COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

March 16, 2016

Suffolk, ss.

Docket No. MS-15-661

CORLISS LANDING CONDOMINIUM TRUST by its Trustees, INVESTMENT REALTY CO., LLC, and XF REALTY, LLC, Petitioners

v.

TOWN OF NORTH ATTLEBOROUGH PLANNING BOARD, TOWN OF NORTH ATTLEBOROUGH BOARD OF SELECTMEN, JC PROPERTIES, LLC and MASSACHUSETTS EXECUTIVE OFFICE OF HOUSING AND ECONOMIC DEVELOPMENT, Respondents

---

DECISION

Appearance for Petitioners:

David C. Manoogian, Esq.
Carriage Court
149 Pleasant St.
Attleboro, MA 02703

Appearance for Respondents North Attleborough Planning Board and North Attleborough Board of Selectmen

Roger M. Ferris, Esq.
7 Peck St., #2
P.O. Box 155
Attleboro, MA 02703

Administrative Magistrate:

Mark L. Silverstein, Esq.

Appearance for Respondent JC Properties, LLC

Edward J. Casey, Esq.
Casey Law Offices, P.C.
8 North Main St., Suite 201
Attleboro, MA 02703

Appearance for Respondent Executive Office of Housing and Economic Development

Ricks Frazier, Esq.
Executive Office of Housing and Economic Development
One Ashburton Place, 21st fl.
Boston, MA 02108

Summary of Decision

The constructive grant, under M.G.L. c. 43D, § 7, of a permit for a proposed planned business development at properties owned by the applicant in an industrially-zoned (I-60) area within a designated "priority development site" because a town planning board took no final action on the permit application before its statutory 180-day period for doing expired, is affirmed upon the appealing abutters' motion for summary decision.

(1) The appeal's prematurity, prompted by the planning board's assumption that its 180-day period for taking final action on the permit application started and expired earlier than it actually did under M.G.L. c. 43D, § 5 and the town's Chapter 43D permitting guide, is not a jurisdictional defect.

(2) The procedural defects asserted by the petitioners —the town's failure to promulgate regulations implementing Chapter 43, lack of written notice to the applicant that its permit application was complete, and insufficient public hearing notice—do not require permit annulment. The town planning board's Chapter 43D permitting guide implemented the coordinated permit application and review process Chapter 43D requires. The applicant does not challenge the planning board's failure to give it written notice that its permit application was complete, and the petitioners assert no injury to their own interests because of this omission. The public hearing notice did not mislead the petitioners as to the work proposed or its location in a priority development site, and did not impede their participation in the public hearing.

(3) The work permitted constructively is determined to be (a) the five commercial/industrial buildings with associated parking areas and stormwater management systems on property the applicant owns along the western side of the private-right-of way section of a street (Santoro Drive) that the town has not yet accepted as a public way; (b) a storage shed and paved outdoor equipment storage area on property the applicant owns along the eastern side of Santoro Drive; and (c) modifications to the length, width, paving and curb cuts along this private right-of-way section within the priority development area and, at its southern end, its transition to Santoro Drive's "paper street" section, from which the petitioners access their property.

(4) The permitted work is subject to the requirements of Chapter 43D for priority site development, and to the requirements and conditions that North Attleborough Zoning Bylaws section VI.N recites for a planned business development. However, the constructive permit does not include conditions that the planning board might have required if it had acted on the permit within the 180-day period that Chapter 43D prescribes.

(5) The permitted work also does not include modifications of Santoro Drive that the town may require before the street, or a part of it, may be accepted as a public way. This includes a full turnaround, where Santoro Drive's private right-of-way and "paper street" sections meet, that may be required to accommodate fire and other emergency vehicles, as well as truck traffic to and from the abutters' property, and/or to meet municipal and state traffic safety requirements and improve traffic circulation along Santoro Drive or on other local streets and state highways. These modifications require separate application, review and approval, none of which is precluded by the constructively-granted permit, or by this Decision.

Introduction

In this first-impression appeal under M.G.L. c. 43D, the Commonwealth's expedited permitting statute, Corliss Landing Condominium Trust (Corliss), the owner of a commercial/industrial condominium in the Town of North Attleborough, Massachusetts (the Condominium property), and two condominium unit owners,[1] challenge a permit for a planned business development in an abutting "priority development site"[2] along Santoro Drive that was deemed to have been constructively granted to respondent JC Properties, LLC (JC) when the town planning board failed to take final action on JC's permit application within 180 days, as Chapter 43D statute requires. *See* M.G.L. c. 43D, §§ 5(a), 7. The petitioners challenge the constructively-granted permit as procedurally deficient, and as allowing modifications of Santoro Drive that would impede access to the Condominium property from the drive's "paper street" section and render Santoro Drive, or a part of it, unacceptable by the town as a public way.

For the reasons set forth below, I grant summary decision affirming JC's constructively-granted permit. I also determine that the constructive permit allows the work that JC proposed within the priority development site and along and within the private right-of-way section of the street, but does not include permit conditions the planning board might have included if it had taken final action on the permit application within the statutory180-day period for doing so, although the

[1]/ Petitioners XF Realty, LLC, which owns Condominium Unit 4; and Investment Real Estate Co., LLC, which owns Unit 6.

[2]/ *See* M.G.L. c. 43D, § 2 (definition of "priority development site"), discussed below at 8.

work remains subject to the requirements of Chapter 43D for priority site development, and to the requirements and conditions recited by the local zoning bylaws for a planned business development. I also determine that the constructive permit does not include, or preclude, work the town may require before the street is accepted as a public way, including, but not limited to, a full turnaround for fire and emergency equipment and trucks entering and leaving the Condominium property where the street's private and "paper street" sections meet, or other modifications to meet municipal and state traffic safety requirements and/or to improve traffic circulation on Santoro Drive or other local streets and state highways.

Background

Locus in this matter is in the northeastern part of North Attleborough, Massachusetts, east of U.S. Route 1 and west of Interstate Route 95, that is bounded on the north by Landry Avenue and on the south by John L. Dietsch Boulevard. (*See* attached Sketch.)

A large portion of this area was part of a residential subdivision with an access roadway, Santoro Drive, that was proposed by a prior owner, approved by the North Attleborough Planning Board in 2008, but never built. Part of Santoro Drive is currently a paved "paper street" that the town has not yet accepted as a public way. This section begins at John L. Dietsch Boulevard, close to where the boulevard turns direction from north-south to east-west and runs north for 220 feet.

The approximately three-acre Condominium property that Corliss owns includes an industrial/commercial condominium building with access along the western side of this paper street section of Santoro Drive. North of the "paper street" section's end, Santoro Drive is a private, and

currently unpaved, right-of-way. JC owns three undeveloped lots (parcels 486, 487 and 488), comprising approximately six acres in an industrial (I-60) zone, along the western side of this private section of Santoro Drive, between the Condominium property and Landry Avenue to the north. JC also owns nearly seven acres along the eastern side of Santoro Drive, whose southern end abuts a snow and ice management business (Case Snow Management, Inc.) along John L. Dietsch Boulevard, near the beginning of Santoro Drive. Most of this property is undeveloped; a building that Case Snow would lease is under construction at the property's southernmost portion.

On June 25, 2015, North Attleborough filed an application with the Massachusetts Executive Office of Housing and Economic Development's Interagency Planning Board, pursuant to M.G.L. c. 43D, § 3, for the designation of a priority development site comprising JC's properties on either side of Santoro Drive. The Interagency Permitting Board approved the designation of this priority development site on June 10, 2015.[3] Shortly afterward, on June 18, 2015, JC applied to the North Attleborough Planning Board for a special permit, pursuant to the local zoning bylaws, to construct a "planned business development" at the priority development site—five 10,000 square-foot buildings for commercial or industrial uses, and associated parking areas, along the western side of the Santoro Drive right-of-way, and, along Santoro Drive private way's eastern side, a parking and equipment storage area that Case Snow would lease.

JC filed its permit application under North Attleborough Zoning Bylaws § VI.N, the section governing planned business developments. Several procedural missteps or imperfections followed.

[3]/ The town formally accepted the application of Chapter 43D to this priority development site on July 28, 2015.

The planning board processed the permit as one filed pursuant to M.G.L. c. 43D, although its notice of public hearing on JC's permit application referenced the Commonwealth's Zoning Statute, M.G.L. c. 40A, and the town's zoning bylaws, but not M.G.L. c. 43D. The town also did not notify JC in writing that its priority development permit application materials were complete. Per M.G.L. c. 43D, § 5(a) and the town's Chapter 43D priority development site permitting guide, the town was required to give this notice (or a notice that the application was incomplete) to JC within 20 days after the date on which it submitted its permit application to the planning board (June 18, 2015). Because the planning board's 180-day statutory period for reviewing and deciding JC's permit application began to run from the day following the required notice of application completeness, the town's failure to give this notice generated some confusion about when the planning board needed to complete its review and issue a decision. At some point, the planning board concluded that this review period ended in mid-December 2015, 180 days after JC filed its permit application.

The planning board held a public hearing on JC's proposed development between July and early December, 2015. Both JC and Corliss participated in the public hearing. The planning board scheduled a vote on JC's permit application for December 10, 2015, but, after it closed the public hearing on that date, three of its members recused themselves from voting, and the board did not vote or issue a decision. The planning board would take no further action afterward on JC's priority development permit application.

Based upon the planning board's 180-day review period computation, the board, Corliss and JC assumed that JC's priority development site permit was granted constructively, per M.G.L. c. 43D, § 7, when the board took no final action on the permit application by December 15, 2015. On

December 16, 2015, the petitioners filed this appeal challenging the constructively-granted permit with the Division of Administrative Law Appeals (DALA), pursuant to M.G.L. c. 43D, § 10(b). They sought the permit's annulment based upon alleged procedural deficiencies, including the planning board's failure to issue a notice that JC's permit application was complete, as M.G.L. c. 43D, § 5(a) requires, failure to promulgate rules and regulations for processing a Chapter 43D permit application, and failure to comply with local zoning bylaw requirements for permitting planned business developments. The petitioners also claimed that:

> [t]he constructive approval of the JC [a]pplication impermissibly eliminates a substantial portion of Santoro Drive that was previously approved by the planning board pursuant to G.L. c. 41, sections 81(O) through 81(W) and makes private the remaining portions thereof, thus depriving the Trust Land and petitioners of frontage on a way which was to be constructed in such a fashion as to become eligible to be accepted as a public way by the Town.

(Doc. 1: Appeal, dated Dec. 16, 2015, at 7, para. 24(e).)[4]

M.G.L. c. 43D, § 10(d) requires that DALA decide an appeal commenced under that statute within 90 days of its receipt. On December 18, 2015, I issued an order scheduling a prehearing conference and directing each of the respondents[5] to file an answer to the appeal. To help identify what the constructively-granted project actually allowed the applicant to build, the order also directed JC to submit a copy of the affidavit M.G.L. c. 43D, § 7 requires an applicant to file with the city or

[4]/ References are to the documents the parties filed in this appeal, which are numbered in the order in which they were filed at DALA. "Doc" refers to the filing, and is followed by more specific references to one or more of the materials the filing included, such as a memorandum or exhibits. A list of these filings and the materials they included is included in the Appendix to this Decision.

[5]/ The respondents are, in addition to JC, the North Attleborough Planning Board and Board of Selectmen, and the Massachusetts Executive Office of Housing and Economic Development.

town clerk when a priority development permit is granted constructively.[6] JC filed the affidavit on January 4, 2016. The parties filed their respective answers to the appeal during the first two weeks of January 2016.

On January 5, 2016, the petitioners moved for a summary decision annulling the permit based upon their procedural deficiencies claims. The respondents filed oppositions to the motion through January 19, 2016. Neither the motion nor the opposing papers asserted that there were any genuine issues of material fact precluding a full summary disposition of this matter without a factfinding hearing.

