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DECISION UPON APPLICATION OF 737 MAIN STREET, LLC FOR A COMPREHENSIVE PERMIT FOR 737-741 MAIN STREET

I. APPLICANT AND PUBLIC HEARING

A public hearing of the Acton Board of Appeals (the "Board") was held in the Town Hall on Monday, December 4, 2006 on the application of the 737 Main Street, LLC (the "Applicant") for a comprehensive permit under Massachusetts General Laws Chapter 40B, §§ 20-23 (the "Act") to build low or moderate income housing in a development consisting of four (4) dwelling structures and containing a total of eight (8) housing units (the "Project") located at 737-741 Main Street and identified as Parcels 9 and 10 on Assessor's Map D-5 (the "Site"). The Board held continued public hearings on January 8, 2007, January 29, 2007 and February 5, 2007. In addition the Board conducted a site visit on January 13, 2007. The hearing was closed on February 5, 2007 and deliberations conducted on that date.

Sitting as members of the Board throughout the hearings were Jonathan Wagner, Chairman; Kenneth Kozik, Member and Cara Voutselas, Member.

II. THE PROJECT

A. The Project consists of 105,438 square feet of land (2.42 acres) located at 737-741 Main Street in Acton. The Site presently comprises of single lot containing a dwelling (the Charles I. Miller House) having an address of 737 Main Street. This dwelling is included in Massachusetts Historical Commission's Inventory of Historical and Archeological Assets of the Commonwealth and Acton's List of Cultural Resources. It will be preserved and moved by the Applicant to a different location within the existing lot. The lot will then be subdivided into two separate lots, with one lot containing the present dwelling (Lot M-1 on the Applicant's Plans) and the other containing four (4) structures with two residential units in each structure (Lot M-2 on the Applicant's Plans).

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A True Copy. Attest:
TOWN CLERK ACTON, MASS.

B. On November 1, 2006 the Applicant submitted an application for a Comprehensive Permit to build four (4) dwelling structures containing a total of eight (8) housing units. The Project will be legally structured as an 8-unit condominium, with two (2) units being sold as Affordable Housing. Unit #1 and Unit #4 on the Applicant's Plan are the designated Affordable Housing units.

C. Each of the 8 units will have 3 bedrooms, 2 baths and consist of approximately 2,064 gross square feet of living area with garaged parking within its building.

D. The Site is located within the R-2 Zoning District.

E. The Plan (the "Plan") for the Project is entitled "Master Plan Madison Place (Comprehensive Permit) 737 Main Street, Acton, Massachusetts Owner: 737 Main Street LLC Scale: 1"-30' Date: October 17, 2005" by R. Wilson and Associates of 8 sheets (See Exhibit 3).

III. JURISDICTIONAL REQUIREMENTS

Pursuant to Massachusetts General Laws Chapter 40B, §§ 20-23 and regulations promulgated by the Department of Housing and Community Development Housing Appeals Committee, an applicant for a comprehensive permit must fulfill three jurisdictional requirements:

A. Status of Applicant

The applicant must be a public agency, a non-profit organization, or a limited dividend organization. The Applicant is a limited dividend organization agreeing to legally bind itself to limit the profit it derives from the comprehensive permit development. Limitation of profits will be accomplished by execution of a Regulatory Agreement between the Applicant and the subsidizing agency. The Regulatory Agreement will limit the Applicant's profit from the development to 20% of the development costs. The Board has incorporated conditions to ensure the execution of the Regulatory Agreement as well as the monitoring and enforcement of the limitations contained therein.

B. Public Subsidy Requirement

Chapter 40B requires that the project be fundable by a subsidizing agency under a low and moderate income housing subsidy program. The Applicant has received a Determination of Site Eligibility and Preliminary Approval of the Project under DHCD's Local Initiative Program, 760 CMR 45.00, dated September 9, 2006. (See Exhibit 1). The Board finds that this DHCD Determination of Site Eligibility satisfies this jurisdictional requirement.

