

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

AUTUMNWOOD, LLC

v.

SANDWICH ZONING BOARD OF APPEALS

No. 05-06

DECISION

June 25, 2007

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

_____)	
AUTUMNWOOD, LLC,)	
)	
Appellant)	
)	
v.)	No. 05-06
)	
SANDWICH ZONING BOARD OF)	
APPEALS,)	
)	
Appellee)	
_____)	

DECISION

I. PROCEDURAL HISTORY

On March 5, 2004 Autumnwood, LLC filed an application for a comprehensive permit with the Sandwich Zoning Board of Appeal to build nearly three hundred housing units on a 47.5-acre site near Kiah's Way, not far from Quaker Meetinghouse Road in Sandwich. Construction of the housing would be financed under either the Housing Starts Program of Massachusetts Housing Finance Agency (MassHousing) or the New England Fund of the Federal Home Loan Bank of Boston. The Board granted the developer's application subject to thirty-five conditions, filing the decision with the town clerk on February 15, 2005. The conditions of the Board's permit included provisions that prevented seventy percent of the land from being developed, and required within the remaining developable area that single family housing be built on lots no smaller than one third of an acre. The decision also questioned the use of Kiah's Way and two other roads, Discovery Hill Road and Pin Oak Drive, for access to the development.

The developer appealed the Board's decision to this Committee on March 4, 2005. On November 4, 2006, the presiding officer issued a ruling denying the Board's motion to dismiss, ruled that the Board's decision should be deemed a *de facto* denial of the developer's permit application, and ordered that the matter move forward for hearing under the burdens of proof allocated pursuant to 760 CMR 31.06(2) and 31.06(6). See Ruling on Motion to Dismiss and Motion for Clarification of Grant or Denial (Nov. 4, 2005). These rulings have been reviewed by the Committee, and they are incorporated into this decision as rulings of the full Committee.

Pursuant to the Committee's regulations, the parties negotiated a Pre-Hearing Order, which was issued by the presiding officer; prefiled testimony was submitted; a site visit and three days of hearings to permit cross-examination of witnesses were conducted; and post-hearing briefs were filed.

II. JURISDICTION

To maintain its appeal, the developer must satisfy the three jurisdictional requirements contained in 760 CMR 31.01(1).

First, the requirement that the developer control the site was addressed in the presiding officer's November 4, 2005 Ruling on Motion to Dismiss. Also see Exh. 6, 7; Tr. II, 153.

Second, MassHousing issued a determination of project eligibility on December 2, 2003. Exh. 9; Pre-Hearing Order, § II-5. The limited challenge to that determination was also rejected in the Ruling on Motion to Dismiss. The Board has not demonstrated that the project is no longer eligible for a subsidy. See 760 CMR 31.01(2)(f).

Third, in this appeal, the Board has not challenged the developer's status as a limited dividend organization, a matter which, in any case, is closely related to the question of fundability, which has been established by the project eligibility determination. See generally, Pre-Hearing Order, § III; Board's Brief (filed Mar. 9, 2007); *O.I.B. Corp. v. Braintree*, No. 03-15, slip op. at 3-4 (Mass. Housing Appeals Committee Mar. 27, 2006) and cases cited.

Finally, though technically it is not a question of jurisdiction, but rather a matter that may be raised by the Board as an affirmative defense, the parties have stipulated that the town of Sandwich has not satisfied any of the statutory minima established in G.L. c. 40B, § 20. Pre-Hearing Order, § II-4; also see 760 CMR 31.04.

III. FACTUAL OVERVIEW

The development proposal before the Committee is for 272 housing units: 176 single-family homes, 96 one- and two-bedroom condominium units in six large buildings.¹ Pre-Hearing Order, § II-6; Exh. 2. The site is a nearly square, 47.5-acre parcel of undeveloped land in a district zoned for single-family homes on 60,000 square-foot lots. Exh. 31-A; 31-B; 45, ¶ 23; Board's Brief, p. 4. The land to the northwest is also undeveloped. On the other three sides, the proposed development is surrounded by existing housing. All of the land bordering the site on both its northeast side and southeast side contains houses developed as part of the Kings Grant Acres subdivision. Exh. 2; 5; 13-A. The northeast side of the site is bounded by Kiah's Way, and a dozen single-family homes on half-acre (20,000 to 25,000 square-foot) lots in Kings Grant Acres front on this roadway. Exh. 2, 5, 13-A. Along the southeast border of the site and extending due south are approximately 70 more homes in the Kings Grant Acres subdivision on 20,000 to 30,000 square-foot lots. Exh. 2, 5; 13-A. Adjacent to the Kings Grant Acres subdivision, along the southwest border of the site, is the Sherwood Forest development, which consists of 36 single-family homes on lots of approximately 15,000 to 20,000 square feet.² Exh. 2, 5, 10-A, 10-B; Tr. II, 138.

