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SCITUATE, MASS.

FINDINGS AND DECISION ON COMPREHENSIVE PERMIT APPLICATION
G.L. c. 40B, §20-23; SCITUATE COMPREHENSIVE PERMIT RULES

APPLICANT: Herring Brook Meadow, LLC (the "Applicant")

PROPERTY: 126 and 132 Chief Justice Cushing Highway - Route 3A;
Assessor's Map and Parcels 58-1-8A and 58-1-5 (the "Property")

PROJECT: Herring Brook Meadow (the "Project")

DATE: November 9, 2007

I. PROCEDURAL HISTORY AND JURISDICTIONAL FINDINGS

1. Application for so-called Comprehensive Permit received by the Scituate Zoning Board of Appeals (the "Board") on November 8, 2006. The application is for 60 condominium housing units on an approximately 15.34 acre parcel. The Application also included a so-called "project eligibility letter" by the Massachusetts Housing Finance Agency ("MassHousing").
2. The Applicant proposes to be a limited dividend organization. However, the Applicant has failed to allow the Board to conduct review of its proforma to assess compliance with applicable auditing standards. Accordingly, the Board is unable to determine that the Applicant is a complying limited dividend organization. Thus, the Applicant has failed to meet its burden that it has satisfied the provisions of 760 CMR 31.01(1)(a).
3. The subsidizing agency is MassHousing. Per a letter from MassHousing, dated May 26, 2000, the Applicant asserts that project eligibility has been established under the Housing Starts and NEF Programs. However, the Board finds that MassHousing failed to adequately conduct its due diligence and otherwise comply with the regulations under 760 CMR 31.01(2) in the issuance of its letter. Particularly, for reasons detailed more fully herein, MassHousing failed to demonstrate "that the proposed housing design is generally appropriate for the site on which it is located." 760 CMR 31.01(2)(b)(3). Additionally, as detailed more fully herein, MassHousing failed to establish that "the project appears financially feasible on the basis of estimated development costs." 760 CMR 31.01(2)(b)(5). Furthermore, the project would destroy or otherwise negatively impact environmentally sensitive lands and is not otherwise consistent with smart growth standards that have been purportedly employed by MassHousing. Accordingly,

4. the jurisdictional requirements under 760 CMR 31.01(1)(b) have not been satisfied.
5. The Applicant possesses an interest in the Property by virtue of the fact that it owns the property located at 132 Chief Justice Cushing Highway and has executed an Option to Purchase with the current property owner for 126 Chief Justice Cushing Highway. An extension of this agreement to June 30, 2008 has been executed, thereby satisfying the jurisdictional prerequisite of site control under 760 CMR 31.01(1)(c). Jurisdiction will be valid for so long as a valid Option or purchase and sale agreement for 126 Chief Justice Cushing Highway is in full force and effect.
6. From the very early stages of the public hearing, the Board implored the Applicant to reconfigure the site plan in response to clearly expressed local concerns. However, the Applicant was non-committal to this request until October 4, 2007, the same date that it requested the hearing be closed. On that date, the Applicant formally revised its Application during the public hearing by substantially reconfiguring the site plan, as described more fully in the succeeding sections hereof. This allowed the Board and its consultants as well as Town officials only one hearing session to work with the Applicant during the review of this revised proposal. As described within the succeeding sections of this decision, this left inadequate time to review the plan and resolve deficiencies thereon.
7. A public hearing timely commenced on November 29, 2006 and was continued, with good cause to the following dates: January 3, 2007, March 22, 2007, May 24, 2007, June 12, 2007, August 2, 2007, October 4, 2007 and November 1, 2007. The Board reluctantly closed the hearing on November 1, 2007 despite the existence of several unresolved issues.
8. The hearing was closed on November 1, 2007 because, at the conclusion of the October 4, 2007 hearing session, the Applicant presented a letter requesting that the hearing be closed. The Board refuted the Applicant's reasons that the hearing be closed and continued the same to November 1, 2007. However the Applicant failed to appear on November 1st although the Board continued to take new evidence and hear expert testimony. Due to the Applicant's failure to appear (and *ad hoc* standards promulgated by the Housing Appeals Committee), the Board closed the hearing.
9. Among the issues that were unresolved as of October 4, 2007 were: (i) concerns over wetlands issues regulated under the Scituate wetlands protection by-law; (ii) ongoing review of the design of the proposed buildings; (iii) parking and traffic concerns; (iv) a review of the applicant's *proforma* per MHP Guidelines; (v) flooding concerns; (vi) miscellaneous concerns raised by the Board's consulting civil engineers. These ongoing issues, which are discussed more fully below,

were clearly expressed to the Applicant. All of these issues were still unresolved after the November 1, 2007 hearing session.