I held a prehearing conference, which all of the parties attended, on January 28, 2016. At the parties' request, I deferred disposition of the summary decision motion through February 29, 2016, so that the parties could attempt resolution by agreement. Because the petitioners' non-procedural objections to the project focused upon Condominium property access, the parties discussed a modified layout of Santoro Drive, where its paper street section met its private way section, by providing a turnaround sized sufficient for trucks entering and leaving the Condominium property and, as well, for firefighting equipment and other emergency vehicles. In addition, because the proposed turnaround would have to be built partially on the private section of Santoro Drive, the parties also discussed granting an easement of use in this portion of the Drive to the petitioners and the town.

---

[6]/ It goes without saying that when a permit is granted constructively, there is no written permit stating what work it allows, and there is also no notice of permit issuance to abutting owners or others who are entitled to receive it. The apparent purpose of the affidavit that M.G.L. c. 43D, § 7 requires is to give notice of the constructive permit grant and of the project that was granted constructively.

On February 25, 2016, the parties reported that they were unable to resolve this matter by agreement, and requested that I rule on the pending motion for summary decision and determine what work was allowed by JC's constructively-granted permit.

M.G.L c. 43D: An Overview

Because this is the first Chapter 43D appeal before DALA, I review the statute's pertinent provisions before identifying the material facts that are not genuinely disputed here.

M.G.L. c. 43D was added to the General Laws in 2004. *See* St. 2004, c. 149, § 94. Its current version, added by St. 2006, c. 205, became effective on August 2, 2006, and applies here.

Chapter 43D's purpose is to streamline and expedite local permitting processes to allow relatively large-scale economic development projects in areas already zoned for them. *See* St. 2006, c. 205: preamble, and § 2. The statute allows a city or town that accepts its provisions to designate commercially or industrially-zoned public or private property as "priority development sites," subject to approval by the Massachusetts Executive Office of Housing and Economic Development's Interagency Permitting Board, and to offer expedited local permitting for their development or redevelopment. M.G.L. c. 43D, § 2 defines "priority development site" as:

> a privately or publicly owned property that is: (1) eligible under applicable zoning provisions, including special permits or other discretionary permits, for the development or redevelopment of a building at least 50,000 square feet of gross floor area in new or existing buildings or structures; and (2) designated as an appropriate priority development site by the (Interagency Permitting) [B]oard. Several parcels or projects may be included within a single priority development site. Wherever possible, priority development sites should be located adjacent to areas of existing development or in underutilized buildings or facilities or close to appropriate transit

services.[7]

Per M.G.L. c. 43D, § 3, the acceptance of Chapter 43D by a municipality requires a town meeting vote or, in cities, a majority vote of city council members pursuant to M.G.L. c. 4, § 4. When that occurs, the municipality's governing body (*e.g.*, a town's board of selectmen) must take specific measures to implement the statute. These include appointing "a single point of contact to serve as the primary municipal liaison for all issues relating to [Chapter 43D]," amending the municipality's "rules and regulations on permit issuance" to conform to the statute, establishing a procedure for determining all permits, reviews and predevelopment reviews required for a project (including "scoping sessions, public comment periods and public hearings") and identifying supplemental information required for these reviews, and establishing "a procedure, following the notification of the required submissions for review . . . for determining if all the materials required for the review of the project have been completed." M.G.L. c. 43D, § 4. The original (2004) version of the statute included a provision stating that "[t]he municipality is encouraged to compile a comprehensive permitting process guidebook and to provide other informational assistance relative to permitting through a single point of contact," meaning an office or staff member appointed by the municipality "for the purposes of coordinating and facilitating the land use permitting process." M.G.L. c. 43D (as added by St. 2004, c. 149, § 94), §§ 3(a) and (b). This provision, along with most of the original text of M.G.L. c. 43D, § 3, was omitted from the current version of the statute that

[7]/ The current statutory definition of "priority development site" was added by a 2012 amendment of M.G.L. c. 43D. *See* St. 2012, c. 238, § 25.

became effective in 2006. Nonetheless, a number of municipalities, including North Attleborough, have since issued Chapter 43D permitting guides.

Once a municipality accepts Chapter 43D, its governing body may apply to the Interagency Permitting Board to designate an area in the municipality as a priority development site, provided that the owners of property to be included in the site authorize the proposed priority site designation in writing. M.G.L. c. 43D, § 3(a). The priority site designation proposal may include a request for a grant of up to $150,000 to assist the municipality in implementing the statute's requirements, including professional staffing assistance, local government reorganization, and consulting services. M.G.L. c. 43D, §§ 3(a) and (b). The Interagency Permitting Board has 60 days to determine whether a priority development site proposal is eligible for approval, and to approve it if it is. M.G.L. c. 43D, § 3(b).

Once a priority development site proposal is approved, a local authority may accept applications to use or develop land or structures within the site filed under any permitting statute that would otherwise apply to the type of work proposed, including the Zoning Act, M.G.L. c. 40A. *See* M.G.L. c. 43D, § 2 (definitions of "issuing authority" and "permit"). Because the proposed work would occur within a priority development site, however, the application is treated as one for a Chapter 43D "priority development permit."

The statute prescribes a 180-day period for acting on a priority development permit application. This requirement appears in two different statutory sections, and although the 180-day period does not vary between them, the two sections describe differently what it is that the local permit-issuing authority must do before the 180 day period expires. M.G.L. c. 43D, § 5(a) states that

"[p]riority development permit *reviews and final decisions* shall be completed within 180 days," subject to any extension that section 5 allows. (Emphasis added.)[8] M.G.L. c. 43D, § 7 provides that '[f]ailure by any issuing authority to *take final action on a permit or approval* within the 180-day period or extended time, if applicable, shall be considered a grant of the relief requested of that authority." (Emphasis added.)

The statute does not define "final decisions" or "final action," and does not state whether they occur when the permit-issuing authority votes on the priority development permit application, or when it confirms this vote in writing and, if the latter, whether the writing must be filed in the city or town clerk's office. Whatever it is that the issuing authority must do, however, it must be done within the 180 day period, and so it is critical to know when that period begins to run and when it expires.

M.G.L. c. 43D, § 5(a) states that the 180-day period "shall begin the day after the issuance of the notice that the [permit] application materials are complete . . . ." If they are not complete, "the governing body shall notify the applicant in writing within 20 business days from receipt of the completed form of additional information needed or requirements that it may have." *Id.* In that case, "[t]he resubmission of the permit application or the submission of such additional information

[8]/ The "extension" to which section 5(a) refers appears to be either of two things. One is the additional period for reviewing additional information, or a resubmitted permit application, filed by the applicant after it is notified in writing that additional information is needed. This delays the start of the 180-day period for taking final action on a priority development permit application. The other is the additional time for review that M.G.L. c. 43D,§ 5(c) allows when the permit-issuing authority determines "at any time . . . that a permit or other predevelopment review is required which it did not previously identify." Depending upon when this determination is made in the review process, it can either delay the commencement of the permit-issuing authority's 180-day permit period, or stop the clock from continuing to run if permit review is already underway.

required by the governing body shall commence a new 30-day period for review of the additional information." M.G.L. c. 43D, § 5(b).[9]

Neither section 5, nor any other provision of Chapter 43D, states when the 180-day review permit begins to run if the municipality gives the applicant no written notice that its priority development permit application materials are complete or that additional information is needed to review the application. In contrast, North Attleborough's *M.G.L. c. 43D Priority Development Site Permitting Guide* provides that if the applicant is not notified as to the completeness of its permit application within 20 business days, the application is deemed to be complete, and the 180-day period for reviewing and deciding the permit application begins to run, from "the day after the twentieth business day" (meaning, presumably, the twentieth business day after the applicant submits its permit application). (*See Doc. 14*: Opp. of North Attleborough to mot. for summary dec. (Jan. 19, 2016); Aff. of Nancy Runkle, sworn-to Jan. 19, 2016, at Exh. C: *Town of North Attleborough 43D Priority Development Site Permitting Guide* (Dec. 2014) at 10, Part III: Applications and Completeness Review, subparts B and C.)

Failure by a permit-issuing authority to take final action on a priority development permit

---

[9]/ Assuming that the resubmitted permit application or the submitted additional information makes the permit application materials complete, and the applicant is so notified in writing within the 30-day period prescribed by section 5(b), the 180-day review period would appear to begin the day after this notice is issued. I do not need to decide the point, however, because there is no evidence that the North Attleborough Planning Board notified JC in writing that additional information was needed for the board to review its priority development permit application.

I note, however, that while neither M.G.L. c. 43D, § 5 nor M.G.L. c. 43D, § 7 specifically requires that the local permit-issuing authority must render its final decision or take final action on the permit application in writing, section 5 *does* specify that a notice to the applicant that the permit application is complete, or that additional information is required, must be in writing.

application within the 180-day period (or within any extended time to complete review) "shall be considered a grant of the relief requested of that authority." M.G.L. c. 43D, § 7, first sentence. If that occurs, the applicant must, within 14 days after the review period expires:

> file an affidavit with the city or town clerk, attaching the application, setting forth the facts giving rise to the grant and stating that notice of the grant has been mailed, by certified mail, to all parties to the proceedings and all persons entitled to notice of hearing in connection with the application.

Id., second sentence.

A person aggrieved by an issuing authority's final decision on a priority development permit application, or by that authority's failure to take final action on the application within the 180-day period (or its extension, if any), "may appeal to the division of administrative law appeals by bringing an action within 20 days after a written decision was or should have been rendered." M.G.L. c. 43D, §§ 10(a), (b).[10] DALA must issue a final decision within 90 days after it receives the appeal. M.G.L. c. 43D, § 10(d.) An aggrieved party may appeal DALA's decision to the Superior Court within 20 days after DALA issues its decision. *Id*.

[10]/ Two exceptions are appeals challenging final decisions or failures to take final action on applications for permits under the Wetlands Protection Act, M.G.L. c. 131,§ 40, or appeals challenging orders protecting inland wetlands issued under M.G.L. c. 131, § 40A, which continue to be appealed as those statutes, or regulations issued pursuant to them, direct. *See* M.G.L. c. 43D, § 10(b), last sentence.

Undisputed Material Facts

The following material facts are not genuinely disputed.

The Parties

a. The Petitioners

1. Corliss Landing Condominium is a Massachusetts industrial/commercial condominium established, pursuant to M.G.L. c. 183A, under a declaration of trust dated April 7, 2006. (*Doc. 1*: Appeal at 1, para. 1.)

2. Petitioner Corliss Landing Condominium Trust was established by the declaration of trust as the Condominium's organization of unit owners, which is the condominium's governing body under M.G.L. c. 183A. In addition to being the condominium's governing body, the Trust also owns the common areas and facilities of the Condominium property. (*Id*.; Appeal at 6, para. 20.)

3. Petitioner XF Realty, LLC owns Unit 4 of the Condominium, and petitioner Investment Realty Co., LLC owns Unit 6. (*Id*.; Appeal at 1, para. 1, and at 6, para. 20.)

4. The Condominium is located on a 3.44-acre rectangular property along the western side of Santoro Drive identified in the North Attleborough Assessor's records as Map 36, Lot 2 (the Condominium property). The Condominium property abuts, on its northern side, a lot owned by JC Properties, LLC, also along Santoro Drive's western side. The Condominium property abuts an electric transmission line easement along its western side, and, along most of its southern side, it

abuts a property along John L. Dietsch Boulevard belonging to a different owner. The southeast corner of the Condominium property adjoins a portion of John L. Dietsch Boulevard's mapped right-of-way, at a curve in the boulevard where its direction changes from north-south to east-west. However, although the Condominium's address is 344 John L. Dietsch Boulevard, the Condominium property currently has no direct access from that street; access to it is, instead, from Santoro Drive. (*Doc16*: J.C. Properties Planned Business Development, Assessor Map 36, - Parcel 486, 487 & 488, North Attleborough, Massachusetts Project Plan, Sheet 4 of 10: Layout and Materials, revised for special permit submission, Jun. 18, 2015, with further revisions noted thereon through Dec. 4, 2015 (project plan).)

