

HOUSING APPEALS COMMITTEE
Mill Valley Limited Partnership

Decision # **86-25**
Appellant: **Mill Valley Limited Partnership**
Appellee: **Zoning Board of Appeals of the Town of Amherst**
Date: **April 8, 1988**
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I. STATEMENT OF THE CASE

Mill Valley Limited Partnership (Mill Valley), on July 30, 1986, submitted an application to the Zoning Board of Appeals of the Town of Amherst (the Board) for a Comprehensive Permit to build a 164 unit development of low or moderate income housing. The application was filed under the provisions of St. 1969, c. 774 (now G.L. c. 40 ss.20-23) . After due notice and a public hearing, the Board, on October 27, 1986, issued its decision. The decision granted the Comprehensive Permit, but with 27 conditions. From this decision Mill Valley appealed to the Housing Appeals Committee (HAC) alleging that

a number of the conditions rendered the proposal uneconomic; in particular Condition #1 which reduced the number of units from 164 to 82.

The Committee held a conference of counsel, conducted a site visit, and held an evidentiary hearing. The evidentiary hearing occupied six sessions. The hearing, as required by the statute, was conducted as an adjudicatory hearing. Witnesses were sworn, full right of cross-examination was allowed, and a verbatim transcript was kept.

Following the submission of evidence, counsel presented oral arguments, and subsequently submitted post-hearing briefs.

II. ISSUES

Where the Board has granted a Comprehensive Permit with conditions, and the Board's decision is appealed to the Housing Appeals Committee, the Committee must determine whether the conditions imposed by the Board "make the construction or operation of such housing uneconomic and whether they are consistent with local needs". (M.G.L. c. 40B s.23; See also 760 C.M.R. s. 31.05(1) (b))

The major issue in this case is the reduction in the number of units from 164 to 82 (Board Decision, Condition #1). Mill Valley argues that limiting the size of its project to 82 units renders its construction and operation "uneconomic". Therefore, argues Mill Valley, this Committee should issue a Comprehensive

Permit without that condition.

The Board argues, on the other hand, that there exist, in connection with this proposal, serious problems of health and safety relating to sewage, drainage and traffic. The Board agrees that there exists a need for housing for low or moderate income persons, as provided for in the statute, but argues that its decision is consistent with local needs in that the Board has balanced the need against the adverse health, safety and planning factors and that the decision to cut the number of units to 82 represents the maximum number of units that the site will sustain without exacerbating the health and safety hazards beyond tolerable limits.

We have, therefore, the issue of whether limiting the proposal to 82 units renders the proposal uneconomic, and the related issues, hearing on consistency with local

needs, as to whether issues of health, safety and design exist, and whether they will be exacerbated by increasing the number of

allowable units to the point where the health or safety factors, or design concerns outweigh the need, and render the proposal no longer "consistent with local needs".

These concerns relate to the issues of density, traffic safety, drainage and sewage, each of which will be discussed separately.

The provision limiting the number of units to 82 appears in the Decision as Condition #1, which also specifies that the units shall be rental. Whether the Board had the power to restrict the proposal to rental was originally contested by the Appellant. This issue was, however, resolved by an agreement by the Appellant to proceed with the appeal on the basis of rental.

The 27 conditions imposed by the Board's decision were addressed specifically by the Appellant in three documents as follows:

- (1) A 17-page letter to the Committee, with copy to counsel for the Board, dated

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December 15, 1986, which was in effect, a trial memorandum;

- (2) A stipulation (13 pages) dated March 3, 1987, signed by both parties;

- (3) Appellant's Post Hearing Brief (45 pages) dated August 19, 1987.

These three documents indicate conditions to which the Appellant has agreed, changes or modifications to the conditions to which both parties have agreed, and those conditions which the Appellant contests in whole or in part.

- A. Does the Reduction in the Number of Units to 82 Render the Proposal Uneconomic?

As previously stated, the exact language of the statute requires the Committee to determine whether the conditions imposed by the Board "make the construction or operation of such housing uneconomic..." In layman's language, can the developer build and operate this project with this condition and still achieve the "limited dividend" contemplated by the guidelines of the subsidizing agency, in this case the Massachusetts Housing and Finance Agency (MHFA)?

