COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

MALLOW REALTY TRUST

v.

GLOUCESTER BOARD OF APPEALS

No. 02-13

DECISION

May 26, 2004

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

MALLOW REALTY TRUST, Appellant	)	
v.	)	No. 02-13
GLOUCESTER BOARD OF APPEALS, Appellee	)	

DECISION

INTRODUCTION

The conflict presented in this appeal is a classic example of a failure of local planning. The area in which the proposed housing development is to be located was partially developed in the 1960s. Poor planning or implementation resulted in a limited-access-highway interchange that was never completed. This created what is at least inconvenient and possibly hazardous access to a public elementary school and left a large vacant parcel at the northeastern edge of downtown Gloucester. Though this is a natural space for smart growth neighborhood development, it too has no easy access. Of even greater concern is that the City of Gloucester has been presented with a vision of how these longstanding problems should be solved, but it has been unable to implement that vision. Similarly, the design proposed by the developer does nothing to address the problems in the surrounding area—like many designs proposed under our land use laws, it is lackluster rather than visionary.

Under these circumstances, the city blames the developer for the failure to reach an accommodation that would realize the vision, and the owner blames the city.

It is not for us to assess blame when parties are unable to collaborate on creative solutions, nor is there any state or regional mechanism in Massachusetts to remedy failures of local planning. Instead, we are charged only with giving balanced consideration to the proposal before us. We must determine whether it is sufficiently deficient under the standards of the Comprehensive Permit Law so that the denial by the Gloucester Board of Appeals should be upheld or whether, imperfect as it is, the proposal meets the minimum standards for approval.

For the reasons elaborated below, we conclude that that the basic design of the housing proposed, while not ideal, is sound; that with slight modifications, adequate access can be provided to the site; and that therefore the proposal should proceed.

I. PROCEDURAL HISTORY

On August 30, 2001, Mallow Realty Trust, submitted an application to the Gloucester Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build mixed-income affordable rental housing near the Fuller School, between Blackburn Circle on Route 128 and Green Street in Gloucester. The housing is to be financed under one of the Massachusetts Housing Finance Agency's rental housing programs—either the 80/20 Program or Expanding Rental Affordability (ERA) program. Exh.13. After due notice and public hearings, the Board unanimously denied the permit, filing its decision with the Gloucester City Clerk on May 7, 2002. Exh. 1. From this decision the developer appealed to the Housing Appeals Committee. The Committee conducted a site visit, and held five days

of de novo evidentiary hearing, with witnesses sworn, full rights of cross-examination, and a verbatim transcript. Following the presentation of evidence, counsel submitted post-hearing briefs.

II. JURISDICITON

To maintain an appeal before the Housing Appeals Committee three jurisdictional requirements must be met. First, the project must be fundable under an affordable housing program. 760 CMR 31.01(1)(b). A presumption of such "fundability" is created by a written project eligibility determination by a state or federal housing agency. 760 CMR 31.01(2). Here, fundability has been established by Exhibit 13, a June 15, 2001 project eligibility letter from the Massachusetts Housing Finance Agency.

Second, and closely related to fundability, is the requirement in § 31.01(1)(a) that the developer be a limited dividend organization. It is the role of the subsidizing agency to ensure that the developer is a proper limited dividend organization at the time the project receives final subsidy approval since profit limitations are generally inherent in the subsidy program. *Crossroads Housing Partnership v. Barnstable*, No. 86-12, slip op. at 9 (Mass. Housing Appeals Committee Mar. 25, 1987). The courts have concurred in our interpretation. *Maynard v. Housing Appeals Committee*, 370 Mass. 64, at 67, 345 N.E.2d 382 (1976); *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 379, 294 N.E.2d 393, 420 (1973)("...the question of standards for eligibility as a limited dividend organization is properly left to the appropriate State or Federal agency.") The developer has indicated his intention to proceed as a limited dividend organization. Tr. I, 60. Where the Board has raised no specific challenge to the existence of a proper profit limitation, this commitment,

together with the project eligibility letter are sufficient to establish the developer's status as a limited dividend organization. Exh. 13.

Finally, with regard to the site control requirement in § 31.01(1)(c), the developer testified that he owns a 100% interest in the site, and a quitclaim deed was entered into evidence. Tr. I, 58; Exh. 12.

III. FACTUAL OVERVIEW

The developer proposes to construct six buildings with 240 studio, one-, two- and three-bedroom apartments on a 33-acre site at the northeastern edge of downtown Gloucester. Tr. I, 23, 30, 59-60; Exh.38, fig. 1; Exh. 23, p.12, 44. The site is bounded by state Route 128 to the north, the Fuller School and its playing fields to the west, a residential neighborhood to the southwest, recreation fields to the south, and another residential neighborhood to the east. Exh. 3. The land is zoned for duplex residences. Tr. I, 59. It is undeveloped woodland, approximately one fifth of which is wetlands. Tr. I, 23-24; Exh. 4; also see Exh. 2, p. 8. The development will be served by municipal water and sewer service. Tr. I, 35-37.

IV. ISSUES

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a prima facie case by showing that its proposal complies with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and

second, that such concern outweighs the regional need for housing. 760 CMR 31.06(6); also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

Three sets of issues are raised in this case: first, road design and traffic circulation; second, drainage and stormwater management; and third, water and sewer capacity.[1] Pre-Hearing Order (filed Jan. 16, 2003), § II-2.

