

HOUSING APPEALS COMMITTEE
Dartmouth West Housing Associates

Decision # **71-04**
Appellant: **Dartmouth West Housing Associates**
Appellee: **Zoning Board of Appeals of Towns of Dartmouth**
Date: **August 27, 1973**
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DECISION

1. STATEMENT OF PRIOR PROCEEDINGS.

Dartmouth West Housing Associates (the Appellant), submitted to the Zoning Board of Appeals of the Town of Dartmouth (the Board, the Appellees), on August 10, 1971, an application for a comprehensive permit to build four hundred and ninety-eight units of low and moderated income housing on Route 6, North Dartmouth.

The application was filed under Chapter 774 of the Acts of 1969, now M.G.L. chapter 40 B sections 20 to 23,

Subsidy financing was to be under "Section 236" of the National Housing Act. The project was to be constructed in two phases, the first to contain 264 units on 25.9 acres, the second to contain 234 units on 23 acres.

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After public hearing on September 2, 1971 the Board denied the permit on October 6, 1971, issuing a written "Statement of Reasons

for the Decision" as required by the statute.

From this denial the Appellant appealed to the Housing Appeals Committee (HAC). The hearing covered six days and was conducted before two members of the Committee, one of whom had been appointed by the Chairman to conduct the hearing. A site view was taken, with representatives of all parties present.

The hearing was conducted under M.G.L. chapter 30 A, providing for adjudicatory hearings by State agencies and under the Rules and Regulations of HAC. At the conclusion both parties submitted oral arguments and very learned briefs.

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

On March 22nd of this year the Supreme Judicial Court (S.J.C.) issued its landmark decision (the S.J.C. decision), upholding the first two decisions issued by HAC(1). The S.J.C. decision is determinative of a number of issues raised by the Appellee: the constitutionality of Stat. 1969, chapter 774; the power of the Board or HAC to override local zoning and subdivision requirements; the decision that a comprehensive permit does not constitute a variance or "spot zoning;" and the nature of the appeal hearing before HAC as a de novo hearing.

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

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Motions filed by the Board to dismiss on the ground that the appeal hearing was not heard within twenty days, and to strike because the hearing did not take place before a majority of the committee, have been denied and are dealt-with in a separate memoranda.

II. ISSUES.

The statute (Section 23) states that the appeal hearing, in the case of a denial by the Board, "shall be limited to the issue of whether... the decision of the Board of Appeals was reasonable and consistent with local needs," and in fact the major effort of the parties was directed to that issue. Before discussing the questions that were raised under that issue, we deal with procedural and Jurisdictional issues, which the Appellee strongly contended, (1) disqualified the Applicant from submitting or pursuing this application and (2) made it impossible for the Committee to render a proper decision under the statute. The Appellee contended:

- (A) That the Appellant has no standing before the Board or HAC;
- (B) That the plans submitted by the Appellant to the Board and HAC are insufficient on which to a decision under the statute.

A. STANDING OF THE APPELLANT.

The Appellee contends that the Appellant has no "standing" to seek a comprehensive permit for three reasons:

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1. that the Appellant has not sufficient property interest in the site;

2. that the Appellant is not a limited dividend organization;
3. that the Appellant has terminated its existence as a legal entity.

1. Property Interest of the Appellant.

The property interest of the Appellant, Dartmouth West Housing, derives from an option granted to it by Dartmouth Joint Venture(2).

The Appellee attacks this option on various technical grounds: that it contains no time limit, that the consideration is nominal, that the price is indefinite. The fact that the parties are friendly and would agree later to a price or an appraisal, argues the Appellee, should make no difference.

We are not faced here with the issue of whether or not the option is enforceable, but whether it is sufficient to confer "standing." Our purpose is to implement legislative intent to see this housing built, and our only concern is whether or not the Appellant will be able to go ahead if the comprehensive permit is granted. In that context the friendliness between the optionor and optionee, which assures that mere technical deficiencies in this option, if they exist, can be corrected, does make a difference. The Supreme Court decision indicated that the Board or the Committee may rely on the selected financing agency's property interest requirements, and not require the Appellant to establish a present title in the site (3).

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2. See Appellant's exhibit #10.
 3. See S.J.C. decision at p. 525 and note 24 therein.

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In any event the transfer of the 50% interest of the Frank partners to U.S. Gypsum, the holder of the other 50% (4) has combined the total equitable interest of optionor and optionee, Dartmouth Joint Venture and Dartmouth West Housing, in one owner, U.S. Gypsum. This eliminates any possibility of conflict between optionor and optionee.

Cafes cited by the Appellee, which are actions to enforce options or agreements, are not applicable to our concern, which is merely to ascertain if Appellant has sufficient property interest to pursue this application. We so find and so rule.

2. Is Appellant a Limited Dividend Organization?

Dartmouth West Housing Associates was organized as a limited partner-ship between two general groups, the Frank Associates, and U.S. Gypsum Corporation. (5) This is a simple statement of what in the record is a fascinating Journey through a labyrinthine maze of big business involving Frank Associates, the individual partners of Frank, their relationship to Gypsum, and to each other, and to Frank Development Inc., Dartmouth West Village, North Dartmouth

joint Venture, plain Dartmouth Joint Venture, and the relationships between the optionor and optionee.(6)

The limited partnership agreement states "It is the intent of the partners that the partnership be a limited dividend organization within the meaning of that term as used in section 21 of chapter 40B of the General

4. (TR6: 9-10 Appellant's Exhibits 1113, 1121.)

