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Comprehensive Permit 08-04  
Old High School Commons  
October 21, 2008

3 CHARTER ROAD ACTON



MASSACHUSETTS  
BOARD OF APPEALS

REFERENCE REQUEST  
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Decision on the Application by Common Ground Development Corp. for a  
Comprehensive Permit

Old High School Commons  
Decision 08-04  
October 21, 2008

**I. APPLICANT AND PUBLIC HEARING**

1. Pursuant to notice duly mailed, published and posted, a public hearing was held by the Acton Zoning Board of Appeals (the "ZBA") at Acton Town Hall, 472 Main Street, Acton, Massachusetts, on August 7, 2008, commencing at 7:30 p.m., upon the application of Common Ground Development Corporation, a Massachusetts non-profit corporation (the "Applicant"), for a comprehensive permit under Massachusetts General Laws ("MGL") Chapter 40B, §20-23 (the "Act") and under Town of Acton Zoning By-Laws (the "Zoning Bylaw") to convert the existing building at the property located at 3 Charter Road in Acton and identified as Parcel 85 on Assessor's Map F3 (the "Site" or the "Property") to 17 rental units (the "Units"), 14 of which shall be low or moderate income housing as detailed herein (the "Project"). The ZBA held continued public hearings on September 4, 2008, and September 17, 2008, and the ZBA closed the public hearing on September 17th.

2. The ZBA has issued this decision within the time frame specified in MGL Chapter 40B, §20-23.

3. Detailed minutes were taken of all sessions. The minutes and exhibits are available for public inspection in the ZBA's offices. A list of the exhibits is contained in the record.

4. Throughout the public hearing the Applicant was represented by Douglas Deschenes of Deschenes & Farrell, P.C.

5. Sitting as members of the ZBA and present throughout the hearing were Cara Voutselas (Chair), Kenneth F. Kozik (Member) and Francis Mastroianni (Member).

## **II. NATURE OF THIS PROCEEDING**

1. In conducting its hearings in this matter, the ZBA is guided by the decision of the Supreme Judicial Court in Dennis Housing Corp. v. Board of Appeals of Dennis, 439 Mass. 71, 76-77 (2003) (citations omitted), that a qualified developer proposing to build low or moderate income housing:

... may submit to the zoning board of appeals "a single application to build such housing in lieu of separate applications to the applicable local boards." The zoning board is then to notify those "local boards" for their "recommendations" on the proposal; the zoning board may "request the appearance" of representatives of those "local boards" at the public hearing as may be "necessary or helpful" to the decision on the proposal; and the zoning board may "take into consideration the recommendations of the local boards" when making its decision ... The zoning board then has "the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application," ... and in some circumstances, has the power to override requirements or restrictions that would normally be imposed by those local boards. ... If the zoning board denies the application for comprehensive permit, or approves it only on conditions that make the project "uneconomic," the applicant may appeal to the housing appeals committee ... which also has the power to override local regulations and direct the issuance of a comprehensive permit.

2. Any person aggrieved by the issuance of a comprehensive permit has a right of appeal to the Superior Court under Section 17 of the Zoning Act (MGL Chapter 40A).

### **III. GOVERNING LAW**

#### **A. The Low and Moderate Income Housing Act (MGL Chapter 40B)**

1. The law governing this case is the Act and the regulations promulgated by the Department of Housing and Community Development (“DHCD”) Housing Appeals Committee, 760 CMR 56.00 (the “Regulations”).

2. The Act prevents the possible use by cities and towns of exclusionary local bylaws to shut out needed low and moderate income housing, Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339 (1973). The purposes of the Act are satisfied if (a) a town has low or moderate income housing in excess of 10% of the housing units reported in the latest decennial census or which is on sites comprising 1.5% or more of the town’s total land area zoned for residential, commercial, or industrial use, or (b) if the application results in the commencement of low and moderate income housing construction on sites comprising more than 0.3% of such total area or 10 acres, whichever is larger, in one year. See, e.g., Arbor Hill Holdings Limited Partnership v Weymouth Board of Appeals, Housing Appeals, Committee No. 02-09 (9/24/03).

3. Acton does not presently meet any of these criteria.

### **IV. JURISDICTIONAL ELEMENTS (760 CMR 56.04)**

1. Pursuant to the Act and the Regulations, an applicant for a comprehensive permit must fulfill three (3) initial jurisdictional requirements:

- a) The applicant must be a public agency, a non-profit organization or a limited dividend organization;
- b) The project must be fundable by an authorized subsidizing agency under a low and moderate income housing subsidy program; and
- c) The applicant must “control the site.”