5. There is a roughly 30,000 square-foot, single-story rectangular warehouse on the Condominium property that is divided into industrial and/or commercial condominium units. Parking spaces are located along the building's longer northern and southern sides. Traffic circulates around the building and parking spaces via an approximately 30-40 foot wide driveway. Vehicles enter and exit this driveway at an approximately 55-foot-wide entrance along the western side of Santoro Drive side, approximately 110-170 feet north of Santoro Drive's intersection with John L. Dietsch Boulevard. (*Doc. 16*: project plan; *Doc 1*: Appeal at 1, para. 1, and 6, para. 20.)

6. The first 220 feet of Santoro Drive, running north from John L. Dietsch Boulevard, is a "paper street" whose layout was approved by the town planning board in 2008 when it approved a residential subdivision in the area that was never built. The town has not yet approved this "paper street" section, or any other part of Santoro Drive, as a public way. North of the "paper street" section, Santoro Drive is a private right-of-way. Currently, this private section of Santoro Drive is

unpaved and does not extend to Landry Avenue. (*Doc* 1: Appeal, Exh. B: Application of JC Properties for a Planned Business Development, Jun. 18, 2015 (permit application); application narrative at 1, entitled "Pre-Development Conditions"; *Doc. 16*: project plan.)

b. The Respondents

i. JC Properties

7. Respondent JC Properties, LLC owns properties in an I-60 zone (a type of industrial zoning area under the North Attleborough Zoning Bylaws) along both sides of Santoro Drive, between Landry Avenue and John L. Dietsch Boulevard. These are shown on North Attleborough Assessor's Map 36 as parcels 485-488 (the JC property). (*Doc* 1: Appeal, Exh. B (permit application): attached portion of Assessor's Map 36.)

(a) Parcels 487 and 488 are adjacent, trapezoidal lots along the western side of Santoro Drive's private right-of-way section. Parcel 487 is the northernmost of these two lots. It is bounded by Landry Avenue on the north and by parcel 488 on the south. Parcel 488 abuts the north side of the Condominium property;

(b) Parcels 486 and 485 are adjacent, irregularly-shaped lots along the eastern side of Santoro Drive. Parcel 486, along Santoro Drive's private right-of-way section, is the northernmost of these two parcels. It is bounded by Landry Avenue on the north and parcel 485 on the south. Parcel 485, the southernmost of these two parcels, is bounded by John L. Dietsch Boulevard on the south. The northernmost portion of parcel 485, across from and

east of parcel 488, adjoins Santoro Drive's private right-of-way section. The southern portion of parcel 485, across from and east of the Condominium property, adjoins Santoro Drive's "paper street" section. Parcel 485 is partially developed; a 20,000 square foot industrial building is currently under construction near its southern end. This building will be leased by Case Snow, a snow and ice removal contractor.

(*Doc 1*: Appeal at 2, para. 8; *Doc* 7: Affidavit of Edward J. Casey pursuant to c. 43D, § 7, sworn-to Jan. 4, 2016 ("Casey Aff.") at 1, para. 1.; *Doc 16* : project plan.)

ii. The Town

8. Respondent North Attleborough Planning Board is the town's "issuing authority" responsible for reviewing applications to develop or redevelop commercially or industrially zoned properties designated as "priority development sites" pursuant to M.G.L. c. 43D, § 6, and for issuing permits and granting approvals under Chapter 43D. The planning board also reviews and acts upon applications for permits and other approvals under the town's zoning bylaws, including planned business development permit application review under zoning bylaws section VI.N, and the review of applications to construct proposed subdivisions and applications to construct or abandon paper streets, together with the plans that are filed with these applications (including site plans and "Approval Not Required" (ANR) "Form A" plans), and other types of special permit applications. As part of its review process under both M.G.L. c. 43D and the town's subdivision control law and zoning bylaws, the planning board conducts meetings, holds public hearings, determines whether applications are complete or whether additional information is needed to review them, and either

issue or deny the requested permit. *See* http://www.nattleboro.com/planning-board.

9. Respondent North Attleborough Board of Selectmen is North Attleborough's governing body.

10. North Attleborough's zoning bylaws allow a "planned business development" on lots in specified types of commercial or industrial zones, among them a lot in an I-60 zone—the zoning that applies to JC's parcels 485-488 (*see* Finding 7.) (*Doc. 1*: Appeal, Exh. C: North Attleborough Zoning By-Laws in effect as of July, 1974, as amended through June 1, 2015.)

11. Section VI.N of the zoning bylaws applies to a planned business development. This section designates the planning board as the town's "Special Permit Granting Authority" under the Commonwealth's zoning statute, pursuant to M.G.L. c. 40A, §§ 1A and 9.

12. The stated purposes of a planned business development are:

> a. To avoid and to lessen traffic congestion and to promote traffic safety, on state and local highways and roads by the coordination of adjacent land uses and traffic patterns within the commercial districts.
>
> b. To promote and attract visually pleasing commercial development which will expand the commercial tax base of the town.
>
> c. To encourage commercial development in clusters and nodes rather than in "highway strips," thereby discouraging unlimited commercial "strip development" and excessive numbers of curb cuts along highways.

(*Exh 1*: Appeal, Exh. C: zoning bylaws, § VI.N.2.)

13. Section VI.N of the zoning bylaws specifies limitations and conditions on planned business developments, including the following:

> Minimum development size. The area proposed as a planned business development

must contain at least five contiguous acres (although a smaller-sized tract may be reviewed as a planned business development if the applicant requests that the special permit granting authority do so), within one of the commercial or industrial zones that section VI.N specifies, including an I-60 zone, and must be under single ownership or in multiple ownership with easements that allow the common use of access drives and utility systems within the planned business development. (§ VI.N.3)

Minimum open space may be reduced to 30 percent of the planned business development area if the special permit granting authority approves a landscaping plan prepared by a registered professional landscape architect in conjunction with the site plan accompanying the special permit application. If the planned business development is split between a commercial district and a residential or industrial district, the commercial portion must contain at least 30 percent open space as defined by the zoning bylaw. (§ VI.N.4.)

Permitted uses in a planned business development are those allowed by right in commercial districts and listed as retail and service uses in the zoning bylaw's "use schedule B," and all uses allowed in an I-60 zone. (§ VI.N.5).

More than one principal building may be located in a planned business development if the special permit granting authority approves this. If this is allowed, all other criteria required by the zoning bylaw for multiple principal buildings apply; however, the distance between the buildings must be twice the side yard setback that the zoning bylaws require outside of a planned business development. (§ VI.N.6).

Traffic impact mitigation. "As a condition of special permit approval" for a planned

business development, the development must minimize traffic volume and negative safety impacts on adjacent highways by:

> (a) Minimizing curb cuts on state and local roads by providing access via a common driveway serving adjacent lots or premises, access via an existing side street, or access via a cul-de-sac or loop road share by adjacent lots or premises;
>
> (b) Using one curb cut or driveway per planned business development for entrance and exit, which is allowed as of right, unless, where the special permit granting authority deems it necessary to do so, two curb cuts or driveways may be allowed if they are clearly marked "entrance" and/or "exit."
>
> (c) Limiting the width of a curb cut to 25 feet;
>
> (d) Designing driveways to afford safe sight distance for motorists exiting to highways;
>
> (e) Assuring safe interior traffic and pedestrian circulation.

(§ VI.N.7.) Section VI.N.7 also requires that the applicant submit a traffic impact statement prepared by a professional engineer who specializes in traffic engineering, and the section provides that access to state highways "shall be subject to review and approval by the Massachusetts Department of Public Works as required."

Parking and off-street loading requirements recited in section VI.A of the zoning bylaws apply to planned business developments. To the extent feasible, parking areas must be located to the side or rear of a structure, and may be shared with adjacent businesses. (§ VI.N.8.)

Other requirements. Section VI.N also imposes landscaping requirements § VI.N.9), and requirements governing stormwater runoff (§ VI.N.10) and erosion control (§ VI.N.11).

iii. EOHED / Interagency Planning Board

14. Respondent Massachusetts Executive Office of Housing and Economic Development's Interagency Permitting Board, established pursuant to M.G.L. c. 23A, § 62, reviews and acts on applications by Massachusetts municipalities to designate property within their respective boundaries as "priority development sites" pursuant to M.G.L. c. 43D. M.G.L. c, 43D, § 3(a). If requested to do so by a city or town's governing body, the Interagency Permitting Board may determine whether the municipality is eligible for a technical assistance grant to implement the requirements of Chapter 43D. *See* M.G.L. c. 43D, § 3(b).

North Attleborough Accepts and Implements Chapter 43D

15. M.G.L. c. 43D has applied in North Attleborough since June 2014. The town's board of selectmen voted to accept the statute on March 14, 2014, and the special town meeting voted to do so on June 2, 2014. (*Doc 14*: Town opp. to summary decision mot. (Jan. 19, 2016); attached Aff. of Nancy Runkle, Town Planner, sworn-to Jan. 19., 2016, at 2 para. 6, and at Exh. A: North Attleborough Board of Selectmen Minutes, Mar. 13, 2014, and Articles of Special Town Meeting, Jun. 2, 2014.)

16. In December 2014, the North Attleborough Planning Board issued, on the town's behalf, the *Town of North Attleborough 43D Priority Development Site Permitting Guide* (the permitting guide). (*Doc 14:* Runkle Aff., Exh. C.) The permitting guide was not promulgated as rules and regulations governing the issuance of priority development permits under Chapter 43D,

and neither the planning board nor any other town agency or board has issued any such rules and regulations.

17. The permitting guide's stated purpose was "to help developers navigate the permitting process related to land-based developments in the Town of North Attleborough," with an emphasis on Chapter 43D development permitting, although it was also intended to provide assistance with any land-based development project. (*Doc 14*: permitting guide at 1.)

18. The permitting guide explains, among other things, who in North Attleborough town government is responsible for determining when a priority development permit application is complete, and when the 180-day permit application review period prescribed by M.G.L. c. 43D, § 5(a) begins to run. It states, among other things, that:

(a) The town planner is the "permits coordinator" for North Attleborough's Chapter 43D priority development sites and is also a member of the town's "Design Review Committee," with whom a developer must meet before submitting a priority site development permit application in order to identify the proposed project's necessary permits and "critical issues and/or problems" (*Doc. 14*: permitting guide at 8-9.)

(b) Upon receiving a priority site development permit application, the permits coordinator must, within 15 days, convene a meeting of a "design review committee" in order to determine the application's completeness. The committee will then notify the permits coordinator whether the application is complete or whether additional information must be submitted. (*Id*. at 10, part B);

(c) If the permit application is complete, the permits coordinator, "[a]cting for the

Board of Selectmen," must send notice of this completeness to both the applicant and the Interagency Permitting Board by certified mail. If the applicant is not notified of completeness by certified mail within 20 business days, the application is "deemed to be complete" (*Id*. at 10, part C, first unnumbered sub-part); and

(d) If an application is complete, the 180-day review period prescribed by M.G.L. c. 43D begins to run on the day after notice of completeness is mailed to the applicant, or "if the applicant is not notified, then the day after the twentieth business day" (*Id*. at 10, Item C.1).

19. The permitting guide does not prescribe general or special conditions that must be included in a priority development permit.

