

Planning Department

TOWN OF ACTON
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MEMORANDUM

To: Planning Board **Date:** April 19, 2007
From: Roland Bartl, AICP, Town Planner *R. B.*
Subject: Ellsworth Village – Age Restriction; Need for Policy Direction

I have been approached by Attorney Levine's office with a request to consider changes in Ellsworth Village Master Deed that was approved under the Planning Board's Senior Residence special permit under section 9B of the zoning bylaw. The request touches upon two areas; the second is in two parts:

1. Pets. This was not a matter of regulatory concern for the Board and the restriction was chosen by the developer. They want to now change it. I will not further elaborate on this.
2. a) The developer requests a change to allow visitation rights by younger individuals for a duration of up to 60 days and a total of up to 120 per year. The current restriction in the master deed is for a 2-week duration and not more than two weeks per year. The request is made in reflection of one or more buyers' requests. This is a significant liberalization of the current rule. But, I would not view it as inconsistent with the Acton's local intent when zoning bylaw section 9B was adopted.
- 2.b) In marketing the affordable units, and looking for approval of the units by DHCD as local initiative units to count towards Acton's subsidized housing inventory, the developer encountered new DHCD regulations issued in September 2006 that limit the ability to restrict the units to seniors in a way that is inconsistent with the master deed as approved. In effect, the affordable units could not be age restricted in any way as long as there is at least one person residing in them with an age of 55 or older. This would be a change that I would find much harder to reconcile with my understanding of Acton's intent.

The language on age restriction in the zoning bylaw (9B.11) gives the Planning Board great latitude for exceptions through its special permit, and it could possibly accommodate the new State regulations. In drafting it that way, I wanted to retain flexibility precisely in order to be responsive to regulatory changes at the State level. However, I did not expect any change quite as sweeping as this one, and I am assuming that this is not what the Town had expected or intended when it adopted zoning bylaw section 9B. . . While I am assuming above what the Town's intent and expectation was

I have inquired with Town Counsel and received an education on the Federal and State Fair Housing Laws, the new DHCD regulations and the new DHCD Local Initiative Guidelines adopted under them. He then reviewed the Acton zoning bylaw and the Ellsworth

Village special permit. He arrives at the conclusion that Acton's bylaw and the special permit for Ellsworth Village comply with applicable Federal and State law, and that the new DHCD rules should not apply to Ellsworth Village as its permit precedes the new regulations. The latter point can be argued and it is not inconceivable that DHCD will try to insist on the applicability of its new regulations.

The Planning Board has three options to consider:

- I. Pursue clarification with DHCD that the new rules do not apply. If successful, the result would be most consistent with my understanding of the local intent for Senior Residence Development. However, it will take time and effort to work through the matter with DHCD and the outcome is uncertain. Meanwhile the affordable units Ellsworth are sitting vacant. For marketing to proceed the matter must be settled first.
- II. Accept the DHCD rules for the Ellsworth Village project.
- III. Reject the DHCD rules for Ellsworth Village, if DHCD remains insistent on them. In doing so, we must recognize that the affordable units at Ellsworth Village will not count towards Acton's affordable housing inventory. Nevertheless, they will still answer to a local (or regional) need.

Please advise which avenue the Board wishes to pursue. I will notify the developer that this matter is on the Board meeting agenda in case he wishes to attend.

Regardless of the decision and outcome in this particular case, it is time in light of the new DHCD regulations to revisit Acton's age restriction as they pertain to affordable units. Perhaps, DHCD's regulations are more acceptable here than I believe they would be. One reason for DHCD's unfavorable attitude on age restricted affordable housing is, I am told, that they are difficult to market to qualified buyers. That is probably true enough given the narrow income and asset constraints that the State imposes on affordable unit buyers. We are having at present a very difficult time finding a qualified buyer for one of the affordable units at Audubon Hill. One way to modify the bylaw could be to add an "escape", by which a developer could monetize the on-site affordable housing for purposes that support affordable housing in general, or provide off-site non-age restricted affordable housing elsewhere. Please advise if you would like staff to develop a zoning article for such an amendment.

Attached is Town Counsel memorandum, the Ellsworth Village special decision (no specific mention of the age restriction – was approved as part of the "Plan" as last received before close of hearing), the relevant zoning bylaw section, the relevant excerpt from the Ellsworth Village Master Deed, and other related correspondence.

I:\planning\planning board\reviews\ellsworth village 7 - affhous age restrictions.doc

Roland Bartl

From: Stephen Anderson
Sent: Tuesday, April 17, 2007 12:37 PM
To: Roland Bartl
Cc: Daniel C. Hill
Subject: RE: Acton/Ellsworth Village - Age Restrictions

Pending review of the prior regulations, I agree with your list of options.

Option 1 is preferable, and the parties should argue strongly for it.

Option 2 is a fallback.

Option 3 is a dim third and should only be used as an option of last resort.

Steve

PS: Dan: Let me know if you have the old regs.

From: Roland Bartl [mailto:rbartl@acton-ma.gov]
Sent: Tuesday, April 17, 2007 12:06 PM
To: Stephen D. Anderson
Cc: Daniel C. Hill
Subject: RE: Acton/Ellsworth Village - Age Restrictions

Thank you, Steve. This is very helpful. This gives me talking point for the Planning Board next Tuesday. I have asked Nancy if she happens to have a set of the old rules handy. Pending any major new information, I assume that we have two choices to ensure the units are counted in the subsidized housing inventory:

1. Try to convince DHCD that Ellsworth Village complies with federal and State statute and that the new rules and guidelines do not apply to it because the projects precedes the promulgation of the new rules.
2. If DHCD insists that the new rules apply we could acquiesce and the Planning Board would have to take to action to amend the permit to allow a change in the Master Deed.

If the DHCD cannot be convinced there is a 3rd option: Acknowledge that the units may not count towards the subsidized housing inventory.

I will be waiting to see if anything changes based on review of the prior regulations.

*Roland Bartl, AICP
Planning Director, Town of Acton
472 Main Street
Acton, MA 01720
978-264-9636*

-----Original Message-----

From: Stephen Anderson
Sent: Saturday, April 14, 2007 5:54 PM
To: Roland Bartl
Cc: Don Johnson; John Murray; Daniel C. Hill
Subject: Acton/Ellsworth Village - Age Restrictions

Hi Roland:

4/19/2007

I have attached a memo responding to your questions on the Ellsworth Village Age Restrictions in light of the new DHCD LIP Regulations and Guidelines. I have also attached a link to the Guidelines, to which the new Regulations are appended.

To complete the analysis, we will need to review the DHCD LIP Regulations in effect before September 8, 2006, which are no longer available on line. By copy of this email, I am asking Dan to track those down and provide them to me.

Let me know if you have any questions.

Steve

Shortcut to LIP Guidelines: <http://www.mass.gov/dhcd/Temp/06/LIPgdlines.doc>

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4/19/2007

Roland Bartl

From: Nancy Tavernier
Sent: Tuesday, April 17, 2007 1:27 PM
To: Roland Bartl
Subject: Re: LIP regulations

Hi Roland,

I have attached a copy of the one page elderly exception from the 2004 LIP guidelines. The new ones are very detailed and they are on line here: <http://www.mass.gov/dhcd/Temp/06/LIPgdlines.doc> (see page 40-41)

However the old guidelines are not going to do much good because the Ellsworth units have **never** been approved by DHCD and when we started the process to get DHCD approval, the new guidelines were already published in draft form. There are several major changes in the new ones that would be beneficial to Ellsworth so they will probably not want to use the old ones anyway. First of all they would only be allowed to use \$100,000 in equity from the sale of a home, the new ones allow \$200,000. Also and more onerous, the old guidelines required every member of the household to be 62 or older, the new ones require only one member of the household to be 55.

I have been totally confused about the Ellsworth units and I certainly hope they have not bypassed ACHC. Betty and I began the DHCD approval process with Fenton's sister Donna in June and we were proceeding well with DHCD through August. Then inexplicably it fell through the cracks. I thought Donna was carrying it forward and she thought I was which is not something I would ever do for a developer. Donna and Jimmy were confused that since the Town had to sign the LIP application, they read it to mean we did all the heavy lifting too. Finally in November, Donna contacted me to see if the approval had been received. I was flabbergasted! I immediately contacted DHCD and they were very apologetic and immediately submitted comments that needed answers from Donna. The last I heard anything from Donna was Dec. 6, 2006. I have never heard another word from her or DHCD about Ellsworth and then was consumed by Willow-Central so didn't attempt to follow up. I figure I should not have to be chasing a developer who needs the approval badly, there should be plenty of motivation for them to just finish it up.

