

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
No. 16-01359

YAN HUANG & others¹

vs.

LEO BARTOLINI, JR.² & others³

FINDINGS OF FACT, RULINGS OF LAW
AND ORDER FOR JUDGMENT

The plaintiffs (the “Abutters”),⁴ five residents of the town of Southborough (the “Town”), brought this action pursuant to G. L. c. 40A, § 17, challenging the grant of a G. L. c. 40B comprehensive permit (the “Permit”) to defendants William A. Depietri (“Depietri”) and Park Central, LLC (collectively, “Park Central”) by the Town of Southborough Zoning Board of Appeals (the “Board”). The Permit issued in connection with Park Central’s plan to develop 180 affordable housing apartment units (“40B units”) and 139 townhouse units (“condo units”),⁵ which Park Central intended to be sold at market rate, near the intersection of Route 9 and Interstate 495 (“I-495”) in Southborough (hereinafter, the “Project”).

¹ Wen Yu Chen, Emily Smith, Ronald Dean Trustee of Flagg Road Realty Trust, Carrie Dublois-Mello, Edward Webb, Charles Gennari, Marnie Hoolahan, Atilla Herczog, Ninan Polackal, Matthew Brownell, Bimal Patel, L’Abri Fellowship Foundation, Erica Higgins, William Rufo, Karen Hanlon Shmikus, David Winand, Howard Rose, Linda Perkins, Mark Ruthfield, and Peter Reiszner.

² As a member of the Town of Southborough Board of Appeals.

³ David Eagle and Paul Depranos, as members of the Town of Southborough Board of Appeals; Park Central, LLC; and William A. Depietri.

⁴ Although more than twenty individuals were named as plaintiffs in the original complaint, at the time of trial, the plaintiffs were Yan Huang, Attila Herczeg, Matthew Brownell, L’Abri Fellowship Foundation, and Linda Perkins.

⁵ Park Central testified at trial that, due to wetlands restrictions, the maximum number of condo units that could be constructed was limited to 114. Because the Permit authorizes 139 units, the court’s review is based on that number. Nevertheless, the legal analysis and factual findings in this decision would not change even if the number of condo units was reduced from 139 to 114.

The action was tried, jury waived, over portions of twelve days ending on May 1, 2021. The trial was conducted virtually with attorneys and witnesses appearing entirely by the Zoom platform.⁶ Seventeen witnesses testified and 143 exhibits⁷ were received in evidence. The parties agreed to certain facts. During the trial, I took a view of the Project location and the surrounding area and roads. Following the trial, the parties were permitted additional time to submit post trial pleadings. Closing arguments occurred in September of 2021. Based on all the testimony, exhibits, stipulations, the view, other credible evidence introduced at trial, and reasonable inferences, I find the following facts and rule as follows.

I. GENERAL BACKGROUND

A. Overall Site

Park Central owns a parcel of land just over one hundred 100 acres (“overall site”), located at the intersection of Route 9 and I-495. The overall site is uniquely located with favorable transportation access in all directions. Route 9, which travels east/west, is just south of the southerly border of the overall site. The overall site has access (entry and exit) to the westbound lane of Route 9 by way of Park Central Drive. I-495, which travels north/south, abuts the western boundary of the overall site. I-495 provides efficient and ready access to the Massachusetts Turnpike and Interstate 290. Access to the I-495 ramps is approximately 300 feet along Route 9 from the overall site. Because of potential traffic conflicts caused by existing driveways on Route 9, the volume of traffic on Route 9, and the proximity to the I-495 ramps, the predecessor to Massachusetts Department of Transportation (“MassDot”) conditioned or

⁶ After some acclamation and except for occasional technological glitches, the trial was conducted efficiently. For most trial days, the court had over thirty participants in the Zoom “gallery.”

⁷ The Office of the Attorney General’s written response dated August 1, 2018, to an Open Meeting Law complaint was accepted *de bene* and marked as Exhibit C for identification. The parties were invited to brief the issue of its admissibility. Because the document represents a “record of investigation” not specifically authorized by statute, see Mass. G. Evid. § 803(8)(C), Park Central’s objection to its admissibility is sustained.

limited vehicular access to the overall site from Route 9. Accordingly, the use of Park Central Drive is currently limited for access to the Red Roof Inn Motel (an abutting property) and an office building.

The easterly boundary abuts several locally travelled residential neighborhoods and properties. The overall site potentially includes three other means of vehicular access along the easterly boundary. From north to south: Blackthorn Drive is a cul-de-sac ending at the overall site, portions of Tara Road abut the overall site, and Bantry Road is a cul-de-sac with potential access to the overall site. The southeasterly corner of the overall site benefits from approximately 200 feet of frontage on Flagg Road. The overall site's frontage on Flagg Road is approximately 250 feet from the westbound lane of Route 9. Flagg Road acts as a local connector road between the center of Town and Route 9. The width of Flagg Road is impaired by a constriction (narrowing of the roadway) over a culvert located approximately 450 feet from the intersection of Route 9.

B. The Application

1. Original Application

In February 2014, Park Central filed an application with the Board for a comprehensive permit pursuant to G. L. c. 40B ("c. 40B") to construct 180 housing units, of which 45 (25%) were slated to be affordable. The 40B units were to be housed in five three-story buildings set on approximately 13 acres of the overall site. At the time of the application, the affordable housing inventory in the Town was 8.83% as compared to the local needs benchmark of 10% ("benchmark").⁸ See G. L. c. 40B, § 20. The 40B units were contemplated to be "for sale."

⁸ "Local needs" is a term of art defined in G. L. c. 40B, § 20. Local zoning requirements and regulations are deemed "consistent with local needs," and thus permissibly imposed by a zoning board of appeals, when a town's low- or moderate-income housing constitutes ten percent of the total housing stock. G. L. c. 40B, § 20.

Access was proposed, in general terms, at Bantry Road, Blackthorn Drive, a connector road to Flagg Road (“connector road”), and Park Central Drive.

Park Central was determined to be a qualified applicant when it received Project Eligibility Letters from the Massachusetts Housing Finance Agency (“MassHousing”) on February 11, 2014, and June 19, 2015.

2. Revised Application

The following year, Park Central modified its application to include an additional 158 market-rate condo units, which would be integrated with the 40B units into a single project. The condo units would occupy approximately 57 acres of the overall site and the 40B units would occupy 9 acres. The revised application resulted, in part, from negotiations with neighbors to eliminate access to the overall site by way of certain local roads.⁹

The negotiations with the neighbors culminated in a detailed settlement agreement by which, among other obligations and conditions, Park Central agreed that: (1) access to the Project would be prohibited by way of Tara Road, Bantry Road, and Blackthorn Drive (except for emergency access); (2) the 40B units would be relocated away from local streets and would be concentrated adjacent to I-495; (3) the number of 40B unit buildings would be reduced from five to two (increasing the number of stories from three to four); and (4) 22 acres of the overall site would be dedicated for open space. Significantly, the 40B units would change from for-sale units to rental units. This meant that Park Central and the Town would receive 100% credit towards the benchmark as opposed to only 25%.¹⁰ By changing the 40B units to rental units, the Town would exceed the benchmark well into the future. See Guidelines, G. L. c 40B

⁹ The Board retained a 40B consultant, who facilitated the negotiations.

¹⁰ Under Park Central’s original application, only 25% of the units were affordable; therefore, Park Central and the Town would have received 25% credit towards the benchmark.

Comprehensive Permit Projects and Subsidized Housing Inventory, Section II(A)(2)(b)(1) (2014) (“In a rental development . . . , if at least 25% of units are to be occupied by Income Eligible Households earning 80% or less than the area median income . . . then all of the units in the rental development shall be eligible for inclusion in the [Subsidized Housing Inventory].”). See also Town of Southborough Zoning Board of Appeals Comprehensive Permit Regulations and Guidelines § 6.6.1 (hereinafter, “Board’s Regulations and Guidelines”) (“Comprehensive Permit developments shall include at least 25% affordable units, as defined by Chapter 40B.”).