There are three points of vehicular access to the proposed development from the existing roads in the Kings Grant Acres and Sherwood Forest developments. There will be additional curving roads constructed within the site, and houses will be built on lots of about 6,000 square feet. Tr. II, 116, 138; Exh. 2. Six condominium buildings are

1. Though the record is ambiguous, we assume that the developer has abandoned its proposal to also include two rental units over a gas station or convenience store.

2. Technically, this development is not a subdivision since it was constructed under a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 rather than under the Subdivision Control Law, G.L. c. 41, §§ 81K- 81GG. Exh. 10.

clustered in the northern corner of the site in an area that appears to be less than three acres. Exh. 2.

IV. PRELIMINARY ISSUES³

A. The Developer's Rights to Use Kiah's Way, Discovery Hill Road, and Pin Oak Drive

The Board contends that the developer has not established that it that it possesses the rights either to improve Kiah's Way and Discovery Hill Road to the width proposed or to connect to the surrounding roadways. (For a complete description of the access plan, see section V-A, below.) There are in fact serious questions about access rights, and in response, the developer has presented extensive evidence of its claims. This consists primarily of the testimony of a lawyer experienced in real estate law who researched the law and facts concerning the roads in question, and provided a detailed report concluding that they are public roads that developer has the right to use.⁴ See Exh. 46, 46-12, 46-13, 46-14, 55; Tr. I, 66-136. In addition, the developer commissioned a professional land survey of the roads in question. See Exh. 50, 50-B. The Board, in turn, hired a similar expert, who contests these claims. See Exh. 51.

We need not address this matter in more detail, however, since we have long held that even where not simply access but actual control of the site is at issue, the developer need only establish a colorable claim of title, and that adjudication of the complex title or

3. At the beginning of its brief, the Board also attempted to reserve its rights with regard to a number of miscellaneous legal claims, e.g. whether issues under state environmental laws may be raised before the Committee, whether all of the Committee's members must attend hearings, and various evidentiary rulings. See Board's Brief, pp. 2-3. Since these were not briefed in detail, the Committee similarly will not address them, but rather relies on the full record in this case and on its discussion of these legal questions in its decisions in other cases.

4. The most significant questions concern rights to use public ways. But as noted in the presiding officer's ruling on the motion to dismiss in this case, there are also questions concerning the developer's right to make improvements in the area of the utility easement. See Ruling on Motion to Dismiss and Motion for Clarification of Grant or Denial, p. 4 (Nov. 4, 2005). These are also questions of property rights that, if they cannot be resolved amicably, should be adjudicated by the courts and not by this Committee. The developer has shown a colorable claim that it has obtained the necessary rights within the easement. Exh. 26-A, 26-B, 26-C; Tr. I, 80-82, II, 118-133.

similar issues will be left to the expertise of the courts.⁵ *Bay Watch Realty Tr. v. Marion*, No. 02-28, slip op. at 4 (Mass. Housing Appeals Committee Dec. 5, 2005); *Hamilton Housing Auth. v. Hamilton*, No. 86-21, slip op. at 9 (Mass. Housing Appeals Committee Dec. 15, 1988), *aff'd sub. nom. Miles v. Housing Appeals Committee*, No. 89-122 (Essex Super. Ct. Oct. 6, 1989); also see *Billerica Development Co. v. Billerica*, No. 87-23, slip op. at 18-19 (Mass. Housing Appeals Committee Jan. 23, 1992); *Cloverleaf Apts., LLC v. Natick*, No. 01-21, slip op. at 7, n.3 (Mass. Housing Appeals Committee Dec. 23, 2002), *aff'd*, No. 03-0321 (Suffolk Super. Ct. Jan. 28, 2005); cf. *Princeton Development, Inc. v. Bedford*, No. 01-19 (Mass. Housing Appeals Committee Sep. 20, 2005). We find that the developer has established a colorable claim of right to use Kiah's Way and the other roadways for access to the site. Lest there be any doubt about the need for the developer to clarify its rights to improve and use these three roadways, we will require it by condition. See § VII-2(b), below.