So, that's my update on Ellsworth. It sounds like there may be some activity but you and Counsel need to know that DHCD has not approved the marketing plan and signed off on the units to allow them to be counted.

Let me know if you need anything more and I am curious to know what is going on since ACHC is the monitoring agent. We are having horrendous problems with our 55+ affordable units at Robbins Brook, our first experience. I shudder to think about what's coming.

Nancy

At 11:55 AM 4/17/2007, you wrote:

Nancy:

Do you by any chance have a copy of the DHCD LIP Regulations in effect before September 8, 2006 - and handy without spending a lot of time searching? I have word from Counsel that the new regulations probably

4/19/2007

do not apply to the Ellsworth Village project. But, we would need to see the previous regulations, also. They are no longer on line. We could probably get them from the State, but I thought I'd ask you in case you have them handy.

Thanks -

*Roland Bartl, AICP
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Elderly Exception:

The primary reason for the elderly exception is that elderly households typically live on fixed incomes, which are eroded by inflation.

1. Applicants will be reviewed on a case-by-case basis.
 - a. *does not apply - per memo 10/21/04* The Elderly Exception to the first-time homebuyer applies only when everybody in the household is over the age of 62.
 - b. If any member of the household is under the age of 62, then the household must qualify under rules that apply to normal households.
2. The elderly need not be first-time homebuyers if a presently owned home will be sold to create income to provide a down payment and/or to pay monthly rent or mortgage costs.
3. The requirement of a minimum mortgage of 50% does not apply to the elderly; the LIP unit may be bought with cash.
4. The elderly must meet the \$50,000 asset test. That is, the cash value of retirement accounts, savings accounts, mutual funds, insurance, etc. will be considered as assets. However, if the equity from the sale of a home will be applied to the purchase price of the LIP unit, then the excess not applied, up to a maximum amount of \$100,000, will not be considered an asset, though interest from this excess will be imputed at the passbook rate established by HUD and considered as income.
5. The elderly must meet income eligibility requirements. DHCD will include, as income, income from assets such as retirement accounts, savings accounts, mutual funds, insurance, etc., as well as more typical sources of income.

Roland Bartl

From: Stephen Anderson
Sent: Saturday, April 14, 2007 5:54 PM
To: Roland Bartl
Cc: Don Johnson; John Murray; Daniel C. Hill
Subject: Acton/Ellsworth Village - Age Restrictions

Hi Roland:

I have attached a memo responding to your questions on the Ellsworth Village Age Restrictions in light of the new DHCD LIP Regulations and Guidelines. I have also attached a link to the Guidelines, to which the new Regulations are appended.

To complete the analysis, we will need to review the DHCD LIP Regulations in effect before September 8, 2006, which are no longer available on line. By copy of this email, I am asking Dan to track those down and provide them to me.

Let me know if you have any questions.

Steve

Shortcut to LIP Guidelines: <http://www.mass.gov/dhcd/Temp/06/LIPgdlines.doc>

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4/19/2007

MEMORANDUM

TO: Roland Bartl, Town Planner

FROM: Stephen D. Anderson, Town Counsel

RE: Acton/Ellsworth Village: Age Restricted Housing

DATE: April 13, 2007

Federal and state laws prohibit discrimination in the sale and rental of housing on the basis of the age of the household's occupants. 42 U.S.C. §3604; G.L. 151B, §§6-7. As a result, a complex set of laws have developed around age-restricted housing. Here's a primer:

1. **Federal Fair Housing Act, 42 U.S.C. § 3607(b)(2)**

Age discrimination is allowable under the Federal Fair Housing Act if the housing qualifies as "housing for older persons" and otherwise complies with the relevant provisions of the Act. Such housing must restrict occupancy to either (a) households consisting exclusively of persons at least 62 years old; or (b) households in which at least one member is at least 55 years old. 42 U.S.C. § 3607(b)(2). The prohibition against age discrimination and the senior housing exemption were intended "to protect families with children while still "fully protect[ing] the rights of senior citizens who live in retirement communities, and ... allow[ing] those communities to exclude families with children if they so choose." Taylor v. Rancho Santa Barbara, 206 F.3d 932, 936 (9th Cir. 2000), quoting, 134 Cong. Rec. H4603 at *H4607 (daily ed. June 22, 1988).

To maintain its status as "housing for older persons" under federal law and, consequently, its ability to exclude children, a housing development must continually meet the following criteria: (i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons....; (ii) occupancy of at least 80 percent of the units by at least one person 55 years of age or older; and (iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older. 42 U.S.C. § 3607(b)(2).

2. **State Fair Housing Law, G.L. c. 151B, s. 4(6) and 4(7)**

The state fair housing law, G.L. c. 151B, §§ 4(6) and (7), outlaws discrimination in housing based on age, with certain exceptions. The state law was amended by St. 2006, c. 291, § 1, effective December 6, 2006. The amendments apply "only to dwelling units constructed after January 1, 2007." The 2006 amendments were approved on September 7, 2006.

Prior to the 2006 amendments, the state fair housing law allowed age discrimination in housing by virtue of the following exceptions to the definition of “age” (emphasis added):

The word “age” as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over, **on 1 parcel or on contiguous parcels of land, totaling at least 5 acres in size.** For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

The 2006 amendments eliminated the requirement of 5 acres for age-restricted housing, and substituted in its place was a requirement that the property owner or manager shall register biannually with DHCD:

The word “age” as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over **if the housing owner or manager register biennially with the department of housing and community development.** For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

3. DHCD Regulations

DHCD’s Local Initiative Program (“LIP”) regulations, 760 CMR 45.03(8) and 760 CMR 45.04(7), expressly provide the following Affirmative Fair Marketing requirements (emphasis added):

Low or Moderate Income Housing units subsidized pursuant to the Local Initiative Program shall be subject to an affirmative fair marketing plan approved by the Department. Marketing shall effectively outreach protected groups underrepresented in the municipality. **There shall be a specific prohibition of discrimination on the basis of race, creed, color, sex, age, disability, familial status, sexual orientation, national origin or any other legally protected category in the leasing or sale of housing.**

Under 760 CMR 45.01, these LIP regulations “shall be effective on September 8, 2006, and shall apply to applications filed thereafter.” The provisions of 760 CMR 45.00 as previously in effect “shall remain effective with respect to applications filed before September 8, 2006, and with respect to Low or Moderate Income Housing units subject to LIP at that time.”¹

4. DHCD’s Local Initiative Program Guidelines

In November 2006, DHCD issued its Local Initiative Program Guidelines to “provide a basis for the operation of the Local Initiative Program and guidance to local public officials, housing developers, and other interested parties” (page 1). The Guidelines provide (at page 2, emphasis added) that:

LIP approval may be granted for age-restricted housing upon a showing of actual need and marketability within the municipality. At the discretion of DHCD, such approval may be withheld (i) if other age-restricted housing units in the community, which have been issued a Determination of Project Eligibility or which have been otherwise approved by the community remain unbuilt or unsold, or (ii) if the proposed age-restricted units, in context with the municipality’s other recent housing efforts, are unresponsive to needs for family housing.

The Guidelines also provide as follows (page 18, emphasis added):

All LIP projects must have a marketing plan approved by DHCD. There shall be a specific prohibition of discrimination on the basis of race, creed, color, sex, age, disability, marital status, familial status, sexual orientation, national origin, veteran status, or any other basis prohibited by law in the leasing or sale of units, except for exempt qualified age-restricted developments.

The Guidelines specifically provide that Age-Restricted Housing (housing for persons 55 and over) “must meet the following criteria” (at page 41, bolded emphasis added):

- **For LIP Units, there shall be no occupancy restriction except that one household member must be age 55 or older;**
- **Children age 18 or younger cannot be excluded from occupancy of the LIP Units;**
- Developers are encouraged to consider unit designs in which master bedrooms and bathrooms are located on the first floor.