5. See Appellant's Exhibit 1113. "Limited Partnership Agreement."

6. See Appellant's brief pp. 5-5 and record references cited therein.

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Laws of Massachusetts" (TR2: 7-8). It provided also for compliance with F.H.A. limited dividend regulations. Limited dividend status is a prerequisite for F.H.A. section 236 financing. Appellant Gas already received initial approval for such financing from F.H.A.

Such eligibility meets the definition of a limited dividend organization under the Rules and Regulations of HAC. (7)

We rule against the Appellee's contention that the definition of a limited dividend organization in the HAG Rules and Regulations section 1(f) is self serving, circular, or unconstitutional. (8)

We rule that the Appellant is a limited dividend organization.

3. Has Appellant Ceased to Exist?

We described above the transfer of the 50% interest from the individual Frank partners to U.S. Gypsum, holder of the other 50%. We cited these facts in support of Appellant's property interest. The Appellee contends that, on the contrary, the net legal effect of this transfer is to extinguish the existence of Appellant as a legal entity citing M.G.L. ch. 109, section 20.

We are not concerned with whether Dartmouth's status is now that of a limited partnership or a wholly owned subsidiary of U.S. Gypsum.

7. TR2: 4-5; 7-8. Appellant's Exhibit 1111, 16B, 16C. TR1: 74, 80.

8. HAC Rules and Regs.

See 1(f). Limited dividend organization means any applicant which (a) proposes to sponsor housing under chapter 40 B and (b) is not a public agency and (c) is eligible to receive a subsidy from a State or Federal agency after a comprehensive permit has been issued. See Op. A.G. Aug. 7, 1970.

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We rule that Dartmouth West Housing remains a "limited dividend or the statute after the transfer and that is our only concern under

the statute.

We rule that the Appellant has "standing" on all three grounds against such "standing" by the Appellee.

B. ARE APPELLANT'S PLANS SUFFICIENT?

We ruled in our decision in the Hanover case (9) that detailed construction plans need not be submitted with the initial application, and indicated that it would have an inhibiting effect on the intent of the legislature in facilitating this housing to require the Applicant to go to a great expense for detailed plans with no assurance of a permit.

The Appellee argues that the Statutory directive to the board of appeal to seek input from other town boards and officials is meaningless if the plans don't contain the detail the boards need for passing on them.

The argument arises from a misconception as to the scope of an application for a comprehensive permit. It is not, at this stage, a detailed and complete application for construction permit.

It is similar to the first submission by any other developer - not to the building-department but to the planning department; not for a permit to construct, but for something in the nature of a preliminary site or feasibility approval. Campanelli was not required to file detailed construction plans with his initial submission, which was to the planning board, not the building department. (10)

9. Country Village Corp. v. Board of Appeals of Hanover HAC decision July 13, 1971.

10. Appellee's Exhibit 1121, (TR4: 43-44.).

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By the time the conventional developer has gone to the expense of submitting detailed construction plans to the building department, already has a preliminary site approval from the planning department and no zoning problems.

The board of appeals rather than the planning department was undoubtedly chosen by the legislature as the single agency through which the single comprehensive permit was to issue because the major problem under Chapter 774 was seen to be zoning, not site planning, or construction details.

The legislature provided for an input from the other officials because the average board of appeals' expertise is normally restricted to questions of variances, special permits, spot zoning and the like. The input of the other officials was to help the board of appeals to determine general feasibility, not to pass on details.

Of course, a comprehensive permit involves more than

preliminary site approval. There should be some preliminary information to indicate the type of building, type of construction, building placement, roads, interior and exterior traffic arrangement, parking, firefighting and service vehicle access, etc.

This is a general indication only and by no means is intended as a complete check list.

Because the concerns of the subsidizing finance agency up to the point of preliminary approval required Just about the same amount of detail in initial plan submissions, it was determined by HAG, in early cases, to adopt - similar criteria. Thus the plans which had to be prepared for F.H.A. or M.F.H.A's preliminary approval would suffice for initial submission for a comprehensive permit.

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In doing so HAG anticipated the principle enunciated in the S.G.C. decision with respect to the Appellant's property interest, that is, that the Board or HAG could rely on the selected financing agency's requirements.

And just as the conventional developer must eventually develop detailed construction plans, and secure all necessary official approvals to insure compliance with all reasonable health, safety, building and planning requirements, so the developer under a comprehensive permit, though freed by the statute from some local zoning subdivision and planning requirements must eventually come up with the same set of detailed constructions plans and assurances of compliance with all reasonable health, safety, building and planning requirements. This he is constrained to do by the rules and requirements of the Design Review teams and construction engineer terms of a subsidy financing agencies, and by reasonable conditions attached his comprehensive permit by Boards of Appeal or by HAC, as was done in the Concord and Hanover cases. The practice of attaching such conditions to the comprehensive permit was-specifically approved by the S.J.G. (11)

In this case the Appellant has agreed in his submission to conform to all the requirements of the local building codes, and other applicable regulatory agencies, and all local rules and regulations governing subdivisions, except the specific list of variances from the zoning code, in particular the "cluster zoning concept." (12)

In view of this explanation of the function of preliminary plan submissions, questions raised by the Appellee as to adequacy of provisions for roof snow load, size of exterior studs, and the adequacy of fire exits, need

11. S.J.C. decision, p. 520 ff.

12. Appellant's Exhibits 4,5,6,7. See note on plan sk 14 a Appellant Exhibit 115. "Plans shall conform to all the requirements of local building code and other applicable regulatory

agencies.