B. The Developer's Qualifications

In the Pre-Hearing Order, the Board raised the question of whether developer has sufficient qualifications or credentials to complete the project. Despite waiver of the issue by the Board's failure to brief it, we will address the matter succinctly. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E.2d 595, 598 (1995). As a general rule, it is well settled under the Comprehensive Permit Law that we will not review a developer's qualifications. *T/D/B Realty Tr. v. Northbridge*, slip op. at 12-13 (Mass. Housing Appeals Committee Aug. 5, 1974). Our regulations are even more explicit, providing that we are generally not to hear evidence with regard to the developer's capabilities. 760 CMR 31.07(4). Also see *Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 02-21, slip op. at 6-9 (Mass. Housing Appeals Committee Dec. 12, 2006). This issue has most recently been addressed by the Land Court in *Henshaw v. Board of Appeals of the Town of Tisbury*, Land Court No. 304282, 2006 WL 2514177 (Aug. 31, 2006). The Court reiterated the comments we made in *CMA, Inc. v. Westborough*, No.

5. The status of Kiah's Way and Discovery Hill Road has already been the subject of three separate Land Court registration cases. Exh. 46-14, p. 1; Tr. I, 71.

89-25, slip op. at 7 (Mass. Housing Appeals Committee Jun. 25, 1992) that “issues such as... the developer's qualifications... are issues with are not intended to be reviewed in detail within the comprehensive permit process” and are not “matters of concern in the usual sense.” *Henshaw*, 2006 WL 2514177, *9. It went on to note that there is authority in *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 378, 294 N.E.2d 393, 420 (1973) for requiring at least disclosure of financial information, but noted that review by the court was to be “limited.” *Id.*

The approach described in *CMA, Inc. v. Westborough*, supra and § 31.07(4) of our regulations is sound policy. It reflects the judgment of state housing officials that certain of the complex issues that arise in the development process cannot be sorted out easily in an adversarial hearing process, but rather are best left to the managerial discretion of the subsidizing agency or project administrator. Review of the qualifications of the development team will be part of the final approval process. See 760 CMR 31.09(3), 31.01(2)(b)(6).⁶

Though our normal practice, as just described, is to leave the review of developer's qualifications to the subsidizing agency or project administrator, our regulations permit us to inquire into the developer's “ability to finance, construct, or manage the project” if “good cause” is shown. 760 CMR 31.07(4). In this case, however, we note that there is evidence in the record that the developer’s principal has over 30 years of experience in the commercial and residential construction industry. Exh. 45, ¶ 4-15; Tr. II, 148. Therefore, we decline to exercise our discretion to take the unusual step of examining the developer's qualifications.

Finally, though we see little ambiguity in our regulation or precedents, it is important to note that in the context of traditional land use law, consideration of either an applicant's past record of violation of local bylaws or of his character and reputation is

6. Both market-rate developers and affordable housing developers are also subject to some review by the lenders with whom they work. But only affordable housing developers undergo the additional level of scrutiny provided by § 31.09(3), and this provides the town with additional protection. The town may also, of course, protect itself by requiring a bond or other security for the proper completion of the work. Cf., G.L. c. 41, § 81U. If the town were permitted to apply more stringent qualification standards to affordable housing developers than it does to market-rate developers, it would run afoul of the of the statutory provision that all requirements be applied “as equally as possible to subsidized and unsubsidized housing.” G.L. c. 40B, § 20.

improper. *Dowd v. Board of Appeals of Dover*, 5 Mass. App. Ct. 148, 155-157, 360 N.E.2d 640, 645-646 (1977); also see *Warner v. Lexington Historic Districts Com'n*, 64 Mass. App. Ct. 78, 83, 831 N.E.2d 380, 385 (2005); *Fafard v. Conservation Corn 'n. of Reading*, 41 Mass. App. Ct. 565, 571, 672 N.E.2d 21 25 (1996). These precedents lend support to our decision not to delve into the developer's qualifications. See *Northern Middlesex Housing Assoc. v. Billerica*, No. 89-48, slip op. at 9 (Mass. Housing Appeals Committee Dec. 3, 1992), *aff'd* No. 93-0067-D (Suffolk Super. Ct. May 17, 1994).

V. LOCAL CONCERNS

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a *prima facie* case by showing that its proposal complies with state or federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that such concern outweighs the regional need for housing.⁷ 760 CMR 31.06(6); also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 413 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

The Board has raised two local concerns: "the adequacy from a traffic safety viewpoint of Kiah's Way, Discover Hill Road..., and Pin Oak Drive for vehicular access," and "the density of the proposed housing." Pre-Hearing Order, §§ III-3, III-7, III-8.

A. Access

As noted above, there are three points of access to the proposed development from existing roads. Also see Appendix.