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1. The Pre-Hearing Order, which describes the "sole issues in dispute," also lists building design as an issue. Pre-Hearing Order § II-2(d). The Board chose not to present evidence on this matter, nor did it brief the question, however, and it is therefore waived. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995). The brief, which is styled as "Findings of Fact and Issues of Law," focuses primarily on access (paragraphs 2 through 19), and drainage (paragraphs 20 through 27). In paragraph 28, however, the Board argues that the project does not comply with the state Wetlands Protection Act. Considerable testimony was heard regarding this. See, e.g., Tr. III, 93-94 (proximity of a sewer pump station to the wetlands); Tr. III, 111-113 (replication). Compliance with the Wetlands Protection Act is not a matter properly before this Committee; Chapter 40B permits waiver only of local requirements, and the proposal must comply fully with state law. *9 North Walker Street Development, Inc. v. Rehoboth*, No. 99-03, slip op. at (Housing Appeals Committee Jun. 11, 2003); also see Tr. III, 114. There was also testimony that there is local wetlands protection ordinance, which "[b]asically ... adopts and accepts most of the state regulation requirements...." The ordinance was not put into evidence, the Board's expert was not familiar with it, and it was not mentioned in the Board's brief. (In addition, there was passing reference to subdivision regulations, which also appear to work in concert with the Wetlands Protection Act, rather than imposing more stringent requirements. See Tr. IV, 36-39.)

In paragraphs 31 through 37 of its brief, the Board argues that the "project is inconsistent with the [City's master plan] and thus the Board is justified in denying it." Findings of Fact and Issues of Law, ¶ 33. Specifically, the Board argues that "The applicant's project is inconsistent with each and every plan the city has adopted. The project does not have a viable planned roadway system, it lacks an adequate drainage system, it has the potential to surcharge the combined sewer overflow system, and the project is too dense for the site." Findings of Fact and Issues of Law, ¶ 37. This Committee has long considered arguments that a certain proposed use or its location is inconsistent with a municipality's master plan. See *Harbor Glen Assoc. v. Hingham*, No. 80-06 (Mass. Housing Appeals Committee Aug. 20, 1982); *KSM Trust v. Pembroke*, No. 91-02 (Mass. Housing Appeals Committee Nov. 18, 1991); *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01 (Mass. Housing Appeals Committee Sep. 18, 2002). But this is not the sort of argument that the Board is making (and if it were, it was not properly raised in the Pre-Hearing Order). Rather, the Board is simply reiterating the local concerns of traffic and drainage, and has not alleged that the proposal is inconsistent with specific provisions of the City's master plan. See Tr. III, 24; also see, e.g., Tr. III, 34; Exh. 23, pp. 100-107. Density was not raised in the Pre-Hearing Order, nor was evidence introduced, and we will not consider it.

A. Traffic Safety

Superficially, vehicular access to the site seems good, since entrances are proposed on three sides—from the west, the east, and the south. The relationship of the site to local roads and to Route 128 in the western and southern access areas, however, raises difficult design issues.

The developer proposes that primary access be from the west by building an entrance roadway to intersect with the Fuller School drive near the Blackburn Circle; secondary access would be provided by extending both Dodge Street (from the south) and Perkins Street (from the east) into the site. See Exh. 8; 38, p. 1, Tr. II, 100. (Exhibit 8 is attached to this decision as Appendix A.) The entrance near the Fuller School is at the congested, badly designed area at the end of the Blackburn Circle off-ramp, and the project roadway itself will wrap around behind the school, not far from exits that may be used by children during emergencies. The Dodge Street access involves an awkward right-angle turn. The Perkins Street entrance is uncomplicated.

The proposed roadway layout and access were designed by two registered professional engineers employed by the developer. Overall site design was done by Paul Turbide, a civil engineer trained and experienced in land use planning and design. Tr. I, 16-20. Mr. Turbide worked with an independent transportation engineer, Dermot Kelly. Tr. II, 47-50. The overall roadway plans, plus exceptionally detailed plans for the western entrance and intersection near the Blackburn Circle, were prepared by Mr. Turbide. Exh. 5, 22. Mr. Kelly prepared three traffic studies—in 1993, 2001, and 2003. Tr. II, 50, 53-91; Exh. 38. He also prepared a detailed Conceptual Access Plan confirming Mr. Turbide's design for the

western entrance. Exh. 38-A. Mr. Turbide testified, without elaboration, that the roadways and access design complies with generally recognized design standards. Tr. I, 29. Mr. Kelly testified in detail concerning existing and proposed traffic volumes and other aspects of the design. Tr. II, 52-91; also see Exh. 38 (including responses to comments from the Board's consulting engineers, pp. 21-30). He concluded that the design meets both generally recognized criteria and state and federal standards. Tr. II, 91. The testimony, roadway designs, and traffic studies are sufficient to establish the developer's prima facie case.