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On the arithmetic of this issue, Murray Movitz, project manager for the developer, testified on behalf of Mill Valley; and in opposition, Robert Anderson, principal accessor of the

Town of Amherst, testified on behalf of the Board. Mr. Movitz testified from a pro-forma financial statement entitled, "Summary of Estimated Project Capital Costs" drawn in accordance with MHFA's guidelines, which he had prepared for submission to MHFA, to test the financial feasibility of an 82 unit proposal. The "Summary" lists the capital costs applying to a 164 unit project in one column and those relating to an 82 unit project in a second column. The thrust of Mr. Movitz's testimony was that the project of 82 units was "uneconomic". (Tr. Apr. 8, 1987 pp. 51-62, Exib. 3).

Robert Anderson, principal accessor for the Town of Amherst, testified in rebuttal. Using the figures submitted by Mr. Movitz, Mr. Anderson disputed a number of the capital costs carried by Mr. Movitz for the 82 unit project, and substituted what he considered to be more realistic figures. All of these figures are incorporated in Exhibit #10 which shows the two columns of figures prepared by Mr. Movitz for the 164 and 82

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unit projects, and in addition a third column entitled, "Adjusted 82 Unit", which shows Mr. Anderson's figures.

The conclusion to be drawn from Mr. Anderson's testimony is that, based on his assumptions, which he testified are more realistic than Mr. Movitz's, the 82 unit project is "economic". (Tr. July 7, 1987 pp. 10-12). Mr. Movitz's figures indicate that it will require approximately \$115,000 of additional income, above what can be reasonably expected, based on prevailing rents, to make the 82 unit project "fly".

While Mr. Anderson disputed a number of assumptions made in Mr. Movitz's figures, we will discuss only two points which were emphasized in the argument in the Board's brief. Mr. Movitz carried a cost of \$1,230,000 for the cost of the land for the 164 unit project, which works out to \$7500 per unit for a 164 unit project. He carried the same total of \$1,230,000 for the 82 unit project. Mr. Anderson carried a total of \$615,000, half of Mr. Movitz's figure, for the 82 unit project. Mr. Anderson's figure

is arrived at by multiplying the 82 units by a land cost of \$7500 per unit.

The Board argued that the developer should carry only costs attributable to the 82 units, without

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burdening the 82 unit projections with this land cost and with other actual costs incurred to date in connection with the 164 unit project. While the Committee is not basing its finding as to whether an 82 unit project is economic on the resolution of this issue, we mention it because we wish to speak to this point, a point which will undoubtedly arise in the future. The situation will arise each time a Board cuts down the number of

requested units. The decision in each instance will depend on the facts of the particular case.

While it is possible to project a set of facts in which a developer is so inexperienced or reckless that he embarks on a totally unrealistic development and incurs expenses that should not be considered in determining whether a lesser number of units required by a Board will be economic, it is unrealistic to apply such a rule to an experienced and able developer, who has proceeded to incur reasonable costs, in connection with a project that has received sufficient encouragement from the subsidizing agency and concerned local officials to justify the developer in pursuing the project, and in incurring reasonable expenses in developing the

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project. To the developer it is one endeavor, and he must hope in the long run to recover all his costs and make a profit.

It

is unrealistic to say to such a developer that in projecting theoretical costs for a "new" project, he must choke down and swallow reasonable costs that he has actually incurred, or has obligated himself to incur.

The evidence that we deem most significant in determining whether the reduction in the number of units to 82 renders the project uneconomic are the two letters from the subsidizing agency, and the letter from the Executive Office of Communities and Development (EOCD). (See Exhibits #4, Vol. II, Tabs. #12 and 13, and Exhibit #11.)

After the Board decision reducing the number of units to 82, Mr. Movitz prepared the standard application to MHFA, which made its own financial analysis, and informed the developer that "the 82 unit application appears to be financially impractical", and could support an MHFA mortgage loan only if the developer (1) raised the rents \$300 over the actual market rentals in Amherst, or (2) provided an "extraordinary \$2,000,000 capital investment above and beyond the usual owner's

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contribution. (Tr. Apr. 8, pp. 51-55, 62; Letter from MHFA dated Mar. 2, 1987, Exhib. 4, Tab. 12.)

