

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

STANDING ORDER NO. 11-01

PRE-HEARING ORDERS

Applicable to all Matters before the Committee on November 9, 2011, and thereafter.

Effective November 9, 2011, it is hereby ORDERED that:

Pursuant to 760 CMR 56.06(7)(d)(3), “prior to the evidentiary portion of the hearing, the presiding officer may issue a pre-hearing order, which, if possible, shall be drafted jointly by the parties.” In drafting such orders, the parties shall, unless granted leave by the presiding officer to proceed otherwise, conform to the “Forms for Pre-Hearing Orders” posted on the Committee’s website, as they may be modified from time to time.

Adopted: November 9, 2011

Effective: November 9, 2011.

Housing Appeals Committee

Werner Lohe
Chairman

F O R M S
F o r
P R E - H E A R I N G O R D E R S

The attached forms should be used for all hearings before the Housing Appeals Committee. It is the responsibility of counsel to discuss the contents of the Pre-Hearing Order well in advance of the Pre-Hearing Conference, and prepare a single draft. Any areas of disagreement will be discussed with the presiding officer at the conference. The pre-Hearing Order will be signed at the Conference or shortly after.

This Pre-Hearing Order should not require substantial redrafting. Sections II through VII should be *completed* by counsel, adding specifics that apply in the particular case. Subparagraphs that are not applicable may be deleted, but language in the form **should not be changed until it is discussed with the presiding officer** at the Pre-Hearing Conference.

Exhibits should be exchanged in advance and counsel should attempt to agree on the admission of as many as possible. Exhibits that cannot be agreed upon should be listed in the Pre-Hearing Order as Proposed Exhibits. Their admissibility will either be ruled upon by the presiding officer at the Pre-Hearing Conference or, if the hearing is oral (without prefiled testimony), during the course of the hearing. Exhibits should be listed with consecutive numbers, without regard to whether they are the Appellant's or the Board's exhibits. The exhibits themselves will normally be physically numbered during the Pre-Hearing Conference.

Witness lists should also be exchanged in advance. Each list should be given careful consideration to avoid duplication. Witnesses should be listed with their titles or functions. If the subject matter of their testimony is not clear from their titles or functions, short explanations should be provided.

Two documents are attached below. The first is a form to be used in cases in which the Board issued a denial; the second is for cases in which a permit was granted with conditions. These documents are available in Word.

The draft Pre-Hearing Order and all agreed upon and proposed Exhibits should be filed with the Committee one week prior to the Pre-Hearing Conference.

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

<hr/>)	
[Developer],)	
	Appellant)	
)	
v.)	No. ____ - ____
)	
[Town] BOARD OF APPEALS,)	
	Appellee)	
<hr/>)	

DRAFT (DENIAL)

[DATE OF DRAFT]

PRE-HEARING ORDER

I. INTRODUCTION

1. Pursuant to 760 CMR 56.06(7)(d), this pre-hearing order formalizes matters agreed to by the parties at and following the Preliminary Conference of Counsel [DATE], 201[X] and Pre-Hearing Conference [DATE], 201[X] in the above case. Its purpose is to facilitate the presentation of evidence at the *de novo* hearing before the Housing Appeals Committee.

2. For good cause, either party may at any time request modification of this order. Any such request for modification of Stipulations, Issues in Dispute, or Proposed Witnesses shall be by written motion as provided in 760 CMR 56.06(5)(a) and (c). A request for modification of Exhibits may be made orally during an evidentiary session of the hearing, provided that five days prior notice has been given to opposing counsel.

II. STIPULATIONS

1. By decision filed with the town clerk on [DATE], with regard to the parcel of land located [ADDRESS], [Town] Board of Appeals denied the Appellant's application for comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 (see Exhibit 2).

2. The town of [Town] has not satisfied any of the statutory minima defined in sentence two of the definition of “consistent with local needs” in G.L. c. 40B, § 20.

