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VIA EMAIL AND FIRST-CLASS MAIL

December 8, 2017

Boxborough Planning Board
29 Middle Road
Boxborough, MA 01719

**RE: 700, 750 & 800 Massachusetts Avenue – Site Plan Approval, and Alternate Access
Special Permit Application for Applicant Boxborough Town Center, LLC**

Dear Chair and Members of the Board:

As representatives of the group Citizens to Save Our Town Center on the proposed development of the above referenced parcels, we offer this comment letter, by the deadline you set, to provide sound legal authority for application denial and reiterate the strong grounds available on the record.

You decided that comment letters are due by December 10. That turns out to be a Sunday—when your offices are closed. In light of this, we recommend that you regard as valid any comments, from our clients or anyone, post-marked or received by your office by Monday, December 11.

As mentioned in our prior letter submitted at your November 27 hearing, Citizens to Save Our Town Center retained us to review the plans, supporting documents, and other salient materials of this Application.

When we attended the hearing, we listened closely to the Applicant's representations and presentations to the Board; heard the reading of all forty-six conditions proposed by Places Associates, Inc.; bore witness to the public comments on the conditions; and noted the many issues, concerns, questions, and facts raised by the public (including our client).

This letter emphasizes the importance of the Board's pending decision, provides legal reasoning grounded in the documents before you, and puts the role of permit conditions in perspective.

I. Applicant's Impatience Should Not Hasten The Decision-Making Process

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Our prior comments are applicable now, more than ever. At the November 27 hearing, the Applicant did not respond substantively to your questions and comments and instead orally argued that you've taken *enough time* on this matter, so it's *time* to close the record to public comment and vote.

We urge that you not be tempted to end this matter due to the applicant's impatience. Rather, we urge you to take as much time as legal and necessary for you to ensure that all i's are dotted and all t's are crossed, all issues are fully addressed in the written record, all concerns and questions are answered in writing, all criteria are fully satisfied, and if not the plans are denied.

Anything less would be reckless. Your decision will rise or fall in court on these documents in the record, as may be supplemented by other documents and witness testimony at trial.

II. The Planning Board Has The Authority To Deny Site Plan Approval

Turning to your authority to deny this Application: you have the authority to deny a site plan application if the project doesn't meet the criteria outlined in the Bylaw. Further, under the Rules and Regulations of Site Plan Approval for Boxborough, a site plan denial is treated as a special permit denial and must be appealed to court under G.L. c. 40A, § 17.¹

"Essentially, site plan review is the process by which the reviewing board determines whether or not the applicant has complied with relevant by-law or ordinance provisions."² A planning board may deny site plan approval for a use by right if it doesn't comply with the standards and criteria of the bylaw. *Goren v. Town of Weston*, 2006 WL 2382744.

As outlined in our first letter, there are several aspects of this Site Plan Application that do not comply with the relevant Bylaw provisions, and cannot be conditioned to do so.

Here are two leading cases with examples of site plan review denials, based on non-conformance with zoning bylaws and criteria, which have held up in court on appeal.

A. *Auburn v. Planning Board of Dover*, 12 Mass. App. Ct. 998 (1981)

In the case of *Auburn v. Planning Board of Dover*, 12 Mass. App. Ct. 998 (1981), the Dover Planning Board denied a site plan application for an as-of-right use that spanned two parcels. The Dover site plan criteria concerned "safe and proper use of the land," as does the Boxborough Bylaw on site plan approval.³ The Dover Planning Board denied the site plan application because the plans were inadequate with respect to "providing for safe vehicular and pedestrian movement," among others.⁴

¹ Boxborough Site Plan Approval Rules and Regulations, §5.3.

² *Y.D. Dugout, Inc. v. Board of Appeals of Canton*, 357 Mass. 25, 29-30 (1970); *Hallenborg v. Town Clerk of Billerica*, 360 Mass. 513, 521 (1971); *Haverty Builders, Inc. v. Fled*, 1989 WL 1182994.

³ Boxborough Bylaw, Art. VII §§ 8001, 8002, and 8005.

⁴ *Auburn v. Planning Board of Dover*, 12 Mass. App. Ct. 998 (1981).



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Upon receiving notice of the site plan denial, the applicant appealed to Superior Court, which determined that “the board’s decision on the [applicant’s] application was based on ‘several problems of apparent deficiencies in the plans presented, any one of which would in and of itself have called for rejection as presented.’”⁵

This example is notable because the court found that a failure to “provide for safe vehicular and pedestrian movement,” on its own, called for rejection of the project as presented. This is the exact scenario for the pending Application in Boxborough.

