HILL LAW

May 9, 2016

BY HAND

Shrewsbury Zoning Board of Appeals
Richard D. Carney Municipal Office Building
100 Maple Avenue
Shrewsbury, MA 01545-5398

Re: Application for Comprehensive Permit – 440 and 526 Route 20, Shrewsbury

Dear Members of the Board:

As you may recall, this firm represents neighbors and abutters to the proposed 250-unit residential development located at 440 and 526 Route 20, Shrewsbury (the "Project" and the "Project Site"), which is the subject of a pending application for a comprehensive permit under General Laws Chapter 40B, §§20-23 proposed by Smart Growth Design, LLC (the "Developer").

As the state-imposed six-month deadline for closing the Board's hearing approaches, the Neighbors remain concerned that a number of critical planning, safety and environmental issues remain unresolved. Despite having materially re-designed both "Phase I" and "Phase II" of the Project over a month ago, the Developer has still not submitted revised, scaled site plans, signed and stamped by a registered professional engineer. The only available depictions of the changes are in the form of un-scaled sketches included within the Developer's PowerPoint presentation from March 28, 2016. This has disabled the peer reviewers and the public at large from evaluating the changes, determining whether they actually address previously-identified deficiencies. We would like to highlight a few of these in this letter.

1. Stormwater Management

First, we are concerned that there has been no follow-up from Graves Engineering on any civil engineering component of the Project, including without limitation, the Developer's waiver requests. We are not aware of any memoranda from Graves after its initial January 22, 2016 evaluation, despite several open design issues and major plan changes (which revised plans have yet to be filed with the Board despite discussion about them at the last two Board hearings). For example, the Developer has not addressed snow storage in response to Graves' comment #4.

Further, the Developer's responses to Graves' January comment letter repeatedly references changes it *will* make to its plans, but the Developer has not provided revised plans and Graves has not confirmed that revised plans address its original concern (or that the revised plans do not raise *new* concerns). For example, Graves commented that trees should not be located within the detention basin areas, and the Developer responded that it will revise its site plans accordingly. Similarly, Graves requested a more complete delineation of the drainage subcatchment areas on the plans, which is necessary to ensure that the pre- and post-development drainage conditions are consistent. Instead of providing this information on a revised set of plans, the Developer merely agreed to show the full subcatchment areas on the next set of revised plans, which to date has not been filed. The same generic response was made to Graves' comments Nos. 18, 22, 23, 24, 27, 28, 29, 30, and 34.

ACTION ITEM #1: The Board should require the Developer to comprehensively respond to Graves' comments with revised plans that incorporate the contemplated design changes.

A more serious omission in the design review process is the Developer's failure to provide the data and calculations requested by Graves in comment #16. The Developer basically refused to provide this information on the grounds that the Project's stormwater design will be reviewed by the Conservation Commission when the Developer files a Notice of Intent under the state Wetlands Protection Act. The same response was made to Graves' comments 17, 20, and 21. This response demonstrates a fundamental misunderstanding of the comprehensive permitting process under Chapter 40B. The Developer appears to assume that because the Project's drainage system will be reviewed for compliance with state law by the Conservation Commission at some future date, that the Zoning Board has no authority to review the drainage system's compliance with the Town's 13-page Stormwater Management Bylaw (Article 21) as part of the comprehensive permit process. This is incorrect. Since the Town has stormwater management standards that exceed state law requirements, the Board can, and should, review the Project's drainage system for compliance with the local bylaw.

Critically, the Developer has not requested any waivers from the Stormwater Bylaw, and the Bylaw imposes more strict requirements than what is required under the state Wetlands Protection Act. We question whether the Project even complies with the state standards, given what appear to be incorrect baseline assumptions in the Developer's Stormwater Report. The Developer's stormwater utilities have been sized based upon extreme rainfall assumptions, but the source for the assumptions is not identified (or at least we did not see it). The current source of rainfall data that should be used for all stormwater design and engineering in the Commonwealth is the NOAA Atlas 14 (Sept. 2015), which provides a rainfall depth for the 100-year storm event (24 hours) of 7.57 inches for Worcester (see attached). In contrast, the Developer's engineer used a smaller rainfall depth assumption of 7.00 inches for the same storm event.

