

HOUSING APPEALS COMMITTEE
Bedford Town, Inc.

Decision # **72-07**
Appellant: **Bedford Town, Inc.**
Appellee: **Bedford Board of Appeals**
Date: **August 27, 1973**
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I. STATEMENT OF PRIOR PROCEEDINGS.

Bedford Town, Inc. (Appellant) [1] a limited dividend corporation can March 2, 1972 filed with the Board of Appeals of Bedford (the Board) (the Appellee) an application for a comprehensive permit to build ninety six units of multifamily, subsidized housing in approximately ten acres of land at the rear of the Bedford Shopping Center, off New Punster Road in Bedford.

The application was filed under Chapter 774 of the Acts of 1969, now M.G.L. Chapter 40 B, sections 20-23. [2]

- [1] The Appellant, Bedford Town Inc. may be variously referred to throughout this decision as the "Petitioner" or the "Applicant."
- [2] References to sections 20-23 may be referred to throughout this decision without repeating "M.G.L. Chapter 40 B."

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Subsidy financing was to be provided by Massachusetts Housing Finance Agency.

A public hearing was held by the Board on May 4, 1972. By decision filed June 13, 1972, the Board denied the application.

From that denial Bedford Town, Inc. appealed to the Housing Appeals Committee (HAC). After due notice, site view, and preliminary conference a public hearing was held by HAG on August 10, 1972. The hearing was conducted as an adjudicatory hearing under the provisions of M.G.L. chapter 30 A, and the Rules and Regulations of HAG. Witnesses were sworn and full right of cross examination was afforded the parties.

Further facts will appear in the discussion of the issues to which they relate.

II. ISSUES.

The Board's decision found that the Petitioner is an eligible Applicant and that it proposes to build low and moderate income subsidized housing as defined in the statute (sec. 20). [3]

The Supreme Court decision of March 22, 1973, decided, against the contention of the Appellee raised at the hearing (TR1: 4), that the Board had power to grant a comprehensive permit in a zoning district where such construction is not permitted under the local zoning bylaw. [4]

[3] Board's Decision Findings # (1) and # (2) d M.G.L. ch. 40, sec. 20 "Definitions."

[4] Board of Appeals of Hanover v. Housing Appeals Committee Board of Appeals of Concord v. Housing Appeals Committee 1973 Mass. Adv. Sheets p. 491, hereinafter referred to as the S.J.C. decision.

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The single issue before us, under the statute (sec. 23) is whether or not the Board's denial was "consistent with local needs." [5] The 20 [6] definition of this term in Section and the discussion of this concept in the S.J.C. decision indicates the following guidelines in resolving this issue. We apply two general tests.

(1) We must determine, first, whether the town has met any of the three mathematical minimum criteria set out in section 20 (see note 4) i.e. the 10%, 1 1/2, or 0.3% minima. If any one of these criteria has been met, we must uphold the Board's decision as "consistent with local needs."

[5] Section 23. The hearing by the housing appeals committee in the department of community affairs shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was reasonable and consistent with local needs...

[6] "Consistent with local needs", requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or

to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use or (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year; provided, however, that land area owned by the United States, the Commonwealth, or any political subdivision thereof, the metropolitan district commission or any public authority shall be excluded from the total land area referred

to above when making such determination of consistency with local needs.

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The Board's decision (Finding 114) specifically found that the 10% minimum had not been met, and its Finding 115 incorporated by reference the letter from its Building Inspector dated April 10, 1972, indicating that the 1 1/2% and 0.3% minimum statutory acreage requirements had not been met.

(2) If no one of the three mathematical criteria has been met, we apply the second general test. This requires us to balance certain factors--health and safety hazards or valid planning concerns, i.e. site or building design, or need for open space, against regional low and moderate housing needs, together with the number of low income persons in the town (see Sect. 20, quoted in fn. 6)

The existence of regional need and local need was not in dispute. [6a] The Board's decision, at page 3, states that:

"The Board realizes the need for additional housing in the town and is basically in sympathy with the intent and concept of Chapter 774."

