

TO: Citizens for Milford
FROM: Gerald M. Moody, Town Counsel
DATE: September 28, 2016

The questions which your group has presented cover a considerable amount of territory from the legal perspective and will take varying amounts of time and review to fully respond. What follows are responses to certain of your questions, though not in the order presented.

Under the heading of **Communications with Milford Residents**, you presented the following. It makes some sense to respond to these first.

- What is the process for Milford residents to follow in order to have their concerns heard and addressed?
- Is it possible for the town to hos an open forum in which the public can air their concerns and have their questions answered by town officials?
- Can Milford residents attend the ZBA meetings? Are they allowed to speak and ask questions? When and where are the meetings held?

The process for Milford residents to be heard as to their concerns is through the public hearing(s) before the Zoning Board of Appeals (ZBA). That Board is charged by law to hold a public hearing, to hear from the proponents and interested abutters and residents and to take evidence in the matter. It is the ZBA, and only the ZBA, which will make the final decision in this matter. That decision will be, of course, subject to appeal by the developers if they are dissatisfied to a state body known as the Housing Appeals Committee (HAC). If an abutter or group of interested parties desire to appeal, that appeal is taken to Superior Court.

Residents with information they want to bring forward, in opposition or in support of the project, should come to the Zoning Board of Appeals which will, in due course, hear their concerns. Keep in mind that no application has yet been filed for the anticipated project. When an application is filed the Board will schedule a public hearing within 30 days of the filing. The Board will take certain other actions including giving notice to town boards and agencies for their input and review. From the public perspective the Board will give notice to all abutters, and abutters to abutters within 300 feet of the project, and will publish notice of the public hearing in

the newspaper. I expect the event will be well publicized and thus all should know of its coming. Documentary evidence can be submitted to the Board during the course of the public hearings and the Board will take and consider any and all information, from proponents or abutters or opponents, that is presented.

The chairman of the ZBA will control the order at the public hearing. In the typical proceeding evidence and information is first taken from the developer. Usually, there are considerable reports from experts and other proponents for a developer. It must be kept in mind that this matter is considerably different than the gaming facility process which very much lent itself to such open forums. In the Casino matter total discretion rested with the local boards, and ultimately the people of Milford. That is not the case in an application for a comprehensive permit under G.L. c. 40B. The decision to be made by the Zoning Board of Appeals is not discretionary but one that has to be driven by information and data presented to the ZBA, and the HAC if it comes to that.

As to the final question, of course, Milford residents can attend the ZBA meeting and as I indicated they will be allowed to speak and ask questions. It is anticipated that the ZBA hearings will be scheduled for the Upper Town Hall because of the number of parties involved and the interested residents likely to attend.

In a section entitled **Milford's Negotiations with the Developer** three questions were presented which I will respond to in a serial fashion below.

- Is it possible to negotiate with the developer to reduce the number of units to decrease the impact on Milford? Or, is it possible to keep the same number of units but reduce the number of 2 and 3 bedroom units in favor of more studio and 1 bedroom units?

It is possible to negotiate with the developer in relation to the number of units in order to decrease impacts in Milford. In fact, such negotiations are common. In some cases, developers cooperate in this regard and in other cases they have insisted that they have proposed the minimum number of units necessary to make the project financially feasible. I would expect that such discussions will go on between the developer and the ZBA and its representatives. In the case of past projects in Milford the town has been successful in reducing the number of bedrooms so that the projects were all approved for 2 bedroom units or under. This was perceived as advantageous, based upon evidence developed over the years in relation to Milford's Plan Residential Developments (PRD). Since that time the law and/or the regulations have been amended to limit our ability to do that. However, those discussions will certainly take place before the ZBA.

- Are there any grounds on which the town can make a case to prevent this development from being built?

I am not currently aware of any absolute “grounds” which could be utilized to prevent the development. The law was first authorized in 1969, it was very controversial at the time, and it was called and is still called the Anti-Snob Zoning Act. For better or for worse, the law is structured to prevent the kind of absolute opposition which was prevalent in many suburban communities to any kind of development of what is referred to as “affordable housing”. Beyond that it is difficult to say much as the application itself has not yet been submitted. If a city or town, like Milford, does not meet the mandated minimums in terms of affordable housing, as will be discussed in another section, then there is a strong presumption in favor of the developer and the ultimate approval of the development, with reasonable conditions.

- Is it possible to reach out to other town for the information about their experiences in dealing with 40B developments?

It certainly is possible but I doubt it would be very productive. Milford has experience with 40B developments. One was approved on Cedar Street many years ago and another one was approved on Beaver Street for a considerable number of Town House units. This latter development was subject of considerable discussion and public hearings and was ultimately approved with significant conditions. Another development was proposed around 2008 for the former American Athletic Club property and went through a considerable amount of public hearings, including opposition. It was ultimately withdrawn with the coming of the financial crisis in 2008. Frankly, there will be nothing which will be relevant for the Zoning Board to consider in relation to any other particular towns experience with 40B developments. The law anticipates a degree of categorical opposition to such projects and is structured in such a way as to require consideration of projects on their own, and subjects those projects to very specific project based scope of review, thus reducing the effect of opposition not based upon relevant project based considerations.