First, Kiah's Way—an ancient way three to four miles long that has been improved in some parts of Sandwich and not in others—forms the northeast boundary of the site. Exh. 20, fig. 1; Tr. I, 69-70. In this area, Kiah's Way is only partially improved,

7. The shift in burden of proof is based upon a presumption created by the town's failure to satisfy any of the statutory minima described in 760 CMR 31.04 (1) and (2). See 760 CMR 31.07(1)(e).

and beginning where it crosses a major collector road (Quaker Meetinghouse Road) to the southeast, it runs northwest through a utility company's power line easement to the eastern corner of the site, and then along the site's boundary, with existing houses in the Kings Grant Acres subdivision fronting along it opposite the site. Exh. 2; 5; 20, fig. 1; 41; 50-B; Tr. I, 79-83. Another ancient way, Discovery Hill Road, intersects Kiah's Way roughly midway along the site's boundary, and continues through the center of the site.⁸ Exh. 20, fig. 1; Tr. I, 91-92. The developer proposes to improve both of these ancient ways. Thus, cars will be able to turn off Quaker Meetinghouse Road, which is part of the town's primary street network, travel about 500 feet along Kiah's Way through the power-line easement, travel an additional 1,000 feet along Kiah's Way along the northeast border of the site, and then turn left into the site on Discovery Hill Road or continue a short distance farther to the condominium portion of the development. Exh. 2; 5; 20, p.3; 41; 50-B.

Second, along the southeast boundary of the site a roadway in the Kings Grant subdivision, Pin Oak Drive, ends in a cul-de-sac. The right of way of this cul-de-sac touches the property line of the proposed site, and because of that and the shape of the right of way, it is obvious that it was laid out with the intention of providing a roadway connection to the proposed site. Exh. 2, 13-A. The developer proposes to complete this connection with a roadway that will run through the site and intersect with Discovery Hill Road roughly in the center of the site. Exh. 2.

Third, when the Sherwood Forest development was laid out, Discovery Hill Road was improved to form one of its roadways.⁹ Exh. 10-B. There, too, the right of way was laid out in a manner that anticipates that the remainder of Discovery Hill Road would someday be widened and improved, that is, a short stub was provided pointing in the direction of the proposed site. Exh. 10-B; 50-B, sheet 6. The developer proposes to complete this connection as well. As an alternative means of connecting to the roadway

8. Discovery Hill Road is currently a narrow, unimproved cart path. Exh. 2; Tr. I, 91-92.

9. It is labeled "Discovery Hill Road South" on the approved plan. Exh. 10-B. It is labeled "Sherwood Lane" on some later plans. See, e.g., Exh. 5.

network in the Sherwood Forest development, the developer has purchased a lot that abuts the proposed site, and could build a roadway connecting to Castle Lane. Tr. II, 154.

The only issue with regard to traffic safety is that of roadway width, upon which considerable evidence from the developer's expert transportation engineer was introduced.¹⁰ The existing roadways generally appear to be 22 feet wide, though they may be a foot or two narrower in some locations. See Exh. 48, p. 4, second full para. For instance, the Board's expert witness testified that Discovery Hill Road (Sherwood Lane) in the Sherwood Forest development is 20 feet wide. Exh. 52, ¶ 8. The developer's expert originally testified that roads within the site would be 22 feet wide, but later corrected himself, saying they will be 20 feet wide. Exh. 48, p. 9; 56, p. 2. There is no evidence that, with regard to the existing roads or roads proposed within the development, the difference between widths of 22 and 20 feet is a material difference.¹¹

The developer's expert based his safety analysis on the conservative assumption that access would be provided only at Kiah's Way and Pin Oak Drive. Exh. 48, p. 8, first para. First, Pin Oak Drive, like the other roadways in the area, is in good condition, and when connected to the roadways within the proposed development will clearly be suitable for access. Exh. 20, p. 6; 48, p. 9, second full para. With regard to the use of Kiah's Way, which has generated much more controversy, the expert testified that "a roadway with a minimum of 20-foot paved width can be provided. This is more than adequate to provide a safe, two-way roadway." Exh. 48, p. 8, second para; also see Tr. II, 121. Finally, he considered what has now been proposed as additional access from the Sherwood Forest development, either using the stub that was left there to connect to Discovery Hill Road or by creating a new point of access at Castle Lane.¹² Exh. 45, p. 8,

10. Even though the Board did not raise issues concerning the volume of traffic generated by the proposed development of single-family homes and condominium units, this was also addressed thoroughly in the testimony of the developer's expert. See Pre-Hearing Order, § III-3; Exh. 48, pp. 5-7; also see Exh. 20.

11. If anything, the evidence tends to show that the town has accepted 20-foot-wide roads in this area as safe roads. A further complication is that it appears that some of the roadways may in fact have a travel way of only 18 feet plus one-foot-wide, asphalt "Cape Cod berms" along both edges. Tr. II, 81-83.