A member of the Board testified as to this need (TR1: 79) and also that no multi-family apartment zoning existed in Bedford. (TR1: 81. See also TR1: 43)

At least eight unsuccessful attempts had been made over the years to establish multi-family zoning by Mr. DeBonis, the Appellant's principal. The last, in March 1972, the vote at the

Town meeting was 205 in favor and 11) against. A difference of five votes would have provided the two third vote necessary to carry.

[6a] The 1970 Federal census shows a total of 2,988 families in Bedford. 78 families (2.6%) comprising 344 persons, are below the poverty level (\$3,743 or less per year for a non farm family of four.

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The Board's decision to deny the comprehensive permit based on its findings relative to sewer, water, and drainage conditions which the Board found to constitute health and safety hazards, sufficient under the statute to outweigh the regional need considered with the number of low income persons in Bedford.

A. Sewer Needs.

The Board found that existing sewer need already exceed sewer capacity, and the state has refused to permit further connections to the sewer until new pumping stations and lines to Lexington are Completed. Completion is scheduled for late 1973 or early 1974.

In his opening presentation to HAG, Counsel for the Appellant stated:

"As to the sewer, the Petitioner concedes that there is a present sewer problem in the Town of Bedford and would stipulate that any decision granting relief by this Committee should be conditioned upon permit from a State Division of Water Pollution Control to connect to the sewer before we could undertake any building or certainly any occupancy." (TR1: 4) (See also TR1: 54; 1: 67-69)

Members of the Board in executive session, urged the imposition of such a condition in the comprehensive permit, rather than an outright denial, as the proper way to handle the problem of current inadequate sewage facilities. We find that legislative intent behind Chapter 774, would have favored such a disposition as "consistent with local needs," rather than an outright denial.[7]

[7] See minutes of Executive Session, Board of Appeals, May 25, 1972 pp. 2-4. Attached to Appellee's Answer.

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B. Water Supply

The Board's finding as to water supply was as follows:

"The Bedford water supply is presently inadequate to meet the existing needs of the town. New well exploration is in progress but will not be complete until late 1973. At best this increase will only provide for the current needs and not for any expansion."

We find that water supply problems do presently exist in Bedford. Camp Dresser and McKee, the town's water consultant so reported. In June of 1972 the selectmen declared a water emergency and also prohibited, up to September 4th, building construction necessitating water use. (TR1: 62-64)

On the other hand there was testimony that in addition to new well exploration, there were pending negotiations to purchase a million gallons a day from Burlington. (TR1: 49-53) If, as indicated in Mr. DeBonis's testimony, Bedford can pump two and a quarter million gallons daily, and uses two million daily during peak, and less than a million daily during off peak periods, the probabilities are that the new sources will provide for more than current needs as found by the Board. There is more than a

reasonable probability that the daily requirement of this project can be comfortably handled at that time.

In any event, Mr. DeBonis has testified, on the basis of his experience, and tests made some years ago, that as an alternative, if the Bedford water supply problem existed, continued, or became critical, he was prepared to sink his own artesian wells and create his own water storage facilities on the premises. (TR1: 53-4)

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At the executive session of the Board referred to, the same suggestion was made with respect to water supply as to sewer facilities, i.e. that rather than deny the comprehensive permit outright, the permit be granted with conditions that would adequately safeguard health and safety of occupants and town residents. We find that such a disposition would have been more in consonance with legislative intent and consistency with local needs than outright denial.

C. Drainage Problem

This was definitely the issue of greatest concern to the town officials. In communications to the Board of Appeal under Section 23, the Selectmen, the Board of Health, and the Town Engineer all

recommended that engineering studies be undertaken and a satisfactory drainage plan be approved by the Town Engineer before a comprehensive permit be granted,

Pertinent facts relative to the drainage problem are as follows:

In 1966 Wilbur Nylander, G.E. was engaged by Mr. DeBonis to do engineering design for drainage of a single family subdivision under existing zoning called the "Dunster Street Subdivision." He found that at the southern boundary of Mr. DeBonis's land on the northerly side of Great Road opposite Loomis Street there existed the invert to a 48 inch culvert leading under Great Road, which connected to a 48" drain pipe which ran with along Loomis Street.