In short, Park Central relocated the 40B unit buildings away from certain neighbors, added the condo units, and directed vehicular access to the overall site away from certain local roads on the easterly side of the Project. The settlement agreement incorporated a concept plan (“Concept Plan”) for the overall site. The settlement agreement, however, included only six neighbors, none of which were the Abutters. Accordingly, the settlement agreement did not bind the Abutters in any regard.

3. Use Variance

Because the overall site included property zoned industrial, Park Central needed a Use Variance for the condo units. On April 13, 2015, during the pendency of the ongoing Permit public hearing process and in furtherance of incorporating the condo units, Park Central filed an application with the Board for a Use Variance. On May 27, 2015, the Board granted a conditional Use Variance (“Variance”) by a 4-1 vote allowing construction of the for-sale condo units on approximately 57 acres of overall site and incorporating the Concept Plan. The Variance, amongst other provisions and conditions, included the following:

Evidence Presented

8. The fully engineered site plans will be prepared as part of overall project plans that will include the c. 40B affordable housing component

and the wastewater treatment facility. Composite plans are necessary as road and building layout and footprints are an integral facet of storm water drainage and utility location. It was also explained that the road that will connect the affordable housing and townhouse components to Flagg Road, although located substantially within the townhouse area, will be a fundamental component of the 40B approval process. The overlap in road use is incidental to the use variance process. Approval of the road design and infrastructure layout will be through the Comprehensive Permit application. Notwithstanding, Applicant proposes to design and build the connector road to municipal subdivision road standards. Drainage and infrastructure will be constructed to applicable state and municipal requirements and standards. The entire parcel with the possible exception of the 21.42 deed restricted area will be submitted under the provisions of M.G.L. c. 183A, the Massachusetts Condominium Law with each of the three uses (townhouses, affordable housing and waste water treatment facility) being situated within distinct phases with attendant exclusive use common areas.

10. Approval of the use variance application is a necessary condition precedent to the substantial expense that Applicant will incur if final engineering plans are required to be prepared prior to variance approval. Board retention of the authority to review and approve final site plans as a condition of any building permit, the Board's ongoing jurisdiction in connection with the c.40B approval process as well as specific conditions that can be incorporated into the variance decision offer sufficient safeguard for the Board to assure that the final plans will be substantially in compliance with the Concept Plan.

Conditions

1. The entire site shall be developed and constructed in substantial conformity with the Concept Plan dated April 8, 2015 submitted to the Board as part of the Variance Application.
2. The Variance shall be effective only following final Board approval of Applicant's c. 40B Comprehensive Permit Application for a 180 unit *rental* affordable housing project with buildings and infrastructure located in substantial compliance with the April 8, 2015 concept Plan and which approval shall be final when all appeals have expired. Applicant shall amend and modify its pending Comprehensive Permit Application to reflect this change.
3. All roads, drainage, wastewater treatment plant and other infrastructure that service both the affordable housing development and the townhouse

development allowed by this Variance shall be permitted and constructed pursuant to the Comprehensive Permit.

5. Applicant shall submit to the Board fully engineered site plans setting forth all of the components of the affordable housing project, townhouse development, storm water drainage, utilities, building foot prints, waste water treatment facility, Connector Road, townhouse access roadways and common driveway layout. The Site Plans shall be the same Site Plans as submitted for c.40B Project. The Board shall have final approval of the Site Plan under both its Variance and Comprehensive Permit jurisdiction.

13. Variance is subject to Residential Site Plan Approval by Planning Board pursuant to Section 174-10 (2) (Major Plan Review) for all categories not covered by the Zoning Board Site Plan approval under the Use Variance Site Plan Approval namely, lighting, landscaping, parking and sidewalks, and any other applicable categories per the above-referenced section.

In sum, the Variance contemplated the integration of the 40B and for-sale condo units, but also indicated that the Project would share roadways, stormwater, drainage infrastructure and wastewater infrastructure. As a result, vehicular traffic to the overall site was significantly altered. Park Central eliminated routine access to the overall site through Tara Road, Bantry Road, and Blackthorn Drive. Access by way of Blackthorn Drive was limited to emergency access only. Moreover, access to the Project would only be permitted from Route 9 by Park Central Drive and from the connector road, and egress from the Project would be limited to the connector road.

The efficacy of the Variance was conditioned on the future granting of a single comprehensive permit for both the relocated 40B units and the condo units. The Variance was not appealed,¹¹ and Park Central proceeded with the comprehensive permit process using the revised application consistent with the settlement agreement, the Variance, and Concept Plan.

¹¹ A neighbor of the Project filed an action in the Worcester County Superior Court asserting that the Variance expired. That suit was eventually dismissed. *Green v. Zoning Board of Appeals of Southborough*, 96 Mass. App. Ct. 126, rev. denied, 483 Mass. 1106 (2019).

C. The Board

The Board consists of five members and two associate members. Associate members sit by designation when a Board member is unavailable or unable to participate. Due to attrition, the only members qualified to vote on the Project were members Leo Bartolini (“Bartolini”), David Eagle (“Eagle”), and Paul Depranos (“Depranos”).

The Board has adopted Comprehensive Permit Regulations and Guidelines to establish procedures for comprehensive permit applications under c. 40B. See Board’s Regulations and Guidelines. The Board’s Regulations and Guidelines provide that the public hearing for comprehensive permit applications will be conducted according to the Rules and Regulations of the Board. See Board’s Regulations and Guidelines § 7.1.

D. Public Hearings

The Board commenced public hearings in March 2014. On March 24, 2016, the Board approved seventeen requests for waivers (“waivers”) submitted by Park Central. All the waivers were approved by the affirmative vote of the three participating members. The public hearing was closed on August 24, 2016. The application was subject to approximately thirty noticed public hearings. Of those hearings, at least eleven were for purposes of continuing the public hearing to a subsequent date or to provide the Board with a brief update without the submission of additional information or public comment.

E. Traffic Studies

Park Central originally retained Green International Affiliates, Inc. (“Green Traffic”) to conduct traffic studies for the Project. Green Traffic conducted two studies prior to the submission of the application. Both studies were limited in scope to the affordable housing component of the application and did not include an analysis of the condo units or future uses at

the overall site. Green Traffic retained a subcontractor to physically obtain the raw traffic data that was incorporated in its reports. Green Traffic's data was consistent with MassDOT data and was adopted in subsequent traffic studies. The court credits testimony that the traffic data originally obtained by Green Traffic, as updated in subsequent reports, is accurate and reliable.

After Park Central modified its application, it retained The Engineering Corp. ("TEC Traffic") as its traffic consultant. TEC Traffic's analysis included information and data from Green Traffic's prior studies. TEC Traffic's review included the 40B units and the condo units. TEC Traffic also studied and reported the potential traffic impact of the ten-acre parcel located within the overall site that was designated or reserved for future development. For purposes of its analysis, TEC Traffic presumed the future development site would include a hotel (with 125 beds) and an assisted living facility (with 150 rooms).

Jason Degray, first at Greenman Peterson, Inc. and later at Tool Design Group (collectively, "Degray Traffic"), acted as peer review traffic consultant on behalf of the Board. Degray Traffic's role was to review Park Central's reports to ensure its compliance with industry standards and that it accurately set forth the potential traffic impact of the Project. The Town (through the Board of Selectmen) also retained Degray Traffic to conduct a road safety study of Flagg Road and Deerfoot Road. This study made recommendations to the Town for traffic related improvements of existing roadway conditions. Recommended mitigation measures included, replacement of the culvert, traffic calming measures, removal of stonewalls and landscaping to improve sightlines, realignment of intersections, and additional signage.

F. The Decision

Neighbors and other town officials lodged complaints about Bartolini's conduct as chairman of the Board as it related to the Project. On August 8, 2016, Bartolini stepped down as

chairman of the Board, and Eagle was elected chairman pro-tem for purposes of the Project. On August 24, 2016, after all the public hearings and various submittals, the Board, by its three participating members, Eagle, Bartolini and Depranos, voted to grant the Permit. The Board executed its finding and decision that same day (“Decision”). The Decision included detailed findings and conditions of approval under the separate headings of Regulatory Conditions, General Conditions, Construction Conditions, Wetlands and Stormwater, Wastewater Treatment Facilities, and Special Conditions. The Board’s decision was filed with the Town Clerk, and the Abutters timely filed an appeal.