12. Though either option is adequate, improvement of Discovery Hill Road seems to be the preferred option, although a question remains as to whether the developer has the right to widen

fourth para; 56, p. 5, fourth conclusion; Exh. 57, ¶15. He concluded that “the proposed project can be constructed and occupied with adequate and safe access and the proposed development will not create new safety deficiencies in the existing neighborhood. ...[M]ultiple access points will minimize the traffic effects of the project.” Exh. 48, p. 10, § IV, second para.; p. 11, third para; also see Exh. 56, pp. 2-3.

In addition, though there was little detailed testimony in this regard, the 20-foot width of Kiah’s way appears to be consistent with the guidelines prepared by the American Association of State Highway and Transportation Officials (AASHTO). Total vehicle trips per day in and out of the proposed 272-unit development will be approximately 2,580. Exh. 20, p. 23, Table 5. Since there will be three points of access to the proposed development, total vehicle trips on Kiah’s way, including trips from the existing houses on the road, are unlikely to exceed 1,500. The AASHTO guidelines show a minimum design width of 20 feet for such a roadway if the design speed is 40 mph or less. Exh 56, pp. 3-4; 60, p. 384; also see Tr. II, 24-31, 49-61, 74-76.

Similarly, the 20-foot width of Kiah’s way meets the minimum standards of the Massachusetts Highway Department (MassHighway). Its Project Development and Design Guide first addresses “multimodal accommodation,” that is, the manner in which motor vehicles, bicycles, and pedestrians are accommodated, and then design elements, particularly lane width. See Exh. 59-D, §§ 5.2, 5.3. The guide makes it clear that for a new roadway, separate accommodation for all users (i.e., pedestrians, bicyclists, and drivers) “is often the preferred option.” Exh. 59-D, § 5.2.1, p. 5-5. As the developer’s expert acknowledged on cross-examination, because a limited width of right of way is available, Kiah’s Way has been designed to provide the less desirable option of shared accommodation for all users. Tr. II, 51. The guide notes, however, that “[t]his condition occurs when there is low user demand and speeds are very low, *or* when severe constraints limit the feasibility of providing shoulders.” Exh. 59-D, § 5.2.5, p. 5-10 (emphasis added). Thus, shared accommodation is clearly permissible under the MassHighway

this beyond a single lane. Exh. 45, p. 9, first full para. That question we leave for the Land Court. If both the Castle Road option and the Discovery Hill Road option are ultimately available to the developer, it is the Board that should determine which is the more desirable design.

standards under some circumstances. The guide goes on: “With the exception of local roads, [shared] accommodation will require a Design Exception.” Exh. 59-D, § 5.2.5, p. 5-10. Whether Kiah’s Way should be classified as a local road or a collector road is a matter of judgment. It is clearly much smaller than Quaker Meetinghouse Road, which can fairly be classified as a major collector road. See Tr. II, 27. We accept the developer’s expert’s unambiguous testimony on cross-examination that Kiah’s Way is not a minor collector, but rather, a local road.¹³ Tr. II, 29-31. Thus, under the MassHighway standards, even without an exception, it is properly designed with shared accommodation for all users.¹⁴

The second issue under the MassHighway guide is the width of travel lanes. The “area type” that applies to Kiah’s Way is Suburban High Density. Tr. II, 26. In such an area, the range of travel lane width suggested for a local road is 9 to 12 feet.¹⁵ Exh. 59-D, fig. 5-14, p. 5-31. Thus, under this criterion, the 20-foot width of Kiah’s Way is also acceptable.

Further, traffic calming principles suggest that it may be appropriate for Kiah’s way to be slightly narrower than the other roads in the neighborhood. See Exh. 56, p. 2, first full para; Tr. II, 84-89. Many of the existing roads and the proposed roads are curving, while Kiah’s Way, like one or two other roads in the neighborhood, is quite straight. See Exh. 5. Though traffic calming principles are not addressed in detail in the record, it appears likely that “narrower street widths [will] promote safety” by lowering

13. The developer’s expert prepared a lengthy report which does not distinguish between collector roads and local roads, but simply describes them more generally as “two-lane” or “residential.” Exh. 20, pp. 5-7. The report projects a total of 2,528 additional trips per day in and out of the site. Exh. 20, p. 23. These will be spread among the three access points to the development. Exh. 20, p. 35. The Board’s expert testified only that “[a] collector street is defined *by the town* of Sandwich as a street with collects... traffic from several minor streets, or which handles traffic equivalent to that generated by 50 homes or more.” Exh. 52, ¶ 8 (emphasis added). This statement on its face is inaccurate since any such definition would presumably refer to 50 homes *or less*. More important, the expert did not testify as to his own opinion of whether Kiah’s Way will be a local street or a collector or as to how he would classify the road with reference to generally accepted standards.