The differences in rainfall inputs in the Developer's HydroCAD stormwater simulation model may impact the groundwater mounding calculations, the sizing of the stormwater

infiltration chambers, as well as stormwater pipe sizing. In other words, by underestimating the volume of rainfall in extreme storm events, the Developer may be under-sizing its stormwater utility infrastructure, which could lead to flooding on municipal streets and downgradient abutting properties. Given the extreme density of the Project (250 units) and the correlative extreme intensity of the use of the Project Site, which maximizes the Developer's profit, the Developer has an incentive to make its stormwater systems as small as possible (to take up less room and cost less), which runs counter to the Town's interests in adopting the Stormwater Bylaw, which is to prevent flooding and to protect natural resources. Bylaw, §1(a).

> **ACTION ITEM #2: The Board should require the Developer to submit: (a) all of the data and calculations supporting its stormwater management design, (b) a narrative explaining how the Project complies with the Stormwater Bylaw, or if it doesn't, what waivers it needs, and (c) revised stormwater calculations and plans (if necessary) that incorporate the current NOAA Atlas 14 rainfall assumptions.**

2. Density

At recent meetings, the Developer has touted the fact that its elimination of 30 units from the Project (from 280 to 250) has enabled it to avoid any zoning dimensional waivers. However, the Project still grossly exceeds what would be allowed if the Project Site was within the "Apartment" zoning district, and would not be permitted at all in the underlying "Limited Industrial" district. Therefore, the Board would be well within its authority to limit the Project's deviation from this "use" nonconformity, and from the dimensional requirements that would have been applicable in the Apartment zoning district. As my clients have stated in comment letters and in testimony before the Board, the density of this Project is grossly inconsistent with the surrounding residential neighborhood. The Project doesn't even comport with the Chapter 40B Guidelines adopted by the Department of Housing and Community Development, which proscribe that:

> [when developing multi-family housing in the context of an existing single-family neighborhood], it is important to mitigate the height and scale of the buildings to adjoining sites.
>
> [T]he massing of the project should be modulated and/or stepped in perceived height, bulk and scale to create an appropriate transition to adjoining sites.

DHCD's "Handbook – Approach to Chapter 40B Design Reviews" suggests that projects can be deliberately designed to minimize disruption with neighborhood patterns.

> Affordable housing projects under c.40B often have design elements that are different from the surrounding context as described by the terms used in the regulations; e.g., use, scale. However, with careful design and

consideration of the project elements in relationship to the adjacent streets and properties, the projects can better integrate with the surrounding context.

It is clear that little thought or effort was made by the Developer to respect the "building typology," and the size and scale of the homes in the existing single-family residential neighborhood. The Project's large apartment buildings are not "modulated" or "mitigated" in any way to provide an "appropriate transition" to the abutting residential properties.

As we have previously noted, it's appropriate for the Board to consider this Chapter 40B application in light of the Town's "Apartment zoning district" provisions in the Zoning Bylaw, even if waivers are not technically required because the Project Site is not located within the Apartment zoning district. The Apartment zoning district provisions is how the Town has chosen to regulate the type and size of uses being proposed here. These provisions contain sensible restrictions on the intensity of the use of a particular site, placing a 50% cap on lot coverage and a maximum density of 125 units. No parking facilities may be located within the required side and rear yards, which in the Apartment district is fifty (50) feet. Reproduced below for your convenience is Footnote 5 to Table I – Use Regulation Schedule of your Zoning Bylaw, which contains the Bylaw's restrictions on multi-family housing (garden-style) within the Apartment district:

(5) MF-1 – Multi-family structures in accordance with the provisions of Table II provided that each dwelling unit has two (2) exterior exposures; each structure contains not more than twelve (12) dwelling units unless each unit has a ground level floor in which case the structure shall contain not more than eight (8) dwelling units; multiple structures, excluding detached accessory structures, shall be separated by a minimum distance of fifty (50) feet, except that structures equipped throughout with an approved automatic sprinkler system may be separated by a minimum distance of twenty (20) feet; and provided further that: (amended 5/19/05)