10. Rather than work with the Board, the Applicant filed a premature appeal to the Housing Appeals Committee on October 23, 2007.
11. The Board utilized the services of legal consultant Jason Talerman, the engineering firm of Pennoni Associates, Inc., and the engineering/environmental firm of Woodard & Curran to assist in the review of the Application. Town officials, boards and commissions, including, but not limited to, the Building Inspector, Conservation Commission, Design Review Committee, Fire Department and Planning Board also contributed a significant amount of information and analysis. The Applicant agreed to bear the expense for all of these consultants. The Board obtained a proposal for review of the Applicant's proforma but the Applicant refused to fund the same. At the time of the issuance of this decision, the Applicant was in arrears on payments due and owing for the Board's peer review and legal consultants.
12. The Applicant was represented by Attorney Janet Stearns. The Applicant was also represented by Sitec Engineering and McMahon Transportation Engineers and Planners. The Applicant also utilized the services of Dr. Peter Rosen with respect to flooding issues. The Applicant's Architect is Phung/Porzio.
13. Multiple site visits were taken by all Board members. A public working session was attended by the Applicant and the Board's Chairman Albert Bangert on July 25, 2007. An additional working session between the Applicant, Board Member Sara Trezise and the Scituate Design Review Committee on September 12, 2007.
14. Interested members of the public, as well as organizations such as the Committee for the Preservation for the First Herring Brook and the North and South River Watershed Association. All comments by such interested parties were offered in opposition to the project. Professional Wetlands Scientist Mario DiGregorio provided a written report and testimony to the Board on behalf of the Committee for the Preservation of First Herring Brook.
15. Throughout the hearing, the Applicant provided a variety of reports and plans but left unaddressed many of the Board's primary concerns. Nor was the Applicant adequately responsive to the inquiries of the Board's consultants.

II. PROJECT and PROPERTY DESCRIPTION

1. The Project and the Property are described in the plans of Sitec, as revised through September 17, 2007. The Project is also described in the architectural plans of the Phung/Porzio Studio of Architecture, as revised through October 4,

2007. The architectural plans are not stamped by a registered architect as required under applicable regulations. Hereinafter, the collective plans describing the project, as revised, are referred to as the "Plans."

2. The Property contains 15.34 acres - 126 Chief Justice Cushing Highway contains .95 acres and 132 Chief Justice Cushing Highway contains 14.39 acres. Sitec contends that the total buildable area of the Property is limited to 3.94 acres (or 26% of the total acreage). As described below, even this small percentage may be drastically overestimating the amount of buildable acreage.
3. In the area of development as shown on the Plans, the Applicant proposes to place up to seven (7') feet of fill. The area where fill is proposed contains one or more wetland resource areas.
4. As revised, the Project consists of 60 so-called garden-style condominium units arranged in three large buildings, two which contain 21 units and one which contains 18 units. The buildings are proposed to be concentrated on the portion of the Property that is closest to Route 3A, which is a State Highway and a busy commuter road. The Project would be highly visible from Route 3A and First Herring Brook.
5. The Project is not within walking distance to any local services and Route 3A does not have sidewalks. Area development is limited to upland areas and is characterized by low density single-family residential uses. Town center (Scituate Harbor) is miles away.
6. The Applicant proposes public water and a private wastewater treatment facility.
7. The Property is located off of Route 3A and is adjacent to the First Herring Brook, a river in the Town of Scituate. The First Herring Brook is connected to the North River, which is a State designated scenic river. Scituate is a coastal community. This area of Town exhibits great natural beauty and environmental sensitivity
8. The Property is extremely low lying with a high elevation of 24 feet in the southwest corner. Most of the site is well below this elevation. There is substantial and undisputed evidence that the Property floods during nearly every significant period of rainfall and/or ocean storm event. The Applicant's proposed filling and re-grading will alter the currently existing flooding characteristics of the Property and the surrounding parcels.
9. Flooding concerns were addressed in each of the reports from Woodard & Curran ("W&C"). These reports, dated March 20, 2007, May 24, 2007, June 7, 2007 and October 3, 2007, made repeated inquiries into flooding relating concerns that were not addressed by the Applicant. Unfortunately, the Applicant was not fully responsive to the flooding concerns that were raised in W&C's technical reviews.