14. The MassHighway guide also notes, “Much like minor collectors, local roads are sometimes designed to provide shared accommodation for all users.” Exh. 59-D, § 5.3.4.4, p. 5-35.

15. “Travel lanes narrower than 10 feet are only appropriate for local roadways and some minor collectors with very low traffic volumes and speeds.” Exh. 59-D, § 5.3.3.3, p. 5-32.

driving speeds.¹⁶ See Exh. 56, p. 2, first full para; Exh. 59, § 5.3.3.3, p. 5-32; Tr. II, 75, 84-89.

We conclude that the developer has met its burden of proving that the development, designed with three access points—Kiah’s Way, Pin Oak Drive, and either Discovery Hill Road or Castle Lane—is adequately designed from a traffic safety viewpoint.

In response, both the Board’s expert civil engineer and the town engineer testified that Kiah’s Way should be constructed to a width of 24 feet. Exh. 52, ¶¶ 8, 11; 53, ¶¶ 4-9, 19. This testimony is quite general, does not specifically address whether the roadway will be unsafe at a 20-foot width, and is less persuasive than that of the developer’s expert. In particular, the testimony that access for a fire truck will be “difficult or impossible” is not credible. See Exh. 53, ¶ 11. The past director of planning and development for Sandwich also testified with regard to road width. Her testimony, as well, was largely general and less persuasive than that of the developer’s expert. See, e.g., Exh. 54, ¶ 9.

The Board’s expert also suggests that no connection to the proposed development should be permitted at Pin Oak Drive. Exh. 52, ¶ 13. Particularly considering the many similar roads in the subdivisions to the southwest of the Sherwood Woods development, his opinion is conclusory and not persuasive. See Exh. 5; also see Tr. II, 92.

We conclude that the Board has failed to prove legitimate local concerns with regard to traffic safety that outweigh the regional need for housing.

B. Density

The developer proposes 176 single-family homes plus 96 condominiums units in multi-family buildings on a 47.5-acre site. Pre-Hearing Order, § II-6, II-9; Exh. 2. Both the developer’s principal and its architect testified that the development of single-family homes, with additional condominiums, was designed carefully “to encourage community with individual privacy on small lots” in “a safe and walkable neighborhood.” Exh. 45,

16. Though the portion of the MassHighway guide that was admitted into evidence mentions in passing in § 5.3.3.3 that “[n]arrower lanes.. can encourage lower operating speeds,” the lengthy chapter in the guide on Traffic Calming and Traffic Management was not introduced. See Exh. 59-D, p. xi-xii (table of contents).

¶¶ 25, 26; 49, ¶¶ 6-11. For the reasons described below, we find that the developer has established a *prima facie* case that this neighborhood complies with generally recognized standards with regard to density.¹⁷

The evidence shows that the neighborhood that has been designed is attractive and functional, perhaps even more so than some more spacious traditional subdivisions. Architectural drawings confirm the testimony of the developer's architect that the development consists of "nicely designed semi-custom three-bedroom homes and ... in addition a series of attached townhouse-style condominium units," and which are "conducive to today's living patterns..." Exh 49, ¶¶ 6, 7; Exh. 2, 3. Although the surrounding subdivisions consist of 20,000 to 30,000 square-foot lots, there is no reason that lots must be this size. Rather, these houses, on small, 5,000 to 6,000 square-foot lots, are of varying, but compatible styles that make efficient use of the land. Exh 49, ¶ 8; 45, ¶ 25; 62-A to 62-J. The footprint of the homes ranges from approximately 750 to 1,200 square feet, plus decks and porches. Exh. 3-A; Tr. III, 6-11. Typically, they are set back 30 feet from the street.¹⁸ Exh. 3-1 to 3-E. They are laid out in such a way that one-car garages (14' x 22') could be added in the future, toward the rear of the site, set back 40 to 50 feet from the street. Tr. III, 11-12, 14. The houses are typically set back from the property line 5 to 10 feet on one side, and 20 to 25 feet from the property line on the other side, where the driveway is located. Exh. 3-A to 3-E. Thus, though some houses could be as close as 15 to 20 feet to the neighboring house, more typically they will be 20 to 30 feet apart. Exh. 3-A to 3-E; Tr. III, 25. All of this creates a development "similar to older style, small-lot neighborhoods, whereby the house occupied a closer relationship to the street and, through use of front porches, fostered social interaction and a sense of community...." Exh. 49, ¶ 10.

