COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

28 CLAY STREET MIDDLEBOROUGH, LLC

v.

MIDDLEBOROUGH ZONING BOARD OF APPEALS

No. 08-06

DECISION

September 28, 2009

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

28 CLAY STREET MIDDLEBOROUGH, LLC, Appellant v. ZONING BOARD OF APPEALS OF MIDDLEBOROUGH, Appellee	)	No. 06-16

DECISION

I. PROCEDURAL HISTORY

On October 4, 2007, 28 Clay Street Middleborough, LLC applied to the Middleborough Zoning Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build 250 mixed-income rental housing units known as the Lodge at Middleborough on a 12.5-acre site near the intersection of Routes 44 and 28 in the western part of Middleborough. Exh. 1.a. The housing is to be financed either by the Massachusetts Housing Finance Agency (MassHousing) or the New England Fund of the Federal Home Loan Bank of Boston. Exh. 2.

The Board denied the comprehensive permit, filing it with the town clerk on June 3, 2008. Exh. 5. On June 23, the developer appealed to this Committee. Thereafter, in order to structure the Committee's *de novo* hearing and narrow the issues presented, the parties negotiated a Pre-Hearing Order, which was issued by the presiding officer pursuant to the Committee's regulations. Prefiled testimony was received from six witnesses, a site visit and two days of hearings to permit cross-examination of witnesses were conducted, and post-hearing briefs were filed.

II. FACTUAL OVERVIEW

This case involves a 12.5-acre site in an existing, partially developed commercial subdivision known as Middleborough Park at 495 (the Park).[1] The area once contained a handful of single-family homes, which have slowly been removed to facilitate development of the Park, leaving a lone, isolated residence. Tr. II, 59-60. The park is in the general vicinity of the intersection of Route I-495 and U.S. Route 44 in North Middleborough. Exh. 39-54, sheet 6 (Appendix A);[2] 37-C (Appendix B); 18 (Appendix C); also see Exh. 1.d, sheets 1 and 2. Route I-495 runs from northwest to southeast. *Id.* Route 44 runs due east from the Route I-495 interchange, and a quarter of a mile east of the interchange is a large rotary (typical of the sort built during the first half of the twentieth century), where Route 44 intersects with Massachusetts Route 18/28 and West Grove Street. *Id.* Route 44 runs due east and west through the rotary; Route 18/28 runs due north and south through the rotary, and West Grove Street ends at the rotary, approaching it from the south east, parallel to Route I-495. *Id.* The development site is about a quarter mile north of the rotary, with a small amount of frontage on the east side of Route 18/28; it is located between Clay Street and Commerce Boulevard, both of which intersect with Route 18/28. Exh. 1.d, sheet 2; 39-54, sheet 6 (Appendix A); 37-C (Appendix B). Clay Street is an older, rather narrow road that crosses Route 18/28 at an oblique angle, and Commerce Boulevard is a newer, wider road that dead ends at the highway. The boulevard is the entrance road to the Park, an eleven-lot commercial subdivision of slightly over 100 acres in which three lots have been rented and

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1. The developer, 28 Clay Street, LLC, is a wholly owned and controlled subsidiary of the Conroy Development Corporation (Conroy), and Conroy, through another limited liability company that it owns and controls, owns all the undeveloped portions of the Park. Exh. 35, ¶¶ A-2, B-1; Tr. I, 52.

2. A number of exhibits entered into the record clearly illustrate various aspects of the development site and the area around it, but no single exhibit shows it comprehensively. The site and the area are best depicted on sheet 6 of Exhibit 39-54 (Exhibit 39 has 68 sub-exhibits, labeled 39-1 through 39-68), in Exhibit 37-C, and in Exhibit 18, and therefore those exhibits have been appended to this decision as Appendices A, B, and C. While the existing roads are shown accurately on these exhibits, it should be noted that they also show two roads that have not been completed. That is, all three exhibits show Commerce Boulevard, a roadway that has only been partially completed, and sheet 6 of Exhibit 39-54 (Appendix A) shows a conceptual design for a ring road for which there are no definite construction plans.

developed—as a multi-tenant office building, and office and light manufacturing building, and a food distribution warehouse and retail facility. Exh. 1.d, sheet 2; 1.f, sheet 2; 39-44, fig. 2; 35, ¶¶ B(1), C(4), C(5). The development site is at the western edge of the Park, and immediately to its east it abuts two of the three developed commercial properties. Exh. 1.d, sheet 2; 1.f, sheet 2; 39-44, fig. 2. To the north (and slightly east) is an undeveloped portion of the subdivision. *Id.* To the north (and slightly west), across Clay Street, that is, between Clay Street and Route 18/28 is another developed commercial subdivision (the Campanelli Business Park), a small bank, a gas station, and some undeveloped land. Exh. 1.d, sheet 2; 1.f, sheet 2; 39-68.

The southern portion of the site, the land between the site and the rotary, and the land around the Route I-495 interchange are zoned General Use. Exh. 18 (Appendix C). The northern part of the site and the land around it are zoned Residential A, that is, primarily for single-family homes. Exh. 18 (Appendix C); Exh. 17, § IV-A. Residential uses are allowed in both the Residential A and General Use districts, though only the General Use district permits multi-family housing. See Exh. 42, ¶ 2; Exh. 17. The areas near the site that are zoned Residential A are also within a zoning overlay district called the Development Opportunities District (DO District), the purpose of which is "to provide opportunities for economic development expansion in a planned multi-use district" that permits commercial uses by special permit. Exh. 18 (Appendix C); Exh. 17. §§ IX-A, IX-B(1)(a). (The DO District is identified on Appendix C by hatching.) The DO District comprises approximately 700 acres, and includes 87 existing residential properties and between 100 and 400 acres of vacant, developable land. Tr. II, 44; Exh. 37, ¶ 12; 37-C, 37-D. To the southeast of the rotary, between Route 44 and West Grove Street is a large Affordable Housing Target Area. Exh. 18 (Appendix C); Exh. 24 (map on last page, entitled: "Housing Opportunities: Downtown"). (The small, westernmost portion of the Affordable Housing Target Area is identified on Appendix C by the letters "AH.")

III. PRELIMINARY ISSUE

A. Ruling on Motion for Summary Decision

Soon after this appeal was filed, the Board filed a motion for summary decision, arguing that the town was entitled to the benefit of one of the "safe harbors" provisions in our regulations. On October 15, 2008, the Committee's presiding officer denied that motion. We have considered the Board's claim under both 760 CMR 56.03(4) and 56.03(5),[3] and we reaffirm the presiding officer's ruling that no safe harbor is available to the developer.

Our regulations contain several provisions that offer an incentive for municipalities to construct affordable housing by providing them with safe harbors from unfriendly comprehensive permit developments. See, e.g., *Alexander Estates, LLC v. Billerica*, No. 05-14, slip op. at 2 (Mass. Housing Appeals Committee Ruling on Motion to Dismiss Mar. 27, 2006). Specifically, any comprehensive permit decision of the town's board of appeals is deemed consistent with local needs as a matter of law and will therefore be upheld if the town 1) has been certified as in compliance with an approved Affordable Housing Plan (that is, not only has an approved plan, but also, within a calendar year, has increased the number of affordable units in the community by at least 0.50%[4] of the town's total housing stock) or 2) has made significant recent progress toward its statutory minimum of affordable housing, that is, increased the number of affordable units by at least 2.0% of the town's total housing stock. 760 CMR 56.03(1)(b); 56.03(4)(f); 56.03(5).