C. Site Control Requirement

An applicant must hold legal title, or sufficient legal right to acquire title to the property upon which the Project will be built. The Applicant has provided a copy of a deed dated October

27, 2005 which conveys title of the Site to the Applicant. (See Exhibit 1). The Board finds that this jurisdictional requirement is satisfied.

IV. REQUESTED WAIVERS FROM LOCAL BY-LAWS AND ZBA REGULATIONS

A. Acton Zoning Bylaw

1. Section 3.1 Table of Principal Uses – Section 3.1 Table of Principal Uses is a zoning provision relating to housing density. Section 3.1 prohibits multifamily dwellings in an R-2 District as the Applicant proposes to construct. Housing density is a legitimate planning, health and safety concern to be addressed by the Board in the context of a comprehensive permit application. This Project is located in an area of primarily single family homes. The addition of an eight-unit condominium development coupled with the moving of the Charles I. Miller House to Lot M-1 will significantly alter the character of the neighborhood. On the other hand, the Board of Selectmen and the Planning Board have strongly endorsed this Project noting that the location is within the North Acton Village District and that it furthers the goal of additional affordable housing for the town. Therefore, the Board finds that on balance the Site is appropriate for the development of multi-family affordable housing and therefor grants a waiver from Sections 3.1 of the Acton Zoning Bylaw.

2. Section 3.3 Residential Uses - Section 3.3 prohibits more than one building to be located on a lot (with certain exceptions not applicable here). The Applicant proposes construction of four (4) buildings. As the Site is near several existing multifamily developments and the Town's recreational facility at Nara Park, and recognizing the need for low and moderate income housing, the Board finds that the Site is appropriate for multiple buildings as the Applicant is proposing and therefor grants a waiver from Sections 3.3 of the Acton Zoning Bylaw.

B. Subdivision Rules and Regulations

1. Section 8.1.14-Table II-Vertical Design - Section 8.1.14-Table II-Vertical Design prohibits a slope grade of greater than 2% within 50' of an intersection whereas the Applicant proposes a slope grade of 3% at the Site. As the increase is slight and both the Planning Board and Engineering Department indicate the variation is acceptable, the Board finds that the 3% slope grade is reasonable and therefor grants a waiver from Section 8.1.14-Table II-Vertical Design.

2. Section 8.1.18.2.c-T Shaped Turnaround - Section 8.1.18.2.c-T Shaped Turnaround requires that a turnaround be 70' feet whereas the Applicant proposes a turnaround of 60'. As the 10' variation is slight and both the Planning Board and Engineering Department indicate the variation is acceptable, the Board finds that the requested waiver 60' turnaround is reasonable and therefor grants a waiver from Section 8.1.18.2.c-T Shaped Turnaround.

V. DISCUSSION AND FINDINGS

This comprehensive permit application for a small, multi-family affordable housing development presents a particularly challenging decision for the Board. As noted at the hearing, the Board feels strongly that this development will significantly alter the character of the neighborhood. While the Applicant has worked closely with the Town to preserve the Charles I. Miller House, the solution of creating Lot M-1 in fact, increases the density of the Site. The Board also notes that while the location is within the North Acton Village District, the vision articulated by the Master Plan for this area is many years from being realized. Furthermore, the Board struggled with the fact that the Town is in a "moratorium" period and is not under the same statutory pressure to approve this Project as is usually the case for a comprehensive permit under Chapter 40B.

On the other hand, The Board notes that this Project has received a strong endorsement from the Board of Selectmen and the Planning Board. The Board recognizes the need for additional affordable housing and this Project conforms to the Comprehensive Permit Guidelines established by the Town. Finally, it is worth noting that the Applicant worked very closely with the Town and was very responsive to the needs and requests of Town staff in the course of the application process.

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

A. Acton does not presently have sufficient low or moderate income housing to meet Chapter 40B's minimum criteria.

B. The proposed 8-unit project will, when conforming to the conditions set forth in this Decision, adequately provide for traffic circulation, storm water drainage, sewerage and water without an undue burden on the occupants of the Project or on the surrounding neighborhood or the Town.