17. The developer has correctly pointed out in its Appellant's Suggested Revision and Argument on Proposed Decision (filed Jun. 8, 2007) that only density and not design is at issue in this case. The "sole issues in dispute" are traffic safety and "the density of the proposed housing." Pre-Hearing Order, §§ III-2, III-3. No issue has been raised with regard to the fact that some of the units are single-family homes and others attached condominium units. On the contrary, the Board, in its original decision permitted the developer to build "either a subdivision of single-family detached homes or multi-family condominium buildings." Exh. 1, p. 10, § IV-3.

18. Four of the five typical designs show a 30-foot setback. The fifth shows nearly 50 feet. Exh. 3-E.

In addition, the development is located not far from large tracts of open space and an elementary school and a high school. Exh. 24; 45, ¶ 24; 54, ¶23. More important, open space is provided on the site itself. In one corner, wetlands require leaving a small area of open space; along the entire southeast border, a fairly broad, open, buffer area will remain with septic infiltration beds under the lawn or meadow; and the large area under the power lines, while far from the highest quality open space, will be not only left open, but maintained as recreational space. Exh. 2; Tr. II, 133, 135, 136-137; III, 16-17. These are connected by a walking path. Exh. 2, 49, ¶ 8; Tr. II, 137; III, 17. Most important, near the center of the development, there is an open recreation area of at least 15,000 square feet designed to mimic a village green.¹⁹ Tr. II, 134; Exh. 2; 49, ¶ 8.

We find that the developer has established a *prima facie* case that the single-family development that it has proposed, because of its design and open space, complies with generally recognized standards with regard density.

The Board, on the other hand, has proven few, if any objective, problems to support its general claims that the proposed development is too dense. Its prefiled testimony places little emphasis on density. See, generally, Exh. 52, 53; Exh. 54, ¶¶ 24-26. That testimony, for the most part, either speaks in generalities;²⁰ simply recites the town standards from which the developer has requested relief; or voices unsupported fears that because there is already some affordable housing nearby, the development “could stigmatize the entire area;” Exh. 54, ¶¶ 26, 24, 25. The credibility of the one witness who testified with regard to density is seriously undercut by a factual error. Ignoring the open, “village green” area, she stated that “the only true large area of open space... is the area within the utility easement...,” and “[t]he *only* reserved open space is

19. From Exhibit 2 it appears that this area may actually be as much as twice that size. A label on Exhibit 2 also indicates that a “wastewater treatment facility” will be in this area. But Exhibit 2 also shows another, nearby, 10,000 to 15,000-square-foot area that will be dedicated to septic utilities. See Exh. 22 (lots 106, 107). Though the record is unclear, from Exhibit 62-E it appears likely that the building that houses most of the package treatment plant may actually be located on the smaller lot with only infiltration beds under the lawn of the central “village green” area. See, e.g., Tr. III, 17

20. The testimony includes, for example, the statement that “[w]ith highly dense projects,... risks associated with fire are increased due to the obvious fact that fires can spread to adjacent buildings more easily.” Exh. 54, ¶ 9, also see Exh. 54, ¶ 26.

a... utility easement area....” Exh. 54, ¶¶ 26(b), 27 (emphasis added).

We conclude that the Board has not met its burden of proving that there are legitimate local concerns with regard to density that outweigh the regional need for affordable housing.

C. Sidewalks

Sidewalks are a small, but significant design issue in this development. The Board suggests that there should be sidewalks throughout the development and also along Kiah’s Way. Tr. III, 4. The developer has proposed some sidewalks, but not along all of the roads in the development. Tr. II, 151. The photographs of the model prepared by the architect, however, consistently show sidewalks. Exh. 62-B, 62-C, 62-D, 62-G, 62-H, 62-I. Sidewalks appear to be an integral feature of the sort of “older style” neighborhood described by the developer’s architect where houses close to the street “foster social interaction.” See Exh. 49, ¶ 10; cf. Tr. II, 97. We will therefore require them throughout the development. See section VII-2(e), below.

On the other hand, sidewalks are not common in the more traditional subdivisions throughout Sandwich. In fact, the only unequivocal testimony was that “there are no sidewalks within any residential subdivision in Sandwich” or even along recently rehabilitated streets. Exh. 57, ¶¶ 10, 4-6; Tr. II, 149-151. Kiah’s Way is similar in most respects to the existing roads in the neighborhood. See Exh. 5. Since those roads have no sidewalks, we will not order the developer to construct sidewalks along Kiah’s Way.