In this case, the record shows that by a letter dated December 27, 2006, the Department of Housing and Community Development (DHCD) "certif[ied] that Middleborough [was] in compliance with its approved plan…" for a period beginning December 14, 2006 through December 13, 2007. Exh. SD-1. That letter also indicated, however, that the affordable housing units which qualified the town for certification were

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3. The Board's argument cites the Recent Progress provision of our regulations. 760 CMR 56.03(5). Memorandum in Support of Motion for Summary Decision, p. 5 (filed Jul. 31, 2008). The only evidence presented concerns Certification of Municipal Compliance with an approved Housing Production Plan, 760 CMR 56.03(4)(f). (Prior to recodification of our regulations in 2008, these provisions were found at 760 CMR 31.07(1)(d) and 31.07(1)(i), respectively.)

4. Under the earlier regulations, a 0.75% increase was necessary to reach the safe harbor.

required to remain eligible for inclusion in the state's Subsidized Housing Inventory, and one month later, on January 30, 2007, based upon an annual recertification process, because building permits had not been issued for a 66-unit comprehensive permit development, the town's certification was suspended.[5] Exh. SD-A. The suspension remained in effect through 2007 and into 2008. Exh. SD-B, SD-C. The Board offered no evidence to dispute these facts. Similarly, the Board offered no evidence to show that the town had reached the recent progress safe harbor of § 56.03(5). Since the town could not avail itself of either of these provisions when the developer filed its application on October 3, 2007, the motion for summary judgment was properly denied.[6]

IV. LOCAL CONCERNS

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 or federal requirements or other generally recognized

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5. As the letter explained, the certification was based upon the Board's approval of an earlier, unrelated comprehensive permit application. Upon issuance of the permit and its filing with the town clerk in mid-January 2006, those units were placed on the Subsidized Housing Inventory. See 760 CMR 56.03(2)(b)(1)(a). However, those units were removed from the inventory one year later because no building permits had been issued. 760 CMR 56.03(2)(c).

6. The Board also filed a motion to disqualify the presiding officer, which was denied. We reaffirm this ruling by the presiding officer. See generally, 760 CMR 56.06(7)(e)(2), 56.06(7)(d)(4) (authority of the presiding officer). In addition, on the first day of testimony, the Board filed an unsupported, written motion to dismiss, alleging that the developer was not a limited dividend organization. Motion to Dismiss (filed Apr. 14, 2009). Though the Board attempted to bolster this motion by cross-examination of the developer's principal, it was denied orally. We reaffirm the presiding officer's denial of this motion as well. Pre-Hearing Order, §§ II-4, IV (issues in dispute); Exh. 2 (Project Eligibility letter); Tr. I, 37-42 (inconclusive testimony with regard to the legal issue of limited dividend status and project eligibility); 760 CMR 56.04(1) (Project Eligibility); *LeBlanc v. Amesbury*, No. 06-08, slip op. at 3, n.6 (Mass. Housing Appeals Committee May 12, 2008), *aff'd* No. 08-2631 (Suffolk Super. Ct. Jun. 1, 2009); *Bay Watch Realty Tr. v. Marion*, No. 02-28, slip op. at 7-8 (Mass. Housing Appeals Committee Dec. 5, 2005), *aff'd* No. 07-P-1372 (Mass. App. Ct. Oct. 10, 2008); *Delphic Assoc., LLC v. Middleborough*, No 00-13, slip op. at 3-4 (Mass. Housing Appeals Committee Jul.17, 2002, *aff'd* 449 Mass. 514 (2007).

design standards.[7] 760 CMR 56.07(2)(a)(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 the concern outweighs the regional need for housing. 760 CMR 31.06(6); 760 CMR 56.07(2)(b)(2); also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

As described in the Pre-Hearing Order, there are three issues in dispute in this case: whether the rotary can accommodate the additional traffic from the proposed development; whether the development will interfere with plans to construct a ring road around the rotary; and whether the development is inconsistent with the town's long-term planning efforts as reflected in the DO District.[8] Pre-Hearing Order, § IV-3 (Dec. 29, 2008); also see Board's Brief,[9] pp. 28, 30-34, 38-50. These issues are very much interrelated. Capacity limitations of the rotary, which was built for much lower traffic volumes, have led to the suggestion that a ring road be constructed, which in turn is likely to effect the final design of Commerce Boulevard, which abuts the site. All of these are related to long-term planning efforts for this area and the town.

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7. "[A] *prima facie* case may be established with a minimum of evidence." *100 Burrill Street, LLC v. Swampscott*, No. 05-21, slip op. at 7 (Mass. Housing Appeals Committee Jun. 9, 2008), quoting *Canton Housing Authority v. Canton*, No. 91-12, slip op. at 8 (Mass. Housing Appeals Committee Jul. 28, 1993). For example, "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Tetiquet River Village, Inc. v. Raynham*, No. 88-31, slip. op. 9 (Mass. Housing Appeals Committee Mar. 20, 1991).

8. As made clear in the Pre-Hearing Order, the Board has not raised the issue that this multi-family residential development is inappropriately sited within the existing commercial subdivision due to design or other substantive factors. Cf., e.g., *Cloverleaf Apts., LLC v. Natick*, No. 01-21 (Mass. Housing Appeals Committee Dec. 23, 2002)(apartment building approved in underutilized parking area of existing shopping mall). Rather, its contention is that it is inappropriately sited within the DO District due to municipal planning concerns.

9. With regard to the first issue—the current capacity of the rotary—the Board does not, in fact, provide any argument in its brief, and we would therefore normally consider it to be waived. The prefiled testimony of the Middleborough planning director, however, addressed this issue obliquely, and we will therefore consider it briefly. We also note that the planning director's testimony touched on several other issues. See Exh. 39, ¶¶ 10, 11, 25. These, however, were not included in the Pre-Hearing Order, and therefore we will not consider them.

A. The Board has Not Proven that the Rotary Cannot Accommodate the Additional Traffic from the Proposed Development.

The developer's transportation engineer conducted a traffic study, and provided detailed testimony. See Exh 36. In the normal course of this investigation, in consultation with the Massachusetts Highway Department and town officials, he determined that no specific changes to the rotary have been planned for the next five years. Exh. 36, ¶¶ 2, 11-13, 30. He concluded that "while a number of intersections [at the rotary] operate under constrained conditions and several intersection approaches are projected to experience long delays under future conditions independent of project-related traffic, overall delay and vehicle queuing will not be significantly impacted by additional traffic generated by this development." Exh. 36, ¶ 17. The traffic added by the project would increase peak-hour traffic volume by slightly over 2%, but would not "noticeably change vehicle delays." Exh. 36, ¶ 23. "[P]roject-related traffic increases can be adequately accommodated within the existing infrastructure," "the proposed project… will not preclude future improvement to the area, including the ring road, Clay Street, and improvements to the rotary," and "the development can be safely constructed with minimal impact to the surrounding transportation system." Exh 36, ¶ 26; also see Exh. 6; 9; Exh 41. This is sufficient to establish the developer's *prima facie* case. 760 CMR 56.07(2)(a)(2).

The Board has not responded with any specificity with regard to capacity. It correctly notes that the 1987 study "advised that the Middleborough rotary and surrounding road network would, [over the long term,] be unable to accommodate the additional traffic generated by the DO District development." Board's Brief, p. 30. Further, the Middleborough planning director testified concerning a number of scenarios under which increasing traffic and difficulties in constructing additional traffic lights might worsen the current problems. See, e.g., Exh. 39, ¶ 12. This testimony, however, provides no specific evidence that the proposed development itself will result in a traffic increase that the rotary cannot accommodate. And, the Board's other expert, a transportation planner, did not address capacity *per se*, but focused on concerns that the

development would interfere with future improvements (see below). See, e.g., Exh. 38, ¶ 8; 38-A, p. 2.

