

Planning

DEC 19 2008



Erin K. Taylor

MASSACHUSETTS
BOARD OF APPEALS

Decision on the Application by 442 Massachusetts Avenue, LLC for a Comprehensive Permit for 442 Massachusetts Avenue

Decision 08-08

I. APPLICANT AND PUBLIC HEARING

1. Pursuant to notice duly mailed, published and posted, a public hearing was held by the Acton Zoning Board of Appeals (the "ZBA") at Acton Town Hall, 472 Main Street, Acton, Massachusetts, on November 3, 2008, commencing at 7:30 p.m., upon the application of 442 Massachusetts Avenue, LLC (the "Applicant"), for a comprehensive permit under Massachusetts General Laws ("MGL") Chapter 40B, §§20-23 (the "Act") and under Town of Acton Zoning By-Laws (the "Zoning Bylaw") for a four Unit condominium development to be called Lalli Terrace (the "Project") at 442 Massachusetts Avenue and identified as Parcel 120 on Assessor's Map F2 (the "Site" or the "Property"). All four Units at the Project shall be affordable.

2. The ZBA has issued this decision within the time frame specified in the Act.

3. Detailed minutes were taken of all sessions. The minutes and exhibits are available for public inspection in the ZBA's offices. A list of the exhibits is contained in the record.

4. Sitting as members of the ZBA and present throughout the hearing were Cara Voutselas (Chair), Marilyn Peterson (Member) and Francis Mastroianni (Alternate Member).

II. THE PROJECT

1. The Project consists of .66 acres of land located at 442 Massachusetts Avenue in Acton. A single family home is currently located on the Site.

2. On October 15, 2008, the Applicant submitted an application for a Comprehensive Permit in accordance with the Act to create a four (4) Unit condominium development. The development will consist of three two-bedroom townhouses plus the pre-existing four-bedroom single family home.

3. The Site is located within the R-2 Single Family Residential Zoning District.

4. The Site Plan for the Project is entitled "Comprehensive Permit Plan for Lalli Terrace, Acton, Massachusetts" designed by Stamski and McNary, Inc., Acton, Massachusetts, scale: 1"=20', consisting of:
Sheet 1 of 4 – Master Plan and Layout Plan; Natural Features and Existing Conditions Plan; dated August 14, 2008, last revised November 17, 2008.
Sheet 2 of 4 – Site Development Plan; Erosion and Sedimentation Control Plan; dated August 14, 2008, last revised November 17, 2008.
Sheet 3 of 4 – Detail Sheet; dated August 14, 2008, last revised November 17, 2008.
Sheet 4 of 4 – Landscape Plan and Details by Kim Ahern; dated August 18, 2008; and a Draft Record Plan; dated August 14, 2008, last revised November 17, 2008.

5. The Architectural Plan for the Project is entitled "Three Dwelling Unit Townhouse, 442 Mass. Ave. (Rt. 111), Acton, Mass." designed by E.J. Rempelakis Associates, Acton, Massachusetts, consisting of sheets A-1 through A-6; dated August 20, 2006.

III. JURISDICTIONAL ELEMENTS (M.G.L. Chapter 40B, §§20-23 and 760 CMR 56.04)

1. Pursuant to the Act and the regulations promulgated by the Commonwealth of Massachusetts Department of Housing and Community Development Housing Appeals Committee at 760 CMR 56.04 (the "Regulations"), an applicant for a comprehensive permit must fulfill three jurisdictional requirements:

- a) The applicant must be a public agency, a non-profit organization or a limited dividend organization;
- b) The project must be fundable by an authorized subsidizing agency under a low and moderate income housing subsidy program; and
- c) The applicant must "control the site."

2. As discussed more fully below, the ZBA finds that the Applicant has provided sufficient information to meet these jurisdictional requirements.

A. Status of Applicant

1. Pursuant to the Regulations at 760 CMR 56.04(1)(a), an applicant for a comprehensive permit must be either a public agency, a non-profit organization, or a limited dividend organization. The Applicant has satisfied this criterion by forming a limited dividend organization which shall agree to legally bind itself to limit the profit it derives from a comprehensive permit development. Satisfaction of this criterion shall be accomplished through the execution of a Regulatory Agreement between the subsidizing agency and the Applicant. The Regulatory Agreement, at a minimum, shall stipulate that

the Applicant's profit from the Project is limited, in accordance with 760 CMR 56.04(8)(b) for Rental Projects, as to Development Fees and Distributions from Operations, and the Regulatory Agreement shall provide mechanisms to enforce this requirement.

