass. 106, 653 N.E.2d 589 (1995), dealing with the educational purpose exemption of the second paragraph of § 3.

In dismissing the argument of abutters who challenged the proposed use on ****51** residential property of a barn to house and educate retarded adults—that the exemption applied only when the educational use occupied the entire property—the court in *Watros* stressed that the second paragraph "speaks not once, but twice, of 'land or structures' as the focus of the exemption." 421 Mass. at 113, 653 N.E.2d 589. The "constrictive result" flowing from the abutters' reading of the statute was "neither required by the language of the statute nor consistent with its purpose," *id.* at 114, 653 N.E.2d 589, which was "to prevent local interference with the use of real property"—whether of land or of structures thereon—for the exempt purposes identified in the statute. *Id.* at 113, 653 N.E.2d 589. Here, also, the plain language of the statute (which, as in *Watros,* speaks not once but twice of "land or structures") and its manifest intent—to broaden, rather than narrow, the opportunities for establishing child care facilities in the Commonwealth[7]—overwhelm the board's constrictive effort to parse any ***823** substantial child care facility on a residential property out of the statute.[8]

***824** 2. *Reasonableness of regulations.* As in *Campbell v. City Council of Lynn,* 415 Mass. 772, 777 & n. 6, 616 N.E.2d 445 (1993), we are concerned with a prior nonconforming

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structure. Despite the *Campbell* precedent, however, there was no inquiry as to whether alterations necessary to transform the barn **52 into a child care facility would take it outside the protection granted by G.L. c. 40A, § 6, to prior nonconforming structures. Pursuant to G.L. c. 40A, § 3, there could be no denial of the right to use the barn as a child care facility. Accordingly, analysis pursuant to § 6 would not turn on any impact of the *use* of the barn as a child care facility but on whether the barn *structure,* as altered, would be substantially more detrimental to the neighborhood than the existing nonconforming structure.

This case was decided in the Land Court solely on the basis of G.L. c. 40A, § 3, third par., and, while it appears unlikely that the proposed renovations of the barn would fail the § 6 test, the record does not invite resolution under § 6. In any event, we conclude that Petrucci is entitled to relief based on § 3 and that there is no reason to require proceedings under § 6. See *Campbell v. City Council of Lynn,* 415 Mass. at 777–778 n. 6, 616 N.E.2d 445.

The judge ruled that Petrucci had successfully demonstrated the unreasonableness of the dimensional requirements that the commissioner and the board imposed upon the barn. The relevant sections of the by-law require a side yard width of twenty feet and a rear yard depth of thirty feet, with a maximum building height of twenty-five feet. The barn is over thirty-four feet high and is located only twelve feet from both the side and rear lot lines. Compliance with the zoning requirements is possible only if the barn is physically relocated on the lot.[9]

The parties agree that the controlling authority on the reasonableness *825 of the application of zoning regulations to exempt uses under G.L. c. 40A, § 3, is *Trustees of Tufts College v. Medford,* 415 Mass. 753, 616 N.E.2d 433 (1993),[10] which announced an ad hoc, fact-specific approach to resolving disputes in most § 3 situations:

> "[T]he question of the reasonableness of a local zoning requirement, as applied to a proposed ... [exempt] use, will depend on the particular facts of each case. Because local zoning laws are intended to be uniformly applied, an [applicant] ... making challenges similar to those made by Tufts will bear the burden of proving that the local requirements are unreasonable as applied to its proposed project. The ... [applicant] might do so by demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the ... [applicant's property], without appreciably advancing the municipality's legitimate concerns. Excessive cost of compliance with a requirement imposed [by the zoning ordinance] ..., without significant gain in terms of municipal concerns, might also qualify as unreasonable regulation of an ... [exempt] use." (Footnote omitted.)
>
> 415 Mass. at 759–760, 616 N.E.2d 433.

The judge's conclusion, that enforcing Westwood's dimensional controls in Petrucci's circumstances would be unreasonable, represented a proper application of the factors set forth in *Tufts College.*

Based upon the trial testimony of Petrucci's

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expert witnesses on zoning issues and historic buildings and of Petrucci himself (who had been in the construction business **53 for thirty-five *826 years),[11] the judge relied on the following findings and undisputed facts:[12] The two-story, 4,960 square foot barn was built between 1840 and 1850 and is "a wonderful example" of the transitional "Greek Revival Italianate" style. As such, it is "a rare building form" that possesses historic and architectural merit deserving of preservation. It is surrounded by mature trees and particularly dense foliage on the sides closest to adjoining lots. In order to comply with the by-law by relocating the barn elsewhere on Petrucci's lot, numerous mature trees would have to be cut down and removed (from both the old and the new locations), a new foundation excavated, the entire barn lifted up and moved to the new foundation, and its roof reconstructed to lower its height. All of that compliance work not only would destroy the barn's unique Italianate cupola and Palladian window, but also would adversely change the massing of the structure, disturb the sense of the building's continuity, and ruin both its historical character and architectural integrity. The cost to Petrucci to move the barn would be approximately $150,000, beyond the cost of renovating it to serve as a child care facility.[13] The municipality's legitimate concerns served by the setback and height requirements in the by-law—safety, aesthetics, and privacy[14]—would all be negatively affected by the *827 relocation of Petrucci's barn. In its new, unscreened location, the barn would be significantly closer and more visible to Petrucci's residence and to neighboring homes. As a result, the potential fire danger would be increased, the privacy of the Petruccis and their neighbors would be reduced, and the loss of so many trees would adversely impair the community's character. Were the barn not moved and the child care facility abandoned, all of the present zoning infirmities would continue to exist.

In light of this evidence, the judge determined that imposition of the town's dimensional requirements on the project would levy excessive costs of compliance on Petrucci and effectively deny the use of the premises for a child care facility; would serve no valid goals of municipal zoning regulation, see *Campbell v. City Council of Lynn,* 415 Mass. at 779, 616 N.E.2d 445; and would, in fact, detrimentally affect neighborhood safety, aesthetics, and privacy. Therefore, he was satisfied that Petrucci had carried his burden under *Tufts College* of showing the unreasonableness of requiring compliance with those requirements. We agree.[15] Contrast **54 *Tufts College,* 415 Mass. at 762–764, 616 N.E.2d 433 (challenged zoning requirements were not shown to be unreasonable as applied to project because applicant failed to put in any evidence regarding estimated cost or difficulty or hardship of compliance, whereas municipality demonstrated that compliance would enhance safety and ease serious parking problems in the affected area).

3. *Judge's ordering of the permit.* The amended final judgment ordered the board, over its objection, to issue Petrucci a building permit for the child care facility. The board charged that such an order erroneously deprived abutters of their appellate *828 rights under G.L. c. 40A, § 17. The board's theory was that so long as it was defending its decisions upholding the commissioner,

abutters were adequately represented and not aggrieved; but that they might become aggrieved, on bases other than those relied on by the board, when the board issued the building permit. The judge observed that the board had failed to state that any such potential abutters even existed (much less to identify them or their supposedly novel, separate grievances) or to suggest any additional issues that might be raised by such hypothetical abutters. Consequently, he rejected the board's position as sheer speculation supported by no relevant authority. He was satisfied that the facts in this case encompassed every criticism of the project which an abutter might reasonably raise in a § 17 appeal and reflected the board's protective persistence in pursuing all legitimate issues. The judge's refusal to allow further delay in implementing Petrucci's lawful project appears eminently sound to us. It was an exercise of his discretion under § 17 to grant such relief "as justice and equity may require," since it is clear from the record that the same ultimate result would ensue from an unspecific remand as that effected by the challenged order. See *Chira v. Planning Bd. of Tisbury,* 3 Mass.App.Ct. 433, 439–440, 333 N.E.2d 204 (1975), and cases cited; *Selectmen of Stockbridge v. Monument Inn, Inc.,* 8 Mass.App.Ct. 158, 163, 391 N.E.2d 1265 (1979), and cases cited, *S. C.,* 14 Mass.App.Ct. 957, 438 N.E.2d 365 (1982). Cf. *Lapenas v. Zoning Bd. of Appeals of Brockton,* 352 Mass. 530, 533–534, 226 N.E.2d 361 (1967); *MacGibbon v. Board of Appeals of Duxbury,* 369 Mass. 512, 520, 340 N.E.2d 487 (1976); *Leominster Materials Corp. v. Board of Appeals of Leominster,* 42 Mass.App.Ct. 458, 463, 677 N.E.2d 714 (1997).

Judgment affirmed.

All Citations

45 Mass.App.Ct. 818, 702 N.E.2d 47

Footnotes

1 General Laws c. 40A, § 3, third par., inserted by St.1990, c. 521, § 2, provides:

> "No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the *primary, accessory or incidental* purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. As used in this paragraph, the term 'child care facility' shall mean a day care center or a school age child care program, as those terms are defined in section nine of chapter twenty-eight A." (Emphasis added.)

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[2] The judge quoted § 5 of the by-law, which states, in pertinent part: "No building or structure shall be constructed, and no building, structure or land shall be used, in whole or in part, for any purpose other than for *one or more* of the uses hereinafter set forth as permitted in the district in which said building, structure or land is located, or set forth as permissible by special permit in said district ...." (emphasis added).

[3] General Laws c. 40A, § 3, second par., sets forth the so-called "Dover Amendment," inserted by St.1950, c. 325, and reinserted by St.1975, c. 808, § 3, which provides, in pertinent part, that no zoning bylaw shall "prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or ... by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements."

[4] The board cites no statutory or decisional authority for this proposition. As indicated in note 2, *supra,* it was not at all "clear ... under the by-law."

[5] There are no Massachusetts cases explicating the status or character for zoning purposes of a child care facility located on residential property. *Woodvale Condominium Trust v. Scheff,* 27 Mass.App.Ct. 530, 533–535, 540 N.E.2d 206 (1989), dealing with the question whether a family day care business was permissible in a unit of a condominium, the master deed of which stated that the unit could be used "solely for residential dwelling purposes," is as close as we can find. There, the court concluded that the many distinctions between normal, residential use and a busy day care operation made the latter so different from the former that it could not be deemed a usual incident of residential living. Cases in other jurisdictions appear divergent. Compare *Schofield v. Zoning Bd. of Adjustment of Dennis,* 169 N.J.Super. 150, 154–155, 404 A.2d 357 (1979) (home day care of twelve to eighteen children is not incidental to residential use), and *Metzner v. Wojdyla,* 125 Wash.2d 445, 452, 886 P.2d 154 (1994) (even small-scale child care incompatible with covenant restricting use of the property to residential purposes), with *People v. Bacon,* 133 Misc.2d 771, 776–778, 508 N.Y.S.2d 138 (N.Y.Dist.Ct.1986) (home day care of children is a permissible accessory use in a residentially zoned district).

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[6] The judge did not rely on the plain language of the statute in rendering judgment for Petrucci, but his correct decision may be sustained on appeal on any sound basis. See *Hickey v. Commissioner of Pub. Welfare,* 38 Mass.App.Ct. 259, 263, 647 N.E.2d 62 (1995).

[7] Aside from the very fact that it creates an exemption from local zoning restrictions, G.L. c. 40A, § 3, third par., defines "child care facility" as a "day care center" as that term is used in G.L. c. 28A. Chapter 28A, § 1(4), inserted by St.1972, c. 785, § 1, states that it is the policy and purpose of the Commonwealth to "promote the development of day care services in order to provide that such services shall be available in every community for all families which express a need for them." Although clear statutory language ordinarily obviates the need to resort to rules of interpretation, *Bronstein v. Prudential Ins. Co. of America,* 390 Mass. 701, 704–705, 459 N.E.2d 772 (1984), both related statutes, see *Plymouth County Retirement Assn. v. Commissioner of Pub. Employee Retirement,* 410 Mass. 307, 309–312, 571 N.E.2d 1386 (1991); *Civitarese v. Middleborough,* 412 Mass. 695, 700–702, 591 N.E.2d 1091 (1992), and legislative history, see *Commonwealth v. Gove,* 366 Mass. 351, 354–355 & n. 4, 320 N.E.2d 900 (1974), may be referenced by way of supplementary confirmation of the intent reflected in the words used.

[8] The board cites *Watros* as supportive of its position, because of the court's incidental observation there, 421 Mass. at 113, 653 N.E.2d 589, that the educational use exemption of G.L. c. 40A, § 3, second par., does not distinguish between "principal" and "accessory" uses, while the third paragraph of § 3 explicitly does. The board's invocation of *Watros* fails precisely because it rests on the assumption, rejected by *Watros,* that an entire parcel of "land" must be used to benefit from the exemption and ignores the presence of the word "structure" in the statute. The board cites no other relevant authority for its statutory construction argument, but presumably relies on two standard canons. First, the use of different language in related statutes dealing with the same subject matter ordinarily indicates that different meanings were intended. See 2B Singer, Sutherland Statutory Construction § 51.02 (5th ed. 1992). Cf. *Beeler v. Downey,* 387 Mass. 609, 616, 442 N.E.2d 19 (1982). However, like all such canons, this one does not apply when (as here) the statutory language is so clear as to make extrinsic aids unnecessary, especially an aid whose application would be contrary to the Legislature's undoubted purpose. See *Brady v. Brady,* 380 Mass. 480, 483–484, 404 N.E.2d 75 (1980); *Commonwealth v. Fall River Motor Sales, Inc.,* 409 Mass. 302, 315–316, 565 N.E.2d 1205 (1991). Second, "[w]henever possible, we give meaning to each word in the legislation; no word in a statute should be considered

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superfluous." *International Org. of Masters, Mates & Pilots, Atl. & Gulf Maritime Region, AFL–CIO v. Woods Hole, Martha's Vineyard & Nantucket S.S. Authy.,* 392 Mass. 811, 813, 467 N.E.2d 1331 (1984). Again, even if applicable, this is not an ineluctable doctrine, see *Bartlett v. Greyhound Real Estate Fin. Co.,* 41 Mass.App.Ct. 282, 289, 669 N.E.2d 792 (1996), and in any event must yield to the even more fundamental precept, expressly relied on by the Land Court judge, that "a strictly literal reading of a statute should not be adopted if the result will be to thwart or hamper the accomplishment of the statute's obvious purpose, and if another construction which would avoid this undesirable result is possible." *Watros,* 421 Mass. at 113, 653 N.E.2d 589. In light of our holding above, we do not have to depend upon the judge's rationale—that by use of the words "primary, accessory or incidental" in the statute "the legislature intended to cover all bases ... and to leave no type of [child care facility] use beyond the reach" of the exemption—although we find the judge's construction of this remedial statute persuasive. See *Champigny v. Commonwealth,* 422 Mass. 249, 251, 661 N.E.2d 931 (1996); *Wonderland Greyhound Park, Inc. v. State Racing Commn.*, 45 Mass.App.Ct. 226, 233, 696 N.E.2d 964 (1998). We note, in this connection, that the board has failed to identify any use or purpose that might be but was not included or encompassed within the words "principal, accessory or incidental."

9 The commissioner and the board determined that, short of relocation, Petrucci would have to obtain a variance, after site plan review. On Petrucci's second motion for partial summary judgment, the judge ruled that the proposed exempt use could not be made subject to either variance procedures or site plan review, a conclusion in accord with *Trustees of Tufts College v. Medford,* 415 Mass. 753, 760, 765, 616 N.E.2d 433 (1993). The board has not questioned that ruling in this appeal.

10 In his first partial summary judgment decision, the judge ruled that the *Tufts College* analysis, though arising in an educational use context, was applicable to child care facilities (another ruling unchallenged here). The basic rationale of *Tufts College* has been applied to another provision of G.L. c. 40A, § 3. See *Prime v. Zoning Bd. of Appeals of Norwell,* 42 Mass.App.Ct. 796, 802, 680 N.E.2d 118 (1997) (involving the agricultural use exemption of the first paragraph). Given the identity of the language of the "reasonable regulations" provisions in the second and third paragraphs of § 3, the teaching of *Tufts College* regarding the scope of the educational exemption vis-à-vis local zoning regulation was properly invoked by the judge. See *Insurance Rating Bd. v. Commissioner of Ins.,* 356 Mass. 184, 188–189, 248 N.E.2d 500 (1969); *Green v. Board of Appeals of Provincetown,* 404 Mass. 571, 573, 536 N.E.2d 584 (1989).

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[11] At the trial on the issue of the reasonableness of requiring Petrucci's compliance with Westwood's rear yard, side yard, and building height requirements, the board called no witnesses and adduced no evidence to show how the imposition of those limitations on Petrucci's project would advance legitimate municipal concerns.

[12] The board does not complain that any of the judge's findings or the evidence presented by Petrucci's witnesses on which the judge relied was erroneous, except with respect to the finding regarding the estimated cost of compliance to relocate the barn. The board's challenge in that respect is wrong (see note 13, *infra*).

[13] The board incorrectly maintains that the evidence regarding the cost of the barn's relocation (and, hence, the "cost of compliance" highlighted by the Supreme Judicial Court in the *Tufts College* test) was tainted by hearsay. This assertion overlooks the fact that Petrucci testified to his own understanding of the cost to move the barn, based on his thirty-five years of experience as a licensed builder. See *Colangeli v. Construction Serv. Co.,* 353 Mass. 527, 529–530, 233 N.E.2d 192 (1968); *Varney v. Donovan,* 356 Mass. 739, 255 N.E.2d 605 (1970); *Larabee v. Potvin Lumber Co.,* 390 Mass. 636, 643, 459 N.E.2d 93 (1983). The judge noted that this testimony was received without objection. In any event, the judge ruled, quite appropriately in our view, that "it is a matter of common sense that the cost to move a structure of the size and age of this barn would be significant."

[14] The board does not disagree that these are the municipal purposes served by the relevant by-law requirements.

[15] The board's sole criticism of the judge's decision on the issue of regulatory reasonableness (other than its misplaced assertion that Petrucci's cost of compliance evidence was hearsay, see note 13, *supra*) is that Petrucci did not demonstrate what the profits might be from his venture, which, the board suggested, might easily support the cost of compliance and make it reasonable. The board's critique fails in two respects. First, it rests on the assumption, contrary to the record, that the child care facility would be a commercial, for-profit enterprise. Second, it is based on the premise that different standards for gauging the costs of compliance ought to apply for proprietary as opposed to nonprofit chid care facilities. That premise finds no support in the language of the

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statute, nor in its purpose. Such a discrimination on the basis of corporate form would tend to create a significant disincentive for the private sector to address the public purpose of making child care services as widely available as their need requires. See note 7, *supra.*

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462 Mass. 280
Supreme Judicial Court of Massachusetts, Suffolk.

REGIS COLLEGE
v.
TOWN OF WESTON & others.[1]
SJC–10919
|
Submitted Dec. 5, 2011.
|
Decided May 22, 2012.

Synopsis
Background: Private college brought action against town, seeking declaration that proposed development of residential and educational facilities was exempt from local zoning laws under Dover Amendment. The Land Court Department, Suffolk County, Alexander H. Sands, III, J., entered summary judgment in favor of town. College applied for direct appellate review.

Holdings: The Supreme Judicial Court, Lenk, J., held that:

college was required to show that proposed facility had a primarily educational purpose, and

fact issue precluded summary judgment.

Vacated and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

****348** Catherine J. Savoie, Boston, for the plaintiff.

George X. Pucci, Boston, for town of Weston & another.

Lisa C. Goodheart, Boston, for the interveners.

The following submitted briefs for amici curiae:

Donald V. Rider, Jr., City Solicitor, & Christopher J. Petrini, Barbara J. Saint Andre, Framingham, & Heather W. Kingsbury, Worcester, for City Solicitors and Town Counsel Association & another.

Robert J. McCarron, Edgartown, for Association of Independent Colleges and Universities in Massachusetts.

F. Beirne Lovely, Jr., for Archdiocese of Boston.

Present: IRELAND, C.J., SPINA, CORDY, BOTSFORD, GANTS, DUFFLY, & LENK, JJ.

Opinion

****349** LENK, J.

***281** The Dover Amendment, G.L. c. 40A, § 3, second par., exempts from certain local zoning laws land or structures that are to be

used by nonprofit educational institutions for "educational purposes." The plaintiff, a private college, brought suit against a town and a local zoning authority (defendants), seeking, among other things, a declaration that its proposed development of residential and educational facilities for older adults known as "Regis East" qualifies for protection under the Dover Amendment. A Land Court judge granted summary judgment in favor of the defendants. The plaintiff appealed and we granted its application for direct appellate review. Because we cannot conclude that the plaintiff "has no reasonable expectation" of demonstrating that Regis East will primarily operate in furtherance of educational purposes, *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716, 575 N.E.2d 734 (1991), we vacate the judgment and remand the case to the Land Court.[2]

1. *Background.* a. *Facts.* The parties stipulate that the plaintiff is a "non-profit educational corporation" within the meaning of the Dover Amendment.[3] The plaintiff offers both graduate and undergraduate degrees, operates a continuing education program designed for senior citizens residing in the town of Weston (Weston) and surrounding communities, and maintains established nursing and social work programs.

***282** The plaintiff is affiliated with the Congregation of the Sisters of St. Joseph, a Catholic religious order whose members continue to form a majority of the plaintiff's board of governors. Since 1927, either the plaintiff or the Sisters of St. Joseph have held title to approximately 130 acres of land in Weston. The plaintiff's campus presently occupies approximately seventy of these acres, and is located on the western side of Wellesley Street, a street that bisects the larger parcel of campus land. The proposed development, Regis East, will be across the street on a site of approximately sixty acres that is at present largely wooded and undeveloped.

As planned, Regis East will comprise eight buildings, with a total built area of 766,600 square feet.[4] The motion judge inferred based on facts in the record that the residential units themselves would occupy approximately 470,000 square feet, accounting for approximately sixty per cent of the built area. The remaining (nonresidential) area is expected to be used for a variety of purposes, including dining, meetings and events, fitness activities, healthcare, and recreation. The project's nonresidential area will also house classrooms, a "Children's Center," and an "Adult Day Care Center." The nonresidential area will contain a central connecting "promenade," with two levels of parking underneath it.

Residents at Regis East will live in apartment units of about 1,300 square feet. They are expected to average seventy-five years of age at the time of their arrival. They will be admitted based on an application and interview process, the details of ****350** which remain unspecified. Residents will be required to pay an entrance fee of between $700,000 and $1 million that, in large part, will be returnable to them, or their estates, should they leave. They will also pay a monthly fee of approximately $4,000.[5]

The plaintiff indicates by affidavit that residents will be assigned "academic advisors" and will be required to enroll in a

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minimum of two courses per semester,[6] which they will choose ***283** in consultation with their advisors. Residents will be able to satisfy the minimum course requirement through courses offered to students enrolled in degree-granting programs, the current continuing education program, or self-directed study approved by the resident's academic advisor and by a person holding the title of "the Dean of the East Campus."

Residents will also be able to enroll in more than the minimum required level of classes, and potentially to pursue degrees and certificates awarded to the plaintiff's current student body. Further, residents will be assigned a "wellness coordinator," and will be required to take health and fitness classes offered "through" the plaintiff. The plaintiff avers that these requirements will be individualized and coordinated through a "Wellness and Education Curriculum Plan" that will account for each resident's individual intellectual and physical abilities and interests, and that will be approved by the dean.

The plaintiff also anticipates a level of integration between Regis East and its existing campus. Residents will have full access to facilities and events on the west campus. West campus students also are expected to be able to take advantage of nursing and social work opportunities that may arise at Regis East. The plaintiff emphasizes, in particular, that students enrolled in its degree-granting nursing programs could potentially obtain clinical placements at Regis East.[7] However, the plaintiff has provided few specifics on how such internships and clinical placements will be implemented.

b. *Procedural history.* In 2005, the plaintiff petitioned the zoning board of appeals of Weston (zoning board) for relief from certain of Weston's municipal zoning regulations that would otherwise preclude construction of the Regis East development. The zoning board denied this petition, based in part on its determination that it did not have jurisdiction to find that Weston's zoning regulations were preempted by the Dover ***284** Amendment. The plaintiff then brought an action in the Land Court against Weston and its zoning board.

A Land Court judge determined that the zoning board did have jurisdiction to determine whether the project was protected under the Dover Amendment, and remanded the matter for such a determination. On remand, the zoning board again denied the plaintiff's petition. The parties then returned to the Land Court. The judge subsequently granted summary ****351** judgment for the defendants, concluding that the plaintiff's proposed use of Regis East did not fall within the protection of the Dover Amendment.

The judge rested his decision on a determination that Regis East's educational purpose "seems subordinate to [the plaintiff's] desire to provide elderly housing and/or a source of revenue." He noted further that the record was "unclear" whether the plaintiff would in practice insist on the residents participating in educational programs, and specifically whether the plaintiff would in fact evict residents who failed to complete the minimum course requirement. Finally, he echoed the defendants' concern that "elements" of the project's educational components were

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"vague."

2. *Discussion.* We first address the scope of the Dover Amendment's protection of "the use of land or structures for ... educational purposes." Concluding that the statute protects only those uses serving primarily educational purposes, we then address whether the plaintiff has shown that the record before the motion judge contains evidence sufficient to create a material dispute of fact whether Regis East has as its dominant purpose a goal that "reasonably could be described as educationally significant." *Whitinsville Retirement Soc'y, Inc. v. Northbridge,* 394 Mass. 757, 761 n. 3, 477 N.E.2d 407 (1985) (*Whitinsville*).

a. *Standard of review.* We review a grant of summary judgment de novo. *Miller v. Cotter,* 448 Mass. 671, 676, 863 N.E.2d 537 (2007). Summary judgment is appropriate when, "viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.,* 410 Mass. 117, 120, 571 N.E.2d 357 (1991), and cases cited.

b. *Scope of protected educational purposes.* The Dover Amendment provides, in relevant part:

***285** "*[N]or shall any [zoning] ordinance or by-law prohibit, regulate or restrict the use of land or structures* for religious purposes or *for educational purposes on land owned or leased by* the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by *a nonprofit educational corporation;* provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements" (emphasis added).

We have construed this text on a number of occasions. See, e.g., *Whitinsville, supra* at 759–761, 477 N.E.2d 407; *Fitchburg Hous. Auth. v. Board of Zoning Appeals of Fitchburg,* 380 Mass. 869, 872–874, 406 N.E.2d 1006 (1980) (*Fitchburg*); *Kurz v. Board of Appeals of N. Reading,* 341 Mass. 110, 113, 167 N.E.2d 627 (1960). In so doing, we have emphasized that the word "education," as employed in Massachusetts statutes and cases, "is a broad and comprehensive term." *Mount Hermon Boys' Sch. v. Gill,* 145 Mass. 139, 146, 13 N.E. 354 (1887). We have refused to limit Dover Amendment protection to traditional or conventional educational regimes.