We do not doubt that congestion is a problem in the area of the rotary. In fact, congestion and safety issues at the rotary have been noted in various plans since at least 1981. See, e.g., Exh. 19, p. 5; Exh. 38, ¶¶ 12, 19; 38-F, Ch. 6, p. 16. But the Board has not presented sufficient evidence to meet its burden of proving that the proposed development raises a local concern that outweighs the regional need for affordable housing.

B. The Board Has Not Proven that the Development Will Interfere with Plans to Construct a Ring Road.

Replacement of the rotary by a much larger ring road is the cornerstone of the long-term plan for alleviation of the congestion problem at the rotary. Exh. 38, ¶¶ 18, 21. It is therefore important that the proposed development not prevent construction of such a road.

In his traffic study and testimony, the developer's transportation engineer considered not just the current traffic situation, but also Middleborough's long-term plans to address congestion at the rotary by constructing a ring road. Exh. 36, ¶ 12, 26. He concluded that the proposed development would not interfere with such plans. "Should the 'ring-road' project move forward…, Clay Street could still be modified with a dead-end section…, [and] the traffic entering and leaving the site would be re-distributed such that all traffic traveled to and from Bedford Street," where the roadways could accommodate that traffic. Exh. 36, ¶ 34; also see Exh. 36, ¶ 26; Exh. 6; 9. This is sufficient to establish the developer's *prima facie* case. 760 CMR 56.07(2)(a)(2).

The Board's response is complex and somewhat opaque. We agree with the Board that roadways in both the Park and the nearby Campanelli Business Park have been required by the Middleborough Planning Board to be constructed or designed so as to connect to one another in order to begin the formation of a ring road, and that this is important. See Board's Brief, p. 20, Exh. 39, 11; Exh. 37-C (Appendix B); Exh. 39-54, sheet 6 (Appendix A). The northeast quadrant of the ring road, however, remains far from completion. The Campanelli Drive section of the ring road, which runs from Route

18/28 east to the eastern part of Clay Street, has been completed, but that constitutes only about a quarter of the ring road in that quadrant. Commerce Boulevard itself is not planned to be part of the ring road, but rather to be more in the nature of a spoke connecting Route 18/28 to the ring road. See Exh. 1.f, sheet 2; Exh. 39-54, sheet 6 (Appendix A). The "spoke," Commerce Boulevard, has been completed, but there are no immediate plans for construction or either the section of the ring road linking the end of Commerce Boulevard to the Campanelli Drive section of the ring road to the north, nor the section of the ring road to the south, which is to intersect with Route 44.

While the roadways in this area are far from completion or even final design, the most immediate concern that the town has had to address is the likely increase in traffic on Commerce Boulevard as the Park develops. As the Board correctly points out, a traffic signal cannot be placed at the existing intersection of Commerce Boulevard and Route 18/28 since that would result in traffic backing up into the rotary. Exh. 39, ¶ 12. Therefore a requirement has been imposed—if certain congestion thresholds are reached in the future—to build the section of the ring road that would link Commerce Boulevard to Campanelli Drive at Clay Street. Exh. 39, ¶ 12; see Exh. 37-C (Appendix B). In addition to this link, the town has required—once the congestion thresholds are reached—that Clay Street be dead-ended and the intersection of Clay Street with Route 18/28 eliminated. Exh. 39, ¶¶12, 14.

The Board argues that because the housing development proposal would retain the Clay Street-Route 18/28 intersection as its entrance, the proposal "negates the ability to mitigate traffic" in the manner described above.[10] Exh. 39, ¶ 16; also see Board's Brief, pp. 22-23, 30-34. It claims that the proposed design would prevent

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10. There is also passing reference to a recommendation by the Southeastern Regional Planning and Economic Development District (SRPEDD) that a buffer area be preserved near Rte. 18/28 to accommodate future widening of that highway to four lanes. Exh. 38, ¶ 20; also see Exh. 39, ¶ 17. While this is a legitimate concern, it does not appear to be a problem since the development plans show the closest building located nearly 100 feet from the edge of the existing right of way. Exh. 1.f, sheet 2; also see Exh. 39, ¶ 17; also see Exh. 41, ¶¶ 7, 8.

creation of a dead end on Clay Street, and would therefore induce cut-through traffic in residential neighborhoods.[11] *Id.*

As a threshold matter, the Board has pointed to no clear evidence that lack of a dead end on Clay Street would result in cut-through traffic in residential neighborhoods, nor is there any indication of the severity of that potential problem. But we will assume that there is a significant local concern with regard to cut-through traffic.

Assuming that cut-through traffic must be minimized, our review of the extensive, though sometimes confusing testimony and documentation presented by the Board reveals no specific, concrete impediment either to creation of a dead end on Clay Street or otherwise to the construction of the ring road. See Exh. 39; Exh. 39-1 through 39-68; Exh. 38. Further, in rebuttal, the developer has presented convincing testimony that a safe entrance to the proposed housing development can be created on Clay Street at Route 18/28 and, at the same time, a dead end can constructed on Clay Street without impeding plans for the ring road.[12] Exh. 41, ¶¶ 10, 11, 14; Exh. 40, ¶¶ 4-5. Last, our own review of the plans and the documentation not only comports with the latter view, but also suggests that since there is still much planning to be done in this entire area, there will be no lack of alternatives for addressing the concerns raised by the Board as the larger project of remedying congestion at the rotary proceeds.[13]

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11. Implicit in this argument is the idea that town officials will not modify the existing permits that establish the framework for future roadway improvements. See Board's Brief, p. 34. This flies in the face of the history of this case (as well the typical practice of towns that are encouraging commercial development), since permits have been modified continually to accommodate new development plans and traffic congestion mitigation options. The town will have ample opportunity to consider nearly unlimited options for modifying the permitting landscape in this area before the ring road is completed. Though the Board does not argue that it or this Committee lacks the power to modify the existing permits as part of a comprehensive permit (and that does not appear necessary at this point), we should note that such power is integral to the Comprehensive Permit Law. *Taylor Cove Development, LLC v. Andover*, No. 09-01 (Mass. Housing Appeals Committee Ruling on Motion for Summary Judgment Jul. 7, 2009).

12. Further, all of the discussion during the hearing concerned a dead end between Route 18/28 and the ring road. It appears that the residential area to the northeast of the ring road could also be protected from cut-through traffic by creating a dead end on Clay Street *outside* of the ring road, that is immediately north of the ring road between the ring road and Ash Street. See Exh. 18 (Appendix C).

13. We note that the requirement that the link between Commerce Boulevard and Campanelli Drive be constructed—if and when certain congestion thresholds are met—remains in effect.

Thus, in our judgment, the Board has not presented sufficient evidence to meet its burden of proving that the proposed development will, on the most detailed level, create a legitimate local concern with regard to cut-through traffic, or, in the long run, interfere with plans for construction of a ring road.

C. The Development is Inconsistent with Middleborough's Municipal Planning Interests, which Outweigh the Regional Need for Housing.