B. Public Subsidy Requirement

1. A housing development being proposed under a comprehensive permit application must be subsidized under a low and moderate income housing subsidy program. The Applicant has submitted a Project Eligibility Letter, dated August 29, 2008, from the Commonwealth of Massachusetts Department of Housing and Community Development. The ZBA finds that this Project Eligibility Letter substantially complies with the project subsidy requirement set forth in the Regulations at 760 CMR 56.04(1)(b).

C. Site Control Issues

1. To be eligible to obtain a comprehensive permit under the Act, an applicant must demonstrate that it holds legal title to the property that is the subject of the application or that it otherwise has a sufficient legal right to acquire title to the property or to control the property.

2. The Property is currently owned by Margaret Grallert, 442 Massachusetts Avenue, Acton, MA. The Applicant has entered into a Purchase and Sale Agreement, dated September 2007, amended June 18, 2008 with the owner of the Property. As a result, the ZBA finds that, as of the date of issuance of this Comprehensive Permit, the Applicant has demonstrated that it has sufficient legal right to control the Property.

IV. APPLICATION REQUIREMENTS

1. The ZBA finds that Applicant's submitted application substantially complies with the ZBA's comprehensive permit application requirements as stated in the Town of Acton's "Rules and Regulations for Comprehensive Permits" adopted May 17, 2004, as applicable.

V. SUMMARY OF DECISION

1. For the reasons stated below, the ZBA approves, with the conditions set forth, below the application of 442 Massachusetts Avenue, LLC for a comprehensive permit for the Project consisting of a four moderate income condominium Units under the Act.

VI. CONCLUSORY FINDINGS

1. Based on the evidence presented by the Applicant, local boards and officials, and interested parties at the public hearings, the ZBA finds as follows:

- a) Acton does not presently have sufficient low or moderate income housing to meet the Act's minimum criteria.
- b) The proposed Project (as depicted on the Plans submitted with said application) will, when conforming to the conditions set forth in this Decision, adequately provide for traffic circulation, storm water drainage, sewerage, and potable water, without an undue burden on the occupants of the Project, the surrounding neighborhood or the Town.
- c) The proposed Project will, when conforming to the conditions in this Decision, not be a threat to the public health and safety of the occupants of the Project, the neighborhood or the Town.
- d) The proposed Project, as supported by the evidence, and as conditioned below (i) would not be rendered uneconomic by the terms and conditions of this Decision, and (ii) would represent a reasonable accommodation of the need for low and moderate income housing in the Town.
- e) The proposed Project is supported by the Acton Board of Selectmen, the Acton Community Housing Corporation and the Acton Planning Board.

2. Therefore, the ZBA finds that it is an appropriate exercise of its discretion to grant this comprehensive permit with the conditions below.

VII. WAIVERS FROM LOCAL BYLAWS AND REGULATIONS

A. Acton Zoning Bylaw

1. The Applicant has requested waivers from the following Zoning Bylaw provisions:

- a) Section 3.1, to allow multi-family dwelling in R-2 zoning district.
- b) Table of Standard Dimensional Regulations: Minimum Lot Frontage in R-2 District 150 feet. Current Lot frontage is 100 feet.

2. The ZBA finds that the increased density of this Project is reasonable for affordable housing on the Site. The ZBA further finds that the Lot frontage of the Property is already non-conforming and the Project would not increase the scope of such non-conformity. Therefore, the ZBA grants the requested waivers from (i) Section 3.1, and (ii) the Table of Standard Dimensional Regulations: Minimum Lot Frontage in R-2 District of the Zoning Bylaw.

B. Wetland Protection Bylaw

1. The Applicant has requested a waiver from Section F8.3(3) of the Wetland Protection Bylaw which requires a 75-foot setback to the edge of driveways, roadways, and structures because the proposed driveway is located approximately 44 feet from the wetland and the proposed multifamily dwelling is located approximately 64 feet from the wetland.

2. The ZBA finds that the location of the proposed (i) driveway approximately 44 feet from the wetland, and (ii) multifamily dwelling approximately 64 feet from the wetland is reasonable given the physical constraints of the Site. Therefore, the ZBA grants the requested waiver from Section F8.3(3) of the Wetland Protection Bylaw.

C. Wetland Protection Rules & Regulations

1. The Applicant has requested a waiver from Section 3.2(3) of the Wetland Protection Rules & Regulations which require a 75-foot no build setback to the edge of driveways, roadways, and structures because the proposed driveway is located approximately 44 feet from the wetland and the proposed multifamily dwelling is located approximately 64 feet from the wetland.