A second letter from MHFA, sent to the developer on July 6, 1987, after Mr. Anderson had challenged Mr. Movitz's pro-forma figures and conclusions, reiterated the points made in the first letter, and supported Mr. Movitz's conclusions, making the following additional points:

- (1) In comparing the 164 unit proposal with the 82 unit proposal, many of the development costs could not be proportionally reduced;

- (2) That the analysis on which MHFA's March 2 letter was based covered all the operating expenses, construction costs, and vacancy rate disputed by Mr. Anderson;
- (3) That economics of scale obtainable on a 164 unit development are not available in a development of only 82 units, and therefore the operating expenses would be much closer to \$3600 per unit on an 82 unit proposal as compared to \$3100 per unit in the 164 unit proposal;
- (4) That the 5% vacancy factor is the threshold

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standard at MHFA for underwriting reviews. It is based on an experience of many years and is considered to be a prudent level;

- (5) That the EOCD letter advised the town that it would not be possible to go through with the CDAG grant of \$800,000 for infrastructure support for this project if the number of units were reduced to 82.

The MHFA letter's concluding sentence is

"-It is therefore clear that the 82 unit reduction imposed by the Zoning Board of Appeals will render the Mill Valley Estates Development infeasible."

The reference to the EOCD letter (Exhib. 4, Tab. 14) raises the question of the CDAG grant.

In the early stages of the development of this project, the developer sought, and received, an extraordinary amount of support from local officials. As the Board Decision indicates (at p. 3), the Planning Board voted unanimously to recommend the proposal for approval, the Housing Authority supported it, and the Town Engineer's "...-general conclusion was that the project would not worsen any existing problems, given the improvements anticipated by the money appropriated by the CDAG grant..."

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In support of this project the Town of Amherst, in May 1986, submitted an application to the Executive Office of Communities and Development (EOCD) for a CDAG grant, and in July 1986, received preliminary approval for a grant of \$800,000 for site improvements "in support of Mill Valley Estates, Winn Development Company's 164 unit SHARP..." (Exhibit #4, Tab. 13) Of this sum, \$500,000 was to finance the construction of the access road to the site; the balance was to improve sewage facilities, and to

provide a traffic light to alleviate traffic concerns at the corner of South Hadley Road.

The Board's decision assumed that the CDAG grant would continue to be available even after the project was reduced to 82 units. In fact, the Board's grant of the permit for 82 units is expressly conditional upon final approval of the \$800,000 CDAG grant. (See Decision, Condition #20.)

The letter from EOCD, however, makes it clear that the CDAG grant was given preliminary approval based on the proposed creation of a specific number of affordable rental housing units and a specific level of private investment.

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The EOCD letter concludes:

"Should the Mill Valley Estates project be significantly reduced to the number of units cited by the Amherst Zoning Board of Appeals it would not be possible to commit CDAG funds to the project..."

The finding by MHFA that the project is financially unfeasible, and the withdrawal by EOCD of the CDAG grant insure that the project will not go forward.

We find that Condition #1, reducing the number of units to 82, makes the construction or operation of such housing uneconomic.

B. Consistency With Local Needs

We now turn to the second half of the statutory provision with respect to imposed conditions, which asks whether the particular condition is consistent with local needs. As previously indicated, the position taken by the Board is that health, safety and planning concerns exist, which are tolerable for 82 units, but whose impact with a larger number of units outweigh the housing need and render the proposal not consistent with local needs. So, with each such concern raised by the Board, we must answer two questions:

- (1) Does the concern or hazard exist?

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- (2) On a project larger than 82 units, will its impact outweigh the housing need and render the project "not consistent with local needs"?

The concerns so raised by the Board relate to density, roads, sewage and traffic.

1. Density

The actual density of the maximum number of units proposed (164) on the total acreage of this site (approximately 36 acres) is only 4.5 per acre. (See Stipulation #9.) It cannot reasonably be argued that this is an unreasonable density for multifamily housing, particularly where the 580 market rate apartments in the vicinity, all built under special permit from this Board, have a collective density of 7.25 units per acre. (Board Decision p. 2).