G. The Abutters

Each Abutter directly abuts the Project. L’Abri Fellowship Foundation (“Foundation”) owns real estate at 43 Lovers Lane and 49 Lynbrook Road. Ben Keyes, who has a relationship with the Foundation, lives with his family at a house at 43 Lovers Lane. This property abuts the northeastern corner of the Project that Park Central designated as open space. The Foundation operates a Christian study center and community house at 49 Lynbrook Road. The Lynbrook Road property is used as retreat accommodations for a maximum capacity of twenty students attending programs at the Foundation. The Lynbrook Road property is located on the northerly side of Lynbrook Road and does not directly abut the Project. Occupants of the Foundation properties regularly use and walk the neighborhood roads. The Foundation’s alleged harm is that even a slight increase in traffic will create safety issues on Lovers Lane and traffic and safety concerns for Flagg Road and roadways intersecting with Flagg Road (including Route 9). Further, the Foundation raised issues of construction noise and disruption.

Attila Herczeg lives with his family in a single-family residence at 4 Jacobs Lane (off Lovers Lane). Matthew Brownell owns a single-family residence at 8 Jacobs Lane. The rear

portions of these properties abut the portion of the Project that Park Central has designated as open space. Herczeg contends his harm relates to traffic issues – notably, a dangerous Route 9 intersection, Flagg Road’s inability to handle additional traffic, and vehicles attempting to use ill-suited Lovers Lane as a cut-through.

Linda Perkins lives with her family in a single-family residence at 1 Tara Road. This property abuts the Project at a location near the proposed condo units. This property is also proximate to the Project’s emergency vehicular traffic access point off Blackthorne Drive. Perkins’ harm was generally traffic and congestion related to Flagg Road and particularly that many or most vehicles from the Project will turn left on Flagg Road towards the schools and center of town. Perkins described Flagg Road as a winding and narrow country road with poor sightlines creating concerns for pedestrians, bicyclists, and emergency access. Perkins testified that “local” traffic know to be careful along the neighborhood roads. It follows, however, that residents of the Project would be “local” and similarly careful. Perkins was further concerned about the removal of trees creating noise, dust, and general mayhem. Perkins described the Flagg Road and Route 9 intersection as “beyond treacherous.”

Yan Tang Huang (“Huang”) lives with his family in a single-family residence at 75 Flagg Road. Huang’s house is the closest building to the connector Road. Huang’s house is just north of the culvert. Huang’s lot steeply slopes down towards Flagg Road. Huang’s driveway is encumbered by unique terrain and difficult sightlines. Huang’s harm relates to the confluence of being the nearest house to the connector road, the connector road being proximate to the culvert, and safety issues at the Route 9/Flagg Road intersection, which would be exacerbated by the additional traffic on Flagg Road that the Project would generate.

Each of the Abutters regularly use nearby local roadways for all purposes.

H. Additional Permits

Construction of the project would require additional permitting from a number of governmental agencies (excluding building and construction related permits). The entry of additional vehicles to the Project by Park Central Drive requires a Highway Access Permit from MassDOT. MassDOT also requires certain mitigation measures prior to the issuance of any permit.¹² Park Central must also obtain final approval from the subsidizing agency pursuant to 760 Code Mass. Regs. § 56.04(7).

Additionally, the Project requires Massachusetts Environmental Policy Act Office (“MEPA”) filing. MEPA ensures that state agencies study the environmental consequences of projects of a certain scale and requires them to take all feasible measures to avoid, minimize, and mitigate damage to the environment.

Furthermore, pursuant to the Massachusetts Wetlands Protection Act, the Project is subject to approval via an order of conditions by the Conservation Commission, or a superseding order of conditions by the Massachusetts Department of Environmental Protection (“DEP”). The Project also must comply with the DEP’s Stormwater Policy. The Conservation Commission previously denied Park Central’s application, and Park Central appealed that decision to DEP. The construction and operation of the proposed wastewater treatment plant also requires a Groundwater Discharge Permit from DEP.

The Variance and Permit appear to have created a hybrid version of the site plan review under the auspices of the planning board. The Variance stated the Project would be subject to site plan review “for all categories not covered by the Board Site Plan approval under [this Variance] namely, lighting landscaping, parking and sidewalks, in other applicable categories per the

¹² After the Decision issued, the board of selectmen corresponded with MassDOT about its concerns for increased traffic the Project would generate on Flagg Road.

above-referenced section.” The Permit waived site plan approval for the 40B units but implied that the condo units would still be subject to “residual site plan approval” as set forth in the Variance. The planning board denied site plan approval and an appeal was pending at the time of trial.

I. Prior Proceedings

The Abutters and Park Central filed cross motions for summary judgment. The Abutters challenged the Board’s jurisdiction contending that the Board failed to comply with quorum requirements. This Court denied the Abutters’ motion finding that the Board met the quorum requirements and that a simple majority vote of the Board was sufficient to approve the Permit. (See Decision and Order, Docket No. 31, dated May 23, 2019). Additionally, Park Central’s motion was allowed as to the Abutters’ ability to challenge the Variance in this proceeding. All parties to this action agreed that the court would not hear evidence on these particular issues, as they were resolved previously by summary judgment. Instead, the court suggested, and the parties agreed, that this Court’s memorandum of decision as to the summary judgment issues would be incorporated in these findings.

II. GOVERNING LAW

A. Comprehensive Permit Statutory and Regulatory Scheme

The Comprehensive Permit Statute, G. L. c. 40B, §§ 20-23 (the “Act”), was enacted to address the shortage of low-and moderate-income housing (affordable housing) and reduce regulatory barriers that impede permitting and construction of affordable housing. 760 Code Mass. Regs. § 56.01. The Act reflects the Legislature’s careful balance between leaving local authorities their well-recognized autonomy to establish local zoning requirements while also foreclosing municipalities from obstructing the building of a minimum level of affordable

housing for low-income persons. *Board of Appeals of Woburn v. Housing Appeals Comm. of Dep't of Hous. & Cmty. Dev.*, 451 Mass. 581, 584 (2008). It ensures local municipalities do not make use of their zoning powers to exclude low- and moderate-income groups but also simplifies the process by which a developer may obtain approval of an affordable housing project through a unified permitting process. *135 Wells Ave., LLC v. Housing Appeals Comm.*, 478 Mass. 346, 351 (2017).

Pursuant to the Act, a developer, who seeks to build a housing development that includes at least 25% affordable housing, may apply directly to a local municipality's zoning board of appeals for a "comprehensive permit," rather than applying to each individual agency that typically would have control over some of the necessary permits. *Id.* at 352, citing G. L. c. 40B, § 21. See Board's Regulations and Guidelines § 6.6.1. See also *Middleborough v. Housing Appeals Comm of the Mass. Dep't of Hous. & Cmty. Dev.*, 449 Mass. 514, 517 n.7 (2007) ("To be eligible for a comprehensive permit under G. L. c. 40B, § 21, it is 'commonly understood' that in a residential development with both affordable and market-rate units, at least [or only] twenty-five per cent of the planned project must be set aside for owners or renters with incomes that do not exceed eighty per cent of the area median income."). The local zoning board of appeals, in turn, has authority to review the application in its entirety, to override local requirements and regulations, and to issue permits or approvals to the same extent, and with the same authority, as any of those local agencies. *135 Wells Ave., LLC*, 478 Mass. at 352. "This authority is intended to simplify the application process and to ensure that local obstacles are not put in place, thus enabling more affordable housing projects to be completed." *Id.* Although a zoning board can waive local requirements, the Board is not permitted to waive state laws. *Jepson v. Zoning Bd. of Appeals of Ipswich*, 450 Mass. 81, 90 (2007).

