



## TOWN OF SUNDERLAND

### OFFICE OF BOARD OF APPEALS

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#### FINDINGS AND DECISION ON COMPREHENSIVE PERMIT APPLICATION G.L. c. 40B, §20-23; SUNDERLAND COMPREHENSIVE PERMIT RULES

APPLICANT: Sugarbush Meadows, LLC (the "Applicant")

PROPERTY: 56.55 acres of undeveloped land off of Route 116 and Plumtree Road, Sunderland Assessor's Parcels: Map 16, Plot 2 and Map 13, Plot 80 (the "Property")

PROJECT: Sugarbush Meadows (the "Project")

DATE: January 3, 2008

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#### I. PROCEDURAL HISTORY AND JURISDICTIONAL FINDINGS

1. Application for so-called Comprehensive Permit received by the Sunderland Zoning Board of Appeals (the "Board") on September 19, 2006, with additional materials submitted on September 28, 2006. The application is for 150 rental housing units on an approximately 57 acre parcel. The Application also included a so-called "project eligibility letter" by the Massachusetts Housing Finance Agency ("MassHousing").
2. The Applicant proposes to be a limited dividend organization. However, the Applicant has not yet demonstrated that it is a complying limited dividend organization. Particularly, the Applicant has not demonstrated that it will limit the return on its actual costs of development to 10% per year. A mere pledge of compliance to internal policies of MassHousing is insufficient to allow the Board to conclude that the Applicant is a limited dividend organization, especially given the recent findings of the Massachusetts Inspector General regarding flawed auditing procedures. Accordingly, the Board finds that the Applicant has failed to meet its burden that it has satisfied the provisions of 760 CMR 31.01(1)(a).
3. The subsidizing agency is MassHousing. Per a letter from MassHousing, dated April 26, 2006, the Applicant asserts that project eligibility has been established under the MassHousing ERA Program. However, the Board finds that

MassHousing failed to adequately conduct its due diligence and otherwise comply with the regulations under 760 CMR 31.01(2) in the issuance of its letter. Particularly, for reasons detailed more fully herein, MassHousing failed to demonstrate "that the proposed housing design is generally appropriate for the site on which it is located." 760 CMR 31.01(2)(b)(3). Furthermore, the project would destroy or otherwise negatively impact environmentally sensitive lands and is not otherwise consistent with smart growth standards that have been purportedly employed by MassHousing. Indeed, MassHousing's internal records reveal that its staff found the project to be non-compliant with smart-growth standards. Accordingly, the jurisdictional requirements under 760 CMR 31.01(1)(b) have not been satisfied.

4. The Applicant possesses an interest in the Property by virtue of the fact that it is the proposed purchaser under a non-arm's length purchase and sale agreement with the related entity (EHC Associates, LLC) that owns the Property. Accordingly, the Applicant has satisfied the jurisdictional prerequisite of site control under 760 CMR 31.01(1)(c) with respect to the Property, for so long as said purchase and sale agreement is in full force and effect. The Applicant has failed to demonstrate, however, that it possesses the requisite control of the access to the Property from Route 116. Particularly the Applicant has failed to demonstrate that it possesses the necessary rights to improve this way in a manner that will allow for safe and efficient ingress/egress.
5. A public hearing timely commenced on October 17, 2006 and was continued, with good cause to the following dates: November 16, 2006, December 14 2006, January 9, 2007, March 20, 2007, May 10, 2007, June 26, 2007, July 24, 2007, September 5, 2007, October 23, 2007, and November 15, 2007. A site visit was taken by Board members on November 3, 2007. The Board closed the hearing on November 15, 2007 despite the existence of several unresolved issues. The Applicant granted an extension of the time to issue a decision up to and including January 11, 2008. The Board deliberated on December 4, 2007, December 19, 2007 and January 3, 2008.
6. Among the issues that were unresolved as of November 15, 2007 were: (i) concerns over wetlands issues regulated by the Sunderland Conservation Commission under both the Sunderland Wetlands Protection By-law and the Massachusetts Wetlands Protection Act; (ii) parking concerns related to student housing; (iii) issues relating to wildlife habitat; (iv) market analysis establishing that the project will support family housing rather than student housing; (v) concerns regarding lack of sufficient fire apparatus to combat fires in the Project; (vi) general density concerns which MassHousing directed the Applicant to discuss with the Board; (vii) necessary analysis required to fully evaluate the project's stormwater management system and (viii) a genuine commitment to completing infrastructure improvements necessitated by the Project entrance on Route 116. The need for resolution of these ongoing issues, which are discussed more fully below, was clearly expressed to the Applicant. In many instances, the Applicant abruptly refused to address these concerns despite their plain relevance to the question of "consistency with local needs." The Applicant's divisive