¹ The provisions of 760 CMR 45.00 as previously in effect are apparently no longer available on-line. We will obtain a hard copy of the regulations and update this memorandum as appropriate.

- The Project Sponsor's attorney must provide a letter demonstrating that the age-restricted development will be in compliance with state and federal fair housing laws, including M.G.L c. 151B Section 4(6);
- Determinations of Project Eligibility for comprehensive permits projects may be granted for age-restricted housing only upon a showing of demonstrated need and marketability within the municipality, and solely at the discretion of DHCD. Such approval may be withheld (i) if age-restricted housing units that have been issued a project eligibility letter or have been approved by the municipality have not yet proceeded to construction or remain unsold, or (ii) if the proposed age-restricted units, in context with other recent housing efforts by the community, are unresponsive to needs for family housing.

A marketing study must be done demonstrating the need for this type of housing in the applicable HUD region, the availability of buyers for both the market and affordable units in the development, the status of similar projects serving the 55 and Over market in the area (e.g. number proposed and/or under construction, rate of vacancy/occupancy, etc). The study must demonstrate both an understanding of the region's demographics and particular strategies necessary to attract buyers to both market and affordable units.

- The LIP requirement that preference be given to appropriately sized households applies to 55 and Over housing.

5. Acton's Senior Residence Zoning Bylaw

Section 9B of the Acton Zoning Bylaw authorizes the Planning Board to grant a special permit for a Senior Residence development subject to the following Age Restriction (emphasis added):

All DWELLING UNITS in a SENIOR Residence development shall be subject to an age restriction described in a deed, deed rider, restrictive covenant, or other document that shall be recorded at the Registry of Deeds or the Land Court. **The age restriction shall limit the DWELLING UNITS to occupancy by SENIORS, age 55 or older, or their spouses of any age; provide for reasonable, time-limited guest visitation rights; and authorize special exceptions that allow persons of all ages to live in a DWELLING UNIT together with a SENIOR resident as the Planning Board shall further define and specify in its special permit.** The age restriction shall run with the land in perpetuity and shall be enforceable by any or all of the owners of DWELLING UNITS in the SENIOR Residence development or by the Town of Acton.

6. Ellsworth Village Senior Residence Development

On April 26, 2005, the Acton Planning Board approved a special permit for the 33-unit Ellsworth Village Senior Residence development on a parcel containing +/-8.31

acres of land under the provisions of section 9B of the Acton Zoning Bylaw. Section 3.1.16 of the special permit required that the condominium master deed and all legal documents related to the affordable units shall “specify that the affordable units shall be sold to income eligible persons or households that meet the age restrictions of the master deed.” Section 3.2.10 of the special permit provided as follows:

Two of the affordable units shall be sold and resold to qualified persons or households with incomes at or below 80% of the Boston Area Median Income for two-person households, and one unit shall be sold and resold to age qualified persons or households with incomes at or below 70% of the Boston Area Median Income, at prices that allow these income groups to purchase the units in accordance with the Department’s of Housing and Communities Development (DHCD) Local Initiative Program (LIP) guidelines and to qualify these affordable units a part of Acton’s affordable housing stock under M.G.L. Ch. 40B.

Pursuant to the special permit, the Master Deed for the Ellsworth Village project contains, at § 9, over-55 residential use age restrictions. Section 9(d) prohibits residence by children under 18 years of age except for short-term visitation or in the case of deceased or incapacitated parents (such that the resident grandparents are acting *in loco parentis*).

7. Analysis of the Ellsworth Village Permit Under Applicable Law

On the face of the documents provided, the following observations apply to the Ellsworth Village Senior Residence Special Permit:

- The Permit appears to comply with the federal Fair Housing Act.
- The Permit appears to comply with the state Fair Housing Act, both before and after the 2006 amendments. If and to the extent the amendments apply to the Project (i.e. if the dwelling units are constructed after January 1, 2007), the housing owner or manager must register biennially with DHCD.
- DHCD’s new LIP Regulations “shall be effective on September 8, 2006, and shall apply to applications filed thereafter.” As a result, DHCD’s new LIP Regulations do not apply to the Ellsworth Village Special Permit which was issued almost two years ago.²
- DHCD’s new LIP Guidelines are dated November 2006. The Guidelines do not contain an “effective date” provision, nor do the Guidelines carry the force of a law or regulation. Assuming that the Guidelines go hand-in-hand with DCHD’s new LIP Regulations (which are appended to the Guidelines), one may infer that the Guidelines shall be effective on September 8, 2006, and shall apply to applications filed thereafter.

² The provisions of 760 CMR 45.00 as previously in effect are apparently no longer available on-line. We will obtain a hard copy of the regulations and update this memorandum as appropriate.

- If the Guidelines do apply to the Ellsworth Village Senior Residence Project, the Project's residence restrictions on minors violate at least two provisions of the Guidelines (that, "For LIP Units, there shall be no occupancy restriction except that one household member must be age 55 or older," and that, "Children age 18 or younger cannot be excluded from occupancy of the LIP Units").

8. Conclusion

Subject to a review of DHCD's LIP Regulations in effect prior to September 8, 2006, the Ellsworth Village Senior Residence Special Permit appears to conform to applicable federal, state and local law at the time it was issued. DCHD's new LIP Regulations and Guidelines should not apply to the Project in a way that undermines the prior age restrictions approved by the Planning Board. However, this conclusion is not without doubt as DHCD takes an increasingly restrictive view of age restricted units. To ensure that the affordable units in the Project will count/continue to count to the Town's Subsidized Housing Inventory, the developer and the Planning Board should request the specific concurrence of DHCD that the Ellsworth Village Senior Residence Special Permit is not subject to DHCD's new LIP Regulations and Guidelines.

Roland Bartl

From: Roland Bartl
Sent: Friday, April 13, 2007 1:13 PM
To: Stephen Anderson
Cc: 'Daniel C. Hill'
Subject: RE: Ellsworth Village

Steve:

As a follow-up: i ran into Jim Fenton today over lunch. He told me that the ACHC asked him to hold the lottery for the affordable units until the new DHCD regulations had come out. I am not sure if or why the felt they needed to do that, or if that will changes your conclusions and advise. But, I thought it a worthwhile tidbit of info you should know.

*Roland Bartl, AICP
Planning Director, Town of Acton
472 Main Street
Acton, MA 01720
978-264-9636*

-----Original Message-----

From: Roland Bartl
Sent: Thursday, April 12, 2007 2:25 PM
To: Stephen Anderson; 'Daniel C. Hill'
Subject: FW: Ellsworth Village

Steve or Dan:

Could you please look at this and advise how we might handle this matter, especially with respect to the DHCD rules. This has been pending on my desk since the end of last year and the Ellsworth Village folks are getting rather impatient, understandably. I need your advise on the matter as to what the Planning Board should or should not consider.

Thank you

*Roland Bartl, AICP
Planning Director, Town of Acton
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Acton, MA 01720
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-----Original Message-----

From: Roland Bartl
Sent: Wednesday, March 14, 2007 10:44 AM
To: Stephen Anderson
Subject: RE: Ellsworth Village

Steve:

Have you had a chance to look a this, yet?

*Roland Bartl, AICP
Town Planner, Town of Acton
472 Main Street*

4/19/2007

Roland Bartl

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Sent: Thursday, April 12, 2007 2:25 PM
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*Roland Bartl, AICP
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-----Original Message-----

From: Roland Bartl
Sent: Wednesday, March 07, 2007 1:26 PM
To: Stephen Anderson
Subject: FW: Ellsworth Village

Steve:

When you get a chance, could you look into this matter, especially regarding the applicability of the new DHCD rules not allowing age restrictions in LIP units. It is my understanding that they came out after the issuance of the Ellsworth permit, so I would argue that the new DHCD rules should not apply here.

However, if their applicability cannot be avoided, why would there be a problem with the income restricted units being different from the market rate units.

The zoning bylaw give the Planning Board flexibility to specify appropriate age restrictions in individual projects. It did so for Ellsworth Village where it allowed (-writing now from memory-)

4/19/2007

visitation rights for minors in general, and residency rights for minors in cases where the senior resident in the unit is the parent or guardian. The deed restriction was drafted in Lou's office and ultimately approved as part of the plan with any changes stated in the decision. I don't think the decision touches on the age restrictions as that was an item all agreed on at the time. But, there would have to be an approval of a plan change. I do not think the Planning Board would necessarily embrace the DHCD rules in a revised decision.