The Board's real concern, as indicated in its discussion in the decision (on pp. 8-9) is the impact of an additional 25% to the total of the existing units in this apartment complex area. The decision discusses vandalism, noise levels and police calls due to poor management of neighboring apartment complexes. All

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these items must be balanced against need, particularly in view of the approval by the Planning Board, which stated that "this is an appropriate development at the density and design proposed for the area" (See Exhib. 1, Tab. 8B), and the testimony of one of the Selectmen that the Selectmen had negotiated the figure down from 215 units to 164, and that that was a figure at which they felt comfortable in applying for CDAC funds (Tr. May 21 p. 14).

The Board sought to meet some of the problems of additional noise, etc., from the general increase of units in this area by means of conditions attached to the Comprehensive Permit. These conditions will be covered in our discussion of the conditions, infra.

2. Roads

Access to and from this development is via an access road that leads to East Hadley Road. East Hadley Road is described as located in a flood plain (a location which would not be chosen for it today). It is a two-lane road through which all the other developments have access. East Hadley Road connects Route 116, for traffic going north to the university and town center, with Route 9, which goes west to Hadley and Northampton.

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The decision states that East Hadley Road is "frequently flooded, resulting in its closing, as reported by abutters as well as town authorities" (Decision p. 9). When flooding takes place, PVTAs buses detour through adjacent streets, posing a traffic hazard for children.

The intersection of East Hadley Road with Route 16 is reported by the Police Chief to have one of the highest traffic accident rates in town. Concerns of the Police Chief with the

design of the access road have been resolved by the Stipulation. Concerns relating to the acquisition of an easement for a secondary emergency access road, and the design of such, have also been resolved by the Stipulation.

The "frequent flooding" of East Hadley Road, testified to by abutters, turns out to be "about three times in the 16 plus years I have been here", according to the Town Engineer, and "only about a couple of times since I have been a police officer" (1959), according to the Police Chief. The longest diversion of traffic was 12 hours to 24 hours, according to their recollection (Tr. July 2, pp. 54, 55, 70)

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Admittedly, East Hadley Road, only two lanes, and in a flood plain, is not an ideal access for this development, but it was all there was when the Board issued special permits for the construction of the other apartment complexes which must use it. The traffic report (Exhib. 4, Tab. 11A) indicates that the bulk of the traffic from this development will use only a short section of East Hadley Road up to Route 116.

Most significant is the fact that the CDAG grant, which goes along with this project, provides funds for sidewalks on East Hadley Road and for a traffic light at the bad intersection of East Hadley Road and Route 16 - a net plus for traffic safety.

3. Drainage

The facts relating to drainage are that the land currently drains off to the south via natural swale, over the golf course. For that reason, there was no attempt to show that the alleged flooding, or any future flooding, to East Hadley Road, would come from this project.

The current drainage, however, discharges over the golf course to the south, and occasionally causes flooding. This, according to the golf course

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representative is a fact of life that takes place one to three times a year. The water runs off quickly and is dealt with by the golf club (Tr. Apr. 8 p. 27).

The concern, however, is that the buildings and the paved area ways of the proposed project will exacerbate the runoff to the golf course. The drainage plan for the project provides for buffering the peak flow of storms by collecting the excess runoff in retention basins. The net effect is that the golf course condition will not get worse, and in fact, will be somewhat improved because the retention basin will also handle flow when the ground is frozen. In addition, the drainage plan calls for piping some of the current flow directly into the Fort River (Tr.

Apr. 8, p. 20).

The Town Engineer confirmed that the current drainage situation would be somewhat improved by the drainage plan, and in any event the current situation would not be adversely impacted (Tr. July 2 pp. 68-70).

The Town was concerned that the retention basins might prove dangerous to children, and imposed a number of conditions to mitigate this hazard. These are discussed infra under "Conditions".

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4. Sewage

An existing sewer problem is caused by the fact that storm water surcharges the sewer line, either through cracks in the pipes or because of illegal connections from roof drains or basement sump pumps. A manifestation of this condition is the occasional overflow in manholes, particularly one on the golf course. (See Exhib. 2A). A further problem with the sewage system is a line which goes under Fort River to a pumping station on the other side, which contains a siphon, and which occasionally malfunctions. (Tr. July 2 pp. 72-73).

The testimony is not too clear as to exactly what causes the problem, since it is not one of under-capacity. The developer's engineer described it as "an engineering problem, nothing out of the ordinary". He testified that the CDAG funds provide "a vehicle to solve that problem". (Tr. Apr. 8 p. 18).