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not be passed on in this decision but may be dealt with by conditions attached to the permit.

We have examined the plans submitted to the Board, and to HAG.

The plans show a site layout, building placement, relation to public streets, interior and exterior traffic accommodations, and typical elevations and floor plans. We find and rule that the plans as submitted comply with the requirements of the statute for submission with a comprehensive permit application.

C. WAS THE BOARD'S DECISION CONSISTENT WITH LOCAL NEEDS?

The issues we have discussed up to this point are procedural and jurisdictional issues relating to standing and rights of parties to pursue actions, and powers of tribunals to hear them.

The only substantive issue related to the subject matter of the statute, with which we can concern ourselves in this hearing, is clearly set out in the statute, which at the risk of redundancy we repeat at this point.

Sec. 23. The hearing by the housing appeals committee... 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...

The statute contains a detailed definition of "Consistent with local needs," but section 20 contains no similar definition for "reasonable." The S.J.C. decision states that the word "reasonable" is surplus verbiage and is included in the concept "consistent with local needs" in that the Board's decision could be reasonable only if it was consistent with local needs.(13)

The statutory definition (section 20) lists a number of sub-issues which must be considered by HAC in arriving at its decision on the general

13. S.l.C. decision. Footnote 1117, p.514.

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issue of consistency with local needs. Guidelines laid down in the S.J.C, decision clarify considerably the process by which HAC considers these sub-issues in arriving at a decision on the general issue: whether or not the denial by the Board was consistent with local needs.

We consider first whether or not the town has met any of the

statutory statistical minima set out in section 20. If the town has met any one of these minima we must uphold the Board's denial as consistent with local needs." The three statutory statistical minima under the definition of "consistent with local needs" (section 20) are that:

(1) low or moderate income housing exists which is in excess of 10% of the housing units reported in the latest decennial census of the city or town.

or

(2) on sites comprising 1 1/2% or more of the total land area zoned for residential, commercial or industrial use.

or

(3) the application... would result in commencement of construction of such housing on sites comprising more than three tenths of one percent 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.

If the town's denial of the comprehensive permit doesn't meet the first general test, i.e., whether the town has met any one of the three

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statutory minima, we apply the second test of consistency with local needs. 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. If these factors outweigh regional need, we must rule that the Board's decision is consistent with local needs and uphold it.

I. Consistency with Local Needs:

Is the board's Decision Consistent with Local Needs Under Any One of the Three Statistical Criteria Set Out in the Statute (section 20)?

The town conceded, as to this first test, that it does not meet two of the three statutory criteria--the 10% and 1 1/2% minima (TR1: 85-86).

The town argues that its decision was consistent with local needs under the third criterion, i.e. that granting the permit would result in the commencement of construction during the calendar year, of low and moderate income housing on sites comprising more than three tenths of one percent of "the total land area zoned for residential, commercial, or industrial use."

a. The Three Tenths of One Per Cent Criterion.

The town based its contention on computation based on acreage figures which fortunately are not in dispute between the parties. These undisputed acreage figures are: (14)

[14] Appellee's Exhibit #31 "Area Statistics Town of Dartmouth".

See TR5 16-25, 69-86 which will aid in understanding how the figure of 8,749 acres of "unzoned" area was arrived at.

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1. Total acreage of Dartmouth	39,552 acres
2. Government lands and water bodies--ponds, reservoirs, Bay	8,905 acres
3. Tax titles held by town (not foreclosed)	
4. Swamps, Rivers, Marshlands	6,656 acres
5. Land "unzoned"	8,749 acres

Two further facts are relevant to and understanding of this issue: the Campanelli development, and the phasing aspect of Appellant's development.

Campanelli, Inc. obtained in 1971 a subdivision permit for 172 units, and expected to build 100 units in 1972, to cover in 1972, to cover 43 acres (15), or at least 88 units to cover 37,84 acres (Appellee's brief p. 10). Although this was a standard subdivision, Campanelli had an application in process for a federal 235 I subsidy. We find that it is possible under this subsidy program to sell these units either through 235 I subsidy or through conventional financing to any buyer. (16) We find further that Campanelli is neither a nonprofit organization, limited dividend organization, or public agency within the provisions of chapter 40 B, Sec. 20.

The Appellant's application clearly contemplated building in two phases. Phase I contemplated 264 units on 25.9 acres to be constructed in 1972: Phase II contemplated 234 units on 23 acres to be built in 1973. The Board also had in hand Appellant's F.H.A. application and H.U.D. correspondence which indicated that this phasing was done at H.U.D.'s request. (18) We find that the Board had ample notice of the fact that the Appellant intended to commence construction on a site no larger than 25.9 acres in 1972.