North Attleborough Designates a Priority Development Site Along Santoro Drive

20. On January 5, 2015, a special town meeting approved the filing of an application with the Interagency Permitting Board for the designation of a priority development site, pursuant to M.G.L. c. 43D, comprising JC's lots 486, 487 and 488 and the private right-of-way section of Santoro Drive, including its southern end adjacent to the Condominium property, up to where it meets Santoro Drive's "paper street" section. (*Doc 1:* Appeal at 8, and at Exh. A: Town Clerk's recording of Jan. 5, 2015 town meeting vote to approve the filing of the application with the Interagency Permitting Board; *Doc 14*: Town Opp. to Mot. for Summary Decision (Jan. 19, 2016); Runkle Aff., Exh. B.)

21. On June 3, 2015, North Attleborough submitted an application to EOHED's Interagency Planning Board to approve this priority development site. (*Doc. 1*: Appeal, Exh. A: North Attleborough's Chapter 43D application to the Interagency Permitting Board dated June 3, 2015, and attached, undated aerial photograph showing location of priority development site.)

22. On June 10, 2015, the Interagency Permitting Board approved the designation of the priority development site. On July 28, 2015, North Attleborough formally accepted the application of Chapter 43D to the Priority Development Site by signing the Interagency Permitting Board's designation. (*Doc 14*: Runkle Aff., Exh. C.)

The JC Permit Application and its Constructive Grant

23. On June 18, 2015, JC Properties filed, with the planning board, a permit application for a 12.86-acre planned business development at the priority development site, along both sides of Santoro Drive. It included a single-page permit application form prescribed by the planning board, known as a "Form P application for a planned business development." This form stated that the application was being submitted "for review of a Planned Business Development under the requirements of the Zoning Act and the North Attleborough Zoning By-Laws, and the Planning Board's Rules and Regulations Governing the Special Permit Process for a Planned Business Development in the Town of North Attleborough."[11] The permit application also included a

[11]/ The reference to "rules and regulations" is preprinted on Form P. There are no such regulations in the record. Absent any assertion or evidence to the contrary, the form's reference to "rules and regulations" appears to be generic, and to include, therefore, the zoning bylaw section applicable to a planned business development—section VI.N—which *is* in the record.

narrative entitled "Special Permit Application for J.C. Properties, Planned Business Development, Landry Avenue / Santoro Drive, North Attleborough, Massachusetts, and was dated June 18, 2015. The narrative included an aerial photograph of locus with the boundaries of the proposed planned business development site outlined on it, and a certified list of abutting owners, several plat maps, including one showing a layout for Santoro Drive. JC submitted, with its application, a filing fee check for $250, the amount specified by Form P. (*Doc. 1*: Appeal, Exh. B: "Form P" Application of JC Properties, L.L.C. to North Attleborough Planning Board, with attached narrative, dated Jun. 8, 2015 (permit application).)

24. JC's permit application narrative described the purpose of the proposed work as the construction of a cohesive planned business development with shared parking, driveways and access, designed so that the buildings' parking areas and loading doors would not face the abutting residential neighborhood.

(a) Along the western side of Santoro Drive, on parcels 487 and 488, JC proposed to build five buildings for commercial and/or industrial use, each with a footprint of 5,000 square feet, with associated parking, driveways and utilities, including drainage structures. Each of these buildings would contain 5,000 square feet of high-bay (two-story) garage space and 10,000 square feet of office space (two stories with 5,000 square feet per floor).

(b) Along the eastern side of Santoro Drive, JC proposed to build a 64,300 square foot paved outdoor storage, near the lot's northern end at Landry Avenue and, at the southern end of the lot, a 2,500 square foot accessory storage shed to be used primarily for the storage of road salt, all of which would be leased by Case Snow.

(c) JC sought a special permit (under the local zoning bylaw) allowing waivers associated with the required setback along Landry Avenue so that landscaping and buffers could be provided along that street rather than parking areas and driveways for the proposed buildings, as well as "waivers for [the] number of buildings on one lot and total parking spaces."

(*Doc 1*: Appeal at 1, para. 1, and at Exh. B: permit application narrative, at 2 (under the subheading "Post-Development Conditions") and at 2-3 (under the subheading "Setbacks"); *see also Doc* 7: Aff. of Edward J. Casey pursuant to c. 43D, § 7, sworn-to Jan. 4, 2016, at 1, para. 1.) The permit narrative also described the project's stormwater management system, including the direction of all surface and rooftop runoff to a subsurface infiltration system during less intense storm events, and the control of construction-related impacts, including erosion sedimentation. (*Doc 1*: permit application narrative at 3-4.)

25. JC's project consulting firm submitted project plans revised through the permit application date (June 18, 2015) with the priority development permit application. One sheet of those plans (Sheet 4 of 10), shows the layout of JC's proposed planned business development, including, along the western side of the private right-of-way section of Santoro Drive, the location of the five proposed buildings, contiguous parking areas in front of them, and access to and exit from the parking areas along the private right-of-way section of Santoro Drive at three points. This plan also shows the Condominium property, the 20,000 square foot industrial building under construction along the eastern side of Santoro drive across from the Condominium property, the proposed modifications of Santoro Drive's private right-of-way section, and a "proposed municipal access

easement" where Santoro Drive's private right-of-way section meets its "paper street" section. The private right-of-way section of Santoro Drive is shown with a completed, paved width of 24 feet, and as extending northward to within approximately 70 feet of Landry Avenue, where Santoro Drive would curve into the parking area in front of the northernmost of the five buildings JC proposed to build. The plan shows no connection between the northern end of Santoro Drive and Landry Avenue. At the southern end of Santoro Drive's private right-of-way section, the plan shows a semi-circular paved area (as opposed to a full turnaround) along the western side of the drive, just north of the boundary between the Condominium property and JC's parcel 488, and the drive's widening to 36 feet (the width of the "paper street" section). This widened, paved portion of the southernmost end of Santoro Drive's private right-of-way is labeled "Proposed Municipal Access Easement" on the plan. (*Doc 16*: project plan.)

26. On June 23, 2015, the town planner notified the professional engineer who had prepared JC's priority development permit application, by email, that the submitted application fee was insufficient because the fee had increased from $250 to $5,825, and JC submitted the balance due ($5,575) to the planning board. (*Doc. 13*: JC Properties, LLC's memorandum in opp. to mot. for summary dec. (Jan. 15, 2016): Aff. of Nicola Facendola, P.E., sworn-to Jan. 15, 2-15 at 2, paras. 5-6; and at Exh. A (copy of town email dated Jun. 23, 2015).)

27. The planning board did not send written notice of application completeness or incompleteness to the applicant. The town planner's June 23, 2015 email regarding the increased permit application fee (*see* Finding 22) was the only notice that JC received regarding any level of the permit application's completeness. *Doc. 13*: JC Properties, LLC's memorandum in opp. to mot.

for summary dec. (Jan. 15, 2016) at 2, top para., and attached Facendola Aff. at 2, para. 7.)

28. On July 2, 2015, the North Attleborough Planning Board issued notice of a public hearing scheduled for July 16, 2015 regarding JC Properties' application for a planned business development permit. The notice stated that it was issued pursuant to M.G.L. c. 40A, §§ 1A and 9, and Section VI.N "and other sections" of the North Attleborough Zoning bylaws. It did not state that it was being issued pursuant to M.G.L. c. 43D. The notice described the project for which JC had submitted a permit application thus:

> The proposed project is located on 12.86 acres of vacant land in the Industrial 60,000 sq. ft. Zoning District and consists of the construction of five, 10,000 square foot buildings for commercial and/or industrial uses with associated parking, fenced in storage area for Case Snow Management's equipment along with an accessory storage shed. The site is bounded by Landry Avenue to the North, Santoro Drive to the South, a commercial condominium building located to the Southwest of the Parcel and an industrial building currently under construction to the Southeast of the Parcel and an industrial building currently under construction to the Southeast of the Parcel. The property is further identified as Lots 486, 487 and 488 on the Assessors Plat 36 and located in an I-60 zoning district.

(*Doc. 15*: Petitioners' memorandum in support of motion for summary decision, Jan. 28, 2016; Exh. A: Hearing Notice dated July 2, 2015.)

29. The planning board held a public hearing on JC's planned business development application over the next several months, beginning on July 16, 2015 and continuing on seven additional dates, the last of which was December 10, 2015. The planning board had planned to vote on JC's permit application on December 10, 2015, but three of the planning board's five members recused themselves from voting. The planning board closed the public hearing on that date without issuing a decision. (See *Doc. 7*: Aff. of Edward J. Casey pursuant to M.G.L. c. 43D, § 7, sworn-to

Jan. 4, 2016, at 2, paras. 3-5; *Doc. 13*: JC Properties, LLC's memorandum in opp, to mot. for summary decs. (Jan. 15, 2016) at 2, bottom para., and attached Aff. of Nicola Facendola, sworn-to Jan. 15, 2016, at 2, para. 8.)

30. The planning board did not vote further, or issue a decision, on JC's permit application after December 10, 2015. Its failure to "take final action" on the permit application within the 180-day period prescribed by M.G.L. c. 43D, § 5(a) resulted in the constructive grant of the permit pursuant to M.G.L. c. 43D, § 7.

31. On December 18, 2015, the petitioners filed an appeal challenging JC's constructively-granted priority development permit with the Division of Administrative Law Appeals (DALA), pursuant to M.G.L. c. 43D, § 10.

Discussion

1. Jurisdictional Issues

M.G.L. c. 43D, § 10(a) provides in pertinent part that "[a]ppeals from issuing authority decisions or from a grant by operation of law shall be filed within 20 days after the last individual permitting decision has been rendered or within 20 days after the conclusion of the 180 day period as set forth in subsection (a) of section 5, whichever is later."

There is no assertion here that the petitioners' appeal was filed late, and the record does not suggest its lateness. The record does suggest, however, that the petitioners commenced this appeal before JC's priority development permit was deemed to have been constructively granted when the

planning board failed to take final action on the permit application within the prescribed 180-day period. I conclude, however, that this apparent prematurity was not a jurisdictional defect.

a. Computing the 180-day permit review period

I resolve, first, when the 180-day permit review period prescribed by M.G.L. c. 43D, § 5(a) began to run, and when it expired.

Per M.G.L. c. 43D, § 5(a) and North Attleborough's 43D Priority Development Site Permitting Guide, the town had 20 business days from the date on which JC submitted its planned business development permit application (June 18, 2015) to notify the applicant that its application for a permit was complete or that the applicant needed to submit additional information. The statute provides that the 180-day permit review period "shall begin the day after the issuance of the notice that the [permit] application materials are complete," M.G.L. c. 43D, § 5(a), second sentence. It does not state, however, when, or even whether, the 180-day review period begins if the applicant is sent a notice that its permit application is incomplete, or is sent no notice of completeness or incompleteness. The town's permitting guide fills in this gap, as the statute allows it to do. *See* M.G.L. c. 43D, §§ 4(e)[12] and 5(a), second sentence. The town's permitting guide provides that if the applicant is not notified by certified mail that its application was complete or incomplete within 20 business days, then its application is deemed to be complete. The permitting guide also provides that

[12]/ M.G.L. c. 43D, § 4 provides in pertinent part that "[w]ithin 120 days of the acceptance of this chapter the governing body [of a city or town] shall implement the following: . . . (e) establish a procedure, following the notification of the required submissions for review . . . for determining if all the materials required for the review of the project have been completed.

the 180-day permit review period prescribed by M.G.L. c. 43D, § 5 commences on the day following notice to the applicant by certified mail that its permit application is complete or, if notice of permit completeness or incompleteness is not sent, the 180-day period commences on the day after the twentieth business day following the submission of the permit application. (*Doc. 14*: permitting guide at 10, Part III: Applications and Completeness Review, subparts B and C.)