2. As discussed more fully below, the ZBA finds that the Applicant has provided sufficient information to meet these jurisdictional requirements.

#### **A. Status of Applicant**

1. Pursuant to the Regulations, an applicant for a comprehensive permit must be either a public agency, a non-profit organization, or a limited dividend organization, 760 CMR 56.04(1)(a). The Applicant has satisfied this criterion by forming a limited dividend organization which shall agree to legally bind itself to limit the profit it derives from a comprehensive permit development. Satisfaction of this criterion shall be accomplished through the execution of a Regulatory Agreement between the subsidizing agency and the Applicant. The Regulatory Agreement at a minimum shall stipulate that the Applicant’s profit from the development is limited in accordance with 760 CMR 56.04(8)(b) for Rental Projects as to Development Fees and Distributions from Operations, and the Regulatory Agreement shall provide mechanisms to enforce this requirement. See Section G below.

2. In the application submitted to the ZBA (the "Application"), the Applicant is identified as Common Ground Development Corporation, a Massachusetts non-profit corporation which has a principal place of business at 167 Dutton Street, Lowell, Massachusetts 01852, and whose president is James Canavan. Accordingly, for purposes of this Application, the ZBA considers Common Ground Development Corporation to be the sole Applicant under this Application. The ZBA has incorporated conditions below to ensure that this entity complies with the jurisdictional requirements of the Regulations and will execute a suitable Regulatory Agreement pursuant to this comprehensive permit.<sup>1</sup>

#### **B. Public Subsidy Requirement**

1. A housing development being proposed under a comprehensive permit application must be subsidized under a low and moderate income housing subsidy program. Here, the Applicant has submitted a project eligibility letter dated April 17, 2008 from the Massachusetts Housing Partnership to the Applicant. That letter includes the Massachusetts Housing Partnership's determination of project eligibility under the comprehensive permit rules establishing fundability by a subsidizing agency under a low and moderate income housing subsidy program which qualifies the project for consideration for a comprehensive permit under MGL Chapter 40B.

2. The ZBA finds that this project eligibility letter substantially complies with the project subsidy requirement set forth in the Regulations, 760 CMR 56.04(1)(b).

#### **C. Site Control Issues**

1. To be eligible to obtain a comprehensive permit under Chapter 40B, an applicant must demonstrate that it holds legal title to the property that is the subject of the application or that it otherwise has a sufficient legal right to acquire title to the property or to control the property.

2. The Applicant entered into a ground lease dated December 18, 2006 with the Town of Acton for the control of the site, and this lease was amended by a First Amendment to Lease dated October 20<sup>th</sup>, 2008. A copy of the lease, as amended, is on file with the ZBA (as amended, the "Lease"). As a result, the ZBA finds that, as of the date of issuance of this comprehensive permit, the Applicant has demonstrated that it has sufficient legal rights to control the Site.

#### **V. APPLICATION REQUIREMENTS**

1. The ZBA finds that the submitted Application substantially complies with the ZBA's comprehensive permit application requirements as stated in the Town of

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<sup>1</sup> The Applicant has explained that the developer of the Project will be a single purpose, for-profit, limited dividend organization and that Common Ground Development Corporation will be the project sponsor. The Applicant has explained that, when appropriate, the Applicant will return to the ZBA to request approval for the transfer of this comprehensive permit to the single purpose, for-profit, limited dividend organization mentioned above. See Section D.1 hereof.

Acton's "Rules and Regulations for Comprehensive Permits" adopted May 17, 2004, as applicable.

## **VI. SUMMARY OF DECISION**

1. For the reasons stated below, the ZBA approves with the conditions set forth below the Application of Common Ground Development Corporation for a comprehensive permit for the Project consisting of a seventeen (17) rental units, including fourteen (14) low and moderate income units, under the Act.

## **VII. THE PROJECT**

1. The Site as defined in the initial Application consists of 1.23 acres of land located at 3 Charter Road in Acton and is identified as Parcel 85 on Assessor's Map F3.

2. On or about July 11, 2008, the Applicant filed the Application for a comprehensive permit to convert the existing building at the property to 17 rental units, 14 of which shall be low or moderate income housing.

3. The project plans were revised over the course of the hearing to address issues as they arose. The plans for the Project on which this approval with conditions is based (the "Plans") are entitled "Old High School Commons, Acton, Massachusetts, Common Ground Development Corp.", dated May 28, 2008, last revised September 8, 2008, designed by Richard Westcott, P.E. of Westcott Site Services, scale 1" = 20', and consist of the following sheets:

- C-0 Natural Features & Existing Conditions & Site Demolition Plan,
- C-1 Site Plan,
- C-2 Site Development Plan, Grading & Erosion & Sediment Control,
- C-3 Site Development Plan, Site Utilities,
- C-4 Landscape Plan,
- C-5 Site Construction Details Plan.