We have also, however, recognized two commonsense and interrelated limits on the statute's application. The first is that the Dover Amendment protects only those uses of land and those structures that have as their bona fide goal something that can reasonably be described as "educationally significant." ****352** *Whitinsville, supra* at 761 n. 3, 477 N.E.2d 407. The second is that the educationally significant goal must be the "primary or dominant" purpose for which the land or structures will be used. *Id.* at 760, citing *Cummington Sch. of the Arts, Inc. v. Assessors of Cummington,* 373 Mass. 597, 603, 369 N.E.2d 457 (1977). See *Fitchburg, supra* at 874, 406 N.E.2d 1006.

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i. *Nontraditional educational goals.* A proposed use of land or structures may have an educational purpose notwithstanding that it serves nontraditional communities of learners in a manner tailored to their individual needs and capabilities. *Fitchburg, supra* at 874–875, 406 N.E.2d 1006. Accordingly, we have concluded that the Dover Amendment applied to certain facilities for the disabled or the infirm, notwithstanding that the education afforded by such institutions differed markedly from that offered by ***286** "traditional" academic institutions. See *id.* at 869–870, 406 N.E.2d 1006 (residential facility in which "adults, with histories of mental difficulties, will live while being trained in skills for independent living, such as self-care, cooking, job seeking, budgeting, and making use of community resources"); *Gardner–Athol Area Mental Health Ass'n v. Zoning Bd. of Appeals of Gardner,* 401 Mass. 12, 13–14, 513 N.E.2d 1272 (1987) (residential facility where adults with mental disabilities "would be taught daily living, as well as vocational skills").

These cases comport not only with the longstanding view in Massachusetts that "[e]ducation is a broad and comprehensive term,"[8] *Mount Hermon Boys' Sch. v. Gill, supra* at 146, 13 N.E. 354, but also with the legislative history of the Dover Amendment. As part of a general revision of the zoning statutes in 1975, the Department of Community Affairs proposed that Dover Amendment protection be limited to "school[s]" or analogous "place [s] or facilit[ies]." See 1972 House Doc. No. 5009 at 84. In rejecting this language, the Legislature chose not to adopt a statutory test that would limit Dover Amendment protection only to projects similar to "schools," a term fairly read as denoting traditional educational institutions. Such a rejection "provides an indication that the Legislature did not want" the protection of the Dover Amendment to be limited only to those facilities closely analogous to traditional schools and colleges.[9] *Commonwealth v. Houston,* 430 Mass. 616, 625, 722 N.E.2d 942 (2000). See ***287** *Green v. Wyman–GordonCo.,* 422 Mass. 551, 556, 664 N.E.2d 808 (1996), ****353** citing 2A Singer, Sutherland Statutory Construction § 48.04 (5th ed. 1992).

In light of the historically broad meaning accorded the word "education," and the flexibility preserved by the Legislature in its 1975 rewording of the Dover Amendment, we are unwilling to conclude that a party seeking the protection of the Dover Amendment is required to show that its proposed use of land will be analogous to a traditional educational institution. Thus, there is no reason why, in principle, the promotion of "the cognitive and physical well being of elderly persons" through academic and physical instruction could not be an educational purpose under the Dover Amendment. See *Lasell Village, Inc. v. Assessors of Newton,* 67 Mass.App.Ct. 414, 423, 854 N.E.2d 119 (2006).

ii. *Primary educational purpose.* That conclusion does not, however, dispose of the case before us. In our prior Dover Amendment cases, unlike the present action, the parties did not dispute the primary purposes to be accomplished by the challenged projects, but rather questioned whether those purposes were properly characterized as "educational." See, e.g.,

Whitinsville, supra at 759, 477 N.E.2d 407 (no dispute that facility would "teach[ ] [elderly residents] crafts and provid[e] entertainment and stimulus for them"); *Fitchburg, supra* at 870, 874, 406 N.E.2d 1006 (no dispute that facility would house "adults, with histories of mental difficulties, ... while ... train[ing them] in [specified] skills for independent living"). Here, the concern expressed both by the judge and by the defendants is that the project may not in fact operate as the plaintiff claims it will. In the zoning board's view, the educational aspects of the Regis East development are so "amorphous, flexible and vague" as to suggest that they are mere "window dressing" for what is essentially a "luxury residential" complex.

It is well settled that purely residential and purely recreational projects are not referred to in normal usage as "educational," notwithstanding that the residences may be quiet and conducive to study, *Phi Beta Epsilon Corp. v. Boston,* 182 Mass. 457, 459, 65 N.E. 824 (1903), or that the recreation provided "be entertainment of the highest and most beneficial type." *Boston Symphony Orch. v. Assessors of Boston,* 294 Mass. 248, 256, 1 N.E.2d 6 (1936). Further, we have required not only that a proposed use of land have ***288** educational purposes, but also that these purposes be "primary or dominant." *Gardner–Athol Area Mental Health Ass'n v. Zoning Bd. of Appeals of Gardner,* 401 Mass. 12, 18, 513 N.E.2d 1272 (1987) (Lynch, J., dissenting). Thus, the plaintiff must show not only that Regis East will serve educational purposes, but that such purposes predominate over Regis East's residential and recreational components.

The plaintiff challenges this dominant purpose requirement. Noting that the words "primary" and "dominant" do not appear in the statutory text, the plaintiff contends that Regis East should qualify as a "use of land for ... educational purposes" so long as the project incorporates more than "incidental" educational components. Although the dominant purpose requirement represents a judicial gloss on the statute, it is consistent with the statutory language and furthers the purposes of the act.[10]

****354** In employing the phrase "educational purposes," the Legislature used "everyday words" that must be interpreted in view of common usage. See *Kurz v. Board of Appeals of N. Reading,* 341 Mass. 110, 112, 167 N.E.2d 627 (1960). See also *Schulman v. Attorney Gen.,* 447 Mass. 189, 191, 850 N.E.2d 505 (2006), quoting *Mazzone v. Attorney Gen.,* 432 Mass. 515, 526, 736 N.E.2d 358 (2000) (Legislature presumed to employ statutory terms in manner consistent with their "common ***289** and approved usage"). "[I]n a broad sense, anything taught might be considered, to a greater or less degree, educational." *Kurz v. Board of Appeals of N. Reading, supra* at 113, 167 N.E.2d 627. That being said, however, the Dover Amendment is a statute regulating "land use, not philosophy," *Needham Pastoral Counseling Ctr. v. Board of Appeals of Needham,* 29 Mass.App.Ct. 31, 34, 557 N.E.2d 43 (1990), and a facility would only be described as "educational" in common usage if it served primarily educational purposes.[11] *Whitinsville, supra* at 760, 477 N.E.2d 407. See Black's Law Dictionary 592 (9th ed. 2009) (defining "educational institution" as "all buildings and grounds *necessary to accomplish* the full scope of

educational instruction" [emphasis supplied]).

Moreover, the Dover Amendment represents a specific exception to the general power of municipalities to adopt and enforce zoning regulations and by-laws. See *Crall v. Leominster,* 362 Mass. 95, 101–102, 284 N.E.2d 610 (1972). "The whole of the Dover Amendment ... seeks to strike a balance between preventing local discrimination against an educational use, ... and honoring legitimate municipal concerns that typically find expression in local zoning laws" (citation omitted). *Trustees of Tufts College v. Medford,* 415 Mass. 753, 757, 616 N.E.2d 433 (1993). As a practical matter, the protection afforded by the Dover Amendment can be financially advantageous to the land owner. Because the statutory purpose of preventing local discrimination against educational uses is only furthered if the intended use of the land is in fact educational, the term ****355** "educational purposes" should be construed so as to minimize the risk that Dover Amendment protection will improperly be extended to situations where form has been elevated over substance.[12] See Rice, ***290** Re–Evaluating the Balance Between Zoning Regulations and Religious and Educational Uses, 8 Pace L.Rev. 1, 42 (1988).

The primary purpose requirement accordingly reflects the concern that the Dover Amendment protect only those projects in fact having as their primary and genuine purpose a "goal that reasonably could be described as educationally significant." *Whitinsville, supra* at 761 n. 3, 477 N.E.2d 407. Otherwise put, the requirement helps ensure that a party invoking Dover Amendment protection does so without engrafting an educational component onto a project in order to obtain favorable treatment under the statute.

The dominant purpose requirement is consistent with the zoning act as a whole. In categorizing uses of land under the zoning act, courts have traditionally sought to determine the principal use of an establishment "viewed in its totality." See, e.g., *Foxborough v. Bay State Harness Horse Racing & Breeding Ass'n,* 5 Mass.App.Ct. 613, 617, 619, 366 N.E.2d 773 (1977). Once identified, that principal use rather than any subsidiary use generally controls determinations of the property's consistency with zoning ordinances. See, e.g., *Henry v. Board of Appeals of Dunstable,* 418 Mass. 841, 844, 641 N.E.2d 1334 (1994); *Petros v. Superintendent & Inspector of Bldgs. of Lynn,* 306 Mass. 368, 371–372, 28 N.E.2d 233 (1940). Thus, the requirement that it is a project's primary purpose rather than any subsidiary purpose that controls whether it is protected by the Dover Amendment is consistent with an interpretation of the statute as part of a "harmonious[ ] ... [and] consistent body" ***291** of land use law. Cf. *Boston Hous. Auth. v. Labor Relations Comm'n,* 398 Mass. 715, 718, 500 N.E.2d 802 (1986).

Our courts have repeatedly observed that zoning ordinances are only equitable, and only likely to succeed, if they are applied uniformly. See *Amberwood Dev. Corp. v. Board of Appeals of Boxford,* 65 Mass.App.Ct. 205, 212, 837 N.E.2d 1161 (2005), and cases cited. Indeed, the Legislature requires by statute that, with specified exceptions, zoning ordinances or bylaws "shall be uniform within the district

for each class or kind of structures or uses permitted." G.L. c. 40A, § 4. While the Dover Amendment creates an exception to this general rule of uniformity, it does not **356 effect a wholesale suspension of that principle. See *Campbell v. City Council of Lynn,* 415 Mass. 772, 778, 616 N.E.2d 445 (1993); *Trustees of Tufts College v. Medford, supra* at 760–761, 616 N.E.2d 433. It is fitting, therefore, that the statute preempt the uniform application of zoning laws only where those laws impede the use of land for educational activities, and not where their primary effect is on noneducational uses.

Hence, we reaffirm that in order to claim the protection of the Dover Amendment's "educational purposes" clause, a landowner must demonstrate that its use of land will have as its primary purpose a goal that can reasonably be described as educationally significant.

c. *Summary judgment.* As discussed, *supra,* in order for Regis East to qualify for Dover Amendment protection, the plaintiff must establish that the residential and recreational aspects of Regis East do not constitute its primary purpose but instead support the project's dominant educational purpose of providing academic and health-related instruction to older adults. In order for the defendants, as moving parties, to prevail on summary judgment, however, they must establish that the plaintiff "has no reasonable expectation" of making such a showing at trial. See *Carey v. New England Organ Bank,* 446 Mass. 270, 278, 843 N.E.2d 1070 (2006), quoting *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 716, 575 N.E.2d 734 (1991). On this record, we cannot say that the defendants have met their burden in this regard.

A party moving for summary judgment who does not bear the ultimate burden of proof at trial may discharge the party's initial burden of production by demonstrating "to the court that *292 the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Kourouvacilis v. General Motors Corp., supra* at 715, 575 N.E.2d 734, quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 328, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (White, J., concurring). It is then incumbent on the nonmovant, here the plaintiff, to demonstrate the existence of a dispute as to the material facts challenged by the moving party with admissible evidence. *Kourouvacilis v. General Motors Corp., supra* at 711, 575 N.E.2d 734. Such a demonstration must be made on the basis of "specific facts." Mass R. Civ. P. 56(e), 365 Mass. 824 (1974). See *Ng Bros. Constr., Inc. v. Cranney,* 436 Mass. 638, 648, 766 N.E.2d 864 (2002) (contractor could not obtain summary judgment against homeowners where contractor could not articulate specific services performed); *Haverty v. Commissioner of Correction,* 437 Mass. 737, 754, 776 N.E.2d 973 (2002) (prisoner plaintiffs could not avoid summary judgment through "generalized statements about changes in conditions within the entire prisoner population").

The defendants based their motion for summary judgment on the contention that Regis East does not serve a bona fide educational purpose and that, even if some such purpose could be shown, there would be no basis on which a fact finder could conclude that it was primary or dominant.

The plaintiff has presented multiple affidavits listing "facets of the Regis East academic program."[13] The plaintiff avers, among other things, that residents of Regis East will be subject to a "mandatory academic requirement of a minimum of two academic courses each semester"; that residents will be provided with an ****357** individually-tailored "Wellness and Education Curriculum Plan"; and that residents will be paired with academic advisors and wellness coordinators. The plaintiff's affiants also contemplate a "full and complete integration" between residents of Regis East and its more traditional students, including cross-offerings of classes and extracurricular activities.

Further, the plaintiff's affidavits explain that the Regis East project was conceived "as an extension of Regis's mission to educate people," and that each aspect of Regis East is tailored to this mission. The plaintiff substantiates this claim by reference ***293** to its current continuing education programs for senior citizens, as well as its traditional focus on gerontology and what it describes as the "caring professions." We cannot say that it would be irrational for a finder of fact to conclude from this evidence that Regis East will primarily serve educational purposes. Cf. *Lasell College v. Newton,* 36 Mass.App.Ct. 1122, 635 N.E.2d 277 (1994) (affirming, in unpublished memorandum and order, on similar record, finding of trial judge that retirement community had dominant educational purpose).

In determining that the affidavits and accompanying materials submitted by the plaintiffs were not sufficient to avoid summary judgment, the motion judge emphasized that these materials were often "vague and amorphous."[14] While hardly a model of specificity, the materials are nonetheless not so vague as to be impermissibly conclusory. See, e.g., *Polaroid Corp. v. Rollins Envtl. Servs. (NJ), Inc.,* 416 Mass. 684, 696, 624 N.E.2d 959 (1993) (affidavit conclusory where it consisted of unsupported conclusions of law or fact); *Graham v. Quincy Food Serv. Employees Ass'n & Hosp., Library, & Pub. Employees Union,* 407 Mass. 601, 610 n. 4, 555 N.E.2d 543 (1990) (affidavit conclusory where it consisted largely of denials of movant's account and statements of "belief" rather that knowledge). Rather, viewed in the light most favorable to the plaintiff as the nonmoving party, the affidavits outline multiple aspects of the Regis East project that reasonably could be considered educational. Moreover, the record suggests an explanation for the lack of specificity in the plaintiff's affidavits: that the novelty of the Regis East project requires that many of its details will necessarily be worked out by experienced educators through day-to-day operation.

We note further that prior Dover Amendment cases addressing whether a proposed use has a dominant educational purpose have turned on specific findings of fact, including those bearing on how a project would likely be operated. See, e.g., *Whitinsville, supra* at 759–760, 477 N.E.2d 407; *Fitchburg, supra* at 874–875, 406 N.E.2d 1006. Indeed, a ***294** central point of contention here is whether Regis East will in fact be operated in line with its declared purposes. Cf. *Lasell Village v. Assessors of Newton,* 67 Mass.App.Ct. 414, 422, 425 & n. 13, 854 N.E.2d 119 (2006) (determining on appeal from tax assessment that project, which had

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been granted Dover Amendment protection, was not in fact operated primarily for educational purposes). Because the motion judge decided this case at the summary judgment stage, he could make no factual determinations in this regard.[15]

The resolution of that and other pertinent disputed matters will implicate credibility ****358** determinations, such as whether the plaintiff in fact intends to enforce its mandatory course requirements and evict residents who do not comply, and whether residents' individualized curricular plans will be developed in tandem with professional educators, or will instead consist of recreational activities. The motion judge's memorandum of decision reveals a level of skepticism on these points that suggests a weighing of evidence more appropriate at trial, where the credibility of witnesses and the weight to be accorded evidence may be addressed by a trier of fact. On the record before us, the defendants have not shown that they are entitled to judgment as a matter of law. See *Bayer Corp. v. Commissioner of Revenue,* 436 Mass. 302, 307–308, 763 N.E.2d 1100 (2002).

3. *Conclusion.* The judgment is vacated and the case is remanded to the Land Court for further proceedings consistent with this opinion.

So ordered.

All Citations

462 Mass. 280, 968 N.E.2d 347, 280 Ed. Law Rep. 369

Footnotes

1 The zoning board of appeals of Weston. A judge in the Land Court allowed Christie Hedges, Robert Hedges, Ahmed Mohiuddin, Patricia Mohiuddin, Arnold Zenker, and Barbara Zenker to intervene as defendants.

2 We acknowledge the amicus briefs of the City Solicitors and Town Counsel Association and the Massachusetts Municipal Association; the Association of Independent Colleges and Universities in Massachusetts; and the Archdiocese of Boston.

3 General Laws c. 40A, § 3, second par. (Dover Amendment), exempts from all but specified types of municipal zoning regulations the use of land by religious, governmental, and nonprofit entities "for religious purposes or for educational purposes."

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[4] The parties stipulate that the development does not comply with the relevant zoning bylaws; the area is zoned for single-family residences.

[5] In 2004, the plaintiff's internal revenue projections suggested that the project would generate net revenue commensurate with sale or lease of the land. However, the continuing accuracy of these revenue projections is disputed.

[6] A proposed draft of the Regis East residency agreement makes completion of at least two academic courses per semester each year an express condition of residency, and the plaintiff states in an affidavit that a similar term will be included in the final agreement.

[7] The plaintiff avers that it is currently required to compete for clinical placements for its students offsite, at locations that the plaintiff maintains are difficult for students to reach given the lack of public transportation in Weston.

[8] Early cases construing the word "education" interpreted that term as extending to a farm operated incident to a school, *Mount Hermon Boys' Sch. v. Gill,* 145 Mass. 139, 146, 13 N.E. 354 (1887), and an institution "for the purpose of training young women in the principles of home making." *Assessors of Boston v. Garland Sch. of Home Making,* 296 Mass. 378, 380, 6 N.E.2d 374 (1937). We presume that, in choosing statutory terms, the Legislature is aware of the application accorded those terms at common law and under prior statutes. See *Guaranty–First Trust Co. v. Textron, Inc.,* 416 Mass. 332, 336, 622 N.E.2d 597 (1993).

[9] The Legislature's rejection of language in the course of a continuous process that in fact results in the enactment of a statutory amendment should be distinguished from the Legislature's failure to act on a proposed bill. In the former case, the Legislature has been presented with a series of drafting choices, and has selected one, thereby implicitly rejecting the alternatives. See *Commonwealth v. Houston,* 430 Mass. 616, 625, 722 N.E.2d 942 (2000). In the latter case, the Legislature has simply failed to act, a failure which might represent a rejection of the proposed text, but could also represent a determination that the Legislature's limited time is better spent addressing other issues. See note 10,

infra.

10 We are not persuaded by the plaintiff's contention that the post–enactment history of the Dover Amendment indicates a legislative intent to protect projects with subsidiary rather than primary educational purposes. The plaintiff's argument relies heavily on a proposed 2001 bill that would have "require[d] that education is the primary use and purpose of the facility and not incidental thereto." 2001 House Doc. No. 1836. The plaintiff states that the decision not to enact this bill suggests that the Legislature did not wish to see a primary purpose requirement made part of the Dover Amendment.

"[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.' " *United States v. Craft,* 535 U.S. 274, 287, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002), quoting *Pension Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990). Where a legislative proposal is not contradicted by the language of a later-enacted bill, compare note 9, *supra,* but simply not enacted, the Legislature's failure to act is better explained by "[t]he practicalities of the legislative process" than by "legislative dislike for the principle involved." *Franklin v. Albert,* 381 Mass. 611, 615–616, 411 N.E.2d 458 (1980). Indeed, the Legislature's failure to act could also represent a determination that its concerns have been adequately addressed "by ... judicial development of decisional law." *Id.* at 616, 411 N.E.2d 458, quoting H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1395–1396 (tent. ed. 1958).

11 Recent Land Court Dover Amendment cases where no primary educational purpose was found demonstrate multiple examples of facilities that would not normally be described as "educational," yet arguably contain nontrivial educational components. See, e.g., Aquarius Sanctuary Ctr. for Higher Learning & Healing, Inc. *vs.* Zoning Bd. of Appeals of Littleton, No. 378178(JCC) (Dec. 17, 2009) (alternative medicine clinic could not establish that it was educational merely because it offered alternative medicine workshops); Metrowest YMCA, Inc. *vs.* Hopkinton, No. 287249, Civ. A. No. 03–0467 (July 10, 2006) (fitness and pool facility did not qualify as educational facility merely because it offered exercise-related classes "typical of those" offered at commercial fitness centers).

12 In construing the educational exemption to the Dover Amendment, we have often looked to decisions addressing tax exemptions. See *Fitchburg Hous. Auth. v. Board of Zoning Appeals of Fitchburg,* 380 Mass. 869, 873–874, 406 N.E.2d 1006 (1980), citing *Cummington*

Sch. of the Arts, Inc. v. Assessors of Cummington, 373 Mass. 597, 604, 369 N.E.2d 457 (1977); *Assessors of Lancaster v. Perkins Sch.,* 323 Mass. 418, 422, 82 N.E.2d 883 (1948); *President & Fellows of Harvard College v. Assessors of Cambridge,* 175 Mass. 145, 146–147, 55 N.E. 844 (1900); and *Trustees of Phillips Academy v. Andover,* 175 Mass. 118, 125, 55 N.E. 841 (1900). As with the Dover Amendment exemption from zoning laws, tax exemptions have obvious financial benefits to those claiming them. The appropriate inquiry in determining whether an entity claiming exemption from taxation has satisfied its burden of proof extends well beyond "bare statutory compliance." *Brown, Rudnick, Freed & Gesmer v. Assessors of Boston,* 389 Mass. 298, 302, 450 N.E.2d 162 (1983). "[W]e have refused to allow form to control." *Id.* at 303, 450 N.E.2d 162. Cf. *New England Theosophical Corp. v. City of Boston,* 172 Mass. 60, 64, 51 N.E. 456 (1898) (refusing to apply tax exemption for "literary" societies in manner that would "permit any [group of] men ... to live free from taxation, by forming a corporation" and asserting that it operated for literary and educational ends).

13 The contents of these affidavits are detailed at greater length in part 1, *supra.*

14 For example, the plaintiff has provided few details on the specific qualifications it will require of its academic staff, the minimum level of class performance that will constitute successful completion of a resident's mandatory course requirements, or the doctrine or philosophy undergirding its planned curricular offerings.

15 The judge instead emphasized uncontested facts related to the proportion of Regis East's built square footage that the plaintiff will devote to residential uses, and the project's significant revenue. Such considerations have not been central to our prior cases. Rather, we have considered as protected structures facilities not themselves used for educational activities but operated with the primary goal of supporting an institution's educational mission. See, e.g., *Radcliffe College v. Cambridge,* 350 Mass. 613, 616–618, 215 N.E.2d 892 (1966).

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33 Mass.App.Ct. 111
Appeals Court of Massachusetts, Bristol.
Gordon W. KIRKER & another[1]
v.
BOARD OF APPEALS OF RAYNHAM; Chris S. Osburn, Intervener.

No. 90–P–1167.
|
Argued Jan. 13, 1992.
|
Decided July 30, 1992.

Synopsis
Landowners appealed from judgment of the Superior Court, Bristol County, John M. Xifaras, J., denying permission to erect shed on their property. The Appeals Court, Armstrong, J., held that: (1) judgment ordering landowners to tear down shed used in connection with construction business operating as nonconforming use did not have res judicata effect, and (2) building permit could not be denied on grounds that farm use would derogate from intent and purpose of zoning bylaws.

Reversed and remanded.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****399 *111** Linda D. Oliveira, Fall River, for plaintiffs.

Charles E. Berg, Boston, for intervener.

Before ARMSTRONG, SMITH and GREENBERG, JJ.

Opinion

ARMSTRONG, Justice.

The Kirkers appeal from a judgment affirming a decision of the board of appeals of Raynham (board) denying permission to erect a steel garage or shed, fifty-nine by seventy-three feet, ostensibly for farming purposes. The district is zoned residential, but, while the Kirkers maintain a dwelling on the lot, they use most of it in connection ***112** with a construction business which operates as a nonconforming use.

In 1985 the Kirkers erected a shed, having obtained a building permit to do so. In an action by an abutter seeking enforcement of the zoning by-law, the Kirkers were ordered to dismantle the shed, which was found to have been designed for use in connection with the construction business, as a garage for repairing and maintaining construction equipment. That decision was affirmed by this court in an unpublished memorandum, *Osburn v. Board of Appeals of Raynham,* 25 Mass.App.Ct. 1107, 516 N.E.2d 188 (1987), and the shed was torn down.

In 1988 the Kirkers sought another building permit to erect a shed that is said by counsel to be identical or substantially identical to the previous one. The Kirkers, who defended the first shed as an accessory building to their residence, claim to seek the second shed as a

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barn for sheltering cattle and storing hay and grain in connection with a farming operation. Since the earlier decision, the Kirkers allege, they have converted not less than five acres of their thirteen-acre plot to farm use for the raising of beef cattle, goats, a horse, and a peacock. This portion of their land is now subject to farm-use classification for property-tax purposes. See G.L. c. 61A, §§ 1–10.

The building inspector rejected the application, citing the judgment concerning the first shed. The board affirmed the denial but for different reasons that will be discussed below. In the Superior Court the board moved for summary judgment on the ground of res judicata. The motion was allowed, presumably (as no reason was stated) for the reason stated in the motion.

It was error to dismiss the appeal on the ground of res judicata. First, the record in the previous suit does not show that the court either considered or was called upon to consider whether the shed might be permissible of right as a farm building. Although, on appeal in that action, the Kirkers apparently sought to justify the first shed as a farm building, our decision noted that, in the trial court, the ***113** Kirkers had expressly disclaimed any such contention. The transcript of the trial shows that the judge indicated that the Kirker property was not a farm and that he declined to consider the case on the basis that "this place might fall within the statutory definition of a farm at some time in the future." The town relies on certain portions of the judge's findings in the first action, indicating that, in his view, the shed was designed for use in maintaining construction equipment and was not suitable for farm use. Those, at most, create an ambiguity concerning the issues, the basis of decision, and what was deliberately left open by the judge. Compare *McSorley v. Hancock,* 11 Mass.App.Ct. 563, 568–569, 417 N.E.2d 982 (1981), in which the defendants (the town of Hancock and the Commonwealth) were held not to have sustained their burden of showing that the damages being sought for a second taking were duplicative of damages awarded for an earlier taking, because the components of the earlier award of damages were not ascertainable. See also *Commonwealth v. Bunting,* 401 Mass. 687, 691–692 n. 7, 518 N.E.2d 1159 (1988), declining to apply issue preclusion where the record of the earlier proceeding was ambiguous.