2. The ZBA finds that the location of the proposed (i) driveway approximately 44 feet from the wetland, and (ii) multifamily dwelling approximately 64 feet from the wetland is reasonable given the physical constraints of the Site. Therefore, the ZBA grants the requested waiver from Section 3.2(3) of the Wetland Protection Rules & Regulations.

VIII. CONDITIONS ATTACHED TO COMPREHENSIVE PERMIT

For the foregoing reasons, the ZBA grants the application of 442 Massachusetts Avenue, LLC for a comprehensive permit for the Project under the Act, subject to each and every one of the following conditions:

A. General Conditions

A.1 Prior to commencement of any construction concerning any portion of the Project (whether pursuant to a building permit or otherwise), unless extended by the Building Commissioner for good cause shown, the Applicant shall submit to the Building Commissioner a final set of Engineering Drawings and Architectural Plans for the Project which shall be identical to the Plans cited in Sections II.4 and II.5 above except that they shall be updated and revised in accordance with the requirements of this Decision. The submission shall also include a list of the specific changes made to conform to the requirements of this Decision. Such list and the final set of Engineering Drawings and Architectural Plans shall be signed and stamped by the Design Engineer. The Building Commissioner shall review the final set of Engineering Drawings and Architectural Plans to ensure that they are consistent, and in conformity, with this decision.

Upon the Building Commissioner so finding, the ZBA shall endorse the final set of Engineering Drawings and Architectural Plans which shall thereupon constitute the final plans for the Project (the “Approved Plans”) under this Decision and shall be filed with the records of the ZBA.

- A.2 In the event the Building Commissioner determines that the Applicant’s construction drawings submitted with its building permit application(s) materially deviate from the Approved Plans in such a manner that, in his professional opinion, they do not conform to the requirements and conditions imposed by this Decision, the Building Commissioner shall notify the Applicant of the specific deviations, and the Applicant shall either bring the construction drawings into conformity with the requirements and conditions imposed by this Decision or seek modification of this Decision in accordance with 760 CMR 56.05(11). In the event of a disagreement between the Building Commissioner and the Applicant with respect to the construction drawings, they shall notify the ZBA which shall thereupon determine whether the building permit construction drawings conform to the requirements and conditions imposed by this Decision. Upon finding that the building permit construction drawings (with any necessary revisions) do conform to the requirements and conditions imposed by this Decision, the ZBA shall endorse those construction drawings if so requested by the Applicant.
- A.3 This Decision shall be promptly recorded at the Middlesex County (Southern District) Registry of Deeds with site plan sheets 1 of 4, 2 of 4, and 4 of 4, and the record plan sheet of the Plans. This Decision shall become effective upon recording. Proof of recording of this Decision shall be forwarded to the ZBA prior to issuance of a building permit or to the start of construction.
- A.4 The Applicant shall comply with all local rules and regulations of the Town of Acton and its boards and commissions, unless expressly waived herein or as otherwise addressed in these conditions.
- A.5 The Applicant shall pay all fees of the Town of Acton imposed generally with respect to construction projects and for the purposes of monitoring compliance of the Project’s construction and occupancy in accordance with this Decision.
- A.6 The Applicant shall copy the ZBA, the Building Commissioner and the Zoning Enforcement Officer on all correspondence between the Applicant and any federal, state or Town official, board or commission that concerns the conditions set forth in this Decision, including, but not limited to, all testing results, official filings and other permits issued in connection with the Project.

- A.7 The Applicant shall comply with the Massachusetts State Building Code and any local regulations or fee requirements of the Building Commissioner. Unless otherwise expressly waived herein, the Applicant shall pay all required fees for all building permits including, without limitation, any fees charged for inspections and permits.
- A.8 The Applicant shall maintain a copy of the endorsed Approved Plans and this Decision at the Site at all times during construction.
- A.9 The Applicant shall obtain temporary easements or written permission from any abutting property owner if, during the course of construction of the Project, it becomes necessary to enter upon abutting land for construction or planting.
- A.10 Each condition in this Decision shall run with the land and shall, in accordance with its terms, be applicable to, and binding on, the Applicant and the Applicant's successors and assigns for as long as the Project is occupied for multi-family residential purposes and the use of the Site does not strictly and fully conform to all requirements of the Zoning Bylaw.
- A.11 This Decision permits the construction, use, and occupancy of four (4) housing Units on the Site. The construction and use of the Site shall be in conformity with the Approved Plans. There shall be no construction or creation of more than the four (4) housing Units permitted by this Decision, nor construction or creation of any other buildings, structures or infrastructure on or under the Site not shown on the Approved Plans, without in each case further approval of the ZBA in the form of a written amendment to this Decision.
- A.12 All determinations with respect to compliance hereunder before the issuance of a building permit or an occupancy permit shall be made by the Zoning Enforcement Officer or the Building Commissioner as the ZBA so elects.