The most significant issue in this case is the question of the development proposal's consistency with long-term planning in Middleborough. This Committee has always given such planning efforts careful consideration in determining consistency with local needs under G.L. c. 40B, §§ 20-23. See *Harbor Glen v. Hingham*, No. 80-06, slip op. at 6-16 (Mass. Housing Appeals Committee Aug. 20, 1982); *KSM Trust v. Pembroke*, No. 91-02, slip op. at 5-8 (Mass. Housing Appeals Committee Nov. 18, 1991); *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01 (Mass. Housing Appeals Committee Sep. 18, 2002); also see 760 CMR 56.07(3)(g). And, clearly, as argued by the Board in its brief, Middleborough has both planned for development in the area in which the housing is proposed, and has engaged in townwide planning—traffic planning, economic and community development planning, affordable housing planning, and master planning.[14] See Board's Brief, pp. 38-50.

Our approach to analyzing a board's claim that its planning efforts justify denial of a comprehensive permit derives from our *Pembroke* decision (above), as elaborated in *Barnstable*. That is:

First, as always, the developer must establish a *prima facie* case. 760 CMR 56.07(2)(a)(2).

Then, we examine the master plan in effect at the time of the developer's application. *Paragon Residential Properties, LLC v. Brookline*, No. 04-16, slip op. at 45 (Mass. Housing Appeals Committee Mar. 26, 2007); *Meadowbrook Estates Ventures,*

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14. Long-range, townwide land use plans are referred to as either "comprehensive plans" or "master plans." Because Massachusetts state law does not require local zoning to conform to such a plan, "master plan" is the preferred term, and that is how Middleborough refers to its highest level, most general planning. See Exh. 22; M. Bobrowski, Massachusetts Land Use and Planning Law § 12.13, n.1 (2d ed. 2002).

LLC v. Amesbury, No. 02-21, slip op. at 12 (Mass. Housing Appeals Committee Dec. 12, 2006), *aff'd* No. 08-P-1240 (Mass. App. Ct. Sep. 16, 2009). The Board must present sufficient evidence concerning its master planning to meet a three-part test:

1. Is the plan bona fide? (Was it legitimately adopted, and, more importantly, does it continue to function as a viable planning tool in the town?)
2. Does the plan promote affordable housing?
3. Has the plan been implemented in the area of the site?

If any of these questions is answered, "No," we will not consider the plan in making our decision.

On the other hand, if a plan passes these tests, its requirements or recommendations will not automatically determine the outcome of the case before us. Instead, we must then analyze the master plan and its relationship to the proposed affordable housing. This analysis has at least two, frequently related aspects.

First, the answers to the three threshold questions determine the amount of weight we give to the plan. Of particular importance in determining how much weight should be given to the plan are the second and third questions, and specifically whether the housing element of the master plan (or a subsidiary affordable housing plan) has actually shown results. That is, has the housing plan resulted in construction of a substantial amount of affordable housing? 760 CMR 56.07(3)(g).

Second, we must determine whether the provisions of the plan are unnecessarily restrictive as applied specifically to the proposed project, that is, would the proposed housing actually undermine the plan to a significant degree? This analysis is very similar, if not identical, to the balancing that we always engage in under the Comprehensive Permit Law. That is, focusing first on the particular planning interest articulated by the town that the proposed housing is inconsistent with, we consider the totality of the town's planning interests, and determine whether those interests are sufficient to outweigh the regional need for affordable housing. The master plan is placed on the town's side of the scale, and the strength of the plan itself, the extent to which it has actually been implemented, and the extent to which it encourages and has resulted in affordable housing all lend weight to the town's argument that local planning concerns with regard to a particular proposal

outweigh the regional need for housing. *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at 6 (Mass. Housing Appeals Committee Sep. 18, 2002).

1. The developer's case

Because there are no specific state or federal standards addressing comprehensive planning concerns, the developer may establish a *prima facie* case by showing that its proposal conforms to generally recognized standards. *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at. 4, (Mass Housing Appeals Committee Sep. 18, 2002).

First, the development's project manager, a real estate development specialist with fifteen years of experience, testified that he reviewed a number of factors before concluding that the site is an appropriate location for this development. Exh. 35, ¶ C-1. He considered the fact that it is zoned for residential development, and that the DO District encourages innovative, multi-use development. Exh 35, ¶ C-2. He also considered the nature of the commercial uses in the Park and surrounding uses. Exh. 35, ¶¶ C-3 to C-9.

More important, the developer presented extensive testimony from a professional planner with more than thirty years of experience. See Exh. 37, ¶ 1; 37-A. He considered the zoning, the DO District, comprehensive planning concerns, and other factors. Exh. 37, ¶¶ 4, 5-6, 16-18. He also testified that the sum of Middleborough's plans "do not purport to constitute a comprehensive planning effort. Rather each one is little more that a report of conditions with generalized recommendations." Exh. 37, ¶ 18. He concluded that "the proposed site… is a suitable site for a residential development as proposed."[15] Exh. 37, ¶ 3.

Thus, the developer has established a *prima facie* case with regard to comprehensive planning concerns. 760 CMR 56.07(2)(a)(2).

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15. Although the developer's expert's view that the site is suitable for housing and his view of the town master plan and his view are certainly interrelated, they are nonetheless distinct opinions. It is primarily upon the former opinion, as well as other evidence, such as the testimony of the developer's project manager, that we base our finding that a *prima facie* case has been established. As will be seen below, we disagree with the developer's expert's characterization of the town's master plan.

2. The Board's Case

a. Master Planning in Middleborough

The history of Middleborough's planning efforts, particularly as it relates to the area in which the site is located, is described in the testimony of the town's planning director, and in various documents admitted into evidence.[16]

In 1981, in large part to prepare for growth expected to result from the completion of Route I-495 1982, Middleborough retained the regional planning association, the Southeastern Regional Planning and Economic Development District (SRPEDD) to prepare a Middleborough Industrial Development Study. Exh. 39, ¶ 7(a); 19, p. 1. SRPEDD studied a relatively small area north and east of the planned highway interchange, that is, the area in which the proposed housing site is located. Exh. 19, p. 1. The study noted that development of an industrial park was problematic due to lack of municipal sewer and zoning issues, and suggested that "[d]evelopment of an office park, corporate headquarters, or mixed-use complex with industrial, office, warehousing, and possibly even commercial and residential building [was] also a possibility...." Exh. 19, p. 2. It also noted that the rotary "loom[ed] as a potential problem area because of limited capacity...." Exh. 19, p. 5. It concluded that the area had "good potential for economic development," but that the existing residential zoning was a "drawback," and recommended a zoning change as the "best first step" to encourage economic development. Exh. 19, p. 13.

Soon after, in 1982, Middleborough Town Meeting passed a bylaw creating the Development Opportunities District (DO District) in this area. Exh. 39, ¶ 7(a); 17, § IX; 39-3. This is an overlay district which permits a variety of commercial uses by special permit. Exh. 39-3, §§ A, B. The overall purpose of the DO District was to "provide opportunities for economic expansion" while "prevent[ing] detrimental effects and impact on neighboring properties." Exh. 17, p. IX-1, § A; 39-3, p. IX-1, § A. Part of the DO District (including part of the proposed housing site) remained zoned for "General Use," and in that area, the town was concerned about the "disjointed appearance" of

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16. A number of exhibits were admitted in this case were filed in duplicate, for example, Exhibits 17 (§ IX) and 39-3, 19 and 39-4, 20 and 39-6, 22 and 39-8, 23 and 39-10, 25 and 39-34, 26 and 39-33, 27 and 39-32, 30 and 39-47, 31 and 39-47, 24 and 39-12, 39-2 and 39-35.

unplanned development. Exh. 20, p. III-8. In the area of the DO District that remained zoned residential, although residential uses were not formally excluded, not only were existing residences to be carefully protected from detrimental uses, but, more important, commercial uses were clearly to be favored and "co-mingling of residential and industrial uses" was not contemplated. Exh. 39, ¶¶ 7(a), 7(b), 7(d), 7(h); also see Tr. II, 41-42, 92.