The zoning bylaw on senior residence developments is here: <http://doc.acton-ma.gov/dsweb/Get/Document-12979/2006+Zoning+Bylaws+REDUCED.pdf> . Look at section 9B.

The Ellsworth Village special permit is attached.

The age restriction in the Ellsworth condo master deed is attached (see in "restrictions on use of units").

Please advise.

Thank you -

*Roland Bartl, AICP
Town Planner, Town of Acton
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PS 1: We will need to take a look at the viability of the senior housing special permit in light of the DHCD rules going forward.

PS 2: I don't think anybody here in Planning cares about how many dogs can be kept in a unit.

-----Original Message-----

From: Cathy S. Netburn [mailto:cnetburn@dipnlaw.com]

Sent: Tuesday, March 06, 2007 12:59 PM

To: Roland Bartl

Cc: 'Authentic Homes Inc'; cparo@dipnlaw.com

Subject: Ellsworth Village

Roland,

In mid December, we forwarded you a proposed amendment to the Master Deed of the Ellsworth Condominium, which amendment changed the rules regarding pets, and the length of time that children could visit to sixty days at a time with a yearly limit of 120 days. You promptly emailed back expressing concern that the additional visitation days seemed inconsistent with the spirit of the permit and Senior Residence By-Law.

While we do not necessarily disagree, we are requesting this change due to requests from potential buyers.

Additionally, at the same time as receiving your response, we received a response from Nancy Tavernier advising that the new DHCD regulations for LIP Local Action Units do not allow children age 18 or younger to be excluded from the Local Action

4/19/2007

Units. The result is that the LIP Local Action Units are not age restricted at all as long as one of the occupants is 55, but all the other units are, and this seems to me, inconsistent with the spirit of the by-law under which this project was approved. I am currently trying to reach Marilyn Contreas at DHCD to discuss this further but I am concerned that we will need to add language to the Master Deed to reflect the foregoing.

Assuming that we do, I have to imagine potential buyers will question why they can't have grandchildren for extended visits. In any event, will you contact me when you get a moment so that we can discuss.

Thanks for your assistance in this matter.

Cathy

Cathy S. Netburn, Esq.

D'Agostine, Levine, Parra & Netburn, P.C.
268 Main Street
Acton, MA 01720-6233
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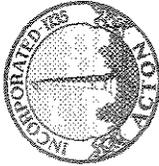
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Excerpt from zoning bylaw for Senior Residence Developments:

9B.11 Age Restriction – All DWELLING UNITS in a SENIOR Residence development shall be subject to an age restriction described in a deed, deed rider, restrictive covenant, or other document that shall be recorded at the Registry of Deeds or the Land Court. The age restriction shall limit the DWELLING UNITS to occupancy by SENIORS, age 55 or older, or their spouses of any age; provide for reasonable, time-limited guest visitation rights; and authorize special exceptions that allow persons of all ages to live in a DWELLING UNIT together with a SENIOR resident as the Planning Board shall further define and specify in its special permit. The age restriction shall run with the land in perpetuity and shall be enforceable by any or all of the owners of DWELLING UNITS in the SENIOR Residence development or by the Town of Acton.



Planning Board

TOWN OF ACTON
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DECISION
05-01

Ellsworth Village
Senior Residence Special Permit
April 26, 2005

GRANTED with CONDITIONS

Decision of the Acton Planning Board (hereinafter the Board) on the application of Ellsworth Village, LLC (hereinafter the Applicant) for property in Acton, Massachusetts, owned by Robert R. Moran & Richard B. Warren, Trustees, 125-135 Great Rd. Realty Trust, 171 Great Road, Acton, MA 01720; James D. Fenton, 3 Milbery Lane, Acton, MA 01720; and Michael J. Jeanson, 12 Kennedy Lane, Acton, MA 01720.

The property is located in the rear of 133 Great Road and off the end of Brabrook Road in Acton, and consists of portions of parcels shown on the 2004 Acton Town Atlas map F-4 as parcel 69, and map F-5 as parcel 40 (hereinafter the Site).

This Decision is in response to an application for a Senior Residence special permit, received by the Acton Planning Department on December 1, 2004, pursuant to Section 9B of the Acton Zoning Bylaw (hereinafter the Bylaw) and the Rules and Regulations for Senior Residence special permits (hereinafter the Rules).

The Applicant presented the subject matter of the special permit to the Board at a duly noticed public hearing on January 25, 2005. Mr. George Dimakarakos of the engineering firm Stanski and McNary, Inc. represented the Applicant. The hearing was continued to February 22, 2005, March 22, 2005 (without presentations, discussions, or deliberations), and April 12, 2004, and then closed. Board members Lauren S. Rosenzweig (Chairman), Gregory E. Niemyski (Vice Chairman), Ruth M. Madin, Stacy S. Rogers, Christopher R. Schaffner, and associate Edmund R. Starzec were present throughout the hearing. The Chairman designated Mr. Starzec to sit on the Board to act on this application pursuant to section 10.3.9 of the Bylaw. The minutes of the hearing and submissions on which this decision is based upon may be referred to in the Planning Department or the Town Clerk's office at the Acton Town Hall.

EXHIBITS

Submitted for the Board's deliberation were the following exhibits:

- 1.1 A plan entitled "Senior Residence Special Permit Plan for Ellsworth Village, Brabrook Road, Acton, Massachusetts" dated November 19, 2004, last revised on March 1, 2005, drawn by Stanski and McNary, Inc., 80 Harris Street, Acton, MA 01720, consisting of ten sheets.
- 1.2 Supplemental items and documentation required by the Rules consisting of:
 - * A properly executed Application for a Senior Residence Special Permit, dated 11/23/04.

- * Filing fee.
- * A completed Development Impact Report, form DIR.
- * Certified abutters list.
- * Use description.
- * Draft master deed and bylaws for the Ellsworth Village Condominium containing age restrictions; and descriptions and restrictions for the common land, last revised 4/7/05.
- * Documents, last revised 4/7/05, related to the affordable dwelling units including a written statement, draft deed restrictions, deed rider, and regulatory and monitoring agreements; development pro-forma; description of the criteria and process for the selection of affordable unit buyers; schedule for the construction of the affordable units; tabulation of affordable and market rate unit types; developer information.
- * Copies of deed and plans of record.
- * Drainage, earth removal, and water balance calculations.
- * Traffic impact study.
- * Architectural floor and elevation plans.

1.3 Additional information submitted by the Applicant:

- * Conceptual pathway plan over abutting Town land to Brookside Shops, 145 Great Rd. Mr. Al Frizzei, owner of the apartments at 121 Great Road, received on 2/18/05.
- * Conceptual access plan for access via 121 Great Road, dated 1/31/05.
- * A sketch of potential impact of access via 133 Great Road, received on 2/18/05.
- * Letter from Stanski and McNary, Inc. accompanying the revised plan submission, dated 3/10/05, including a revised use description and supplemental data in support of the storm sewer design.
- * Cover letter from D'Agostine, Levine, Parra & Neburn, P.C., dated 4/7/05, for revised condominium documents, and the affordable housing monitoring agreement.
- * Correspondence from Acton Water District Manager to project engineer, dated 4/11/05.

1.4 Interdepartmental communication received from:

- * Acton Building Commissioner, dated 12/27/04 with attachments, and 3/17/05;
- * Acton Community Housing Corporation, dated 1/13/05;
- * Acton Engineering Administrator, dated 1/21/05 and 3/28/05;
- * Acton Finance Director's office, dated 12/14/04;
- * Acton Fire Chief, dated 1/20/05 and 4/11/05;
- * Acton Health Director, dated 12/16/04;
- * Acton Historical Commission, dated 12/8/04;
- * Acton Municipal Properties Dir. & Tree Warden, dated 12/15/04 and 3/16/05;
- * Acton Town Planner, dated 1/21/05 with attachments, 2/17/05, and 4/7/05;
- * Acton Police Chief Frank Widmayer, dated 2/25/05;
- * Acton Transportation Advisory Committee, dated 1/13/05.