B. Submission Requirements

- B.1 This comprehensive permit shall lapse on the date that is one hundred eighty (180) days following the date on which this Decision is filed with the Acton Town Clerk (which deadline shall be extended for a period equal to the duration of the pendency of any appeals taken from this Decision by any person other than the Applicant) unless the Applicant has submitted to the ZBA, prior to the expiration of such 180 day period, written evidence satisfactory to the ZBA that:
 - a) Applicant has received a written commitment from a public or private financing institution or institutions to provide the major portion of the financing required for construction of the Project as conditionally approved by this Decision; and

- b) The Project, as conditionally approved by this Decision, and the Site qualify for, and will receive, financial assistance under a program administered by a federal or state subsidizing agency to assist the construction of low or moderate income housing within the meaning of the Act.

B.2 Pre-Construction Submissions: Prior to the issuance of a building permit for the Project, the Applicant shall:

- a) Deliver to the ZBA a certified copy of any determination by the federal or state subsidizing agency that the Applicant qualifies as a non-profit or limited dividend organization within the meaning of the Act and the limitation on such dividend. The Applicant shall forthwith perfect, maintain and provide to the ZBA proof of its status as a limited dividend or non-profit organization under the provisions of § 21 of the Act;
- b) Deliver to the ZBA a certified copy of the financing contract between Applicant and the federal or state agency or agencies that will provide the financial aid for construction of low or moderate income housing required by the Act for a comprehensive permit for the Site;
- c) Obtain and file with the ZBA a copy of (a) a building permit from the Acton Building Commissioner pursuant to the Massachusetts State Building Code, and (b) the construction drawings submitted to obtain said building permit;
- d) Obtain and file with the ZBA a copy of any approvals from the Acton Board of Health which may be required under any statute, code, rule, or regulation affecting public health not otherwise preempted by the Act to the extent not otherwise expressly covered by this Decision.

B.3 As Built Plans: Prior to the occupancy or use of the Project, the Applicant shall submit to the ZBA an “As Built Plan” showing all pavement, buildings, drainage structures, and other infrastructure as they exist on the Site, above and below grade, including, without limitation, appropriate grades and elevations. The As Built Plan shall be signed by a registered land surveyor or civil engineer, certifying that the Project as built complies with all applicable conditions of this comprehensive permit.

B.4 As Built Utilities Plan: An accurate as built utilities plan and profile, showing actual in-ground installation of all utilities, shall be submitted to the Department of Public Works not later than 180 days after completion of construction.

C. Site Development Construction Conditions

- C.1 The Applicant shall obtain all building permits and occupancy permits required by the Massachusetts State Building Code.
- C.2 The Applicant shall ensure safe and convenient vehicular access to the Site during the entire construction of the Project. ZBA representatives shall be permitted access to the Site to observe and inspect the Site and construction progress until such time as the Project has been completed.
- C.3 The Applicant shall submit a construction and permitting schedule prior to the start of construction and semi-annually thereafter to the ZBA to assist in Project status update and review.
- C.4 Intentionally Omitted
- C.5 The Applicant shall forward final architectural plans to the ZBA at the time of applying for building permits. All construction shall be periodically inspected by the Building Commissioner and shall be in compliance with all Massachusetts State Building Code requirements and this Comprehensive Permit.
- C.6 The Applicant shall be responsible for ensuring that nuisance conditions do not exist in and around the Site at any time during construction of the Project. The Applicant shall at all times use all reasonable efforts to minimize inconvenience to residents in the general area.
- C.7 Hours: The hours of operation for any construction activities on the Site shall be between 7:00 am and 7:00 pm, Monday thru Friday, 8:00 am and 5:00 pm on Saturdays, and no work shall be allowed on the Site on Sundays or on holidays as recognized by the Commonwealth of Massachusetts.
- C.8 Dust: The Applicant shall implement dust control operations, in a manner approved by the Building Commissioner or the Town Engineer, whenever necessary or directed by the Building Commissioner or the Town Engineer, even though other work on the Project may be temporarily suspended as a result thereof. Methods of controlling dust shall meet all applicable air pollution standards as set forth by federal and state regulatory agencies.
- C.9 Noise: The Applicant shall ensure that noise from Project construction activities does not exceed acceptable levels, as promulgated by federal and state regulatory agencies. The Applicant shall cease any excessively loud activities as determined, and when directed, by the Building Commissioner.
- C.10 Vibration: The Applicant shall ensure that vibration does not extend beyond the Site and create a nuisance or hazard for abutters.