The CDAG grant, in fact, provides \$80,000 for sewer improvements. The developer argues that far from posing a sewer-related threat to its neighbors, this development, with its accompanying CDAG grant, will actually improve things for the entire neighborhood.

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That, in effect, is the tenor of the testimony of the Town Engineer, who outlined a series of alternatives as to how those improvements could be effectuated. (Tr. July 2 pp. 72-76).

5. Water Supply

Although the adequacy of the water distribution system was not pressed as an issue by the Board, the Town Engineer testified that he was involved in preparing the CDAG request for improvements in the water distribution system in the neighborhood. The CDAG contains an item for \$300,000 for the provision of a parallel water main. This will connect with the existing main. It can be looped with the existing system, which would provide more flow, particularly for firefighting, so that in effect the whole neighborhood is benefitted.

In summary, the Committee finds and rules that the

restriction of the project to 82 units will render the project uneconomic and is not consistent with local needs.

C. Other Conditions

Up to this point our discussion has centered on Condition #1, which reduced the number of units to 82.

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As previously indicated, in all there were 27 conditions imposed by the Board's decision, many of which have been agreed to in whole or in part by the Appellant. The following discussion will deal only with those conditions, or portions the conditions, in which there is not agreement between the parties.

The contested areas include, in general, conditions which sought to impose unacceptable conditions subsequent, which had the effect of a veto on the grant of the Comprehensive Permit; conditions which unreasonably invade the area of project management, and infringe on prerogatives of the subsidizing agency, or the developer; and conditions which are not within the sole power of the Appellant to fulfill. With respect to those conditions that fall within the latter group, this decision will relieve the developer of the requirement that the condition be fulfilled, but indicates an expectation that the developer will exert his best efforts in that direction.

The number of the imposed conditions, and the area of detail in which the Board has sought through these conditions closely to continue to regulate the construction and management of this development,

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go far beyond anything that the Committee has encountered to date. In a number of respects the conditions go far beyond the letter, and particular the spirit and the intent of the law.

The letter of the law is clear enough. The conditions must meet the test of whether they "make the construction or operation of such housing uneconomic and whether they are consistent with local needs". Our fairly exhaustive discussion of Condition #1 indicates the way this statutory rule is applied in practice to the major condition imposed here - the reduction in the number of units to 82.

The ability of the Board to impose conditions, in general, has salutary effects. To pinpoint a health or safety hazard, or a potential hazard, and to make provision against it by a condition, is a situation contemplated by the statute, and if contested, gives the Committee the opportunity to appraise its economic effect, the extent of the housing need, the extent of the hazard, and to balance these factors against the broad rule of "consistency with local needs".

In applying the statutory rule, we look to everything

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we can find to determine how the Legislature wanted us to construe and apply this statutory language.

Fortunately, there are guideposts. The Report of the Committee on Urban Affairs (June 1969) quoted in part in our Regulations at 760 CMR: 30.01(2) describes an existing practice the legislation was designed to eliminate. "the process of obtaining local approval is so protracted as to discourage all but the most determined and well-financed builders..." Further to speed the process was the provision of a single hearing by the Board of Appeals rather than separate hearings, before multiple boards, the provision of strict time constraints for moving the process through the Board, and by the specific provision in the statute that the requirements or regulations shall apply equally to subsidized and unsubsidized housing (Sec. 20).

The kinds of obstacles to construction imposed by municipalities before passage of the legislation are detailed in the discussion in the leading case (Board of Appeals of Hanover v. Housing Appeals Comm., [363 Mass. 339](#) at pp. 346-354)

This brief review indicates the general guidelines under which the Committee will appraise conditions

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imposed on a Comprehensive permit. Thus the Committee will not approve conditions which impose burdensome delays or obstacles on construction, after a permit is granted, that the legislation itself sought to eliminate as a condition to granting the permit in the first place.

Thus conditions which are conditions subsequent, requiring approvals after Comprehensive Permits are granted are frowned upon. (See Dennis Housing Authority v. Dennis Board of Appeals, June 14, 1984).