A second reason why res judicata would not foreclose the second application is that the factual situation on which the earlier permit revocation was predicated has allegedly changed in material respects. The ****400** Kirkers now operate, according to them, a bona fide farm, recognized as such under the farmland taxation program. At the time of the earlier application, they were found not to be operating a farm on the property (they had "a few chickens and possibly a few other animals and ... [had] small gardens ... for household use," according to the judge in the first action). The fact that they were not entitled to erect a barn when they were not a farm does not mean that they may not be so entitled in light of later developments.

No other reason appears from the record why the Kirkers are, as matter of law, not entitled to a building permit. The board of appeals listed several reasons for denial which, although they are not now defended by the

town, we mention ***114** briefly. First, the board's determination that a building permit for farm use "would derogate from the intent and purpose of the zoning by-laws," language apparently taken from the statute controlling variances, G.L. c. 40A, § 10, first par., is inapposite because a variance is not required for construction of a farm building on a farm. *Tisbury v. Martha's Vineyard Commn.*, 27 Mass.App.Ct. 1204, 1206, 544 N.E.2d 230 (1989). Farming is a use permitted as of right in the residence "A" zoning district in which the Kirkers' lot is located; and, in any event, G.L. c. 40A, § 3, as amended through St.1987, c. 191, bars a zoning by-law that purports to "prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture ...; [or] prohibit or unreasonably regulate the expansion or reconstruction of existing structures thereon for the primary purpose of agriculture...." "Agriculture" includes the raising of livestock. *Building Inspector of Mansfield v. Curvin,* 22 Mass.App.Ct. 401, 402–404, 494 N.E.2d 42 (1986). Although the statutory language does not in terms include *new* farm structures, it was held in *Cumberland Farms of Conn., Inc. v. Zoning Bd. of Appeal of N. Attleborough,* 359 Mass. 68, 73, 267 N.E.2d 906 (1971), where a building permit for a cow barn had been denied, that "[i]t cannot fairly be denied that refusal of a board of appeal to approve permits for reasonable shelter of cattle from the New England climate, in fact and as a practical matter, may effect prohibition of dairy land expansion." Contrary to the board's statement that "[u]se of the property cannot change according to the [applicant's] business activities," it is tautological to say, so far as zoning is concerned, that one may change his property to any use that the zoning by-law permits as of right. The suggestion that a farm barn would be "detrimental to the public good," echoing language from the statute concerning special permits, G.L. c. 40A, § 9, first, third, and twelfth pars. (as amended through St.1987, c. 584, § 10), is inapposite as no special permit is required. "Approval [of a cow barn], may not be denied merely because the board would prefer another use of the land or no use." *Cumberland Farms of Conn., Inc. v. Zoning Bd. of Appeal* ***115** *of N. Attleborough,* 359 Mass. at 75, 267 N.E.2d 906. Compare *Newbury Junior College v. Brookline,* 19 Mass.App.Ct. 197, 207, 472 N.E.2d 1373 (1985) ("A dormitory license may not be denied merely because the licensing authority thinks that the educational use would not be good for the neighborhood"). See also *Tisbury v. Martha's Vineyard Commn.*, 27 Mass.App.Ct. at 1206, 544 N.E.2d 230 (permit to install fuel tank sufficiently large to serve a large greenhouse-nursery could not under § 3 be denied).

Doubtless the building inspector and the board were concerned that the proposed shed, ostensibly intended for agricultural purposes, is, in reality, intended for use in the Kirkers' nonconforming construction business. If, in fact, the proposed shed is identical to the one ordered removed in the previous action, it will have features seemingly designed for servicing large construction equipment. It should be obvious that the special protections afforded farms by G.L. c. 40A, § 3, cannot be used as a pretext for unlawful enlargement of nonconforming uses. The Raynham zoning by-law (see § 6.2[2]) appears not to permit the construction of a new building (as opposed to alteration or enlargement of an existing building) for a nonconforming

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**401 purpose. The board in the first instance may properly determine whether the proposed shed is larger than what is reasonably required for the Kirkers' small farm operation, or is plainly designed for another purpose, subject to de novo review as outlined in the *Cumberland Farms* decision, 359 Mass. at 75, 267 N.E.2d 906. Conditions may be placed on a building permit to prevent its use for unlawful purposes. Compare *Jackson v. Building Inspector of Brockton,* 351 Mass. 472, 479, 221 N.E.2d 736 (1966).

The judgment is reversed. A new judgment is to be entered, declaring that the decision of the board is in excess of its authority and is annulled, and remanding the case to the board for reconsideration of the Kirkers' application. No party is to have costs of appeal.

So ordered.

All Citations

33 Mass.App.Ct. 111, 596 N.E.2d 398

Footnotes

1 Margaret A. Kirker.

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43 Mass.App.Ct. 828
Appeals Court of Massachusetts, Hampden.
BERKSHIRE POWER DEVELOPMENT, INC.

v.
ZONING BOARD OF APPEALS OF AGAWAM, Antonia Cuccovia & others,[1] Interveners.
No. 97–P–1071.
|
Argued Oct. 17, 1997.
|
Decided Nov. 19, 1997.

Synopsis
Corporation applied to zoning board of appeals for special permit to erect industrial buildings taller than 40 feet. The board voted two in favor, one opposed, and denied the application on ground that unanimous vote was required. Corporation appealed. The Superior Court, Hampden County, William H. Welch, J., granted summary judgment in favor of corporation, reasoning that simple majority vote, rather than unanimous vote, was all that was required. Abutters who had objected to application moved to intervene. The Superior Court, Hampden County, Bertha D. Josephson, J., granted motion, and appeal was taken. The Appeals Court, Gillerman, J., held that corporation was precluded from arguing, on appeal, that relief from height limitations could not be the subject of a special permit and that a simple majority vote of the board was therefore all that was required.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

****1089 *828** Paul L. Feldman (J. Gavin Cockfield, with him), Boston, for interveners.

Alan K. Posner (John A. DeTore, with him), Boston, for plaintiff.

Before ARMSTRONG, GILLERMAN and JACOBS, JJ.

Opinion

GILLERMAN, Justice.

The plaintiff (Berkshire) seeks to construct and operate a 252 megawatt, gas-fired electric power generating plant on approximately forty acres of land located in Agawam in a zoning district permitting industrial use. Berkshire applied to the zoning board of appeals of Agawam (the board) for a ***829** special permit to erect certain structures taller than forty feet.[2] After a public hearing, the board voted two in favor, one opposed, and the special permit was denied. See G.L. c. 40A, § 9 (action by a board of three members requires a unanimous vote). Berkshire appealed to the Superior Court, see G.L. c. 40A, § 17, and thereafter filed a motion for summary judgment. The judge allowed Berkshire's motion and entered a final judgment granting Berkshire's application to build the electric generating facility upon the favorable vote of

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two members of the board. This appeal followed.

We recapitulate the history of this controversy in some detail.

1. *Proceedings before the board.* Berkshire's application to the board was filed July 20, 1995; it stated that it was an "[a]pplication to [the] Board of Appeals for special Permit as provided in the zoning and other By-laws."[3] Below the printed portion of the form appears the following: "Please see the attached special permit application for permission to erect certain buildings and necessary, appurtenant structures and equipment in excess of 40 feet."

The cover letter from Berkshire's counsel to the chairman of the board of appeals states that the application is "[p]ursuant to Section 180–63 of the Agawam Zoning Code ... for a special permit in connection with certain buildings ... that will be in excess of 40 feet in height...."

Berkshire submitted a memorandum of law to the board to "address the standard of review" to be applied by the board regarding a special permit application for "exception to height limitations." In brief, Berkshire urged the board to follow the standard of review for special permits set forth in § 180–11(G) of the Agawam zoning code. Subparagraph (G) provides that the board shall not approve a special permit application unless it finds that the following five conditions are met: the site is an appropriate location for the intended use; the use will not adversely affect the health, safety, or property values of the ***830** neighborhood; there will be no nuisance or safety hazard created; there will be adequate safety controls for the intended use or service; the use will not be against the public interest or detrimental to the character of the neighborhood.

****1090** Berkshire's memorandum pointed out that while § 180–11 is entitled "Special use permit exceptions and special permits," the standards of that section (which appear in subparagraph [G]) "apply to more than just 'uses'...." Thus, states the memorandum, "a request for a height exception must be reviewed in the context of the special permit process set forth in Section 180–11."

A majority of the board (two members) voted to grant the application and issued their opinion on January 5, 1996. The decision recites public hearings on four days, and public meetings on three additional days, all in connection with the Berkshire application to permit the construction of certain buildings and appurtenant structures in excess of forty feet. The majority found numerous facts, referred to its extensive review and investigation of the application, and adopted the argument of Berkshire that the provisions of § 180–11(G) provide the applicable standard of review. The majority found that all five conditions were satisfied. The favorable vote of the majority was subject to the performance of forty-seven conditions.

The minority member voted to deny the application. He noted that "[b]oth opponents and proponents of this appeal agreed that the Standards of Review to apply to the approval or denial of the Special Permit regarding this appeal would be those criteria of Section 180–11(G) of the Zoning Ordinance...." The minority member concluded that the five conditions of § 180–11(G) were not satisfied.

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As a result of the negative vote of the dissenting member, the application for a special permit was denied, as noted above.

2. *Proceedings in the Superior Court.* Berkshire then filed a timely complaint in the Superior Court, see G.L. c. 40A, § 17; the complaint alleged that under § 180–63 the approval of the board was required after a public hearing, that there was a public hearing, that a majority of the board approved the application, and that the decision of the board to treat the vote as a denial was an error of law. Gone were the arguments it made to the board—that a special permit was required, and that the standards of § 180–11(G) must be satisfied.

Certain abutters who had objected to Berkshire's application ***831** filed a motion to intervene in the Superior Court proceedings. The motion was denied on the ground that, Berkshire's application for a special permit having been denied, the abutters were not aggrieved. See *Prudential Ins. Co. v. Board of Appeals of Westwood,* 18 Mass.App.Ct. 632, 635, 469 N.E.2d 501 (1984) (no aggrievement under Mass.R.Civ.P. 24[a][2], 365 Mass. 770 [1974] where board's decision benefited the proposed interveners).

Berkshire then filed its motion for summary judgment, arguing that the "authorization requested is not a special permit governed by G.L. c. 40A, § 9," and that having obtained a simple majority vote, Berkshire is entitled to judgment as matter of law.

The judge agreed; he reasoned that the proposed use was as of right under the zoning code and therefore cannot be made the subject of a special permit. Since the forty-foot limitation was merely a "reasonable term or condition," a simple majority vote was all that was required. The judge entered final judgment for Berkshire on June 13, 1996, purporting to affirm the board's "approval" of Berkshire's application to build the power plant. The board then entered into a settlement agreement with Berkshire, and the decision was made by the board not to appeal the decision of the Superior Court.

The abutters now reappeared. They filed an emergency motion for reconsideration, or in the alternative, a motion to intervene. The judge who heard the original motion to intervene heard this emergency motion. See Rule 9D of the Superior Court, effective January 31, 1990. The judge allowed the emergency motion to intervene. She reasoned that motions to intervene *after* judgment, while seldom granted, may be allowed "if the proposed intervener demonstrates a strong justification." *Cruz Mgmt. Co. v. Thomas,* 417 Mass. 782, 785, 633 N.E.2d 390 (1994). The judge found that justification in the newly developed "inadequate representation" ****1091** of the interests of the abutters,[4] and the "pivotal bearing" of the board's rules and regulations which the abutters proposed to add to the record on appeal and which had not been offered in evidence at the board's hearing on the application for a special permit. Those regulations provide, in part, "The approval of any matter requiring a public hearing is dependent upon the *unanimous* consent of the three (3) members who are sitting on the case" (emphasis added). Berkshire's application ***832** to the single justice of this court to reverse the allowance of the motion to intervene was

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unavailing, and it filed a notice of appeal, later dismissed by stipulation. Meanwhile, upon motion duly allowed by the motion judge, the record on appeal was supplemented by, inter alia, the board's rules and regulations.[5] See *Cruz Mgmt. Co. v. Thomas, supra* at 784, 633 N.E.2d 390. Finally, an assented-to motion designed to obtain consideration of the supplementary material by the judge who had entered summary judgment for Berkshire was denied.[6]

3. *Discussion.* We disagree with the judge's order allowing summary judgment for several reasons.

First, we proceed from the premise that a "local board of appeals brings to the matter an intimate understanding of the immediate circumstances, of local conditions, and of the background and purposes of the entire by-law; and so ... the board's administrative view is valuable and is wanted." *Fitzsimonds v. Board of Appeals of Chatham,* 21 Mass.App.Ct. 53, 57, 484 N.E.2d 113 (1985). Thus it is that "[w]e give substantial deference to the construction placed on ... an ordinance by the agency charged with its administration," i.e., the board of appeals. *Manning v. Boston Redev. Auth.,* 400 Mass. 444, 453, 509 N.E.2d 1173 (1987).

In this case, as the abutters point out, Berkshire's brief in support of its application brought to the attention of the board, correctly, that "[p]revious ... decisions [of the board] make clear that applications for approval to build something in excess of 40 feet in the Industrial A and B Districts are treated as special permit applications and are reviewed against the standards set forth in Section 180–11(G)."[7] Copies of the decisions ***833** were appended to Berkshire's brief to the board.[8] As stated in *Manning v. Boston Redev. Auth.,* we must, and do give "substantial deference" to the board's established interpretation of its zoning code. 400 Mass. at 453, 509 N.E.2d 1173. We do not find any persuasive argument to the contrary.

In addition, Berkshire's brief to the board pointed out, correctly, that the failure to apply the standard of § 180–11(G) to an application for a special permit "could result in reversal of the [board's] decision on appeal pursuant to G.L. c. 40A, § 17." See *MacGibbon v. Board of Appeals of Duxbury,* 356 Mass. 635, 637–638, 255 N.E.2d 347 (1970). See also *Manning v. Boston Redev. Auth., supra* at 453, 509 N.E.2d 1173.

****1092** To these forceful arguments we add (i) *Woods v. Newton,* 351 Mass. 98, 102–103, 217 N.E.2d 728 (1966) (holding, under § 4 of c. 40A—the predecessor to § 9 of c. 40A—that a zoning code which authorizes an appeal board to grant a special permit in order to allow a deviation from the code's height limitation was a proper exercise of the board's power under § 4, and the deviation could not have been allowed as a variance); (ii) that, as we pointed out in careful detail in *Emond v. Board of Appeals of Uxbridge,* 27 Mass.App.Ct. 630, 541 N.E.2d 380 (1989), a purpose of the 1975 Zoning Act, St.1975, c. 808, was to eliminate the "exception" language in the 1954 act, thereby permitting the continuation of the use of the special permit mechanism in connection with dimensional variations, *id.* at 633–636, 541 N.E.2d 380; and (iii) because the board applied the provisions of § 180–11 including

the standards set forth in subparagraph (G), and denied the application because of the failure of a unanimous vote, the judge's authority, if he disagreed with the board, would be limited to remanding the application to the board for further consideration in light of the judge's opinion. See *V.S.H. Realty, Inc. v. Zoning Bd. Of Appeals of Plymouth,* 30 Mass.App.Ct. 530, 535, 570 N.E.2d 1044 (1991).

To all of this Berkshire argues that, by omitting any reference to a special permit in § 180–63, Agawam elected not to *require* a special permit for permitted deviations from that section (thus ***834** distinguishing, arguably, the *Woods* and *Emond* cases, *supra*). This is so, Berkshire argues, because a municipality "may elect to allow approval of deviations from dimensional requirements by mechanisms not subject to [the unanimity requirement of] G.L. c. 40A, § 9."

We need not, in this case, consider the seemingly novel proposition put forward by Berkshire regarding unidentified "mechanisms" which would support its position in the Superior Court and in this court. That theory was available to Berkshire when it filed its application to the board. It chose instead to file an application for a special permit, and in support of that application filed a fourteen-page memorandum arguing, with considerable persuasiveness, that a special permit was the appropriate procedure and that the standards of § 180–11(G) were those which must be applied to save the intended relief from illegality. That position was maintained continuously until the release of the final decision of the members of the board; indeed, the minority member pointed out that both Berkshire and its opponents "agreed" that the standard of review by the board was that formulated in subparagraph (G) of § 180–11 regarding special permits.

It is clear enough to us that the theory advanced by Berkshire to the Superior Court judge was not the result of a fresh insight into the law of land use in Massachusetts which would warrant careful consideration, but rather the product of a quite different stimulation provided by the dissenting member of the board. Having carefully and deliberately led the board, and those who opposed its application, down the road toward a special permit, see note 7, *supra,* Berkshire may not now abandon an analysis that it induced the board and others to adopt, in favor of an opposing theory it hopes will produce a satisfactory result. Compare *Santa Maria v. Trotto,* 297 Mass. 442, 447, 9 N.E.2d 540 (1937) ("[t]he theory of law on which by assent a case is tried cannot be disregarded when the case comes before an appellate court for review"); *Gurry v. Board of Public Accountancy,* 394 Mass. 118, 126, 474 N.E.2d 1085 (1985) ("[a] party is not entitled to raise arguments on appeal that he *could have raised, but did not raise,* before the administrative agency ...").

In sum, we see no basis for disturbing the settled practice of the board, not precluded by G.L. c. 40A, § 9, regarding the availability of special permit proceedings in order to obtain ***835** relief from height limitations,[9] and the accompanying requirement of the unanimous vote of the board, as required by § 9. Therefore, we reverse the judgment and remand the case to the Superior Court for the entry of a final judgment affirming the decision ****1093** of the board. See

Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974) (summary judgment may be rendered against the moving party).

So ordered.

All Citations

43 Mass.App.Ct. 828, 686 N.E.2d 1088

Footnotes

1 Maria Cuccovia, Joseph S. Schlaffer, Katherine M. Schlaffer, John J. McCarthy, Manon M. McCarthy, Susan Fay, Leon J. Duquette, and Bonnie Duquette.

2 Section 180–63 of the Agawam zoning code provides as follows: "Industrial buildings shall not exceed two (2) stories, forty (40) feet in height, *except with approval of the Board of Appeals after a public hearing.* These provisions shall not apply to required equipment appurtenant to industrial buildings, except that smokestacks, water tanks, grain elevators and the like are not permissible except after approval of the Board of Appeals after a public hearing." (Emphasis added.)

3 The quoted sentence appears in the printed form, except that the word "special" was interlineated in handwriting.

4 The board, as we have said, settled with Berkshire and declined to file a notice of appeal from the judgment entered in the Superior Court.

5 The supplementary material also included the zoning code of Agawam prior to 1975, and the affidavit of Joseph J. Conte, Sr., the building inspector and zoning enforcement officer of Agawam from 1967 through 1989. This opinion does not rely upon any of the supplementary material filed in this case.

6 The following endorsement appeared on the motion: "The Court decided the motion on the basis of the pleadings and evidence before him at the time, not on new matters introduced through pleadings before another Judge after intervention was [allowed] after

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final judgment was entered without vacating or revising the judgment."

7 Indeed, in its written, "closing comments" Berkshire submitted to the board, Berkshire wrote, "It is apparent that everyone involved in this process has understood that certain buildings, structures and equipment proposed to be constructed by Berkshire Power require a special permit under Section 180–63 and 180–11 of the Agawam Zoning Code because they are in excess of 40 feet." These "comments" were included in the papers submitted to the judge who decided the summary judgment motion. See note 8, *infra.*

8 The board filed a memorandum of law in opposition to Berkshire's motion for summary judgment. Attached to the memorandum were various exhibits, including the prior decisions of the board to which the memorandum referred. Thus those decisions were before the judge who decided the motion for summary judgment.

9 Berkshire's argument that the special permit provisions of § 180–11(G) are limited to particular *uses*—thereby excluding relief from dimensional requirements—is plainly wrong under the *Emond* case, *supra* at 633–636, 541 N.E.2d 380.

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97 Mass.App.Ct. 713
Appeals Court of Massachusetts, Barnstable.
Christina STEVENS, trustee,[1]
v.
ZONING BOARD OF APPEALS OF BOURNE & another.[2]
No. 19-P-248
|
Argued February 13, 2020.
|
Decided June 19, 2020.

Synopsis
Background: Property owner, a realty trust, brought action against zoning board and abutter, challenging board's decision reinstating original cease and desist order prohibiting wedding receptions on property, after abutter appealed from building inspector's new cease and desist order revised pursuant to settlement agreement in a Land Court action between town and owner, to which abutter was not a party. Following jury-waived trial, the Superior Court Department, Barnstable County, Robert C. Rufo, J., affirmed board's decision. Owner appealed.

Holdings: The Appeals Court, Green, C.J., held that:

abutter was not bound by settlement agreement, and

board acted within its authority in determining that owner's advertisement and rental of property as a venue constituted a commercial use that was not accessory to its permitted residential use.

Affirmed.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

****794** Zoning, Enforcement, Building inspector, Permitted use, Board of appeals: jurisdiction. Municipal Corporations, Building inspector, Selectmen. Practice, Civil, Zoning appeal.

CIVIL ACTION commenced in the Superior Court Department on October 3, 2016.

The case was heard by Robert C. Rufo, J.

Attorneys and Law Firms

John D. Bowen for the plaintiff.

Jonathan D. Fitch for James F. Molloy.

Present: Green, C.J., Wolohojian, & Sullivan, JJ.

Opinion

GREEN, C.J.

***713** Is an abutter bound by a settlement agreement between the board of selectmen of a town and a neighboring property owner, where the agreement concerned the permissible use of the neighbor's property under the local zoning bylaw, and resolved

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litigation to which the abutter was not a party? We conclude that the abutter in the present case, defendant James F. Molloy, is not so bound, and that defendant zoning board of appeals ***714** of Bourne (board) acted within its authority in concluding that the use by the plaintiff, Lighthouse Realty ****795** Trust, is prohibited under the Bourne zoning bylaw.

Background. The plaintiff, Lighthouse Realty Trust (Lighthouse), owns property in Bourne that it rents out from time to time as a venue for weddings and other large gatherings. Following complaints by neighbors concerning traffic and noise, and the issuance of a cease and desist order to Lighthouse on January 15, 2013 (January 2013 cease and desist order), the town of Bourne (as alleged in the complaint "through its duly appointed [b]uilding [i]nspector") brought a complaint in the Land Court, pursuant to G. L. c. 40A, § 7, for declaratory and injunctive relief, on the ground that Lighthouse's use of the property for such events constituted a prohibited commercial use in the residential zoning district in which the property is located (Land Court action). Lighthouse thereafter entered into a settlement agreement with the selectmen of the town, and a judgment entered dismissing the Land Court action.[3,4] Thereafter, the building inspector issued a revised cease and desist order to Lighthouse, conforming to the terms of the settlement agreement, and defendant Molloy appealed from that order to the board.[5] After hearing, the board issued a decision overturning the building inspector's revised order, and directing reinstatement of the January 2013 cease and desist order (which stated that use of the property for weddings or wedding receptions violated the Bourne zoning bylaw). Lighthouse appealed from the board's decision to the Superior Court, pursuant to G. L. c. 40A, § 17, where judgment entered affirming the board's decision after a jury-waived trial. This appeal followed.

***715** Discussion. a. Effect of the Land Court action. Citing Morganelli v. Building Inspector of Canton, 7 Mass. App. Ct. 475, 388 N.E.2d 708 (1979), Lighthouse asserts that Molloy is bound by the town's settlement of the Land Court action. In Morganelli, abutters brought an action for mandamus against the building inspector, challenging the issuance of a building permit for construction on a nonconforming lot. The question whether a building could be constructed on the lot had been the subject of prior litigation brought by a former owner of the lot, and finally adjudicated to allow construction. Id. at 480, 388 N.E.2d 708. In concluding that the prior adjudication bound Morganelli and his coplaintiff, who were not parties to the prior litigation, the court said that the prior litigation, "in which the building inspector participated as the proper enforcing officer, was, in substance, a proceeding against the municipality of Canton in which the interests of all of the citizens of Canton, including the plaintiffs, were represented. ****796** The building inspector, by having refused to grant a permit ... and by having defended the action against him ... already sought the enforcement of the zoning by-law that the present action seeks to require." Id. at 482, 388 N.E.2d 708. In the present case, Lighthouse contends, Molloy is situated identically to the abutters in Morganelli, and is therefore bound by the judgment in the Land Court action. We disagree.[6]

Unlike the prior litigation in Morganelli, the Land Court action here was resolved by agreement -- in other words, by a voluntary decision by the town selectmen to determine how the bylaw should be enforced with respect to Lighthouse's property. As the board observed in its decision on Molloy's appeal, whether viewed as an amendment to the bylaw specific to Lighthouse's property (albeit outside the procedural and substantive requirements of G. L. c. 40A, § 5), or as an impermissible use variance (albeit granted by the selectmen rather than the board, which, in any event, has authority to grant only dimensional variances under G. L. c. 40A, § 10), the selectmen were without ***716** authority to adjust or determine the proper enforcement of the bylaw as to Lighthouse's property.

Setting aside any question of the role of the selectmen in the settlement agreement (or any question whether the agreement itself is an appealable order or decision of the building inspector),[7] any decision or order of the building inspector pursuant to the agreement was necessarily subject to the notice and hearing requirements of G. L. c. 40A. As we have observed in the past, c. 40A is a "comprehensive statutory scheme." See Elio v. Zoning Bd. of Appeals of Barnstable, 55 Mass. App. Ct. 424, 431-432, 771 N.E.2d 199 (2002), and cases cited, which sets out detailed requirements for notice to "parties in interest," including abutters, and for hearing appeals from decisions by the building inspector either to enforce or to refuse enforcement of zoning requirements.[8] See G. L. c. 40A, §§ 8, 11. If the building inspector could agree to settle enforcement litigation concerning property without participation by abutters or other statutory parties in interest, and without review by the board of appeals, the detailed procedural safeguards embedded in c. 40A to protect the interest of abutters and other parties in interest could be evaded by the simple expedient of a friendly enforcement action brought by a sympathetic building inspector against a property owner, and then settled out of sight of the public.

