

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

16 STEARNS ROAD, LLC

v.

WELLESLEY ZONING BOARD OF APPEALS

No. 2019-08

DECISION

March 15, 2021

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

16 STEARNS ROAD, LLC,)	
)	
Appellant)	
)	
v.)	No. 2019-08
)	
WELLESLEY ZONING BOARD)	
OF APPEALS,)	
)	
Appellee)	
)	

DECISION

I. INTRODUCTION

This case and its companion case, *680 Worcester Road, LLC v. Wellesley*, No. 2019-09 (Mass. Housing Appeals Comm. Mar. 15, 2021), are not typical disputes under the Comprehensive Permit Law. The suitability of the sites and appropriateness of the designs have already been established by Comprehensive Permits issued by the Board. The housing will be built, and all that remains to be resolved are details involving construction logistics to ensure pedestrian safety in the neighborhood and to minimize temporary disruption for neighbors. The dispute in this case centers on whether a limited number of construction workers should be allowed to park on the site during construction.

II. PROCEDURAL HISTORY

On June 18, 2019, the Wellesley Zoning Board of Appeals issued a decision granting a comprehensive permit to 16 Stearns Road, LLC pursuant to G.L. c. 40B, §§ 20-23, to construct affordable housing on a one-acre site at the end of Stearns Road in

Wellesley. The development would be a 24-unit condominium with 6 affordable units subsidized under the New England Fund of the Federal Home Loan Bank of Boston. In its decision, the Board imposed many conditions and denied various requested waivers of local requirements. On July 10, 2019, the developer appealed the Board's decision, challenging only the conditions that prohibit parking by construction workers on the site and nearby streets and that require securing of an off-site location for all construction-worker parking so that the workers can be shuttled to and from the site.

After the Committee opened its hearing, the developer filed a motion for summary decision, which was denied by the presiding officer on July 1, 2020.¹ On July 10, at the request of the parties, the presiding officer consolidated this case and *680 Worcester Road, supra*, No. 2019-09. Consolidation was appropriate not only because the developers in the two cases are closely related entities and because the development sites are very close to one another, but also because one of the legal and factual issues is similar. The cases were consolidated only for the presentation of evidence—all pre-filed testimony and oral testimony is available to establish the factual record in both cases. The appeals themselves, however, remain separate, with the parties having filed separate briefs and the Committee issuing separate decisions.

After consolidation, the parties negotiated a Pre-Hearing Order pursuant to 760 CMR 56.06(7)(d)(3), which the presiding officer issued on July 22, 2020. This Pre-Hearing Order incorporated the provisions of a similar Pre-Hearing Order which had been issued in the *680 Worcester Road* case on February 24, 2020. Seventy exhibits were admitted into evidence, and the parties then submitted pre-filed direct and, in some cases, rebuttal testimony of 16 witnesses. After a site visit, the presiding officer conducted three days of hearings to permit cross-examination of witnesses, and the parties submitted briefs.²

¹ At the same time, the presiding officer denied a motion to intervene made by a single abutter, acting on behalf of a number of neighbors. Intervention was denied because the safety concern raised by the neighbors is substantially similar to the issues that the Board addressed in its decision and continues to pursue on appeal, and because there was no showing that the Board will not diligently represent the neighbors' interests. They were permitted to participate in a limited manner as interested persons. *See* 760 CMR 56.06(2)(b).

² Committee member James G. Stockard, Jr. did not participate in the consideration of this case.

III. FACTUAL BACKGROUND

The site of the housing in this case is at the end of Stearns Road, a short, dead-end street which branches off of another short, dead-end street, Francis Road. Francis Road, in turn, branches off of Route 9 (Worcester Street), which provides the only vehicular access to the small, distinct neighborhood of 20 single-family homes. Both streets are twenty feet wide, and have no sidewalks. From the end of Stearns Road, past the housing site, there is a path for pedestrian access to the nearby Sprague Elementary School. Similarly, there is pedestrian access to the Wellesley Middle School from the end of Francis Road. Exh. 98, ¶¶ 3-6; *see also* Exh. 97. About a dozen children in the neighborhood use Stearns and Francis Roads to walk or ride bicycles to and from the school. Exh. 98, ¶ 6.