C. The proposed 8-unit Project will, when conforming to the conditions set forth 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 Project is located in an R-2 Zoning District. Although there is multifamily housing within a mile of the site, the immediate surrounding area consists primarily of single family homes. Despite the Board's serious reservations about whether the addition of 2 affordable housing units outweighs the destruction of this site (and the precedent that might be set), the Board finds that on balance the proposed 8-unit Project on the Site is supported by the evidence, and as conditioned below, (i) is consistent with the Master Plan, (ii) represents a reasonable balance of the regional need for low and moderate income housing against important local planning concerns, (iii) is consistent with the local needs within the meaning of Massachusetts General Laws, Chapter 40B, Section 20, and (iv) is not rendered uneconomic by the terms and conditions of this Decision.

E. The following waivers from local bylaws and regulations are granted subject to the terms and conditions set forth herein:

1. **Acton Zoning Bylaw**

(a) **Section 3.1 Table of Principal Uses** – to allow construction of 4 multifamily dwellings on a lot;

(b) **Section 3.3 Residential Uses** - to allow construction of more than one residential building on a lot.

2. **Subdivision Rules and Regulations**

(a) **Section 8.1.14-Table II-Vertical Design** – to allow a slope grade of 3% within 50' of an intersection;

(b) **Section 8.1.18.2.c-T Shaped Turnaround** – to allow a 60' turnaround.

3. **Waivers Not Listed** By granting the foregoing waivers from local bylaws and regulations, it is the intention of this Comprehensive Permit to permit construction of the Project as shown on the Plan. If, in reviewing the Applicant's building permit application(s), the Building Commissioner determines that any additional waiver from local bylaws or regulations is necessary to permit construction to proceed as shown on the Plan, the Building Commissioner shall proceed as follows: (a) any matter of a *de minimis* nature shall be deemed within the scope of the waivers granted by this Comprehensive Permit; and (b) any matter of a substantive nature having a potential adverse impact on public health, safety, welfare or the environment shall be reported back to the Board for expeditious disposition of the Applicant's request for a waiver therefrom.

VI. CONDITIONS

For the foregoing reasons the Board grants the application of Acton Community Housing Corporation for a comprehensive permit for the Project under Chapter 40B, subject to each and every one of the following conditions:

A. General Conditions

A.1. Before the Applicant begins any construction on the buildings and units in this project, the Applicant shall submit to the Board a final comprehensive permit site plan, for technical review by the Board to ensure that it is consistent with and in conformity with this Decision, which upon such finding shall be approved and endorsed by the Board (the "Approved Plan"). When creating the Approved Plan, the Applicant shall make all of the changes to the Plan as recommended by:

(a) Engineering Department's 11/29/2006 IDC Memo (Exhibit 10)

(b) Health Department's 11/30/2006 IDC Memo (Exhibit 11)

A.2. The Applicant shall prior to the issuance of any building permit for the Project obtain from the Planning Board a designation of "Approval Not Required Under the Subdivision Control Law" for Lot M-1 as shown on the Plans (Exhibit 3) and relocate the Charles I. Miller House to a new foundation as shown on the Plans and in conformity with the Memorandum of Agreement between the Department of Housing and Community Development and Massachusetts Historical Commission. (See Exhibit 1.) The Applicant shall complete all work necessary and shall obtain an occupancy permit from the Building Commissioner for the Charles I. Miller House prior to issuance of an occupancy permit for the seventh unit of the Project.

A.3. This Decision and the Approved Plan shall be recorded at the Middlesex South District Registry of Deeds. This Decision shall become effective upon recording. Proof of recording shall be forwarded to the Board prior to issuance of a building permit or 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 in respect of construction projects and for the purposes of monitoring compliance of the Project's building construction and occupancy in accordance with this Comprehensive Permit.

A.6. The Applicant shall copy the Board and the Building Commissioner 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.

A.7. The Applicant shall comply with the State Building Code and any local regulations or fees of the Building Commissioner. The Applicant shall pay all required fees for all such building permits including any fees charged for inspections and permits.

A.8. The Applicant shall obtain temporary easements or written permission from any abutting property owner if, during the course of construction, it becomes necessary to enter upon abutting land for construction or planting.