In a very recent decision, the Committee had this to say about a Comprehensive Permit with a condition subsequent:

"...The appellants allege that this in fact puts a veto on the construction of the project since construction cannot proceed without a sewer permit... The imposition of condition #4 illustrates why the Committee frowned on the imposition on the grant of a Comprehensive Permit of a condition subsequent, which in effect makes it impossible to proceed with the construction intended by the granting of the Comprehensive Permit..." (Stoneybrook Village v. Barnstable Board of Appeals, October 4, 1987).

The statutory language in effect limits the area in which the Board may reasonably impose conditions to those concerns

bearing strictly on the issue of

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consistency with local needs, which means balancing the hazard or defect against the housing need. The Board cannot impose conditions which merely substitute its own ideas of good design

or good management for those offered by the proposal, or to impose conditions which simply keep the Board in the picture as a hovering regulatory agency with veto powers after the Board has completed the job reserved to it by the statute of examining the proposal and granting the Comprehensive Permit, if warranted.

If the Board is concerned about aspects of the preliminary plans relating to site, landscaping or utilities (Condition #4), or the design of the primary access, it is entitled to ask the developer to provide this information on a preliminary basis before it makes its decision, just as a planning board could. The Zoning Board cannot require final plans because it is unfair to impose this expense on a developer, who at that point doesn't know whether or not he is going to receive a permit. On the other hand, the Board cannot say, "Here is your Comprehensive Permit; now bring us your final plans for our approval before proceeding with construction." Once the Permit has

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granted, the developer can be required only to conform to the proposal as set out in his preliminary submission, and after the Comprehensive Permit is granted, his sole obligation is to comply with the State's Uniform Building Code.

The same considerations apply to conditions relating to management of the development after construction. These matters are traditionally the concern of the subsidizing agency, which creates the regulations relating to the granting of the subsidy. This fact of life is recognized in the Hanover case and in the Committee's regulations. This applies to areas of details of the lease from with tenants (Condition #3); tenant selection plan, and procedures (Condition #10) (see also 760 CMR 31.05(6) (b) (2)); and the provisions setting the length of the subsidy period. This is an area covered by the parameters of the subsidy itself, and the developer cannot be saddled with conflicting obligations.

We understand why the Board sought to impose conditions limiting assembly of large numbers of persons in the project as an attempt to deal with the problems of noise and general rowdiness created by

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students and others in adjoining projects (Condition #3). The Appellant's brief makes an imposing argument against such conditions based on constitutional issues of free speech and

assembly. We prefer, however, to deal with this issue on the narrower ground that the evidence did not show that such a requirement is generally imposed by Amherst on other proposals (see Statute, sec. 20).

Conditions which are imposed on a Comprehensive Permit which are beyond the power of the developer to effectuate are scrutinized carefully by the Committee (see Stoneybrook, cited supra; also Barnstable Housing Authority v. Barnstable Board of Appeals (H.A.C. October 9, 1987)) imposing requirements on the developer to get a utility pole moved and to having "no parking" requirements instituted on a public street.

These concerns apply to Condition #20, which makes the project contingent on final approval of the CDAG funding in the amount of \$800,000; Condition #21, which requires that the sewer line and water distribution improvements be approved by the Town Engineer and completed prior to occupancy; and Condition #22, which provides for an increase in bus service. These items are primarily the concern of, or within the control

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of the Town. So far all we have is a preliminary approval of the CDAG grant. It was conditioned on 164 units which the Board itself endangered by reducing the number to 82. Considerable negotiation is still to be anticipated. If the developer doesn't have a free hand to take risks to move along with the development until the CDAG is finally approved, and in the full amount of \$800,000, and if he must hesitate before making commitments until the sewer and water improvements are sufficiently advanced so that he feels safe in making such commitments, these delays alone could render the project uneconomic.

The CDAG grant is an economic cornerstone of this proposal. The developer's brief recognizes the fact (p. 44). If anything happens to hinder it, this project simply won't fly. It is unrealistic as well as uneconomic to include Conditions #20 and 21.

Condition #5 is designed to prevent the developer from tampering with a particular stand of trees. Presumably it was included to screen the project in part from abutters from whom the real opposition to this project has emanated, in contrast to the support

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that came from the Planning Board, the Housing Authority and EOCD (... "The introduction of the proposal for this development has brought to the surface extraordinary expressions of resentment and bitterness..." (Decision p. 12)). The developer has argued in its brief that the space may be necessary to provide the minimum number of parking spaces to make the project functional and marketable. The final order will relieve the developer from

this requirement, with a recommendation that if in its final plans the developer can feasibly comply with this condition, that it do so as far as possible.