Unlike the plaintiffs in Morganelli, the abutters in the present case had no opportunity in the Land Court action itself to ensure that their interests were protected. ****797** As we previously observed, see note 4, supra, the Land Court judge denied Molloy's motion to intervene but, recognizing Molloy's potential interest in the resolution of the matter, directed the building inspector to give notice to Molloy and any other abutters of any decision affecting the previous cease and desist order, presumably to preserve their statutory right to appeal from any such action by the building inspector to the zoning board of appeals -- as Molloy subsequently did. The board's decision on that appeal, and Lighthouse's appeal from that decision to the Superior Court, followed precisely the ***717** procedural requirements established by c. 40A. Contrast Barkan v. Zoning Bd. of Appeals of Truro, 95 Mass. App. Ct. 378, 387, 126 N.E.3d 1008 (2019). The settlement agreement reached in the Land Court action neither deprived the board of jurisdiction over Molloy's appeal nor operated to determine the applicability of the bylaw to Lighthouse's property.

b. Merits of the board's decision. Our review of the board's decision requires less

discussion. On review of a decision by a local zoning board of appeals in an appeal to the Superior Court or the Land Court under G. L. c. 40A, § 17, the judge determines the facts de novo, and considers whether the decision of the board is arbitrary, capricious, whimsical, or based on a legally untenable ground. See, e.g., Davis v. Board of Appeals of Chatham, 52 Mass App. Ct. 349, 355, 754 N.E.2d 101 (2001).[9] In an appeal such as the present one, involving interpretation of the local bylaw's requirements, we extend deference to the reasonable interpretation of local zoning regulations by the officials charged with their administration and enforcement. See Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 381, 909 N.E.2d 1161 (2009); APT Asset Mgt., Inc. v. Board of Appeals of Melrose, 50 Mass. App. Ct. 133, 138, 735 N.E.2d 872 (2000). In the present case, we discern no legal error, abuse of discretion, arbitrariness or whimsy, in the board's conclusion that the advertisement and rental of the property by Lighthouse as a wedding venue constitutes a commercial and not a residential use. Neither Lighthouse's trustee nor, so far as indicated by the record, any beneficiary of the trust resides at the property. The use of the property for weddings is conducted pursuant to rental contracts with unrelated third parties, for financial gain by Lighthouse. Accordingly, we discern no reason to invalidate the board's decision that the use of the property as a venue for weddings or other large gatherings by unrelated third parties on a rental basis is not accessory to its permitted residential use. See Henry v. Board of Appeals of Dunstable, 418 Mass. 841, 844-845, 641 N.E.2d 1334 (1994); ***718** Simmons v. Zoning Bd. of Appeals of Newburyport, 60 Mass. App. Ct. 5, 8, 798 N.E.2d 1025 (2003).

Judgment affirmed.

All Citations

97 Mass.App.Ct. 713, 150 N.E.3d 793

Footnotes

1 Of the Lighthouse Realty Trust.

2 James F. Molloy.

3 The stipulation of dismissal stated that the action was to be "dismissed with prejudice." See Mass. R. Civ. P. 41 (a) (1), 365 Mass. 803 (1974), which provides that "[u]nless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice" (emphasis added).

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[4] Molloy sought to intervene after the matter was referred to alternative dispute resolution but before the stipulation of dismissal was filed. The Land Court judge denied Molloy's motion but, recognizing Molloy's potential interest in the resolution of the matter, directed the building inspector to give notice to Molloy and any other abutters of any decision vacating, annulling, or otherwise modifying the January 2013 cease and desist order.

[5] The revised cease and desist order authorized up to four "functions" (defined to include events in excess of twenty-five guests hosted by a renter of the property) per year -- one during each of the months of May, June, September, and October - - with a maximum of one hundred guests at any such function and subject to certain other restrictions (including a 10 P.M. end time, no use of the beach, and a police detail for any function with more than fifty guests).

[6] As a threshold matter, we note that the members of the board of selectmen (who were the signatories to the settlement agreement) have no role or authority in matters of zoning enforcement, except in towns where there is no building inspector or commissioner; such matters are directed by statute to the building inspector or commissioner, subject to review by the zoning board of appeals. See G. L. c. 40A, §§ 7, 8. Simply put, the selectmen were without authority to settle any litigation purporting to determine the proper enforcement of the zoning bylaw regarding a particular use of property. We consider the agreement nonetheless to have been intended to bind the building inspector.

[7] See note 6, supra.

[8] That is why an order remanding a matter to a zoning board of appeals by a court vacating the decision of a local board of appeals or planning board often includes a requirement that any action on remand occur pursuant to notice and hearing as prescribed by c. 40A. See, e.g., Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 24, 514 N.E.2d 369 (1987).

[9] On appeal from such review by the Superior Court, we review the judge's findings of fact

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for clear error, but consider de novo the judge's application of legal requirements to those facts. See Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 383, 909 N.E.2d 1161 (2009); Steamboat Realty, LLC v. Zoning Bd. of Appeals of Boston, 70 Mass. App. Ct. 601, 602, 875 N.E.2d 521 (2007).

End of Document

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360 Mass. 432
Supreme Judicial Court of
Massachusetts, Worcester.

TOWN OF HARVARD
v.
William MAXANT.

Argued Sept. 16, 1971.
|
Decided Nov. 9, 1971.

Synopsis
Bill in equity by town against property owner to enjoin property owner from using or permitting use of land owned by him for the landing or taking off of aircraft. The Superior Court, Worcester County, Meagher, J., entered final decree in favor of the town and the property owner appealed. The Supreme Judicial Court, Quirico, J., held that private aircraft landing strip was not use that was 'customarily incidental' to residential use of property and was not permissible as accessory use of the property.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***432 **348** Morris N. Gould, Clinton (C. A. Peairs, Worcester, with him), for defendant.

Morton C. Jaquith, Town Counsel, for plaintiff.

Before TAURO, C.J., and CUTTER, QUIRICO, and HENNESSEY, JJ.

Opinion

QUIRICO, Justice.

This is a bill in equity brought by the town of Harvard (town) against William Maxant (defendant) to enjoin him from using or permitting the use of land owned by him for the landing or taking off of aircraft, which use is alleged to be in violation of the town's zoning by-law. The defendant contends that this use of his property is lawful either as a permitted primary use or as accessory to a permitted use. The case is before us on the defendant's appeal from a final decree in favor of the town.

***433** We have a report of all the evidence presented at the trial. It consists principally of oral testimony. The trial judge was not requested to file a report of material facts found by him. G.L. c. 214, s 23. However, he voluntarily filed a written decision which included detailed findings of facts. In this situation we 'examine the evidence and decide the case according to our own judgment, accepting as true the findings of the trial judge, whether based wholly or partly upon oral evidence, unless they are shown to be plainly wrong, and finding for ourselves such other and additional facts as we deem to be justified by the evidence.' Sulmonetti v. Hayes, 347 Mass. 390, 391—392, 198 N.E.2d 297, 298. Accordingly, we summarize the facts as found by us and by the trial judge.

Prior to October 21, 1968,[1] the defendant

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spoke to the chairman of the town's board of selectmen about the proposed use by him and his son of two parcels of land in the town for an aircraft landing strip. One of the parcels was then owned by the defendant's son and it consisted of 14 acres. The other was an adjoining parcel consisting of 20.47 acres. The selectmen discussed the matter with the town counsel who gave them a written opinion on October 24, 1968, that the proposed use was not permitted by the town's zoning by-law (by-law). On October 28, 1968, the selection sent the defendant a copy of the opinion letter. On November 5, 1968, the defendant wrote the selectmen informing them that he had purchased the 20.47 acre parcel and that he wanted to make the announcement that he and his son would use a part of the parcel as 'a personal landing strip' for landings and takeoffs by his and his son's personal planes. The defendant acquired title to the 20.47 acre parcel by a deed dated December 17, 1968, and recorded on December 30, 1968.

The defendant never applied for or obtained any permit from the town to use the property as a private landing field. He was not required to obtain any permit for the landing field ***434** from the Massachusetts Aeronautics Commission, but he was required to notify the Commission in writing that he was constructing or maintaining the field. G.L. c. 90, s 39B.[2] He gave such notice not later than January 10, 1969.

****349** During the ten years before the defendant purchased his land, about fifteen acres of it had been used by a tenant for growing corn in the area now occupied by the defendant's airstrip. About one acre of the land contained apple trees. After the defendant purchased the land, he did some clearing, planting of clover and mowing in the area where the airstrip is located. He also placed some beehives in three places on the property. There was no building on the property when the defendant purchased it, but prior to the trial in the Superior Court he erected a structure which he used for storing agricultural equipment. His building permit application described this structure simply as a 'storage building,' but the defendant hoped to use it for storing his aircraft in winter.

The airstrip has been used for only six landings and takeoffs. Three were made by the defendant and three were made by his son, each piloting his own single engine plane. These landings and takeoffs involved no extraordinary noise, and neither caused nor resulted in any smoke, odor, fumes or mechanical disturbance. The defendant used the airstrip for his personal pleasure and recreation, and intended to continue to use it for that purpose. He and his son lived about five miles from the airstrip, the defendant in the town of Harvard, and his son in Ayer.

The by-law, at all times material to this case, divides the town into five types of districts: Agricultural-Residential (AR), Business, Commercial, Commercial-Industrial, and ***435** Watershed Protection and Floodplain. The defendant's 20.47 acre parcel is in an AR district. The by-law prohibits certain described or specified 'injurious, offensive, or otherwise detrimental' uses in all districts of the town.[3] The list of specified prohibited uses does not include airports, airstrips, landing strips or the storage of aircraft.

The by-law states that premises shall be used only as therein permitted, and that '(a)ny

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accessory use may accompany the main use.' It defines the word 'accessory' as follows: 'An accessory use or structure is one clearly subordinate to, and customarily incidental to, and located on the same premises with the main use or structure to which it is accessory.' It expressly prescribes and limits the uses which are permitted in each of the five types of zoning districts. Section 5.2 of the by-law provides that the uses permitted as of right in an AR district include one family residences, limited types of home occupations, the renting of rooms to nontransients, various forms of agriculture including housing for farm help and the sale of natural produce of the farm, and certain religious, educational, conservation or municipal uses. Additional limited uses are allowed subject to special permits or other approval required therefor. None of the uses permitted in an AR district, whether as of right or upon special permit or approval, includes airports, airstrips, landing strips or the storage of aircraft. Neither is any of such uses expressly permitted in any of the other four types of districts.

****350** The defendant argues that since a private landing strip does not fall within any of the uses prohibited by s 5.1, it ***436** follows that it must therefore be permitted in an AR district, and perhaps in all five of the zoning districts. We do not agree with this oversimplified reading of one section of the by-law without regard to the other sections. There is no requirement that zoning by-laws or ordinances follow any particular pattern or structure. They may take the form of prescribing uses permitted or prescribing uses prohibited, or a combination of the two. The town adopted a by-law which combines the two. It prohibits certain uses from all zoning districts of the town, and it also prescribes and limits the uses permitted in each district. This by-law is 'both permissive and prohibitive in form.' Building Inspector of Chelmsford v. Belleville, 342 Mass. 216, 217, 172 N.E.2d 695, 696. The defendant's use is not made lawful solely because it is not prohibited by s 5.1 of the by-law. It must also be a use which is permitted in an AR district under s 5.2. Considered as the primary use made of the land, the private landing strip does not meet this test.

The defendant next argues that his use of the private landing strip is lawful because it qualifies as 'customarily incidental' to the residential use of the property. If this issue is decided on the record which comes to us from the Superior Court the defendant is barred at the threshold because on that record he made no residential use to which he could claim the private landing strip to be accessory. He gains nothing by resort to the by-law's provision permitting accessory uses since there is no use made of the property except for the landing strip. Village of Old Westbury v. Hoblin, 141 N.Y.S.2d 186 (N.Y.Supr.Ct.). See Adley v. Paier, 148 Conn. 84, 86, 167 A.2d 449; Mahler v. Board of Adjustment of the Borough of Fair Lawn, 94 N.J.Super. 173, 180, 227 A.2d 511, affd. 55 N.J. 1, 258 A.2d 705; Mola v. Reiley, 100 N.J.Super. 343, 348, 241 A.2d 861. Cf. Baddour v. Long Beach, 279 N.Y. 167, 175, 18 N.E.2d 18, app. dism. 308 U.S. 503, 60 S.Ct. 77, 84 L.Ed. 431. For the foregoing reasons, the final decree must be affirmed.

At the argument before this court the defendant offered a document entitled 'Additional Argument Supplementing Brief for Appellant.' stating that since the decision of the ***437** case in the Superior Court he 'has

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applied for and received a building permit and has in fact constructed a permanent residence which he now occupies as his domicile on the 20.47 acre parcel of land in Harvard which is the subject of this proceeding.' The town agreed only that the permit had been issued. The additional facts thus offered cannot be placed before us by the unilateral action of the defendant. Coonce v. Coonce, 356 Mass. 690, 693, 255 N.E.2d 330, and cases cited. However, since the additional facts, it treated as properly before us, would not change the result, and because both sides have argued the question whether the private landing strip would be permitted as accessory to a residential use, we think that by expressing our opinion upon that question we may prevent further litigation between the parties. Wellesley College v. Attorney Gen., 313 Mass. 722, 731, 49 N.E.2d 220, and cases cited. Simeone Stone Corp. v. Board of Appeals of Bourne, 345 Mass. 188, 192, 186 N.E.2d 457.

For the purpose of the present discussion we are assuming that the defendant occupies a residence located on the same premises where the landing strip is located. The only question therefore is whether the use of the landing strip is 'customarily incidental' to the residential use. A review of decisions construing these and similar words will be helpful.

In Needham v. Winslow Nurseries, Inc., 330 Mass. 95, 101, 111 N.E.2d 453, 457, we said that '(a)n incidental or accessory use under a zoning law is a use which is dependent on or pertains to the principal or main use,' and held that the sale of garden tools and equipment, the sale of certain merchandise not grown on the premises, **351 and the use of the premises as the headquarters for a contracting business were not permitted as accessory uses to 'greenhouses' and 'nurseries.' In Pratt v. Building Inspector of Gloucester, 330 Mass. 344, 113 N.E.2d 816, we held that the keeping of two show horses was not within any accessory use impliedly permitted in a residence district. We said, pp. 346—347, 113 N.E.2d, p. 817, 'When the question arises as to uses which in general tend to become deleterious to a neighborhood of homes it would seem that the most liberal test open to us *438 must be whether the use is one that is so necessary in connection with a one family detached house or so commonly to be expected with such a house that it cannot be supposed the ordinance was intended to prevent it. We do not believe that a stable for horses for family use could pass that test either as of 1927 when the ordinance was originally adopted or as of 1950 when it was reenacted. If the same question were presented as of the year 1900, for example, it is possible that a different answer would be required.'

The following helpful discussion of the meaning of the words 'subordinate and customarily incidental' in a zoning by-law provision for accessory uses is contained in Lawrence v. Zoning Bd. of Appeals of North Branford, 158 Conn. 509, 512—513, 264 A.2d 552.

'The word 'incidental' as employed in a definition of 'accessory use' incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. Indeed, we find the word

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'subordinate' included in the definition in the ordinance under consideration. But 'incidental,' when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of 'incidental' would be to permit any use which is not primary, no matter how unrelated it is to the primary use.

'The word 'customarily' is even more difficult to apply. Although it is used in this and many other ordinances as a modifier of 'incidental,' it should be applied as a separate and distinct test. Courts have often held that use of the word 'customarily' places a duty on the board or court to determine whether it is usual to maintain the use in question in connection with the primary use of the land. See 1 Anderson, (American Law of Zoning s 8.26) loc. cit. In examining the use in question, it is not enough to determine that it is incidental in the two meanings of that word as discussed above. The use must be further scrutinized to determine ***439** whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use. * * *

'In applying the test of custom, we feel that some of the factors which should be taken into consideration are the size of the lot in question, the nature of the primary use, the use made of the adjacent lots by neighbors and the economic structure of the area. As for the actual incidence of similar uses on other properties, geographical differences should be taken into account, and the use should be more than unique or rare, even though it is not necessarily found on a majority of similarly situated properties.'

The judge made no express finding on the factual issue whether a private landing strip is or is not 'customarily incidental' to a residential use. No finding was required on the issue because he found that 'there is no residence upon this land, nor is there any agricultural use conducted on the premises, * * * the respondent wants to use this landing strip for purely his personal use and for pleasure, * * * (and) the use of this air strip is not attached to any residential use or agricultural use of the premises in question.'

The defendant relies in part on cases which have held such uses as tennis courts, swimming pools and amateur radio towers to be accessory to residential uses. ****352** Wright v. Vogt, 7 N.J. 1, 80 A.2d 108; Skinner v. Zoning Bd. of Adjustment of the Township of Cherry Hill, 80 N.J.Super. 380, 193 A.2d 861; Bloomfield v. Parizot, 88 N.J.Super. 181, 211 A.2d 230; Hardy v. Calhoun, 383 S.W.2d 652 (Tex.Civ.App.). For additional citations and discussion of similar recreational uses held to be accessory to residential uses, see Rathkopf, The Law of Zoning and Planning (3d ed.) c. 23, s 36 at pp. 23—53 to 23—59, and Supplement thereto. We do not consider those cases applicable to the question before us.

Each of the parties has cited to us a decision in another State on the question whether a private landing strip is accessory to a residential use. The defendant relies on Schantz v. Rachlin, 101 N.J.Super. 334, 244 A.2d 328, affd. ***440** 104 N.J.Super. 154, 249 A.2d 18, and the town relies on Samsa v. Heck, 13 Ohio App.2d 94, 234 N.E.2d 312. In each case the zoning ordinance permitted accessory uses subordinate to the principal

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use and located on the same lot therewith. The ordinance in the Schantz case required that a claimed accessory use be 'clearly incidental' to the principal use, whereas that in the Samsa case required that it be 'customarily incident' thereto. Thus, the ordinance in the latter case was almost identical to that before us. In the Schantz case the court held the private landing strip use was permitted as accessory to a residential use, and in the Samsa case the court held that it was not. We consider the decision in the Samsa case more persuasive because of the similarity of the ordinance involved there to the ordinance before us.

In the case before us the defendant testified that his was the only private landing strip in the town of Harvard, and that he knew of none in adjoining towns. Even if we take notice of the increasing use of private aircraft as a means of business travel and transportation and for pleasure purposes, such use has not become so prevalent in Massachusetts that it can now be held that it is one 'customarily incidental' to the residential use of property. See Building Inspector of Falmouth v. Gingrass, 338 Mass. 274, 276, 154 N.E.2d 896. This conclusion is limited to the factual situation presented by the record before us, and we intend no suggestion that a private landing strip may not some day become 'customarily incidental' to a residential use.

Decree affirmed.

All Citations

360 Mass. 432, 275 N.E.2d 347

Footnotes

[1] The exact date the conversations started is unclear, but there is some evidence that they may have started as early as April, 1968.

[2] Section 39B, inserted by St.1946, c. 607, s 1, provides in part that 'no * * * airport, restricted landing area * * * shall be maintained or operated unless a certificate of approval of the maintenance and operation thereof is granted and is continued in force by the commission.' However, it also provides that the section shall not apply 'to restricted landing areas designed for non-commercial private use * * * provided, that each person constructing or maintaining a restricted landing area for non-commercial private use shall so inform the commission in writing.'

[3] Section 5.1 of the by-law provides as follows: '5.1 GENERAL. No use is permitted which is injurious, offensive, or otherwise detrimental to the neighborhood or community because of a. concussion, vibration, noise, or other mechanical disturbance, b. Smoke, dust, odor,

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fumes, or other air pollution, c. glare, fluctuating light, or electrical interference, d. danger of fire, explosion, radioactivity, or other danger, or e. wastes or refuse (except at the Town Dump), or other characteristics. The customary character of normal farm operations permitted in the Bylaw is not considered detrimental. The collection or open storage of junk or abandoned autos, the commercial raising of swine or fur animals, the manufacture or commercial storage of explosives, a fertilizer plant, a slaughter house, or a race track are specifically prohibited.'

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72 Mass.App.Ct. 372
Appeals Court of Massachusetts, Suffolk.

Susan MULDOON
v.
PLANNING BOARD OF MARBLEHEAD & another.[1]
No. 07–P–1033.
|
Argued May 7, 2008.
|
Decided Aug. 15, 2008.

Synopsis
Background: Landowner appealed planning board's conditional approval of landowner's proposed reconstruction of her single family home. The Land Court, Suffolk County, Karyn F. Scheier, J., annulled the decision and remanded for deletion of setback condition, and board and abutter appealed.

The Appeals Court, Grasso, J., held that by-law allowed board to impose conditions on site plan approval even if stricter than those imposed by minimum dimensional requirements.

Vacated and remanded.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****353** Kevin M. Dalton, Beverly, for the intervener.

****354** Francis T. Mayo, Salem, for the defendant.

Paul M. Lynch, Marblehead, for the plaintiff.

Present: GRASSO, TRAINOR, & WOLOHOJIAN, JJ.

Opinion

GRASSO, J.

***372** The Marblehead zoning by-laws (by-laws) require site plan review by the planning board (board) of certain construction in the town's shoreline districts. As part of its site plan review of Susan Muldoon's proposed reconstruction of her single family home, the board conditioned approval of Muldoon's plan on her (1) using wood clapboard or shingle, rather than brick, on the building exterior (the siding condition) and (2) positioning the house thirty feet from the southwestern boundary of the property rather than the 8.3 feet proposed and ***373** otherwise permitted under the eight-foot minimum setback of the applicable dimensional by-law provision (the setback condition).[2] On Muldoon's appeal pursuant to G.L. c. 40A, § 17, see *Prudential Ins. Co. of Am. v. Board of Appeals of Westwood,* 23 Mass.App.Ct. 278, 279, 502 N.E.2d 137 (1986), a Land Court judge ruled that the setback condition was unreasonable and beyond the board's authority because it derogated from the uniformity requirement of G.L. c. 40A, § 4.[3] The judge annulled the board's decision and remanded the case for entry of a new decision deleting the setback

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condition.[4]

On appeal, the board and Timothy Havens, Muldoon's abutter, contend that the judge erred. We agree. The imposition, as a condition of site plan approval, of a setback condition that is more stringent than the minimum setback specified under the applicable zoning by-law is not thereby unreasonable as violative of the uniformity requirement of G.L. c. 40A, § 4. We reverse the judgment annulling the board's decision and remand for determination of the reasonableness of the setback condition under the site plan review criteria contained in the by-law. See *Prudential Ins. Co. of Am. v. Board of Appeals of Westwood,* 23 Mass.App.Ct. at 282 n. 7, 502 N.E.2d 137 (judge determines legal validity of board's decision on facts found by her without being confined to evidence before the board).

1. *Site plan review.* Although not expressly provided by statute, site plan review is recognized as a permissible regulatory tool and a means for communities to control the aesthetics and environmental impacts of land use under their zoning by-law. See *Osberg v. Planning Bd. of Sturbridge,* 44 Mass.App.Ct. 56, 57, 687 N.E.2d 1274 (1997). Site plan review has to do with the regulation of permitted uses, not their prohibition. See *id.* at 57–59, 687 N.E.2d 1274. "[I]f the ***374** specific area and use criteria stated in the by-law [are] satisfied, the board [does] not have discretionary power to deny ... [approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use." *Prudential Ins. Co. of Am. v. Board of* ****355** *Appeals of Westwood,* 23 Mass.App.Ct. at 281–282, 502 N.E.2d 137, quoting from *SCIT, Inc., v. Planning Bd. of Braintree,* 19 Mass.App.Ct. 101, 105 n. 12, 106, 472 N.E.2d 269 (1984). The board is forbidden from entertaining any "standard, criterion or consideration not permitted by the applicable statutes or by-laws." *Britton v. Zoning Bd. of Appeals of Gloucester,* 59 Mass.App.Ct. 68, 73, 794 N.E.2d 1198 (2003). A zoning by-law may require site plan approval for uses that are otherwise permissible as of right, provided the site plan review provisions of the by-law (a) set forth proper standards for review; (b) do not authorize prohibition of the permitted use; and (c) provide for regulation of the permitted use through reasonable terms and conditions. See *Castle Hill Apartments Ltd. Partnership v. Planning Bd. of Holyoke,* 65 Mass.App.Ct. 840, 841, 844 N.E.2d 1098 (2006) (board limited to imposing reasonable conditions on use).

2. *The criteria for site plan approval.* Here, the site plan approval criteria are set forth in Section 200–37 of the by-law.[5] ***375** That section mandates that the board consider, among other things, the general purpose and intent of the by-law; the extent to which architectural and design features are in harmony with the prevailing character and scale of buildings in the neighborhood and town (including, without limitation, building materials, screening, breaks in roof and wall lines, adequate light, air, circulation, and separation between buildings); and the extent to which the adverse effects on abutting lots, the immediate neighborhood, and the town are minimized, including, but not limited to, obstructions of views. The site plan approval provision authorizes the board to "impose any conditions deemed necessary to achieve the purposes of [the by-law]."

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In applying these criteria, the board imposed the setback condition based on its specific finding that Muldoon's lot is ninety-two feet in width, leaving adequate space to locate the building farther away from the southwestern boundary line in order to provide for "improved light, air [,] ... circulation and separation" between Muldoon's and Haven's adjacent homes. On appeal, the judge did not assess the reasonableness of the condition on that ground because she concluded that the setback condition "cannot be found to be reasonable" because it derogates from the uniformity requirement of G.L. c. 40A, § 4. Relying on *Castle Hill Apartments Ltd. Partnership v. Planning Bd. of Holyoke, supra,* the judge ruled that the setback condition imposed a dimensional requirement that was not subject to alteration by the board, because "such matters were previously resolved in a legislative sense when the [town] enacted the [by-law]."