Although the City did no traffic studies of its own, the Board introduced testimony about traffic conditions and traffic safety from several witnesses. Tr. V, 43. Brian Tarr, the Assistant Superintendent of Schools, testified concerning his observations of traffic at the Fuller School and Blackburn Circle.[2] Lt. Joseph Aiello, Operations Commander for the Gloucester Police Department, testified about the current traffic conditions and hazards at Blackburn Circle and the school. Gerald Solomon, Director of the Right of Way Bureau of the Massachusetts Highway Department testified as to the status of the state permit needed to permit access to Route 128. Two engineers employed by the city also testified: David Knowlton, a professional civil engineer who is the supervising city engineer, and Michael Hale, a certified planner who functions as a construction engineer, managing capital improvement projects. Tr. III, 75-77; V, 26. Mr. Knowlton testified only in a conclusory manner since he had focused on sewer issues and had not personally reviewed the roadway plans. Tr. III, 100-102. Mr. Hale testified in more detail since he was the city staff person

2. A member of the Gloucester School Committee also testified briefly. He did not offer specific testimony concerning traffic safety, other than his general concern, since "other [witnesses] spoke to the issue of traffic control and pedestrian issues...." Tr. V, 9. He also spoke of concerns about disruption of classes by the noise from construction vehicles, but this issue was not among the issues raised in the Pre-Hearing Order nor briefed.

who reviewed the plans. Tr. V, 28-35. In addition, a consulting engineer, Samuel Offei-Addo, who is a registered engineer certified in transportation engineering, testified concerning his review of the plans.

As will be seen, each of these witnesses portrayed an accurate picture of the difficult existing conditions near the site. But while they highlighted many potential problems, they ultimately did not present convincing evidence that the proposed design is hazardous or sufficiently unworkable to outweigh the regional need for housing. We will consider the concerns they raised by examining the points of access one at a time, and then we will examine the interrelationship among the entrances.

1. Blackburn Circle Entrance - The Board's primary concern is about safety at the Blackburn Circle entrance to the proposed development.

Immediately abutting the Blackburn Circle is land that was once owned by the Roman Catholic Archdiocese of Boston. In 1965, a temporary access permit to the rotary was issued by the state highway department to provide access to a high school being built by the Archdiocese. Tr. IV, 11-12, 33. The temporary connection was intended to be superseded by a permanent connection to the public street system. Tr. IV, 12. Work on such a connection was never begun, however, and the exit and entrance to Route 128 at the Blackburn Circle remained uncompleted. Exh. 3.

In 1996, the Right of Way Bureau of the Massachusetts Highway Department recommended that the permit be upgraded to permit general public access to the housing site. Tr. IV, 17. Since the recommendation was subject to a number of conditions (and it appears that approval by federal officials is also required), the developer has not yet received final approval for access. Tr. IV, 28. We do not need to delve deeply into the complex regulatory

posture of the application, however, since the developer will have to comply with all state and federal requirements in any case.[3] See Tr. IV, 12-28, 31, 36-40. We will focus on local concerns.

The Archdiocese of Boston sold the high school building, and since the mid-1970s, it has been used by the City of Gloucester as a public school serving nearly 700 children from kindergarten through fifth grade. Tr. IV 43, 56. The building also has a wing that houses administrative offices. Tr. IV 43.

The developer proposes to build its access roadway on school property between the school building and the Blackburn Circle rotary, using an easement that was acquired when the Archdiocese of Boston sold the school and subdivided the land. Tr. I, 25, 28-29, 62. Children will not normally be near the roadway since it goes along the side and back of the building, and they are generally restricted to the front of the school building, which faces the playground. Tr. IV, 48-49. But in some cases of emergency inside the building, children, including the youngest, will leave the building toward the proposed roadway using a number of different emergency exits. Tr. IV, 61-63, 72, 122-124.

Emergency Evacuations - The first issue raised by the Board is that students using the emergency exits at the back of the school may be endangered by traffic on the adjacent project roadway. Clearly, young children are more at risk than adults would be in such circumstances. Tr. IV, 75, 156. In recognition of that, the school already has a plan giving each classroom teacher specific instructions as to where to lead his or her class so that

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3. To gain MassHighway's approval, the developer may have to show that its roadway will be accepted by the City of Gloucester as a public way. See Tr. V, 34. We express no opinion on this issue since our role is to review design issues, not the question of whether or not the developer is likely to be successful in obtaining permits from other state agencies.

children will not wander off toward Route 128.[4] Tr. IV, 71, 94-95. The proposed roadway will generally be about 40 feet from the school building, and will have a sidewalk on the side closer to the school. Exh. 22, sheets 1 and 3; also see Tr. II, 96. If there were an emergency during the peak traffic hour in the morning, of the total of 123 vehicles per hour that would be expected to be entering or leaving the site, 74 vehicles (or slightly more than one car per minute) would be passing along the roadway adjacent to the school. Exh. 38, pp.12, 14, and fig. 6; cf., Tr. IV, 152. The Board's traffic engineer was unable to offer an opinion as to what the speed of traffic on the roadway would be, and testified unconvincingly about the "potential" risk.[5] Tr. IV, 152, 158. We are sympathetic to the assistant superintendent's general concern for safety here, and to police operations commander's concern that children not be "forced into the road."[6] See Tr. IV, 74-75, 124. But little hard evidence was presented to rebut the prima facie case presented by the developer and the testimony of its traffic engineer that the roadway would not pose a significant risk. See Tr. II, 97. While risk to students during emergency evacuations at this location is certainly a legitimate local concern, the Board has not presented sufficient evidence to prove that the concern outweighs the regional need for housing.