- C.11 Traffic: The Applicant shall implement necessary traffic safety controls to ensure safe and convenient vehicular access in and around the Site. Any traffic problems that occur as a result of Site operations and construction shall be mitigated immediately following notification of same by the ZBA, at the expense of the Applicant. Additional traffic mitigation measures may be required as determined, and when directed, by the Building Commissioner.
- C.12 Roads: The Applicant shall be responsible during construction for the sweeping, removal of snow and sanding of the internal roadways permitting access to the Site by residents and emergency vehicles.
- C.13 Debris: Burial of any stumps or debris on the Site is expressly prohibited. Localized burial of stones and/or boulders is prohibited to prevent the creation of voids from soil settlement over time.
- C.14 Soil: Soil material to be used as backfill for pipes, roads, and/or structures shall be tested at the expense of the Applicant by a firm selected by the ZBA. Testing of said backfill shall be performed in conformance with standards and frequencies established by the Building Commissioner.
- C.15 Utilities: Utilities, including, but not limited to, electric, cable and telephone, shall be located underground.
- C.16 Stabilization Requirements: No building areas shall be left in an open, unstabilized condition longer than sixty (60) days. Temporary stabilization shall be accomplished by hay bales, hay coverings or matting. Final stabilization shall be accomplished by loaming and seeding exposed areas.
- C.17 Construction vehicles shall be parked on the Site and they shall not be parked on adjacent streets or Massachusetts Avenue.

D. Legal Requirements

- D.1 Any sale or transfer of rights or interests in all or any part of the Site shall include a condition that successors are bound by the terms and conditions of this Comprehensive Permit. This Comprehensive Permit may not be transferred to an entity in which the Applicant owns and controls less than 50% of the equity interests in such entity, without the prior written approval of the ZBA and the execution of any instruments or documents that may be required for the perpetual enforcement of this Comprehensive Permit as determined in the reasonable discretion of legal counsel to the ZBA. The scope of the ZBA's review of any proposed transfer shall be limited to the review of a transferee's qualifications, experience, and capacity to complete the Project.

- D.2 The Applicant and all subsequent owners of condominium Units at the Site shall be bound by all conditions and requirements set forth in this comprehensive permit.
- D.3 The driveways, utilities, drainage systems, and all other infrastructure shown in the Approved Plans shall remain privately owned. The Town of Acton shall not have any legal responsibility for the operation or maintenance of the infrastructure at the Site, including, but not limited to, snow removal or trash collection for the Project.
- D.4 In setting the percentages of beneficial interest in the condominium common areas in the Condominium Master Deed, the Applicant shall ensure that the percentages assigned to the Units reflect their fair market value, taking into account the housing restrictions that encumber the Units.

E. Traffic and Safety Conditions

- E.1 Each Unit in the Project shall be equipped with fire and carbon monoxide detection systems and shall comply with the applicable provisions of the Massachusetts State Building Code and Fire Safety Code. The fire and carbon monoxide detection system for each Unit in the Project shall be subject to the approval of the Acton Fire Chief consistent with his authority under said Codes.
- E.2 No building permit for the Project shall be issued until the Applicant has obtained approval from the Engineering Department, Police Chief and Fire Chief of the permanent street address for the Project.

F. Landscaping Conditions

- F.1 Prior to the issuance of a building permit for the Project, the Applicant shall deliver a revised Landscaping Plan to the ZBA that shows adequate lighting along the proposed driveway and the revised Landscaping Plan shall be acceptable to the Zoning Enforcement Officer.

G. Affordability Requirements

To the extent permitted, by the Department of Housing and Community Development (formerly the Executive Office of Communities and Development) (“DHCD”), the following conditions shall apply. Applicant shall support the Town in obtaining the DHCD’s approval of the following conditions:

- G.1 Affordable Units: The three (3) two-bedroom Units shall be made available for purchase by households whose aggregate income is no greater than 80% of the area median income for a 3-person family (the “Area Median Income”) as published by the Department of Housing and Urban Development for the Boston Primary Metropolitan Statistical Area.