B. Standard of Review

General Laws c. 40B, § 21 provides that “[a]ny person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in [G. L. c. 40A, § 17].” The burden of proof is on the party to whom the permit was granted. See *Tebo v. Board of Appeals of Shrewsbury*, 22 Mass. App. Ct. 618, 626 (1986). “[T]he judge is required to hear the matter de novo and determine the legal validity of the decision of the board upon the facts found by him [or her].” *Josephs v. Board of Appeals of Brookline*, 362 Mass. 290, 295 (1972). The court gives no evidentiary weight to the findings or decision of the board, see *id.* at 295; however, the court cannot substitute its own judgment for that of the board. *Caruso v. Pastan*, 1 Mass. App. Ct. 28, 30 (1973). When a board grants an application, “[it] must . . . make an affirmative finding as to the existence of each condition of the statute or by-law required for the granting of the . . . permit,” and “in order to affirm the board’s decision on appeal[,] [the court] must find independently that each of those conditions is met” (citations omitted). *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73 n. 5 (2003). The Board’s decision “cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.” *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 639 (1970).

III. FURTHER FINDINGS AND RULINGS OF THE COURT

There were three principal arguments raised during the trial. First, Park Central contended that the Abutters lack standing to challenge the issuance of the Permit. The second issue was whether the Board’s Decision was based on a legally tenable ground, and finally, the Abutters argued that the Board’s Decision was arbitrary and capricious in a myriad of ways, including that (1) the Project lacks safe and adequate access; (2) the Board prematurely closed

the public hearing and voted without adequate deliberation; and (3) the public hearing process was tainted by procedural irregularities and improper conduct by Board members. Each argument is addressed in turn below.

A. Standing

“Only a ‘person aggrieved’ may challenge a decision of a zoning board of appeals.” *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996), quoting G. L. c. 40A, § 17. In the c. 40B context, as with zoning appeals under the Zoning Act, G. L. c. 40A (“c. 40A”), “the words ‘person aggrieved’ are not to be narrowly construed.” *Id.* See *Planning Bd. of Hingham v. Hingham Campus, LLC*, 438 Mass. 364, 368 (2003) (“For purposes of interpreting the term ‘person aggrieved’ under the comprehensive permit statute, we look to interpretation of the identical term in G. L. c. 40A, § 17.”). Nevertheless, [a]ggrievement requires a showing of more than minimal or slightly appreciable harm.” *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 121 (2011).

A “person aggrieved” is one who “suffers some infringement” of a legal right or interest that is protected by the statute. See *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700 (2012) (addressing standing under G. L. c. 40A, § 17), citing *Marashlian*, 421 Mass. at 721; accord *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 30 (2006) (same under c. 40B). Because the legal interests protected by c. 40B are materially different from those protected by c. 40A, “[t]he requirements for standing in a G. L. c. 40B case are significantly stricter than in an ordinary zoning appeal.” *Taylor v. Board of Appeals of Lexington*, 451 Mass. 270, 277 n.10 (2008). “Although the Legislature chose in G. L. c. 40B, § 21, to incorporate the judicial review procedure established in G. L. c. 40A, § 17, the substantive

standing requirements of G. L. c. 40A are neither the same as nor incorporated into G. L. c. 40B.” *Standerwick*, 447 Mass. at 28.

As immediate abutters to the Project, the Abutters are “entitled to a rebuttable presumption that [they are] a ‘person aggrieved’ under G. L. c. 40B, and therefore have standing to appeal from the grant of the comprehensive permit.” *Jepson*, 450 Mass. at 90. To rebut this presumption, Park Central must present evidence that the Project would not have any adverse impact on the Abutters. See *Standerwick*, 447 Mass. at 34 (“[T]o rebut the presumption, the defendant must offer evidence warranting a finding contrary to the presumed fact” [quotations and citation omitted].). If Park Central successfully challenges the Abutters’ status with evidence supporting this challenge, then the presumption recedes, see *Watros v. Greater Lynn Mental Health & Retardation Ass’n, Inc.*, 421 Mass. 106, 111 (1995), and the Abutters must “establish—by direct facts and not by speculative personal opinion—” that if the Project is built, they will suffer an injury to some interest protected by c. 40B and that this injury “is special and different from the concerns of the rest of the community.” *Jepson*, 450 Mass. at 88-89 (quotations and citations omitted). “[T]he evidence must provide specific factual support for each of the claims of particularized injury . . . and . . . the evidence must be of the type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board’s action.” *Murchison v. Zoning Bd. of Appeals of Sherborn*, 485 Mass. 209, 215 (2020), citing *Butler v. Waltham*, 63 Mass. App. Ct. 435, 441 (2005). Only one of the Abutters needs standing for the appeal to proceed. *Jepson*, 450 Mass. at 92.

Here, as an immediate abutter, Huang is entitled to the rebuttable presumption that he is a “person aggrieved” under c. 40B. *Id.* at 90. To rebut this presumption, Park Central presented evidence from TEC Traffic that the Project would not have an adverse impact on Huang’s

property. Huang then responded with credible evidence from traffic consultant Kenneth Cram (“Cram Traffic”) regarding public safety issues the Project presented, particularly related to Flagg Road, the culvert, and the Flagg Road intersections with the connector road and Route 9. Cram Traffic contended, and the court agrees for the purposes of standing, that the narrowness of Flagg Road, combined with the constriction of the culvert created safety issues due to increased traffic. Furthermore, Cram Traffic opined that twenty to twenty-five percent of vehicles exiting the connector road would be turning left on Flagg Road proximate to the culvert and Huang’s house.¹³

Because public safety, roadway infrastructure, and vehicular safety on abutting roadways are local interests protected by the Board’s regulations, see Board’s Regulations and Guidelines §§ 6.5, 7.3.1.6, and c. 40B, see 760 Code Mass. Regs. § 56.07(3)(d), I find that the evidence presented coupled with the unique location of Huang’s house and its sightline issues establishes that access to and from the Project could cause him to suffer injury that is not shared by the rest of the community. See *Marashlian*, 421 Mass. at 723 (finding plaintiffs met their burden by submitting evidence that project would increase traffic, if minimally, and reduce some available public parking spaces, which plaintiffs used to meet their business and personal needs).

Accordingly, Huang is a “person aggrieved,” and thus is entitled to seek judicial review of the issuance of the Permit.

B. Board’s Decision was not Based on a Legally Tenable Ground

Based on the court’s standard of review, I make the following additional findings of fact and rulings of law based on all the credible evidence presented at trial and not limited to that

¹³ As set forth later in this decision, this court does not credit some of Cram Traffic’s testimony as it relates to certain safety issues. Such a finding on the merits, however, does not defeat a finding of standing. See *Jepson*, 450 Mass. at 91 (a finding that goes to the success of the merits does not implicate a party’s ability to challenge acts of the board; “[t]o do so would be to deny standing, after the fact, to any unsuccessful plaintiff” [citation omitted]).

which was presented to the Board. *Josephs*, 362 Mass. at 295. These findings are de novo, with no deference to those made by the Board. *Id.* These findings are drawn largely from witness testimony, exhibits, my view of the property location, and reasonable inferences, and based on this evidence, I conclude that the Decision is not based on a legally tenable ground because the Project does not meet the comprehensive permit criteria set forth in c. 40B due to the inclusion of the condo units in the Permit. *MacGibbon*, 356 Mass. at 639.

The condo units have no affordability component, which is a requirement of c. 40B, and Park Central did not submit any financial information from which this Court could find that the construction of the affordable units required the financial support of the for-profit condo units. Rather, given the number and scope of the condo units as compared to the original application, the court reasonably infers that the 45 affordable units within the 40B units were not financially dependent or reliant on the construction of the market rate condo units in the revised application.

In sheer numbers, the affordable units total 45 with the balance of the 40B units (135) to be rented at market rates. The 45 affordable units represent 25% of all the 40B units which count towards the Town's benchmark. See 760 Code Mass. Regs. § 56.03(2)-(3). See also Guidelines, G. L. c 40B Comprehensive Permit Projects and Subsidized Housing Inventory, Section II(A)(2)(b)(1) (2014). However, the addition of 139 market rate condo units, with no affordability component, significantly alters the scale of the Project – namely, because the affordable units no longer represent 25% of the overall units. Furthermore, in terms of acreage, the 40B units utilize 9 acres while the condo units encompass 58 acres. Aside from the alteration of the affordability calculation, by way of traffic concerns, TEC Traffic estimates that the condo units would generate over 40% of the Project's traffic.