1.5

- * Correspondence received from abutters and nearby residents:
 - * Mr. Chip Chapin, 4 Brabrook Rd., dated 2/24/05 and 4/4/04, both with attachments.
 - * Mr. Tom Lemire, 5 Brabrook Rd, dated 4/8/05.
 - * Mr. Ed Vrablik, 11 Brabrook Road, dated 2/13/05, and 2/28/05.

1.6

- * Other:
 - * Various e-mail correspondence between Town Counsel Stephen Anderson, Town Planner, and the Applicant's legal counsel between 9/30/04 and 3/18/05.
 - * E-mail from Town Planner to Mr. Dimakarakos of Stanski & McNary, dated 10/29/04.

- * Documents of record relating to the status of Brabrook Road as a public way and additional record plans for the area in the vicinity of the Site.
- * Letter from Town Counsel to the Acton Building Commissioner, dated 6/11/1996.
- * Letter from Town Counsel to the Engineering Department, dated 3/16/1983.
- * Ellsworth Village Housing Starts Program Application to MassHousing, dated 6/10/03.
- * MassHousing "Site Approval" letter, dated 9/22/03.
- * Miscellaneous correspondences, plans, and aeriels, dated in 2003, relative a to potential Comprehensive Permit project on the Site.
- * Letter from Stranski and McNary, Inc., dated 9/10/04, with three alternative conceptual site plans attached.
- * Hearing and decision extension agreement dated 3/22/05.

Exhibits 1.1 through 1.3 are referred to herein as the Plan.

2 FINDINGS AND CONCLUSIONS

Based upon its review of the exhibits and the record of the proceedings the Board finds and concludes that:

- 2.1 The Site is located within the Residence B zoning district, the Affordable Housing Overlay District B, and the Groundwater Protection District Zone 4.
- 2.2 The proposed use, Senior Residence housing, is allowed on the Site by special permit in accordance with the Bylaw section 9B.
- 2.3 The Plan shows a 33-unit Senior Residence development with a common septic system on a parcel containing +/-8.31 acres of land. The resulting density of 3.97 units per acre meets the standards of section 9B.
- 2.4 The Applicant proposes that the required common land remains in private condominium ownership. The common land provides open space benefits to the future residents and the nearby neighborhood but has no town-wide significance.
- 2.5 Three of the dwelling units are proposed as affordable in accordance with the provisions of the Bylaw, section 9B.12. To adequately meet the needs of low- and moderate income households, it is important that affordable units come in a range of prices and sizes. M.G.L. Ch. 40B sets a 10% affordable housing goal for every community in the Commonwealth. This decision intends to ensure that the three affordable units count and meet local needs.
- 2.6 Brabrook Road leads through a residential neighborhood of +/-10 single-family homes. A side street, Flagg Road, has 8, or so, homes on it. Brabrook Road is a public way that currently ends in a temporary turnaround with an easement on the lot at 11 Brabrook Road. The public street easement continues for +/-260 feet in an unimproved state.
- 2.7 The Brabrook and Flagg Roads homes currently use wells for their domestic water supply.
- 2.8 The Plan shows an extension of Brabrook Road as a public way within the public street easement for primary access to the Site, and the removal of the temporary turnaround. A new suitable turnaround is proposed at the new end of Brabrook Road.
- 2.9 The Plan shows improvements over the entire length of Brabrook Road including the installation of a sidewalk and water main.
- 2.10 Ellsworth Village Road does not conform to the standards of the Acton Subdivision Rules and is proposed as private way.
- 2.11 An emergency access will be provided from Great Road over lot 1C (133 Great Road), which also provides convenient pedestrian access to shops and businesses on Great Road.

The Plan shows pedestrian access to East Acton Village via the end of the Brabrook Road layout and connecting with a sidewalk on the abutting commercial property, and a pedestrian walk will lead to the Town-owned land that abuts the Site in the northwest. Thus, the project provides ample potential for walking to nearby shops and services, between neighborhoods, and to future Town recreation facilities, and thus could reduce automobile travel in the immediate area. To turn their potential into opportunity, the pedestrian connections need to be secured with easements that allow their general public use on foot.

The Plan shows the removal of several trees and an embankment in the shoulder of Pope Road for sight distance improvements at the Pope Road / Brabrook Road intersection. Pope Road is a designated scenic road under Chapter J of the Town Bylaws which regulates the removal of street trees in scenic roads.

- 2.12 The proposed construction work on the site and in the adjacent public ways may require blasting. Recent findings show that toxic perchlorate compounds used in blasting are stable in the ground and resurface in nearby drinking water supply wells. The risk has been identified but neither the State nor the Federal Government appear to have regulations on safety standards or exposure limits, yet.
- 2.14 The Applicant had proposed a +/-750-foot long emergency access road or pathway from the Site to Brookside Shops via Town-owned land. This road is not feasible as proposed and therefore not required. The Board finds that within reasonable cost limits the resources for the pathway should be diverted to providing public water service on Flagg Road.

The Applicant requested no waivers from the Rules.

- 2.15 The Board has received comments from various Town departments and other parties, which are listed in Exhibits 1.4 through 1.6 above. The Board considered these comments and comments received at the public hearing. The Board considered these comments in its deliberations, made them available to the Applicant, and incorporated them into this decision as the Board deemed appropriate.

The Plan as amended herein and the proposed uses as approved herein are appropriate for the Site; consistent with the Master Plan; in harmony with the purpose and intent of the Bylaw, specifically Section 9B; comply in all respects to the applicable requirements of the Bylaw and the Rules, and will not be detrimental or injurious to the neighborhood. After considering several alternatives, the Board finds that granting this special permit protects and enhances Acton's New England character, its environmental and historic resources, and scenic vistas; provides common land that benefits the Town, abutters, and the future residents in the proposed development; provides quality housing for seniors with a range of incomes and physical abilities; provides for the safety of vehicular movement, and for the safety and convenience of pedestrians in a manner that is compatible with the Town's New England character and the needs of seniors.

3 BOARD ACTION

Therefore, the Board voted on April 26, 2005 -- five in favor, one opposed -- to GRANT the requested special permit subject to and with the benefit of the following Plan modifications, conditions, and limitations.

3.1 PLAN MODIFICATIONS

No building permit shall be issued before the endorsement of the Plan as modified and approved hereunder. Before the endorsement of Plan and before any construction activity begins on the Site, the Plan shall be revised to include the following additional, corrected, or modified information.

Except where otherwise provided, all such information shall be subject to the approval of the Planning Board or its designee.

Brabrook, Flagg, and Pope Roads

- 3.1.1 Provide a Professional Engineer's analysis in accordance with MUTCD, section 2B.05 to determine if traffic or street conditions warrant the installation of the proposed stop sign and stop line on Brabrook Road at Pope Road. If not warranted, remove it from the Plan.
- 3.1.2 Add an advanced pedestrian crossing sign on the southbound side of Pope Road north of the Brabrook Road intersection. The exact location shall be determined in consultation with the Engineering Department.
- 3.1.3 For the work on Brabrook Road, specify a sloped granite curb at the Pope Road rounding and around the neck-down opposite Flagg Road as specified in the Acton Subdivision Rules, section 9.5.2, and the pavement & sloped granite edging detail on Plan sheet 6.
- 3.1.4 On Plan sheet 5 -- cross section STA -1+24.65 to 0+52, specify a minimum sidewalk width to 4 feet free of obstructions.
- 3.1.5 With reference to sheet 5 - cross section STA -1+24.65 to 0+52, add a construction detail and specifications for mounting the guardrail to the pre-cast modular retaining wall, or on the alternate block retaining wall if it is used.
- 3.1.6 Add Plan drawings and specifications for a water main over the entire length of Flagg Road, subject to the conditions and qualifications stated under Conditions below.
- 3.1.7 Add a construction detail and/or note that specify that trenches and new pavement joints in all public ways shall be patched using the "grind and inlay method" subject to more detailed specifications to be obtained from the Acton Engineering Department.