We disagree. That the by-law contains minimum dimensional requirements is not ****356** dispositive of whether, in accordance with site plan approval criteria set forth in the by-law, the board may impose reasonable conditions that result in stricter dimensional requirements than would otherwise be the case. In *Castle Hill, supra* at 847, 844 N.E.2d 1098, we noted that density was not among the factors listed for the board to consider. Here, by contrast, the site plan provision of the by-law specifically directs the board to consider (1) whether the architectural and design features of the proposed structure are in harmony with the prevailing character and scale of buildings in the neighborhood and town and afford adequate light, air, circulation, and separation between buildings, and ***376** (2) whether adverse effects on abutting lots, the neighborhood, and the town, including obstruction of views, are minimized. We construe the by-law provision as empowering the board to impose reasonable conditions on site plan approval in order to achieve those goals even where those conditions impose dimensional requirements stricter than the minimum required by the applicable zoning by-law. What conditions, if any, might be deemed reasonable or whether the problem is so intractable as to admit of no reasonable solution requires careful factual analysis. See *Prudential Ins. Co. of Am. v. Board of Appeals of Westwood,* 23 Mass.App.Ct. at 283, 502 N.E.2d 137 (judge examines the proposal to see if the problem is so intractable as to admit of no reasonable solution).

Because the judge ruled that *any* condition of site plan approval that increased the minimum dimensional requirements of the by-law was unreasonable, she did not make detailed factual findings addressing the board's contention that the setback condition was a reasonable means of assuring "adequate light, air, circulation, and separation" between Muldoon's and Haven's properties, and that Muldoon's placement of her home 8.3 feet from Haven's sideline would have the effect of needlessly obliterating a major portion of Haven's view and block an important source of Haven's light and air. Nor did she consider whether the setback condition was reasonable in light of the by-law's site plan approval criteria regarding the extent to which adverse effects on abutting lots, the neighborhood, and the town (including obstructions of views) are minimized.

Accordingly, we vacate the judgment

annulling the setback condition and remand for factual findings and determination regarding the reasonableness of the setback condition in light of the standards set forth in the zoning by-law.

So ordered.

All Citations

72 Mass.App.Ct. 372, 892 N.E.2d 353

Footnotes

[1] Timothy D. Havens, intervener, is an abutter.

[2] There is no dispute that Muldoon's use was permitted as of right in the shoreline general residence district and that the structure proposed by her complied with all of the minimum dimensional controls set forth in the by-law.

[3] General Laws c. 40A, § 4, as inserted by St.1975, c. 808, § 3, provides in pertinent part: "Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted."

[4] The judge also ruled that the siding condition imposed by the board was reasonable; Muldoon does not contest that ruling.

[5] Section 200–37(C) of the by-law provides in pertinent part:

"Standards for special permit for site plan approval. The Planning Board shall consider the following standards:

"(1) The general purpose and intent of this Bylaw.

"...

"(3) The extent to which:

"(a) The architectural and design features are in harmony with the prevailing character and scale of buildings in the neighborhood and Town (such as but not limited to: building

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materials, screening, breaks in roof and wall lines, adequate light, air, circulation and separation between buildings).

"...

"(e) The adverse effects on abutting lots, the immediate neighborhood and the Town of Marblehead are minimized including (such as but not limited to: conflicts between residential, commercial and industrial uses, obstructions of views, increases in use of Town services and impact on Town infrastructure)."

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2008 WL 4946478
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

Massachusetts Land Court.
Department of the Trial Court,
Middlesex County.

Jonathan WHITE, as trustee of 144 Beaver Road Trust and MJN Construction, LLC, Plaintiffs,
v.
Wendy Kaplan ARMOUR, Peter Knight, Winifred Li, Jane Carlson, Mark Margulies and Elizabeth Munro, as members of the Town of Weston Zoning Board of Appeals, The Town of Weston, and Eugene Reznik, Defendants.

No. 381210 (KCL).
|
Nov. 19, 2008.

MEMORANDUM AND ORDER ON THE PARTIES' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS (CONVERTED TO MOTIONS FOR SUMMARY JUDGMENT) AND THE PLAINTIFFS' MOTION FOR SUMMARY REINSTATEMENT OF BUILDING PERMIT

LONG, J.

Introduction

***1** This case is a G.L. c. 40A, § 17 appeal from a decision of the Weston Zoning Board of Appeals (the "ZBA") that revoked a January 3, 2008 building permit for additional finished space in the plaintiffs' dwelling at 144 Beaver Road in Weston and a G.L. c. 240, § 14A challenge to the bylaw on which that revocation was based.[1]

The essence of the dispute is simply stated. Town of Weston Zoning Bylaw § V.B.1.a (the "Bylaw") allows a single-family home to be constructed by right so long as its Residential Gross Floor Area ("RGFA") does not "exceed the greater of 3,500 s.f. or 10% of the lot area up to a maximum of 6,000 s.f."[2] If the RGFA exceeds that maximum, site plan approval from the Weston Planning Board is necessary. Bylaw § V.B.2.d.[3] The plaintiffs' home was built with a RGFA of just under 6,000 square feet,[4] but contained considerable unfinished space that deliberately was left unfinished so that site plan approval would not be required.[5] An occupancy permit was duly issued for the house in this configuration. Certificate of Occupancy No.1943 (Sept. 7, 2007).

Less than four months later, on December 19,

2007, the plaintiffs applied for a building permit to complete the unfinished areas, which was issued on January 8, 2008. Defendant Eugene Reznik, an abutter living at 158 Beaver Road, timely appealed that issuance to the defendant ZBA. As revealed at the hearing of that appeal, "the Building Inspector, the builder and the architect all had in mind that once the building was built with less than 6,000 s.f. of RGFA, a second building permit would be sought and granted to finish out the unfinished portions. It was their view that if the building were completed in stages, then so long as the first stage was less than 6,000 s.f., the building could be finished without site plan approval by the Planning Board." ZBA Decision at 5 (May 1, 2008).

The ZBA was equally as candid. It admitted that, "[t]o date, the Weston Planning Board has declined to review additions to existing houses to determine RGFA." *Id.* But, the ZBA saw the plaintiffs' situation as different.

> In substance, in fact, in intention, and in spirit, this particular case before the Board was not a situation of an existing house to which an addition later was added. It was a situation where a house was constructed that clearly exceeded the 6,000 s.f. RGFA limit, where site plan approval should have been sought beforehand. That the builder and architect made a mistake early in the construction process in calculating the building's RGFA is not an excuse for avoiding the site plan approval process. As soon as the mistake was discovered, the builder and owner should have applied for site plan approval or modified the design of the house so that it would fall under the 6,000 s.f. limit without having to resort to temporary fixes such as ripping out or leaving unfinished, for a short time, areas that were always meant to be finished.

***2** *Id.* Accordingly, since site plan approval had neither been sought, obtained, or waived by the planning board, the ZBA voted unanimously to revoke the building permit for the additional space. *Id.*

The plaintiffs' appeal from that decision and their motion for summary reinstatement of the building permit are based on three arguments. First, the plaintiffs argue that the Bylaw does *not* apply to subsequent work on a house, even if that work was intended from the start. Second, the plaintiffs contend that the ZBA is estopped by the past practices of the town's building inspector, who had issued building permits without site plan approval in allegedly similar situations, and by the planning board, which "has agreed to waive submission requirements and Site Plan Approval under Section V .B.2.d and Section XI of the Weston Zoning By-law, for existing houses that exceed the Residential Gross

Floor Area provision to the By-law, where finishing off interior space is proposed and where there is no change to the exterior of the house." Letter from Susan Haber, Town Planner, to Rob Morra, Inspector of Buildings (Aug. 15, 2008). Third, the plaintiffs maintain that the provision in G.L. c. 40A, § 3 that "[n]o zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building" invalidates the Bylaw requiring site plan approval for homes with an RGFA in excess of 6,000 square feet and the statute's exception "that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements" does not apply.

I disagree with each of these contentions. As more fully set forth below, on the undisputed facts of this case, I find and rule that the Bylaw clearly applies to situations such as this where a home deliberately has been phased with the intent of avoiding the site planning process. I find and rule that the past practices of the former building inspector do not estop either the current inspector or the ZBA from applying and enforcing the Bylaw.[6] I find and rule that the planning board's past practice of "waiv[ing] submission requirements and Site Plan Approval under Section V.B.2.d ... for existing homes ... where finishing off interior space is proposed and where there is no change to the exterior of the house," Letter from Susan Haber, Town Planner, to Rob Morra, Inspector of Buildings (Aug. 15, 2008), would not preclude that board from requiring site plan approval in the situation presented by this case or in any other case it deemed appropriate so long as its decision was not arbitrary or capricious. Finally, I find and rule that the Bylaw is a "reasonable regulation ... concerning the bulk and height of structures" and thus not invalid under G.L. c. 40A, § 3 nor in violation of the uniformity requirements of G.L. c. 40A, § 4. *See 81 Spooner Road LLC v. Brookline,* 452 Mass. 109, 117 (2008). Accordingly, the defendants' motion for summary judgment is **ALLOWED,**[7] the ZBA's decision is **AFFIRMED,** the plaintiffs' motion for summary reinstatement of the building permit is **DENIED,** and the plaintiffs' claims are **DISMISSED** in their entirety, with prejudice.

Discussion

***3** "Summary judgment is appropriate where there is no genuine issue of material fact, and when viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." *Gray v. Giroux,* 49 Mass.App.Ct. 436, 438 (2000) (citing Mass. R. Civ. P. 56(c)). The only *potentially* disputed facts relevant to these motions concern the past practices of the building inspector and planning board-did the former building inspector, in fact, issue building permits to build out previously unfinished interior space in excess of the RGFA threshold without prior site plan approval and did the *planning* board regularly "agree[ ] to waive submission requirements and Site Plan Approval under Section V.B.2.d and Section XI of the Weston Zoning By-law, for existing houses that exceed the Residential Gross

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Floor Area provision to the By-law, where finishing off interior space is proposed and there is no change to the interior of the house"? Letter from Susan Haber, Town Planner, to Rob Morra, Inspector of Buildings (Aug. 15, 2008). For purposes of these motions, taking all disputed facts in the light most favorable to the plaintiffs, I assume these facts to be true.[8] As discussed more fully below, however, they are not material to this memorandum and order. Even *with* these facts, the defendants are entitled to summary judgment dismissing the plaintiffs' claims as a matter of law.[9]

The initial question presented by this case-whether the Bylaw facially applies to situations where a building permit is sought for previously unfinished interior space that was deliberately left unfinished to avoid the requirement of site planning approval-is easily answered. Bylaws, like statutes, are to be interpreted according to "the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Moloney v. Boston Five Cents Savings Bank, FSB,* 422 Mass. 431, 433 (1996) (quoting *Telesetsky v. Wight,* 395 Mass. 868, 872-873 (1985)). The Bylaw's words are straightforward. Homes with an RGFA of more than 6,000 square feet require site plan approval before a building permit may issue. The Bylaw's purpose for this requirement is clear. In the town's judgment, size matters. Larger homes (those in excess of 6,000 square feet) are deemed to have a greater impact on their surroundings than smaller ones and surely this is so. Generally speaking, larger homes have more bulk, more bedrooms, more cars, more visitors, and more activity. Interpreting the Bylaw as *not* requiring site plan approval for a home in excess of 6,000 square feet if the developer simply leaves a portion of its interior unfinished for a short period of time would make the Bylaw subject to manipulation and evasion, effectively rendering it meaningless. *See 81 Spooner Road LLC,* 452 Mass. at 118-119 (upholding powers of towns to restrict subsequent conversion of previously "unfinished" space to prevent developers from "thwarting" bylaw requirements). The town currently interprets the Bylaw as requiring site plan approval in such situations (Aff. of Robert Morra, Inspector of Buildings at 1 (Sept. 11, 2008); ZBA Decision at 5 (May 1, 2008)) and that interpretation is entitled to deference. *Livoli v. Zoning Bd. of Appeals of Southborough,* 42 Mass.App.Ct. 921, 923 (1997).

***4** The plaintiffs argue that the Bylaw impermissibly turns a "by right" use into a use requiring a special permit. Amended Case Management Joint Statement at 2 (July 15, 2008). This is incorrect for two reasons. First, on its face, the Bylaw does *not* require a special permit, only site plan approval. The two are quite different. *Osberg v. Planning Bd. of Sturbridge,* 44 Mass.App.Ct. 56, 58-59 (1997). Unlike a discretionary special permit, "if the specific area and use criteria stated in the by-law [are] satisfied, the board [does not] have discretionary power to deny ... [site plan approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use." *Prudential Ins. Co. of America v. Bd. of Appeals of Westwood,* 23 Mass.App.Ct. 278, 281-82 (1986) (quoting

SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass.App.Ct. 101, 105, n. 12, 106 (1984)). Second, a municipality is entitled to draw reasonable regulatory distinctions based on size. The line drawn by the Bylaw (requiring site plan approval for homes greater than 6,000 square feet) is not only a reasonable distinction, but also a reasonable approach to addressing the consequences of such size. *See Y.D. Dugout, Inc. v. Bd. of Appeals of Canton,* 357 Mass. 25, 31 (1970) (towns may adopt "reasonably flexible methods ... allowing [their] boards ... to adjust zoning regulation to the public interest in accordance with sufficiently stated standards"); *Andrews v. Town of Amherst,* 68 Mass.App.Ct. 365, 367-368 (2007) (Municipalities have "broad legislative powers" under the Home Rule Amendment, Art. 89 of the amendments to the Massachusetts Constitution, and the Zoning Enabling Act, G.L. c. 40A, to regulate land use within their boundaries. Standards will be upheld so long as they serve allowable zoning objectives, § 2A of St.1975, c. 808, and are neither in violation of any provision of the Zoning Enabling Act nor "an arbitrary or unreasonable exercise of the police power having no substantial relationship to the public health, safety or general welfare.").

Moreover, an important point should not be forgotten. The town is *not* saying that a building permit will not issue. The ZBA has simply said that the permit's issuance in this case was premature because site plan review was never sought, obtained, or formally waived by the planning board. The law prohibits the planning board from acting arbitrarily or capriciously. After reviewing the situation, the planning board might very well decide that the site need not be altered in any way. At most, it can only impose reasonable terms and conditions unless no such terms could resolve the site's problems, if any. *Prudential Ins. Co. of America,* 23 Mass.App.Ct. at 283 n. 9 ("In some cases, the site plan, although proper in form, may be so intrusive on the interests of the public in one regulated aspect or another that rejection by the board would be tenable.").

***5** The plaintiffs next argue that the town is estopped from enforcing its Bylaw because the past practice of its building inspector had been to issue building permits to build out previously unfinished interior space without prior site plan approval and the past practice of its planning board had been to waive submission requirements and site plan approval where (as here) there was no change to the exterior of the house. This too is incorrect. First, this is *no longer* the building inspector's practice and, moreover, it is one he recognizes was "not consistent with the RGFA requirements of the By-law." Aff. of Robert Morra at 1. Second, it is not clear that it is *still* the practice of planning board or if, under that practice, waivers were given *automatically* for situations such as this where the developer deliberately left space unfinished (space always clearly *intended* to be finished) solely to avoid the site planning approval process. If that *is* the practice, for the reasons discussed above, it is improper. The Bylaw requires site plan approval and a municipality is not estopped from enforcing its laws due to the previous improper actions of its agents. *Holahan v. Medford,* 394 Mass. 186, 191 (1985) (courts should be "reluctant to apply principles of estoppel to public entities where to do so would negate requirements of law intended to protect the public interest," quoting *Phipps Prods.*

Corp. v. Massachusetts Bay Transp. Auth., 387 Mass. 687, 693 (1982)); *Dagastino v. Commr. of Corr.,* 52 Mass.App.Ct. 456, 459 (2001) (citing *McAndrew v. School Comm. of Cambridge,* 20 Mass.App.Ct. 356, 360 (1985)).

The plaintiffs' next challenge to the Bylaw is their contention that it violates G.L. c. 40A, § 3 and is thus invalid because it impermissibly regulates the interior area of a single-family residential building. This argument also fails. The Bylaw does not regulate the interior area. It regulates the *external impact* of that area and is thus a permissible regulation concerning the "bulk" of structures within the meaning of G.L. c. 40A, § 3. 81 *Spooner Road LLC,* 452 Mass. at 117.

The zoning bylaw at issue in *81 Spooner Road LLC* concerned a residential dwelling's floor-to-area ratio. A building permit was issued and the neighbors challenged that permit on the grounds that the top floor of the house was intended to be used as habitable space, not an attic. The ZBA agreed and revoked the permit. The developer appealed, contending that the floor-to-area ratio regulations were invalid as applied to single-family homes pursuant to G.L. c. 40A, § 3. The initial question presented was whether G. c. 40A, § 3 prohibited "all restriction of the interior area of a residence." *Id.* at 112. The Supreme Judicial Court rejected this argument, noting that if it did so,

> none of the regulatory devices mentioned in the proviso in § 3, second par. [allowing "reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements"] would be valid, and single-family residences could be constructed to cover an entire lot, with no height restriction. Houses, as well as lots, could abut, wreaking havoc on the purposes of zoning. We do not construe a statute in a manner that renders its purposes ineffective or its words meaningless.

***6** *Id.* at 112-113. It further stated that "the prohibition ... cannot be absolute because it would deprive the town of all ability to regulate 'density of population and intensity of use' created by single-family homes." *Id.* at 117.

In construing the meaning of the statute, the court focused particularly on its use of the word "bulk." As the court noted, "unlike the other devices mentioned in the proviso, a 'bulk' regulation operates in a more complex manner involving consideration of interior area" and was different and distinct from "size." *Id.* at 113-114. "[W]hen 'bulk' and 'size' are used interchangeably, they refer to width, length, and height, but 'bulk may also be expressed in terms of [a building's] gross floor area.' " *Id.* at 114 (citing 3 A.H. Rathkopf & D.A. Rathkopf, Zoning and Planning § 54:2, at 54-2 (2005)). "[R]egulation of the bulk of a building by considering its internal area, as through the use of a floor-to-area ratio, is a generally recognized and accepted principle of zoning" of which "the Legislature was well aware" when it enacted G.L. c. 40A, § 3. *Id.* at 115. Thus, the court concluded, "it follows that the proviso of § 3, second par., permits consideration of interior area in bulk regulation." *Id.* In sum, the court concluded,

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"regulation of single-family residences pursuant to the authority in the proviso of G.L. c. 40A, § 3, second par., including bulk regulation of floor-to-area ratio, is a proper exercise of the zoning power, provided the effect of such regulation on the interior area of such structures is incidental." *Id.* at 117.

Here, the regulation is of "gross floor area" rather than "floor-to-area ratio," but the analysis is the same. As stated above, bulk can be expressed in terms of gross floor area. *Id.* at 114. Further, as the court held, "to the extent the definition of 'gross floor area' and the floor-to-area ratio operate as a use restriction, they constitute a permissible 'intensity of use' regulation under c. 40A, § 3 and St.1975, c. 808, § 2A." *Id.* at 118.

Whether this Bylaw (requiring site plan approval for homes with an RGFA in excess of 6,000 square feet) is an "incidental" rather than "direct" regulation of interior space and whether the requirement of site plan approval is rationally related to RGFA has already been answered by the analysis earlier in this memorandum. To repeat, in the view of the town, size matters. Larger homes (those in excess of 6,000 square feet) are deemed to have more of an impact on their surroundings than smaller ones and surely this is so. Generally speaking, larger homes have more bulk, more bedrooms, more cars, more visitors, and more activity.

To be sure, the court in *81 Spooner Road LLC* did state that "dimensional, bulk, and density requirements may properly regulate single-family residences so long as they *do not set minimum or maximum levels of interior area*." *Id.* at 116-17 (emphasis added). However, contrary to the plaintiffs' argument, the site plan approval requirement for residences with an RFGA greater than 6,000 square feet does *not* "flatly prohibit the construction of a single-family house in excess of 6,000 square feet."[10] Reply Brief of Jonathan A. White, Trustee, and MJN Construction LLC, to Oppositions and Cross Motions of Town of Weston and the Weston ZBA, and to Reznik's Opposition to Motion for Judgment on the Pleadings at 5 (Aug. 15, 2008); *see also* Brief of Jonathan A. White, Trustee, and MJN Construction LLC, in Support of Motion for Judgment on the Pleadings Pursuant to M.R. Civ. P. 12(c) at 19 (June 27, 2008). Rather, it merely sets a level that triggers a requirement for site plan approval for residences with an RGFA greater than 6,000 square feet. This is clearly intended to address the *external effects* of such bulk (*e.g.,* the number of cars, residents and visitors; parking and driveway location; the types and locations of activities, etc.) and thus is a rational and "incidental" bulk regulation. *See 81 Spooner Road LLC,* 452 Mass. at 118-19 (where the bylaw provision allowing conversion of attic and basement space to habitable space only after ten years was rationally related to the goal of regulating density and intensity of use).

***7** The plaintiffs also contend that the site plan approval requirement for buildings with an RGFA greater than 6,000 square feet cannot validly regulate bulk and density because other provisions in the Bylaw specifically deal with bulk and density considerations (height, setback, parking, etc.) and the planning board would be bound to follow them. As *Muldoon v. Planning Board of Marblehead* makes clear, however, that argument fails as well. 72 Mass.App.Ct. 372 (2008). Where, as here, the goals of site plan

approval include minimizing the impacts to neighboring properties and the community,[11] the site plan approval bylaw allows the planning "board to impose reasonable conditions on site plan approval in order to achieve those goals even where those conditions impose dimensional requirements stricter than the minimum required by the applicable zoning by-law." *Id.* at 376. Stricter requirements in such circumstances do not violate the uniformity requirements of G.L. c. 40A, § 4. *Id.* at 375. As a result, the fact that the planning board evaluates the impacts of bulk and density for homes with an RGFA in excess of 6,000 square feet under the Bylaw's general site plan approval provisions rather than simply requiring those homes to meet the specific dimensional requirements in other sections does not invalidate the site plan approval requirement for those homes.

The plaintiffs' more general attack that the Bylaw violates the uniformity requirements of G.L. c. 40A, § 4 fails as well. In this argument, the plaintiffs once again equate the site plan approval requirement to bylaws that require a special permit for certain uses, citing *SCIT, Inc. v. Planning Board of Braintree,* 19 Mass.App.Ct. 101 (1984), for the proposition that Weston cannot require site plan approval without violating the uniformity requirement. As explained above, however, special permits and site plan approvals are very different mechanisms, and the Bylaw does *not* require a special permit for a use allowed as of right. In addition, as the town points out in its briefs, the town applies uniform requirements within the two classes established by the Bylaw: (1) single-family residences constructed after October 29, 1988 with an RGFA of *less* than 6,000 square feet and (2) single-family residences constructed after October 29, 1988 with an RGFA of *more* than 6,000 square feet. The fact that the planning board *may* impose stricter requirements on residences with an RGFA exceeding 6,000 square feet does not violate the uniformity requirement. *Muldoon,* 72 Mass.App.Ct. at 375.

Conclusion

For the foregoing reasons, I find and rule that Bylaw §§ V.B.1.a, V.B.2.d, and XI, requiring site plan approval for single-family homes with an RGFA in excess of 6,000 square feet, clearly applies to situations such as this where a home deliberately has been phased with the intent of avoiding the site planning process. I find and rule that the past practices of the former building inspector do not estop either the current inspector or the ZBA from applying and enforcing the Bylaw. I find and rule that the planning board's apparent practice of "waiving submission requirements and Site Plan Approval under Section V.B.2.d ... for existing homes ... where finishing off interior space is proposed and where there is no change to the exterior of the house," Letter from Susan Haber, Town Planner, to Rob Morra, Inspector of Buildings (Aug. 15, 2008), would not preclude that board from requiring site plan approval in the situation presented by this case or in any other case it deemed appropriate so long as its decision was not arbitrary and capricious. Finally, I find and rule that the Bylaw is a "reasonable regulation ... concerning the bulk and height of structures" and thus is not invalid under G.L. c. 40A, § 3 nor in violation of the

uniformity requirements of G.L. c. 40A, § 4. *See 81 Spooner Road LLC,* 452 Mass. at 117; *Muldoon,* 72 Mass.App.Ct. at 374. Accordingly, the defendants' motion for summary judgment is **ALLOWED,** the ZBA's decision is **AFFIRMED,** the plaintiffs' motion for summary reinstatement of the building permit is **DENIED,** and the plaintiffs' claims are **DISMISSED** in their entirety, with prejudice. Judgment shall enter accordingly.

***8 SO ORDERED.**

All Citations

Not Reported in N.E.2d, 2008 WL 4946478

Footnotes

1 The home is owned by plaintiff Jonathan White, as trustee of 144 Beaver Road Trust. Plaintiff MJN Construction, Inc. was the applicant for its permits, as agent for the trust.

2 "*By Right Uses:* a. Unless located on a lot which bounds on a Scenic Road as defined in Section II, single family detached dwelling containing one housekeeping unit only, together with accessory buildings not containing a housekeeping unit.... The Residential Gross Floor Area 'RGFA' of any new or replacement single family dwelling use constructed pursuant to a building permit issued on or after October 29, 1998 may not exceed the greater of 3,500 s.f. or 10% of the lot area up to a maximum of 6,000 s.f." Bylaw § V.B.1.a.

> Bylaw § V.B.1.a. Bylaw § II (Definitions) defines RGFA as "[t]he sum of the horizontal area(s) of the above-grade floors in the residential building(s) on a lot, excluding unfinished attics but including attached or detached garages. The RGFA shall be measured from the exterior face of the exterior walls."

3 "*By-Right Uses Allowed With Site Plan Approval:* d. New or replacement single-family dwelling, together with accessory buildings not containing a housekeeping unit, in conformity with Section VI.F.2 [requirements for number and location of dwellings on one lot], which is constructed pursuant to a building permit issued on or after October 29, 1998, and which exceeds the RGFA limit provided in Section V.B.1.a." Bylaw § V.B.2.d.

4 The plaintiffs' architect calculated the final RGFA as 5,992 square feet. Letter from Richard Waitt, Jr., P.E. of Meridian Associates, Inc. to Mr. Courtney Atkinson, Building Inspector

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(Oct. 26, 2007).

[5] Attic space is excluded from RGFA calculations. *See* n. 2, *supra.* To bring their RGFA below 6,000 square feet, the plaintiffs left a 400 square foot second floor room unfinished, removed its ceiling, and thus turned it into an attic. *See* Ex. 1 (Second Floor Plan, "unfinished area").

[6] Weston's new building inspector, Robert Morra, testified by affidavit that he has "determined that past practices of this [the Building] department are not consistent with the RGFA provisions of the By-law in that building permits have been issued for existing residences, without referral to the Planning Board for Site Plan review, despite the fact that the maximum threshold requirements of Section V.B.1.a of the By-law have been exceeded" and, "because [he] has determined that such a practice is not consistent with the By-law's RGFA provisions, [he has] put an end to that practice and [has] denied and will continue to deny any application for a building permit which exceeds RGFA thresholds in new construction or for an existing residence constructed pursuant to a building permit issued on or after October 29, 1998" (the effective date of that Bylaw provision). Aff. of Robert Morra at 1-2 (Sept. 11, 2008). He further stated that he would "continue to require the building permit applicant to apply to the Town's Planning Board for Site Plan Approval pursuant to Section XI of the By-law" and, "[o]nce the Planning Board has concluded its review of the proposed project pursuant to Section XI of the By-law, a building permit may be issued if all other By-law requirements are met." *Id.* at 2.