Park Central cites *Jepson* to support its contention that the condo units were properly incorporated into the Permit. *Jepson* permitted the addition of a small commercial component to a c. 40B project. 450 Mass. at 94-95. While *Jepson* held that c. 40B should be broadly construed for the intended benefits of affordable housing, the commercial use in that case was “incidental” and only complemented the proposed affordable housing development. *Id.* at 95. However, here, under any legal or factual analysis, the condo units represent a major component of the Project.

Park Central further suggests in its trial brief that because the Variance incorporated the condo units, and because the Variance was not appealed, the integration of the condo units within the c. 40B project is unassailable. This court, however, finds that the Variance does not alter or change the statutory requirements of c. 40B. See *Jepson*, 450 Mass. at 85 n.9 (stating c. 40B confers on board power to override local requirements and regulations but cannot waive compliance with state laws).

In this case, the inclusion of the condo units under the guise of affordable housing is inconsistent with the Legislative intent and legal requirements of c. 40B. See *Id.* at 95-96 (stating Legislature considered that developers of c. 40B projects need to generate a *reasonable* economic return). The practical effect of the inclusion of the condo units within the Permit results in an end run around the affordable housing statute. As the Supreme Judicial Court previously stated, “[t]he Legislature would not likely condone the manipulation of the comprehensive permitting process to thwart the construction of low and moderate income housing,” see *Planning Bd. of Hingham*, 438 Mass at 370; however, this Court finds that the converse of that statement also rings true. The Legislature likely would not condone the manipulation of c. 40B so that major developments can bypass local authority under the pretext of affordable housing. See 760 Code Mass. Regs. § 56.02 (“A Project may contain *ancillary*

commercial, institutional, or other non-residential uses, so long as the non-residential elements of the Project are planned and designed to: (a) complement the primary residential uses; and (b) help foster vibrant, workable, livable, and attractive neighborhoods consistent with applicable local land use plans” [emphasis added].). Therefore, considering the totality of the circumstances, the issuance of the Permit was not based on a legally tenable ground. Accordingly, the Permit must be annulled.

C. Access, Traffic, and Roadways¹⁴

The Abutters’ traffic consultant, Cram Traffic, was retained to review the traffic implications of the project and testify at the trial. Much of Cram Traffic’s testimony was consistent with other testifying witnesses and traffic experts as to the physical condition of the impacted roadways, narrowness and usage of the neighborhood streets, and some of the challenges of Flagg Road (including the culvert). Cram Traffic also testified as to deficiencies in the traffic studies performed by Park Central. Cram Traffic conceded, however, that it did not dispute the underlying traffic count data prepared by Park Central’s traffic consultants.

1. Left turn on Flagg Road

The Abutters contend that it was arbitrary and capricious to allow left turns from the connector road onto Flagg Road. At the outset, the Abutters continually and significantly overstated the number of vehicle trips attributable to the Project. As stated in more detail below, the Abutters’ repeated use of 3,222 vehicle daily trips is inaccurate, and the court credits the evidence that the daily weekday travel trips on the connector road to Flagg Road are 978.

Of this figure, TEC Traffic estimated that 85% of vehicles would turn right towards major highways while approximately 15% of vehicles would turn left on Flagg Road towards the

¹⁴ Having heard significant evidence on multiple other matters in dispute between the parties, the court makes additional findings to assist the parties in the event of an appeal.

center of Town. After the view, and due in part to the exceptional access to Route 9 and I-495, I credit that a vast majority of traffic from the Project will be turning right off the connector road to Flagg Road for prompt and superior highway access. Cram Traffic acknowledged that in the worst-case scenario, 20 to 25% of vehicles would turn left on Flagg Road. I credit that approximately 15 to 20% of vehicles exiting the connector road will turn left towards the center of Town. Further, I find that such additional traffic generated by the Project will not meaningfully impact vehicular travel or safety on Flagg Road.

The Town's Chief of Police opposed the condition limiting left turns from the connector road to Flag Road during the weekday hours of 7 AM to 9 AM. In the context of this Project, this is a minor condition. It was the Chief's opinion that such a turn restriction would be "unenforceable" due in large measure to the Town's lack of resources to dedicate a police officer to that location. Further, the Chief opined that the left turn would create an "extreme safety issue." I do not credit the Chief's testimony with respect to the sign. On cross-examination, the Chief readily acknowledged that the enforcement issues related to the no left turn sign are no different than enforcement of other Town signs (i.e. speed limit and stop signs). I also credit TEC Traffic's testimony that most people generally follow and obey traffic signs regardless of the presence of police to enforce the requirements. Further, Cram Traffic testified restricting left turns off the connector Road to Flagg Road would not create a safety concern.

2. Culvert

Flagg Road is impaired by the narrowing or constriction over the culvert. The width of Flagg Road at the culvert is approximately 17 feet. By all accounts, the culvert should be replaced or widened to facilitate traffic on Flagg Road.

The culvert is approximately 450 feet from the intersection of Route 9 and Flagg Road and just north of the proposed connector road. Signage currently alerts drivers to the narrowing of the road at the culvert. The culvert is an admitted constriction. Because of the narrowing, centerline striping of Flagg Road was not completed over the culvert. The traffic consultants universally agree that the Town should improve the roadway over the culvert, which causes a narrowing of the traveled way. I find that the modest additional traffic generated by the Project does not significantly increase the safety concerns of the long existing culvert constriction.

The Abutters also raised questions about traffic backup or queuing on Flagg Road as vehicles intend to turn right onto the westbound lane of Route 9. While some Abutters testified as to long waits to exit Flagg Road onto Route 9, I credit the testimony of Abutter Huang that little or no backup occurred at this intersection when he regularly commuted towards the end of morning rush-hour (pre-pandemic). I further credit TEC Traffic's opinion that queuing at the intersection would not create a traffic hazard or cause vehicles to "backup" as far as the culvert or alternatively cause vehicles to reverse course causing additional congestion for those traveling north on Flagg Road. Moreover, the Flagg Road/Route 9 intersection benefits from some "platooning"¹⁵ from a traffic signal on Route 9 approximately 3,000 feet easterly from the intersection. To the extent the Project may create traffic issues, I credit TEC Traffic that any backup or queuing will occur within the Project along the connector road.

3. Safety concerns for neighboring streets

Cram Traffic was critical of Park Central's traffic studies' failure to examine certain intersections. For example, Cram Traffic suggested that Lovers Lane "could" be used as a cut

¹⁵ Platooning is the creation of an artificial gap in upstream traffic. Cram Traffic disputes the benefit of any platooning because of the distance to the traffic signal. I also credit the testimony of Abutter Huang that the traffic signal assists drivers entering onto Route 9.

through road. Lovers Lane is extremely narrow and, in some spots, wide enough for only one car. Therefore, it's narrowness and location make it an unlikely shortcut or "cut through." I do not credit testimony that traffic on Lovers Lane or Lynbrook Road will be impacted by the Project.

The court heard ample testimony about the narrow width of some of the neighborhood roads, the desire for sidewalks,¹⁶ the possible benefit of removing certain trees or stonewalls to improve sightlines, possible installation of stop signs at certain intersections, realignment of certain intersections and the possibility of installing traffic calming measures or signage. Each of these traffic mitigation items would improve the current state of neighboring streets. The cost of all such improvements well exceeds \$1 million. The Permit provided that Park Central would contribute \$25,000 towards traffic mitigation on Flagg Road.¹⁷ Gray Traffic opined, and the court agrees, that the onus for the wish list of traffic related improvements should be borne by the Town. The Project would generate a small increase in traffic on Flagg Road (Degray Traffic estimated one vehicle per minute). The Project would be a minor contributor to existing traffic concerns. Additionally, the lack of statistical crash data or objective evidence of safety issues dictates the court's finding that the Project would not meaningfully impact the number of purported safety issues raised by Abutters.

¹⁶ The Town does not have a robust sidewalk network in this area. While Park Central proposed sidewalks on certain neighborhood roads, the proposal was not well received by residents. Additionally, resident complaints about pedestrian and bicyclist safety on Flagg Road existed prior to this application.