The Applicant may sell one of the two-bedroom units to the Acton Housing Authority to use for its low-income family rental program, if the unit is selected by that Authority pursuant to a separate RFP process. The four-bedroom single family home shall be made available for purchase by a household whose aggregate income is no greater than 120% of the Area Median Income for a 5-person family.

G.2 Sales Prices: The maximum sale prices for the Units shall be reviewed and approved by the DHCD at the time of lottery for the selection of buyers of the Units. Subject to the approval of DHCD, the sale price for the 3 two-bedroom Units shall be set to be affordable to a three person household at 70% of the Area Median Income published by the Department of Housing and Urban Development for the Boston Primary Metropolitan Statistical Area. Subject to the approval of DHCD, the sale price for the 1 four-bedroom Unit shall be set to be affordable for a five person household at 120% of the Area Median Income published by the Department of Housing and Urban Development for the Boston Primary Metropolitan Statistical Area. Any modification or deviation from the designation of Units as originally proposed and reviewed by the DHCD shall be subject to approval by the DHCD.

G.3 Selection of Buyers for Affordable Units: The Applicant shall obtain the DHCD approval of a buyer selection plan for the sale of the Units prior to putting the Units on the market. Buyers shall be selected through a fair lottery process (the "Lottery"). To the maximum extent permitted by law and the DHCD, first preference for the purchase of two townhouse units shall be given to households that meet one or more of the following "Acton Connection" preference criteria:

(a) at least one member of the household is currently a legal resident of the Town of Acton. For purposes of the Lottery, a person shall be deemed a resident if that person has been registered as an Acton resident with the Acton Town Clerk pursuant to G.L. c. 51, § 4 and would be considered a resident under the United States Census Bureau's residency guidelines. ("Usual residence" has been defined as the place where the person lives and sleeps most of the time. This place is not necessarily the same as the person's voting residence or legal residence. Also, non-citizens who are living in the United States are included, regardless of their immigration status.);

(b) at least one member of the household is an employee of the Town of Acton, the Acton Water District, the Acton Public Schools, or the Acton-Boxborough Regional School District;

(c) at least one member of the household is currently privately employed within the Town of Acton.

The selection of purchasers for the Units, including the administration of the Lottery, shall be administered by a consultant retained and funded by the Applicant. The Lottery shall be implemented pursuant to a Lottery Plan developed by the lottery consultant and approved by the DHCD. The Acton Community Housing Corporation, if permitted by the DHCD, shall oversee the Lottery. The Applicant shall fund the expenses of the Lottery.

Selected purchasers shall complete a first-time homebuyer course before the closing of the purchase of a Unit if required by the purchaser's lender. The Applicant shall request that the DHCD shall make available a list of such courses for purchasers to attend.

Income eligibility shall be governed by the rules and regulations of the DHCD Local Initiative Program, or in default, the rules and standards employed by the Department of Housing and Urban Development in the selection of income-eligible tenants for publicly subsidized housing.

If permitted by the DHCD, disputes concerning income qualification and Acton Connection qualification shall be resolved in the first instance by the Town through the Board of Selectmen or its designee, Acton Community Housing Corporation. A party aggrieved by a qualification-related decision of the Acton Community Housing Corporation may appeal the decision to the ZBA for a final determination.

The provisions of this section are intended to complement and not to override or supersede any rules, regulations, or requirements of the DHCD, the Massachusetts Commission Against Discrimination, the Local Initiative Program, or any authority with jurisdiction and like purpose, to provide low and/or moderate income housing.

G.4 Perpetual Affordability Restriction: Prior to the issuance of any building permits, a Regulatory Agreement, in a form acceptable to Town Counsel and the DHCD shall be executed and recorded. The Regulatory Agreement shall provide, among other things, that (a) 100% of the Units in the Project will be sold and resold subject to a Deed Rider, in a form acceptable to Town Counsel and DHCD, and (b) the Project Owner's profit shall be limited to 20% of the total development cost of the Project as defined by the Regulatory Agreement and applicable regulations. The Deed Rider shall be attached to and recorded with the Deed for each and every Unit in the Project at the time of each sale and resale, and the Deed Rider shall restrict each such Unit pursuant to this Decision in perpetuity in accordance with the requirements of MGL Ch. 184, §§ 31-33. After obtaining the DHCD's final approval of the Regulatory Agreement and Deed Rider, the Applicant shall use its best efforts to obtain any necessary governmental approvals for such a deed restriction to last in perpetuity, including without limitation the approval of the DHCD if required pursuant to MGL Ch. 184, § 32 or other law. The Applicant shall submit to the ZBA written evidence of the

Applicant's efforts to secure approval of the perpetual restriction and all responses thereto. The absence of a response shall not be deemed a denial of the request to approve the perpetual restriction.