A.9. 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 and the use of the land does not strictly and fully conform with the requirements of the Acton Zoning Bylaw; and reference to these conditions shall be incorporated in the Master Deed and in each Unit Deed recorded for the Project and for any unit in the Project.

A.10. This Decision permits the construction, use and occupancy of 8 housing units on the Site. The construction and use of the Site shall be in conformity with the Plan, and there shall be no further subdivision of the Site, or the creation of additional housing units or any other structures or infrastructure except that which is showing the Plan, without further approval of the Board in the form of an amendment to this Decision.

B. Submission Requirements

B.1. Pre-construction Submissions: Before the Applicant begins any construction of the buildings and units in the Project, the Applicant shall have:

(a) delivered to the Board, from a public or private financing institution, or institutions, a written commitment to provide the financing necessary for the construction of the Project as approved by this Decision;

(b) delivered to the Board from the Department of Housing and Community Development ("DHCD") evidence the Project, as approved by this Decision, and the Site are acceptable and qualify under the Local Initiative Program.

(c) Delivered to the Board the organizational papers of the limited dividend organization which will construct the Project and a certified copy of any determination by the DHCD that the organization qualifies as a limited dividend organization within the meaning of the Act and what the limitation on dividend is.

(d) obtained, and filed with the Board a copy of any approvals from the Acton Board of Health which may be required under any statute, code, or rule and regulation affecting public health not otherwise preempted by Chapter 40B, to the extent not otherwise expressly covered by this Decision;

(e) delivered to the Board final architectural drawings for all buildings shown on the Plan, providing a scaled depiction of the front, rear and side elevations;

(f) delivered to the Board any and all Condominium Documents together with certification by Town Counsel of the Town of Acton that said Condominium Documents are consistent with and in conformity with this Decision

B.2. As Built Plans: Prior to the occupancy or use of the final unit constituting a part of the Project, the Applicant shall submit to the Board an "As Built Plan" showing all pavement, buildings, drainage structures and other infrastructure as they exist on the Site, above and below grade, including appropriate grades and elevations. The plans shall be signed by a registered land surveyor or civil engineer, certifying that the Project as built conforms to and complies with the conditions of this Comprehensive Permit.

B.3. **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 Building Department after completion of construction.

B.4 **Certification of Landscape Architect:** Prior to Tree Warden's final inspection of the plantings, the Applicant shall submit certification by its Landscape Architect as set forth in Acton Municipal Properties Department's 11/13/2006 IDC Memo (Exhibit 6)

C. Site Development Construction Conditions

C.1. The Applicant shall ensure safe and convenient vehicular access to the Site during the entire duration of the Project. Members of the Board shall be allowed access to the Site to observe and inspect the site and construction progress until such time as the Project has been completed.

C.2. The Applicant shall submit a "progress submittal," including design drawings, with the Acton Building Commissioner when the project is approximately 50% complete. Progress submittals shall include any and all updated or revised design calculations supplementing the original design plans

C.3. The Applicant shall be responsible to ensure that nuisance conditions do not exist in and around the site during the construction operations. The Applicant shall at all times use all reasonable means to minimize inconvenience to residents in the general area.

C.4. Work Hours – With the exception of hauling earth to and from the site, the hours of operation for any construction activities on-site shall be between 7AM and 7PM, Monday through Friday, 8AM and 5PM on Saturdays, and no work shall be allowed on-site on Sundays or on Holidays as recognized by the Commonwealth of Massachusetts. All earth hauling to and from the site is limited to Monday – Friday 9AM – 4PM.

C.5. The Applicant shall implement dust control operations, in an approved manner, whenever necessary or whenever directed by the Building Commissioner or the Town Engineer, even though other work on the project may be suspended as a result thereof. Methods of controlling dust shall meet all air pollutant standards as set forth by federal and state regulatory agencies.

C.6. The Applicant shall implement measures to ensure that noise from project construction activities does not exceed acceptable levels, as set forth by federal and state regulatory agencies. The Applicant shall cease any excessively loud activities when directed by the Building Commissioner.