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4. The highway is about 150 feet from the school, and is apparently unfenced. Exh. 22, sheet 3.

5. In describing the risk, the witness used phrases such as "a bit elevated," "I don't know what the difference is...," "you can't really tell," "I can't say if it's going to happen...." Tr. IV, 152.

6. This is yet another area in which neither party has shown creativity. Though our ruling is based upon the design presented to us, we note that design alternatives were barely explored. The Board's traffic engineer testified briefly about the noise that would be created if old-fashioned speed bumps were used to slow traffic. Tr. IV, 153. Modern speed *humps* or even more innovative devices such as speed tables or chicanes were not discussed at all, nor were possibilities such as installing some sort of emergency signals linked to the emergency doors or the school alarm system.

Vehicular Congestion - The second issue raised by the Board concerns vehicular congestion at the school entrance, which includes the related issues of management of school parking problems and back-up or "stacking" of cars on the Route 128 off ramp.

As with any elementary school, during arrival and departure times, the school entrance and parking areas are very busy. Students are dropped off from eleven buses as well as private automobiles. Tr. IV, 46. There is congestion in the parking lots. Tr. IV, 51.

This is significantly exacerbated, however, by congestion related to the exit from Blackburn Circle. Because the exit was never finished, its geometric configuration is highly unusual. Where the off ramp and the on ramp were designed to join together into a single, straight roadway, the pavement stopped, and instead, a sharp—nearly 90-degree—dogleg bend was created, forming the entrance roadway to the Fuller School parking areas. Exh. 3, 38-A. Between the bend and the parking areas the roadway continues straight for a little over 100 feet, and the proposed roadway is designed to intersect with this section at a right angle, forming a "T" intersection. Exh. 38-A.

The parties did not present a clear description of the traffic flow in this area. The standard scientific traffic analysis performed by the developer shows levels of service (LOS)[7] both at existing intersections and after construction of the proposed roadway ranging from LOS A to LOS C. Exh. 38, pp. 15-19. These calculations, however, do not analyze delays caused by the dogleg or as cars actually enter the parking area—presumably because these are not intersections as defined by the scientific methodology. See Exh. 38, pp. 18-19. Testimony from the Board's expert concerning the observed behavior of traffic at the dogleg

7. LOS results from a road capacity analysis, and is a "qualitative measure describing operations conditions within a traffic stream.... Six levels... are given letter designations form A to F, with level-of-service (LOS) A representing the best operation conditions..." Exh. 38, p. 16.

was inexact at best. The operations commander of the Gloucester Police Department testified that although the speed limit on the rotary is 25 mph, traffic comes off the rotary and "into the school" at 55 mph.[8] Tr. IV, 109-111, 130-131. This is certainly not entirely accurate since the sharp dogleg clearly slows traffic to some extent, and it is highly unlikely that cars are actually entering the parking areas at 55 mph.[9] Tr. II, 101; IV, 127. In fact, there is evidence in the developer's traffic study that spot speed measurements using radar showed "that vehicles exiting Route 128 slow to below 20 miles per hour... due to the nature of the existing horizontal alignment of the Fuller School Driveway, which bends sharply to the left, serving as a form of passive speed enforcement. Exh. 38, p 28.

The testimony of the police operations commander that the overall situation is a "nightmare" is quite credible, however. See Tr. IV, 108. On some mornings, particularly at the beginning of the school year or in bad weather, traffic waiting to get into the school backs up not only into the Blackburn Circle, but actually onto Route 128 itself, and the police department stations a police cruiser on the highway more than half a mile before the rotary in order to slow traffic. Tr. IV, 52, 108-109. Conditions in the entire area (the off ramp, the

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8. Q: They drive 55 miles an hour into the school?
   A: Yes, they come up the extension doing 55 and they ignore the 25 mile an hour sign that is there.
   ...
   Q: And do you know the approximate speed of the vehicles coming off of the circles [sic] into the school?
   A: The posted speed is 25 but the speed on the divided highway is 55 which is pretty much what they maintain.
   Tr. IV, 110-111.

9. None of the Board's witnesses addressed the specific geometric configuration of the new design in the area of off-ramp, although this question was raised in passing during the hearing by the presiding officer. See Tr. II, 101. It appears quite likely that smoothing out the dogleg is undesirable since it will increase traffic speeds. Tr. II, 101. Therefore, we include a condition that the dogleg be retained or that the area be otherwise redesigned to any reasonable specifications suggested by the City of Gloucester Engineering Department. See Section VI-2(b), below.

roadway approaching the school, and the school parking areas) are sufficiently problematic that police officers are assigned in three locations—one at the school parking lot, one at the Blackburn Circle off ramp, and one on Route 128. Tr. IV, 115, 116.

Based upon the evidence presented by the developer, we find that after construction of the proposed roadway, new or existing turning movements not directly related to traffic congestion from the Blackburn Circle off ramp will remain at LOS C or better, which is clearly acceptable. Exh. 38, pp. 15-19. (Among these movements is the right turn out of the proposed project roadway onto the Blackburn Circle on ramp.) Left turns from the off ramp onto the proposed roadway, however, even though standard methodology shows that they will be at LOS A, are a different matter. We find, based upon observations, that at discrete times in the morning, there is a serious congestion problem in that area. The question then presented is whether that congestion is sufficient to justify denial of the comprehensive permit.