15. TR4: 21, 37, TR5: 8.

16. TR4: 32, 33, 54.

- 17. Appellant Exhibit #14.
- 18. Appellant Exhibit #16A, 16C.

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The Appellee took the total Dartmouth acreage of 39,552 acres, deducted from it the (1) governmental lands and water bodies, (2) tax title land, (3) swamps, rivers and marshes, and (4) "Unzoned" land, totalling 24,635 acres, leaving 13,917 acres against which he computed .3% as 44.75 acres. From this he deducted proposed Campanelli construction in 1972 under chapter 40 B, section 20.

A tabulation of Appellee's computation follows:

Total Dartmouth acreage		39,552
Deduct		
Gov't land and water bodies	8,905	
Tax titles	325	
Swamps, Rivers, Marshes	6,656	
Unzoned	8,749	24,635

		14,917
$.3 \times 14,917 = 44.75$ less Campanelli 37.84 ----- 6.91		

The Appellee argued further that the correct acreage for the Appellant's project was 86.87 acres which represented North Dartmouth Joint Venture's total parcel, (19) that Appellant could not arbitrarily cut this to 48.9 acres representing Phase I and II or 25.9 acres representing Phase I only, without complying with Dartmouth's subdivision control law.

Appellee argues that even the smallest figure, 25.9 exceeded the 6.91% which he computed to be available under the .3% criterion.

 19. Appellee's exhibit 115.

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The Appellant argued that the only figure properly deducted from the total Dartmouth acreage of 39,552 acres was the amount of 8905 acres representing Government Lands and Water Bodies, (ponds, reservoirs, the Bay), that the other three categories, (1. tax title lands, 2. swamps, rivers, and marshes and, 3. unzoned lands) were improperly deducted, that on this computation .3% amounted to 91.84 acres.

Appellant argued that the Campanelli project should not be counted since neither the 235 I program nor Campanelli, who was not

a limited dividend developer, qualified under chapter 40 B. Appellant argued that even if Campanelli were included the maximum subsidized starts for 1972 would total 68.9 acres computed as .3% by the Appellant.

A table of Appellant's figures follows:

Total acreage	39,552 acres
deduct Gov't lands and water-bodies	8,905

	30,647 acres

.3 x 30,647 = 91.84 acres

Appellant's Phase I	25.9 acres
Campanelli 100 units	43

	68.9 acres

We sustain the contentions of the Appellant as to all these categories. We state our conception of the rationale behind legislative intent in setting these mathematical criteria, which was to strike a reasonable balance, out of the available land, between land to be made available for subsidized housing on the one hand, and unsubsidized, fully taxable uses on the other. The .3% requirement insured that the process would be so regularized that the amount of low and moderate income housing built under

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this program in any one year should not overburden the municipal system.

1.) Tax Title Land.

Thus tax title land, subJect to a right of redemption which has not yet been foreclosed, may be redeemed, (and most often is) and be available to be built upon. In this respect it is like any land subJect to a mortgage. Not until the right of redemption is terminated by a carefully defined legal process in the Land Court (M.G.L. ch. 60) does tax title land become town owned land specifically excluded in the statute (M.G.L. ch. 40 B sec. 20) as government owned land.

2.) Swamps, Rivers, Marshes.

The wetlands classed as swamps, rivers and marshes, 6,656 acres, we do not put in the same category as "water bodies" like ponds, reservoirs and the Bay. We do not adopt the Appellee's definition of swamps and marshes as land "under water" to be excluded from "land area" within the statute. We take notice of tile numerous developments of such areas for residential, commercial or industrial use. The adoption of state wetland laws, flood plain zoning, Hatch Act licensing procedure all attest to the

constant struggle between the ingenuity of the developers to utilize such lands for development and the attempts of conservationists to preserve them in their pristine state. We would not pit rivers in the same category as swamps and marshes, but more properly in "water bodies." There is not separate acreage figure for rivers. Fortunately it is not material since, on our rulings, the Appellant's project would not exceed the .3% criterion if the total figure of 6,656 acres were treated as "water bodies."

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3.) The "Unzoned" Land.

Considerable testimony was adduced at the hearing, and there was much erudite argument and citing of cases in the briefs of both parties as to whether the 8,749 acres colored yellow on Appellee's Exhibit 1/12 was to be classed as "unzoned" or "zoned as unrestricted." Neither argument touches the real issue of legislative intent. When the statute refers to .3% of land "zoned

for" residential, commercial CT industrial use, it is using the term "zoned for" here, not in its technical sense, but in the sense of "available for." Certainly it was not the intent of the legislature that an area of the town totalling over twenty percent of its total acreage, on which the building department can and has issued permits for residential, commercial and industrial use, (TR5: 110-11) and on which an industrial park is planned (TR5: 122) is to be excluded from land available for these uses in a computation of the .3% on a narrow interpretation of "zoned for" in the statute (Sec. 20) or of "unzoned" or "zoned as unrestricted" as applied to this tract.

Such an interpretation would exclude from the operation of St. 1969 ch. 774 those towns in Massachusetts which have no local zoning, and also provide a means to others, which by repealing their local zoning ordinances, would totally exclude the operation of the statute.