1. **All off-street parking areas as required under Section VII D shall be provided, none of which shall be in the required yards.**
2. **On-site recreational facilities shall be provided in an amount and type compatible with the proposed size of the development.**
3. **Single developments shall not exceed 125 living units.**
4. **Site development shall be in accordance with the applicable provisions of the Planning Board's current Subdivision Rules and Regulations regarding utilities, drainage, parking areas and roadways.**
5. **Due consideration is given to reducing the impact of the development on abutting properties with respect to traffic, lighting, location of recreational facilities, yard requirements and screening.**
6. **All access ways to and from the site shall be privately maintained.**
7. **A site plan has been prepared in accordance with the provisions of Section VII F.**
8. **Final development plans are substantially consistent with the proposals presented to the Town at the time of rezoning**

As we previously stated, a Chapter 40B applicant is only entitled to waivers from local bylaws and regulations to the extent necessary to make a project "economic." Unless and until the Developer proves to the Board, through the presentation of verifiable economic analyses, that the waivers it is requesting are necessary (or, in this case, the extent of its waivers is necessary), the Board need not, and should not, waive them. Chapter 40B regulations specifically provide for a process of economic peer review towards the end of the public hearing, through which the Board proposes a set of conditions or waiver denials to the Developer, the Developer makes an evidentiary presentation on how the conditions render the project "uneconomic," and the Board then tests the Developer's economic assumptions through its own peer review. See, 760 CMR 56.05(6). Since the Developer has asked for and needs waivers to build a project with 250 apartment units, and the Board does not need to accept a density of 250 units unless the Developer proves that such a density is required for the financial viability of the Project, the Board should not close its hearing until it puts the Developer to this test. Please consult with your 40B consultant Paul Haverty on this issue if you have any doubts.

ACTION ITEM #3: The Board should follow the procedure under 760 CMR 56.05(6) and provide a list of proposed conditions or waiver denials, including a condition limiting the density of the project to 125 residential units, to the Developer for its consideration and objections, and retain a 40B economics peer review consultant to test the Developer's assumptions.

3. Neighborhood Mitigation

In addition to reducing the density of this Project, there are other conditions the Board could impose in its comprehensive permit that could mitigate the Project's impacts on the abutting residential neighborhood.

a. *Traffic*

In our January 25, 2016 letter to the Board, we flagged a number of traffic safety issues concerning the Project's generation of significantly-more traffic entering the Stoney Hill Road (west) intersection with Route 20. To our knowledge, neither the Developer nor the Board's traffic peer review consultant has addressed these comments. Residents of the Stoney Hill Road neighborhood have raised numerous traffic-related concerns, in writing and at hearings.

We understand that the Developer has made a proposal to make the access driveway from Phase I of the Project onto Stoney Hill Road (west) restricted to emergency only. Under this change, all access to and from Phase I would be from its frontage on Route 20. This is a significant design improvement, and we respectfully request that the Board impose this as a condition in its comprehensive permit (assuming that it issues a permit with conditions, rather than deny the permit). Importantly, the Developer's compliance with this condition should not be "conditional" on any further state-level approvals, such as a highway access permit from the state Department of Transportation (DOT) – this would unnecessarily give the Developer an opportunity to renege by making a less-than-honest application to MassDOT. MassDOT is

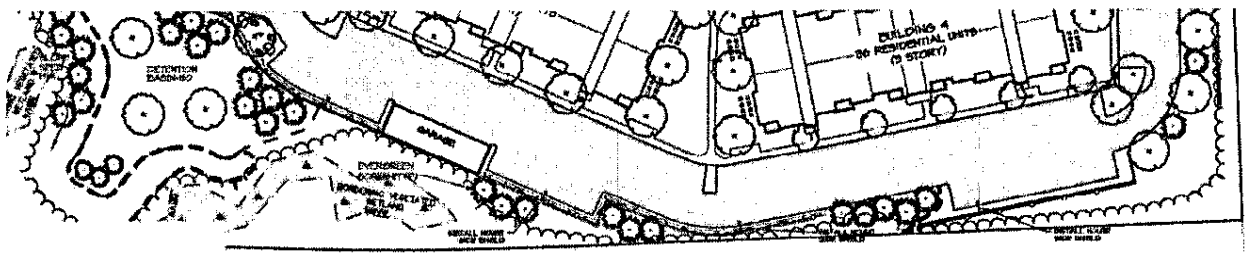
likely to approve a highway access permit with the understanding that all of Phase I traffic will use this driveway if it understands that the Developer has no choice under local permitting, and if the Town affirmatively supports the application.