Neither the planning board nor any other town body or agency sent written notice of application completeness (or incompleteness) to the applicant. Based upon the permit review timetable prescribed by the town's permitting guide, the 180-day time for the planning board to take final action on JC's permit application, which was submitted on June 18, 2015, began to run on July 17, 2015, the day after the 20 business day period for giving the applicant notice of permit application completeness expired. The 180- day period expired, therefore, on January 15, 2016. Because the planning board took no final action on JC's permit application by that date, the permit was granted constructively, pursuant to M.G.L. c. 43D, § 7.

The petitioners filed their appeal at DALA, on December 18, 2015, after the planning board had closed the public hearing but was unable to vote on JC's permit application. Nearly a month would pass before JC's permit was deemed to have been constructively issued. However, the planning board believed that its time to take final action on the permit expired on December 18, 2015. Although calculating the 180-day period according to the planning guide suggested that the board still had time to issue a decision, and that the permit was not yet granted constructively, the petitioners were not prepared to risk losing their appeal rights. The planning board would take no action on JC's permit application after December 18, 2015, and the permit ended up being granted

constructively on January 16, 2016, while this appeal was underway and before I held the prehearing conference on January 28, 2016.

b. The appeal's prematurity is not a jurisdictional defect

In determining whether the appeal's prematurity rendered it jurisdictionally defective, I apply two fundamental principles.

First, a petitioner challenging an agency action cannot be aggrieved until it receives notice of that action. *See EMC Corp. v. Comm'r of Revenue*, 433 Mass. 568, 573, 744 N.E.2d 55, 59-60 (2001) (taxpayer's time to appeal a state tax deficiency assessment runs from the date on which the taxpayer is given notice of assessment, not from the date on which the tax deficiency was assessed, which is an internal government act that occurs without notice to the taxpayer). That principle is difficult to apply if it is unclear whether a particular type of notice triggers the time to appeal agency action, or when the agency fails to act or give formal notice of its inaction. In that situation, the appealing party is left guessing whether and, if so, when, it becomes aggrieved or, thus, when its time to appeal begins to run. This guessing may trigger a premature appeal, as it did here.

The second principle is particularly helpful in this circumstance—"statutes embodying procedural requirements should be construed, when possible, to further the statutory scheme intended by the Legislature without creating snares for the unwary," particularly when this construction imposes no hardship on the decisionmaking agency. *Id.*; 433 Mass. at 574, 744 N.E.2d at 59, *citing Becton, Dickinson & Co. v. State Tax Comm'n*, 374 Mass. 230, 233, 372 N.E.2d 1254, 1257 (1978) (prematurity of taxpayer's application to Appellate Tax Board to review State Tax Commission's

denial of request to abate tax deficiency assessment was not fatal to the Board's jurisdiction, and did not interfere with administrative procedure or with statutory policy favoring informal resolution of taxpayer disputes, since both the taxpayer and Commissioner knew that the deficiency assessment was inevitable and there was no hope of informally resolving disagreement over the appropriate accounting method; in addition, "it is a general policy of the law to prevent loss of valuable rights, not because something was done too late, but rather because it was done too soon.").

Applying these principles, a statute requiring that an appeal be taken within a certain time after a specific event occurs, such as an agency's permit decision or its failure to issue one, is construed as fixing the latest, but not the earliest, time for the appeal to be taken, unless it provides otherwise. *Becton, Dickinson*; 374 Mass. at 274, 372 N.E.2d at 1257*; see also Webster Thomas Co. v. Commonwealth*, 336 Mass. 130, 143 N.E.2d 216, 219 (1957) (although statute provided that petition for assessing damages to property not taken in condemnation proceedings could be filed within one year after right to damages vested (meaning when the public construction project causing the injury to property was completed), a petition brought before construction was completed and, therefore, before the right to bring a damages assessment petition vested, could be reviewed if the claimant's property had already fully sustained all physical damage related to the project). Moreover, when an appeal is filed before a municipal board action becomes final without objection to its prematurity, the appeal's prematurity is little more than an inconvenience to the party having to defend the as-yet incomplete board action. *See National Bank of Commerce v. New Bedford*, 175 Mass. 257, 258-59, 56 N.E. 288, 288-89 (1900).

All of these principles are well applied here. Per M.G.L. c. 43D, § 10(a), an appeal

challenging a permit granted constructively when the issuing authority fails to take final action within the 180-day period prescribed by M.G.L. c. 43D, § 5(a) must be brought within 20 days after the 180-day period expires. However, Chapter 43D does not fix the earliest time for an appeal challenging a constructively-granted permit. This point matters where, as here, there is confusion about the date on which the permit was constructively granted, and the issuing authority was the source of the confusion. The question is whether the premature appeal, though not barred by Chapter 43D, disrupted orderly procedure before the planning board. It did not; the petitioners commenced their appeal at DALA eight days after the planning board had closed the public record on JC's permit application and was then unable to vote on it because three of its five members recused themselves. The planning board acted no further on the permit application before its 180-day time to do so actually expired, underscoring that there was no orderly procedure that the petitioners' appeal disrupted.

The prematurity of the petitioners' appeal is not a jurisdictional defect that precludes its determination on the merits. I turn next, therefore, to the petitioners' motion for summary decision.

2. Motion for Summary Decision

a. Ground Rules

Summary decision may be granted in adjudicatory appeals such as this one when there are no genuine or material facts to be adjudicated and the outcome is compelled as a matter of law. A party moving for summary decision must show the absence of any genuine issue of material fact with

competent evidence, as well as its entitlement to a summary disposition in its favor as a matter of law. *See* 801 C.M.R. § 1.01(7)(h).

A motion for summary decision prompts a review of the record in search of a genuine, material factual issue that could be decided only through an evidentiary hearing. *Palmer v. Boston Retirement Bd.*, Docket No. CR-13-575, Decision at 21 (Mass. Div. of Admin. Law App., Nov. 20, 2015); *Lilly v. Fair Labor Div. (Kirby Distributorship Appeals)*, Docket Nos. LB-10-505 et al., Decision and Order on Motion for Summary Decision at 13-14 (Mass. Div. of Admin. Law App., Nov. 26, 2013). The existence of such an issue revealed by the record will defeat the motion, therefore, even if the non-moving party files no response to it. A motion for summary decision may also be denied when the facts presented, whether by the motion and opposing papers, or by the record, do not suffice to show whether a genuine, material factual issue exists or not. *Palmer* at 22; *Lilly* at 14. The motion may be granted, on the other hand, when the exhibits accompanying it, or the remainder of the record, show no genuine, material factual issues precluding summary decision, even if the motion itself does not make this showing as definitively as it might. *Palmer* at 22.

Because a motion for summary decision "searches the record" to determine whether any genuine, material factual issues are presented, summary decision may be granted in favor of the opposing party if the law, and the absence of a genuine, material factual dispute, compels this outcome, even if the opposing party did not cross-move for this relief. *See Castellani v. Fair Labor Div.*, Docket No. LB-10-533, Partial Summary Decision at 12 (Mass. Div. of Admin. Law App., Aug. 13, 2013).

b. Absence of Genuine, Material Factual Issues Precluding Summary Decision

In addition to advising that the parties could not resolve this appeal by agreement, the parties' February 26, 2016 joint status report clarified what was and was not disputed here, and what the competing positions were as to the disputed matters. The report made it clear that this appeal raised no genuine issues of material fact and could be decided summarily, and that the parties were requesting this disposition. It advised that:

(1) The parties did not agree whether the constructively-granted permit should be deemed to include standard conditions imposed by the Planning Board when it issues special permits under the Zoning Act, M.GL. c. 40A,[13] or whether there were any permit conditions they could agree to add. (*Doc. 21*: Joint Status Report (Feb. 25, 2016) at 1-2).[14]

---

[13]/ M.G.L. c. 40A, § 9 provides in pertinent part that:

> Zoning ordinances or by-laws shall provide for specific types of uses which shall only be permitted in specified districts upon the issuance of a special permit. Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law, and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time or use.

[14]/ The petitioners' draft proposed memorandum of decision had proposed 32 such conditions, but JC's counter-draft had eliminated all but three of them, which it had revised, and the petitioners did not agree with their revision. One of these proposed conditions concerned the modification of a wetlands order of conditions and stormwater management permit the North Attleborough conservation commission had issued for JC's proposed project, which could become necessary if the layout of Santoro Drive was changed to add a full turnaround where the drive's private right-of-way section met its "paper street" section, in order to accommodate truck traffic to and from the Condominium property or meet town requirements for accepting Santoro Drive as a public way. JC was willing to apply to the conservation commission for these modifications if the petitioners agreed to waive their right to appeal a new or modified order of conditions or stormwater management permit. The petitioners were unwilling to agree to a permit condition waiving their appeal rights. (*Doc. 21*: Joint Status Report (Feb. 25, 2016) at 1-2).

(2) The petitioners did not oppose JC's proposed use of its properties for commercial or industrial development. Their opposition was based upon a concern that if JC exercised its rights under the constructively-granted permit and built the project it proposed without conditions requiring the construction of a full turnaround where the private and "paper street" sections of Santoro Drive meet, no turnaround would ever be built, the "paper street" section of Santoro Drive would end in a stub without a full cul-de-sac, and the town would never accept this stubbed section as a public street, which would, in turn, have a negative effect upon the value of the petitioners' property interests. (*Id*. at 4.)

(3) JC believed that the constructive approval of its permit application entitled it to build the project it proposed without modifying Santoro Drive's layout. However, it was still offering to pursue, separately, a layout modification "consistent with the plans associated with the constructively-approved application, by submitting a new application to the Planning Board under [M.G.L.] c. 41, § 81(W)." It also offered to pursue any other approvals needed for a revised layout of Santoro Drive, including modifications of previous conservation commission orders and any local board of public works approval needed to revise that layout and allow Santoro Drive's approval as a public way. (*Id*. at 4.)

(4) The Executive Office of Housing and Economic Development opposed annulling the constructively-granted permit on any of the grounds that the petitioners raised in their summary decision motion, because, among other things, the petitioners had sufficient notice that JC Properties's permit application was being processed as one filed under Chapter 43D and were not prejudiced by the planning board's review process. EOHED perceived no requirement that DALA

" determine issues that in the ordinary course would remain open for further proceedings at a later date or before a different permitting authority." In its view, JC's permit application "had been approved and it should be entitled to proceed accordingly." However, EOHED urged DALA to include, in its decision, "not only the approval of the core elements of the Application, but such other standard, ordinary and necessary provisions as the Town may demonstrate are its customary practice in approving construction permits." (*Id*. at 5-6.)

The town respondents filed an addition to the joint status report on February 26, 2016. They asserted, as they had in opposing the petitioners' summary decision motion, that the constructive approval of JC's permit should be upheld, but they declined to take a position as to whether the earlier subdivision of the same area had to be approved before JC could build the project that was constructively permitted. That said, it was "the recommendation of the Town that [JC] modify the subdivision on record to reflect the order of the [DALA] Administrative Judge and/or ultimate decision in the Appeal process." (*Doc. 22*; Position of the Town of North Attleborough Planning Board and Town of North Attleborough Board of Selectmen, Feb. 26, 2016.)