3. The Appellant, [DEVELOPER], has received a determination of Project Eligibility pursuant to 760 CMR 56.04 under the [NAME OF HOUSING PROGRAM], fulfilling the project eligibility requirements of 760 CMR 56.04(1).¹ (See Exhibit 1.)

4. [OTHER STIPULATIONS, INCLUDING ELEMENTS OF EITHER PARTY’S CASE, BELOW, THAT ARE NOT IN DISPUTE]

III. MOTIONS [OPTIONAL]

As further specified in the pleadings on file with the Committee, the parties have moved as follows:

1. Outstanding Motions

- a. Appellant’s Motion to ... (filed __/__/__)
- b. Board’s Motion to ... (filed __/__/__)

2. Motions that have been Ruled Upon

- a. Appellant’s Motion to ... (filed __/__/__) - Ruling __/__/__: Granted/Denied
- b. Board’s Motion to ... (filed __/__/__) - Ruling __/__/__: Granted/Denied

Should this matter be subject to appeal to the courts, the parties reserve their rights with regard to motions that have been ruled upon.

The parties reserve the right to file motions to strike objectionable portions of prefiled testimony if necessary.

1. [ALSO SEE *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 520-521 (2007)(requirements are not jurisdictional, but rather a substantive aspect of the appellant’s case).]

IV. ISSUES IN DISPUTE AND BURDENS OF PROOF

1. Pursuant to 760 CMR 56.07(1)(a), the central issue in this case is whether the decision of the Board was consistent with local needs.

2. Pursuant to 760 CMR 56.07(2), the issues below are the sole issues in dispute, and the parties shall have the burden of proving their cases as follows:

Appellant/Applicant's Case

[ONLY IF THERE IS NO STIPULATION IN THIS REGARD IN ¶ II-3, ABOVE:

X. to prove that it has met the project eligibility requirements of 760 CMR 56.07(2)(a)(1), 56.04(1), and 56.04(6). See Exhibit 1.]

3. to establish a prima facie case by proving that its proposal complies with federal or state statutes or regulations or with generally recognized standards with regard to the following specific issues of local concern:²

(a) [issue heading] - (for specific issue, see ¶ IV-5(a), below)

(b) [issue heading] - (for specific issue, see ¶ IV-5(b), below)

(c) [issue heading] - (for specific issue, see ¶ IV-5(c), below)

4. [ONLY IF THE APPELLANT CHOOSES TO PURSUE THIS ISSUE] alternatively, to prove that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing with regard to these specific issues:³

(a) [issue]

(b) [issue]

Board's Case

5. to prove that valid health, safety, environmental, design, open space, or other local concerns which support the denial of the comprehensive permit, that is, to prove a local concern with regard to each of the specific issues in ¶ IV-4, above.⁴

For each such issue, the local bylaw, regulation, requirement, or other restriction upon which the Board relies and the Board's position with regard to it is as follows:

2. 760 CMR 56.07(2)(a)(2).

3. 760 CMR 56.07(2)(a)(4).

4. 760 CMR 56.07(2)(b)(2).

(a) [issue heading from ¶ IV-4, above] - [citation to bylaw, reg., etc.] - [position, claim, or allegation]

(b) [issue heading from ¶ IV-4, above] - [citation to bylaw, reg., etc.] - [position, claim, or allegation]

(c) [issue heading from ¶ IV-4, above] - [citation to bylaw, reg., etc.] - [position, claim, or allegation]

6. to prove that such local concerns outweigh the regional housing need.⁵

7. [ONLY IF INADEQUACY OF EXISTING MUNICIPAL SERVICES OR INFRA-STRUCTURE IS IN ISSUE] to prove that existing municipal services or infrastructure, namely, _____ (¶ __, above), are inadequate to meet local needs, and that provision of such services is not [CHOOSE ONE] technically/financially feasible.⁶

Appellant/Applicant's Rebuttal

8. to prove that preventive or corrective measures have been proposed which will mitigate the local concerns.