[7] The motions under consideration were initially filed under Mass. R. Civ. P. 12(c) (judgment on the pleadings). All parties, however, submitted materials beyond the scope of that rule (Plaintiffs, for example, filed an appendix that included materials from other cases (Misc. Case Nos. 354262(AHS) and 376194(KCL)) and an affidavit of Janet Schmidt (attaching letter from Weston's town planner and documents related to building permits for other properties). Defendant Eugene Reznik filed his own affidavit. The town defendants filed an affidavit from the town's current building inspector, Robert Morra, and documents related to his rulings on other building permit applications.). The motions were thus converted to ones for summary judgment and I address them as such. Mass. R. Civ. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment.").

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[8] The defendants concede that such building permits had been issued in the past by the former building inspector, a practice that Mr. Morra, the current building inspector, does not follow and it is one that he believes was "not consistent with the RGFA requirements of the By-law." Aff. of Robert Morra, Inspector of Buildings at 1 (Sept. 11, 2008). The defendants also concede that, in at least one instance (15 Walnut Road), the planning board "agreed to waive submission requirements and site plan approval" as set forth in Ms. Haber's August 15, 2008 letter.

[9] The plaintiffs' argument that Mr. Reznik did not have standing to bring the plaintiffs' violation of the RGFA Bylaw before the ZBA of appeals is unavailing. As a direct abutter, potentially affected by the external impacts of the plaintiffs' expansion of their RGFA, Mr. Reznik had a "legitimate interest in preserving the integrity of the district," *Rafferty v. Sancta Maria Hospital,* 5 Mass.App.Ct. 624, 629-30 (1977), and thus a right to have the issue of the Bylaw's applicability addressed by the ZBA.

[10] The plaintiffs even acknowledge this fact in other sections of their brief-"No reading of the Weston Bylaw leads to the conclusion that a house exceeding 6,000 square feet may not be built at all." Brief of Jonathan A. White, Trustee, and MJN Construction LLC, in Support of Motion for Judgment on the Pleadings Pursuant to M.R. Civ. P. 12(c) at 30-31 (June 27, 2008).

[11] *See* Bylaw §§ XI.H.4 ("development shall minimize demands placed on Town services and infrastructure), XI.H.8 ("Exposed storage areas ... and other unsightly uses shall be set back and/or screened to protect neighbors from objectionable features."), XI.H.9 ("proposed projects shall be designed in such a way as to minimize shadows on neighboring properties"), and XI.H.10 ("There shall be no unreasonable glare ... onto neighboring properties from lighting or reflection.").

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December 12, 2023
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By Electronic &1st Class Mail

Howard S. Goldman, Acting Chair
Zoning Board of Appeals
Town of Needham
Public Service Administration Building
500 Dedham Avenue
Needham, MA 02492

Re: Appeal of Building Permit # BC-23-10079 – 1688 Central Ave., Needham, MA (the "Building Permit")

Dear Acting Chair Goldman and Members of the Zoning Board of Appeals:

By formal application dated October 23, 2023 (the "Appeal"), several named Needham residents ("the Appellants") appealed the decision of the Needham Building Commissioner, Joseph Prondak, to issue a Building Permit dated September 19, 2023 (the "Building Permit"), to Matt Borrelli and Needham Enterprises, LLC (collectively, "Needham Enterprises"), for the construction of a childcare facility (the "Project") on the property located at 1688 Central Avenue in Needham (the "Property"). We are writing on behalf of the prospective tenant for the Project, the Needham Children's Center, to notify the Board of certain serious, procedural defects which require the immediate dismissal of the Appeal for lack of jurisdiction.

Specifically, and while there are significant and compelling *substantive* reasons to deny the Appeal, as those reasons are described in the letter written by applicant's counsel, Attorney Evans Huber, dated November 13, 2023, there are fatal *procedural* errors which render this Board without jurisdiction to hear any part of the Appeal. As more fully detailed in the paragraphs that follow, the Board cannot proceed to the merits of the Appeal, and must vote to dismiss the Appeal for lack of jurisdiction because:

1. The Appellants state they are appealing the Building Permit pursuant to Massachusetts General Laws, Chapter 40A, §§8 and 15, and § 7.5.1 of the Zoning Bylaw. The section cited by Appellants, M.G.L. c. 40A, § 8, provides a process for an appeal to this Board by "any person aggrieved … by an order or decision of the inspector of building." The other section cited by Appellants, M.G.L. c. 40A, § 15, expressly requires that appeals pursuant to § 8 be filed within 30 days. Article III of the Rules of the Needham Zoning Board of Appeals further requires that: "***Any communication, purporting to be an appeal, a petition or an application, shall be***

treated as mere notice of intention to seek Board action, until such time as it is made on a complete official application form and the applicable filing fee is paid." While the Appellants filed a letter captioned as a "Notice of Appeal" on October 19, 2023, their formal Application of Appeal was not filed until October 23, 2023 (see a true copy attached hereto as **Exhibit A**), four days after the mandated deadline. The failure to meet this deadline is fatal to the Appellants' appeal and deprives the Board of jurisdiction. *Connors v. Annino,* 460 Mass. 790, 797 (2011) ("We interpret §§ 7, 8 and 15 to mean that when a party with adequate notice of the issuance of a building permit claims to be aggrieved by the permit on the ground that it violates the zoning code, the party must file an administrative appeal within thirty days of the permit's issuance; a failure to do so deprives the board or other permit granting authority, and later the courts, of jurisdiction to consider the appeal.")

2. In their letter entitled Notice of Appeal, the Appellants further state: "This is also a request to the Building Commissioner, made pursuant to Mass. Gen. L. c.40A, §§ 7 [*sic*], to enforce the Zoning Bylaw by revoking or suspending the Building Permit." The section quoted by the Appellants, M.G.L. c. 40A, § 7, describes the process for interested parties to request zoning enforcement, and details the Building Commissioner's responsibility to respond, in writing, if the request is denied. By letter dated November 1, 2023, the Building Commissioner followed the prescribed procedure and issued his denial of the Appellants' request for enforcement (hereinafter, "the Enforcement Denial Decision", a true copy of which is attached hereto as **Exhibit B**). In addition to providing a process for appealing building permits, M.G.L. c. 40A, § 8, also provides a process for an appeal to this Board by "any person aggrieved by reason of his inability to obtain … enforcement action" and, as noted above, § 15 expressly requires that appeals pursuant to § 8 be filed within 30 days. The Appellants never appealed the Enforcement Denial Decision within 30 days, and therefore, the Building Commissioner's decision on those claims is final and not subject to appeal before this Board. See *Vokes v. Avery W. Lovell, Inc.*, 18 Mass. App. Ct. 471, 479 (1984), review denied, 393 Mass. 1103. ("We conclude that the date on which a zoning enforcement officer responds in writing to a § 7 request for enforcement creates the appealable decision contemplated by § 8 and becomes the date for measuring the thirty-day appeal period set forth in § 15."); see also *Connors v. Annino,* supra, 460 Mass. at 797 (holding that failure to file the administrative appeal within thirty days deprives the board of jurisdiction to consider the appeal).

Accordingly, and as a matter of law, this Board lacks jurisdiction to hear the Appellants' claims, and must move forthwith to dismiss the Appeal for lack of jurisdiction. Further details in support of the dismissal are set forth in the following paragraphs which, in addition to

summarizing the statutory provisions governing the procedural defects outlined above, also review the state and local provisions defining the scope of the Board's jurisdiction to hear Section 15 appeals, the impact of the Judgment in the earlier Land Court litigation, and provide additional grounds for the Board to deny the Appeal, should it decide to reach its merits. We trust that, after hearing all of this important legal background, the Board will act swiftly to vote to dismiss the Appeal at its next hearing and allow this much-needed childcare facility to be constructed without further obstruction and delay.

A. Procedural Background

To understand the scope of the Board's role in this Appeal, it is first important to understand how this matter came before the Board in its current procedural posture. The Building Permit was issued following the entry of Judgment in the matter of *Needham Enterprises, LLC v. Needham Planning Board, et al.,* Massachusetts Land Court, Miscellaneous Case No. 22 MISC 000158 (JSDR) (the "Litigation"). The Litigation was filed by Needham Enterprises following the issuance of a Special Permit by the Needham Planning Board pursuant to the Needham Zoning Bylaw's ("NZB") provisions governing Major Project Site Plan Review Special Permits (the "Planning Board Decision"). In the Litigation, Needham Enterprises challenged the application of the Major Site Plan Review Special Permit process to the Project on the grounds that the Project involved a use protected under the provisions of the so-called Dover Amendment set forth in Massachusetts General Laws, Chapter 40A, Section 3. The Litigation further challenged several of the conditions imposed by the Planning Board through the Major Site Plan Review Special Permit process.

During the Litigation, the Appellants sought to intervene twice. On both occasions, their Motion to Intervene was denied by the Land Court on the grounds that their interests were already adequately represented by the Planning Board.

After a three (3) day bench trial and site view, the Land Court entered its Judgment in the Litigation on August 22, 2023. A true copy of the Judgment is attached hereto as **Exhibit C.** In its Judgment, the Land Court annulled the Planning Board Decision finding that, pursuant to the provisions of the Dover Amendment, the Planning Board Decision:

(1) exceeded its authority its authority and is hereby annulled,

(2) that the Project complies with the dimensional requirements of the ***local zoning bylaws and,*** pursuant to G. L. c. 40A, § 3, ***is not subject to further review thereunder***, and

(3) that the LLC is entitled to apply for a building permit ***without further action by the Board***. (emphasis supplied).

After Judgment entered, Needham Enterprises applied to the Building Commissioner for the Building Permit to construct the Project. According to his November 1, 2023 letter, the Building Commissioner reviewed the Building Permit application and determined that it "proved satisfactory to all regulations under purview of the Department." See Exhibit B. He thus issued the Building Permit on September 19, 2023.

As noted above, by Application dated October 23, 2023, the Appellants appealed the Building Permit to this Zoning Board of Appeals, citing that the appeal was filed pursuant to Massachusetts General Laws, Chapter 40A, §§ 8 and 15, and the Needham Zoning Bylaw, § 7.5.1, and further requested, pursuant to Massachusetts General Laws, Chapter 40A, § 7, that the Building Commissioner enforce the zoning bylaw and revoke the Building Permit. The Building Commissioner responded to the enforcement request pursuant to § 7 by issuing his Enforcement Denial Decision, dated November 1, 2023. Each of these local and statutory provisions are reviewed in the paragraphs below.

B. Applicable Statutory and Zoning Bylaw Provisions

The following paragraphs review the local and statutory provisions identified in the Appeal, as well as the relevant provisions of the Rules of the Needham Zoning Board of Appeals and Massachusetts General Laws, Chapter 40A, § 14, the state statute defining the powers of boards of appeal in Massachusetts:

1. Needham Zoning Bylaw, Section 7.5.1

Section 7.5.1 of the NZB states, in relevant part, that the Needham Zoning Board of Appeals shall:

> "…hear and decide an appeal taken by any person aggrieved by reason of his (her) inability to obtain a permit or enforcement action from the Building Inspector ***under the provisions of General Laws, Chapter 40A and/or this By-Law***... or by any person … aggrieved by an order or decision of the Building Inspector in violation of any provision of the General Laws, Chapter 40A or this By-Law." (emphasis supplied).

Thus, this local bylaw provides for appeals both from a decision of the Building Inspector to issue a permit and from a zoning enforcement decision (both relevant to this Appeal). By its express terms, the provision authorizing the Board to hear appeals such as the instant Appeal, limits the scope of the Board's review solely to zoning matters set forth in the Massachusetts Zoning Act (M.G.L. c. 40A) and the NZB. Accordingly, issues pertaining to matters not regulated by zoning – such as those regulated by the Needham General Bylaws or by Board of Health Regulations – are **not** within the Board's jurisdiction in this appeal.

2. Massachusetts General Laws, Chapter 40A, Section 8

Section 8 of M.G.L. c. 40A similarly provides, in relevant part:

> "An appeal to the permit granting authority ***as the zoning ordinance or by-law may provide***, may be taken by any person aggrieved ***by reason of his inability to obtain*** a permit or ***enforcement action from any administrative officer*** under the provisions of this chapter… ***or by any person … aggrieved by an order or decision of the inspector of buildings***... in violation of any provision of this chapter or any ordinance or by-law adopted thereunder." (emphasis supplied).

Thus, like its parallel local NZB counterpart, §7.5.1, this statute provides for appeals both from a decision of the Building Inspector to issue a permit and from a zoning enforcement decision (both relevant to this Appeal). Here again, like the parallel local NZB provision, the scope of the Board's authority to hear appeals under this state statute is limited to alleged violations of the Zoning Act (M.G.L. c. 40A) and the Needham Zoning Bylaw. The Board's jurisdiction does not include matters not regulated by zoning – such as those regulated by the Needham General Bylaws or by Board of Health Regulations.

3. Massachusetts General Laws, Chapter 40A, Section 7

Section 7 of M.G.L. c. 40A charges the Building Commissioner with the enforcement of the zoning bylaw and further provides the process for requesting zoning enforcement, stating in relevant part that, if the Building Commissioner:

> "…is requested in writing to enforce such ordinances or by-laws against any person allegedly in violation of the same and such officer or board declines to act, he shall notify, in writing, the party requesting such enforcement of any action or refusal to act, and the reasons therefor, within fourteen days of receipt of such request."

Thus, § 7 describes the process for interested parties to request zoning enforcement, and details the Building Commissioner's responsibility to respond, in writing, within fourteen days, if the request is denied, together with an explanation of the reasons for the denial.

4. Massachusetts General Laws, Chapter 40A, Section 15

Section 15 of M.G.L. c. 40A details the hearing process conducted by the Zoning Board of Appeals when hearing appeals brought pursuant to § 8 and, in relevant part, states:

> "Any appeal under [§ 8]… ***shall be taken within thirty days*** from the date of the order or decision which is being appealed. The petitioner shall file a notice of appeal specifying

> the grounds thereof, with the city or town clerk, and ***a copy of said notice,*** including the date and time of filing certified by the town clerk, ***shall be filed forthwith by the petitioner with the officer or board whose order or decision is being appealed,***[1] and to the permit granting authority, specifying in the notice grounds for such appeal…
>
> …
>
> "The concurring vote … of four members of a board consisting of five members, shall be ***necessary to reverse any order or decision*** of any administrative official under this chapter …
>
> …
>
> "The board shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions…" (emphasis supplied).

Section 15 thus sets the 30-day deadline for any aggrieved party to appeal a Building Commissioner's decision to the Zoning Board of Appeals. As detailed below, case law confirms that failure to meet this deadline is fatal to the appeal. Section 15 also mandates a super-majority quantum of vote to "reverse" the Commissioner's decision under the Zoning Act and/or the NZB, or otherwise the decision will be upheld.

5. Rules of the Needham Zoning Board of Appeals, Article III

Article III of the Rules of the Needham Zoning Board of Appeals, a copy of which is attached hereto as **Exhibit D**, governs how appeals and petitions are made to the Zoning Board of Appeals and states:

> "Every petition and application for action by the Board shall be made on an official application form, entitled "Board of Appeals - Application for Hearing," which shall be furnished by the clerk upon request. ***Any communication, purporting to be an appeal, a petition or an application, shall be treated as mere notice of intention to seek Board action, until such time as it is made on a complete official application form and the applicable filing fee is paid.*** To be a complete form, the applicant must consult with the Building Inspector and all information called for by the form must be furnished by the applicant in the manner therein prescribed with precise language identifying the applicable provisions of the Zoning By-Laws and the specific nature of the appeal,

[1] In his letter dated November 1, 2023, the Building Commissioner states that he was never served with a copy of the Appeal.

petition or application. The form to be used is hereby made a part of these Rules." (emphasis supplied).

Here, the Rules of the Needham Zoning Board of Appeals make clear that an appeal of a Building Commissioner's decision will not be deemed to have been made unless and until the application form required by the Board has been filed, together with the filing fee.

6. Massachusetts General Laws, Chapter 40A, Section 14

Section 14 vests zoning boards of appeal in Massachusetts with the power to hear and decide appeals in accordance with M.G.L. c. 40A, § 8, as described above. In exercising that power, § 14 provides that the Board may:

> "make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision, and to that end ***shall have all the powers of the officer from whom the appeal is taken*** and may issue or direct the issuance of a permit." (emphasis supplied).

Thus, § 14 limits the Zoning Board to the exercise of only the powers the Building Commissioner held in his review of the Building Permit application, i.e., determining whether the Project complied with the provisions of the NZB. See NZB § 7.2.1 ("[n]o building or structure shall be constructed…without a permit having been issued by the Building Inspector. No such permit shall be issued unless such construction…as proposed, shall comply in all respects with the provisions of this By-Law….").

Consequently, in light of the foregoing statutory and local provisions, the scope of the Board's authority **when reviewing a timely-filed appeal of a Building Permit or zoning enforcement decision**, is to either: (i) uphold the Building Commissioner's decision; or (ii) reverse it on the grounds that it violates zoning (in which case, the needed zoning relief must then be obtained from either the Board of Appeals or the Planning Board, depending on which zoning provision is determined to be violated).

In this instance, however, because no timely appeal was filed – of neither the Building Permit nor the Building Commissioner's Enforcement Denial Decision – the Board must dismiss the Appeal for lack of jurisdiction, as detailed in the paragraphs below.

C. The Appellants' Appeal Must Be Dismissed for Lack of Jurisdiction

The Board may not reach the substantive merits of the Appellants' Appeal because it fails on jurisdictional grounds. Specifically, this Board does not have jurisdiction to review either the Appeal of the Building Commissioner's decision to issue the Building Permit, or his Enforcement Denial Decision because no timely appeal was filed under M.G.L. c. 40A, § 15.

1. The Appellants' Appeal of the Building Permit was Untimely Under M.G.L. c. 40A, §§ 8 and 15, and Article III of the Rules of the Needham Board of Appeals.

The Commissioner issued the Building Permit on September 19, 2023. Although the letter from Appellants' counsel, entitled "Notice of Appeal" is dated October 19, 2023, the formal Application mandated by Article III of the Rules of the Needham Zoning Board of Appeals is not dated until October 23, 2023. Pursuant to Article III: "***Any communication, purporting to be an appeal, a petition or an application, shall be treated as mere notice of intention to seek Board action, until such time as it is made on a complete official application form and the applicable filing fee is paid.***" Thus, counsel's Notice of Appeal letter, although filed on October 19, 2023, constitutes merely a notice of an intention to file an appeal under M.G.L. c. 40A, §§ 8 and 15, and per the Board's own rules, was not final until the completed Application form was filed on October 23, 2023 (assuming the filing fee was simultaneously paid, something the record does not reflect).

The failure to complete the Appeal filing within 30 days is fatal to the Appellants' claims and, in fact, deprives this Board of jurisdiction to hear the appeal. *Connors v. Annino,* 460 Mass. 790, 797 (2011) ("We interpret §§ 7, 8 and 15 to mean that when a party with adequate notice of the issuance of a building permit claims to be aggrieved by the permit on the ground that it violates the zoning code, the party must file an administrative appeal within thirty days of the permit's issuance; ***a failure to do so deprives the board or other permit granting authority, and later the courts, of jurisdiction to consider the appeal.***" (Emphasis supplied.)) Thus, the Board must vote to dismiss the Appeal for lack of jurisdiction.

2. The Appellants Have Not Appealed the Enforcement Denial Decision within 30 Days as Required Under M.G.L. c. 40A, §§ 7 and 15.

In the opening paragraph of their Notice of Appeal, the Appellants recite that, in addition to appealing the Building Permit: "This is also a request to the Building Commissioner, made pursuant to Mass. Gen. L. c.40A, §§ 7 [*sic*], to enforce the Zoning Bylaw by revoking or suspending the Building Permit." The Appellants then include in their appeal a list of NZB provisions that they claim are purportedly violated by the issuance of the Building Permit.

In his Enforcement Denial Decision, issued on November 1, 2023, the Building Commissioner refused the Appellants' request to revoke or suspend the Building Permit and addressed each of the Appellants' § 7 zoning enforcement requests, one by one, setting forth substantive grounds for why the building permit did not violate those provisions and was instead issued lawfully under the NZB. See Exhibit B. The Building Commissioner's letter denying the requested enforcement relief was issued within the fourteen-day window prescribed under § 7.

If the Appellants disagreed with the Building Commissioner's zoning determinations set forth in his letter dated November 1, 2023, they had 30 days to appeal that determination to the Zoning Board of Appeals, pursuant to the provisions of M.G.L. c. 40A, § 15. They did not take such an appeal on or before December 1, 2023, and this failure is fatal to their zoning enforcement claims under §7. See *Vokes v. Avery W. Lovell, Inc.,* 18 Mass. App. Ct. 471, 479 (1984), review denied, 393 Mass. 1103. ("We conclude that the date on which a zoning enforcement officer responds in writing to a § 7 request for enforcement creates the appealable decision contemplated by § 8 and becomes the date for measuring the thirty-day appeal period set forth in § 15."); see also *Connors v. Annino,* supra, 460 Mass. at 797 (holding that failure to file the administrative appeal within thirty days deprives the board of jurisdiction to consider the appeal). Accordingly, the Board also lacks jurisdiction to hear the Appellants' request for zoning enforcement, as well as the appeal of the Building Permit, and the Board must vote to dismiss the Appeal in consequence.

D. In the Unlikely Event the Board Proceeds to the Merits, the Building Permit and the Building Commissioner's Enforcement Denial Decision Must Be Upheld

In the unlikely event the Board votes to proceed to decide the Appeal on its substantive merits, it should vote to uphold the Building Commissioner's decision to issue the Building Permit and his Enforcement Denial Decision for the well-articulated reasons set forth in Attorney Huber's letter to this Board dated November 13, 2023. In addition to those reasons, however, there are additional procedurally substantive reasons for the Board to uphold those decisions:

1. In Appellants' Claim Nos. 1, 3 and 4, they urge the Board to overturn the Building Permit on the grounds that the Land Court decision concerning the Major Site Plan Review and the Dover Amendment was erroneous and that the Building Permit should not issue until the appeal of the Land Court Judgment, which is currently pending in the Massachusetts Appeals Court, is finally resolved. This is not how the appellate process works. There is no court-ordered stay of the Judgment and, therefore, the Judgment remains in force and effect unless and until it is overturned by the Appeals Court. See M.G.L. c. 40A, § 17; see also Mass. R. Civ. P. 62 and Mass. R. App. P. 6 (clarifying procedure for requesting a stay and effect thereof (none of which has occurred here). With no stay of the Judgment in effect, the Appellants' pending appeal before the Massachusetts Appeals Court does not serve as a bar to the issuance of the Building Permit, and if the Board decides to reach the merits of the Appeal, it should be denied for this reason.

2. The provisions of M.G.L. c. 40A, §§ 8, 14 and 15, as well as NZB §§ 7.2.1 and 7.5.1, all make clear that the scope of the Board's authority in reviewing the Building Commissioner's decisions is limited to alleged violations of *zoning* provisions

adopted pursuant to M.G.L. c. 40A and does **not** include the portions of the Appellants' Appeal related to Stormwater Management and Erosion Control (Appellants' Claim No. 2), Environmental Assessment (Appellants' Claim No. 7), or Construction Management Plan (Appellants' Claim No. 11). None of these matters pertain to zoning and thus none are within the Board's jurisdiction as defined by M.G.L. c. 40A, §§ 8, 14 and 15, or NZB §§ 7.2.1 and 7.5.1, and thus these claims should be denied for this reason.

3. The Appellants' claims of alleged zoning violations (Appellants Claim Nos. 5 (two non-residential buildings on one lot), 6 (identification of intended use of barn), 8 (landscape design), 9 (parking requirements) and 10 (§ 5.3 General Design Requirements)), have all been previously determined – with no further appeal – by the Building Commissioner in his Enforcement Denial Decision. Thus, the Building Commissioner's determinations on those claims are final and are not lawfully before the Board. The lack of such an appeal on or before December 1, 2023 is fatal to the Appellants' zoning enforcement claims pursuant to §§ §7, 8 and 15. See *Vokes v. Avery W. Lovell, Inc.,* supra, 18 Mass. App. Ct. at 479, review denied, 393 Mass. 1103. Moreover, even if the zoning enforcement claims were lawfully before the Board (they are not), they are governed by the Land Court's Judgment, which determined that the Project complies with all provisions of the NZB applicable to a Dover Amendment protected use, and that the Project "***is not subject to further review***" under the local zoning bylaws." See Exhibit C. Therefore, the Appellants claims of zoning violations should be similarly denied by the Board.

Consequently, even if the Board votes to proceed to decide the Appeal on its merits, in addition to the extensive substantive reasons set forth in Attorney Huber's letter to this Board dated November 13, 2023, the Board should vote to deny the Appeal for these procedurally substantive reasons, as well.

E. Due Process Considerations

Before closing, it is important to address the Appellants' claims regarding an alleged lack of due process. Prior to the commencement of the Litigation, the abutters were active participants in the proceedings before the Planning Board, where they were afforded notice and an opportunity to be heard, and where their public comments almost exactly mirror the ones they are making here again in this Appeal.

If the Appellants were concerned that their interests would not adequately be protected by the Needham Planning Board during the ensuing appeal of that decision to the Land Court, they should have filed their own appeal of that decision within 20 days of that decision, pursuant to

M.G.L. c. 40A, § 17. They did not. Instead, they chose to wait until Needham Enterprises appealed (something they knew was coming, as it was discussed during the Planning Board hearing process), and then sought to intervene in the proceeding. During the hearings on their motions to intervene, they had, yet again, ample opportunity to have their concerns heard and vetted by the Court. They have now appealed the Land Court decisions to the Massachusetts Appeals Court, where they have made the very same arguments for the fourth time now, with this Appeal being the fifth.

Suffice it to say that there are no due process concerns here. The Appellants have had ample notice and opportunity to be heard and voice their concerns in relation to the Project, first before the Planning Board and thereafter before the Land Court and Appeals Court. We urge the Board not to be distracted by these unsupported due process claims, and to instead uphold its charge under the NZB and the Massachusetts Zoning Act (M.G.L. c. 40A) by limiting its scope of review to the matters properly before it, and only to those matters.