Per the joint status report, then, the parties seek a full summary decision of this appeal, comprising (1) a ruling on the petitioners' summary decision motion determining whether any of the procedural defects it asserted required annulling JC's constructive permit; and (2) a determination of the constructively-granted permit's scope—what work it allowed, whether any permit conditions are properly read into it, and which work is outside the permit's scope and is reserved for future resolution. Because the parties identified no genuine, material factual issues precluding summary decision, and the record reveals none, I turn to the summary decision motion next.

c. Procedural Defects Asserted in the Summary Decision Motion

The petitioners do not seek summary decision based upon the priority development project's alleged detrimental impact upon Condominium property access, the suitability of Santoro Drive for acceptance as a public way, or the Santoro Drive layout that was, or may have been, approved in 2008 together with the previously-proposed subdivision.[15] Instead, their motion for a summary decision annulling JC's constructive priority development is based upon three alleged procedural defects, in the following order—the planning board's failure to issue notice that JC's permit application materials were complete; the board of selectmen's failure to comply with the requirements of M.G.L. c. 43D, § 4 by, among other things, not designating a single town point of contact for processing permit applications under Chapter 43D, and not promulgating rules and regulations implementing Chapter 43D; and the failure of the planning board's public hearing notice to disclose that Chapter 43D applied to JC's permit application. The petitioners argue that these procedural defects require annulment of JC's constructive permit. The town respondents join JC in arguing that none of these asserted defects prejudiced the petitioners or vitiated the permit's constructive grant as a matter of law.

i. Failure to Give Notice of Permit Application Completeness

Chapter 43D directs a municipality that has accepted Chapter 43D to (among other things)

[15]/ The record does not show what layout of Santoro Drive was part of the definitive subdivision that the planning board approved in 2008.

establish "a procedure, following the notification of the required submissions for review . . . for determining if all the materials required for the review of the project have been completed." M.G.L. c. 43D, § 4, clause (e). Section 4 does not specify the form or content of this procedure. It also does not specifically require that the applicant be given a written notice that its permit application materials are complete.

Section 5 of the statute addresses notice to the applicant regarding the completeness of its application or, more accurately, notice to the applicant regarding application incompleteness. It directs that the municipality's governing body "shall notify the applicant within 20 business days from its receipt of the completed form of additional information needed or requirements that it may have." M.G.L. c. 43D, § 5(a), third sentence.[16] Section 5 does not state, however, that the applicant must receive written notice if its permit application is complete.. It also does not state the consequence of failing to give that notice. In contrast, North Attleborough's Chapter 43D permitting guide requires written notice to the applicant that its priority development permit application is complete (if that is the case), and provides that if this notice is not given by certified mail to the applicant within 20 business days after the "permit application package" is submitted to the planning board,[17] "then the application is deemed to be complete." (*Doc. 14*: Exh. C, permitting guide at 10.)

M.G.L. c. 43D, § 5(a) does furnish, however, a practical reason for issuing a written notice

---

[16]/ "Completed form" means, presumably, the priority development permit application or other permit form the municipality requires the applicant to complete as part of the "procedure" it adopts pursuant to section 4.

[17]/ Specifically, to the town planner or, in the permitting guide's parlance, the "permits coordinator." (*Doc. 14*: Exh. C, permitting guide at 9.)

of permit application completeness to the applicant. Per section 5(a), the 180-day period for reviewing a priority development permit application and issuing a final decision "shall begin the day after the issuance of the notice that the application materials are complete pursuant to clause (e) of section 4." As this appeal illustrates, the practical consequence of omitting this notice to the applicant is potential confusion as to when the 180-day review period begins to run and, thus, when it ends, and when the applicant is deemed to have been issued a constructive permit pursuant to M.G.L. c. 43D, § 7 due to the issuing authority's failure to take final action on the permit application.

That practical consequence occurred here, and it affected the planning board foremost. The board computed its 180-day period to review and act on the permit with too early a starting and ending date. If the board had issued a written notice of permit completeness to JC as the permitting guide directed, its computation of the 180-day period might have revealed that its deadline for taking final action on JC's permit application expired in mid-January 2016, rather than in mid-December 2015. Still, however, it is entirely a matter of speculation whether the planning board would have been able to proceed with a vote on the permit application and issue a decision or a conditioned permit if it had waited until after December 10, 2015 to do so, in view of the recusals that cost it a voting quorum on that date. (*See* Finding 29).

JC was potentially affected by the planning board's failure to give it written notice of permit application completeness, to the extent that it might have been left uncertain whether it had submitted a complete application with the information needed by the planning board to proceed with permit review. JC has asserted no objection to this notice failure, however. The town planner apparently advised JC's representatives informally that the application was sufficient. (*Doc. 13*: JC's

memorandum in opp. to mot. for summary dec. at 4). In addition, the permit's constructive grant made academic any uncertainty JC may have had about permit review status when it received no written notice of permit completeness, although the permitting guide should have sufficed, for all concerned, to make it certain that the permit application was deemed to be complete 20 business days after the application was filed with the planning board.

Neither M.G.L. c. 43D, § 5(a), nor the town's permitting guide, required that the petitioners, or any other abutters, be given notice that JC's priority development permit application materials were complete. Nonetheless, the petitioners' personal interests were potentially implicated by the planning board's failure to issue notice of permit application completeness if the omission had left them uncertain as to whether the board's permit review was underway and, as a result, deprived them of an opportunity to participate fully or meaningfully in the public hearing on JC's permit application. They assert no such uncertainty or deprivation, however. The petitioners have, therefore, no personal interest at stake in asserting that the town failed to give written notice that JC's permit application materials were complete.

The planning board's failure to give written notice of permit application completeness furnishes, thus, no ground for annulling JC's constructively-granted priority development permit.

ii. Failure to Implement Measures Required by M.G.L. c. 43D, § 4

M.G.L. c. 43D, § 4 states that the governing body of a municipality that accepts Chapter 43D must:

(a) appoint a single point of contact to serve as the primary municipal liaison for all

> issues relating to this chapter; (b) amend rules and regulations on permit issuance to conform to this chapter; (c) along with the issuing authority, collect and ensure the availability of all governing statutes, local ordinances, by-laws, regulations, procedures and protocols pertaining to each permit; (d) establish a procedure whereby the governing body shall determine all permits, reviews and predevelopment reviews required for a project; all required scoping sessions, public comment periods and public hearings; and all additional specific applications and supplemental information required for review, including, where applicable, the identification of potential conflicts of jurisdiction or substantive standards with abutting municipalities and a procedure for notifying the applicant; and (e) establish a procedure, following the notification of the required submissions for review as set forth in clause (d), for determining if all the materials required for the review of the project have been completed.

The petitioners assert that North Attleborough's Board of Selectmen implemented none of these measures. (*Doc 15*; Petitioners' mem. of law in support of mot. for summary dec. (Jan. 28, 2016) at 4.) There is no evidence in the record that the board of selectmen implemented any of these measures. However, M.G.L. c. 43D, § 4 does not prohibit the delegation of this responsibility by the board of selectmen to a municipal executive agency such as a planning board.

North Attleborough's permitting guide sets out a coordinated procedure for the expedited review of permits and approvals needed to develop or redevelop property in a priority development site, and identifies this procedure as one that the board of selectmen must establish under Chapter 43D. (*Doc. 14*; permitting guide, part I, entitled " Program Establishment," at 8.) This suggests strongly that the board of selectmen delegated the details developing the town's expedited permitting program to the planning board, and that it did so by issuing the Chapter 43D permitting guide.[18]

[18]/ The statute's original version encouraged a municipality to "compile a comprehensive permitting process guidebook and to provide other informational assistance relative to permitting through a single point of contact," meaning an office or staff member appointed by the municipality "for the purposes of coordinating and facilitating the land use permitting process." (*See* above at 10-11.)

There is no evidence, and no assertion by any party, that the board of selectmen did not delegate the implementation of the measures that M.G.L. c. 43D, § 4 requires to the town planning board, that the planing board issued the Chapter 43D permitting guide without the board of selectmen's knowledge or consent, or that the planning guide was not intended to implement Chapter 43D on the town's behalf.

The permitting guide includes the measures listed at M.G.L. c. 43D, § 4, clauses (a) through (e), if not literally, than in substance, and consistent with the statute's objective of streamlining and expediting local permitting processes for the purpose of developing or redeveloping designated priority development sites. (*See* above at 9.)

M.G.L. c. 43D, § 4, clause (a) requires that a municipality accepting Chapter 43D designate a " single point of contact" for expedited permitting purposes. North Attleborough's permitting guide does so. It identifies the town planner as the "first point of contact when developing a [priority development] project proposal or applying for a permit," and as the "single point of reference and contact for all development related permit information," who acts as a liaison between an applicant and town permit-issuing authorities, and "helps applicants track where an application is in the process." (*Exh. 14*; permitting guide at 2.)

The permitting guide does not itself amend rules and regulations on permit issuance to conform to Chapter 43D, the permitting guide, as section 4, clause (b) requires. What it does do, however, is specify the town's coordinated procedure for permitting projects at designated priority development sites which, for all intents and purposes, is one of M.G.L. c. 43D, § 4's purposes. It also requires that the board of selectmen are notified formally as this processes goes forward.

The coordinated procedure is intended to generate, first, an "application package," prepared by the applicant with municipal assistance, that addresses all of the local permits required for the priority site development it proposes. The permitting guide identifies the authorities responsible for issuing these permits as the town board of health, board of selectmen, building and inspections department, conservation commission, department of public works, fire department, planning board and zoning board of appeals. (*Exh. 14*; permitting guide at 3: "North Attleborough Permit Matrix," and at part III: "Applications and Completeness Review," sub-part entitled "Prior to Application Submittal.") Representatives of these municipal agencies may serve as members of a "design review committee" with whom the developer must meet. As "permits coordinator," the town planner is responsible for arranging this meeting. The meeting's purposes is to identify the permits that a proposed priority development site project requires, and the town bylaws, zoning bylaws, rules and regulations, and specific permit requirements that apply. Over the next 30 days, the applicant may request a followup meeting with the design review committee before it submits a "preliminary application package," in order to "identify any additional items that may be needed by the issuing authorities for their project review and decision." (*Id.*; permitting guide, part III, at 10.) Once this process is completed, the applicant submits its application package to the town planner, who notifies the board of selectmen of this filing. Permit application review process then proceeds, starting with the design review committee's determination of application completeness or incompleteness. The tow planner sends notice of this determination to the board of selectmen and the applicant. (*Id.*; permitting guide at 10.)

The remainder of the permitting guide includes sub-parts that prescribe the process for

reviewing permit applications once they are complete, including the 180-day period for reviewing and deciding a priority development site permit application, and automatic permit approval when a permit-issuing authority fails to take final action on the permit application within 180 days. (*Id*., part III, at 11-12, and part VI, at 13). Other sub-parts address extensions of the 180-day period, including those granted when priority development site project proposals are modified substantially after a permit application is filed (*id*., part IV, at 12-13), priority development site permit modifications after the permit is granted (*id*., part V, at 13), appeals from a permit-issuing authority's decision or from an automatic grant of approval (*id*., part VI, at 14-15), and priority development site permit transfers and renewals (*id*., part VII, at 15.)

These provisions satisfy, in substance, what M.G.L. c. 43D, § 4, clause (b) requires. The permitting coordination for which the town planner is responsible per the permitting guide, including the meeting with the design review committee, and the permitting matrixes that the guide includes, also satisfy the requirement of section 4's remaining clauses—clause (c), which requires the collection, and ensuring the availability, of all governing statutes, local ordinances, by-laws, regulations, procedures and protocols pertaining to each permit; clause (d), which requires that a procedure be established for determining all permits, reviews and predevelopment reviews that a project at a priority development site requires, and all additional specific applications and supplemental information required for permit application review; and clause (e) (which requires that a procedure be established to determine whether all the materials required to review a permit application and the project it proposes have been submitted.

I conclude, therefore, that there is no basis for annulling JC's constructive permit based upon

the alleged failure of the North Attleborough Board of Selectmen to comply with the requirements of M.G.L. c. 43D, § 4, clauses (b) through (e). The town's Chapter 43D permitting guide achieved the substantive objectives of those clauses, even if it was not done so precisely as the clauses specify.

iii. Failure of Public Hearing Notice to State Applicability of Chapter 43D

The petitioners also assert that the planning board's July 2, 2015 public hearing notice was defective and inadequate for procedural due process purposes, because it did not state that it was being issued pursuant to M.G.L. c. 43D. (*Doc. 15*; petitioners' mem. of law in support of mot. for summary dec. at 6-8.)