5. 760 CMR 56.07(2)(b)(2).

6. 760 CMR 56.07(2)(b)(4).

V. EXHIBITS

Exhibits Admitted into Evidence⁷

- 1. Determination of Project Eligibility - __/__/__
- 2. Decision of [Town] Board of Appeals - __/__/__
- 3. Site Development Plans⁸ [required]
- 4. Architectural Plans [if necessary]
- 5. List of Requested Waivers of local requirements⁹ [required]
- 6. Regulatory Agreement [required]
- 7. Deed Rider [if homeownership]
- 8. Ltr. to [Name] fr. [Name] - __/__/__
- 9. Memo to [Name] fr. [Name] - __/__/__
- 10. etc., etc.

Proposed Exhibits (Admissibility to be Ruled Upon at the Pre-Hearing Conference or during the Hearing)

For the Appellants

—
—

For the Board

—
—

7. [ALL DOCUMENTS IN EXISTENCE AT THE TIME OF SIGNING OF THIS PRE-HEARING ORDER WHICH ARE KNOWN TO COUNSEL OR SHOULD BE KNOWN TO COUNSEL ARE TO BE ADMITTED INTO EVIDENCE OR PROPOSED FOR ADMISSION. LATE-FILED EXHIBITS WILL BE ADMITTED ONLY IF THEY WERE NOT IN EXISTENCE WHEN THE PRE-HEARING ORDER WAS SIGNED (TYPICALLY, THESE ARE DOCUMENTS PREPARED BY A WITNESS IN AID OF HIS OR HER TESTIMONY) OR DUE TO OTHER EXTENUATING CIRCUMSTANCES.]

8. [ITEMS V-3 THROUGH V-7 SHOULD DESCRIBE THE CURRENT PROPOSAL, WHICH IS BEING PRESENTED TO THE COMMITTEE FOR APPROVAL. PREVIOUS ITERATIONS OF THESE ITEMS SHOULD NOT BE INCLUDED UNLESS THEY ARE ESSENTIAL TO THE PROOF OF THE DEVELOPER’S CASE. TYPICALLY, THE CURRENT PROPOSAL WILL NOT HAVE BEEN CHANGED IN ANY MATERIAL WAY FROM THE PROPOSAL THAT THE BOARD APPROVED WITH CONDITIONS OR DENIED. ANY CHANGE IS SUBJECT TO 760 CMR 56.07(4).]

9. 760 CMR 56.05(2)(h).

VI. PROPOSED WITNESSES

For the Appellants

_____, Proponent [IF NECESSARY]

_____, Architect [IF NECESSARY]

_____, Site Engineer [IF NECESSARY]

_____, [TITLE]

etc.

For the Board

_____, [TOWN ENGINEER] [IF NECESSARY]

_____, [TOWN STAFF MEMBER] [IF NECESSARY]

_____, Consulting Engineer [IF NECESSARY]

_____, [TITLE]

etc.

VII. SCHEDULE FOR PRE-FILED TESTIMONY AND HEARING

1. The Appellant's direct case shall be filed on or before [DATE], 201[X]. [NORMALLY 6 WEEKS AFTER THE PRE-HEARING CONFERENCE]
2. The Board's direct case shall be filed on or before [DATE], 201[X]. [NORMALLY 12 WEEKS AFTER THE PRE-HEARING CONFERENCE]
3. The Appellant's rebuttal case shall be filed on or before [DATE], 201[X]. [NORMALLY 16 WEEKS AFTER THE PRE-HEARING CONFERENCE]
4. A teleconference regarding scheduling of witnesses shall take place at [TIME][X].m. on [DATE], 201[X]. [NORMALLY IMMEDIATELY AFTER THE APPELLANT'S REBUTTAL CASE IS FILED, I.E., 1 TO 2 WEEKS PRIOR TO THE ORAL PORTION OF THE HEARING]
5. The oral portion of the hearing shall convene at 10:00 a.m. on [DATE], 201[X] at [ADDRESS] in the town of [NAME]. This session shall be followed by a site visit. Additional sessions will be scheduled at the Committee's offices in Boston on consecutive days thereafter.