approach in this regard was further evidenced by its complaint to the District Attorney, alleging that the Town violated the Open Meeting Law – a complaint that was rejected by the District Attorney.

7. The Board utilized the services of legal consultant Jason Talerma, of Blatman, Bobrowski & Mead, LLC, the engineering firm of Vanasse Hangen Brustlin, Inc. (“VHB”) for review of engineering and traffic issues, and the services of H&H Associates, LLP for review of the applicant’s financial *proforma*. Town officials, boards and commissions, including, but not limited to, the Conservation Commission, Fire Department, Police Department, Finance Committee, Board of Selectmen and Planning Board, as well as the Sunderland Water District also contributed a significant amount of information, testimony and analysis.
8. The Applicant was represented by Attorney Louis Levine of D’Agostine, Levine, Parra & Netburn, P.C. and housing consultant Joel Kahn of Equity Alliance. The Applicant was also represented by the Berkshire Design Group (BDG), Boart Longyear Drilling Services, Gifford Engineering, New England Environmental, Cold Spring Environmental Consultants, Traffic Engineering Solutions and Mount Hope Engineering with respect to engineering, environmental and traffic issues. The Applicant’s principal Scott Nielson also attended most hearing sessions and offered extensive commentary.
9. Interested members of the public attended the public hearing and offered both written and oral testimony. All comments by such interested parties were offered in opposition to the project. No member of the public spoke in favor of the project. The Board remarked that it had never been faced with a development proposal where not a single member of the public spoke in favor of the proposal.
10. Throughout the hearing, the Applicant provided a variety of reports and revised plans. At no time, however, did the reports or revised plans adequately address the Board’s core concerns.

## II. PROJECT and PROPERTY DESCRIPTION

1. The Project and the Property are described in the plans of Berkshire Design Group (BDG), as revised through August 10, 2007. The Project is also described in the architectural plans of the Martin Architectural Group, dated September 5, 2006. Hereinafter, the collective plans describing the project, as revised, are referred to as the “Plans.”
2. The Property contains approximately 57 acres. The Property is undeveloped, except for a barn and structures associated with a fish hatchery that formerly operated on the site. The Property contains a great deal of wetlands and has a high water table. Based upon available evidence, the Property is prone to flooding.



3. The Property was formerly used for agricultural purposes and requires a determination by the Massachusetts Department of Food and Agriculture that development is consistent with Executive Order 193 of the Laws of the Commonwealth.
4. The Property was the site of a previously submitted subdivision proposal, which was approved by the Planning Board for thirteen lots. The original subdivision proposal was for 22 units but due to concerns over the adequacy of the stormwater management and drainage, the Planning Board was compelled to reduce the number of lots.
5. As detailed on the Plans, the Applicant proposes 150 apartments in five identical three-story, 30-unit buildings. Three story residential buildings are not allowed under Sunderland Zoning By-laws. The Town allows 3 story commercial buildings but only with a Special Permit in the Commercial District. No such Special Permit has ever been granted. The Sunderland Fire Department does not possess sufficient apparatus (i.e. a ladder truck) to combat a fire in a three-story building. A community building is also proposed.
6. The southernmost building in the Project is accessed by a single, lengthy, narrow driveway and walkway that will cross over culverts that bisect a wetland. Several of the Project's drainage structures are also in close proximity to the wetlands.
7. The Project is proposed to be accessed by driveways to both Plumtree Road and Route 116. Plumtree Road is a local roadway that is typified by single family residential houses. The Applicant proposes a major access point along a narrow opening between two houses on Plumtree Road. The second access is via a long, narrow corridor that provides for access to Route 116. The Project would share this access with other high-traffic uses located on lots which border this way. Route 116 is a major North/South thoroughfare that supports vehicles accessing Interstate 91 to the North and the University of Massachusetts to the South, in addition to other vehicles. Route 116 exhibits significant truck traffic, especially from nearby gravel, sand and asphalt plants. Route 116 is already overburdened and is the site of many accidents. There is a local commuter bus stop near the Property that already poses significant conflicts for pedestrians. Upon the repeated requests of the Board for four possible alternatives to resolve these concerns, the Applicant presented one tentative proposal for some mitigation of the risks posed by this access drive. However, the Applicant never made a firm commitment to even this single option.
8. The Route 116 corridor already supports several apartment complexes, all of which are dominated by tenants who are students of University of Massachusetts. The Applicant has stated that the Project will be dedicated to families but every similar development in the region, including all developments cited by the Applicant in its market analysis, is student-based.
9. The Applicant proposes 318 parking spaces (2 per unit plus 18 spaces for the community building) which would be adequate for conventional housing. The