In 1984, the Middleborough Planning Board issued the first special permit in the DO District for a fourteen-and-a-half-acre portion of the Park. Exh. 25. In 1985, a further special permit was issued for the entire 112-acre Park. Exh. 26. One or two additional special permits were issued, a definitive subdivision plan for the Park was approved in 1990, and then, in 1996, the special permits were incorporated into an Amended Master Special Permit, which in turn was amended four times, through 2004. Exh. 27; 39-32; 39-37; 28; 29; 30; 31; 32; also see Exh. 39-63.)

Meanwhile, in January 1986, SRPEDD prepared a Northwest Middleborough Traffic Study, which recommended that the town undertake an engineering study for reconstruction of the rotary area. Exh. 39, ¶ 7(e); 39-5. In April 1986, SRPEDD prepared a second study entitled Northwest Middleborough Master Plan Update, which also recommended the engineering study. Exh. 39, ¶ 7(f); 20. Though this document is called a "master plan update," it is unclear from the record whether there was a previous master plan or whether that plan addressed anything other than traffic. Similarly, this document itself—the "update"—is a study or report, rather than a plan adopted by the town of Middleborough. See, e.g., Exh. 20, pp. II-1, II-3. (The document is a curious one since it purports to consider just northwest Middleborough, but dedicates one of its three chapters to the entire General Use District, which spans the entire town from northwest to southeast, and in so doing, recommends an overlay district while entirely ignoring the fact that a DO District already exists in the northwest portion of the town. See, e.g., Exh. 20, pp. III-2, II-3, II-10.)

In 1987, the town commissioned a further report detailing the traffic problems at the rotary, the Development Opportunities District Comprehensive Traffic Impact Study. Exh. 39, ¶ 7(g); 39-7.

In 1999, a final report was prepared for the Middleborough Planning Board entitled Bedford Street (Route 18/28) Transportation Master Plan.[17] Exh. 39-53.

In 2001 the Middleborough Planning Board hired a consulting firm to prepare the "first part" of the town's master plan, the Middleborough Master Plan: Report on Findings and Alternatives. Exh 39, ¶ 7(h); 22. The report described itself as "a substantive part of the town-wide program to create a twenty-year Master Plan…," and consists of "findings" and "alternatives." Exh. 22, pp. ii, 1. It included a section on housing, and stated that among the goals "articulated for the housing component of the master plan " was to "[e]valuate Middleborough's needs for affordable hosing…," and it described a number of "choices that the town could make" to promote housing affordability and diversity. Exh. 22, pp. 81, 101-106. This document was completed in February 2002, and submitted to the state Department of Housing and Community Development (DHCD). Exh. 39, ¶ 7(h); 39-9.

In October 2002, the Housing Sub-Committee of the Master Plan Committee adopted an Affordable Housing Policy Statement. Exh. 39-11, cover letter. (It was to be considered by the Board of Selectmen and the Planning Board, as well, though there is no indication as to whether these boards also approved it. See Exh.)

In 2004, as a "continuation" of the earlier master plan report, the town prepared its Community Development Plan. Exh. 39, ¶ 7(i); 23. This was funded by DHCD and three other state agencies. Exh. 22, cover. It has an extensive housing component, and incorporated the earlier Affordable Housing Policy Statement. Exh. 23, pp. 9-37; 39, ¶ 7(i).

Finally, in May 2005, with a revision in October 2005, Middleborough prepared an Affordable Housing Plan. Exh. 24. It was approved by DHCD in November 2005.[18] Exh. 14; 15; 39, ¶ 7(j).

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17. The most recent traffic study was completed in July 2007, shortly before the developer' application for a comprehensive permit; it appears to have been commissioned by Massachusetts Highway Department in part to provide local officials with information on which to base planning decisions, and was entitled Planning for Growth, Raynham to Carver. Exh. 39-55, pp. 1-4.

18. DHCD not only approved the housing plan, but, as discussed in section III-A, above, in December 2006, it also certified that Middleborough was in compliance with that plan for purposes of establishing a "safe harbor" pursuant to 760 CMR 56.03(4). Exh. 14. The

Based upon the above history and a careful review of the documents, we conclude that Middleborough has met the three tests with regard to master planning.

1. We acknowledge at the outset that in most cases we expect to see a complete, fully integrated master plan, and that such a plan has not been adopted in Middleborough. At the time of the developer's application (and at the time of the hearing), the town was still in the midst of its planning process, but the particular facts presented here justify an exception to our normal rule. This is not a case like *Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 02-21, slip op. at 12 (Mass. Housing Appeals Committee Dec. 12, 2006), *aff'd* No. 08-P-1240 (Mass. App. Ct. Sep. 16, 2009), in which the "Master Plan was prepared well after the developer applied for a comprehensive permit.... [and, in fact, at that time the] Master Plan Steering Committee was not even established...." Nor is this similar to *Paragon Residential Properties, LLC v. Brookline*, No. 04-16, slip op. at 45 (Mass. Housing Appeals Committee Mar. 26, 2007), in which the Board had "not introduced evidence that its Comprehensive Plan was in effect...," and the Interim Planning Overlay District in question was approved two years after the developer's application, or *Brierneck Realty, LLC v. Gloucester*, No. 05-05, slip op. at 22-23 (Mass. Housing Appeals Committee Aug. 11, 2008), in which we found that "the plan's implementation... has not been demonstrated sufficiently...."

Rather, in the present case the DO District was formally adopted by Middleborough Town Meeting prior to the developer's application, much as a planned zoning district was approved by town meeting in our *Hingham* case. See *Harbor Glen v. Hingham*, No. 80-06, slip op. at 9 (Mass. Housing Appeals Committee Aug. 20, 1982). In that case, there was no master plan *per se*, but the town had engaged in an extensive planning process to determine the best use for an abandoned 750-acre naval ammunition depot. In our decision in that case, we referred to the town's planning interchangeably as the "Ammunition Depot Plan" and the "Master Plan." *Hingham, supra*, slip op. at 13. The DO District in the present case is analogous to the zoning change approved by

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certification was suspended, when, after a year, building permits were not issued for a previously approved 66-unit comprehensive permit development. Exh. 15.

Hingham Town Meeting, and thus we will make an exception to our normal practice of considering only townwide master plans.[19]

In addition, however, the Middleborough Planning Board, the Middleborough Master Plan Steering Committee, town staff, consultants, and citizens have taken significant steps toward finalizing a formal master plan. In 2002, an extensive, 195-page "Report on Findings and Alternatives" was issued as the "first part" of such a plan. From this has come the 2002 Community Development Plan, the 2005 Affordable Housing Plan, and other planning activities.

Based upon the history described above, we find that the DO District, together with Middleborough's extensive master planning activities, constitute a legitimately adopted, viable planning tool, satisfying our requirement that the town's plan be *bona fide*.

2. Second, Middleborough's planning promotes affordable housing. A particularly strong component of Middleborough's master planning is its Affordable Housing Plan, which has been approved by DHCD. See Exh. 24; also see Tr. II, 114. It not only presents housing goals and strategies, but also identifies five "priority areas" within the town as appropriate locations for affordable housing development and specific sites to be developed. Exh. 24, pp. 25-21, particularly Tables 25 and 27; also see Exh. 23, pp. 32-36.