And finally, all these considerations indicate the impracticality of Condition #25 requiring "substantial" construction within two years. The mere economic imperative of continued and rising interest rates and construction costs provides all the impetus necessary to insure that construction within two years will be as "substantial" as the developer can possibly make it. The Stipulation acknowledges that we are dealing with a developer with a proven track record (Stipulation #3). The condition merely insures a potential future area of

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disagreement. In the highly unlikely event that the developer, in two years, can reasonably be accused of unreasonably delaying on this project, adequate relief could be obtained by an application to modify the Comprehensive permit.

The Committee notes, with much approbation, the large area of agreement with respect to these conditions, and other issues, which parties were able to achieve by negotiation, and which are incorporated in the written Stipulation, dated March 3, 1987. In general, both counsel and principals in this matter have conducted themselves with a high degree of professionalism and courtesy, and mutual understanding of each other's concerns.

In line with such understanding, the Appellants, through their counsel, notified the Committee, and the Appellee's counsel, that they were aware of the continuing and deeply felt concerns of the Board; that they took those concerns seriously; and that they had seriously negotiated with the subsidizing agency for additional subsidy to enable them to reduce the number of units requested. While the Appellant does not retreat from its position that the record

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clearly indicates that the Committee should find in its favor for the full number of units requested, to wit 164, the Appellant has offered, based on its preliminary discussions with the subsidizing agencies, to reduce the total number of units, requested to 148.

III. FINDINGS, RULINGS AND ORDER

Based on our preliminary discussion and findings of fact, we rule that certain of the conditions imposed upon the grant of the Comprehensive Permit, as set out hereafter, make the construction or operation of such housing uneconomic and are not consistent with local needs.

1. The decision of the Board of Appeals is hereby amended by making the following changes in the conditions. These changes represent changes made by the Committee in light of our foregoing discussion, and changes stipulated or agreed to by the parties as indicated by the record.

- (a) Condition #1
The total number of units allowed shall be 148 instead of 82. The developer shall have the option of achieving this

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reduction from the 164 units set out in this proposal by eliminating one or more proposed

buildings, and/or by eliminating units from several buildings. The distribution among two, three and four bedroom households shall be in the ratios presently indicated in Condition #1, and the proportions of units reserved for low or moderate income rentals, and for the handicapped, shall also be in the percentages, proportions and numbers as presently indicated in Condition #1.

- (b) Conditions #2, 7, 13, 14, 15, 16, 17, 18 and 24 shall remain in effect.
- (c) Condition #4
The provision that the buildings be no higher than 35 feet from grade and shall contain no more than 12 units each, is retained, provided that the 12 unit buildings may be connected by breezeways, covered passageways or similar structures. The other provisions of Condition #4 are removed.
- (d) Condition #5
The provisions that Mill Valley replace

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plantings which die within two years is amended to permit the developer to replace them with plantings more suitable to the environment. The provision requiring the preservation of the stand of trees on the northeastern boundary of the site is eliminated, but the developer is strongly urged to preserve this stand of trees if at all practicable. The balance of the provisions in Condition #5 are retained.

- (e) Condition #6
This condition shall be reworded to read as follows:
"The developer shall stipulate to the design and location of the detention ponds, after consultation with the Town Engineer. No building shall be constructed within 50 feet of the edge of the detention ponds."
- (f) Condition #8
This condition shall be reworded to read as follows:
"The petitioner shall submit written evidence to the Board of Appeals that the second access

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way through the property of Brittany Manor Apartments may be legally developed by the

petitioner. The developer shall stipulate to the design of the secondary access, after consultation with the Town Engineer and Fire Chief."