Board, however, was concerned with increased parking demand of student-based housing. The Applicant refused to respond to the Board's repeated requests for further analysis of this issue.

10. The Project is not within walking distance to a town center, schools, banks, libraries or other similar services. The residents of the Project would have to rely on buses and cars. The sole retail establishments in close proximity to the Project would require pedestrian use along and across Route 116.
11. The Property is environmentally sensitive. Although the Applicant received a letter from the Massachusetts Division of Fisheries and Wildlife (DFW), dated December 1, 2006, concluding that the project would not result in a "take" of rare or endangered species, the Property is burdened by the actual current designation of "core habitat." Under the Massachusetts Natural Heritage and Endangered Species Program, "core habitats" require the "highest priority of protection." The DFW letter states that its December, 2006 findings may be reconsidered due to the availability of "new rare species information" and that, in any event, such findings will be voided if construction is not commenced within 3 years.
12. The Applicant proposes a private on-site wastewater treatment facility. The last Plan revision showed buildings conflicting with the location of the system's leaching field. This conflict was never resolved.
13. The Applicant proposes a private on-site water source for all general uses. For emergency water supply, the Applicant proposes to utilize water supplied by the Sunderland Water District, which is a separate statutory entity that is not considered a "local board" for c. 40B purposes. As of the date of the close of the public hearing, the Water District was still non-committal with respect to an emergency water supply.
14. The Property is primarily located in the Town's Rural Residential Zoning District, although the proposed access way to Route 116 is in the Commercial District.

### III. FINDINGS

In addition to the foregoing findings, the Board hereby finds the Project is inconsistent with local needs, as follows:

1. Traffic Safety: The Project would increase the current volume of traffic utilizing Route 116 by more than 1000 vehicles per day. In that student housing complexes typically exhibit a higher number of vehicles, the number of vehicle trips per day could actually be much higher. As a threshold matter, the introduction of this volume of traffic could overwhelm existing conditions along Route 116 and the affected intersections. General principles dictate that a project of this size requires two viable means of two-way access in order to ensure safe and expedient access for residential and emergency vehicles. However, each of the project's two proposed access points are fatally flawed, as follows:

- a. As to Route 116, vehicles entering the Project from the South will be required to take a left turn into the Property. Similarly, vehicles traveling north from the Project would have to take a left turn out of the Property. Due to the high volume and high speed of traffic along Route 116, this would increase the risk of accidents even if the Applicant is able to provide a left-turn lane on Route 116 a feature that it has suggested but has not committed to provide; however, the existence of a left-turn lane would result in through-traffic passing on the right, which would conflict both with vehicles leaving the Project and with pedestrians crossing the street. This would also result in unsafe conflicts with the multiple curb cuts for existing nearby businesses, as well as the bus stop(s) adjacent to the Property. Absent a firm plan for full signalization and other traffic calming measures, this point of access is inadequate and will result in unacceptable risks to public safety. Accident history for other similar projects along Route 116, substantiate the Board's concerns in this regard. Additionally, the Applicant failed to demonstrate that this access driveway will not conflict with adjacent property owners who will be using the same.
- b. As to Plumtree Road, use of this access-way will cause an unacceptable amount of traffic to a presently low-volume local roadway. The additional traffic will result in substantial detriment to the existing surrounding neighborhood. Furthermore, the Plumtree Road/Route 116 intersection will become unsafe with the addition of this new traffic. Already a candidate for signalization in the near future (the Applicant did not express any commitment to contribute to the cost of signalization), the introduction of this new traffic will exacerbate conditions. The Project traffic utilizing this intersection will conflict with vehicles using Route 116. Furthermore, the increased Plumtree Road traffic will conflict with the Project's other proposed Route 116 access, which is located in close proximity to the Plumtree Road intersection.