Further, just as the overall master plan must be *bona fide*, the housing component must actually promote affordable housing and not merely pay lip service to the idea, and that is the case here. Not only is the Affordable Housing Plan a thorough, sophisticated document, but in addition, actual progress has been made.[20] The town has adopted zoning changes to allow second- and third-floor apartments in downtown business

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19. The approach to master plans that we adopted in *Hingham* was first codified in our regulations in 2002. Then, and now, the title of the regulations refers to "Municipal... Planning," while the text refers to a town's "master plan," rather than master planning in general. See 760 CMR 31.07(3)(d) (2002), 760 CMR 56.07(3)(g). We do not interpret the choice of words in the regulation as intending to limit the precedent established in *Hingham*; rather, we see a single doctrine that the evolved from *Hingham* to our three-part test, and was then codified in our regulations.

20. We leave unanswered the question of whether there might be circumstances in which we would find that the town's affordable housing plan satisfied our standard even though—due to market conditions or other factors—little affordable housing had actually been built.

districts[21] and accessory apartments generally; it has created an Affordable Housing Target Area; and it has begun preparing, but not yet adopted, inclusionary zoning provisions, zoning for higher density multi-family housing in general use districts, and a G.L. c. 40R (Smart Growth Zoning and Housing Production) development proposal for a site near the commuter rail station. Tr. II, 31-36, 100-101. In addition, a number of affordable housing developments have been considered by the town. Thirteen potential developments are listed in the 2005 Affordable Housing Plan. Exh. 24, p. 32, Table 27. Of these, five have been permitted and built, four permitted but not built, two abandoned, and two are unknown. Tr. II, 101-103; also see Exh. 14.

3. Finally, the plan has been implemented in the area of the site. The evolution of plans since the early 1980s, as described in detail above, shows a continued focus on this area. New development by special permit has been consistent with the purposes of the DO District, and on at least two occasions appropriate zoning changes have been approved by Middleborough Town Meeting—to permit construction of the adjacent Campanelli Business Park and to allow retail sales as an accessory use for one of the tenants of the Park. Exh. 39, ¶ 7(o); also see Tr. II, 116. In nearly a dozen instances, the town has used tax increment financing under G.L. c. 40, § 59 to encourage commercial development in this area. Tr. I, 106-109; II, 108. And, there is no evidence of inconsistent actions by the town. Cf. *KSM Trust v. Pembroke*, No. 91-02, slip op. at 7 (Mass. Housing Appeals Committee Nov. 18, 1991).

b. Analysis

We now turn to the question of the amount of weight we give to the plan. As noted above, although we consider the master plan in its entirety, we assign particular importance to the strength of the housing element and whether it has actually shown results. That is, in this case, we consider that, on one hand, the town's planning efforts have been *bona fide* and have been implemented in the area of the site, but, on the other hand, they are incomplete. More important, the housing element is sufficiently strong that it was approved by DHCD, and Middleborough was certified—at least briefly—as

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21. The town also obtained Community Development Block Grant funds for conversion of some of this space into affordable housing apartments. Tr. II, 34.

having met its annual goal for production of new affordable housing. Exh. 14; see 760 CMR 56.03(4)(f); also see nn.5, 18, supra. And, as described above, the Affordable Housing Plan has actively promoted, and achieved results in developing new housing. We therefore conclude that considerable weight should be given to the town's planning efforts.

Finally, we must determine whether the provisions of the plan are unnecessarily restrictive as applied specifically to the proposed project, that is, would the proposed housing actually undermine the town's planning interests to a degree significant enough to outweigh the regional need for housing? Specific planning concerns evident in the master planning that relate to the proposal, as well as the strength of the planning itself, its implementation, and town efforts to build affordable housing must be weighed against the regional need for housing. *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at 6 (Mass. Housing Appeals Committee Sep. 18, 2002).

The crux of the Board's argument is that the DO District "does not contemplate the co-mingling of residential and industrial uses...."[22] Board's Brief, p. 36; Exh. 39, ¶ 7(d). "[R]esidential use conflicts directly with the town's longstanding planning efforts to develop the site and surrounding area for commercial and industrial use." Board's Brief, p. 37.

We agree. First, from the history described above, there is no question that the proposed residential development is inconsistent with the town's master planning, which for years has envisioned commercial developments in the area, integrated with each other and minimizing conflicts with nearby uses. See, e.g., Exh. 39, ¶¶ 7 (p. 3), 7(b), 7(d), 7(h). One of the premises of all of the town's planning, as noted in the Affordable Housing

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22. The Board's alternative attempt to cast its argument in exactly the same terms as our decision in *Stuborn Ltd. Partnership v. Barnstable, supra*, is not persuasive. See Board's Brief, p. 49. It argues that "land zoned (and master planned) for industry... is scarce and in need of preserving for such purpose." *Id.* Not only is there no natural limit to land that can be zoned for commercial use—as there is to harbor frontage—but, in fact, the Middleborough Community Development Plan recommends making the DO District smaller. Exh. 23, p. 69; Tr. II, 48; also see Exh. 22, p. 7 (first and fifth key findings). Neither can the Board argue that there is something inherent in the general location of the DO District within the town that makes it unsuitable for affordable housing. The site is very close—only about one tenth of a mile—to the edge of the Affordable Housing Target Area. Exh. 18 (Appendix C); Exh. 24 (map on last page entitled: "Housing Opportunities: Downtown").

Plan, is that there must be "an adequate amount of high quality economic development that is not constrained by residential development within or adjacent to priority economic development areas." Exh 24, p. 12. The prudence of such an approach is supported by noting that the town has felt compelled to require dramatic mitigation efforts (including a fourteen-foot-high earthen berm) on the part of one of the businesses in the Park to protect a single residential building that remains isolated nearby on Clay Street. Exh. 39, ¶ 7(q); also see Tr. II, 59.

Equally important is the effect that permitting this development would likely have on the town's long-term plans for economic development. The immediate impact of this development might not be great; the DO District is fairly large, and only partially developed, and thus, removal of one commercial parcel would have limited economic ramifications. But it would set a precedent. It might well encourage further residential development in the DO District—either by comprehensive permit or as of right, since single family homes are permitted in the underlying Residential A district. Further, it would undercut the town's efforts to attract new commercial developments, since they could no longer be assured that possible conflicts with residential uses would be minimized.

Although Middleborough has not zoned the area around the site solely for commercial uses, in its planning it has expressed a strong preference for such uses—and it has done so consistently for over twenty years. In some communities and in particular locations, zoning for mixed-use development has gained increasing acceptance. Exh. 37, ¶¶ 9, 32. But Middleborough has not chosen that approach for this area near Route I-495. That judgment must be respected, and with regard to this particular development site—in the heart of a developing commercial park—we conclude, as we did in somewhat similar circumstances in 1982 in *Harbor Glen Associates v. Hingham*, No. 80-06, slip op. at 6-16 (Mass. Housing Appeals Committee Aug. 20, 1982), that, in light of the particular history of master planning in Middleborough, the planning interest in encouraging commercial development and limiting residential uses that has been articulated in that planning process outweighs the regional need for housing. Therefore, the Board's denial of the developer's application for comprehensive permit is affirmed.