W&C's memos reference the substantial alterations that are proposed and seek clarity with impacts to the area's ability to process flood conditions. W&C's memos also raise concerns with conflicts between flooding conditions and the ability of the altered landscape to manage stormwater. Throughout its review, W&C indicated that the Applicant failed to demonstrate compliance with DEP's Stormwater Management Guidelines. Very early in the process, W&C also questioned the Applicant's calculation of purported Land Subject to Flooding, an issue that the Applicant did not address (but ultimately conceded) until the 10/4/07 hearing. This discrepancy directly affected W&C's review of flooding, stormwater and wetlands issues. W&C's concerns regarding inland flooding of abutting properties are shared by the Massachusetts office of Coastal Zone Management ("CZM"). Additionally, W&C's last report highlighted the Applicant's continued failure to address all previous concerns. In this report, W&C also highlighted unresolved concerns for wastewater breakout that may neither comply with State standards nor be adequately addressed in another forum.

10. The Property is in the A-1 and Saltmarsh and Tideland Conservation zoning districts and the Flood Plain and Watershed Protection overlay zoning district. The Saltmarsh and Tideland Conservation zoning district is adopted for the purpose of "designating and protecting saltmarsh and tideland natural resources" and places great restrictions on development within its boundaries. The purpose of the Flood Plain and Watershed Protection District is to protect health and safety of residents from development in low-lying areas, to protect water supplies, and to protect environmental resources. Like the underlying districts, the overlay district places great restrictions on development within its boundaries. This project would not be possible under existing zoning bylaws.
11. The Property is also located in the North River Scenic Corridor.
12. The Property is located within a Zone II well-head protection area.
13. The Property contains area designated as Priority and Estimated habitat for rare species, as contained in the atlas promulgated by the Natural Heritage and Endangered Species Program of the Massachusetts Division of Fisheries and Wildlife.
14. Of great significance in the Board's proceeding is the impact of wetlands. The Town of Scituate has adopted a local Wetland Protection By-law that is significantly more stringent than the State Wetlands Protection Act. The Applicant has not requested any waivers from the local wetlands protection by-law. Wetlands issues involve the following facts:
 - a. The Property has exhibited sporadic but significant disturbances due to past activities. Accordingly, the soils have been severely altered, making wetland delineation difficult.

- b. The Applicant has filed several appeals and suits against the Scituate Conservation Commission in an effort to revive agricultural exemptions that have been determined to be expired by the Conservation Commission.
 - c. The Applicant obtained an Order of Resource Area Delineation (ORAD), dated November 16, 2004, from the Scituate Conservation Commission. However, the ORAD does not delineate bordering vegetated wetlands (BVW). Additionally, the Applicant failed to file a timely extension request for the ORAD, which is set to expire on November 15, 2007 – which is significant in that, under existing law, any litigation under this Comprehensive Permit Decision will not “toll” the effectiveness of the ORAD.
 - d. The Applicant originally delineated approximately 12,000 square feet of Isolated Land Subject to Flooding (ILSF) on the Property, a substantial portion of which is located in the area where the Project is concentrated. W&C first raised concerns about this delineation in its report of March 20, 2007. However, not until the October 4, 2007 hearing, 6 months after W&C first raised concerns, did the Applicant present the Board with a revised ILSF delineation. This new delineation exhibits a 600% increase in ILSF - to more than 78,000 square feet.
 - e. The Property exhibits a substantial amount of jurisdictional “riverfront” adjacent to the First Herring Brook.
 - f. Given reports prepared by the Board’s consultants as well as any other evidence submitted to the Board, the Applicant was directed to provide more analysis of wetlands related issues. Particularly, the Board received sufficient evidence to question whether or not BVW is actually present in the area of the Property to be developed. The presence of BVW would have a substantial impact on the feasibility of the Project. In that there exists no approved delineation of BVW, the Board requested further review so as to make an informed decision under the local Wetlands Protection By-law. The Applicant, however, refused, preferring instead to simply declare, on the basis of insufficient information, that no wetland conditions are present. The Applicant’s declaration in this regard is in conflict with other evidence available to the Board (both through submissions at the hearing and through observations on site visits), as well as the report of Professional Wetlands Scientist Mario DiGregorio.
 - g. Parcels immediately adjacent to the Property possess wetlands characteristics. Sitec previously delineated BVW on some of these parcels.
 - h. While historical disturbance of soils on the Property makes it difficult to assess the status of BVW thereon, there are significant wetlands indicators, including wetlands vegetation and hydrology. Further study of this outcome-determinative issue is required.
15. Civil Engineering and traffic issues were reviewed by the Board’s consultant James Comeau of Pennoni Associates, Inc. (“Pennoni”). Pennoni issued reports dated March 9, 2007, June 7, 2007 and October 31, 2007. The Applicant did