F. Conclusion

The Board cannot reach the substantive merits of the Appellants' appeal and must instead dismiss the Appellants' appeal for lack of jurisdiction because the Appeal of the Building Permit was not timely filed, and because the Building Commissioner's Enforcement Denial Decision as never appealed, and thus his zoning determinations set forth in is Enforcement Denial Decision are final. In the unlikely event the Board decides to proceed to hear the merits of the Appeal, it should vote to uphold the Building Commissioner's decisions. As outlined above, the Appellants fail to articulate a single, lawful ground for the reversal of the Building Permit or the Building Commissioner's Enforcement Denial Decision. For these reasons, we respectfully urge the Board to dismiss the Appeal for lack of jurisdiction or, in the event it decides to reach the merits, deny the Appeal and uphold the Building Permit.

We thank the Board in advance for its consideration of these matters. I will be at the hearing on November 14, 2023, should Board members have any questions.

Very truly yours,

Sarah A. Turano-Flores

Sarah A. Turano-Flores

STF:ae
Enclosures

cc (via email only): Evans Huber, Esq.
Joseph Prondak, Building Commissioner
Dylan Sanders, Esq.

Exhibit A

ZBA Application For Hearing

Applicants must consult with the Building Inspector prior to filing this Application. *Failure to do so will delay the scheduling of the hearing.*

Applicant Information

Applicant Name	**See attached list of appealing residents.**		Date: 10/23/2023
Applicant Address			
Phone		email	

Applicant is ☐Owner; ☐Tenant; ☐Purchaser; ☐Other_____

If not the owner, a letter from the owner certifying authorization to apply must be included

Representative Name	**Dylan Sanders**		
Address	**Beveridge & Diamond, P.C.; 155 Federal St., Ste. 1600; Boston, MA 02110**		
Phone	617-549-5828	email	dsanders@bdlaw.com

Representative is ☒Attorney; ☐Contractor; ☐Architect; ☐Other_____

Contact ☐Me ☒Representative in connection with this application.

Subject Property Information

Property Address	1688 Central Ave.		
Map/Parcel Number	Parcel 213, Assessor's Plan No. 199	Zone of Property	Single Residence A

Is property within 100 feet of wetlands, 200 feet of stream or in flood Plain?
☐Yes ☐No

Is property ☐Residential or ☒Commercial

If residential renovation, will renovation constitute "new construction"?
☐Yes ☐No

If commercial, does the number of parking spaces meet the By-Law requirement? ☐Yes ☐No
Do the spaces meet design requirements? ☐Yes ☐ No

Application Type (*select one*): ☐Special Permit ☐Variance ☐Comprehensive Permit ☐Amendment ☒Appeal Building Inspector Decision

ZBA Application For Hearing

Existing Conditions:

Statement of Relief Sought:
Revocation of building permit. See attached Notice of Appeal, dated October 19, 2023.

Applicable Section(s) of the Zoning By-Law:
See attached Notice of Appeal, dated October 19, 2023.

If application under Zoning Section 1.4 above, list non-conformities:

	Existing Conditions	Proposed Conditions
Use		
# Dwelling Units		
Lot Area *(square feet)*		
Front Setback *(feet)*		
Rear Setback *(feet)*		
Left Setback *(feet)*		
Right Setback *(feet)*		
Frontage *(feet)*		
Lot Coverage *(%)*		
FAR *(Floor area divided by the lot area)*		
Numbers must match those on the certified plot plan and supporting materials		

ZBA Application For Hearing

Date Structure Constructed including additions:	Date Lot was created:
N/A	

Submission Materials	Provided
Certified Signed Plot Plan of Existing and Proposed Conditions *(Required)*	
Application Fee, check made payable to the Town of Needham Check holders name, address, and phone number to appear on check and in the Memo line state: "ZBA Fee – Address of Subject Property" *(Required)*	
If applicant is tenant, letter of authorization from owner *(Required)*	
Electronic submission of the complete application with attachments *(Required)*	
Elevations of Proposed Conditions *(when necessary)*	
Floor Plans of Proposed Conditions *(when necessary)*	

Feel free to attach any additional information relative to the application. Additional information may be requested by the Board at any time during the application or hearing process.

❖❖❖❖

I hereby request a hearing before the Needham Zoning Board of Appeals. I have reviewed the Board Rules and instructions.

I certify that I have consulted with the Building Inspector N/A
date of consult

Date: 10/23/2023 Applicant Signature /s/ Dylan Sanders

An application must be submitted to the Town Clerk's Office at townclerk@needhamma.gov and the ZBA Office at dcollins@needhamma.gov

Appealing Needham Residents

Holly Clarke, 1652 Central Avenue
Gregg Darish, 34 Country Way
Robert DiMase, 1681 Central Avenue
Matthew Heideman, 1708 Central Avenue
Nicole Heideman, 1708 Central Avenue
Carl Jonasson, 1729 Central Avenue
Ann Lyons, 1689 Central Avenue
Peter Lyons, 1689 Central Avenue
Eileen Sullivan, 1695 Central Avenue

Exhibit B

Town of Needham
Building Department
500 Dedham Ave.
Needham, MA 02492

Tel.781-455-7550 x 308

November 1, 2023

Town of Needham / Zoning Board of Appeals
500 Dedham Ave.
Needham, MA. 02492

Re: Application review for the November 16, 2023 Hearing

1688 Central Avenue, Appeal of Building Inspector's Decision and the Issuance of Permit #BC-23-10079

Dear Board Members,

The Applicants in this case are appealing the decision of this office to issue a Building Permit to Needham Enterprises LLC/ Matt Borelli as well as requesting that I, as Building Commissioner, revoke or suspend this same Building Permit, based on grounds stated within their letter dated October 19, 2023.

In response to the latter, I hereby deny the request to revoke or suspend Building Permit #BC-23-10079 and note that this office received no direct request from the applicants.

In response to the appeal, I offer the following comments relative to each point numbered in the letter of 10/19/2023:

1. The judge's Decision entitled Needham Enterprises LLC to a Building Permit. All Building Permits are subject to review and approval by the Building Inspector. This review proved satisfactory to all regulations under the purview of the Department.
2. Sheet #4 of the Site Development Plans show sufficient compliance with the Storm Water Bylaw. These plans are stamped and signed by a Massachusetts Registered Civil Engineer. No engineering evidence has been presented by the applicants showing that the plan submitted is not sufficient.
3. The Dover Amendment (Massachusetts General Law, Chapter 40A, Section 3, 3rd paragraph) exempts childcare uses from many requirements of Zoning Bylaws and:

a. The Major Site Plan Review Decision was annulled.
b. The Major Site Plan Approval Decision contained the same conditions that are normally within a Special Permit and these cannot be applied to Dover Amendment protected uses.

c. The Building Department will only allow the barn to be used accessory to the childcare center. There is no requirement or need to determine that now nor is there a requirement forcing removal of this building.
d. Matt Borelli has been informed of this limitation of "accessory use only".
e. Neither the Zoning Bylaw nor State Building Code require further investigation here.
f. Childcare uses are exempt from landscaping or landscape plans by the Dover Amendment.
g. The parking requirements in the Bylaw are not specific to childcare uses or other Dover exempt uses. They can be applied arbitrarily and therefore considered unreasonable.
h. This childcare use is exempt from section 5.3 of the Bylaw as prescribed by the Dover Amendment.

4. A Construction Management Plan is not required under the Zoning Bylaw or Building Code. This is a relatively small construction project and the Building Department views the permit holder capable of properly managing this site without need for a formal plan.

PROJECT SUMMARY:

This issued permit, #BC-23-10079, allows the construction of a single story, 10,000 square foot childcare facility. The operator currently has a facility within the Baptist Church at 858 Great Plain Ave. and has been in business for 43 years. The Church is closing and the childcare facility will move to 1688 Central Ave. The new facility will serve approximately 115 children with 8 staff members.

The site lies in an SRA Zoning District, contains 143,003 square feet when 43,560 square feet are normally required, 250 feet of frontage along Central Ave. when 150 feet are normally required. The building will be set back 64 feet from Central Ave. when 30 feet are normally required. The side setback will be 52 feet and the rear, 811 feet when 25 feet and 15 feet are normally required, respectively. The lot coverage is 9% and the floor area ratio is .09, but there are no prescriptive requirements for these. 29 Parking spaces will be provided (if the formula provided in the Bylaw for parking for non-Dover-exempt uses were applied here, the required number would be 25).

The applicant also provided documentation showing that the most intense drop off times would be between 7:30am and 9:15am. Data from the existing facility on Great Plain Ave. shows an average of 29 to 39 cars spread out during these 2 hours. Afternoon pick-up times are 4pm to 6pm and show 39 to 55 cars spread out during these times. In addition to normal travel lanes to access the parking areas, a queueing lane of approximately 200' has been provided.

With respect to childcare facilities, the Dover Amendment only allows application of reasonable regulations that concern the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage. This office has determined the documents submitted for this facility fully comply with the provisions of the Zoning Bylaw that we are allowed to apply.

Therefore, I respectfully request that the Zoning Board uphold the issuance of Building Permit #BC-23-10079.

I will attend the hearing on November16, 2023.

Sincerely,

Joe Prondak
Building Commissioner

Exhibit C

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

NORFOLK, ss.

22 MISC 000158 (JSDR)

NEEDHAM ENTERPRISES, LLC,

Plaintiff,

v.

NEEDHAM PLANNING BOARD,

And

PAUL ALPERT, ADAM BLOCK, MARTIN JACOBS, and JEANNE McKNIGHT, in their capacity as members of the NEEDHAM PLANNING BOARD,

Defendants.

JUDGMENT

In this action, commenced on March 23, 2022, plaintiff Needham Enterprises, LLC ("the LLC") appealed from the grant of a special permit with conditions issued by defendant Needham Planning Board ("the Board") pursuant to a zoning provision requiring a Major Project Site Plan Review Special Permit for projects of a certain size. The special permit was issued with respect to a proposed childcare facility ("the Project"), which is governed in part by G. L. c. 40A, § 3, the Dover Amendment. The LLC challenged the application of the Major Site Plan Review Special Permit process to the Project, and also challenges a number of the particular conditions imposed by the Board. In accordance with the memorandum of decision after trial issued by the court (Roberts, J.) on August 15, 2023, it is hereby

ORDERED, **ADJUDGED** and **DECLARED** on Count II of the Complaint Pursuant To M.G.L. c. 40A, Sections 3, 9 And 17 (1) that the March 1, 2022 decision of the Board exceeded

its authority and is hereby annulled, (2) that the Project complies with the dimensional requirements of the local zoning bylaws and, pursuant to G. L. c. 40A, § 3, is not subject to further review thereunder, and (3) that the LLC is entitled to apply for a building permit without further action by the Board.

And it is further

ORDERED and **ADJUDGED** that this Judgment is a full adjudication of the parties' claims in this case, all claims not addressed in the preceding paragraph are dismissed with prejudice and all prayers for relief by any party to this action that are not granted in the preceding paragraph are denied.

SO ORDERED.

By the Court (Roberts, J.)
/s/ Jennifer S.D. Roberts

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson, Recorder

Dated: August 22, 2023.

Exhibit D

2021 JUN 23 PM 1:17

TOWN OF NEEDHAM, MASSACHUSETTS

BOARD OF APPEALS

RULES

(As adopted on January 28, 2010)
Amended on September 15, 2011
Amended on December 19, 2019
Amended on June 17, 2021

ARTICLE I. GENERAL

Section 1. Purpose and Scope

These Rules are adopted by the Needham Board of Appeals (hereinafter referred to as the "Board") as authorized by Massachusetts General Laws, Chapter 40A, Section 12, for the purpose of establishing uniform procedures for conducting the business of the Board which, in general, but without limitation, shall consist of hearing all appeals, petitions and applications coming under its jurisdiction as both a permit granting authority and a special permit granting authority by virtue of the applicable provisions of Massachusetts General Laws and the Needham Zoning By-Law (hereinafter referred to as the "Zoning By-Law") and other By-Laws. Such appeals and matters of original jurisdiction, subject to conformance with these Rules, will in general consist of the following:

(a) Receive and act upon all appeals from a decision of the Building Inspector in performing the duties and responsibilities contemplated by Massachusetts General Laws and the Zoning By-Law within the Town of Needham;

(b) Receive and act upon, as a permit granting authority, all petitions for variances from compliance with applicable provisions of the Zoning By-Law;

(c) Receive and act upon, as a special permit granting authority, all applications for special permits as authorized by the Zoning By-Law;

(d) Receive and act upon all applications seeking authorization and a Comprehensive Permit to build low and moderate income housing contemplated by Massachusetts General Laws, Chapter 40B, Section 21; and

(e) Receive and act upon all matters otherwise legally coming under the jurisdiction of the Board.

An application for a Comprehensive Permit, Item (d) above, shall be further subject to the Board's Comprehensive Permit Rules, adopted on September 15, 2011, as amended from time to time.

Section 2. Petitioner or Applicant

An appeal may be taken by any person aggrieved by any decision of the Building Inspector. A petition or application for other than a Comprehensive Permit (I.1.(d)) may be brought by a property owner, a tenant, a licensee, a prospective purchaser or other applicant provided that documentation from the owner certifying the petitioner's legal interest and right to file accompanies the petition or application. An application for a Comprehensive Permit (I.1.(d)) may be made only by a public agency or by a limited dividend or nonprofit organization. In the case of an appeal, a petition for a variance or an application for a special permit the applicant shall file with the Town Clerk who shall transmit it forthwith to the Board. It is strongly recommended that all new appeals, petitions and applications be first reviewed by the Building Inspector to

assure their correctness, completeness and clarity. It is also recommended that all petitions and applications be first reviewed by the clerk of the Board.

ARTICLE II. ORGANIZATION

Section 1. Elections

At the first regular meeting following the qualification of annual appointee(s), the Board shall elect a chairperson and vice-chairperson. Each shall serve until a successor is duly elected. Associate members shall not participate in this election.

Section 2. Chairperson - Powers and Duties

The chairperson shall preside over all hearings and meetings of the Board. Subject to the rules as stated herein, he/she shall decide all points of order, unless overruled by a majority of the Board in session at the time. The chairperson shall appoint such committees as may be deemed necessary or desirable from time to time.

In addition to powers granted by Massachusetts General Laws and the Zoning By-Law, and subject to these Rules and further instructions of the Board, the chairperson shall supervise the work of the clerk, arrange for necessary help, and exercise general supervision over the Board's activities.

Section 3. Vice-Chairperson

The vice-chairperson shall preside over hearings and meetings and perform the duties of the chairperson during the absence or unavailability of the chairperson.

Section 4. Clerk

A clerk shall be appointed by the Board, and subject to the direction of the Board and its chairperson, shall undertake all of the clerical work of the Board including all correspondence of the Board, sending of all notices required by law and the rules and orders of the Board, receive and scrutinize all petitions and applications for compliance with the rules of the Board, keep dockets and minutes of the Board's proceedings, compile all required records, maintain necessary files and indices and call the roll at all Board meetings.

Section 5. Associate Members

The chairperson of the Board shall designate an associate member to sit on the Board in case of the absence, inability to act or interest on the part of a member. In the event of a vacancy on the Board, the chairperson shall designate an associate member to act as a member until the vacancy is filled by an appointment by the Board of Selectmen.

Section 6. Quorum

A quorum for purposes of conducting public hearing and transacting other business shall consist of two (2) members. If a quorum is physically present, other members may participate remotely and vote on matters in accordance with regulations adopted under the Open Meeting Law (currently set forth in 940 CMR 29.10).

Section 7. Regular Meetings

Regular meetings of the Board shall be held as necessary at 7:30 P.M. on the third Thursday of each month, or at other times as determined by the Board at a place specified in the meeting notice.

Section 8. Special Meetings

Special meetings may be called by the chairperson or at the request of two members. Written notice thereof shall be given to each member at least forty-eight (48) hours before the time set, except that announcement of a special meeting at any meeting attended by all members shall be sufficient notice. Notices shall be posted publicly as required by law.

Section 9. Absences

Pursuant to Town Meeting's acceptance of Massachusetts General Laws, Chapter 39, Section 23D, no member of the Board shall be disqualified from voting on any matter solely due to said member's absence from no more than a single session of the hearing at which testimony or other evidence is received; provided, however, that before any such vote, said member shall certify in writing that he/she has examined all evidence received at the missed session, which evidence shall include an audio or video recording of the missed session or a transcript thereof, such certification to be part of the record of the hearing.

ARTICLE III. SUBMISSION OF PETITION OR APPLICATION

Section 1. Application Form

Every petition and application for action by the Board shall be made on an official application form, entitled "Board of Appeals - Application for Hearing," which shall be furnished by the clerk upon request. Any communication, purporting to be an appeal, a petition or an application, shall be treated as mere notice of intention to seek Board action, until such time as it is made on a complete official application form and the applicable filing fee is paid. To be a complete form, the applicant must consult with the Building Inspector and all information called for by the form must be furnished by the applicant in the manner therein prescribed with precise language identifying the applicable provisions of the Zoning By-Laws and the specific nature of the appeal, petition or application. The form to be used is hereby made a part of these Rules.

Section 2. Filing Period for Appeal

(a) In the case only of an appeal from a decision of the Building Inspector, a petition or application shall be filed with the Town Clerk within thirty (30) days from the date of issuance of a permit or refusal of a permit by, or an order, ruling, decision or determination of, the Building Inspector.

(b) All other petitions and applications may be filed at the discretion of the applicant or petitioner. Petitions and applications to be heard at a regular meeting of the Board must be filed no later than the last Thursday of the month preceding the month of the regular meeting.

Section 3. Submissions

Thirteen (13) copies of the application form shall be submitted and each application shall be accompanied by a plot plan prepared by and under the seal of a registered engineer or registered land surveyor showing current conditions and such other plans, sketches or diagrams as are needed to show clearly the nature of the specific request being made by the petitioner. The size of the document(s) shall be 8-1/2" x 11" or 11" x 17", drawn to a scale of 1" = 40' or such other size and scale as the Building Inspector might approve during the review discussion. The plans shall have a north point, names of streets, zoning districts, property lines, dimensions of the subject lot, locations of buildings on the lot, parking areas, driveways and all other information pertinent to the petition or application as required by the Zoning By-Law, other By-Laws or Rules and these Rules. All changes requested by the petitioner shall be clearly identified.

Section 4. Filing Fees and Cost of Public Notice

(a) An appeal from the action of the Building Inspector shall be accompanied by a check payable to the Town of Needham in the amount of *Two Hundred Dollars ($200).*

(b) A petition for a variance shall be accompanied by a check payable to the Town of Needham in the amount of *Two Hundred Dollars ($200).*

(c) An application for a special permit for a single family residence shall be accompanied by a check payable to the Town of Needham in the amount of *Two Hundred Dollars ($200* and for all others (including commercial) in the amount of *Five Hundred Dollars ($500).*

(d) An application for a Comprehensive Permit under G. L. Chapter 40B Section 21 shall be accompanied by an administrative fee in the amount specified in the Board's Comprehensive Permit Rules, as may be amended.

(e) An application to amend, modify or transfer a variance or special permit shall be accompanied by a check payable to the Town of Needham in the amount of *Two Hundred Dollars* ($200).

(f) All fees are established to cover the cost of and to otherwise defray reasonable expenses incurred by the Board in processing petitions and applications filed with the Board.

(g) An appeal, petition or application shall not be deemed filed until filing fee set forth above have been paid to the Town Clerk.

(h) In addition to the above stated filing fees, the applicant shall be responsible to pay the cost of publishing public notice of any hearing in a newspaper. The clerk shall prepare the notice and arrange for publication. The newspaper may send an invoice directly to the applicant or through the clerk. The applicant shall pay any such invoice promptly upon receipt and failure to make timely payment shall be grounds for the Board to withhold a decision or deny an application.

(i) The Town shall be exempt from payment of a filing fee, but shall pay the costs of publication.

Section 5. Outside Consultants and Fees

When reviewing an appeal, petition or application hereunder, the Board may determine that the assistance of outside consultants is warranted because the necessary expertise is unavailable from municipal employees. The Board may, in its sole discretion, require that the applicant pay a reasonable review fee sufficient to enable the Board to retain consultants of its choice, said fee to be deposited into a special account established pursuant to Massachusetts General Laws, Chapter 44, Section 53G. The funds from said account and any accrued interest thereon may be expended at the direction of the Board without further appropriation, with any excess amount remaining in the account upon completion of the Board's review to be repaid to the applicant or to the applicant's successor in interest. Minimum qualifications for outside consultants shall consist of either an educational degree in or related to the field at issue or three (3) or more years of practice in the field at issue or in a related field. The Board's selection of an outside consultant may be appealed by an applicant or petitioner to the Board of Selectmen, which Board may disqualify such consultant only on the grounds that the he/she has a conflict of interest and/or does not possess the minimum qualifications noted above.

Section 6. Dismissal of Incomplete Filings

The Board may dismiss an appeal, petition or application if the application form is not complete or the submissions required by Section 3 are not made. Such dismissal may be made without a hearing on the merits and shall be deemed a withdrawal without prejudice to refiling when the application and submissions are complete.

Section 7. Names and Addresses of Abutters

After the petition or application is filed, the clerk of the Board shall obtain immediately a list of the names and addresses of all parties in interest including the petitioner, abutters, owners of land directly opposite on any public or private street or way and abutters to the abutters within three hundred (300) feet of the property line of the petitioner, as they appear on the most recent applicable tax list, as defined by Massachusetts General Laws, Chapter 40A, Section 11, and the Zoning By-Law. The assessors shall certify to the Board that list of names and addresses of all parties in interest.

ARTICLE IV. HEARINGS

Section 1. Notice

Notice of hearings shall be advertised as required by the provisions of General Laws, Chapter 40A, and the Zoning By-Law. In addition, a copy of the advertised notice shall be sent by mail, at least seven (7) days prior to the date of the hearing, postage prepaid, or delivered, to all parties in interest and to the Board of Selectmen, Planning Board, Building Inspector, Superintendent of Public Works, Town Engineer,

Conservation Commission and Town Clerk, and where determined appropriate by the Board, other Town boards and officials.

Section 2. Hearings to be Public

All hearings shall be open to the public and shall be conducted in accordance with the Massachusetts Open Meeting Law, Massachusetts General Laws, Chapter 30A, Sections 18 through 25.

Section 3. Representation and Absence

An applicant may appear in his/her own behalf or be represented by an agent or attorney. In the absence of an appearance without due cause indicated by the applicant, the Board shall decide on the matter either using the information it has otherwise received or dismissing the petition, at its discretion, with or without prejudice.

Section 4. Continuances

A continuance may be requested by an applicant by written request submitted to the clerk in advance of a hearing or orally at a hearing. The Board may, in its discretion, allow or deny any request for a continuance. Unless notified in writing that a continuance has been granted, an applicant must appear at a scheduled hearing. Any continuance granted upon request of an applicant shall constitute an agreement by the applicant to extend the time limits for actions by the Board by the duration of the continuance and such agreement, at the request of the Board, shall be set forth in writing.

Section 5. Hearing Procedure

(a) Hearings will start at the stated time in the notice unless delayed because of prior hearings.

(b) At the hearing any party whether entitled to notice thereof or not may appear in person or by agent or by attorney.

(c) At the hearing the chairperson may administer oaths, summon witnesses and call for the production of papers. The Board shall retain any record which has been introduced in evidence, for reference in the consideration of the case.

(d) No person shall address a hearing of the Board without leave of the chairperson, and all persons shall, at the request of the chairperson, be silent. If a person, after warning from the chairperson, persists in disorderly behavior, the chairperson may order him/her to withdraw from the hearing, and, if he/she does not withdraw, may order a constable or any other person to remove him/her and confine him/her in some convenient place until the hearing is adjourned.

(e) The chairperson may close the hearing immediately if, in his/her opinion, these Rules are being violated and/or the hearing is becoming disorderly.

(f) The chairperson will open each hearing by reading, or causing to be read, the notice as advertised.

(g) The petitioner or his/her representative will then present his/her case, stating fully the reason(s) why the petition or application should be granted.

(h) When the petitioner or his/her representative has concluded the presentation, the chairperson will allow all those in favor of the matter under consideration to speak. Those who wish to speak will rise, address the chairperson, give their names and addresses, then proceed.

(i) When all those in favor have spoken, the chairperson will then allow those in opposition a similar opportunity to be heard.

(j) Rebuttals may only be allowed at the discretion of the chairperson.

(k) Similarly, no cross-examination will be allowed, although questions seeking information and deemed relevant by the Board may be allowed at its discretion.

(l) Members of the Board who are hearing the case may direct appropriate questions during the hearing.

(m) When all facts have been presented, the chairperson will close the hearing and inform the petitioner or his/her representative and others present that they will be notified of the Board's decision.

(n) In the event an applicant fails to appear at a scheduled hearing, the Board may continue the matter or, in its discretion, dismiss the matter. Unless the Board indicates otherwise in its decision, any such dismissal shall be deemed a withdrawal without prejudice to refilling the application.

Section 6. Information to be Furnished to the Board

An applicant may submit written materials in advance of the hearing, at the hearing or at any time prior to close of evidence at the hearing. With the Board's permission, an applicant may submit material subsequent to the close of the hearing, such as a revised plan, but only if the substance reflected in such material was presented at the public hearing and the Board does not rely on such material as evidence. Any legal memorandum must be submitted at least forty-eight (48) hours in advance of the hearing unless the Board sets a different deadline. Any applicant may submit a proposed decision to the Board. All submissions shall be made to the clerk.

In the case of a variance the following points, based on Massachusetts General Laws, Chapter 40A, shall be addressed and factually supported:

(a) The particular land or structure and /or the use proposed for the land or structure, if any;

(b) The circumstances relating to the soil conditions, shape or topography of the land and structures and especially affecting the land or structure for which the variance is sought which do not affect generally the zoning district in which it is located;

(c) The facts which make up the substantial hardship, financial or otherwise, which results from the literal enforcement of the applicable zoning restrictions with respect to the land or structure for which a variance is sought;

(d) The facts to support a finding that the relief sought will be without substantial detriment to the public good; and

(e) The facts to support a finding that the relief sought may be given without nullifying or substantially derogating from the intent or purpose of the Zoning By-Law.