We have held for many years that an existing, off-site hazard, particularly if it will not be significantly exacerbated by the increase in vehicular traffic from the site, is not a legitimate local concern upon which the denial of a comprehensive permit may be based. See *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. at 6 (Mass. Housing Appeals Committee Jan. 16 1991); *Merrimack Meadows Corp. v. Tewksbury*, No. 87-10, slip op. at 36 (Mass. Housing Appeals Committee Aug. 23, 1988)(even where a project contributes to existing problems at an intersection, it is the town's responsibility to make improvements).

The congestion problem arises in the early morning, when residents of the proposed housing are generally leaving the area, and few cars are entering the residential development. Approximately 62 vehicles per hour will be leaving, turning right onto the Blackburn Circle

on ramp, and only 12 entering the proposed roadway, turning left off of the congested off ramp. Exh. 38, p.14, fig. 6. In this second, critical area—the off ramp—the traffic flow during this time is already 254 vehicles per hour. Exh. 38, p.14, fig. 6. We must certainly infer that even the addition of 12 vehicles to the existing 254 will have *some* negative impact on the traffic flow. But the Board was unable or chose not to quantify this impact. It seems likely that the impact is minimal. But in any case, the Board has not met its burden of establishing that there is sufficient concern to outweigh the regional need for housing.

Pedestrian Safety - Finally, the Board raises two questions of pedestrian safety. First, as might be expected from the previous discussion, there are concerns about the safety of children walking to and from school on the western side, near Blackburn Circle. Currently, approximately 20 students cut through a private industrial property, and cross through a chance opening in the guardrail at the exit from Black burn Circle, continue unsupervised along the edge of the highway ramp, and then cross over the pavement. Tr. IV, 55, 57, 78, 116-117; Exh. 3. There is no evidence that the traffic from the site or the configuration of the proposed roadway would affect this in any significant way. As noted above, such an existing, off-site hazard, particularly if it will not be significantly exacerbated by traffic from the site, is not a legitimate local concern upon which the denial of a comprehensive permit may be based. See *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. at 6 (Mass. Housing Appeals Committee Jan. 16 1991); *Merrimack Meadows Corp. v. Tewksbury*, No. 87-10, slip op. at 36 (Mass. Housing Appeals Committee Aug. 23, 1988)(even where a project contributes to existing problems at an intersection, it is the town's responsibility to make improvements).

Second, the Board raises generalized concerns about the "higher mix between vehicles and school children" at the western entrance. Tr. IV, 144; also see, e.g., IV, 48, 76-77. These dangerous areas appear to be mostly on school property—in the large parking areas—and some of the congestion is caused students walking from the east across the playing fields, playground, and then parking areas. Tr. IV, 53. In any case, however, the Board did not introduce specific evidence as to how the housing proposal would exacerbate the already hazardous situation.

2. Dodge Street Entrance – The intersection of the project's access road and Dodge Street is an acceptable access point for normal traffic. Because the road will be extended by creating a sharp, 74-degree, elbow turn, there is no doubt that the intersection will be awkward. It is clearly undesirable for emergency access. Fire trucks can probably not make the turn at all, and police cars and ambulances may prefer a more direct route in emergency situations.[10] This is of no consequence, however, since either the Fuller School Drive entrance or the Perkins Street entrance is available for emergency access.

Care will have to be taken in the final design to make the intersection safe for everyday traffic. One option, since it is basically half of a four-way intersection, would be to place a stop sign for traffic coming in each direction. More sophisticated traffic calming measures—modern speed humps or a raised intersection—are probably more desirable.[11]

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10. We do not know what to make of testimony that on a nearby portion of Dodge Street there is a tree in the middle of the street. Tr. IV, 128. The only testimony was that the city "attempted to remove it one time before, but it got nasty." Tr. IV, 128. Whether or not the tree should be removed, the Board has certainly not proven that there is any local concern in this regard that outweighs the need for housing.

11. The street is reasonably wide. There is a 40-foot right of way, and the existing street appears to be 30 feet or more wide. Exh. 8 (notation on plan indicates "40' WAY"; unlike Perkins Street, at the northeast corner of the site, the exact pavement width is not noted). If the danger of cars crossing the centerline were of sufficient concern, there would even be room for a narrow median strip.

Unfortunately neither party explored the design in great detail during testimony. For that reason, we take the unusual approach of permitting the Board to review the final design of this intersection if the developer and city staff cannot agree on a mutually acceptable configuration. See Section VI-2(c), below.[12]

3. Perkins Street Entrance – Perkins Street is the least problematic of the entrances. Though it is a narrow city street with parking on both sides, it is available for access to the site. See Tr. IV, 166-167; also see Tr. V, 31; Exh. 8; Exh. 38, p. 6. Where it currently ends, it can simply be extended. There is a short, four- to six-lot subdivision road leading off it to the east at that point, but there was no concrete testimony as to how a three-way intersection at this location would cause any problem. See Tr. V, 29-30.