## **VIII. CONCLUSORY FINDINGS**

1. Based on the evidence presented by the Applicant, local boards and officials and interested parties at the public hearings, the ZBA finds as follows:

- a) Acton does not presently have sufficient low or moderate income housing to meet Chapter 40B's minimum criteria.
- b) The proposed 17-unit Project (as depicted on the Plans) will, when conforming to the conditions set forth in this Decision, adequately provide for traffic circulation, storm water drainage, sewerage, and potable water, without an undue burden on the occupants of the Project or on the surrounding neighborhood or the Town.

- c) The proposed Project will, when conforming to the conditions in this Decision, not be a threat to the public health and safety of the occupants of the Project, the neighborhood or the Town.
- d) The proposed Project is supported by the evidence, and as conditioned below, (i) would not be rendered uneconomic by the terms and conditions of this decision, and (ii) would represent a reasonable accommodation of the need for low and moderate income housing.
- e) The proposed Project is supported by the Acton Board of Selectmen, the Acton Community Housing Corporation and the Acton Planning Board.

2. Therefore, the ZBA finds that it is an appropriate exercise of its discretion to approve this comprehensive permit with the conditions below.

## **IX. WAIVERS FROM LOCAL BYLAWS AND REGULATIONS**

### **A. Acton Zoning Bylaw**

- 1. The Applicant has requested waivers from the following Zoning Bylaw provisions:
  - a) Section 3.1, to allow multi-family dwelling in R-2 zoning district.
  - b) Section 6.5, to allow 32 parking spaces to be 9' x' 18' and to allow 22' width of maneuvering aisle.
  - c) Section 6.7, to allow for less than required landscaping within the proposed parking lot.
  - d) Section 6.7.3, to allow for access driveway 22' wide.
  - e) Section 6.7.6, to allow for less than required perimeter landscaping.
  - f) Section 6.7.7, to allow for less than required interior area landscaping.

2. The ZBA finds that the increased density of this Project is reasonable for affordable housing on this Site. Therefore, the ZBA grants the requested waiver from Sections 3.1 of the Zoning Bylaw. In addition, the ZBA finds that the dumpster at the development will be more effectively screened with natural screening (rather than a stockade fence) if smaller parking spaces are permitted and, as a result, the ZBA grants the requested waiver from Section 6.5 of the Zoning Bylaw and grants an additional waiver to allow for certain parking spaces to have dimensions of 8.5' x 18' rather than 9' x 18' as shown on the Plans. Furthermore, the ZBA finds that the development of the

contemplated affordable housing and associated parking is reasonable in relation to the size of the Site, especially in light of the fact that the existing building on the Site is simply being redeveloped. Therefore, the ZBA grants the requested waivers from Sections 6.5, 6.7, 6.7.3, 6.7.6 and 6.7.7 of the Zoning Bylaw.

**B. Rules and Regulations for Comprehensive Permits**

1. The Applicant has requested waivers from the following provisions of the Acton Rules and Regulations for Comprehensive Permits:

- a) Section 1.4, to allow development of the Project without posting a performance guaranty.
- b) Section 3.2, to allow development of the Project without the submission of title encumbrances.

2. The Applicant had also requested a waiver from Section 3.13 of the Acton Rules and Regulations for Comprehensive Permits. However, the Applicant withdrew this waiver request at the public hearing.

3. The Applicant will be altering a municipal building, and the Town of Acton could be left with an unsecured and partially renovated building if the Applicant fails to complete the Project. Therefore, the ZBA finds that the delivery of a performance guaranty is required for securing the building in the event that the Applicant abandons the Project, and the ZBA denies the Applicant's request for a waiver of the performance guaranty requirement of the Acton Rules and Regulations for Comprehensive Permits.

4. The ZBA finds that the submission of title encumbrance information is not required in this case because the Town of Acton holds the title to the Property, and the Applicant only holds a leasehold interest in the Site. As a result, the ZBA waives the provisions of Section 3.2, to allow development of the Project without the submission of title encumbrances.

**C. Additional Waivers**

1. The Applicant has requested a waiver from the payment of building permit fees, water connection fees, sewer connection fees and such other application/permit/connection fees as may be applicable to the Project.

2. The ZBA finds that it cannot waive the water connection fee for the Project because this fee will be imposed by the Acton Water District, and the Acton Water District is not a municipal entity.