ACTION ITEM #4: The Board should impose as a condition of its approval of this Project a restriction that the roadway shown on the plan as accessing Stoney Hill Road (west) shall be limited for emergency access purposes.

b. *Landscaping, Screening and Buffering*

In our view, pulling the roadway, parking areas, and buildings at least 50 feet away from the Project Site's rear property boundary, consistent with the Apartment zoning district provisions, would allow for much-needed buffering and screening from the Project to the abutting single-family homes, and would be more consistent with Chapter 40B design guidelines referenced above.

Relatedly, the Developer should provide a more robust landscaping plan with dense vegetated screening and fencing between the Project and the residential abutters. The "planting and lighting plan" sheet filed the Developer in November is lackluster, and offers only a handful of evergreen trees along the rear property line, a number of which are within the detention basin area, which the Developer has agreed to relocate in response to Graves' peer review comments. See, excerpt below:



The Developer has not shown where these detention basin trees would be relocated. Nor has the Developer identified what type of evergreen trees will be planted, or how tall the trees will be when planted (a number of different tree species is identified on the plan sheet, but the Legend is confusing as to how the species match up with the icons depicted on the plan). Given the significant unit density and building massing proposed adjacent to a single-family neighborhood, a robust landscape plan should be a top priority for this Project. We respectfully request the Board to require the Developer to submit a revised landscape plan with more natural screening, and fencing, along the rear property line. This submittal should be made as soon as possible to allow the Neighbors to comment on it before the public hearing closes at the end of the month of May.

ACTION ITEM #5: The Board should require the Developer to submit by next week a more detailed and robust landscape plan with dense vegetated screening along the rear property boundaries. The Board should then allow enough time for the public to review and provide comments and suggestions on the revised landscape plan.

4. Site Control

Finally, the Developer's satisfaction of the "site control" prerequisite under 760 CMR 56.04(1)(c) was predicated on a purchase and sale agreement with the owner of the Project Site that expired on March 30, 2016. This fact was referenced by MassHousing's Project Eligibility Letter dated June 17, 2015, page 13. In its comprehensive permit application, the Developer specifically requested the Board to make a "finding of fact" that it has site control. See, below:

REQUEST FOR FINDINGS OF FACT

The applicant requests that the Board of Appeals make the following findings of fact in connection with the action of the Board on this application:

1. **Smart Growth Design LLC, a limited dividend organization within the meaning of General Laws, Chapter 40B and 760 CMR 56.02, and is eligible to receive a subsidy under a state or federal affordable housing program after a Comprehensive Permit has been granted.**

2. **The applicant has shown evidence of its site control to qualify it as a recipient of a Comprehensive Permit for this site.**

Unless the Developer can provide proof that the P&S Agreement is still enforceable, an expired P&S Agreement cannot serve as the basis of site control under Chapter 40B, for obvious reasons. Site control is a mandatory prerequisite to applying for and obtaining a comprehensive permit, and is part of the project eligibility determination made by the subsidizing agency under Section 56.04 of the regulations (which is also, itself, a mandatory 40B prerequisite). Therefore, we respectfully request that the Board follow the procedure under Chapter 40B regulations, 760 CMR 56.04(6), and ask MassHousing to reconsider its project eligibility determination in light of the expired P&S Agreement.

ACTION ITEM #6: The Board should follow the procedure under 760 CMR 56.04(6), and ask MassHousing to reconsider its project eligibility determination in light of the expired P&S Agreement.

Thank you for your continued diligence in this matter.

Very truly yours,

Daniel C. Hill

cc: Peter Freeman, Esq.
Shrewsbury Board of Selectmen
Client