FOR THE APPELLANT, [Developer]

[name], Esq.
[address]

FOR THE [Town] BOARD OF APPEALS,

[name], Esq.
[address]

BY THE HOUSING APPEALS COMMITTEE,

(date)

[name]
Presiding Officer

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

<hr/>)	
[Developer],)	
	Appellant)	
)	
v.)	No. ____ - ____
)	
[Town] BOARD OF APPEALS,)	
	Appellee)	
<hr/>)	

DRAFT (APPROVAL WITH CONDITIONS)
[DATE OF DRAFT]

PRE-HEARING ORDER

I. INTRODUCTION

1. Pursuant to 760 CMR 56.06(7)(d), this pre-hearing order formalizes matters agreed to by the parties at and following the Preliminary Conference of Counsel [DATE], 201[X] and Pre-Hearing Conference [DATE], 201[X] in the above case. Its purpose is to facilitate the presentation of evidence at the *de novo* hearing before the Housing Appeals Committee.

2. For good cause, either party may at any time request modification of this order. Any such request for modification of Stipulations, Issues in Dispute, or Proposed Witnesses shall be by written motion as provided in 760 CMR 56.06(5)(a) and (c). A request for modification of Exhibits may be made orally during an evidentiary session of the hearing, provided that five days prior notice has been given to opposing counsel.

II. STIPULATIONS

1. By decision filed with the town clerk on [FDATE], with regard to the parcel of land located [ADDRESS], [Town] Board of Appeals denied the Appellant's application for comprehensive permit pursuant to G.L. c. 40B §§ 20-23 (see Exhibit 2).

2. The town of [Town] has not satisfied any of the statutory minima defined in sentence two of the definition of “consistent with local needs” in G.L. c. 40B, § 20.

3. The Appellant, [DEVELOPER], has received a determination of Project Eligibility pursuant to 760 CMR 56.04 under the [NAME OF HOUSING PROGRAM], fulfilling the project eligibility requirements of 760 CMR 56.04(1).¹⁰ (See Exhibit 1.)

4. Evidence introduced by the parties during the hearing concerning costs and revenues in relation to the economics of the Project will, to the extent possible, be current as of the date of submission of a request for project eligibility determination.¹¹

5. [OTHER STIPULATIONS, INCLUDING ELEMENTS OF EITHER PARTY’S CASE, BELOW, THAT ARE NOT IN DISPUTE]

10. [ALSO SEE *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 520-521 (2007) (requirements are not jurisdictional, but rather a substantive aspect of the appellants’ case).]

11. [THIS IS THE DATE OF LAND VALUATION ESTABLISHED BY THE DHCD COMPREHENSIVE PERMIT GUIDELINES, § IV-B(1). FOR ORDERLY PRESENTATION OF EVIDENCE, OTHER FINANCIAL FIGURES SHOULD BE ESTABLISHED WITH REFERENCE TO THIS SAME DATE. IF THIS DATE IS NOT PRACTICAL, THE PARTIES MAY STIPULATE TO DIFFERENT DATE, E.G., THE DATE OF THIS PRE-HEARING ORDER.]

III. MOTIONS [OPTIONAL]

As further specified in the pleadings on file with the Committee, the parties have moved as follows:

1. Outstanding Motions

- a. Appellant's Motion to ... (filed __/__/__)
- b. Board's Motion to ... (filed __/__/__)

2. Motions that have been Ruled Upon

- a. Appellant's Motion to ... (filed __/__/__) - Ruling __/__/__: Granted/Denied
- b. Board's Motion to ... (filed __/__/__) - Ruling __/__/__: Granted/Denied

Should this matter be subject to appeal to the courts, the parties reserve their rights with regard to motions that have been ruled upon.