4. The Interrelationship Among the Entrances – Though we have found, based upon the proposed roadway design, that the Board has failed to prove that concerns about access outweigh the regional need for housing, it may also be helpful to address the interrelationship among the entrances.

There are three means of access proposed: at the Blackburn Circle, from Perkins Street, and from Dodge Street. Each is safe, and not only the Blackburn Circle entrance, but also the Perkins Street entrance appears to meet minimum safety and design standards if used alone as the primary access point. Further, there are at least three ways these entrances could be combined to provide access to the site.

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12. Design of this intersection or even further extension of the street should be fertile ground for discussion and compromise since a member of the school committee testified that in this exact location there is an existing paved emergency access road in everyday use by the school. Tr. V, 17, 22. It does not appear at all unlikely that eventually the roadway from the proposed development will be extended straight to the west to Trask Street and beyond. This would result in Dodge Street ending in a simple "T" intersection. See Exh. 22, sheet 10; 51.

The first is the developer's proposal, which is to provide open access at all three locations, and most nearly resembles a normal configuration for a residential neighborhood. Second, the Blackburn Circle entrance could be used as primary access, with the other two streets gated for emergency access. Third, Perkins Street could be used as the primary access with the Fuller School Drive access gated and Dodge Street either gated or open.

None of these solutions is ideal.[13] The primary drawback to the open configuration, in addition to increasing congestion slightly at the school, is that it would create a new point of access to Gloucester from the north from Route 128. Despite the natural traffic-calming effects of the neighborhood streets, it is possible that this would generate some cut-through traffic, and that possibility may make it undesirable to the Board and the City.[14] See Tr. II, 93; IV, 162. Providing access *only* at the Blackburn Circle will not only increase congestion, but will also tend to isolate the proposed housing from the rest of the downtown Gloucester community. Using the Perkins Street entrance as the primary access and gating the Fuller School Drive access may be most desirable,[15] particularly if Dodge Street is used as secondary access for residents, spreading the traffic generated by the development more evenly through the surrounding neighborhoods.

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13. As noted in the introduction, a plan already exists for integrating the site into the surrounding neighborhood and dramatically improving the street configuration near the traffic circle, but if it is to be realized, that must happen outside of this adversary proceeding. The plan, developed by Sasaki Associates, is admittedly one that would require the commitment of municipal funds, and to be fully realized, might even require the use of the City's eminent domain powers (though no residences would be demolished). It would make the site part of the network of city streets, improving vehicular and pedestrian access not only to Dodge Street and the Perkins Street/Green Street neighborhood, but also to Trask Street, Gale Road, Millett Street, and others. See Exh. 51, 41, 3; Tr. III, 58, 62-67.

14. The Board's experts testified that there was potential for traffic to cut through the site, but no attempt was made to quantify the concern. Tr. IV, 162; V, 44-45.

15. This would appear to be the option favored by the assistant superintendent of schools. See Tr. IV, 96-97.

In most cases in which we conclude that the Board has failed to sustain its burden, we simply vacate its decision and order that it issue a comprehensive permit based upon the developer's proposal. But in cases such as this, where design issues are complicated and there are several alternatives available, we prefer to give the Board as much flexibility as possible. Therefore we will order the Board to issue a comprehensive permit, but it may choose among the three alternative access plans described above.

B. Stormwater Management

1. The design of the stormwater management system for the proposed development is adequate.

Management of stormwater on the site is fairly straightforward. The developer introduced plans showing the design of the stormwater management system and an extensive, preliminary hydrologic analysis.[16] See Exh. 5, 8, 9, 10, 11. There was testimony that not only will the stormwater system comply with generally recognized engineering standards, but because parts of it are within 100 feet of wetlands, it will also comply with the state Wetlands Protection Act and the Department of Environmental Protection's Stormwater Management Guidelines. Tr. I, 33, 49; II, 23, 33, 45; also see Tr. II, 24-31; III, 135. This is more than sufficient to establish the developer's prima facie case.

The Board introduced testimony from its expert civil engineer, which not only highlighted the preliminary nature of the design, but cast considerable doubt on a number of design details. Tr. III, 117-118, 122-123, 129-134. This is of little consequence since, as we

16. Under the Comprehensive Permit Law, only preliminary plans need be submitted to the Board or this Committee. 760 CMR 31.02(2)(f). The plans prepared by the developer are quite extensive, being between 50% and 80% complete. Tr. I, 38.

have noted above, full compliance with state law will be assured by the permitting procedure under the Wetlands Protection Act. Instead of leaving the final design to that process, as would normally be the case, since questions about the design are quite extensive, we will specifically require in the current case that the final stormwater management system design be resubmitted to either the city engineer or the Board's consulting engineers for review and approval. See Section VI-2(d), below. Of course, if there are changes that sufficiently great so as to require relocation of buildings or roadways, that would require further review by the Board itself. See 760 CMR 31.03(3).

2. The Board has not proven that stormwater from the site will surcharge the city stormwater system.

The site is in the upper reaches of a catchment area within the city's combined sewer system.[17] Tr. III, 82-84; Exh. 52. It is about a half mile from the Maplewood Avenue area, an area about halfway to the harbor, which is subject to flooding due to surcharging because it is a low point with poor piping. Tr. III, 83-85. A plan for capital improvements in the Maplewood Avenue area has been developed, but will not be implemented in the near future due to lack of funding. Tr. III, 85-86. No capital improvements have been recommended in the area where the proposed housing development is located. Tr. III, 85.