VI. LEGAL FEES

The developer deposited funds into escrow to reimburse the Board for the cost of peer review services.²¹ The Board paid \$12,031.00 to the law firm of Kopelman & Paige, P.C. Only fees for technical review of legal documents prepared by the developer, review of legal opinions prepared by the developer's counsel, or similar peer review, are reimbursable. *Page Pl. Apts., LLC v. Stoughton*, No. 04-08, slip op. at 18-20 (Mass. Housing Appeals Committee Feb. 1, 2005); *Pyburn Realty Tr. v. Lynnfield*, No. 02-23, slip op. at 21-24 (Mass. Housing Appeals Committee Mar. 22, 2004). Neither party introduced detailed evidence with regard to the services provided. From some of the evidence, it appears that Kopelman & Paige provided routine representation during the local hearing, which would not be reimbursable. Exh. 34, 37, 38. But it also appears that a significant amount of the work was not general representation, but rather the sort of peer review of complex real estate issues for which the Board can properly seek reimbursement. Exh. 17. Though the record before us is thin, we find that the Board has shown that that the costs were properly assessed.

21. It appears that the developer made several payments. Evidence of only one payment of \$15,000 appears in the record. Exh. 36, p. 1-3.

VII. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Sandwich Zoning Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development, consisting of 272 single-family homes, shall be constructed as shown on the site plan prepared by the developer (Drainage and Utilities – Concept B, 8/6/04, Autumnwood Concept, version 2) (Exh. 2) and architectural drawings by Brown, Lindquist, Fenuccio & Richmond Architects, Inc. (3/1/01) (Exhibit 3, 3-A to 3-E).

(b) The developer shall provide access to the site in three locations: twenty-foot-wide paved access along Kiah's Way; twenty-foot-wide paved access to the improved portion of Discovery Hill Road (Sherwood Lane) in the Sherwood Forest development via either the unimproved portion of Discovery Hill Road or a new roadway connection to Castle Lane across the lot owned by the developer in the Sherwood Forest development; and at Pin Oak Drive.

(c) With regard to the Discovery Hill Road access, if the developer obtains access via the currently unimproved portion of Discovery Hill Road in addition to the access via a new roadway connection to Castle Lane, the Board may choose which option is the more desirable.

(d) Roadways within the development shall be 20 feet wide, as proposed.

(e) Sidewalks shall be constructed on both sides of all of the interior streets of the development, except that they need not be provided at the periphery of the fenced recreation lot in the center of the site. See Exh. 62-E, 62-I.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed

the action of the Board.

4. The developer shall comply with the Massachusetts Environmental Policy Act (MEPA), G.L. c. 30, §§ 61-62H and 760 CMR 31.08(3). If applicable, the comprehensive permit shall not be implemented until the Committee has fully complied with MEPA, and the Committee retains authority to modify this decision based upon findings or reports prepared in connection with MEPA.

5. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all local zoning and other by-laws in effect at the time the developer filed its application with the Board, except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency or project administrator may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.


(d) No construction shall commence until, presumably based upon detailed construction plans and specifications, final construction financing has been approved by the subsidizing agency and all aspects of the development have received final written approval from a project administrator as provided in 760 CMR 31.09(3).

(e) The Board shall take whatever steps are necessary to ensure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

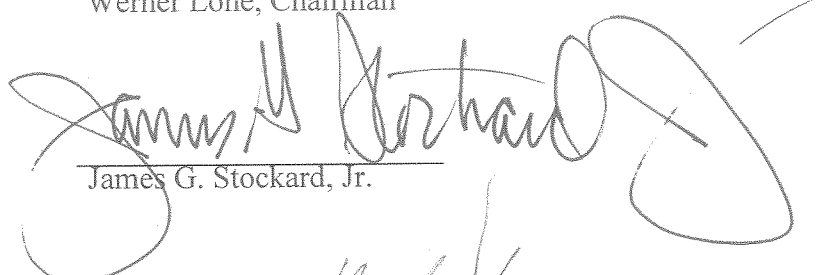
This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

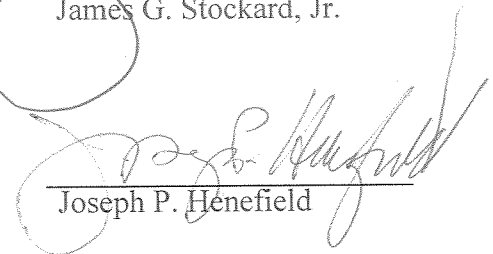
Date: June 25, 2007



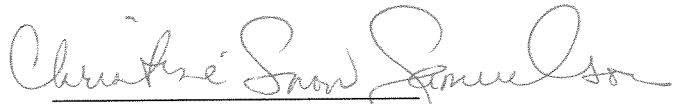
Werner Lohe, Chairman



James G. Stockard, Jr.



Joseph P. Henefield



Christine Snow Samuelson

Dissenting:



Marion V. McEttrick