In any event, as this Decision grants permission to build the Project under the Act, and as the Applicant has obtained the benefits of a comprehensive permit, the Project shall remain subject to the restrictions imposed by the Act so long as the Project is not in compliance with the Town of Acton's zoning requirements which otherwise would be applicable to the Site and the Project but for the comprehensive permit's override of local bylaws to promote affordable housing. Accordingly, this Decision and the Deed Rider shall restrict each such Affordable Unit so long as the Project is not in compliance with the Town of Acton's zoning bylaw, so that those Units continue to serve the public interest for which the Project was authorized. It is the express intention of this Decision that the period of affordability shall be the longest period allowed by law. In no event shall the period of affordability be less than ninety-nine years.

In the event that the Applicant submits to the ZBA written evidence of the Applicant's efforts to secure governmental approval of the perpetual restriction, the written denial thereof, and the grounds for denial, the Applicant shall (a) submit to the ZBA a proposed alternative form Deed Rider which, when approved by the ZBA and Town Counsel, shall be submitted to DHCD for such approval, and (b) grant to the Town of Acton or its designee, subject to the approval of DHCD, in the Deed Rider a right of first refusal, in a form mutually acceptable to counsel for the Applicant and to Town Counsel, covering each Unit in the Project which shall be triggered upon the expiration of the affordability period.

G.5 Profit Cap: To conform to the intent of the Act that profits from the Project be reasonable and limited, the Applicant shall be limited to an overall profit cap of twenty percent (20%) of total development costs of the Project, as accepted by the DHCD (the "Profit Cap"). The Regulatory Agreement shall provide mechanisms to enforce this requirement (the "Profit Cap"). If the Applicant has exceeded the Profit Cap, the Applicant shall donate the excess profit above the Profit Cap to the Town of Acton to be used in the discretion of the Board of Selectmen for the express purpose of promoting, encouraging, creating, improving or subsidizing the construction or rehabilitation affordable housing in the Town of Acton.

G.6 Regulatory Agreement: Prior to applying for a building permit for the Project, the Applicant shall submit to the ZBA a copy of a fully executed Regulatory Agreement between the Applicant, the Town and DHCD, which will be recorded with the Master Deed, prior to the conveyance of the first Unit, governing the protection and administration of the Units covered by this Decision. The Town shall have the right, concurrent with DHCD, to enforce the terms and conditions of the Regulatory Agreement. The Applicant

shall support the Town's efforts to obtain DHCD approval of the Regulatory Agreement.

G.7 DHCD and Financial Information: The Applicant shall forward to the ZBA copies of all correspondence, documents, and information by and between the Applicant and the DHCD. Further, without limiting the foregoing, and in addition to the Applicant's obligations to the DHCD, (a) upon issuance of a final certificate of occupancy for all of the Units and every ninety (90) days thereafter until the last Unit is sold, the Applicant shall cause the CPA to deliver to the ZBA an itemized statement of the Project's total development costs and gross income certified by the CPA, and (b) the Applicant shall provide any back-up and supporting documentation, including, but not limited to, cancelled checks, invoices, receipts, and financial statements, reasonably requested by the ZBA for all Project costs and income sources.

H. Security

H.1 Completion of Infrastructure: No occupancy permit for any Unit shall be issued until: (1) the infrastructure related to the Project as shown on the Approved Plans, including, but not limited to, the driveway, sidewalks, parking areas, common areas, drainage facilities, utilities, landscaping, exterior lighting and all necessary sewer, water and utility service connections has been constructed or installed so as to adequately serve the Project and the Units; and (2) all conditions of this Decision that require action or resolution by the Applicant prior to the issuance of occupancy permits have been completed to the satisfaction of the Building Commissioner. All water connections shall be approved by the Acton Water District and completed and paid for by Applicant in accordance with Acton Water District rules and regulations.

I. Drainage Conditions

I.1 Stormwater shall be managed in accordance with the Massachusetts Stormwater Policy Handbook.

I.2 All stormwater drainage basins shall be located as to facilitate the maintenance and operation of the basins or drainage utility.

J. Parking

J.1 The Project shall provide for on-site parking as shown on the Approved Plans.

J.2 No on-site parking shall be sold to, rented to, licensed to or otherwise conveyed to persons who are not occupants of Units at the Project.

J.3 All parking spaces shall conform to the requirements of Section 6.7 of the Zoning Bylaw, unless specifically provided otherwise herein.