The Board encouraged the Applicant to develop alternatives for the design of the Project's two access drives but the Applicant refused to do so.

2. Pedestrian Safety: Related to the issue of traffic safety is the Board's concern for pedestrian safety. In that the Project is entirely vehicle dependent, any residents not using cars will be dependent on buses to travel to work or school (at UMass). The Applicant has suggested (but not committed to) bus stops on both sides of Route 116. However, both bus stops conflict with the proposed pedestrian crosswalk and Route 116 traffic in general. Of primary concern are pedestrians arriving home from UMass via bus. Even under present (no-build) conditions the evidence supports the conclusion that this is already a dangerous situation. In that all of the available evidence indicates that the Project will be primarily occupied by students, this will result in a substantial increase in the amount of students using this bus stop. These students would be compelled to use an unsignalized crosswalk to cross



a high-speed state highway that has no illumination. This situation is inherently unsafe at night and during inclement weather. The problems are further exacerbated in winter months when darkness arrives early, road conditions worsen and shoulders become narrow due to accumulated snow. Furthermore, pedestrian residents will be crossing Route 116 by foot, especially at night, to access the nearby convenience store or restaurant. The Board also finds that, even if a crosswalk is built, it is foreseeable that residents will not necessarily use the same and, instead, are highly likely to cross Route 116 at a number of locations, thereby increasing the likelihood of accidents. Finally, there are no sidewalks along either Plumtree Road or Route 116.

3. Parking: Based upon available evidence, the Project will be populated primarily by college students. Based upon experience and local knowledge, the Board finds that student apartment complexes often result in more than two cars per unit and that, furthermore, weekend parking demands are higher at student complexes, due to parties, etc. Thus, the Board reasonably requested that the Applicant study this question. Due to the plethora of student complexes in the area, this was an easy issue to study. Nevertheless, the Applicant flatly refused, on multiple occasions, to study this issue. Without accommodations for this extra parking demand, the internal traffic configuration is unsafe both for conventional and emergency vehicles.
4. Fire Safety: The issue of fire safety was among the most controversial and compelling issues discussed during the public hearing. Primarily, the Board's concerns in this regard involve the Sunderland Fire Department's lack of a ladder truck, which precludes the ability to fight a fire in a three story structure. The Applicant conceded that the SFD would require a ladder truck and recognized the extreme cost of such apparatus but refused to either reduce the project to two stories or contribute to the cost of the truck. The Board of Selectmen provided a written report to the Board concluding that the Town simply cannot afford a new fire truck or a garage to store it in. Such report also concluded that any such expense would exceed allowable tax limits (under Proposition 2.5) and would, therefore, require an override. By statute, only the Board of Selectmen can advance an override article for subsequent approval by the voters in the Town. Without such actions, the Board is compelled to conclude that the Project is unsafe with respect to risks posed by fires. The Board further finds that emergency vehicle access to the southernmost building is inadequate, especially during winter months when the single access is narrowed by snow and ice.
5. Housing Need: The Board finds that the Applicant has not demonstrated a need for the housing proposed by the Project (see Section 3.01(m) of the Sunderland Comprehensive Permit Rules). Notwithstanding a commitment that the Project will be reserved for families, the Applicant's own presentation revealed that the units will be rented primarily by students. With a variety of other student rental complexes in the area, there is simply no need for additional housing of this type. Additionally, based upon experiences in other area complexes, the student lifestyle will inherently conflict with the lifestyles of the residents of the affordable units, who are unlikely to be students. Furthermore, with the addition of this project,

along with new student housing at UMass, the Board finds that there will be detrimental impact to longstanding existing rental complexes. The percentage of rental housing in the Town of Sunderland is among the highest in the Commonwealth. Based upon the Applicant's own data, almost all of the existing rental stock in Sunderland leases for an amount that is less than the restricted lease amounts for the proposed affordable units in the Project. While the Town has a need for more affordable for-sale homes, it simply does not have the need for additional rental units.