- (g) Condition #9
The requirement that the resident manager have responsibility for maintaining the emergency access free of snow and parked cars shall apply only to that portion of the emergency access which is on the parcel. All other provisions of Condition #9 are retained.
- (h) Condition #11
Condition #11 is amended by substituting therefore the following language:
"a. The developer shall comply with the requirement that the occupants of the low and moderate income units be selected in cooperation with the Amherst Housing Authority as imposed in Paragraph 11 of the Board's Permit;
b. The developer shall comply with all applicable requirements of the

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subsidizing agency regarding initial rent-up or sales, subsequent rentals or sales, and avoidance of undue concentration of low and moderate income tenants;

- c. The developer shall comply with any and all occupancy restrictions and provisions for the set-aside period for the subsidized units imposed by the subsidizing agency under the applicable subsidy program."
- (i) Condition #12
This condition, which provides for a rent-free daycare facility, is amended by changing the period to a comma, and adding: "So long as the daycare operator is a non-profit entity. If the daycare operator is a for-profit entity, Mill Valley may charge a fair and reasonable rate."
- (j) Condition #19
The developer has agreed to confer with the Police Chief on the design of the access road. By stipulation between the parties,

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the following language is added as
Condition #19:

"In the event that a Comprehensive Permit is issued as a result of those proceedings, The Zoning Board of Appeals agrees as follows:

- a. That if the regulations governing CDAG grants in effect at the time of final approval of the CDAG Grant to the Town of Amherst should require that the access road, on which part of the CDAG Grant will be expended, must be owned by the Town of Amherst, then to the extent and in the manner required by law, the Town will take title to that portion of the Parcel on which the access road is to be constructed;
- b. That if the regulations governing CDAG grants in effect at the time of the final approval of the CDAG Grant to the Town of Amherst permit CDAG funds to be expended on land managed or regulated by the Tour of Amherst, then the Zoning

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Board of Appeals, on behalf of the Town of Amherst, shall execute a management or regulatory agreement consistent with that requirement."

- (k) Condition #23
Condition #23 is amended by substituting therefore the following language stipulated by the parties:
"In the event that a Comprehensive Permit is issued as a result of these proceedings, the Zoning Board of Appeals agrees as follows:
Pursuant to its authority under M.G.L. c. 40B, ss20-23, to endorse the subdivision plan as filed by Mill Valley, thereby creating a site for Hollister apartments of 4.761 acres, and to withdraw the condition in Paragraph 23 of the Board's Permit that no fewer than five acres shall remain as part of the Hollister apartment site after division and sale of the Hollister Realty Trust property to Mill Valley."

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- (l) Condition #26
Condition 26 is amended by substituting the following language stipulated to by the parties:
In the event that a Comprehensive Permit is issued as a result of these proceedings, the Zoning Board of Appeals agrees as follows:
"To make any changes in the special permit authorizing Hollister apartments necessary for transfer of property and change of access, and to withdraw the condition in Paragraph 26 of the Board's Permit that any such changes be made some time in the future."

- (m) Condition #27
Condition #27 is amended by substituting the following language stipulated to by the parties:
"In the event that a Comprehensive Permit is issued as a result of these proceedings, the Zoning Board of Appeals

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agrees as follows:
To make any changes necessary in the special permit authorizing Riverglade Apartments necessary for change of access, and to withdraw the condition in Paragraph 27 of the Board's Permit that any such changes be made some time in the future."

- (n) Such conditions, or portions of conditions, set out in the Board's decision, which are not specifically allowed by the foregoing amendments, are to be deemed removed for reasons previously indicated in this memorandum.

2. The Comprehensive Permit shall be subject to the following additional conditions:

- (a) Construction shall in all particulars be in accordance with all present applicable zoning and building by-laws for the construction of multi-family buildings, except those which are not consistent with this decision. The subsidizing agency or agencies may impose

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requirements for compliance with any other recognized building codes or portions of such codes.

- (b) No construction shall commence until detailed construction plans and specifications shall have been approved by the subsidizing agency or agencies, and such agency or agencies have granted a construction mortgage loan, and subsidy financing for the project has been committed.
- (c) Prior to final financial commitment, the subsidizing agency shall, as part of its project review, comply with the applicable requirements of the Massachusetts Environmental Policy Act, G.L. c. 20 ss.61-62.
- (d) If anything in the decision of the Housing Appeals Committee would seem to permit the building or operation of such housing in accordance with standards less safe than the applicable building and

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and site plan requirements of the subsidizing agency or agencies, the standards of such agency shall control.

HOUSING APPEALS COMMITTEE

Maurice Corman, Chairman

End Of Decision