3. The ZBA finds that the waiver of the building permit fee for the Project will facilitate the development of the Units and, in particular, the affordable Units that are a part of the Project. Therefore, the ZBA waives the building permit fee for the Project. The ZBA does not grant any additional fee waivers.

**D. Waivers Not Listed**

1. By granting the waivers from local bylaws and regulations listed above, it is the intention of this comprehensive permit to permit construction of the Project as shown on the final Approved Plans (as defined below). If, in reviewing the Applicant's building permit application(s), the Building Commissioner or the Zoning Enforcement Officer determines that any additional waiver from local zoning, wetlands, health, or subdivision regulations is necessary to permit construction to proceed as shown on the final Approved Plans, the Building Commissioner or the Zoning Enforcement Officer shall proceed as follows: (a) any matter of *de minimis* nature shall be deemed within the scope of the waivers granted by this comprehensive permit; and (b) any matter of a substantive nature, including those having a potential adverse impact on public health, safety, welfare or the environment, shall be reported back to the ZBA for expeditious disposition of the Applicant's request for a waiver therefrom.

**X. CONDITIONS ATTACHED TO COMPREHENSIVE PERMIT**

For the foregoing reasons, the ZBA grants the Application of Common Ground Development Corporation for a comprehensive permit for the Project consisting of 17 housing units on the Site under Chapter 40B, subject to each and every one of the following conditions:

**A. General Conditions**

- A.1 Prior to commencement of any construction concerning any portion of the Project (whether pursuant to a building permit or otherwise), unless extended by the Building Commissioner for good cause shown, the Applicant shall submit to the Building Commissioner a final set of Engineering Drawings and Architectural Plans for the Project which shall be identical to the Plans cited in Section VIII above except that they shall be updated and revised in accordance with the requirements of this decision. The submission shall in addition include a list of the specific changes made to conform to the requirements of this decision; this list and the final set of Engineering Drawings and Architectural Plans shall be signed and stamped by the Design Engineer. The Building Commissioner shall review the final set of Engineering Drawings and Architectural Plans to ensure that they are consistent with and in conformity with this decision. Upon the Building Commissioner so finding, the ZBA shall endorse the final set of Engineering Drawings and Architectural Plans which shall thereupon constitute the final plans (the "Approved Plans") under this decision and shall be filed with the records of the ZBA.
- A.2 In the event the Building Commissioner determines that the Applicant's construction drawings submitted with its building permit application(s) materially deviate from the final Approved Plans in such a manner that, in his professional opinion, they do not conform to the requirements and conditions imposed by this comprehensive permit decision, the Building



Commissioner shall notify the Applicant of the specific deviations, and the Applicant shall either bring the construction drawings into conformity with this decision or seek modification of this decision in accordance with 760 CMR 56.05(11). In the event of a disagreement between the Building Commissioner and the Applicant with respect thereto, they shall notify the ZBA which shall thereupon determine whether the building permit construction drawings conform to this decision. Upon finding that the building permit construction drawings (with any necessary revisions) do conform to this decision, the ZBA shall endorse those construction drawings if so requested by the Applicant.

- A.3 This decision shall be promptly recorded at the Middlesex South District Registry of Deeds with sheets C-1 through C-4 of the Plans. This decision shall become effective upon recording. Proof of recording shall be forwarded to the ZBA prior to issuance of a building permit or to the start of construction.
- A.4 The Applicant shall comply with all local rules and regulations of the Town of Acton and its boards and commissions unless expressly waived herein or as otherwise addressed in these conditions.
- A.5 Unless otherwise expressly waived herein, the Applicant shall pay all fees of the Town of Acton imposed generally in respect of construction projects and for the purposes of monitoring compliance of the Project's construction and occupancy in accordance with this comprehensive permit.
- A.6 The Applicant shall copy the ZBA, the Building Commissioner and the Zoning Enforcement Officer on all correspondence between the Applicant and any federal, state or Town official, board or commission that concerns the conditions set forth in this decision, including but not limited to all testing results, official filings and other permits issued for the Project.
- A.7 The Applicant shall comply with the State Building Code and any local regulations or fees of the Building Commissioner. Unless otherwise expressly waived herein, the Applicant shall pay all required fees for all such building permits including any fees charged for inspections and permits.
- A.8 The Applicant shall maintain a copy of the endorsed Approved Plan and this decision at the Site during construction.
- A.9 The Applicant shall obtain temporary easements or written permission from any abutting property owner if, during the course of construction, it becomes necessary to enter upon abutting land for construction or planting.