V. REVIEW AND ATTORNEYS FEES

Included in the Pre-Hearing Order among the issues in dispute in this case is whether the Board improperly retained or expended review fees that it held in escrow.[23] Pre-Hearing Order, § IV-3 (Dec. 29, 2008). The Board presented no argument on this issue, and it is therefore waived. *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

For clarity, however, we will summarize the fees that are to be repaid to the developer. (At the time of its application in October 2007, the developer provided a technical review fee in the amount of $20,000. Exh. 10. In July 2008, the Board provided an accounting. Exh. 11.)

First, the balance remaining in the account, $2,565, should be repaid. See Exh. 11, p. 2.

Second, $5,825 was paid to the law firm of Daley and Witten, LLC for "preparation for, attendance at and participation in" the hearing before the Board, a meeting with town staff, and travel expenses. Exh. 11, 2-4, 8-9. Since "[l]egal fees for general representation of the Board… shall not be imposed…," this amount should be repaid. 760 CMR 56.05(5)(a); see also *Attitash Views, LLC v. Amesbury*, No. 06-17, slip op. at 14 (Mass. Housing Appeals Committee Summary Decision Oct. 15, 2007), *aff'd*, No. 2007-5046 (Suffolk Super. Ct. Jan. 7, 2009), *appeal docketed*, No. 2009-P-1096 (Mass. App. Ct. May 29, 2009), and cases cited.

Third, $3,018 was paid to H&H Associates to review financial information related to the proposed development and attend hearings before the Board. Exh. 11, 5-6. Financial review fees may be imposed, however, "only if… the work… consists of review of studies prepared on behalf of the [developer]…." 760 CMR 56.05(5)(b)(1). But the developer never submitted a *pro forma* financial statement to the Board since that may only be required after it proposes conditions to be included as it prepares to grant a comprehensive permit. 760 CMR 56.06(6); Exh. 12. Therefore this amount should also be repaid.

The Board is ordered to repay the developer the total of the above amounts, that is, $11,408.

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23. Also see Motion to Amend Initial Pleading (filed Sep 5, 2008; granted Dec. 12, 2008).

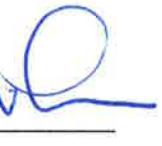
VI. CONCLUSION

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 Middleborough Board of Appeals is consistent with local needs, and is therefore affirmed.

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.

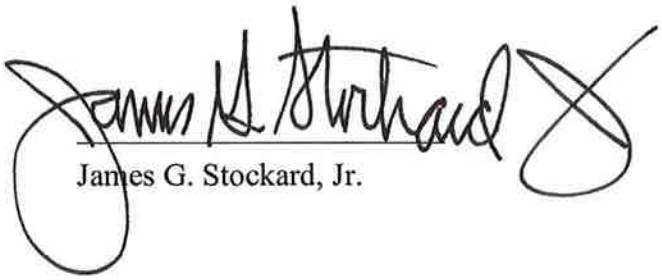
Housing Appeals Committee

Issued: September 28, 2009



Werner Lohe, Chairman

Marion V. McEttrick



James G. Stockard, Jr.