The parties reserve the right to file motions to strike objectionable portions of prefiled testimony if necessary.

IV. ISSUES IN DISPUTE AND BURDENS OF PROOF

1. Pursuant to 760 CMR 56.07(1)(a), the central issue in this case is whether the decision of the Board was consistent with local needs.

2. Pursuant to 760 CMR 56.07(2), the issues below are the sole issues in dispute, and the parties shall have the burden of proving their cases as follows:

Appellant/Applicant's Case

[ONLY IF THERE IS NO STIPULATION IN THIS REGARD IN ¶ II-3, ABOVE:

X. to prove that it has met the project eligibility requirements of 760 CMR 56.07(2)(a)(1), 56.04(1), and 56.04(6). See Exhibit 1.]

3. to establish that the following conditions are beyond the power of the Board to impose, intrude impermissibly into areas of programmatic concern of governmental agencies, or are otherwise in violation of the Comprehensive Permit Law.¹²

(a) Condition ____

(b) Condition ____

4. to prove that the following conditions, in aggregate, make the building or operation of the project uneconomic,¹³ and to prove that each condition individually has more than a *de minimus* economic impact.¹⁴

(a) Condition¹⁵ ____ - (for specific issue, see ¶ IV-6(a), below)

(b) Condition ____ - (for specific issue, see ¶ IV-6(b), below)

5. [ONLY IF THE APPELLANT CHOOSES TO PURSUE THIS ISSUE] alternatively, after proof of the economics of the project, to prove that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing with regard to these specific issues:

(a) Condition ____

(b) Condition ____

12. SEE *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 762 (generally), 765, n.21 (“conditions subsequent”) (2010).

13. 760 CMR 56.07, (1)(c), 56.07(2)(a)(3), 56.05(8)(d), and Committee precedents.

14. SEE *Haskins Way, LLC v. Middleborough*, No. 09-08, slip op. at 14, n.15 (Mass. Housing Appeals Committee Mar. 28, 2011, *appeal docketed* No. 11-0481-B (Plymouth Super. Ct. Apr. 25, 2011)).

15. [IN SOME CASES, REFERENCES TO WAIVERS DENIED IN THE BOARD’S DECISION MAY ALSO BE INCLUDED HERE.]

Board's Case

6. to prove that there are valid health, safety, environmental, design, open space, or other local concerns which support each of the conditions in ¶ IV-4, above.

For each such issue, the local bylaw, regulations, requirement, or other restriction upon which the Board relies and the Board's position with regard to it is as follows:

(a) Condition ____ [from ¶ IV-4(a), above] - [citation to bylaw, reg., etc.] - [position, claim, or allegation]

(b) Condition ____ [from ¶ IV-4(b), above] - [citation to bylaw, reg., etc.] - [position, claim, or allegation]

7. to prove that such local concerns outweigh the regional housing need.

8. [ONLY IF INADEQUACY OF EXISTING MUNICIPAL SERVICES OR INFRA-STRUCTURE IS IN ISSUE] to prove that existing municipal services or infrastructure, namely, _____ (¶ __, above), are inadequate to meet local needs, and that provision of such services is not [CHOOSE ONE.] technically/financially feasible.¹⁶

Appellant/Applicant's Rebuttal

8. to prove that preventive or corrective measures have been proposed which will mitigate the local concerns.

16. 760 CMR 56.07(2)(b)(4).

V. EXHIBITS¹⁷

Exhibits Admitted into Evidence

- 1. Determination of Project Eligibility - __/__/__
- 2. Decision of [Town] Board of Appeals - __/__/__
- 3. Site Development Plans¹⁸ [required]
- 4. Architectural Plans [if necessary]
- 5. List of Requested Waivers of local requirements¹⁹ [required]
- 6. Regulatory Agreement [required]
- 7. Deed Rider [if homeownership]
- 8. Ltr. to [Name] fr. [Name] - __/__/__
- 9. Memo to [Name] fr. [Name] - __/__/__
- 10. etc., etc.