6. Smart Growth: The Board finds that the Project is inconsistent with smart-growth principles, which have been endorsed as a prerequisite to the approval of any project receiving 40B consideration or status. The Project is not near a town center, and is not pedestrian *friendly*. The Project will result in the development of valuable, preferably preserved open space and introduces a form of housing that will not address the actual housing needs for families in Sunderland.
7. Wetlands: The Project proposes several alterations of wetland buffer zones, which, under the Sunderland Wetland protection By-law are a jurisdictional resource area. The Board directed the Applicant to demonstrate that it could meet the performance standards delineated under the local wetlands by-law. However, the Applicant repeatedly refused to address this issue in any manner. Without the type of evidence and proof that would normally be required by the Sunderland Conservation Commission, the Board is unable to conclude that these alterations are consistent with the interests protected by the local wetlands by-law.
8. Wildlife Habitat: The Town, as well as the Commonwealth has standards, regulations and bylaws which serve to protect the environment. The Property has been designated as Core Habitat by the Commonwealth but the Applicant has failed to address this issue. Thus, the Board cannot conclude that the Project can be developed in a manner that is consistent with the stringent protections that are afforded to areas that support Core Habitat for wildlife.
9. Density: The Project would represent an 8.9% increase in the Town's overall housing stock. With such an increase in the housing stock, the Project would pose unacceptably large burdens on municipal services and infrastructure. In recognition of this significant concern, MassHousing Project Eligibility letter required as follows: "In addition to the foregoing conditions MassHousing encourages you to work closely with the Town of Sunderland to resolve their concerns about the substantial impact the current proposal will have on the Town's overall housing stock and water supply. While technically not a 'Large Scale Project' as defined under [the regulations], the proposal does represent a considerable (8.9%) increase over the existing housing units in the town." Notwithstanding this clear directive, the Applicant did not, in any manner, discuss willingness to moderate density or provide other mitigation. In fact, the Applicant affirmatively informed the Board that it would not be amenable to any decrease in the number of dwelling units.
10. Stormwater Management: Review of stormwater management issues is authorized under the Town's Zoning By-laws and Wetland By-laws. Review of this issue



during the public hearing was based solely on the Applicant's preliminary plans. The Board's engineer stated that additional testing would be required in order to fully evaluate the design of the stormwater system. Additionally, the Board received a substantial amount of reliable testimony that the Property is prone to flooding during storm events and periods of seasonal high water. The Applicant's mere preliminary analysis is insufficient to demonstrate that the Project's stormwater management system is inadequate.

11. Lack of Cooperation: As detailed herein, the Applicant was decidedly uncooperative with the Board and failed to address several key issues relating to valid local concerns. This failure to adequately respond to the Board's inquiries disabled the Board from being able to fully and fairly evaluate the Project.
12. Consistency with Zoning By-laws: The "Purpose" clause in the Sunderland Zoning By-laws states:

These regulations are enacted to promote the health, safety and welfare of the inhabitants of the Town of Sunderland, to conserve the value of land and buildings, to encourage the most appropriate use of land throughout the town and to preserve and increase its amenities...

The Project completely fails to support any aspect of these purposes.

#### IV. DECISION

Upon motion, duly seconded, the Board unanimously voted to deny the project for the reasons set forth above.

  
Steve Krol, Chairman

  
James S. Bernotas


  
Thomas R. Herrick

  
Barre E. Tozloski

Rec'd

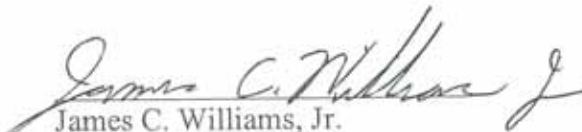
January 10, 2008

10:25 am

  
Wendy A. Saul

Dated: January 3, 2008

Town Clerk

  
James C. Williams, Jr.