Mr. Nylander did not examine the outlet of this drain, but other evidence indicated that it discharged into a ditch that discharged into Elm Brook.

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North of the invert to this culvert lay the watershed that drained into the culvert, which included the "Dunster Street Subdivision," which includes the site of this petition.

On examination of topographical map, Mr. Nylander traced the perimeter of this drainage area, and calculated it to be 270 acres, examining existing zoning requirements, he arrived at runoff coefficient based on an average single family house, on a 32,000 foot lot, plus street areas, net one house per 57,000 feet, over the entire 270 acres, with usual impervious roof and pavement areas, and usual grass, soil, swamp and natural retention areas. He then divided the 270 acres into eight sub-areas, and calculated the runoff on each, including in each case the cumulative runoff from the areas upstream at 90 cubic feet per second.

These calculations were based on the requirements of a five year storm, which Mr. Nylander testified, was recognized engineering practice, and which represented the standards in many towns around New Bedford for which Mr. Nylander had been engaged to perform similar engineering services.

Mr. Nylander's calculations led to a requirement for a 48" pipe at the connection to the existing invert under Great Road, which corresponded to the size of the invert.

Mr. Nylander designed the piping for the Punster Street subdivision, which ranged from 36" to 48" and same was installed according to his design, The subdivision was accepted by the Planning Board which presumably implied approval of Mr. Nylander's drainage design.

The culvert under Great Road, to which Mr. Nylander's system connected, and the rest of the drainage system down Loomis Street and via drainage ditch to Elm Pond, had been designed in 1965 by Haley and Ward, Town consultants. A July 9, 1965 letter from them to the Town indicated that they had calculated the drainage area" as 300 acres, that the run-off was estimated at 90-120 cubic feet per second, and that while a 54" pipe was indicated the proposed 48" pipe would handle all except really severe storms with minimum back flooding. The 48" drain was stated to be the minimum to be considered as an outlet for this area.

A letter dated March 31, 1972 from Haley and Ward to Mr. Burdick, Town Engineer, reviewed this system in the light of the Appellant's current proposal.

This review indicated that the original system had contemplated a 25, impervious surface, and a certain amount of retention in the drainage area. The difference between single family and apartment house development represented a difference of runoff of 4 cubic feet per second as against 11 cubic feet per second. While this affects only the ten acres of the current proposed as against the 270 or 300 acres of the total drainage area, the problem is exacerbated because the site is adjacent to the area drainage outlet, and so is affected by the short-duration effect of high intensity storms rather than the longer duration effect of less intense storms which affect the discharge of the entire area (300 acres).

The proposed 10 acre development by itself would have a limited effect on the runoff from the entire 300 acre drainage area, but will reduce the area available for storage by 7% and, because the top of the 48" pipe is

only two feet below the surface in the vicinity of Dunster Road (this elevation is controlled by the water surface of Elm Brook). The site area will be subject to high ground water table and limited flooding during high runoff periods of severe storms.

In short, substantial changes will require additional drainage capacity, and in addition, downstream flooding may result because of the limited outlet conditions caused by Elm Brook.

Mr. Burdick, Town Engineer, testified that the increased density of the proposed project decreased the retention area upon which Haley and Ward's engineering had been predicated, and to increased the rate of runoff. If the engineering was predicated on a five year storm which presupposed retention areas, diminution of

retention areas increased runoff rate to a point close to flooding.

He was particularly concerned about the below-grade entrances and apartments. He indicated that in previous construction in this area, Mr. DeBonis had followed a standard established by Mr. Burdick in concert with the Planning Board whereby grading around the buildings would be at least a foot above surrounding terrain as a precaution against flooding.

Mr. Burdick didn't believe in engineering for a five year storm. He changed Bedford design calculations from five to ten years which increases the size of the pipe.