We rule, therefore, that the categories of tax title lands, swamps, rivers and marshes, and "unzoned" or "zoned as unrestricted" lands are not to be excluded from total land areas "zoned for" residential, commercial or industrial use in computing the statutory criteria set out in Section 20.

We rule that the Campanelli development is not to be included in the .3% calculation of low or moderate income housing to be constructed in the

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calendar year. We base this ruling on our findings that Campanelli, who is not a limited dividend developer, is not an eligible developer under the chapter 40 B definition of subsidized low and moderate income housing, and that it is impossible to forecast how much of a 235-I development will be sold under the subsidy and how much will be sold through conventional financing.

b. Findings and Rulings.

On the basis of the foregoing findings and rulings we rule that the Appellee has not sustained its burden of proving that its decision to deny the permit is consistent with local needs, on the ground that the issuance of a comprehensive permit to the Appellant would result in the commencement of low/moderate income housing on sites comprising more than three tenths of one percent of the total land area zoned for residential, commercial or industrial use. Since Appellee has failed to prove that the Board's denial of the comprehensive permit is consistent with local needs under the .3% requirement and since Appellee concedes that the town does not meet either the 10% or the 1 1/2% requirement, the Board's decision has not passed the first general test for consistency with local needs. We turn now to the application of the second test.

2. Consistency with Local Needs.

Does the Town's Need to Protect the Health and Safety of the Occupants of the Proposed Housing or of the Residents of the

Town, to Promote Better Site and Building Design in Relation to the Surroundings and to Preserve Open Spaces Outweigh the Regional Need for Low and Moderate

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Income Housing Together with the Number of Low Income Persons in the Town?

This is the second general test of consistency with local needs under the statute (section 20). If the answer to this question is in the affirmative, the decision of the Board denying the comprehensive permit must be upheld as "consistent with local needs."

The guidelines laid down in the S.J.C. decision require a careful balancing process giving all relevant factors appropriate weight. (20)

In support of their respective positions the parties introduced evidence on regional housing needs, population figures and income statistics; under health and safety evidence was submitted of alleged water shortage, fire and firefighting hazards, traffic problems, and noise pollution from airplane overflights; attacks were directed against the cluster zoning site design, and the building design, and there was evidence of the relation on the project of the need to preserve open spaces.

a. Regional Need for Low and Moderate Income Housing Together with Numbers of Low Income Persons in Dartmouth.

Evidence was submitted as to numbers of subsidized low income units in the region, existing and in process, numbers of low income units in relation to total units in Dartmouth, numbers of "moderate" income units, mean per capita incomes in Dartmouth, and

average incomes throughout the region.

Evidence consisted of testimony from witnesses on both sides, exhibits and memoranda ranging in probative value from official reports to

20. S.J.C. decision p. 513.

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newspaper accounts. While we have carefully considered all the evidence we base our findings primarily on official statistical reports: the 1970 Federal census, D.C A's Survey of State and Federally Assisted housing in Massachusetts and Dartmouth Town Reports.(21)

We find that the Southeastern Region, with a population of 504,551, has only 13,188 existing low income subsidized units, 5,227 in process, plus 1,465 moderate income units. These are scattered throughout the region, in Taunton, Fall River, New Bedford, and Plymouth. As of August 1971, (the date of the D.C A. report) the region had no completed "236" housing, though 663 units were in progress (TR1: 84-85). Dartmouth, with 6,067 housing units according to the 1970 census, has only 44 subsidized units, an all-

elderly project (Sol-E-Mar) owned by the Housing Authority. There are no subsidized low income family units, The 1970 Dartmouth Town Report (Appellant Exhibit #17) states on Page 65:

"We expect that the results of this survey will confirm the opinion of the Dartmouth Housing Authority that there is an urgent need for additional housing for the elderly in Dartmouth."

The 1960 census figures (the last available on income) showed a mean income per capita for Dartmouth of \$5,629; a mean of \$3,633 for male head of household and \$1,674 for female (TR2: 26) The need for additional housing for the elderly in Dartmouth and the 1960 census figures on mean income, with due allowance for the date of the census figures, justify finding of the existence of a substantial number of low income persons in Dartmouth.

21. D.C A. Publications on August 1971 "State and Federally Assisted Housing in Massachusetts " Appellant's Exhibit #3, 14, 15, 17, 19, 20.

TR1: 71-75, 76-85 TR2: 21-24.

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b. Health and Safety Factors.

We turn now to a consideration of those issues bearing on health or safety, site and building design, and open spaces, which we are to weigh against regional need for low and moderate income housing together with the number of low income persons in the town,

in order to determine whether or not the Board's denial of the comprehensive permit was consistent with local needs. examine first "the need to protect the health or safety of the occupants of the proposed housing or of the residents of the town." (section 20) Under that general sub-issue the Appellee argued that there were four areas in which this project posed a threat to the health or safety of the occupants or town residents:

- (1) That the Town had a serious water shortage problem.
- (2) That the project presented a serious fire hazard.
- (3) That present traffic conditions threatened the occupants and these conditions would be aggravated by the increase to traffic volume.
- (4) That the site was in an airport approach zone and that noise pollution would be detrimental to the health of the occupants.

1.) Water Supply.