Though state Wetlands Protection Act requirements prohibit any increase in the *peak flow* of stormwater runoff from the proposed development, the total *volume* of runoff is likely to increase. This raises at least the possibility that the stormwater from the development could exacerbate the flooding problem closer to the center of town. The Board, however,

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17. Such old systems, which combine sewage and stormwater in a single pipe are subject to surcharging and frequently overflow during large storm events. See Tr. III, 86; Exh. 36.

produced no evidence that this will in fact happen.[18] Mere conjecture on the part of the Board is not sufficient to meet its burden of proving the existence of a local concern and that the concern outweighs the regional need for housing.[19] Even if there were specific proof on this issue, it is unlikely that this would justify denial of the comprehensive permit. See *North Attleborough, Dexter Street L.L.C. v.*, No. 00-01, slip op. at 17 (Mass. Housing Appeals Committee Jul. 12, 2000)(partial sewer blockage and manhole surcharging problem unaddressed for fifteen years may not be used as the basis for denial of permit); *Franklin Commons Ltd. Partnership v. Franklin,* No. 00-09, slip op. at 15 (Mass. Housing Appeals Committee Sep. 27, 2001)(long-standing sewer capacity problems related to inflow and infiltration not sufficient justification for denial of permit); *Millhaus Trust of Upton v Upton*, No. 74-08, slip op. at 20-21 (Mass. Housing Appeals Committee July 8, 1975)(possible inadequacies of water supply not justification for denial of comprehensive permit where the entire town would benefit from various needed improvements, in regard to which the town has been derelict).

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18. On direct examination, the city engineer testified as follows:
    Q: ...will it create any additional stormwater flow?
    A: I can't tell.
    ...
    Q: Do you have an opinion as to whether it could potentially increase the flooding problems?
    A: No, I don't. I don't think there is enough information provided.

19. If the Board had felt that insufficient information describing the proposal had been provided to it during the local hearing or at the commencement of the appeal, it had the right , pursuant to 760 CMR 31.02(2), to raise that issue by motion. It did not do so. The requirement in that section of the regulations that the developer provide a complete description of the proposal does not, of course, relieve the Board from presenting a thorough factual case during the *de novo* appeal.

C. Municipal Water and Sewer Capacity

1. Water

An existing 16-inch water main, which supplies the Blackburn Industrial Park, traverses the site, and will be used to supply water to the new development. Tr. I, 35. To ensure optimal flow, there will be two connections, forming a loop; there will be tie-ins at both Perkins Street and Dodge Street. Tr. I, 35-36. Should it prove necessary, the developer has offered to provide a pump station to increase water pressure. Tr. I, 36; also see Exh. 2, p. 19. This is clearly sufficient to establish a prima facie case.

The Board has not met its burden in rebutting it. The city's construction engineer testified inconclusively that "[we are] just concerned that this project... could have an effect on the draw and make that exacerbate that situation in Blackburn Industrial Park," and conceded that a pump station would solve the problem if in fact one developed. Tr. V, 43, 46.

2. Sewer

The developer proposes to tie into the existing city sewer system at the intersection of Green and Perkins Streets. Tr. I, 37. The developer presented only the most rudimentary testimony from a professional civil engineer with regard to this issue. But that general testimony combined with a more detailed discussion of sewer capacity in the Comprehensive Permit Application Narrative is sufficient to establish a prima facie case. Tr. I, 37; Exh. 2, pp. 21-22.

The Board challenged the developer's sewer capacity calculations, and presented a more detailed analysis by the town engineer. He testified that because of the age and poor condition of the existing eight-inch sewer mains in the neighborhood, the calculations should

assume a maximum capacity not of 600,000 gallons per day (GPD), but rather of 450,000 GPD. Tr. III, 94-96. Further, he testified that estimated total flow in the sewer lines should be increased by a peaking factor of five, not the factor of four used by the developer's engineer. Tr. III, 96-97. Using these figures, "there is an undercapacity in the system of 20,000 gallons per day during the peak." Tr. III, 97. This was unrebutted by the developer, and therefore the Board has established a legitimate local concern in this regard.

It appears, however, that the developer has offered to mitigate this concern "by putting in a sewer main larger than the eight-inch diameter". Tr. III, 103; V, 67. This is a perfectly appropriate response to permit the housing development to be built. See 760 CMR 31.06(9); also see *Woodcrest Village Assoc. v. Maynard*, No. 72-13, slip op. at 18-19 (Mass. Housing Appeals Committee memorandum Feb. 13, 1974), *aff'd,* 370 Mass. 64, 345 N.E.2d 382 (1976)(developer agreed to construct 2,000 feet of sewer); also see generally *Hilltop Preserve Ltd. Partnership v. Walpole*, No. 00-11, slip op. at 14-15 (Mass. Housing Appeals Committee Apr, 10, 2002). We will condition the issuance of a permit on such mitigation. See Section VI-2(e), below.