The housing site is slightly more than one acre (44,578 square feet), and the building footprint is about one third of that (14,819 square feet). Exh. 58, sheet C1. At completion, there will be 12 surface parking spaces and 36 spaces in a garage inside the building on the ground floor. Exh. 57, p. 12; Exh. 73, ¶ 3. There is room on the site to park approximately 30 to 50 construction vehicles—both before installation of the foundation³ and on the ground-floor parking area and outside areas once the foundation is completed. Exh. 73, ¶¶ 6, 21, 22. During the initial stages of construction there will be up to 10 workers on the site; later, there will be as many as 25 workers on site, including about 20 laborers and 5 supervisors.⁴ Exh. 62, p.8; 73, ¶ 22.

The developer submitted a Construction Management Plan⁵ to the Board, which has a section entitled Construction Worker and Staff Parking. Exh. 62, p. 7. That section states:

³ This is confirmed by visual inspection of the site plan. About one quarter of the lot, in the front, will be open space. Exh. 58, sheet C1. Assuming that each vehicle will take up no more than 200 square feet of space, 30 vehicles could park in this area.

⁴ A supervisor in this case includes a superintendent or a worker sometimes referred to as a foreman or forewoman.

⁵ The Board's chair testified that the Board "routinely requires applicants to submit detailed construction management plans as part of its review" for development proposals that it considers. Exh. 90, ¶ 5. Under the Comprehensive Permit Law, however, the developer is not required to submit a construction management plan to the Board before the permit is issued. That is, since the inception of the Comprehensive Permit Law, it has been the rule that the developer is required to provide only preliminary plans. 760 CMR 56.05(2); *Leblanc v.*

On-site parking by construction laborers is not allowed. Any personal vehicles will be restricted from parking at or around the construction site so as to reduce the impact of residential parking. Parking will be expressly prohibited along Stearns Road, Francis Road or other residential streets. Workers who violate this prohibition will be dismissed from the project. Employees will be encouraged to use carpooling, public parking and public transportation. Trade foreman will have the ability to park on site during all phases of construction, all trade laborers will be required to park off-site at any area local public parking locations and or public transportation. A map detailing the location of the local parking facilities with all day public parking (332 spots available on a first-come first serve basis), which include; Tailby Lot/Railroad Ave Lot/Cameron Lot/Weston Road Lot, will be provided to all sub-contractors... Additionally, sub-contractors will be encouraged to use the Passport Parking App as recommended by the Wellesley Parking Clerk to assist with automatically paying for parking.

That is, while there was only a general description of on-site parking arrangements, the developer specifically agreed, and continues to propose, that only supervisors be permitted to park on-site, and that trade laborers be required to park off-site, while all workers—of any description—are to be prohibited from parking on any residential street in Wellesley.

In response, the Board imposed three conditions, which prohibit not only laborers, but also all construction workers or contractors of any sort from parking on the site, and require the developer to “arrange for adequate off-site parking for all of the construction

Amesbury, No. 2006-08, slip op. at 12 (Mass. Housing Appeals Comm. May 12, 2008), *aff'd* No. 2008-2631 (Suffolk Super. Ct. Jun. 1, 2009), and cases cited. Section 56.05(2) specifically refers to eight items that “constitute a complete description” of the project. Items (a), (c), and (f), in particular, refer to preliminary plans. If only preliminary plans for the design of development itself are required, then certainly, absent specific authorization in the regulations, the Board cannot require plans for construction management before issuing a permit.