¹⁷ The Abutters are critical of the amount of this contribution requirement. Within the confines of a comprehensive permit, the Board is not permitted to require "costs of public infrastructure or improvements off the project site that: (a) are not generally imposed by a Local Board on unsubsidized housing; (b) address a pre-existing condition affecting the municipality generally; or (c) are disproportionate to the impacts reasonably attributable to the Project" 760 Code Mass. Regs. 56.05(8)(d).

D. Consultation with other Boards and Commissions

The Abutters assert that the Board failed in its obligations to communicate and confer with the Planning Board and Conservation Commission. See G. L. c. 40B, § 21 (“The [Board] . . . shall take into consideration the recommendations of local boards . . .”). While the Board shall consider the input and recommendations of companion boards, it is not required to adopt their recommendations. 760 Code Mass. Regs. § 56.05(8)(a).

It is clear that there was a fair degree of hostility amongst the Board on one side and the Planning Board, Conservation Commission, Board of Selectmen, and Abutters on the other, but contrary to the Abutters’ assertions, I find that the Planning Board and Conservation Commission’s input was considered by the Board. The Decision and the Board’s meeting minutes reflect more than a dozen letters from the companion boards. Based on the evidence presented, the Planning Board and Conservation Commission amply delivered their recommendations, the Board received and considered those recommendations, and as permitted by c. 40B, rejected those recommendations. See 760 Code Mass. Regs. § 56.05(8)(a). See also Board’s Regulations and Guidelines § 3.2 (“[T]he Board will typically ask . . . Town entities, as the Board deems may be appropriate, for comments and recommendations related to the proposed Comprehensive Permit development project . . .”).

Nonetheless, the Abutters contend that the Planning Board and Conservation Commission were still reviewing some of the most recently submitted plans for the Project shortly before the Board voted. The Abutters also argue that the vote was rushed to accommodate Eagle’s imminent departure from the Town and thus the Board. Neither of these arguments are persuasive.

By letter dated August 22, 2016, the Conservation Commission contended that greater than 200 items required the Commission's further review. However, no evidence was submitted at trial as to the nature or scope of the purported 200 outstanding items. As to Abutters' complaints about the level of plan detail, comprehensive permit application plans should only approximate the level of detail as a preliminary plan under subdivision control. See Board's Regulations and Guidelines § 4.1 ("The Board understands that for many projects, the plans may not be at a definitive stage of development."). Applicants for comprehensive permits are typically not required to submit its final plans at this stage of the permitting. See Board's Regulations and Guidelines § 11.1 ("Upon completion of the project, the Applicant shall submit 4 copies of the as-built plan of the roads and infrastructure to the Board.").

As for Eagle's departure from the Town, prior to the Decision, Eagle's residence at 11 Sarsen Stone Way in Southborough had been listed for sale. Eagle signed closing documents¹⁸ for the sale of this house on August 24, 2016, the same day the Board voted to grant the Permit. The sale was recorded at the registry of deeds the following day on August 25, 2016. Within a week of the closing, Eagle resigned from the Board.

I do find that the Board concluded its deliberations, voted, and executed the Decision to ensure some finality for the Project prior to Eagle moving out of Town. The application had been pending for over 2 ½ years. Countless meetings were held to consider the merits of the Project. The Planning Board, Conservation Commission, and Abutters fully understood the scope and breadth of the Project. The Board held ample public hearings, and it was clear that certain interests in the Project were entrenched and constructive review was exhausted. Therefore, I do

¹⁸ Title to the property was held by Eagle's spouse. Eagle released any rights of homestead upon the sale.

nott credit the nefarious inferences advanced by the Abutters that the Board's vote was rushed to favor Park Central.

E. Board Members' Alleged Improper Conduct

The hostility amongst the various town boards paled in comparison to the animus directed at the volunteer members of the Board by both Park Central and Abutters relative to this Project.¹⁹ A municipal board decision may be annulled if procured by "improper motives" of its members. *Arrigo v. Planning Bd. of Franklin*, 12 Mass. App. Ct. 802, 811 (1981). The court shall presume proper motive of board members absent evidence to the contrary. *Id.* The court finds no credible evidence of impropriety but will briefly address each of the Abutters' factual allegations.

1. Alleged Board Manipulation

Abutters allege that Park Central manipulated the Board by threatening members (Ed Estella and Deborah Demuria), who Park Central perceived to be unfavorable to the Project. Those board members recused themselves from the Project. Neither of the recused members testified at trial, and the only evidence submitted on this issue were the threatening letters from Park Central. Even if this claim is properly before this Court, the court was not presented with sufficient evidence from which the court could make any findings.

2. Alleged Ex-Parte Communication

Abutters allege that an email communication, dated August 22, 2016, from Eagle to counsel for Park Central discussing proposed conditions for the comprehensive permit was an

¹⁹ "To a certain extent, land-use disputes in cities and towns are fertile ground for allegations of misconduct. Frustrated permit applicants or abutters, unable to obtain relief, are often tempted to blame defeat on the perceived biases or business connections of the land-use decision-maker. A charge of misconduct should be weighed carefully by the attorney representing the disappointed party." Mark Bobrowski, *Massachusetts Land Use and Planning Law*, § 1.07 (4th ed. 2018).

ex-parte communication, which violated the Open Meeting Law, G. L. c. 30A, §§18-25. The email itself was not ex-parte because it included Karen Finelli, who was employed by the Town to assist the Board. Additionally, the email was administrative in nature to add proposed conditions for discussion at an upcoming meeting, and therefore, I do not find this correspondence to be in violation of Open Meeting Law. See *Pearson v. Board of Selectmen of Longmeadow*, 49 Mass. App. Ct. 119, 125 (2000) (holding ministerial acts such as scheduling and cancelling meetings not subject to Open Meeting Law).

3. Alleged Conflicts of Interest

The Abutters allege that particular members of the Board were biased in favor of Park Central and should have recused themselves or should have made further (or more detailed) disclosures.

i. Bartolini Storage and Site Contracting

Bartolini executed a number of conflict-of-interest disclosures for entities related to Park Central's rental of self-storage units owned or controlled by Bartolini. The Abutters have failed to show how Bartolini's disclosures were deficient²⁰ or that Bartolini was conflicted from hearing the application.

Abutters further contend that because Bartolini's family also owned a site work company, Bartolini "could potentially benefit" from future site work contracts, and therefore, Bartolini should have made additional disclosures. However, such speculative argument does not warrant further discussion.

²⁰ I credit the testimony Depietri that some of the disclosures relate to his brother William Depietri and his entity Rosewood Development. The Abutters have attempted to conflate the brothers and their entities.

ii. Eagle Leasing

Depietri and Eagle serve together on the Southborough Economic Development Team (“SEDТ”). The SEDТ was an informal Town sponsored business group that met periodically to promote business activity within Town. I find that Eagle’s volunteer service on the SEDТ with Depietri did not create or cause any conflict of interest.

Eagle was a principal in a business called Eagle Leasing, which leased office trailers and storage containers (collectively “containers”) often used in the construction industry. Eagle Leasing has over 5,000 customers and 16,000 containers. Eagle Leasing’s containers prominently display the Eagle Leasing name and logo. In the late 1990s, an entity that was related to Depietri purchased containers from Eagle Leasing for its use during construction. Photographs were admitted into evidence of Depietri’s entity’s construction sites with containers bearing the Eagle Leasing logo. I credit the testimony that certain Eagle Leasing containers (particularly those not well-maintained) were owned by Depietri.²¹ Once sold, the Eagle Leasing logo remained on the containers. Moreover, some Eagle Leasing containers shown in photographs were likely being used by subcontractors at the various construction sites.

I credit Eagle’s testimony that he had no personal relationship or dealings with Depietri. Eagle Leasing may have done some business with Depietri’s entities, but such business was minor, routine and retail-like transactions. I also find that any such business did not impact or impair Eagle’s objectivity as a Board member. I also credit Eagle’s testimony that Eagle Leasing had a prior business relationship with Depietri’s brother, which Eagle disclosed. Abutters have attempted to conflate the Depietri brothers to support a claim of Eagle’s favoritism. Eagle did not

²¹ Depietri’s related entity also rented some of Eagle Leasing’s containers for a construction project called Northborough Crossing. Northborough Crossing commenced construction in 2018. In 2020, Depietri’s related entity purchased some of the leased containers from Eagle Leasing.

file any disclosure or conflict forms with respect to this Project, and the Abutters have not presented credible evidence that a disclosure was required.