C.7. The Applicant shall implement necessary controls to ensure that vibration does not create a nuisance or hazard for property abutters.

C.8. The Applicant shall implement necessary traffic safety controls to ensure a 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 at the expense of the Applicant. Additional traffic mitigation measures may be required as necessary, or as directed by the Building Commissioner.

C.9. The Applicant is responsible for the sweeping, removal of snow and sanding of internal roadways permitting access to residents and emergency vehicles during construction and until the Condo Association has been legally established.

C.10. Burial of any stumps or debris on 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.11. Upon the request of the Building Commissioner, soil material to be used as backfill for pipes, roads and/or structures (i.e., soil detention basins) shall be tested at the expense of the Applicant, by a firm selected by the Board. Testing of said backfill shall be performed in conformance with standards and frequencies established by the Building Commissioner.

C.12. Utilities, including but not necessarily limited to electric, cable and telephone shall be located underground.

C.13. No building areas shall be left in an open, unstabilized condition for 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.14. Construction vehicles shall be parked on site and off Main Street and at all times.

C.15. A licensed blasting professional shall do all blasting on the site after proper pre-blast inspections have been conducted and all required permits have been obtained from the Acton Fire Department.

D. <u>Legal Requirements</u>

D.1 Any sale or transfer of rights or interest in all or any part of the Site shall include a condition that successors are bound to the terms and conditions of this Comprehensive Permit.

D.2 The Applicant and/or subsequent Owner(s) shall be bound by all conditions and requirements set forth in this Comprehensive Permit.

D.3 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.

D.4 The roadways, utilities, drainage systems, and all other infrastructure shown in the Plan shall remain private and the Town of Acton shall not have, now or ever, any legal responsibility for the operation or maintenance of the infrastructure, including but not limited to snow removal and trash collection.

E. Affordability Requirements

To the extent permitted, by the DHCD, the following conditions shall apply. Applicant shall support the Town in obtaining the DHCD's approval of the following conditions:

E.1 **Affordable Units** - To the extent permitted by the DHCD, two (2) of the units within the Project shall be designated Affordable Units and shall be sold to a household earning no more than 80% of the Area Median Income for a four person family as published by the Department of Housing and Urban Development for the Boston-Cambridge-Quincy Metropolitan Statistical Area.

E.2 **Sale Prices** - The maximum sale prices for the Affordable Units shall be reviewed and approved by the DHCD at the time of lottery for the selection of buyers of the Affordable Units. Subject to the approval of DHCD the sale price for the Affordable Units shall be set to be affordable to a three person household for the 2-bedroom unit or a four person household for the 3-bedroom unit at 70% of the Area Median Income published by the Department of Housing and Urban Development for the Boston-Cambridge-Quincy 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.

E.3 **Selection of Buyers for Affordable Units** - The Applicant shall obtain the DHCD approval of a buyer selection plan for the sale of the Affordable Units prior to putting the Affordable 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 the two Affordable Units shall be given to households that meet one or more of the following "Acton Connection" preference criteria:

(a) 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 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) a son or daughter of an Acton resident

(c) an employee of the Town of Acton, the Acton Water District, the Acton Public Schools, the Acton-Boxborough Regional School District

(d) currently or privately employed within the Town of Acton

The selection of purchasers for the Affordable 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, and deposit $500 in an account established by the Acton Community Housing Corporation to cover its expenses in overseeing the lottery, if permitted by DHCD.

Selected purchasers shall complete a first-time homebuyer course before the closing of the purchase of an affordable unit. 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 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 qualification-related decision of the Acton Community Housing Corporation may appeal the decision to the Board 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 Department of Housing and Community Development, 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.

E.4 **Phasing-In of Affordable Units** - The certificate of occupancy for the first Affordable Unit will be issued prior to the certificate of occupancy for the third market rate unit and the certificate of occupancy for the second Affordable Unit shall be issued prior to the certificate of occupancy for the sixth market rate unit.