A group of questions were asked under the category of **Impact on our Community and Resources**. I will attempt to respond to them as best I can considering my lack of expertise in many areas questioned, and the very limited information now available. The first two questions under the above category relate to water supply.

- Water: How will the addition of 300 apartments in Milford affect our water supply?
- Water: The Milford Water Company has apparently presented a letter to the developer stating it can provide water for the development. How is this possible when our area has succumbed to a record-breaking drought that forced a mandatory water ban? Is the letter available to the public? Is there anything Milford residents and business owners can do to advocate for a preservation of our water supply?

In partial response I have scanned and attached several documents reporting the Milford Water Companies preliminary review. At this very preliminary stage there is probably not much more that can be said in relation to water supply. I am certain that the issue will be looked at very carefully during the course of proceedings. See scan entitled "Water Preliminary Reviews".

- Public Safety: If the apartment buildings are five stories high, can Milford's Fire Department adequately respond to a fire with its current equipment?

A scan of a document has been attached marked "Fire Department Preliminary Review." It is my understanding that whether or not our ladder truck is sufficient will depend upon the ground layout. If the site is properly designed the ladder truck can reach; but not if the design is wrong.

- Property Values: Is there any data suggesting that a community's property values decrease as the number of Chapter 40B projects increase?

I am not aware of any data pointing one way or the other. Such data, and opinions and arguments based upon such data, would not be a permissible consideration under the Anti-Snob Zoning Act and any denial premised upon such data, or opinions derived therefrom, would be quickly overturned.

- Sewer: Can the sewage system handle the additional flow? Will upgrades be needed?
- Developer's Responsibility: Does the 40B law state that the permit should include improvements that the developer must pay for (such as improvements to sewage)?

Obviously, I am not qualified to render an opinion on sewer system capacity or needs. The Sewer Department and consulting engineers will carefully review the application and plans when they are submitted. I have scanned and attached a preliminary review by the consulting engineers.

Unquestionably, sewer issues are often important in the context of any substantial 40B project and they have been important in the past 40B applications in Milford. In order to assist your members in understanding the manner in which sewer issues must be viewed by a ZBA I have attached a copy of my advisory to the Milford Sewer Commissioners from December of 2008 in relation to another project. The advice I gave at that time is still fully applicable.

To assist further consideration of how a local sewer commission, and ZBA, must address sewer issues, I have attached a copy of excerpts from a decision of the HAC rendered in September of 2001 in relation to a Franklin project.

The essence of all of the above is that a city or town, through its Zoning Board of Appeals, may impose conditions upon a development in relation to sewer connections, and the needs created by the project, to the extent of those project specific needs. However, a city or town cannot deny a project simply because it is near capacity in a sewer plant, or because there

are bottlenecks or other problems somewhere in the underground system. As stated in the Franklin decision these would be the kinds of pre-existing problems that should be corrected as part of a towns normal repair and maintenance and cannot be used as a basis for this denial.

On the other hand, obviously any new sewer lines that must be installed to connect any development to the sewer system would have to be done at the complete expense of the developer and under the supervision of the Milford Sewer Department. Additionally, if there are pumping station or other facilities that are required to be upgraded specifically because of the project it may be possible for a ZBA to impose that responsibility, financial and otherwise, upon the developer. These issues can be difficult; they can be factually complex; and they are legally complex but they will be addressed by the ZBA in accordance with the requirements and the constraints of the law.

- Schools: Can the schools accommodate the number of children who are likely to move into the apartments with their families?

Past review of PRD's in Milford and other 40B projects do indicate that the number of children moving into two (2) bedroom or smaller apartments with their parents is relatively small. The same, of course, may not be true for three (3) bedroom units. I am certain that the developer will be presenting a considerable amount of information in relation to his view point on the effects of public schools. Interested parties might also obtain information from the School Department by providing the addresses of existing developments in Milford, the 40B projects or PRD projects, and with that information the school department might be able to provide numbers of students in various grade levels.

Having said all of the above, it must be understood that effect on schools is not going to be a basis to deny a comprehensive permit. I would refer you back to the excerpt which I provided from the Franklin Commons case. The HAC in that case is talking broadly about infrastructure decisions but particularly note in the middle of the second paragraph the reference to school issues. As stated therein, citing earlier decisions "cost of general services in schools may not be considered". Citing other cases the HAC pointed out that "impact on school systems is not a ground for denial."

As soon as I have responses to the other inquiries prepared I will provide that information to you for circulation among your members and/or posting on your website.

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