4. Other Alleged Procedural Irregularities

Abutters make other claims of procedural irregularities and improprieties and contend that meetings were a “sham” or “rubber stamp” to benefit Park Central. The court has carefully considered and but does not credit these allegations. Although this Court has found that the inclusion of the condo units exceeded the Board’s authority under c. 40B, the court does not find that the Board or its members acted in conflict, bad faith, or with favoritism.

F. Additional Factual Findings and Rulings

The Board’s Regulations and Guidelines governing comprehensive permits include a section for Review Standards and Process. See Board’s Regulations and Guidelines § 6.0. The general purpose of the Review Standards is:

- 6.1.1 To encourage a more efficient and uniform review process by clearly specifying local requirements in advance of Applications for Comprehensive Permits;
- 6.1.2 To ensure that Applications demonstrate the maximum benefit in providing housing for families of low and moderate income;
- 6.1.3 To equitably distribute Comprehensive Permit housing units throughout the Town and throughout a Comprehensive Permit development, so as to avoid concentrations of subsidized Comprehensive Permit housing units in any one area;
- 6.1.4 To ensure the long-term viability of Comprehensive Permit developments through well designed projects that function properly and that are provided with adequate utility infrastructure;
- 6.1.5 In a similar manner to that for other development projects presented to the Board or other Town Boards for review, to assure that the appropriate and relevant issues are considered by the Board, including, but not limited to:
 - 6.1.5.1 minimizing impacts to abutting properties, neighborhoods, and municipal services and infrastructure;
 - 6.1.5.2 ensuring that a site design provides affordable housing yet conserves environmental features, woodlands, wetlands and areas of scenic beauty and which preserves sites and structures of historical importance; and

6.1.5.3 providing affordable housing without threatening the ability of the Town to provide bona fide infrastructure and public services to existing and future development on other sites or to municipal uses;

The regulations set forth review standards from which the Board is permitted to waive local regulations to benefit the public interest but not in conflict with the c. 40B Regulations. See Board's Regulations and Guidelines, §§ 6.2.6, 13.1. See also *Jepson*, 450 Mass. at 90. The court will address only the relevant review standards.

1. Section 6.2.1 Impact on Sensitive Areas

Comprehensive Permit developments shall avoid impacts to the extent possible on environmentally sensitive areas such as floodplains, wetlands, groundwater recharge areas, aquifers, areas contributing to municipal water supplies or recreational water bodies, or to significant woodlands, hillsides or other sensitive natural features;

Finding: I credit the evidence that the Project will not significantly impact environmentally sensitive areas. Furthermore, although the Board waived compliance with the local wetlands by-law (to the consternation of the Conservation Commission), the Project is subject to approval of an Order of Conditions by the Conservation Commission pursuant to the Massachusetts Wetlands Protection Act, and also must comply with DEP Stormwater Policy. Additionally, the wastewater treatment facility requires a Groundwater Discharge Permit from DEP. Further, Park Central agreed to permit use of a portion of the overall site as a possible location for a municipal water tank. The court finds that the overall site does not have any particularly significant woodlands, hillsides or other sensitive natural features.

2. Section 6.2.2 Impact on the Site

Comprehensive Permit developments shall be designed to accommodate the natural features of the site. The placement of roads, housing units, driveways, drainage structures and other elements requiring site disturbance shall be sited to fit with the land. The design shall not alter a site in such a manner as to physically transform it dramatically, permanently altering and destroying natural features, drainage patterns, wildlife habitats, historic landscapes and biodiversity of the area. It is the intent that if the development is designed to fit with the landscape, minimizing site disturbance and alteration, it will reduce the cost of construction and development, making it a more economic and

affordable development for all citizens, and will result in fewer problems in the future in dealing with the impacts of massive alteration to the landscape;

Finding: The Project, as designed, is consistent with natural features of the site and its unique location bordering I-495 on the west and commercial properties and Route 9 to the south. The project places the condo units adjacent to residential abutters to the east. While the condo units would be townhouses and not single-family homes, it does not alter the residential character of the housing. The inclusion of the condo units creates significant disturbance (58 acres) compared to the disturbance generated by the 40B units (9 acres). Nevertheless, the Project as designed does not overwhelm and generally fits within the features of the site. The Project also dedicates 22 acres for open space.

3. Section 6.2.3 Impact on Infrastructure

Comprehensive Permit developments shall avoid areas which have public infrastructure or services incapable of serving the increased density of such developments without imposing significant increased public expense that would otherwise be unnecessary for uses built at densities permitted by right. Applicants may downsize their projects or improve the infrastructure to meet these criteria;

Finding: Other than issues of access and traffic discussed elsewhere in this decision, little evidence was adduced at trial as to infrastructure. I find that the public infrastructure at this unique and accessible location is sufficient for this Project.

4. Section 6.2.4 Impact on Municipal Water Supply

The amount of municipal water supply is finite and its use for any new development, including Comprehensive Permit developments, is reviewed and managed by the DPW. Therefore, any Comprehensive Permit development project that includes connection to the municipal water system for water service shall be reviewed by the DPW, and a recommendation from the DPW regarding its assessment of any considerations related to the impact of the proposed project on the municipal water supply shall be provided to the Board;

Finding: I credit the Town's Superintendent of Public Works, Karen Galligan's ("Galligan") testimony that water flow to the Project is adequate and not detrimental to the

Town's current water system. Due to water pressure issues at the Project, Park Central would be required to design and construct a water pumping station to service the Project. Further, due to the elevation of the overall site, Park Central committed to providing a portion of the overall site to the Town for the potential siting of a new water storage tank.

5. *Section 6.2.5 Site Suitability*

While it is not necessarily an absolute requirement, the Board recommends that Comprehensive Permit developments strive to avoid sites which are zoned Industrial;

Finding: The Project obtained the Variance to permit the condo units in industrial zones.

I further find that the overall site is appropriate for this Project.

6. *Section 6.2.6 Exceptions to Local Regulations in Requirements*

It is not the intent of the Board to grant exceptions to local regulations to the extent that such exceptions do not contribute materially to rendering the project uneconomic as described in Chapter 40B. The Applicant must demonstrate that any such local regulation negatively affects the profitability of the project or the affordability of the units within the project.

Finding: The Board granted significant waivers for the Project. Some of the waivers were applicable only to the 40B units or represented routine deviations from regulations. Other waivers, however, provided benefits to the construction of the condo units such as (i) waiver of local stormwater and wetlands bylaws, (ii) waivers of road grades and widths, (iii) and waiver of site plan approval by the planning board except for "residual site plan approval," as set forth in the Variance. Because this Court has found that the condo units should not have been included in the Permit, the condo units were not entitled to the deferential review and waivers intended to benefit affordable housing projects.

7. *Section 6.4 Building Height*

The maximum building height is recommended to not exceed three habitable stories and be consistent with the heights of other building in its neighborhood.

Finding: The Board granted a height waiver for the 40B units (not to exceed 55 feet). I find that because no buildings currently exist on the overall site and because the 40B units abut I-495, the building height waiver was reasonable and consistent with the Regulations.

8. Section 6.5 Access

To assure reasonable standards of public safety, there shall be adequate means of access to a Comprehensive Permit development, which the Board will assess based on an evaluation by and the recommendations of the DPW, the Fire Chief and the Police Chief. Typically this means at least two means of access to the property if eleven (11) or more dwelling units are proposed, or otherwise as recommended by the DPW, the Fire Chief and the Police Chief. The principal means of egress shall have pavement width and grades adequate in the opinion of the DPW, the Fire Chief and the Board for the safe passage of public safety vehicles. If roads within the proposed project site are to become public ways, they shall also be adequate in width, structure, and horizontal and vertical alignments, in the opinion of the DPW and the Board to accommodate Town snow plow vehicles within the paved areas.

Finding: The fire department reviewed and approved the access for its vehicles, lengths and widths of driveways, water availability, and fire lanes. I credit this finding.