Nevertheless, in this case the developer chose to submit a construction management plan. From the testimony of the chair of the Board, Mr. Becker, it is clear that the Board was not satisfied with those plans. Mr. Becker testified, “We allowed parking on the site [for other developments] because the developer provided plans to us that showed how he was going to park on the site....” Tr. II, 140-142. In those cases, the Board was presented with detailed plans, while “[i]n contrast..., the Applicant did not identify to the ZBA either peak or average workers forecast to be on site or where construction workers could park their vehicles onsite.” Exh. 88, ¶ 15. He testified further, “Based on [neighborhood conditions] and in the absence of a definitive on-site parking plan..., [the Board required] the applicant to provide off-site parking and to shuttle its workers to and from that off-site location.” Exh. 90, ¶ 9. Despite this testimony, we decline to draw the inference that the restriction was imposed because of the lack of a detailed plan, but rather will consider it on its merits.

workers/contractors... [and to] arrange for workers to be shuttled between [an] off-site parking location and the site.” Exh. 57, pp. 26, 27, 29 (Conditions 17(k), 22, and 42).⁶ The developer has challenged only these three related conditions.⁷

IV. DISCUSSION

The developer raises a claim of unequal application of Wellesley’s construction parking requirements.⁸ That is, the comprehensive permit regulations provide that “the applicant may prove that Local Requirements and Regulations have not been applied as equally as possible to subsidized and unsubsidized housing, [and] shall have the burden

⁶ Condition 42 states the central, substantive restrictions: “No construction workers or contractors may park on Stearns Road, Francis Road or any other way, or on the Site, during construction. The applicant shall arrange for adequate off-site parking for all of the construction workers/contractors that will work on this Site, and shall be responsible for ensuring that all construction workers/contractors park at this off-site parking location. The applicant shall arrange for workers to be shuttled between the off-site parking location and the Site.”

Condition 17(k) requires submission to the building inspector of a construction management plan that describing “traffic and parking during construction, including arrangements for off-site parking by all workers and shuttling to and from the off-site location (subject to the requirements otherwise contained herein).”

Condition 22 requires submission to the building inspector of “evidence that it has secured an off-site location that is sufficient to provide parking for all construction workers associated with the Project, and that the use of said off-site location for this type of parking is an allowed use of the selected property under the applicable zoning bylaw.”

The developer states that the implication of the requirement to provide off-site parking is that workers are prohibited not only from parking in locations specifically prohibited, but also in any other locations, such as municipal parking lots open to the public. Developer’s Brief, p. 6. But, as the Board points out in its brief, when it wished to limit parking in public lots during construction of other developments, it crafted conditions that explicitly prohibited that. Board’s Brief, p. 8. We do not read the restrictions as broadly as the developer does, and we construe the conditions imposed in this case as permitting workers to park, as an alternative, in public lots just as other members of the public do. *See* Exh. 73, ¶ 6; Exh. 62, p. 7.

⁷ Only issues concerning parking during construction are raised in this appeal. Concerns neighbors have about safety after the building is occupied have been addressed by a condition which requires the developer to contribute \$35,000 for study of and improvements for pedestrian access along Stearns Road. Exh. 57, p. 35 (Condition 71). Temporary pedestrian safety improvements along Stearns Road during construction appear not to have been considered.

⁸ The developer has also argued that because there is no bylaw or regulation that addresses parking during construction, the Board lacks the authority to impose the conditions at issue here. The comprehensive permit regulations provide that municipalities may only impose on a project approved under Chapter 40B those non-waived local requirements and regulations that were in effect at the time of its application to the Board. 760 CMR 56.02: *Local Requirements and Regulations*. We need not consider the issue here because, we decide in any event the Board’s decision treats the proposed project unequally to unsubsidized housing.

of proving such inequality.” 760 CMR 56.07(2)(a)(4); *see also* G.L. c. 20-23, § 20 (definition of “consistent with local needs”). Specifically, the developer argues that even if construction parking has been restricted for other, non-subsidized housing developments, the degree or manner in which its proposal has been restricted—specifically, prohibiting all on-site parking—amounts to unequal application of local requirements.