Chapter 43D does not recite any requirement that the municipality's governing body issue notice of a public hearing on a priority development site permit application, and neither does the town's Chapter 43D permitting guide. The source of those requirements are other laws governing work at the priority development site—the statutes, local laws, and local bylaws governing the use or development of land or structures within that area, including the Zoning Act, M.G.L. c. 40A, and local zoning bylaws, and the proposed work at the priority development site requires permits, licenses and other approvals from the issuing authorities that administer those laws. The application is treated as one for a Chapter 43D priority development permit because the work would take place in a priority development site, but the permit is actually issued, substantively at least, under the land use or development control laws that apply. Chapter 43D provides a procedural tool for coordinating and expediting permitting under those laws. Chapter 43D's 180-day period for completing final action on a permit application preempts shorter time periods that land use or development control

laws provide when the work in question would occur in a designated priority development site, and permit applications are filed according to the coordinated permit application procedure that the municipality has put in place to implement Chapter 43D. However, the substantive permitting requirements of the applicable land use or development control laws continue to apply.

Here, the work that JC proposed remains subject to the requirements that apply to the use or development of land or structures in an I-60 zone and, more specifically, to a planned business development in an I-60 zone such as JC proposed. The zoning laws reciting those requirements, among them North Attleborough Zoning Bylaw Section VI.N, include public notice and hearing requirements. For example, under zoning bylaw section VI.N, part 12, the North Attleborough Planning Board, as the "special permit granting authority" with respect to an application for a planned business development, must hold a public hearing on the application, and must give notice of the public hearing by publication, posting and first class mailing to "parties of interest," as defined by M.G.L. c. 40A, § 11.

The adequacy of the public hearing notice given in this matter depends, therefore, on its sufficiency under Chapter 40A and North Attleborough zoning bylaw section VI.N, part 12. Because "[a] critical feature of the statutory zoning scheme is the opportunity for interested persons to be heard regarding applications for special permits," Chapter 40A "requires 'such full notice as shall enable all those interested to know what is projected and to have opportunity to protest, and as shall insure fair presentation and consideration of all aspects of the proposed modification.'" *Kramer v. Somerville Zoning Bd. of App.*, 65 Mass. App. Ct. 186, 192, 837 N.E.2d 1147, 1153 (2005), *quoting Rousseau v. Framingham Bldg. Inspector*, 349 Mass. 31, 36-37, 206 N.E.2d 399 (1965). Failure to

"comply precisely with the statutory notice requirements" of Chapter 40A, § 17 does not require that the permit decision be invalidated, if the public hearing notice the municipal body gave "still provided notice adequate to allow abutters to attend the hearing." *Kramer*; 65 Mass. App. Ct. at 195, 837 N.E.2d at 1155.[19]

Here, the planning board issued a public hearing notice that identified the lots on which the project would be built and their location, including the streets and property that bounded the project site, as well as the project site's acreage and its location in an I-60 industrial zone. It described what JC proposed to build on those lots as the construction of five 10,000 square foot buildings for commercial and/or industrial uses with associated parking, as well as a fenced-in storage area for Case Snow Management's equipment, along with an accessory storage shed. (*Doc. 15*: Exh. A, notice of public hearing.) The public hearing notice also stated that it was issued pursuant to M.G.L. c. 40A, §§ 1A and 9, and Section VI.N "and other sections" of the North Attleborough Zoning bylaws. (*Id*.) Those were the laws governing the permits that JC's proposed work at a priority development site required, and that it requested through the coordinated application procedure that North Attleborough's Chapter 43D permitting guide prescribed.

Based upon its contents and its mailing to abutters, the public notice that the planning board issued gave notice adequate to allow abutters to attend the hearing. It appears to have prompted the petitioners' interest in that work, as abutting owners, and their participation in the public hearing,

[19]/ There was a complete failure of public hearing notice in *Kramer*; the local zoning board of appeals give an abutting condominium unit owner no notice of a public hearing it held on a telecommunications company's application to the local zoning board of appeals for a special permit allowing it to install a wireless antenna facility on an adjoining building.

where they could voice their concerns regarding the project's impact on their access to and egress from the Condominium property from Santoro Drive, advocate project modifications (including a full turnaround where the drive's private right-of-way and "paper street" sections meet), or attempt to persuade the planning board that additional information from JC was needed to decide the permit application.

Actual notice sufficiency could have been impugned, nonetheless, if the petitioners had alleged, with supporting facts, that the public hearing notice caused them to miss the hearing or diminished their opportunity to be heard with respect to the development JC proposed. The petitioners make no such assertions here. They do not deny receiving the planning board's public notice regarding JC's proposed work. They do not assert that the notice left them unable to identify the site of this proposed work as the designated priority development site adjoining the Condominium property, or otherwise deprived them of an opportunity to be heard before the planning board regarding their concerns. They also do not assert that the planning board's notice of public hearing misled them as to whether JC's application was subject to coordinated, and expedited, review under M.G.L. c. 43D and the town's Chapter 43D permitting guide. JC asserts, without contradiction, that at least one of the petitioners (Corliss) attended the public hearing that the planning board held between July and December 2015. If the petitioners did not know that the project described by the public hearing notice was being processed as one for work at a priority development site under Chapter 43D and the town's permitting guide, they likely learned that this was the case during the public hearing. The petitioners do not contend otherwise.

I conclude, therefore that the public notice defect the petitioners assert furnishes no ground

for annulling JC's constructively-granted priority development site permit. I deny, therefore, the relief that the petitioners sought in moving for summary decision.

Although the petitioners sought summary decision only upon the procedural defects they alleged, the record search that the motion prompted reveals no genuine factual issue barring a summary decision on their remaining claim that the constructive permit goes too far in allowing modifications of Santoro Drive's layout. Moreover, all of the parties have requested that I determine the scope of the work allowed by the constructive permit summarily. Accordingly, I resolve next what work the constructively-granted permit does and does not allow.

2. What Project Was Constructively Permitted?

Although Chapter 43D defines clearly when a permit application to develop or redevelop a priority development site is deemed to have been constructively approved, it does not define what the constructively-granted permit allows the applicant to build. The statute does not state, for example, whether the constructively-granted permit includes permit conditions.

The town's permitting guide offers somewhat more guidance on this point. It states that "[a]n automatic grant of approval shall only [be] for the permit which is before the Issuing Authority. This shall be the Issuing Authority that failed to make a decision within the required timeframe, but not the application as a whole." (*Exh. 14*; permitting guide, part III at 11: sub-part entitled "Application Review," para. D.2.) The "application as a whole" appears to refer to all of the applicable permits that the applicant requires for the work it proposes at a priority development site, which must be discussed with the design review committee, along with the applicable regulations

and requirements that may apply to the proposed project, before the applicant submits its final "application package" to the town. (*Id.*; permitting guide, part III at 10, sub-part C.) However, the permitting guide does not define, or even suggest, what "the permit before the Issuing Agency" is, or how it is to be identified.

Does it include, for example, permit conditions or project modifications the planning board might have included in a priority development permit, had it issued one within the 180-day period for final actions on permits that Chapter 43D prescribes? The petitioners argue that JC's constructively-granted the priority development permit must be deemed to include conditions that the local permitting authority generally includes in land use permits that it issues for projects of similar size and scope under other statutes, such as M.G.L. c. 40A, §§ 1A and 9, and the local zoning bylaw.

The petitioners proposed the addition of 32 conditions to the constructive permit during the discussion among the parties following the prehearing conference. The record does not show whether the planning board includes any of them in permits issued pursuant to Chapter 40A or any other statute. Some appear likely candidates for routine inclusion in zoning special permits; others do not.

The conditions the petitioners proposed included a required delay of construction, and of application for, or issuance of, a building permit, until JC applies for, and the planning board has acted upon, modifications to the Santoro Drive subdivision and the petitioners have exhausted their statutory rights of appeal under the Subdivision Control Law. Another would have deferred issuance of a building permit until JC applies for, and receives, any permits or orders of conditions required

under the Wetlands Protection Act to accommodate modifications to Santoro Drive, and "all rights of appeal of interested and/or aggrieved persons have been exhausted." Another proposed condition required that open space for the project "shall be a minimum of 30 percent," as well as reduced off-street parking and minimum parking stall dimensions. Still another provided that the permit would expire in five years unless the town granted a building permit subject to the conditions the petitioners proposed before the five-year period expired. Other proposed conditions would have limited the transport of soil removal and fill to and from the project site during construction, limited noise levels during construction and hours of operation, required the shielding of on-site lighting from off-site properties, and limited the mechanical sweeping of the parking lot and trash pickup times. (*Doc. 18*: Initial Draft, Memorandum of Decision, Feb. 3, 2016, at 5-10.]

JC's revised draft of a proposed memorandum of decision deleted most of these proposed permit conditions, and kept three of them, but with modifications. One of these conditions would have delayed construction, and the issuance of a building permit, until JC applied for, and the planning board acted upon, modifications to the Santoro Drive definitive subdivision, and also until JC applied for and obtained permits and orders of conditions required under the Wetlands Protection Act for modifications to Santoro Drive; however, it would have required that the petitioners waive their rights to appeal from any conservation commission decision pertaining to the modification of the previously-issued order of conditions and stormwater management permit. (*See Doc. 19*: Revised Draft, Memorandum of Decision, Feb. 9, 2016, at 5-6.)

The town's permitting guide recites no conditions that must be included in a priority development permit, and there is no evidence in the record showing whether the planning board

stated its intent to include any conditions in a permit or permit decision if it had it issued one. A hearing on this point would likely generate little more than speculation as to what permit conditions or project changes the planning board might or might not have required if it had acted on JC's permit application before the 180-day period for doing so expired. It is equally as likely that the Board had no specific conditions or project changes in mind for JC's proposed project when the 180-day period for taking final action on JC's permit application expired. The planning board unquestionably knew that its failure to decide, or take final action on, JC's permit application within the 180-day period would result in the permit's constructive grant. That suggested strongly the need to identify general or special permit conditions before the 180-day period expired. The planning board unquestionably had an opportunity, during the public hearing, to make a record of conditions and project changes it intended to be a part of the project. There is no evidence in the record that it did so, even before three of its members recused themselves from voting on JC's permit application.

The constructive grant of a permit is a "heavy penalty" for a permitting authority's failure to act on a permit application within the time that a statute specifies, and the courts are reluctant to visit this consequence on a board that renders a decision but misses a step in the decisional dance—for example, if it votes to approve a permit but does not record its vote in a written decision until after the statutory time for acting on the permit elapses. S*ee Cardwell v. Woburn Bd. of App*., 61 Mass. App. Ct. 118, 122-23, 807 N.E.2d 207, 210-11 (2004). Here, however, there was no such vote by the planning board, because three of its five members recused themselves, and the board issued no decision on the permit application. When the 180-day period for taking final action on JC's permit application expired, the board had taken no action on the permit at all after closing the

public hearing. There is no board action, thus, that could be construed as a final action averting the permit's constructive grant.

The risk inherent in the permitting authority failure to act within the statutorily-prescribed time for doing so is that a constructively-granted permit will be issued without conditions. That risk was realized here when the planning board did not take final action on JC's permit application within the 180-day period for doing so. The constructively-granted permit includes no permit conditions that the planning board might have included if it had acted on the permit within 180 days, and Chapter 43D furnishes me with no discretion to interpolate any such conditions into the constructive permit, or add them at a party's request.