LPc\m

Route 44 Reconstruction Project

Raynham to Carver

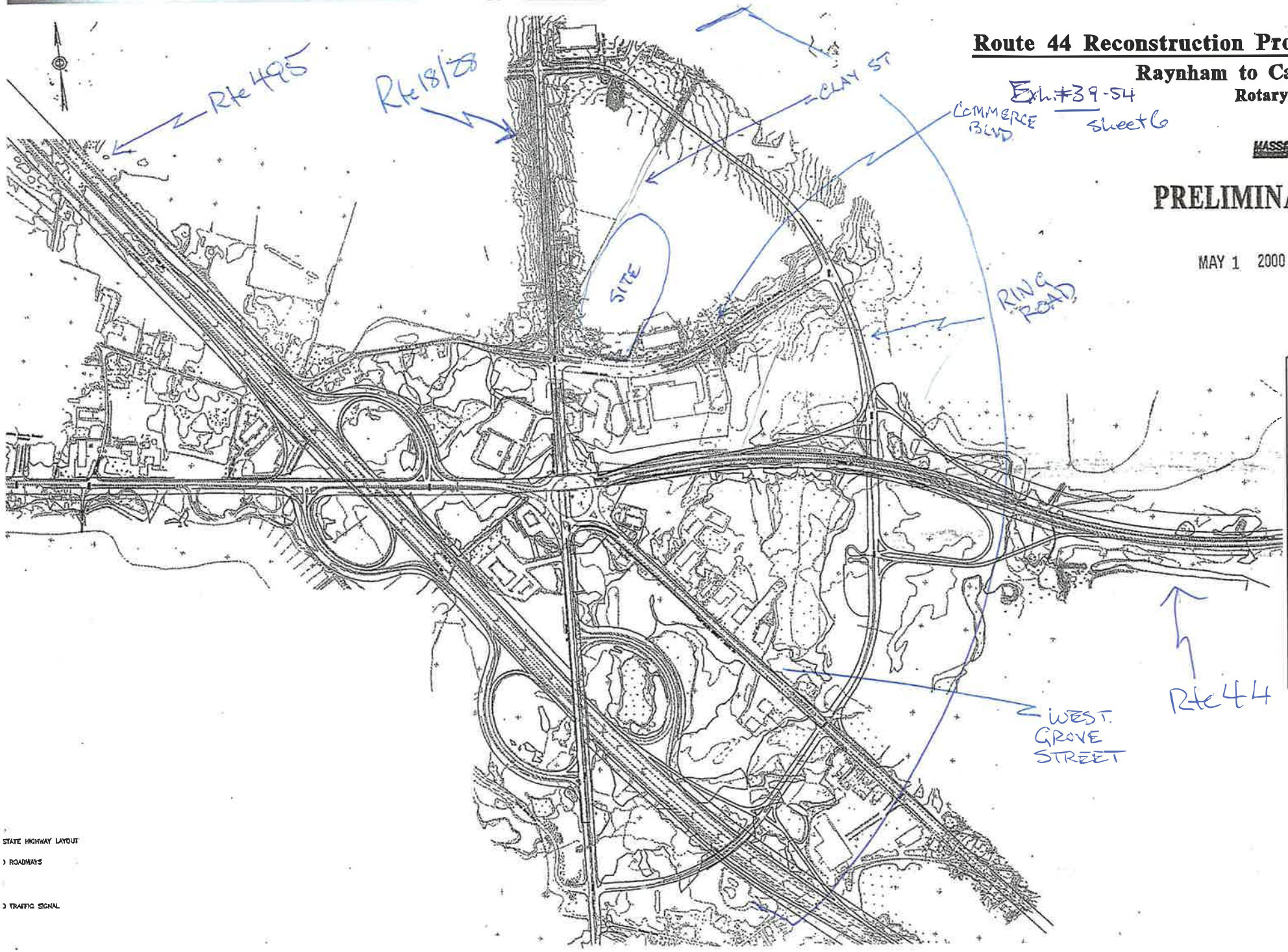
Rotary Area

Exh. #39-54 Sheet 6

MASS HIGHWAY

PRELIMINARY

MAY 1 2000



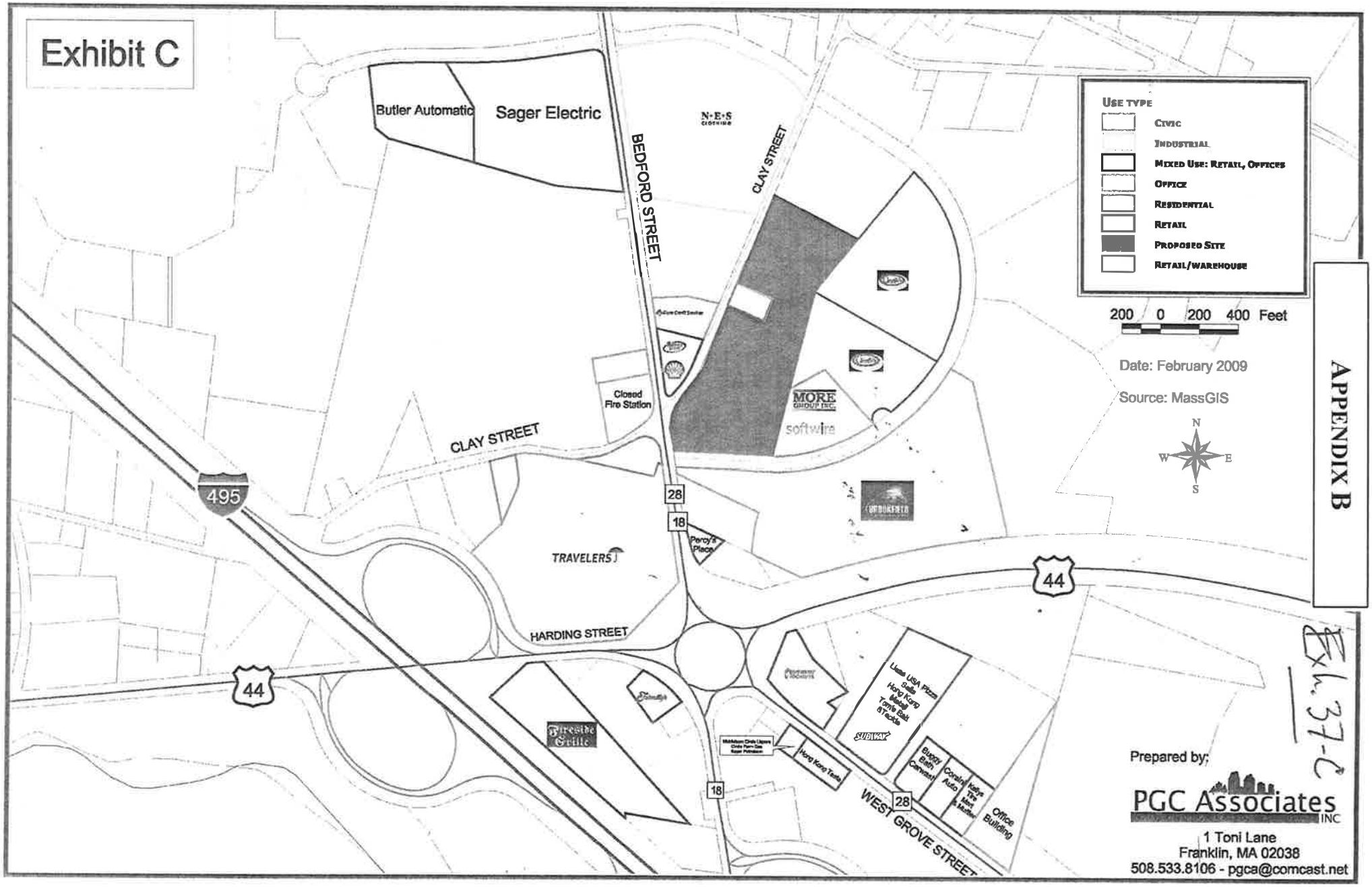
STATE HIGHWAY LAYOUT

) ROADWAYS

) TRAFFIC SIGNAL

APPENDIX A

Exhibit C



APPENDIX B

Ex. 37-C

APPENDIX C

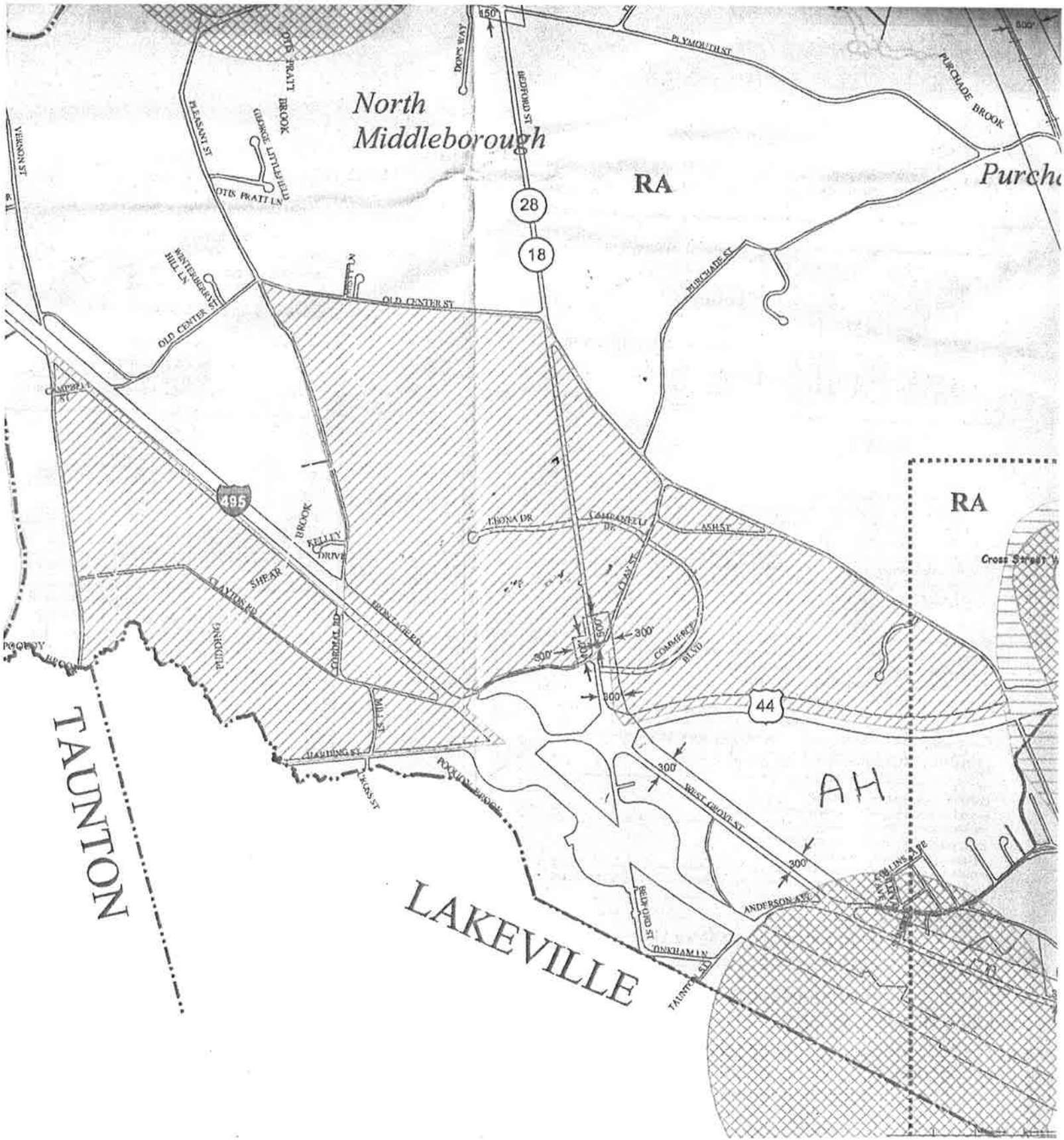



Exhibit 18 (detail)