A major contention of the Appellee was that water supply resources were inadequate to supply present needs and that granting this comprehensive permit presented danger to the health and safety of the residents of the town. (21a)

21a. TRI: 28-31, 34, 48, 58, 65-67. Appellant's Exhibit
3. p. 23-26. TR3: 25, 26-36, 49, 59-60, 120, 123, 126, 130

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On the basis of the testimony of witnesses and exhibits submitted by both parties, as set out in the footnotes, we make the following findings of fact:

Dartmouth obtains its water supply in part from four local wells, and in part by an arrangement with neighboring New Bedford. In 1971, Dartmouth used approximately 500 million gallons of water of which 323 million, approximately 65%, came from its own wells and 166 million, approximately 33%, from New Bedford. (21b)

In addition Dartmouth owns an undeveloped well site, the "Violet property" - whose capacity is unknown but may reach 360,000 gallons per day (TR5: 32).

Phase I of this project will require about 3 million out of the 500 million annual use or approximately six tenths of one per cent.

The town has taken steps on a program to satisfy long term water need. A 1967 report by the engineering firm of Fay Spofford and Thorndike recommended a 20 year contract with New Bedford and the construction of a booster pumping station, storage facilities and new and larger pipelines (TR5: 28, 29).

Portions of this water program have been carried out. The twenty year contract with New Bedford was entered into though there was evidence of some pending revisions, (22) plans for land taking prepared, funds appropriated and parts of the 24 inch pipeline

installed.(23>

- 21b. TR4: 46, 85; TR5: 13, 14, 27-30, 32, 41-48, 72, 89, 92, 98 Appellee Exhibits 7, 16, 17, ' 18.
- 22. Appellant Exhibit 117 p. 96. Appellant Exhibit 8A
TR3: 25-27 TR5: 38-9
- 23. TR5: 30-31, 38-39, 43-48 Appellant Exhibit 17, p. 102

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Dartmouth's Water By-laws require request for a statement of willingness from New Bedford before undertaking projects requiring large additional supplies of water. There was evidence before HAC of such request and negative reply, orally, before the date of the Board's decision, though there is no reference to this in the Board's decision. This request was reduced to writing at a later date.(24)

Dartmouth is to be commended on its foresight in planning, and taking steps to implement a long range water supply program to provide for its future needs.

We find, however, without relying on this comforting prospect, that there exists presently an adequate water supply. We base this finding on the following evidence:

The Dartmouth Superintendent of Public Works, testifying before the Board of Appeals, did not find the water problem insurmountable (25). He testified that "We feel we can work this out with the Applicant by having a separate connection come in by

the proposed line on Route 6." (26) Regarding design of Appellant's water main he said, "Again, these are details which could be worked out,"(27) and suggested Appellant tie in seven dead end mains in the abutting residential development to heap (28) the town, which he said had plenty of time for rapport with the Applicant.

- 24. TR3: 33-36 Appellee's Exhibits 17, 18
- 25. Appellant Exhibit #3 p. 26
- 26. Appellant Exhibit #3 p. 24
- 27. Appellant Exhibit #3 p. 25
- 28. Appellant Exhibit #3 pp. 25-26

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The water study done under supervision of Appellant's engineer by Cattley, Hanack and Richard (TR1: 28) concluded that water pressure was already adequate and that volume problems would be solved by the completion of certain improvements already planned and funded, essentially those discussed by Mr. Brance, Assistant to the Superintendent of Public Works for Dartmouth. (TR5: 43-48)

Development of potential water supply resources from Violet

property could increase the water supply up to possibly 50% above total 1971 use, even if New Bedford can't supply additional water. (TR5: 32)

We note particularly that when Mr. Campanelli received approval for his 172 unit subdivision, the question of a present water shortage problem was not even raised. (TR4: 46)

Nor, it seems, does the question of a present water supply problem seem to have deterred the town from actively pursuing shopping centers along Route 6, (TR3: 146 TR4: 7-8) or an industrial park in the northeast section of the town. (TR3: 60) Our finding that an adequate supply of water is presently available renders M.G.L. ch. 40, sec. 54, cited by Appellee, inapplicable. (29) For the same reason we need not rule on the applicability of the Daley case cited by the Appellant(30) This case held that a town could not

29. M.G.L. chapter 40 section 54.

No building permit shall be issued for the construction of a building which would necessitate the use of water therein, unless a supply of water is available therefore either from a water system operated by a city, town or district, or from a well located on the land where the building is to be constructed, or from a water corporation or company, as defined in section one of chapter one hundred and sixty-five.

30. Daley Corporation Company v. Planning Board of Randolph (1960) [340 Mass. 149](#), 152. See also: Baker v. Planning Board of Framingham (1967) [353 Mass. 141](#).

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disapprove an otherwise proper subdivision on the ground that its execution might accentuate an existing town water shortage because its water supply, "possibly inadequate unless augmented from new sources, will be further depleted by use in the buildings to be constructed."

2.) Fire Hazards.

Throughout the hearing and in its brief, Appellee presented arguments on a number of subjects, each of which was pressed as a separate ground to support the Appellee's contention that the denial of the comprehensive permit was consistent with local needs. While each of these subjects is separately discussed in this decision, many dovetail so that the same facts are applicable under several separate issues.