Further, the Superior Court in the *Auburn* case ruled that “the board’s action was not arbitrary and was based on legally tenable grounds.”⁶ The Superior court entered judgment upholding the Dover Planning Board’s decision to deny the site plan application.

The Applicant then appealed to the Massachusetts Appeals Court, who affirmed the Dover Planning Board’s denial (again). That higher court elaborated that the deficiencies the Planning Board articulated in its denial “were sufficient to justify the board’s rejection of the plans.”⁷

B. *Cumberland Farms, Inc. v. Planning Board of Bourne*, 56 Mass. App. Ct. 605 (2002)

In the case of *Cumberland Farms, Inc. v. Planning Board of Bourne*, 56 Mass. App. Ct. 605 (2002), the applicant sought site plan approval for construction of a convenience store. The Bourne Planning Board conducted public hearings on the site plan and received documentary evidence, testimony by consultants, and comments by planning board members and the public (much like your Board is doing in this instance).

The Bourne Planning Board subsequently issued a detailed decision denying approval of the site plan.⁸ Because the Bourne Zoning Bylaw provided that an appeal of a site plan denial goes to the zoning board of appeals (“ZBA”), (rather than to court under G.L. c. 40A, § 17 as in Boxborough), the applicant appealed the denial to the Bourne ZBA. After a public hearing and comprehensive review, the ZBA affirmed the planning board’s decision to deny the application. The applicant then appealed to Superior Court, which likewise affirmed the planning board’s decision to deny the site plan application.

III. Legal Short-Fallings Of Application Outlined In Previous Letter

In our November 27 letter, we provided your Board with several, independent reasons why the pending site application should be denied. Two are reiterated here.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Cumberland Farms, Inc. v. Planning Board of Bourne*, 56 Mass. App. Ct. 605 (2002).



A. The Planning Board Should Deny The Special Permit For Alternative Access, Which Provides Another Reason To Deny The Site Plan Application

Notably, among those reasons for site plan denial is that this Applicant doesn't qualify for the Special Permit for Alternative Access for Priest Lane, which is necessary to safely accommodate the development. The Planning Board has discretion to not issue this Special Permit.

Under 2012 Bylaw §4800⁹, your Planning Board may grant a Special Permit for Alternate Access only to ways that the Board has determined provide adequate access for fire, police, and emergency vehicles; if the proposed driveway provides for a safer *alternative* than a driveway through the legal frontage (emphasis added); and whether, in the opinion of the Board, the issuance of a special permit will not allow the creation of more building lots that would be allowed without the special permit.

It is clear on its face that the Planning Board should not grant this special permit. First, there is ample evidence in the record from both the Boxborough Fire Department and Police Department that access by Priest Lane does not provide adequate access for fire, police, and emergency vehicles to the proposed development, defeating the requirement of Bylaw §4800 (1). This alone is enough for the Planning Board to deny the special permit.

To compound these shortcomings, the special permit sought is for *alternative* access to a development—not additional access. While Priest Lane may offer an escape hatch from an overcrowded development out to a winding residential cul-de-sac, the Applicant is still proposing that the hazardous Massachusetts Avenue entrance be the main entrance to the development.

The purpose of the special permit and its criteria are also defeated by this Applicant seeking to add more egress points without reducing the danger of any of them, defeating the requirement of Bylaw §4800 (4). This too, is enough for the Planning Board to deny the special permit.

In addition, there is ample evidence in the record that this special permit would allow for the creation of more buildings in the development than would be allowed without the special permit. Public safety officials stated that the number of proposed dwellings in this Site Plan Application cannot be safely accommodated with the access as proposed. *See June 7, 2013 Letter from Boxborough Police Department; January 19, 2017 Letter from Boxborough Police Department; September 28, 2017 Letter from Boxborough Police Department; January 19, 2017 Letter from Boxborough Fire Department.* These letters assume that Priest Lane would serve as an additional emergency egress point.

⁹ 2012 Bylaw, as this parcel is subject to the Zoning Freeze.



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Access via Priest Lane runs counter to each of these mandatory criteria in your Bylaw. Each potential Bylaw violation is its own independent reason, supported in the record, for denial of this Application.

The proposed egress to Priest Lane does not qualify for a Special Permit for Alternative Access. Without this additional egress point, there are simply not adequate entrances and exits to accommodate this development in this location.

B. Parcels Outside The 2012 Freeze Cannot House Accessory Structures Or Uses Of The Proposed Development

A freeze of the 2012 zoning bylaw does not apply to all parcels in the Application and those parcels therefore cannot support or contain accessory structures to the proposed enclave.