VI. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Gloucester Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development shall be constructed as shown on drawings by Port Engineering Associates, Inc. (Existing Conditions Plan, Conceptual Site Plan, Utilities Plan, Conceptual Site Plan), 3/16/01 (Exhibits 4, 5, 6, 7) and architectural drawings entitled Captain's Row Estates, by Flavin Architects, progress issue 8/28/01 (Exh. 16-21).

(b) Access near the Fuller School shall be constructed as show on a drawing entitled Conceptual Access Plan, by Dermot J. Kelly Associates, Inc., 10/16/01 (Exhibit 38-A), except that that the dogleg bend at the end of the Blackburn Circle off ramp be retained or that that area be otherwise redesigned to any reasonable specifications suggested by the City of Gloucester Engineering Department..

(c) Access at Dodge Street shall be constructed pursuant to final designs to be approved by the City of Gloucester. If such designs cannot be mutually agreed upon by city staff and the developer, they shall be subject to further review by the Board, subject, if necessary, to further right of appeal to this Committee.

(d) Prior to commencement of any construction, the completed stormwater management system design shall be submitted to the city engineer or to the Board's consulting engineers for review and approval.

(e) Prior to occupancy, the developer shall upgrade existing municipal sewers as necessary by replacing existing eight-inch mains with larger mains.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and

specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Dated: May 26, 2004

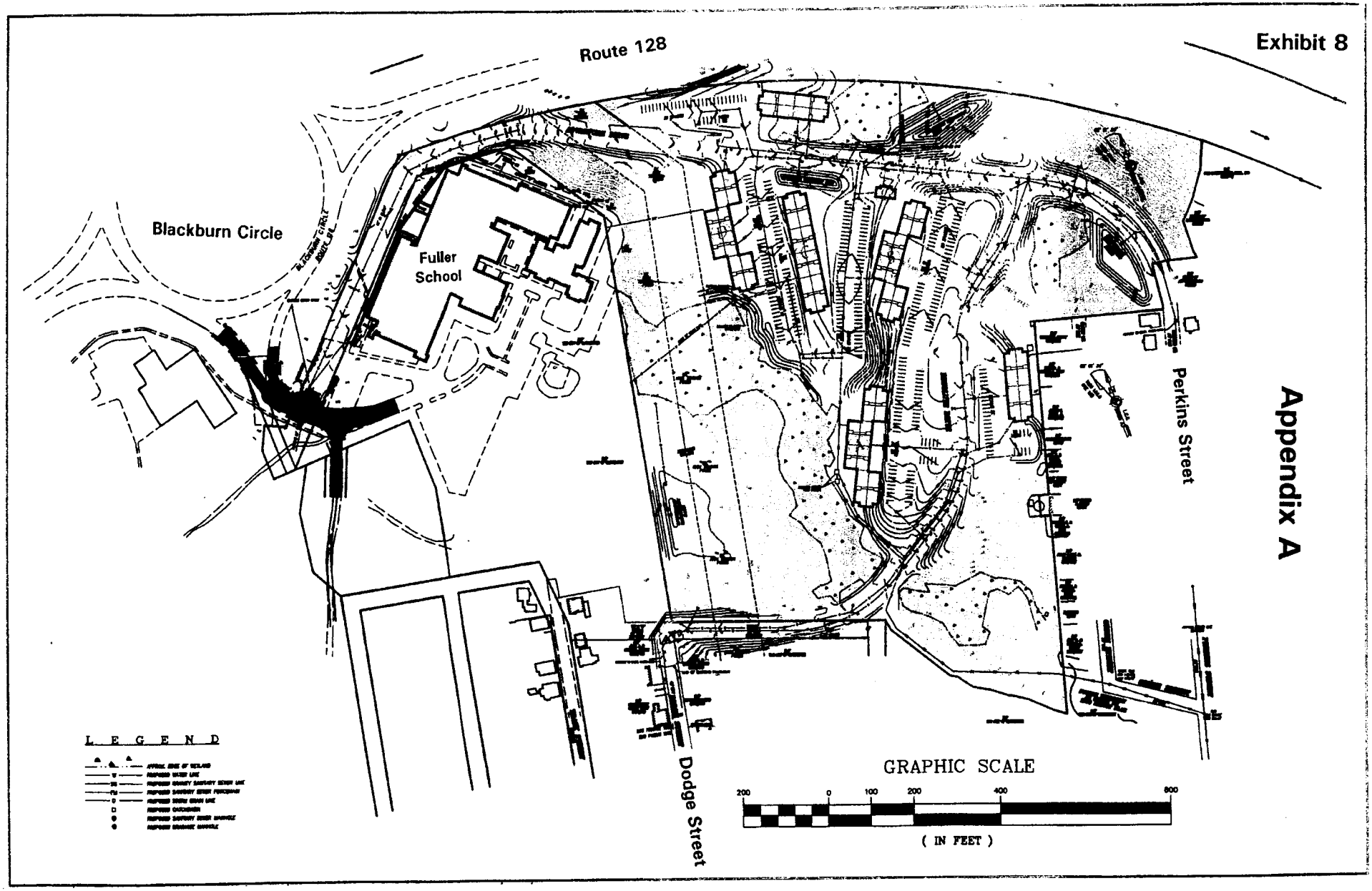
Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

LPc\g-d

Exhibit 8



Appendix A