Documents

- 3.1.8 Submit a signed authorization for the Town to enter and complete the improvements. (Rules, s. 3.10).
- 3.1.9 Submit a list of current mortgage holders, if any (Rules, s. 3.11).
- 3.1.10 Submit a signed fee retainer statement for parcel 1D-2, as outlined in the Acton Subdivision Rules, section 5.2.7.
- 3.1.11 Submit drafts for permanent easements from the owner of lot 1C (133 Great Road) for the benefit of Ellsworth Village Condominium for:
 - * The emergency vehicle access over lot 1C as shown on the Plan; and
 - * The drainage easement shown on the Plan.
- 3.1.12 Separately, submit drafts for permanent easements from the owner of lot 1C (133 Great Road) and the Applicant for the benefit of the Town of Acton for purposes of:
 - * Emergency vehicle access between Brabrook Road and Great Road via Ellsworth Village Road and the emergency access over lot 1C; and
 - * Public pedestrian access between Brabrook Road and Great Road via Ellsworth Village Road and the emergency access over lot 1C, and between Brabrook Road and the Town-owned land abutting the Site in the Northwest via Ellsworth Village Road.
- 3.1.13 Add to the Ellsworth Village Condominium Master Deed and Bylaws appropriate provisions for the condominium's responsibility to mow, plow, and otherwise maintain in a safe walkable condition the emergency access over lot 1C and the "walkway to Property Line" between Ellsworth Village Road and the boundary of the abutting Town-owned land.

- 3.1.14 Add in conspicuous locations to the Ellsworth Village Condominium Master Deed and Bylaws that all uses of the land in Ellsworth Village shall comply with the Town of Acton zoning bylaw and this Senior Residence Special Permit.

Affordable Dwelling Units -- Documents

- 3.1.15 In the condominium master deed and all legal documents related to the affordable units, specify which unit numbers will be the designated affordable units. Note, that the Board under conditions below is requesting an upgrade/relocation of one of the affordable units.
 - 3.1.16 In the condominium master deed and all legal documents related to the affordable units, specify that the affordable units shall be sold to income eligible persons or households that meet the age restrictions of the master deed.
 - 3.1.17 In the condominium master deed specify the percentage in ownership of the affordable units in the condominium reflecting the units' restricted sale and re-sale prices, and specify that the condominium fees shall be assessed proportionately to the units' percentage in ownership. Accordingly, votes in the decisions of the condominium association shall also be based on the percentage in ownership.
 - 3.1.18 In the condominium master deed and all legal documents related to the affordable units, specify the local preference criteria for the sale and re-sale of the affordable units in accordance with section 9B.12.7 of the Bylaw, which the Acton Community Housing Corporation may be further defined from time to time.
- #### **Miscellaneous**
- 3.1.19 On the Record Plan sheet, correct the ownership designation for the Town-owned parcel.
 - 3.1.20 Provide detailed sub -- and total area calculations for the common land and the wetlands and drainage facilities within it, to prove beyond reasonable doubt that the common land meets the area requirement of the Bylaw. If necessary, make Plan adjustments to comply.
 - 3.1.21 Modify the landscape Plan sheet to show evergreen screening in the rear of units 16, 17, and 18 as the Applicant had indicated during the public hearing.
 - 3.1.22 Remove from all Plan sheets the water line that runs from the cur-de-sac easterly across open space easement A to the Site boundary.
 - 3.1.23 Relocate the proposed "Walkway to Property Line" to a place nearest to the southerly corner of the abutting Town of Acton land, such as between units 27 and 28. Specify that it shall be constructed with a paved surface. Add a cross section for this walkway, generally equivalent to the typical sidewalk cross section on Plan sheet 6.
 - 3.1.24 On Plan sheet 6 - pavement & sloped granite edging detail, change curb reveal to 6 inches.
 - 3.1.25 Remove the stop sign and pavement markings at the end of Ellsworth Village.
 - 3.1.26 On Plan sheet 4 correct note 1 to reference parcel 1D-1 instead of 1D.
 - 3.1.27 Add construction specifications and a cross section for the emergency access. It shall be at least 18 feet wide, including gates (see detail on Plan sheet 7). Its surface shall be finished with grass pavers. Add signage as may be required by the Acton Fire Chief.
 - 3.1.28 Add as general notes on Plan sheet 7 the construction activities restrictions stated in section 3.3.1, under Conditions, below.
 - 3.1.29 The Plan shall be modified to comply in all respects with the Bylaw. Unless directed otherwise by this decision, the Plan shall also be modified to comply with all requirements of the Rules, and to address all departmental comments received by the Board in a manner that resolves any concerns raised therein to the satisfaction of the Board.

3.2. CONDITIONS

The following conditions shall be binding on the Applicant and its successors and assigns. Failure to adhere to these conditions shall render this special permit null and void, without force and effect, and shall constitute grounds for the revocation of this special permit, and of any building or occupancy permit issued hereunder. The Town of Acton may elect to enforce compliance with this special permit using any and all powers available to it under the law.

Restrictions on Construction Activities

- 3.2.1 The following restrictions on construction activities shall apply:
- Construction for all work shown on the Plan shall be limited to the hours between 7:00 AM and 5:00 PM Monday through Friday. Work on the Site itself, but not in any public way, may also be conducted between 9:00 AM and 4:00 PM on weekends.
 - Blasting, if necessary, shall be limited to the hours between 9:00AM and 5:00 PM Monday through Friday.
 - Construction and contractor vehicle access to the Site shall be restricted to the emergency access route via 133 Great Road shown on the Plan. Construction and contractor vehicle access via Brabrook Road shall be prohibited, except for work actually performed on Brabrook, Flagg, and Pope Roads as approved hereunder and except for extra large vehicles that cannot safely negotiate the access from Great Road.

Performance Guarantees

- 3.2.2 Prior to the endorsement of the Plan, the Applicant shall provide the Board with a performance guarantee pursuant to section 6 of the Acton Subdivision Rules to secure the construction of Ellsworth Village Road, the improvements in Brabrook Road, Flagg Road, and Pope Road, the pedestrian facilities, the emergency access, and all appurtenances thereto, all as shown on the approved Plan, and the conveyances to the Town required herein. If the performance guarantee is first provided as a restrictive covenant, the Applicant shall provide a monetary performance guarantee under said section 6 for all improvements within Brabrook, Flagg, and Pope Roads before beginning any work there. The Board reserves the right to require additional performance guarantees or to further specify their form for any and all items and improvements shown on the Plan.

Brabrook, Flagg, and Pope Roads

- 3.2.3 Before any work shall begin in any public way, the Applicant shall obtain a permit for construction within a public way from the Acton Engineering Department and coordinate the timing of the work with the Acton Highway Department.
- 3.2.4 All work in public ways shall comply with the Town of Acton "Specifications for Regulating Construction within Public Ways", except as otherwise specified or approved herein.
- 3.2.5 The Applicant shall keep residents on Brabrook and Flagg Roads informed of the construction schedule for work in these streets, and of any changes that may occur.
- 3.2.6 Before removal of any public shade trees within Pope Road for purposes of improving sight distance, follow the procedures for posting, notification, and hearing as specified in Chapter J (Scenic Road Bylaw) of the Town of Acton Bylaws.
- 3.2.7 Upon completion of all work, and prior to the release of the last \$100,000 of performance guarantee, the Applicant shall donate to the Town all the improvements he has made in Brabrook Road and in parcel 1D-2 (except water and utility lines) along with proof that any mechanics liens for such work have been released.

- 3.2.8 The responsibility for plowing and maintaining the improvements in Brabrook Road extension shall be that of the Applicant until such time as they are completed to the satisfaction of the Town and formally conveyed to the Town, including parcel 1D-2.

Following its acceptance of the streets, the Town's maintenance responsibilities will follow standard procedures for Town streets and ways and shall be limited to the improvements located within the street layouts and associated with their function as a street, and to any improvements associated with street drainage located within designated utility easements. The maintenance of all private utilities and services located within or outside the street layout or said easements and of any private drainage facilities feeding into drainage structures within the street layouts or easements shall not be the responsibility of the Town.