Thus, in addition to the town's dependence on a volunteer fire department, (TR3: 108-9) the alleged water shortage, the cluster design, the wood construction, the alleged overcrowded traffic conditions, each put forth as a separate health or safety hazard, or

valid site or building design objection, are all cited as fire hazards. (31)

We have already ruled that an adequate present water supply exists. The cluster zoning design was attacked on the ground that proximity of the buildings fostered rapid spread of fire, and hampered rapid access of fire vehicles and equipment around the buildings. We are not prepared to rule that the cluster design concept, primarily objected to because it violates the town subdivision by-law, is per se a fire hazard. Nor do we find anything

31. TR3: 100, 107-8, 119-20, 133. Appellee Exhibits 24, 25, 26, 27 See footnotes 21 and 22 for record references to water problems.

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about this particular cluster design that renders it particularly hazardous. As to the wood construction, the town raised no fire objections to Campanelli's 172 units of wood frame housing (TR4: 46), nor apparently, to any other wood units among the 1,413 permits issued between 1968 to 1971. (32) Crowded traffic conditions are alleged to impede voluntary fire-fighters in reaching the fire station and in getting the apparatus to a fire. But, no building permits have been denied because of fire danger for local buildings in the same crowded Route 6 area (TR3: 147-9; TR4: 7-8).

Appellant must build according to F.H.A. specifications which are much concerned with fire danger. The Applicant has agreed to conform to all-the requirements of the local building code and other applicable regulatory agencies. (Appellant Exhibit 5 TR2: 58)

The site of Appellant's project is located near a fire station (Appellant's Exhibit 1112).

We find that no irremediable fire danger exists especially affecting Appellant's site.

3.) Traffic; Airplane Overflights.

We have discussed possible delays in reaching a fire, due to traffic conditions, as a possible fire hazard. We discuss here traffic conditions and airplane overflights as existing and potential health and safety hazards which we are required to balance against regional needs in determining whether the town's denial of the comprehensive permit is consistent with local needs.

32. 1968, 405 building permits (Appellee Exhibit 117 p. 85)
1969, 302 " " (Appellant's Exhibit 11 19 pp. 100-102)
1970, 330 " " (Appellant's Exhibit 0 17 p. 107)

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The Appellee points to a 1966 report by Appellant's own aspect which then showed 18,000 daily vehicle trips on Route 6A and 2,200 on Faunce Corner-Road (TR4: 69; Appellee's Exhibit 1125); a count in 1970 of 17, 466 at this intersection, and testimony by Mr. Tougas that he has seen 200 cars bathed up here at a time (TR4: 78). The Appellant's Harris Report (Appellant Exhibit 119. TR4: 84) indicates this housing will generate 4,450 daily vehicle trips.

Appellee points also to other pending commercial developments in this area: the proposed mini mall and the furniture store, as potential traffic generators (TR4: 8).

The Appellee has two concerns here: the addition to traffic congestion on Route 6 to be caused by the proposed housing, and the potential danger to health of occupants from noise, dust, glare, and speed hazards.

Appellee also points to noise from overflights of planes in the approach zone to the New Bedford Airport as a health hazard. (Appellee's Exhibit 1119; TR3: 41)

Appellee argues that under these conditions, it imperative that minimum requirements of the Town of Dartmouth with regard to area and density and be enforced to protect the health safety of the occupants of the proposed housing.

While we agree with the Appellee's contention that the proposed commercial developments on Route 6 will aggravate existing traffic conditions, we must note that the town has not urged this fact against these developments. In fact the town has argued that the site of Appellant's housing proposed so is prime commercial land and should be so developed.(33) All this "commercial" development obviously promises more traffic on Route 6 than the proposed housing development.

33. See reason 8 B in Board's decision, and argument thereon in

Appellee's brief pp. 43-48

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We cannot rule that the mere fact of access to a housing development from a busy, highly travelled road bars such use, any more than such a fact should bar future commercial development. The testimony showed concrete efforts by the developer, in cooperation with state D.P.W, and at its own expense, to ameliorate these conditions and create solutions to access problems by extensive road reconstruction, and new traffic lights and traffic lanes. Such access and egress solutions received specific approval

from state D'.P.U. in their letter dated July 6, 1971.
(Appellant's Exhibit #8 B)

"Department traffic engineers...feel...the...design can accommodate access and egress drives for your proposed development with minimum adverse effect on the flow of traffic."

Similarly, the airplane overflights do not constitute a serious problem. Airplane overflights, with their attendant noise pollution are now pretty much a fact of life. Few urban or suburban areas do not now find themselves in some airport flight approach zone. There was no evidence of inordinately uncomfortable conditions as a result of these overflights. Private single family subdivisions in the \$20,000 to \$40,000 class have been successfully developed in the same area without report of complaint or diminution of value. (TR3: 90-91)

We rule that traffic conditions and airplane overflights do not present health or safety hazards which outweigh regional needs for low and moderate income housing.

We have ruled that none of the health or safety factors alleged by the Appellee; water shortage, fire hazards, traffic conditions, or airplane overflights outweigh regional need for low and moderate income

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housing. We turn next to the remaining factors, which we group together as "planning" factors to distinguish them from health and safety factors, listed in Section 20, which are to be weighed against regional need in determining whether or not the denial of the comprehensive permit was consistent with local needs.

c. Planning Factors.