respond to many inquiries raised by Pennoni but, as highlighted in Pennoni's 10/31/07 memo, the Applicant has failed to address the following issues:

- a. The Applicant has failed to provide a utility plan that will allow for proper peer review;
 - b. The Applicant has failed to provide a landscaping plan that will allow for proper peer review;
 - c. The Applicant has failed to address Pennoni's findings regarding inadequate parking, an issue that is related to the isolated nature of the project. No parking is allowed on Route 3A
 - d. The Applicant has failed to address unanswered questions re: hydrant locations and flows. Several conflicts exist that require attention.
 - e. The Applicant has not provided adequate construction details, even on a preliminary basis.
 - f. Drainage plans are not complete and lack details to allow for Pennoni's evaluation, even on a preliminary basis.
 - g. The Plans do not address needs for snow storage.
 - h. The Plans do not exhibit adequate accommodations for dumpster locations.
16. The Buildings' design was reviewed by the Board with the assistance of the Scituate Design Review Committee ("DRC"). The DRC met with the Applicant on September 12, 2007. The DRC issued a memorandum, dated September 18, 2007, addressing shortcomings in the design. The DRC presented its findings on October 4, 2007 and commented that the revised architectural plans (also dated and submitted on 10/4/07) did not address their concerns. In that there was inadequate time to fully assess the revised plans, the Board directed the DRC to meet in advance of the 11/1/07 hearing and present their findings. At the 11/1/07 hearing, the DRC presented a new memo, dated October 31, 2007. The DRC stated that the Applicant was generally unresponsive to its prior concerns, including, but not limited to: the mass of the buildings, the inadequacies of the floor plans, failure to design the project in a manner that accounts for the visibility of the project from Route 3A and failure to consider smaller buildings in a townhouse format. Of equal concern is that the architectural designs are not consistent with the footprints shown on Sitec's site plans. Nor are the floorplans consistent with the elevations prepared by the same architect. Code violations are evident throughout the design. In light of these inconsistencies, and without reliable stamped architectural plans, it is impossible to evaluate the designs proposed by the Applicant.
17. During the hearing, the Board raised many concerns regarding the marketability of so-called garden-style condominiums in Scituate. Based upon available market data, the condominium market in Scituate is weak, specifically for the style of units proposed by the Applicant. The Applicant never addressed this issue and refused to allow peer review with respect to the same.

III. FINDINGS

In addition to the foregoing findings, the Board hereby finds as follows:

1. The Applicant has failed to adequately respond to inquiries regarding flooding issues and has not provided sufficient information to allow the Board to evaluate this vital issue. Nor has the Applicant allowed for proper peer review of this subject. Based solely on the information before it, the Board finds that flooding issues will likely affect both residents of the Project and residents of surrounding parcels. The Applicant has provided insufficient information to rebut the abundance of evidence in this regard. The Applicant's refusal to participate in the hearing after October 4th disabled the Board from fully analyzing this issue. As a consequence, given the potential of extreme health and safety impacts posed by flooding issues, the Board must take a conservative approach and therefore find that local concerns in this regard outweigh any perceived benefits that may be attributable to the housing proposed in this development.
2. The Applicant has failed to adequately respond to inquiries regarding wetlands issues and has not provided sufficient information to allow the Board to evaluate this vital issue. Nor has the Applicant allowed for proper peer review of this subject. Based solely on the information before it, the Board finds that wetlands issues could have a drastic affect on the viability of the project. Particularly, if BVW is present, the Project, in its current configuration, would be impossible. Furthermore, if BVW is present, the Project may not be possible without extreme adverse impacts to the interests protected by the Local Wetlands Protection By-law, from which no waiver has been sought. The Applicant has provided insufficient information to rebut the abundance of evidence that indicates that BVW and other resource areas exist on the Property. The Applicant's refusal to participate in the hearing after October 4th disabled the Board from fully analyzing this issue. As a consequence, given the potential of extreme health, safety and environmental impacts posed by wetlands issues, the Board must take a conservative approach and therefore find that local concerns in this regard outweigh any perceived benefits that may be attributable to the housing proposed in this development.
3. The Board was encouraged by the Applicant's redesign of the Project but finds that the Applicant has not allowed sufficient time to study the design further and work with the Applicant on further modifications. The Applicant did not commit to the revised plan until the last hearing at which it participated. At present, the plans have many internal conflicts that cannot be reconciled without further modification. It is vital that these inconsistencies be revised at the local level so that the Board can fully and fairly evaluate the proposal. The Applicant's refusal to participate in the hearing after October 4th, disabled the Board from completing this process. The Applicant has also failed to address the reasonable and learned comments by the DRC. Accordingly, the Board finds that, at present, the design flaws disable it from being able to approve the Project.

4. The Board finds that market conditions render the Project, as presently proposed, virtually unmarketable. The Board finds that it is a valid local concern that the project be successful. The Applicant has not established that the project will be financially feasible. Nor has the Applicant allowed for proper peer review of this issue.
5. The Board finds that the Project is inconsistent with general planning principles espoused by the Town of Scituate and the Commonwealth. The Project is inconsistent with smart-growth principles in that it will replace valuable environmental resources with a large project that is inconsistent with surrounding development patterns. The project is not within walking distance to any local services and is miles away from Town Center where several multifamily and mixed-use projects have been built or proposed or are under construction.
6. The Board finds that the Applicant has not adequately demonstrated that the Project's stormwater management plan is satisfactory. Stormwater management is a matter that is regulated both locally and under state standards. The Applicant has failed to fully respond to the inquiries of the Board's consultants. Given health, safety and environmental concerns that are related to proper stormwater design, the Board cannot, at present, approve the Project.
7. The Board finds that the Applicant has failed to demonstrate the Project's wastewater treatment system complies with generally accepted standards for safeguarding the environment and protecting adjacent properties.
8. The Board finds that the Applicant has failed to provide adequate detail in compliance with generally accepted standards as well as the so-called "local action pre-requisite" under 760 CMR 31.02.
9. The Board finds that the Project proposes an inadequate amount of parking. Given the lack of available off-site parking, an inadequate amount of parking could hinder ingress/egress for emergency vehicles.
10. The Board finds that the Applicant's refusal to allow for peer review of the project proforma is inconsistent with MHP Guidelines. More importantly, the Applicant's refusal to allow this peer review has prevented the Board from assessing whether it can impose conditions to address the above-mentioned local concerns.

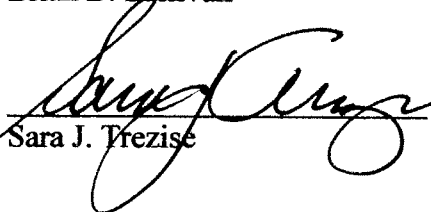
IV. DECISION

Upon motion, duly seconded, the Board unanimously voted to deny the project for the reasons set forth above. The Board denial is based primarily on the Applicant's

failure to provide adequate information and to address issues of great local concern. In that impacts discussed above endanger public health and safety and the environment, the Board is compelled to act conservatively and deny the Project. Had the Applicant allowed for a full and fair review of the Project, the Board may have been in a position to issue a conditional approval of the Project. In this vein, this denial is without prejudice and the Board encourages the Applicant to return to the Board so that the public hearing can be reconvened.


Albert G. Bangert, Chairman


Brian B. Sullivan


Sara J. Trezise

November 9, 2007