Proposed Exhibits (Admissibility to be Ruled Upon at the Pre-Hearing Conference or during the Hearing)

For the Appellants

- .
- .

For the Board

- .
- .

17. [ALL DOCUMENTS IN EXISTENCE AT THE TIME OF SIGNING OF THIS PRE-HEARING ORDER WHICH ARE KNOWN TO COUNSEL OR SHOULD BE KNOWN TO COUNSEL ARE TO BE ADMITTED INTO EVIDENCE OR PROPOSED FOR ADMISSION. LATE-FILED EXHIBITS WILL BE ADMITTED ONLY IF THEY WERE NOT IN EXISTENCE WHEN THE PRE-HEARING ORDER WAS SIGNED (TYPICALLY, THESE ARE DOCUMENTS PREPARED BY A WITNESS IN AID OF HIS OR HER TESTIMONY) OR DUE TO OTHER EXTENUATING CIRCUMSTANCES.]

18. [ITEMS V-3 THROUGH V-7 SHOULD DESCRIBE THE CURRENT PROPOSAL, WHICH IS BEING PRESENTED TO THE COMMITTEE FOR APPROVAL. PREVIOUS ITERATIONS OF THESE ITEMS SHOULD NOT BE INCLUDED UNLESS THEY ARE ESSENTIAL TO THE PROOF OF THE DEVELOPER’S CASE. TYPICALLY, THE CURRENT PROPOSAL WILL NOT HAVE BEEN CHANGED IN ANY MATERIAL WAY FROM THE PROPOSAL THAT THE BOARD APPROVED WITH CONDITIONS OR DENIED. ANY CHANGE IS SUBJECT TO 760 CMR 56.07(4).]

19. 760 CMR 56.05(2)(h).

VI. PROPOSED WITNESSES

For the Appellants

_____, Proponent [IF NECESSARY]

_____, Architect [IF NECESSARY]

_____, Site Engineer [IF NECESSARY]

_____, [TITLE]

etc.

For the Board

_____, [TOWN ENGINEER] [IF NECESSARY]

_____, [TOWN STAFF MEMBER] [IF NECESSARY]

_____, Consulting Engineer [IF NECESSARY]

_____, [TITLE]

etc.

VII. SCHEDULE FOR PRE-FILED TESTIMONY AND HEARING

1. The Appellant's direct case shall be filed on or before [DATE], 201[X]. [NORMALLY 6 WEEKS AFTER THE PRE-HEARING CONFERENCE]
2. The Board's direct case shall be filed on or before [DATE], 201[X]. [NORMALLY 12 WEEKS AFTER THE PRE-HEARING CONFERENCE]
3. The Appellant's rebuttal case shall be filed on or before [DATE], 201[X]. [NORMALLY 16 WEEKS AFTER THE PRE-HEARING CONFERENCE]
4. A teleconference regarding scheduling of witnesses shall take place at [TIME][X].m. on [DATE], 200[X]. [NORMALLY IMMEDIATELY AFTER THE APPELLANT'S REBUTTAL CASE IS FILED, I.E., 1 TO 2 WEEKS PRIOR TO THE ORAL PORTION OF THE HEARING]
5. The oral portion of the hearing shall convene at 10:00 a.m. on [DATE], 201[X] at [ADDRESS] in the town of [NAME]. This session shall be followed by a site visit. Additional sessions will be scheduled at the Committee's offices in Boston on consecutive days thereafter.

FOR THE APPELLANT, [Developer]

[name], Esq.
[address]

FOR THE [Town] BOARD OF APPEALS,

[name], Esq.
[address]

BY THE HOUSING APPEALS COMMITTEE,

(date)

[name]
Presiding Officer