The court also heard significant testimony as to traffic and the ability of local roads to handle additional traffic. Despite its deficiencies, Flagg Road is a significant corridor between the center of Town and Route 9. Residents of Blackthorn Drive, Tara Road and Bantry Road require the use of Flagg Road. Flagg Road also accepts traffic from several other neighborhood roads, including Lovers' Lane, Lynbrook Road, Deerfoot Road (collectively, "neighborhood roads"). Local access vehicles generally access Flagg Road in the southerly direction to access Route 9 (and then likely I-495) or in the northerly direction to access Main Street (Route 30).

Flagg Road runs approximately 1.1 mile from Route 9 to Deerfoot Road. Flagg Road is generally classified as a collector street. While Flagg Road's right-of-way varies from 27 to 34 feet, the paved section of Flagg Road averages approximately 20 to 22 feet. Portions of Flagg Road are narrow due, in part, to stonewalls and existing trees. I credit Galligan's testimony, who

acknowledged some potential safety issues on Flagg Road where the road is narrow and could benefit from some widening. Galligan cautioned, however, that widening roads often increase the speed of travel and a commensurate potential increase in traffic.

I also credit TEC Traffic's opinion that the Project significantly benefits from its proximity to major highways. The overall site provides fast and convenient access to Route 9 with immediate access to I-495. Both the Massachusetts Turnpike and Route 290 are within ten miles of the Route 9 and I-495 interchange. By eliminating direct vehicular access to Tara Road, Bantry Road, and Blackthorn Drive, the Project significantly reduces reliance on the local road network.

TEC Traffic estimated that the Project would generate a total of 978 daily vehicular trips to or from the connector road and Flagg Road, but at the request of the Town, TEC Traffic also studied and reported as to the traffic impact of future development of a ten-acre parcel located within the overall site and designated as potential future development. For purposes of its analysis, TEC Traffic presumed the future development site would include a hotel (with 125 beds) and an assisted living facility (with 150 rooms). TEC Traffic estimated the Project and proposed future development of a hotel and assisted living facility would generate a total of 3,222 vehicle trips per day. Neither the hotel nor assisted living facility has been proposed, let alone permitted. Moreover, future development of this nature would require additional permits with commensurate review of their specific traffic impacts. Therefore, the court credits the evidence that the Project would generate 978 weekday daily trips on the connector road to Flagg Road.

Further, I credit TEC Traffic that most vehicles exiting the connector road will turn right to access Route 9 and I-495. TEC Traffic opined, and this Court credits, that the Project would

contribute a modest number of additional vehicles to local traffic, which would not increase or contribute to any traffic safety issues for the neighborhood roads.

I credit the Board's peer review traffic consultant who opined that TEC Traffic's reports and analysis complied with industry standards. Additionally, Degray Traffic generally agreed (with some slight deviations on level of traffic not altering the conclusions) with TEC Traffic's trip generation analysis and community impact. Degray Traffic opined, and the court credits, that the Project significantly benefits from its proximity to high functioning highways. Moreover, the Project's additional trip generation numbers result in a minor increase in traffic to the local roadways. Degray Traffic recommended some general mitigation efforts for the local roads including sidewalks, removal of certain trees or stonewalls, and/or speed bumps. In fact, the Town on its own accord implemented some of the recommended traffic mitigation items including striping Flagg Road and the installation of dynamic speed feedback signs.

The Abutters and Cram Traffic raised several other potential deficiencies with the Project and Park Central's traffic reports that I do not credit. Cram Traffic was critical of the timing and staleness of some of the traffic data collection. However, on the whole, all traffic experts agree that certain improvements could be made to portions of the neighborhood roads and Flagg Road. The traffic experts, as well as the Town, likewise agree that most of the proposed improvements are within the control of the Town and would be correcting current deficiencies not caused or created by the Project. I find that the Project would not meaningfully impact or create a safety concern relative to the existing roadway system. Mitigation of existing local roadway deficiencies should not be borne by a valid comprehensive permit when the vast majority of traffic from the Project benefits from almost direct access to major highways. Accordingly, I find the Project would not create any new deficiencies or safety concerns.

9. Section 6.6.1 Affordability

Comprehensive Permit developments shall include at least 25% affordable units, as defined by Chapter 40B.

Finding: As previously set forth in this Decision, the inclusion of the condo units without any dedication to affordable units is not in accord with this regulation and c. 40B.

10. Section 6.7 Southborough Preference

The development plan shall provide that all legally permissible efforts shall be made to provide 70% of the affordable units as local preference, with such local preference requirements determined by SHOPC, pursuant to DHCD regulations, and as modified by SHOPC from time to time or for specific proposed projects.

Finding: The Permit includes a provision for local preference for the affordable units.

The Permit incorporated the terms of the Variance, which includes some undefined local preference for the purchase of condo units.

11. Section 6.8 Parking

Adequate parking for the development shall be provided, which the Board will assess based on the recommendation of the Town Planner. A baseline standard for such parking capacity is (i) two parking spaces per housing unit, and (ii) additional parking spaces shall be provided for a community center, if one is proposed, at the ratio of one parking space for each two legal occupants of the community center.

Finding: The Permit included a modest waiver in the size of parking spots within the Project. I find that the parking proposed by the Project is adequate.

12. Section 6.9 Site Amenities

The design of the site shall respect the natural and historic characteristics of the site and shall preserve and enhance the natural landscape wherever possible. The Applicant is encouraged to retain a minimum of 50% of the site as permanent open space. A maximum of 50% of the permanent open space may be developed as park or recreation land. The Applicant is encouraged to protect undisturbed open space with a conservation restriction, and to the maximum extent possible, the site plan shall connect on-site trail systems to abutting trail systems.

Finding: The open space percentage in this regulation is aspirational. The Project proposes 22 acres of open space, which meets or exceeds this design criteria.

13. Section 6.10 Stormwater Management

The plan shall be prepared to conform with the requirements of the Department of Environmental Protection Stormwater Management Guidelines and Policy, and the Town's Stormwater By-Law, whether or not the proposed work is subject to the Wetlands Protection Act, and the plan shall conform to the standards for a 100-year storm.

Finding: The Permit requires compliance with DEP Stormwater Management requirements. The Permit exempts the Project from the Town's Stormwater Bylaw. As previously set forth, this Court finds that the waiver of local bylaw with respect to the condo units exceeds the authority of the Board.

14. Section 7.3 Other Considerations

7.3.1 the health and safety of the residents of the proposed housing and the current residents of the Town, including:

7.3.1.1 the structural soundness of the proposed buildings;

7.3.1.2 adequacy of sewage disposal;

7.3.1.3 adequacy of handling stormwater runoff;

7.3.1.4 adequacy of fire protection;

7.3.1.5 adequacy of water pressure;

7.3.1.6 adequacy of handling traffic generated by the project and the impact of such traffic on adjacent areas;

7.3.2 the height, bulk, and placement of the proposed buildings, accessory structures, and improvements, including:

7.3.2.1 the physical characteristics of the proposed housing;

7.3.2.2 the physical characteristics of the surrounding land;

7.3.2.3 adequacy of access to the site and adequacy of parking arrangements; and

7.3.2.4 adequacy of open areas and green space.

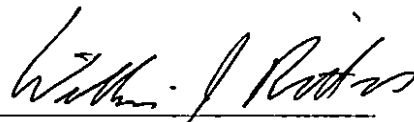
Finding: As set forth in prior findings, I find that the Project meets or exceeds these considerations.

G. General Findings

There may be additional findings that the regulations would typically require as a prerequisite to the Permit which the Board included in its Decision and upon which I do not expressly set out in my decision. In the evidence presented, however, I find a basis to conclude that any remaining factors were properly determined by the Board or were not challenged by the Abutters in this case. I find that the inclusion of the condo units within the Permit was legally untenable and not supported by the record. Moreover, I find independently of the Board's Decision, and, based on the facts as I found them in this decision, that the Project is not entitled to a comprehensive permit under c. 40B.

ORDER FOR JUDGMENT

The decision of the Board is **ANNULLED**, and the Permit is **REVOKED**. Judgment shall enter in favor of the plaintiffs.


WILLIAM RITTER
Justice of the Superior Court

DATED: March 16, 2022