E.5 **Perpetual Affordability Restriction** - Prior to the issuance of any building permits, a Regulatory Agreement, in a form acceptable to the DHCD shall be executed and recorded. The Regulatory Agreement shall provide, among other things, that (a) two (2) of the units in the Project will be sold and resold subject to a Deed Rider, in a form acceptable to the 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 Affordable Unit in the Project at the time of each sale and resale, and the Deed Rider shall restrict each such Affordable Unit pursuant to this Decision in perpetuity in accordance with the requirements of M. G. L. c. 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 M. G. L. c. 184, s 32 or other law. The Applicant shall submit to the Board 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 comprehensive permit statute, G. L. c. 40B, §§20 -23 (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 the event that the Applicant shall submit to the Board 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 grant to the Town of Acton or its designee subject to the approval of the 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 Affordable Unit in the Project which shall be triggered upon the expiration of the affordability period.

E.6 **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 Applicant shall cause a certified public accountant ("CPA") to review the financial records of the Project to determine whether the Applicant has conformed to the Profit Cap requirements of this Comprehensive Permit Decision. The CPA shall submit to the Board and the DHCD a CPA certification that either the Applicant has conformed to the Profit Cap, or certifying the actual profit

from the development. If the Applicant has exceeded the 20% Profit Cap as determined by the DHCD, if permitted by the DHCD, 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 of affordable housing in the Town of Acton. The Applicant shall deposit $4,500. in an escrow account set up by the Town pursuant to G.L. c. 44, §53G to cover the Town's expenses in the monitoring compliance with the Profit Cap. Any funds not expended after the completion of the Town's determination of compliance with the Profit Cap shall be returned to the Applicant.

In determining whether the Applicant has conformed to the Profit Cap requirements of this Comprehensive Permit Decision, the CPA shall be required to certify that (a) the total profit to the Applicant does not exceed twenty percent (20%) of total development costs of the Project, exclusive of development fees; (b) the Applicant has not made unreasonable or excessive payments (i.e. payments in excess of reasonable industry standards applicable to an arm's length transaction) to the Applicant or to its parents, subsidiaries, affiliates, successors, and assigns, or to their respective partners, limited partners, shareholders, managers, or other owners, or to the relatives of the same in connection with work performed on the Project in order to artificially inflate the costs of development of the Project; (c) there have been no commissions charged on the affordable units which are required to be sold pursuant to a lottery selection process as provided by this Comprehensive Permit; and (d) the CPA has been provided access by the Applicant to any reasonable financial information necessary to make these determinations and to verify whether the income and expenses of the Project, including without limitation land acquisition costs, construction costs, landscaping costs, and other expenses, represent fair market value for such items, with particular attention to those arrangements between parties with overlapping ownership to owners of the Applicant.

To the extent permitted by the DHCD, all costs of enforcement of this Profit Cap condition, including legal fees incurred by the Board and/or the Town of Acton, shall be borne by the Applicant.

E.7 **Regulatory Agreement** - Prior to applying for a building permit for the Project, the Applicant shall submit to the Board a copy of a fully executed Regulatory Agreement between the Applicant, the Town and the DHCD, which will be recorded with the Master Deed, prior to the conveyance of the first unit, governing the protection and administration of the Affordable 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 in substantially the same form as was approved by DHCD for the Davis Place, LLC Local Initiative Program project earlier this year.

E.8 **DHCD and Financial Information** - The Applicant shall forward to Town copies of all correspondence, documents, and information by and between the Applicant and the DHCD. Further, without limiting the foregoing, in addition to the Applicant's obligations to the DHCD, if the Town is not the monitoring agent with respect to determining the Project's profit: (a) upon issuance of a final certificate of occupancy for all of the Units, the Applicant shall deliver to the Town an itemized statement of the Project's total development costs and gross income certified by a certified public accountant and every ninety (90) days thereafter until the last unit is sold; 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 Town for all Project costs and income sources.