In the case of a special permit, the following points, based on Massachusetts General Laws, Chapter 40A, and the Zoning By-Law should be clearly identified and factually supported:

(a) The particular type of use proposed for the land or structure, if any;

(b) The conditions and character of operations of the proposed uses which show that it will be in harmony with the general purpose and intent of the district and the Zoning By-Law;

(c) The nature of the proposed use in relation to both the general and specific provisions of the Zoning By-Law governing that use and the district in which it is located; and

(d) Satisfaction of the specific criteria and objectives set forth in Section 7.5.2.1 of the Zoning By-Law, as may be amended.

ARTICLE V. ACTIONS BY THE BOARD

Section 1. Voting Requirements

The concurring vote of all three (3) members of the Board shall be necessary to reverse any order or decision of the Building Inspector, to decide in favor of the applicant on any matter legally coming under the jurisdiction of the Board, to effect any variance in the application of the Zoning By-Law or to grant a special permit where so authorized by the Zoning By-Law, except that any two (2) members may approve a Comprehensive Permit under Massachusetts General Laws, Chapter 40B, Sections 20 through 23. The

Board shall cause to be made a detailed record of its proceedings, showing the vote of each member upon each question, or, if absent, or failing to vote, indicating such fact, and setting forth clearly the reason or reasons for its decisions, and of its other official actions, copies of all of which shall be immediately filed in the office of the Town Clerk and shall be a public record.

Section 2. Withdrawal

An application may be withdrawn by notice in writing to the clerk at any time prior to the hearing by the Board. After commencement of a hearing, a petition or application may be withdrawn only with the consent of the Board which shall determine whether the withdrawal is without prejudice to refiling at any time or with prejudice subjecting the applicant to the provisions of Section 4 below.

Section 3. Reconsideration

When a petition or application has been voted upon and the meeting adjourned, there shall be no reconsideration of a decision of the Board.

Section 4. Repetitive Petition

In order to have any petition or application which has been unfavorably acted upon by the Board reconsidered by the Board within two (2) years, the petitioner must follow the procedure outlined in Massachusetts General Laws, Chapter 40A, and the Zoning By-Law.

Section 5. Decisions

(a) The clerk of the Board will send notices of a decision forthwith to the applicant, to parties in interest and to every person present at the hearing who requests that notice be sent to him/her and states the address to which such notice is to be sent.

(b) The clerk of the Board will send copies of the decision of the Board to the applicant, the Board of Selectmen, the Planning Board, the Board of Assessors, the Town Clerk, the Building Inspector, and where determined appropriate by the Board, other Town boards and departments.

(c) No variance, or any extension, modification or renewal thereof, shall take effect until a copy of the decision bearing the certification of the Town Clerk that twenty (20) days have elapsed after the decision has been filed in the office of the Town Clerk and no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied, or that if it is a variance which has been approved by reason of the failure of the Board to act thereon within the time prescribed, a copy of the petition for the variance accompanied by the certification of the Town Clerk stating the fact that the Board failed to act within the time prescribed, and no appeal has been filed, and that the grant of the petition resulting from such failure to act has become final, or that if such appeal has been filed, that it has been dismissed or denied, is recorded in the Norfolk County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title.

A special permit, or any extension, modification or renewal thereof, shall not take effect until a copy of the decision bearing the certification of the Town Clerk that twenty (20) days have elapsed after the decision has been filed in the office of the Town Clerk and either that no appeal has been filed or the appeal has been filed within such time, or if it is a special permit which has been approved by reason of the failure of the Board to act thereon within the time prescribed, a copy of the application for the special permit accompanied by the certification of the Town Clerk stating the fact that the Board failed to act within the time prescribed, and whether or not an appeal has been filed within that time, and that the grant of the application resulting from the failure to act has become final, is recorded in the Norfolk County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The person exercising rights under a duly appealed special permit does so at risk that a court will reverse the permit and that any construction performed under the permit may be ordered undone. This section shall in no event terminate or shorten the tolling, during the pendency of any appeals, of the 6 month periods provided under the second paragraph of M.G.L., Ch. 40A, Section 6.

(d) The applicant or petitioner is responsible for filing the certified decision in the Registry of Deeds and for paying the recording fees.

(e) A certified copy of the decision and an affidavit from the Registry of Deeds stating that the decision has been recorded are necessary before a building permit dependent on the Board's decision can be issued by the Building Inspector.

ARTICLE VI. POLICIES AND ADVICE

Any advice, opinion, or information given by any Board member or any other official or employee of the Town shall not be binding on the Board. It is declared to be the policy of the Board to discourage any personal appeals or comments to members of the Board and that all communications outside a convened meeting of the Board concerning proposed or pending matters shall be submitted through the clerk.

ARTICLE VII. AMENDMENTS

These Rules may be amended by a majority vote of the members of the Board, provided that such amendment shall be presented in writing at a regular meeting and action taken thereof at a subsequent regular meeting.

ARTICLE VIII. EFFECTIVE DATE

These Rules were adopted at a regular meeting of the Board on January 28, 2010 and became effective as of February 9, 2010. These Rules were amended September 15, 2011; December 19, 2019 and June 17, 2021. The Rules previously adopted and subsequently amended are hereby repealed. No action taken under said Rules shall be affected by said repeal.

Jon D. Schneider

Jon D. Schneider, Chairman

June 24, 2021

Date

Beveridge & Diamond

C. Dylan Sanders
155 Federal Street, Suite 1600
Boston, MA 02110
(617) 419-2311
DSanders@bdlaw.com

December 13, 2023

Howard S. Goldman, Acting Chair
Zoning Board of Appeals
c/o Daphne Collins, Zoning Specialist (dcollins@needhamma.gov)
Planning and Community Development Department
Town of Needham
Public Service Administration Building
500 Dedham Avenue
Needham, MA 02492

Re: Appeal of Building Permit #BC-23-10079 – 1688 Central Ave., Needham, MA (the "Building Permit")

Dear Acting Chair Goldman and Members of the Zoning Board of Appeals:

I am writing on behalf of the neighbors and residents who brought this appeal, in response to the December 12, 2023 letter sent on behalf of the Needham Children's Center ("NCC"), a prospective tenant at 1688 Central Avenue. In particular, I am writing to respond to NCC's argument that the neighbors' appeal of Building Permit #BC-23-10079 was untimely and thus, NCC contends, this Board lacks jurisdiction to hear the appeal.

NCC's procedural argument — which at heart is nothing more than a claim that the appealing residents failed to use the correct "application form" to commence their appeal — has no merit. This hyper-technical argument ignores the fact that the right to appeal a building permit, which the neighbors have exercised here, is provided for by state law, and specifically G.L. c. 40A, §§ 8 and 15. Chapter 40A likewise governs this Board's jurisdiction. Chapter 40A does not require a party to use any particular form in appealing, and a local rule of procedure may not interfere with that state right of appeal or the terms under which it can be exercised. Nor can a local rule of procedure operate to deprive this Board of jurisdiction that state law charges it with exercising. The Town of Needham and this Board may be free to adopt administrative rules governing the procedures in which appeals are handled, but those local administrative requirements cannot change the fundamental terms of the right of appeal which are provided by state law.

The relevant law is straightforward. Pursuant to G.L. c. 40A, § 8:

> An appeal to the permit granting authority [here the ZBA] ... may be taken by ... any person ... aggrieved by an order or decision of the inspector of buildings ... in violation of any provision of this chapter or any ... by-law adopted thereunder.

Pursuant to G.L. c. 40A, § 15:

> [Any] appeal under section eight to a permit granting authority shall be taken within thirty days from the date of the ... decision [of the building inspector] which is being appealed.

Chapter 40A, § 15 also provides for the procedural steps that a party exercising their right of appeal must take, i.e., how the appeal "shall be taken." For example, the statute provides –

> [t]he petitioner shall file a notice of appeal specifying the grounds thereof, with the city or town clerk, and a copy of said notice, including the date and time of filing certified by the town clerk, shall be filed forthwith by the petitioner with the officer or board whose order or decision is being appealed, and to the permit granting authority, specifying in the notice grounds for such appeal.

The petitioners here – the appealing residents – followed the statute to the letter. They filed a notice of appeal specifying the grounds of the appeal with the Needham Town Clerk, and subsequently sent a copy of that notice, stamped by the Town Clerk, to both this Board and the Building Commissioner. Indeed, the Town Clerk and ZBA both acknowledged receiving the neighbors' Noice of Appeal within 30 days. The neighbors also followed the ZBA's rules which, consistent with Chapter 40A, § 15, provide –

> In the case only of an appeal from a decision of the Building Inspector, a petition or application shall be filed with the Town Clerk within thirty (30) days from the date of issuance of a permit or refusal of a permit by. . . the Building Inspector.

NCC argues that this Board's administrative rules, at Article III, § 1 (entitled, "Application Form"), require a party appealing to use a particular form in exercising the right to appeal. And the appealing neighbors did so. NCC argues, however, that because the "Application Form" was not received by the Town Clerk until 33 days had passed, the Notice of Appeal was untimely and this Board lacks jurisdiction.

This is just the kind of hyper-technical, form-over-substance argument that gives the law a bad name; but the law is not, and should not be, so persnickety or precious that residents who filed a "Notice of Appeal with the Town Clerk within the time period required by statute would nevertheless lose their right to be heard because they did not use the proper administrative form found in a local procedural rule. Certainly, there is no argument that (1) the Town Clerk, ZBA, Building Commissioner were not timely notified of the appeal; it is undisputed all received the notice within 30 days, as the statute and, indeed, the ZBA's rules require; or (2) that anyone has been prejudiced because the appealing neighbors did not use the form required by Article III, § 2 when commencing their appeal.

In any event, the neighbors' right of appeal is provided by G.L. c. 40A, §§ 8 and 15, which form part of a "comprehensive statutory scheme" and thus leaves no room for local rules to require anything that the statute does not. *Elio v. Zoning Bd. of Appeals of Barnstable*, 55 Mass. App. Ct. 424, 431 (2002). A ZBA administrative rule – *one not even part of the local bylaw* -- cannot be applied so as to deprive parties of their guaranteed right of appeal under state law.

NCC also argues that the residents have failed to timely appeal the Building Commissioner's denial of their request to enforce the Zoning Bylaw. But NCC makes this argument merely to confuse the Board with an issue that does not apply in this appeal of a building permit. The appeal of the Building Commissioner's decision to issue a building permit covers the same ground as the neighbors' § 7 request that the Building Commissioner enforce the Zoning Bylaw and there is no requirement that the neighbors separately perfect an appeal of the Building Inspectors' written denial of a request to enforce the bylaw. The law provides that parties may request enforcement of a local bylaw and may appeal the Building Inspector's written decision on that request, as an "alternative remedy" because third persons are not entitled to notice of the issuance of a building permit. *Elio*, 55 Mass. App. Ct. at 428, citing *Brady v. Board of Appeals of Westport*, 348 Mass. 515, 519–520 (1965). Here, the appealing residents were aware that a building permit had been issued and they timely appealed that permit under § 15. The fact that the neighbors have not appealed the Building Commissioner's November 1, 2023 written decision is of no consequence to the § 15 appeal of the issuance of the building permit.

Thank you for your attention to this matter.

Sincerely yours,

/s/ Dylan Sanders
C. Dylan Sanders

cc: Evans Huber, Esq.
Sarah Turano-Flores, Esq.
Joseph Prondak, CBO, Building Commissioner

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Daphne Collins

From: Meredith Fried <meredith@thefrieds.net>
Sent: Tuesday, December 12, 2023 8:42 AM
To: Daphne Collins
Subject: 1688 Central Ave

Hi –

I wanted to once again express my STRONG concern that the building has commenced and seems to be well underway at this property. The building permit application for this property is not in compliance with the zoning bylaws and it is not proper for a building permit to be issued until the Land Court matter is resolved with finality. I join many of my neighbors in believing that the building permit issued with no conditions is disappointing and completely dismisses the concerns of and impacts on the immediate and wider neighborhoods surrounding this location. It is unfortunate that the reasonable conditions originally recommended were nixed by a court decision, as there was significant time and consideration given to all parties involved to arrive at those decisions.

I hope that the ZBA will reflect on what has brought us to this point and require the application to comply with Needham's bylaws, that it will stop work under the permit pending the resolution of the Appeals Court proceedings stemming from Mr. Borrelli's challenge of the Planning Board's Site Plan Review Decision, and that it will require that any permit issued for this project have conditions that protect the residents of Needham from the detrimental impacts of the project.

Thank you very much for your consideration.

Regards,

Meredith Fried
136 Stratford Road
Needham

Daphne Collins

From: Robert Dimase <rob.dimase@verizon.net>
Sent: Monday, December 11, 2023 2:53 PM
To: Daphne Collins
Subject: 1688 Central Avenue project
Attachments: Playlist1.wpl; ATT00001.htm

Dear ZBA,
In advance of the hearing scheduled for this Thursday evening I thought I would share some idea of how the developer is blatantly disregarding The Town of Needham General By Laws 3.8.1. In case the two videos attached don't load both were taken at 8:38 PM on November 27th showing a VERY active construction site with no intention of "wrapping up" as was conveyed to me by the Needham police officer on dispatch duty that night. I personally called the Needham police twice but they took no action as far as I can determine. The trucks remained idling on site until well after 9:15 PM when they finally departed.

This was not the first time work rule hours were violated. A week earlier a truck showed up onsite at approximately 6:35 AM and took three (3) separate attempts to back the vehicle and trailer onto the site before achieving success. The entire time, the back -up beeper blared throughout the neighborhood and cars zoomed past in the opposite lane as he was blocking one lane of traffic.

Since the Select Board and Board of Health have so far failed to protect our neighborhood and stand up for our bylaws I would hope that ZBA will take the appropriate actions to reign in in this rogue and inconsiderate developer. Thank you.

Rob DiMase
1681 Central Ave
781-844-5729

Daphne Collins

From: Joseph Prondak
Sent: Monday, December 11, 2023 3:32 PM
To: Daphne Collins
Subject: RE: 1688 Central Avenue project

Hi Daphne,

My computer won't play this but I already got the complaint on the 11/27 activity from 2 other abutters and I addressed it with Matt Borreli the next day.

Joe

From: Daphne Collins <dcollins@needhamma.gov>
Sent: Monday, December 11, 2023 3:08 PM
To: Robert Dimase <rob.dimase@verizon.net>; Joseph Prondak <jprondak@needhamma.gov>
Subject: FW: 1688 Central Avenue project

Good Afternoon Rob,
I am forwarding your construction site concerns at 1688 Central Avenue to Joseph Prondak who is the building code enforcement officer regarding this issue.
He may be contacted at his email included above or by phone at (781) 455-7550, x 537.
Daphne

Daphne M. Collins
Zoning Specialist

Phone 781-455-7550, x 261
Web https://www.needhamma.gov/
https://needhamma.gov/1101/Board-of-Appeals
www.needhamma.gov/NeedhamYouTube

Town of Needham
Planning and Community Development
500 Dedham Avenue
Needham, MA 02492

Regular Office Hours: Mon-Wed 8:00am – 5:00pm
Remote Hours: Thurs 8:00am-5:00pm

From: Robert Dimase <rob.dimase@verizon.net>
Sent: Monday, December 11, 2023 2:53 PM
To: Daphne Collins <dcollins@needhamma.gov>
Subject: 1688 Central Avenue project

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December 13, 2023

Dear Active Chair Goldman and Members of the Zoning Board of Appeals,

I am writing to clarify three points that were discussed at the November hearing on this matter.

Board of Health:

Contrary to assertions at the last hearing, the Board of Health has expressed concern about this property and it has expressed desire to require measures to be taken to ensure the safety of residents. The Board of Health comments submitted to the Planning Board about environmental concerns are still in effect. I attended the Board of Health meeting on November 17, 2023 and asked whether the concerns and conditions that the Board of Health had delivered to the Planning Board during those proceedings had been revoked, or whether the Board of Health stood by what it had said to the Planning Board. Tim McDonald, the Director of the Health Department replied that the Board of Health still had all the concerns expressed, and that it still desired all of the conditions that it sent to the Planning Board regarding this project.

Standard of Review/Power of ZBA:

The right to appeal the issuance of the Building Permit is granted by M.G.L. c. 40A s.8. The abutters are entitled to appeal because they are aggrieved by a building permit that was issued in violation of Needham's zoning bylaws.

The Applicant seems to want to limit this board's review and not have this panel look at the permit as a whole. The ZBA's role is not so limited. The job and authority of the ZBA in this proceeding is to review whether the application for a building permit filed by Needham Enterprises met all the requirements for the issuance of a building permit, whether it showed compliance with all zoning bylaws and whether the conditions to the building permit imposed by the Building Commissioner sufficiently protect the municipal interests of Needham. Under M.G.L. c. 40A s.14, in this proceeding, the ZBA may make orders or decisions, reverse or affirm the Building Commissioners actions in whole or in part, or modify any order or decision. Section 14 provides that the ZBA "shall have all the powers of the officer from whom the appeal is taken". The law does not require the ZBA to accept or defer to the actions and judgment of the Building Commissioner or other Town departments.

Contrary to what has been argued by the Applicant, the Land Court specifically declined to restrict review of the building permit application. It **did not rule** that the Dover Amendment prohibits every department, official or board from enforcing any restriction or bylaw against the Developer on this project. It **did not rule** that the Applicant was *entitled* to a building permit. It **did not** prohibit the Building Commissioner or this board from attaching conditions to the building permit. The Land Court explicitly refused to rule that no condition that was in the Planning Board Decision could be required by the conditions of the building permit. The ZBA is not inhibited by the Land Court from reviewing this application as the Building Commissioner

should have, from stopping work on the prematurely issued building permit, from requiring all prerequisite facets of the application to be complete, from requiring the application to show compliance with all zoning bylaws and from imposing conditions to protect Needham's legitimate municipal interests.

The Effect of the Dover Amendment: **Contours of Protection for Child Care Centers**

The Applicant has essentially argued that s.3 prohibits Needham from enforcing all conditions, regulations, and bylaws on a developer that is constructing a childcare center -- except for regulations of bulk, height, yard size, lot area, setbacks, open space, parking and building coverage. This expansive prohibition is not supported by the language of s.3 or by the caselaw.

The language of s.3 provides:

> Section 3: Subjects which zoning may not regulate; exemptions; public hearings; temporary manufactured home residences
>
> . . .
>
> No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

This paragraph, applicable only to child care uses, is more narrowly drawn than the provisions of the preceding paragraph relating to religious and educational uses.

The child care paragraph forbids only a narrow category of zoning bylaws – zoning ordinances or bylaws that "**prohibit, or require a special permit for**, the use of land or structures…for the …purpose of operating a child care facility." This is different from, and **significantly more narrow** than the paragraph regarding religious and educational uses which provides that zoning bylaws shall not "prohibit, **regulate or restrict** the use of land or structures for religious purposes or for educational purposes."

This distinction is very important. The fact that the legislature chose not to include the words "regulate or restrict" in the child care provision means that they did not intent to shield commercial child care uses from zoning bylaws that merely regulate or restrict child care users – but rather it intended only to forbid bylaws that prohibit or require a discretionary special permit for the use of land or structures for the purpose of operating a child care facility or have the effect of doing so.

In this appeal of the building permit, the Applicant seems to suggest that, for each condition or bylaw, the town must show that it is one that concerns bulk, height, yard sizes, lot area, setbacks, open space, parking or building coverage. This is exactly backwards.

As the cases of Tufts, Rogers and Campbell establish, **all** bylaws are presumed to be valid and **all** bylaws must be enforced for all properties. This is because M.G.L. 40A, s.4 requires uniformity in the application of zoning bylaws.

It is the Applicant that has the burden of proof to show that a condition or bylaw is within the restrictions of the Dover Amendment. For each disputed bylaw, the Applicant must show that the bylaw "prohibits, or requires a special permit for" using the land or structures on 1688 Central Ave for the purpose of operating a child care facility. If the particular bylaw does not do that, *it is not within the scope of the Dover Amendment's prohibition*, and it must be enforced as written. It is not sufficient for the Applicant to allege or prove that a bylaw **impacts** the child care operation, that it **restricts** the child care operation or that it **regulates** the child care operation – Section 3 for child care facilities only forbids prohibiting, or requiring a discretionary special permit for use. It is only if the bylaw prohibits or requires a special permit for the use that the inquiry turns to whether the bylaw is within the enumerated areas of regulation and whether the bylaw serves a legitimate municipal purpose.

Most of the bylaws, regulations and conditions which the Applicant objects to do not prohibit or require a special permit for the use of the land/structures for the purpose of operating a child care facility. They not do that on their face and they do not do that as applied to this child care operation. In fact most of the conditions and bylaws in this case have nothing to do with the use of the land or structures for the operation of a child care facility. Submitting plans that show the intended use of each building does not prohibit a child care operation on the land. Neither does requiring the building plan or setback to be altered to fit in with the surrounding neighborhood, requiring landscaping, tree replacement, buffers, appropriate lighting, screening, protection from headlight glare, adequate parking, traffic mitigation, pedestrian safety, environmental safety, a construction management plan, site plan review, erosion control plans, current stormwater management plans based upon the current site plan, etc. All requirements and conditions under the aegis of these bylaws can be enforced, just as they would be in any other case, because they do not in any way prohibit or require a special permit for the use of land or structures for the purpose of operating a child care facility at 1688 Central Avenue. It is unusual for a Dover Amendment case to involve a project where the town has *allowed the exact daycare center building requested*. Typically, child care s.3 cases involve a project that has been denied by the town – i.e. cases where a bylaw is used to *prohibit* the use of land or structures for the purpose of operating a child care facility such that the child care provision of the Dover Amendment is implicated.

The only bylaw that could *possibly* be considered prohibiting the use of a structure for the purpose of operating a child care facility at 1688 Central Avenue is the bylaw that prohibits more than one non-residential building on a residential lot. This bylaw does not on its face prohibit or require a special permit for the use of buildings or land for the purpose of operating a child care facility.

Applying the bylaw to the particular facts of this case, the bylaw can have the effect of requiring removal of the barn from the property. However, this fact does not mean that the bylaw prohibits the use of a structure for the purpose of operating a child care facility such that it would be prohibited by the Dover Amendment.

The barn is designated on the plan only as “building to remain”. Applicant has never provided any evidence that the barn was intended to be used for the purpose of operating a child care facility. In fact, without renovation to bring the building up to code, the barn could not be used for this purpose. At most, the Applicant has suggested that it intended to use the barn for storage for the child care. Storing items in the barn, even if the items relate to the child care center, does not constitute operating a child care facility in the barn. Therefore, not allowing the second non-residential building for storage does not implicate the Dover Amendment and the bylaw must be enforced as written.

Even if you construe storing items to equal operating a child care facility, the bylaw serves legitimate municipal interests by reducing the amount of commercial buildings on a residential lot, and in a residential neighborhood, in order to protect the residential character of the neighborhood. It is the type of regulation that is allowed by the Dover Amendment because it is one that is concerning open space, building coverage and bulk. It is therefore permissible on its face under the Dover Amendment.

The bylaw also does actually serve that purpose in the circumstance of this case. Requiring the Applicant to have either building but not both will accomplish the municipal interest of protecting the residential character of the neighborhood because it will decrease the amount of building coverage from approximately 15000 sq.ft. to, at most, about 10,000 sq.ft. The decreased bulk will lessen the dominance of the commercial operation amidst the surrounding homes and reduce the extent to which the construction of a commercial building on the lot overrides the residential character of the neighborhood and interferes with the neighbors’ open air, light, views and enjoyment of their property.

The municipal interest of protecting the residential character of neighborhoods outweighs any inconvenience to the child care center of problem solving – of rethinking what needs to be stored indoors, using areas of the new building such as the gym for storage, storing some things offsite, or finding some other way to accommodate all their needs in the building that they themselves designed.

Thank you for your consideration of these matters.

Sincerely,

Margaret Abruzese
30 Bridle Trail Rd.

Daphne Collins

From: Mike Connelly <connelly3439@gmail.com>
Sent: Friday, December 8, 2023 6:57 PM
To: Daphne Collins
Subject: 1688

Members,

I have been following NCC's plight for years. I watched your recorded meeting and have some comments for the board. I am a former NCC parent and attorney that has watched all the Planning Board meetings and followed the railroading by the neighbors that landed the case in court. I wish I had commented at those hearings and can not sit by to watch it happen again.

1) The comments that you heard have already been brought up and the inspector is aware of these issues. Your meeting that I watched appeared to be more of a special permit hearing instead of a hearing to revoke the permit. For the most part the issues presented were not relevant to your decision at hand. The issue for your board, as presented by the attorney for the developer, was if the inspector issued the permit illegally. Why did you cross examine everyone but the appellant? It is their burden.

-There is no place in the bylaw that I see that requires board of health approval and it looks like they approved from my view of the file with a memo and they now have no comment.
-A plan for landscape is not required both under the Dover Amendment and the bylaw. It was clear from testimony that the Dover Amendment does not speak to landscaping. Even if it was required, the solution would be that NCC has to abide by the landscape section of the bylaw which does not require a plan or a review of a plan, just specifications. It would be the inspectors role to see if the project when completed met the requirements of the landscape portion specifications. I agree that this is exempt from review and the judge in the case concluded that town review of this case ends at dimensional requirements.

- Lighting is a similar argument. Dover Amendment does not require it but if it did then the bylaw would have to be followed. This would be reviewed at the end of the project when the lights were on. The bylaw does not require a plan because it is not a special permit or site review application. The judge from my research commented that town review was not allowed.
- Parking and use is determined by the inspector. That is in his jurisdiction. If a use is violated then it would be an enforcement issue, not a permit issue. If an owner applies for a single family house and instead uses it for a hotel, the permit is valid only for a single family house and that would be a violation under the bylaw. In this case, if the barn is not used for storage then that would be an enforcement violation.

I hope that you will trust the inspector. This is not an appeal to add conditions to a permit, it is an appeal to determine if the permit was issued in error. This has been an incredibly long road for NCC and the neighbor's arguments have already been heard. If there are any legal issues, please ask the town attorney. If the neighbors wish to allow for conditions to address these issues, Needham should pass a bylaw.

Thank you.
Mike

Daphne Collins

From: Alan Langsner <alangsner70@gmail.com>
Sent: Tuesday, December 12, 2023 5:29 PM
To: Daphne Collins
Subject: Daycare Project - Central Avenue

Hello,

I would like to formally communicate my view that the Daycare project on Central Avenue be paused until it is in full compliance with Needham's bylaws and the land court process has run its full course.

Thank you,
Alan Langsner
30 Windsor Road
Needham.