Affordable Dwelling Units

- 3.2.9 Units 11, 17, and 22 as shown on the Plan shall be the designated affordable units as shown on the Plan. However, the Board requests that the Applicant consider favorably exchanging unit 11 for one of the larger market-rate duplex units.
- 3.2.10 Two of the affordable units shall be sold and resold to qualified persons or households with incomes at or below 80% of the Boston Area Median Income for two-person households, and one unit shall be sold and resold to age qualified persons or households with incomes at or below 70% of the Boston Area Median Income, at prices that allow these income groups to purchase the units in accordance with the Department's of Housing and Communities Development (DHCD) Local Initiative Program (LIP) guidelines and to qualify these affordable units a part of Acton's affordable housing stock under M.G.L. Ch. 40B.
- 3.2.11 The affordable units shall be sold and re-sold in accordance with the local preference criteria of the Bylaw, section 9B.12.7, which the Acton Community Housing Corporation (ACHC) may further define from time to time.
- 3.2.12 The affordability restrictions for the three designated affordable units shall remain in effect in perpetuity except in the event that at the time of resale no qualified buyer can be located within 180 days after a unit is first marketed, or such extended time as the seller and the monitoring agent may agree to, in such an event the conditions of the regulatory agreement for the unit shall take effect and any proceeds of the sale of the unit in excess of the restricted sale price shall be paid to the Town of Acton for purposes of supporting other affordable housing initiatives in Acton.
- 3.2.13 The Board hereby names the Town of Acton or its designee, the ACHC, as the monitoring agent for the sale and resale of the Site's affordable units on the Site.
- 3.2.14 All draft legal documents and restrictions concerning the affordable dwelling units may be further modified to ensure compliance with the Department's of Housing and Communities Development (DHCD) Local Initiative Program (LIP) guidelines, and to qualify these affordable units a part of Acton's affordable housing stock under M.G.L. Ch. 40B. Such changes, if any, shall be made only under the direction and subject to the approval of the ACHC, which the Board hereby names as its designee in this matter.

Hotline

- 3.2.15 The Applicant shall establish a construction telephone hotline and inform all parties in interest within the Town of Acton (as specified in the Rules) and all residents on Brabrook and Flagg Roads of the hotline number to call for questions, concerns, and complaints. The Applicant shall reply to such inquiries within a reasonable time.

Ellsworth Village Road -- Private Way Restriction

- 3.2.16 Ellsworth Village Road shall remain a private way. The Ellsworth Village Condominium and the owners of units 1 through 33 shall be jointly responsible for plowing, sweeping, and

otherwise maintaining Elisworth Village Road, including all related infrastructure. The Elisworth Village Condominium or the owners of units 1 through 33 shall not petition the Town to plow, sweep, or maintain Elisworth Village Road and shall not petition the Town for acceptance of Elisworth Village Road as a public way.

Accessibility

3.2.17 All dwelling units shall be built to be adaptable with only minor structural changes for persons with disabilities to meet the requirements for Group 2B residences as set forth in the Massachusetts Building Code, 521 CMR, as amended.

Blasting

3.2.18 If blasting is required for any of the work shown on the approved Plan, the applicant shall strictly follow the regulations and instructions of the Acton Fire Department.

3.2.19 If perchlorate compounds will be used in the blasting process, the Applicant shall offer all immediate abutters of the Site, and, in the event that blasting is required on Brabrook, Flagg, and Pope Roads, all residents on Brabrook and Flagg Roads and residents abutting the blasting location on Pope Road, a pre-blasting screening of their domestic well water for ammonium perchlorate and other perchlorate compounds. Prior to conducting the blasting, the Applicant shall pay each such abutter or resident who agreed to a pre-blasting test, the cost of a post-blasting test which they may conduct at the time of their choosing. The post-blasting payment is waived for any abutter who ties into the newly installed water main.

3.2.20 If perchlorate compounds will be used for blasting work in Brabrook, Flagg, and Pope Roads, the insurance requirements in the "Specifications for Regulating Construction within Public Ways" shall be expanded to indemnify the Town for a period not less than 10 years against claims for injury, death, or property damage due to any perchlorate contamination of domestic water supply wells that may result from the blasting activity.

Common Land

3.2.21 All common land areas shall remain in their natural state and remain undisturbed during and after construction except as shown on the Plan.

3.2.22 The common land shown on the Plan and approved hereunder, including any portion that exceeds minimum zoning requirements, shall not be reduced in area.

3.2.23 No portion of the common land shown on the Plan and approved hereunder, including any portion in excess of minimum zoning requirements, shall be used to meet area, setback, or any other zoning requirements for any other development or improvement not shown on the Plan, specifically, it shall not be used to support additional dwelling units or house lots.

Recording of Plans and Documents

3.2.24 This Decision, Plan sheets 1 and 2 (general site layout/master plan and record plan), and the emergency access and drainage easements benefitting the Elisworth Village Condominium as required herein shall be recorded at the Middlesex South District Registry of Deeds or the Land Court prior to the issuance of a building permit on the Site.

Streets and Easements to the Town

3.2.25 In all conveyances, the Applicant shall retain the right to convey to the Town of Acton the emergency and public pedestrian access easements as specified herein, and parcel 1D-2.

3.2.26 Upon completion of all work, and before release of the last \$100,000 of performance guarantee, the Applicant shall offer the Town of Acton for acceptance by Town Meeting parcel 1D-2 for street purposes and the emergency and public pedestrian easements required herein.

Miscellaneous

3.2.27 The proposed pathway from the Site to Brookside Shops on Town-owned land, or any variation thereof, shall not be constructed.

3.2.28 Instead, and subject to the approval by the Acton Water District and the issuance of a Town of Acton permit for construction in a public way, the applicant shall install a water main on Flagg Road. The Board reserves the right to waive this requirement without further public notice, if the Applicant can prove to the Board's reasonable satisfaction that the cost of the water main installation on Flagg Road exceeds the cost of the pathway to Brookside Shops as proposed by a factor of 1.25. Pavement patching of the trench shall follow the "grind and inlay method" required under section 3.1.7 above.

3.2.29 All outdoor lighting installations on the Site shall comply with the standards set forth in section 10.6.2 of the Bylaw.

3.2.30 No work on the Site shall begin prior to the endorsement of the Plan.

3.2.31 The Applicant shall be diligent in complying with the erosion and sediment control plan. The Applicant shall not cause or permit the runoff of water or erosion that results in the flooding or siltation of any street, way, or drainage facility owned or maintained by the Town. If such runoff or erosion occurs, the Building Commissioner may order the immediate cessation of any excavation, construction and building activities until the conditions that caused the runoff or erosion have been corrected.

3.2.32 The installation of the common septic system shall be made in compliance with Acton Board of Health requirements.

3.2.33 All water service lines shall be installed in accordance with the specifications of the Acton Water Supply District.

3.2.34 All work on the Site shall be performed in compliance with the applicable law and regulations protecting wetlands and wildlife habitat in the Town of Acton.

3.2.35 The number of dwelling units on the Site shall not be increased above the number shown on the Plan and approved hereunder.

3.2.36 All work on the Site shall comply with the terms of this special permit and shall conform with and be limited to the improvements shown on the Plan as modified herein.

3.2.37 Upon completion of all work, submit to the Board an as-built plan and a Professional Engineer's certification that all work and construction was executed in compliance with the approved Plan.

3.2.38 If applicable, all taxes, and penalties and back charges resulting from the non-payment of taxes, shall be paid in full prior to issuance of a building permit.

3.4 LIMITATIONS

The scope of this special permit is limited as follows:

3.4.1 The foregoing required modifications and conditions have been stated for the purpose of emphasizing their importance, but are not intended to be all inclusive or to negate the remainder of the Bylaw and the Rules.

3.4.2 This special permit applies only to the Site identified in this decision and to the proposed improvements, use, and activity as shown on the Plan.

3.4.3 Other approvals or permits required by the Bylaw, other governmental boards, agencies, or bodies having jurisdiction shall not be assumed or implied by this decision.

3.4.4 This special permit shall lapse if substantial use thereof has not commenced within two years of the filing date of this decision with the Town Clerk, except for good cause, or if construction under this special permit is not continued through to completion as continuously and expeditiously as is reasonable. For substantial use to have commenced, clearing and grading of at least one street or way as approved hereunder must be under way. For construction to continue towards completion as continuously and expeditiously as is reasonable, construction activity shall not rest for more than one year. A request to extend said time limits must be made in writing to the Board at least 30 days prior to said expiration dates, and the Board herewith reserves its rights and powers to grant or deny such extension, to issue any appropriate changes to the special permit and to require any appropriate modifications of the Plan.