The developer’s principal, Mr. Derenzo, who has 35 years of experience in the construction field, testified that to his knowledge, the combination of parking restrictions imposed in this case is unprecedented in Wellesley. Exh. 71, ¶ 47. He further stated, “On-site parking is generally favored and encouraged due to the resulting minimization of vehicle trips....” Exh. 73, ¶ 13. He made a public records request to the Town of Wellesley for any permits or approvals with conditions similar to those in this case, and in response received copies of project approvals for three market-rate developments: Pleasant Ridge (6-unit residential condominium), Waterstone (141-unit, mixed-use rental housing development), and Belclare (21-unit, mixed-use residential condominium). Exh. 73, ¶¶ 14-18. The Board’s decisions in those cases were entered into evidence. They contain extensive restrictions on construction parking, but each explicitly permits on-site parking. *See* Exhs. 48, p. 15 (Condition 13, Pleasant Ridge⁹); 8 p. 13 (Condition 17, Waterstone¹⁰); 49 & 50, pp. 18, 10 (Conditions 11 & 7, Belclare¹¹). A fourth decision

⁹ Condition 13 of the site plan approval for Pleasant Ridge states, “...on-site parking for construction workers... is specifically permitted, and no vehicles of construction workers... shall be parked on Pleasant Street or any other public way...., or in any public parking lot with 600 feet....” Exh. 48, p. 15.

¹⁰ Condition 17 of the site plan approval for Waterstone states, “...on-site parking... for construction workers... is specifically permitted, and no vehicles of construction workers... shall be parked on Mica Lane, Columbia Street or any other public way...., or in any public parking lot with 600 feet....” Exh. 8, p. 13.

¹¹ Condition 11 of the site plan approval for Belclare states, “no vehicles of construction workers... shall be parked on Grove Street... or any other public way of the Town. The Applicant may park vehicles of employees... on-site in the areas shown its drawing entitled “Construction Management Plan” until such time as the number of vehicles exceeds the capacity of the on-site area. The Applicant may also use the garage on site for parking once it has been constructed. At least thirty days prior to the time that such parking capacity is exceeded, the Applicant shall submit to the Board its plan for off-street parking and transportation of workers from the off-street parking to the Site....” Exh. 49, p. 18. Condition 7 of the modified site plan approval for Belclare states, “...on-site parking for construction workers... is specifically permitted, and no

concerning a mixed-use development, at 978 Worcester Street, was also entered into evidence, in which the decision states that "...there will be a condition that... construction parking will be on-site." Exh. 55, p. 10 (978 Worcester Street). A fifth decision approving a large sports center contained a condition specifically permitting on-site parking. Exh. 88 (Exh. E, p. 24, Condition 13 (900 Worcester Street¹²).

The Board argues that it considers every project on its own merits. It notes that the Pleasant Ridge, Waterstone, and Belclare projects were located near commercial centers, where retaining parking for shoppers and commuters was important. Exh. 88, ¶ 14. Further, "16 Stearns Road is located in a considerably different setting from the [other] projects," Exh. 90, ¶ 8. More specifically, the Board argued its concern about the safety of children walking to school on a narrow street, though the concerns stated are very general. Board's Brief, p. 9. In addition to the volume of construction-worker traffic, the Board states that "workers will be arriving and departing from the job site at roughly the same time as neighborhood children are walking to the Sprague Elementary School each day, or playing in the street." Board's Brief, p. 10. This testimony about safety concerns was from the Board's chair and an abutter. Exh. 80, ¶¶ 8, 9; Exh. 98, ¶¶ 5-8. No expert testimony was presented by the Board to attempt to quantify the risk.