F. Surety &Covenants

F.1 As security for the completion of the infrastructure related to the Project as shown on the Approved Plan, including, but not limited to, the driveways, sidewalks, parking areas, common areas, recreational areas, drainage facilities, utilities, landscaping, and [any other specific infrastructure shown on the plan] (the "Infrastructure"), the release of occupancy permits for all housing units and the sale of all housing units in the development shall be subject to the following restriction:

(a) No occupancy permit for a unit in any building shall be issued, and no sale of any unit shall be permitted, until: (1) the base and binder course for the driveway and parking areas shown on the Plan has been installed; (2) all Infrastructure described herein and as shown on the Plan has been constructed or installed so as to adequately serve said building, provided however, that the final coat of pavement for the driveway and parking areas need not be installed in order to obtain occupancy permits for the first building constructed; and (3) all conditions of this Comprehensive Permit 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. The roadway, common parking areas, individual driveways and all remaining Infrastructure must be fully completed and installed prior to the issuance of the occupancy permit for the 3rd building constructed.

G. Drainage Conditions

G.1 Stormwater shall be managed in accordance with the Massachusetts Stormwater Policy Manual dated March, 1997 (as amended) by the Massachusetts Department of Environmental Protection and Massachusetts Office of Coastal Zone Management.

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

G.3 The Applicant shall maintain and repair the drainage structures and stormwater management system on the Site located outside the proposed roadway layout as shown on the Plans until such time as the Applicant either (1) sells the Site to the Applicant or a new Applicant subject to these responsibilities or (2) assigns or otherwise transfers these responsibilities to the Condo Association. The stormwater management system includes, but is not necessarily limited to detention basins, retention basins, sediment forbays, and water quality swales. A plan for the maintenance of the stormwater management system shall be provided for in the Condo Association bylaws.

H. Parking

H.1 The Project shall provide for on-site parking as shown on the Plan.

H.2 No on-site parking shall be sold to, rented to, licensed to or otherwise conveyed to persons who are not occupants of premises located on the project Site.

I. Sidewalks

The Applicant shall construct a sidewalk in conformity with all town bylaws and approved by the Building Commissioner across the entire frontage of the existing parcel (i.e. both Lot M and Lot M-1 on the Plans).

J. Outdoor Lighting

All outdoor lighting shall be installed in accordance with the requirements of the Acton Zoning Bylaw.

K. Board of Health Conditions

The Applicant shall comply with the Health Department's 11/20/2006 IDC Memo (Exhibit 11).

L. Landscaping Conditions

The Applicant shall comply with the Municipal Properties Department's 11/13/2006 IDC Memo (Exhibit 6).

M. Material Changes

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 change in a material way and/or to a significant degree the proposed Project as reflected in and approved by this Decision, such changes shall be governed by 760 CMR 31.03(3). In no case shall the Applicant be allowed to implement a Project change that increases the number of units, decreases the number of affordable rate units, or increases the number of buildings on

the Site, without submitting a new application and undergoing a new public hearing and decision process.

N. Expiration Date

If construction authorized by a comprehensive permit has not begun within three years of the date on which the permit becomes final, the permit shall lapse. The permit shall become final on the date that the written 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 Board may grant an extension to the three year lapse date for good cause shown, which shall include, for example, 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.

O. Notice to Abutters

At least seven days prior to the start of construction, the Applicant shall provide written notice to the Board and to the residential abutters of the Project of the anticipated construction start date and the anticipated construction schedule.

XI. CONCLUSION

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

This concludes Decision 06-12 of the Acton Zoning Board of Appeals.

ACTON ZONING BOARD OF APPEALS

Jonathan Wagner, Chairman

Kenneth Kozik, Member

Cara Voutselas, Member

DATED: March 19, 2007

Attest: Middlesex S. Register

E.W.
1M
for atty

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EVA K. TAYLOR
TOWN CLERK

April 12, 2007

TO WHOM IT MAY CONCERN:

This is to certify that the attached Board of Appeals Decision (#06-12) on an application for 737 Main Street, LLC for Comprehensive Permit, for 737-741 Main Street, Acton, Massachusetts filed with the Town Clerk's Office on March 21, 2007.

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 K. Taylor
Town Clerk

49302/485

Attest. Middlesex S. Register

Graham & Harsip
289 Great Road
Acton, MA 01720