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He testified that most of the towns around Bedford engineer for ten years; Newton and Watertown for twenty years. [8]

This rather extended review of the testimony is intended to reflect the real concern of the town about the dangers of flooding in this site. We find that existing provisions for drainage are not adequate for the proposed increased intensity use.

Fortunately, the testimony of the two engineers, the developer Mr. DeBonis, and the stipulation of counsel for the Appellant make possible a solution whereby the intent of the legislature, and the proposal made at the executive session of the meeting of the Board for a conditioned comprehensive permit (see fn. #7 supra) can be implemented.

Both Mr. Nylander and Mr. Burdick testified that it is possible to engineer safeguards for adequate drainage into this proposal. (TR1: 27, 76)

Mr. DeBonis testified his willingness to seek and abide by such engineering advice. (TR1: 46)

Counsel for the Appellant stated the willingness of the Appellant to stipulate to the submission of a drainage plan satisfactory to the Town Engineer as a condition of the comprehensive permit. (TR1: 76)

[8] This resume of the evidence on the drainage problem is summarized from the following portions of the Record:

Testimony of Wilbur Nylander (TR1: 16-37)
Testimony of Walter F. Burdick (TR1: 69-76)
Testimony of Cosmo A. DeBonis (TR1: 46)
Stipulation by Mr. Counihan (TR1: 46)

Appellant's Plan showing existing and proposed drainage lines
(Appellant's Exhibit #1)
Haley and Ward 1965 Drainage Plan Letter of July 9, 1965,
March 31, 1971. Appellees Exhibit 1, 2.

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We find that legislative intent will be more nearly implemented and the requirements of consistency with local needs more adequately met with respect to drainage more adequately safeguarding a comprehensive permit with appropriate conditions than by outright denial.

III. FINDINGS, RULINGS AND ORDER.

In view of our subsidiary findings and rulings, and upon a review of the whole record, under the provisions of G. L. ch. 40 B, Sec. 23, the Committee rules that the decision of the Board of Appeals of the Town of Bedford was unreasonable and not consistent with local needs.

The decision of the Board is hereby vacated and the Board is directed to issue a comprehensive permit to the Appellant.

Said comprehensive permit shall provide for the construction of a housing development on the locus which is the subject of this appeal in the approximate number of units and design as presented before the Housing Appeals Committee.

Said comprehensive permit shall be subject to the following conditions:

1. Construction shall in all particulars comply with the Building Code of the Town of Bedford.
2. No construction shall commence until drainage plans for the site shall have been prepared and approved by the Engineering Administrator of the Town of Bedford, and construction shall be in accordance with such plans.

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3. Occupancy shall not be permitted until a sewer system has been constructed and connection to the sewer system of the Town of Bedford has been (1) approved by the Division of Water Pollution Control of the State Department of Natural Resources and (2) connection has been made.
4. Occupancy shall not be permitted until either (1) connection to the water supply of the Town of Bedford has been authorized and made, or (2) adequate water supply

is furnished from an onsite system.

5. No construction shall commence until detailed construction plans and specifications, substantially in accordance with the preliminary plans submitted to the Housing Appeals Committee, shall have been approved by the Massachusetts Housing Finance Agency and until said Agency has granted a construction mortgage loan for the construction of the project.
6. Neither the petitioner, nor its president, Cosmo. A. DeBonis, nor anyone affiliated with the petitioner, shall complete Dunster Road so as to permit passage from the site along the full length of said Dunster Road unless directed so to do by the Planning Board of the Town of Bedford.
7. If anything in the decision of this Committee would seem to permit the building or operation of such housing-in accordance with standards less safe than the applicable building and site plan requirements of the Federal Housing Administration or of the Massachusetts Housing Finance Agency, the standards of whichever agency is financially assisting such housing shall control.

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8. The comprehensive permit shall provide that local officials shall carry out compliance inspections in the usual manner. Should disagreement between the builder and local officials arise, certification by the Department of Community Affairs, if requested, shall be adequate proof of compliance with any requirement under the comprehensive permit, or any of the other terms of this order.

Housing Appeals Committee

Maurice Corman
Hearings Officer

William C. Ames

End Of Decision