K. Sewage Treatment

- K.1 All Units shall be connected to the Town of Acton's municipal sewer system as shown on the Approved Plans. The Applicant shall pay to the Town of Acton all required sewer privilege fees established by the Board of Selectmen acting as the Town's Sewer Commissioners.
- K.2 The sewer privilege fee for each Unit shall be paid prior to the issuance of any building permit therefor.
- K.3 The Applicant shall obtain all necessary permits for connection of the Project to the Acton municipal sewer system, including those necessary to excavate any abutting streets to install the connection.
- K.4 No Unit shall ever be converted, altered or expanded to add bedrooms.

L. Sidewalk Easement

- L.1 Prior to the issuance of a building permit, the applicant shall, for acceptance by Town Meeting, offer the Town of Acton a sidewalk easement for the sidewalk along Massachusetts Avenue as depicted on the Draft Record Plan Sheet.

M. Driveway Entrance

- M.1 Prior to the issuance of a building permit, the Plan shall be revised to achieve a driveway configuration that allows a fire truck (SU-30 design vehicle) heading eastbound towards Kelley's Corner to enter the site without obstructing oncoming traffic.

N. Abandon Road on Westerly Boundary of Site

- N.1 As a condition of this comprehensive permit the applicant, owners, successors, or assigns of property at 442 Massachusetts Avenue shall not oppose or obstruct the future development of a path on the abandoned road if one is proposed in the future. The applicant shall memorialize this condition in the condominium master deed and make every new resident aware of the abandoned road, its potential future use, and this condition.

O. Material Changes

- O.1 If, between the date this decision is filed in the office of the Acton Town Clerk and the completion of the Project, the Applicant desires to materially change the Project as reflected in, and approved by, this Decision, such changes shall be governed by 760 CMR 56.05(11). In no case shall the Applicant be allowed to implement a Project change that increases the number of Units, changes the mix of affordable Units from that required herein, or increases the height of any building on the Site

without submitting a new application and undergoing a new public hearing and decision process. Without limitation, in the event any subsequent permitting process (such as any state or federal governmental approvals) results in a change to the Approved Plans that triggers the need for further waivers from local bylaws, rules, or regulations, any such matter shall be treated as a Project change and the procedures in 760 CMR 56.05(11) shall be followed.

P. Expiration Date

- P.1 If construction authorized by this Decision has not commenced within three (3) years from the date on which the Decision becomes final, the comprehensive permit granted hereby shall lapse. The permit shall become final on the date that this Decision is filed in the office of the Town Clerk if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of. The ZBA may grant an extension of the three-year lapse date for good cause shown, which shall include, without limitation, delay (notwithstanding the Applicant's diligent efforts) in the issuance of a governmental permit or approval or delay occasioned by a third party appeal of a governmental permit or approval required for the Project.

Q. Notice to Abutters

- Q.1 At least seven (7) days prior to the start of construction, the Applicant shall provide written notice to the ZBA and to the abutters of the Project of the anticipated construction start date and the anticipated construction schedule.

R. Self-Correcting Provision

- R.1 In the event a typographical error renders this decision and the final Approved Plans inconsistent as to the number of Units, number of bedrooms, or similar objective characteristics of the Project, the provisions of the final Approved Plans shall control on the point of inconsistency. Otherwise this Decision shall be given full force and effect on its terms, unless amended by the ZBA in writing.

IX. CONCLUSION

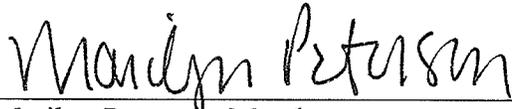
The Application for a comprehensive permit for the Project is hereby granted for the reasons stated above subject to the conditions provided herein.

This concludes the decision of the ZBA.

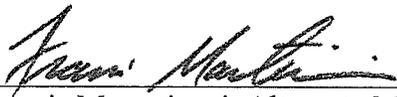
THE ACTON ZONING BOARD OF APPEALS



Cara Voutselas, Chair



Marilyn Peterson, Member



Francis Mastroianni, Alternate Member

Dated: December 19, 2008

CERTIFICATION

I, Eva K. Taylor, Town Clerk of the Town of Acton, Massachusetts do hereby certify that twenty days have elapsed since the above-referenced decision of the Board of Appeals, which was filed in the office of the Town Clerk on _____, 2008, and that no appeal has been filed with the Town Clerk.

Eva K. Taylor
Town Clerk
Acton, Massachusetts

Dated: _____, 2008