The structures, frontage, and access points located on Parcels A, C, and Access Easement C¹⁰, are prohibited under the current Zoning Bylaw, because they are accessory uses to a development which would otherwise be prohibited on those parcels without a special permit. This includes the wells depicted on Sheet 2 of 30 of the Site Plan last revised on August 30, 2017.

Without applying for and obtaining another special permit to use the wells located within setbacks under applicable zoning, the proposed development lacks a sufficient water supply. Site Plan Bylaw § 8007 (7) requires the proposal to have a sufficient water supply. This proposal fails on that account, another solid ground for the Planning Board to deny this Application.

IV. Conditions

Regarding conditions already being considered by your Board, before your Board has determined that the plans meet your criteria for approval, the Applicant wants to put the cart before the horse.

In our opinion, before entertaining conditions for a permit to issue, your Board must properly consider the following: Is the information submitted complete? Are the Board's and staff's questions answered satisfactorily? Are the Applicant's data and calculations in the record reliable? Are the Bylaw criteria fully addressed and indeed met? What is the input of Town boards and officials on site suitability, project design, projected impacts, etc.?

Is the document record complete—the Application, plans and revisions, supporting submittals, video and audiotapes, letters and emails, any transcripts, and the Bylaws, regulations, and policies of the Board.

We observe that conditions provided by Places Associates, Inc., while making a long list, seem to reflect a poll or survey conducted of interested persons and offices; do not cover the

¹⁰ As shown on Sheet 2 of 30 of the Site Plan last revised on August 30, 2017.



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universe of topics needed to minimize and mitigate a project of this size, complexity, and permanent adverse impacts; and lack the enforceable wording regarded as essential to be workable and effective.

For one example, we point out that condition 3 states that, "All traffic traveling to and from the subject properties during the construction process...shall only be from Route 111/Massachusetts Ave. If access is absolutely necessary through Stow Road or Priest Lane..." This condition appears to impose a prohibition, but then negates it in the next sentence, leaves necessity open to interpretation, and indeed leaves that determination to persons unknown.

It is very important to revise this and all conditions that are this vague, which are loopholes big enough to drive a truck through. Surely the Applicant will claim necessity for the smallest reason about Route 111 and assert the Applicant is the one who decides. At the very least, therefore, this condition needs to add, "...as may be determined in advance by the Planning Board at a meeting, and in consultation with Town boards and officials, as well as with advance notice to the affected owners and residents on Stow Road and Priest Lane...."

For another example, the police and fire chiefs have repeatedly highlighted the dangers of the Route 111/Massachusetts Avenue entrance. Yet the conditions only allude to "sight distance" as an issue, fail to address what the sight distance is now (as measured or corroborated by Town officials or consultant), whether there are problems currently, what sight distance would be safe for a new or expanded road intersection, how sight distance is to be changed by the project, whether that impact is generally acceptable, and what sight distance the Applicant should provide so as to safely accommodate the vehicle trips of contractors, future residents, visitors, over the life of the project and, more immediately, the high traffic volume of large trucks and construction equipment to build out the project over several years.

It is very important to get this right. The proper term is Stopping Site Distance. It also is important to expand this to cover the other parameters for safe road design. To put it simply, Stopping Site Distance is a minimum threshold—it is a near worst-case distance that a driver needs to be able to see in order to have room before colliding with something in a roadway.

Note that this criterion is a minimum only, a worst-case evaluation. If this project were to meet (or promise the Town that it intends to meet) the minimum safety in this one regard (panic stop by one hypothetical driver), that should not be enough to satisfy this Board.

On a related point, members of the public have recommended to you, for good reasons, to adopt the alternative criterion of Decision Sight Distance. The Board should fully inform itself on this.

Note also that sight distance (however calculated, with all its issues and limitations) is only one of several considerations when a new road intersection is being proposed. There is the sight distance each way from the point of view of the entering driver, from where likely to be waiting to pull out into traffic; the window of time available to do so safely at various times of the day in either direction; the speeds of the vehicles on the traveled way at those various times;



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and others beyond the scope of this letter, but well within the menu of what your Board must in our opinion ascertain, evaluate and resolve to your satisfaction before any Site Plan approval could even be contemplated.

V. Conclusion

This Board should not be rushed by a hasty Applicant. There are serious, we believe fatal flaws in the Application that warrant disapproval. As illustrated above, the Board has ample authority to deny this Application. If you do so, in our opinion you are likely to be upheld in court.

Very truly yours,



Gregg I. McGregor