The developer contests a number of the points made by the Board. It notes that classes start at the Sprague School at 8:30 a.m., and end at 3:00 p.m. except on Wednesday, when it ends at noon. Tr. II, 152; III, 48, 49. It argues that construction workers will arrive and be on site at 7:00 a.m., and therefore their arrival in their vehicles will not conflict with students walking to school. Developer's Brief, p. 17. Neither party addressed schedules at the end of the day, and we must assume that, at least on some occasions, there will be construction vehicles and school children using Stearns Road at the same time. The Developer also argues that requiring off-site parking may actually result in more vehicle more trips as supervisors drive to the site early in the morning to drop off tool and materials, and then go to the off-site location to park, and reverse this

vehicles of construction workers... shall be parked on any other public way of the Town or in the Cameron Street or Tailby parking lots." Exh. 50, p. 10.

¹² Condition 13 of the site plan approval for 900 Worcester Street states, "...on-site parking for construction workers... is specifically permitted, and no vehicles of construction workers... shall be parked on Worcester Street, Dale Street or any other public way...." Exh. 88 (Exh. E, p. 24).

process at the end of the day. Developer’s Brief, p. 16; Exh. 73, ¶ 9. The Board contests this in its brief, but there is not enough specific evidence to support either position definitively.

With regard to the central issue—that of consistency of application of the restrictions—the chair of the Board testified that he was “familiar with a number of projects... subject to conditions that limit the parking construction worker’s (sic) vehicles on the development site, on public ways, and in public parking lots.” Exh. 90, ¶ 6. He also testified that the Board treated this development just like all other projects. Tr. II, 166; *also see* Exh. 90, ¶ 5; Board’s Brief, p. 3. But, although his testimony and documents in evidence make it clear that the Board frequently restricts construction parking in approving new developments, and he mentioned “about a dozen” projects with similar language, he could remember only one—65 Washington Street—where on-site parking was prohibited. Tr. II, 147-148. And, we are reluctant to credit that recollection since the actual decisions of other developments were put in to evidence, but that of 65 Washington Street was not. See Exh. 8, 48, 49, 55.

Clearly, any construction site, whether in a residential area or a commercial area, results in increased traffic and some risk to pedestrians.¹³ We find that the overall parking situations in all of the instances put before us are comparable, and that in all cases but this affordable housing development, construction parking was allowed on site. Particularly since the developer has agreed to require that most workers park off site, we find, after consideration of the facts before us and the credibility of the witnesses, that the parking restriction was not applied as equally as possible by the Board to subsidized and unsubsidized housing.

V. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit, but concludes that the prohibition against on-site parking and the

¹³ As mentioned in note 7, above, neither party appears to have considered installing temporary improvements for pedestrian safety during the construction period. On the other hand, the Town of Wellesley would have the power to make such improvements without the consent of either the Board or the developer, and if it believes that there is a significant risk, it may do so.

requirement that the developer provide off-site parking and shuttle service are parking requirements that have not been applied as equally as possible to subsidized and unsubsidized housing, and those requirements are void as not consistent with local needs.

The Board is directed to issue an amended comprehensive permit, consisting of the comprehensive permit previously issued by the Board as provided in the text of this decision and the conditions below:

1. The Board shall not include new, additional conditions.
2. The Board shall take whatever steps are necessary to ensure that building permits and other permits are issued, without undue delay, upon presentation of construction plans, pursuant to 760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

3. All Wellesley town staff, officials, and boards shall promptly take whatever steps are necessary to permit construction of the proposed housing in conformity with the standard permitting practices applied to unsubsidized housing in Wellesley.

4. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.

5. 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 applicable local zoning and other by-laws in effect on the date of the submission of the developer's application to the Board, except those waived by this decision or in prior proceedings in this case.

- (b) The subsidizing agency or project administrator 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 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) Construction and marketing in all particulars shall be in accordance with all presently applicable state and federal requirements, including, without limitation, fair housing requirements.

(e) 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.

(f) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and DHCD guidelines issued pursuant thereto.

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

Shelagh A. Ellman-Pearl, Chair

Marc. L. Laplante

Rosemary Connelly Smedile

March 15, 2021

Werner Lohe, Presiding Officer