3.4.5 The Board hereby reserves its right and power to modify or amend the Plan and the terms and conditions of this special permit with or without a public hearing upon the request of the Applicant, his designees or assigns, or upon its own motion.

4 APPEALS

Appeals, if any, shall be made pursuant to MGL, Ch. 40A, S. 17 and shall be filed within 20 days after the date of filing this decision with the Town Clerk.

Signed on behalf of the Acton Planning Board

Roland Barti, AICP, Town Planner
for the Town of Acton Planning Board

This is to certify that the 20-day appeal period on this decision has passed and there have been no appeals made to this office.

Eva Bowen, Town Clerk

Date

Copies furnished:

| | |
|------------------------------|-------------------------------|
| Applicant - certified mail # | Health Director |
| Town Clerk | Municipal Properties Director |
| Fire Chief | Town Manager |
| Owner | Acton Water District |
| | Assistant Assessor |

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- b. **Ceiling:** The plane of the lower surface of attic roof rafters.
- c. **Interior Building Walls Between the Units:** The plane of the interior surface of the wall studs facing each Unit.
- d. **Exterior Building Walls, Doors and Windows:** The planes of the interior surface of the wall studs or in case of a concrete wall, the interior surface of said concrete wall; as to doors, the exterior surface thereof; as to windows, the exterior surface of the glass and window frames.

8. **MODIFICATION OF UNITS**

The owner of any Unit may not, at any time, make any changes or modifications of the exterior of said Unit or any interior changes which affect, or in any way modify, the structural or supportive characteristics or integrity of the building or its services; however, such Owner may modify the interior construction of such Unit in any manner not inconsistent herewith, and further may at any time and from time to time, change the use and designation of any room or space within such Unit, subject always to provisions of this Master Deed and the provisions of the By-Laws of the Association, including the Rules and Regulations promulgated thereunder. Any and all work with respect to the foregoing shall be done in a good and workmanlike manner pursuant to a building permit duly issued by the local building permit authority, if required, and pursuant to the plans and specifications which have been submitted to and approved by the Board of Governors of the Association. Such approval shall not be unreasonably withheld or delayed.

9. **RESTRICTIONS ON USE OF UNITS**

- (a) Each Unit is hereby restricted to residential use and occupancy by senior citizens, fifty-five (55) years of age and older ("Qualifying Person"), their spouses, (including the surviving spouse of a deceased Qualifying Person), and/or a relative by blood or marriage of a Qualifying Person or of such spouse, provided that such relative must be

fifty-five (55) years of age or older (a "Qualified Relative"), except during a six (6) month period following the death or departure from the household of such Qualifying Person, his/her spouse, or Qualified Relative.

- (b) Every sale, resale, or other conveyance of every Unit, whether by the Declarant, or its successors, and or assigns, shall be to: (i) at least one Qualifying Person; (ii) to the spouse or blood relative of a Qualifying Person, so long as the Qualifying Person occupies and intends to occupy the unit as his or her primary residence; or (iii) to a trust or other estate-planning vehicle under which the Qualifying Person holds a beneficial interest, so long as the Qualifying Person (or after the death of the Qualifying Person, his/her spouse or Qualified Relative) occupies or intends to occupy the Unit as his or her primary residence.
- (c) Each Residential Unit shall be occupied by no more than two persons as a single-family residence. A third occupant may be allowed for the express purpose of providing health care to the occupants.
- (d) Overnight guests who are younger than fifty-five (55) years of age shall be allowed for reasonable visitation periods not to exceed two (2) weeks in duration and not to exceed two (2) weeks per year. Children under the age of eighteen (18) shall not be allowed to reside in the Units; occupancy for two (2) weeks or less per year shall not be deemed occupancy by children. Notwithstanding the foregoing, up to two (2) children per Unit, under the age of eighteen (18), whose parents are deceased or otherwise legally or physically incapacitated and unable to perform their parental

functions, shall be allowed to reside with their grandparents without limitation as to time.

- (e) Notwithstanding any provisions of this Section 9, Restrictions on Use of Units, to the contrary, the Declarant, its successors, assigns or affiliates has the right to use any Unit owned or leased by it or any common area or portion thereof or suitable facility in the Condominium for models and for offices for sales, construction, storage and any other lawful purpose. So long as Declarant owns any unit in the Condominium, it shall have the right to erect and maintain "for sale" signs in and on the Common areas and facilities of the Condominium.
- (f) Any lease or rental agreement for any Unit shall be to a Qualifying Person, their spouses, (including the surviving spouse of a deceased Qualifying Person), and/or a Qualified Relative, provided that the tenant(s) all meet the occupancy requirements of Section 9(a) herein, in writing and specifically subject to the Master Deed, the By-Laws of the Association and the Rules and Regulations of the Condominium, including the restrictions with respect to occupancy, and shall have a minimum initial term of six (6) months. A copy of all leases or rental agreements, together with proof of age of all occupants, as executed (with the dollar amount of rent deleted at the unit owner's option) shall promptly be furnished to the Board of Governors who shall keep and maintain the same as part of its records. The Board of Governors shall also be furnished at the same time with written acknowledgement of the lessee that the lessee has received copies of and will comply with the provisions of such Master Deed, By-Laws and Rules and Regulations. Notwithstanding the foregoing, the said Declarant,

its successors, assigns or affiliated entities shall have the further right to let or lease to a Qualifying Person, his/her spouse(s) (including the surviving spouse of a deceased Qualifying Persons), and/or a Qualified Relative, any Units which have not been sold by it, including any such Unit later acquired or later leased by it upon such terms and for such periods, but not less than thirty (30) days, as it, in its sole discretion, shall determine.

- (g) The occupants of each unit shall be entitled to keep one (1) pet, either a cat or a small dog per unit and the keeping of any such pet shall be subject to the Rules and Regulations adopted by the Board of Governors and in the event that any such pet, in the sole discretion of the Board of Governors, causes or creates a nuisance, said pet shall be permanently removed from the property upon three (3) days' notice.
- (h) All uses of the Land in the Ellsworth Village Condominium shall comply with the Town of Acton Zoning Bylaw and the terms and conditions of the Special Permit.

The use of Units by all persons authorized to use same shall be at all times subject to the provisions contained in this instrument, the By-Laws of the Association and such Rules and Regulations as may be prescribed and established to govern such use or which may hereafter be prescribed and established by the Board of Governors of the Association, the By-Laws of the Corporation and the Ellsworth Village Rules and Regulations. Any Unit Owner found by the Massachusetts Superior Court to be in violation of the provisions of this Master Deed, By-Laws and Rules and Regulations of the Association, By-Laws or the Corporation, or Ellsworth Village Rules and Regulations shall be liable for the reasonable counsel fees incurred by the association and/or Corporation in enforcing same.

The Association also reserves the right and easement to enter onto the premises, from time to time, at reasonable hours, for the purpose of reconstructing and repairing adjoining Units, common areas and facilities and to perform any obligations of the Association required or permitted to be performed under this Master Deed and/or the By-Laws of the Association.

10. UNIT APPURTENANCES

Appurtenant to each Unit is the following:

- a. Membership in the Association which shall be in the same percentage as an individual Unit Owner common interest. Such membership is not assignable or severable from the ownership of such Unit.
- b. The exclusive easement to use the decks or porches adjacent to each Unit, if any there be, as shown on the said condominium plans recorded with the Master Deed which is incorporated herein by reference.
- c. The exclusive easement to use the garage and one parking space, each appurtenant thereto, as shown on the said condominium plans recorded with the Master Deed, which are incorporated hereby by reference.

All of the Units shall have appurtenant thereto, in common with each other, the right and easement to use the common areas, including the exclusive easement, if any, as may be granted in the Master Deed and as shown on said Condominium plans, subject to and in accordance with the restrictions, limitations, provisions and conditions as hereinbefore and hereinafter set forth in this Master Deed and the provisions of the By-Laws of the Association and the Rules and Regulations promulgated under the By-Laws.

11. COMMON AREAS AND FACILITIES

The common areas and facilities of the aforesaid Condominium comprise and consist of:

- (a) the land described in the attached Schedule A as may from time to time be amended, together with the benefit of and subject to the rights and easements referred to in this