These factors are listed in Section 20 as "the need...to promote better site and building design in relation to the surrounding, or to preserve open spaces."

The only design concepts attacked by the Appellee were the cluster design concept and the wood design construction. These were not attacked as violations of the town's need to promote better site and building design, but as fire hazards under the town's need to protect health and safety. We have ruled on the fire hazard aspect of these factors.

The possibility of designing a planned unit development utilizing cluster design is a fortuitous fallout which has resulted

under chapter 774 by freeing the modern site designer from the shackling inhibitions of the traditional gridiron subdivision concept. The site designer is enabled to utilize this modern land use planning concept not only to achieve obviously improved aesthetic effects, but better land utilization, the incorporation of interior walkway traffic patterns, exterior motor traffic patterns, less unsightly parking areas, centralized play and recreation areas and centralized community facilities.

The wood construction design is in keeping with the

essentially woodsy nature of the site.

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The Appellee argued in its brief that Appellants original application to F.H.A. devoted only 39 acres to this project instead of the 48.9 acres that is the subject matter of this application. The Appellee argued this indicated lack of interest by Appellant in open spaces. (34) Appellant, on the other hand, pointed out that upon completion of the entire project, only 12% of the site would be occupied by houses, 15% by roads, and 73% of the 48.9 acres would remain as open space (TR2: 24, 57), an additional fortuitous by-product of the use of the cluster zone concept.

Actually there was very little structured presentation on open spaces as an issue under the statute: no evidence of any master plan or other land use constraints which envisioned the preservation of this site as "open spaces."

We rule that no valid planning objections exist which outweigh regional need for low and moderate income housing.

3. Recapitulation of Rulings on "Consistency with Local Needs."

We have ruled that the town has not met any of the three statutory minima for consistency with local needs, that a regional need for low and moderate income housing and a substantial number of low and moderate income persons in Dartmouth exists. We have ruled that the factors alleged under the need of the town to protect the health or safety of the occupants of the proposed housing or the residents of the town, or the need to promote better site and building design, or to preserve open spaces do not outweigh this regional need.

We rule that the denial of the comprehensive permit by the Board is not consistent with local needs.

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D. Other Issues.

We note in passing certain issues because they were raised by the Appellee in the pleadings and in the testimony and argued at some length in its brief. We have not treated these issues at length because we rule they are irrelevant under the statute. Thus "motives" of the Appellant, apart from compliance with the statute, are irrelevant. As long as the Appellant is an eligible applicant,

and all the criteria under the statute are met, it is irrelevant that the Appellant may or may not have been in the past motivated by a desire to supply housing for the employees of its Shopping Mall or to assure customers for it.

The argument that this is prime commercial land and should so developed; that it cannot be economically feasible to develop this land for housing at low and moderate income rentals (Board decision: Reason 118) is equally irrelevant. Apart from chapter

40 B, the Appellant could have, within Dartmouth's cumulative zoning, developed this commercially zoned land for multiple dwellings. We are concerned that the developer not undertake a potential financially disastrous project as we indicated in our "Hanover" decision. (35) With a developer of the financial stability of U.S. Gypsum Corp., we safely leave questions of financial feasibility, development costs, rental schedules, etc. to the rigid criteria of the governmental agency (F.H.A.) supplying the subsidy.

A more troublesome point is raised by statements made by Mr. Hagerty who represented the Appellant in the Board hearing. His statements indicated

35. see Supra, Note 1,7.

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his belief that this petition was really addressed to the Commonwealth rather than to the Board, that the Board's function was merely advisory to HAC, that it was "inappropriate and a waste of time...to judge our application by the standards which are applicable to any variance." (Appellant Exhibit #3 pp. 60-61)

A careful reading of the entire context indicates a better understanding of the statute on Mr. Hagerty's part, than is indicated by these comments. He did understand that he could receive a comprehensive permit from the Board that HAC could not reverse. Fortunately the completeness of the presentation by the Applicant before the Board cannot be criticized. The Appellant therefore does not fall under the implied warning in the Supreme Court decision (p. 518) against making a purely pro forma presentation before the Board.

E. Scope of Order.

The application before the Board and before 11AC covers 498 units on 49.8 acres. While it has been indicated that in fact initial feasibility has been approved by F.H.A. only for Phase I, which covers 264 units on 25.9 acres, and that approval by F.H.A. for Phase II will require preliminary approval by F.H.A. of a market feasibility study, the Committee wishes to emphasize that its findings and rulings cover both Phase I and II. Should a market feasibility study for Phase II be approved by F.H.A, it will not be necessary for the Applicant to re-apply to the Board or to HAC.

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III. ORDER.

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

Said comprehension 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 the following conditions, which have been agreed to by the Appellant.

1. Except as otherwise indicated in this decision, the Appellant shall conform to all the requirements of the local building code, and other applicable regulatory agencies.

The comprehensive permit shall be subject to the following additional conditions:

2. 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.

3. 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

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comprehensive permit, or any of the other terms of this order.

Housings Appeals Committee
August 27, 1973
Maurice Corman
Hearings Officer

C. Wesley Dingman

William C. Ames

End Of Decision