In theory, this could leave JC free to do as it wishes (or at least as its permit application proposed) in an unregulated Wonderland of a priority development site or, from the possible perspective of abutting owners or other project opponents, a zoning dystopia. As a practical matter, however, the absence of permit conditions here does not leave the constructively-granted project free of constraint. JC's priority development, though granted constructively, must conform to the purposes of Chapter 43D and, as well, to the local zoning requirements applicable to planned business developments. Those include fairly extensive requirements and conditions recited by Section VI.N of the North Attleborough zoning bylaws as to such matters as permitted uses and traffic impact mitigation. (*See* Finding 13 above, at 19-21). Those must be met, of course, without the benefit of greater specificity that permit conditions added by the planning board might provide.

The bottom line is that, per M.G.L. c. 43D, § 7, JC obtained a constructively-granted priority development permit automatically when the 180-day period for final action on its permit application

expired. As a result, it is entitled to build the project it proposed within the priority development site along Santoro Drive, including modifications of the drive's private right-of-way section. The permit is subject to the requirements for a priority development that Chapter 43D recites, and to the requirements and conditions for a planned business development that Section VI.N of the North Attleborough Zoning Bylaws recite. It is not, however, subject to additional permit conditions that the planning board might have included if it had issued a final decision or taken other final action on JC's permit application within the 180-day period for doing so that Chapter 43D prescribes. Moreover, even though the project plan labels the widened portion of Santoro Drive's private right-of-way section as "Proposed Municipal Access Easement" (*see* above at 28), the work allowed by the constructive permit does not include modifications of Santoro Drive that the town may require before it accepts the drive as a public way, including a full turnaround, where Santoro Drive's private right-of-way and "paper street" sections meet, to accommodate fire and emergency vehicles and trucks entering or leaving the Condominium property, or to meet municipal and state traffic safety requirements and/or to improve traffic circulation on Santoro Drive or other local streets and state highways. Commendably, JC has maintained its offer to pursue modification of the Santoro Drive layout, consistent with the constructively-approved project, by filing a new application with the planning board pursuant to M.G.L. c. 41, § 81(W) (which governs the modification, amendment or recision of a subdivision plan, including the 2008 subdivision plan that the planning board approved), by seeking approval of a modified Santoro Drive as a public way, and by seeking conservation commission approval needed for such modification. I encourage the parties to pursue this approach, and neither the constructive permit affirmed here, nor this decision, precludes its

pursuit.

Conclusion and Disposition

I deny summary decision in the petitioners' favor upon the grounds their motion asserts.

Upon the record search that the petitioners' motion for summary decision prompted, I find no genuine issues of material fact precluding a summary decision in favor of JC as to its Chapter 43D priority development permit. Because the North Attleborough Planning Board failed to take final action on JC's permit application within the statutorily-prescribed 180-day period for doing so, I affirm the permit's constructive grant, as a matter of law, pursuant to M.G.L. c. 43D, § 7. In doing so, I confirm that the project permitted constructively under section 7 is the planned business development that JC proposed within the designated priority development site along Santoro Drive. This work consists of the five proposed buildings for industrial or commercial use on JC's lots 486, 487 and 488, with associated parking areas and stormwater and erosion control structures, and the proposed shed and storage area at the JC property along the eastern side of Santoro Drive. It also includes the modifications of the private right-of-way section of Santoro Drive that the project plan shows, including modifications of that section's length, width and surface, curb cuts along that section, and that section's transition to Santoro Drive's "paper street" section. The project approved constructively does not include, however, modifications of Santoro Drive that may be needed in order for North Attleborough to accept the drive, or any portion of it, as a public way. Those include a full turnaround, where the drive's private right-of-way and "paper street" portions meet, to accommodate fire and other emergency vehicles and truck traffic to and from the Condominium

property, to improve traffic circulation on Santoro Drive or other local streets and state highways, and/or to meet municipal and state traffic safety requirements. Those modifications require subsequent action, including application, notice, review and approval, none of which is precluded by JC's constructively granted priority development permit, or by this Decision.

SO ORDERED.

This is a final decision of the Division of Administrative Law Appeals. Each of the parties is hereby notified that, pursuant to M.G.L. c. 43D, § 10(d), "an aggrieved party may appeal to the superior court department by bringing an action within 20 days after the division [of administrative law appeals] has rendered a final decision."

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: March 16, 2016

APPENDIX TO DECISION DATED MARCH xx, 2016:
DOCUMENTS FILED IN THIS APPEAL

DOC #	DATE	DOCUMENT
01	12/16/15	Petitioners' Appeal Pursuant to M.G.L. c. 43D, § 10.

Exhibits to the Appeal:

Exh. A: Application for Approval of Priority Development Site (0 Santoro Drive, North Attleborough Assessor's Map 35, Parcels 485-488, and 0 John Dietsch Boulevard, North Attleborough Assessor's Map 34A, Parcel 10A) pursuant to M.G.L. c. 43D, § 2, filed by Town of North Attleborough with the Massachusetts Executive Office of Housing and Economic Development, Interagency Permitting Board Interagency Permitting Board , dated Jun. 1, 2015.

Attachments to the Application for Approval of Priority Development Site:

(1) Certified copy of vote of North Attleborough Special Town Meeting to approve the filing of an application for approval of a priority development site at 0 Santoro Drive, North Attleborough Assessor's Map 35, Parcels 485-488, and 0 John Dietsch Boulevard, North Attleborough Assessor's Map 34A, Parcel 10A, pursuant to M.G.L. c. 43D, for the purpose of expedited permitting, dated Jan. 7, 2015.

(2) Copy of orthophotos showing location of priority development site at Map 35, Parcels 485-488 and Map 35A, Parcel 10A, at Santoro drive and John Dietsch Blvd. in North Attleborough, Massachusetts (undated).

(3) Copy of map of priority development site at Map 35, Parcels 485-488 and Map 35A, Parcel 10A, at Santoro Drive and John Dietsch Blvd. in North Attleborough, Massachusetts showing hydrologic boundaries and flood map areas (undated).

Exh. B: "Form P" Application of JC Properties, L.L.C. to North Attleborough Planning Board, pursuant to the Zoning Act (M.G.L. c. 40A), the North Attleborough Zoning Bylaws, and the Planning Board's Rules and Regulations governing the Special process, for approval of a Planned Business Development in the Town of North Attleborough, for review and approval of a Planned Business Development (five 10,000 square foot buildings for industrial and commercial use on the western portion of the site, with associated parking, driveways and utilities, and a 64,300 square foot paved outdoor storage area with an associated 2,500 square foot accessory storage shed to be used primarily for the storage of road salt) at a site bounded by Landry Avenue on the north, Santoro Drive on the south, an undeveloped parcel owned by the Town of North Attleborough on the east, and an undeveloped commercial parcel on the west, dated Jun. 18, 2015.

Exh. C: Town of North Attleborough Zoning Bylaw, Cover Sheet and Section VI.N (Planned Business Development), in effect as of July, 1974, as amended.

Exh. D: Site plans accompanying the June 18, 2015 application of JC Properties, L.L.C. to North Attleborough Planning Board for approval of a Planned Business Development dated Feb. 26, 2015 and stamped "received" by the Planning Board on Dec. 10, 2015.

02 12/17/15 Division of Administrative Law Appeals acknowledgment of filing of appeal (Docket No. MS-15-661), dated Dec. 17, 2015.

03 12/18/15 FIRST PREHEARING ORDER.

04 12/31/15 Petitioners' Response to First Prehearing Order.

Exhibit to the Petitioners' Response:

Exh A: town of North Attleborough Planning Board, Notice of Public Hearing re Application of JC Properties for a Planned Business Development, dated Jul. 2, 2015.

05	01/04/16	Respondent JC Properties, LLC's assented-to motion to continue prehearing conference scheduled for January 13, 2016. (Assent is by attorneys for petitioners, town respondents, and Massaxchusetts Executive Office of Housing and Eonomic Dvelopment).
06	01/04/16	Respondent JC Properties, LLC's Answer to Appeal.
07	01/04/16	Affidavit of Edward J. Casey pursuant to M.G.L. c. 43D, § 7, sworn-to Jan. 4, 2016 (filed in response to first Prehearing Order dated Dec. 18, 2015, which required its submission).
08	01/05/16	Petitioners' Motion for Summary Decision.
09	01/07/16	Respondent JC Properties, LLC's Response to First Prehearing Order.
10	01/11/16	SECOND PREHEARING ORDER.
11	01/13/16	Respondents North Attleborough Planning Board and North Attleborough Board of Selectmen's Adoption of Respondent JC Properties, LLC's Answer.
12	01/13/16	Respondent Massachusetts Executive Office of Housing and Economic Development (EOHED)'s Response to Claim for Adjudicatory Proceeding and First and Second Prehearing Orders.
13	01/15/16	Respondent JC Properties, LLC's Memorandum in Opposition to Petitioners' Motion for Summary Decision. Attachment to the Memorandum: Affidavit of Nicola Facendola, P.E., sworn-to Jan. 15, 2016.

14 01/19/16 Opposition of North Attleborough Planning Board and North Attleborough Board of Selectmen to petitioners' motion for summary decision.

Attached Affidavit:

Affidavit of Nancy Runkle, Town Planner and Keeper of Records for the North Attleborough Planning Board, sworn-to Jan. 19, 2016.

Exhibits to the Runkle Affidavit:

Exh. A: North Attleborough Board of Selectmen Minutes of March 13, 2014 Meeting.

Exh. B: Approval, by special town meeting on Jan. 7, 2015, of the filing of an application with the Massachusetts Executive Office of Economic Development's Interagency Permitting Board for the designation of a Priority Development Site, pursuant t M.G.L. c. 43D, at 0 Santoro Drive (Map 36, Parcels 485-488) and 0 John Dietsch Boulevard (Map 34A, Parcel 10A); dated Jan. 7, 2015.

Exh. C: Chapter 43 D Acceptance Form (North Attleborough accepts the application of M.G.L. c. 43D to the designated Priority Development Site, approved on June 10, 2015 by the Massachusetts Executive Office of Economic Development's Interagency Permitting Board, located at 0 Santoro Drive (Map 35, Parcels 485-488) and 0 John Dietsch Boulevard (Map 34A, Parcel 10A), to be known as "Industrial Park 43D, North Attleborough, Massachusetts," signed by the town on July 28, 2015.

Exh. D: Town of North Attleborough 43D Priority Development Site Permitting Guide, December 2014.

15 01/28/16 Petitioners' Memorandum of Law in Support of Motion for Summary Decision.

Exhibit A to the Memorandum:

Notice of Public Hearing, dated July 2, 2015, issued by North Attleborough Planning Board, pursuant to M.G.L. c. 40A, §§ 1A and 9, and Section VI.N "and other sections" of the North Attleborough Zoning

		bylaws re application of JC Properties for approval of a special permit for a Planned Business Development on 12.86 acres of vacant land at lots 486, 487 and 488 on Assessors Plat 36 in an I-60 (industrial) zoning district, comprising the construction of five 10,000 square foot buildings for commercial and/or industrial uses with associated parking, fenced-in storage (for Case Snow Management's equipment) along with an accessory storage shed.
16	01/28/16	Project Plan entitled "J.C. Properties Planned Business Development, Assessor Map 36 - Parcel 486, 487 and 488, North Attleboro, Massachusetts: Layout and Materials C-20, Sheet 4 of 10," Jun. 18. 2015, rev. through December 4, 2015" (filed at the 01/28/16 prehearing conference).
17	01/29/16	ORDER FOLLOWING PREHEARING CONFERENCE.
18	02/03/16	Petitioners' initial draft of memorandum of decision.
19	02/09/16	Applicant J.C. Properties, LLC's revised draft of proposed memorandum of decision.
20	02/22/16	ORDER TO REPORT STATUS.
21	02/25/16	Joint Status Report Pursuant to Order to report Status Dated February 22, 2016.
22	02/26/16	Position of North Attleborough Planning Board and Town of North Attleborough Board of Selectmen.

SKETCH ATTACHED TO DECISION DATED MARCH 16, 2016