- A.10 Each condition in this decision shall run with the land and shall, in accordance with its terms, be applicable to and binding on the Applicant and the Applicant's successors and assigns for as long as the Project is occupied for residential purposes and the use of the land does not strictly and fully conform to the requirements of the Acton Zoning Bylaw.
- A.11 This decision permits the construction, use, and occupancy of seventeen (17) housing units on the Site. The construction and use of the Site shall be in conformity with the Approved Plans, and there shall be no further creation of additional housing units or any other structures or infrastructure except that which is shown on the Approved Plans without further approval of the ZBA in the form of an amendment to this decision.
- A.12 All determinations with respect to compliance hereunder before the issuance of a building permit or an occupancy permit shall be made by the Zoning Enforcement Officer or the Building Commissioner as the Town of Acton so elects.

**B. Submission Requirements**

- B.1 This comprehensive permit shall lapse on March 1, 2010 (which deadline shall be extended for a period equal to the duration of any appeals taken from this decision by any person other than the Applicant) unless the Applicant has submitted to the ZBA prior to that time written evidence satisfactory to the ZBA:
  - a) That Applicant has received a written commitment from a public or private financing institution or institutions to provide the major portion of the financing required for construction of the Project as conditionally approved by this decision; and
  - b) That both the Project, as conditionally approved by this decision, and the Site are acceptable and qualify for and will receive financial assistance under a program administered by a federal or state subsidizing agency to assist the construction of low or moderate income housing within the meaning of the Act.
- B.2 Pre-Construction Submissions: Prior to the issuance of a building permit for the Project, the Applicant shall:
  - a) Deliver to the ZBA a certified copy of any determination by the federal or state subsidizing agency that the Applicant qualifies as a non-profit or limited dividend organization within the meaning of the Act and what the limitation on dividend is. The Applicant shall forthwith perfect, maintain and provide to the ZBA proof of its status as a limited dividend or non-profit organization under the provisions of MGL Chapter 40B, § 21;

- b) Deliver to the ZBA a certified copy of the financing contract between Applicant and the federal or state agency or agencies that will provide the financial aid for construction of low or moderate income housing required by the Act for a comprehensive permit for the Site;
  - c) Obtain and file with this ZBA a copy of (a) a building permit from the Acton Building Commissioner pursuant to the Massachusetts State Building Code and (b) the construction drawings submitted to obtain said building permit;
  - d) Obtain and file with the ZBA a copy of any approvals from the Acton Board of Health which may be required under any statute, code, or rule and regulation affecting public health not otherwise preempted by Chapter 40B to the extent not otherwise expressly covered by this decision.
- B.3 As Built Plans: Prior to the occupancy or use of the Project, the Applicant shall submit to the ZBA an "As Built Plan" showing all pavement, buildings, drainage structures, and other infrastructure as they exist on the Site, above and below grade, including appropriate grades and elevations. The plans shall be signed by a registered land surveyor or civil engineer, certifying that the Project as built conforms and complies with the conditions of this comprehensive permit.
- B.4 As Built Utilities Plan: An accurate as built utilities plan and profile, showing actual in-ground installation of all utilities, shall be submitted to the Department of Public Works after completion of construction.

**C. Site Development Construction Conditions**

- C.1 The Applicant shall obtain all building permits and occupancy permits that may be required by the State Building Code.
- C.2 The Applicant shall ensure safe and convenient vehicular access to the Site during the entire duration of the Project. ZBA representatives shall be permitted access to the Site to observe and inspect the Site and construction progress until such time as the Project has been completed.
- C.3 The Applicant shall submit a construction and permitting schedule prior to the start of construction and semi-annually thereafter to the ZBA to assist in project status update and review.
- C.4 The Applicant shall file two complete sets of "progress submittals," including design drawings, with the Acton Building Commissioner at each of the following milestones: 50% complete, and 100% complete. Progress submittals shall include any and all updated or revised design calculations supplementing the original design plans. The Building Commissioner's

and ZBA's input and guidance are critical at these milestones. The Applicant may proceed to the next milestone unless the ZBA finds substantial deviations from the this decision and the Approved Plan, in which case the ZBA shall give notice to the Applicant and the Applicant shall not proceed until the deviations are resolved. The Applicant will be expected to provide a prompt and timely written response to any comments or questions posed by the ZBA or Building Commissioner at each milestone.

- C.5 The Applicant shall forward final architectural plans to the ZBA at the time of applying for building permits. All construction shall be inspected by the Building Commissioner and shall be in compliance with all Massachusetts State Building Code requirements.
- C.6 The Applicant shall be responsible to ensure that nuisance conditions do not exist in and around the Site during the construction operations. The Applicant shall at all times use all reasonable means to minimize inconvenience to residents in the general area.
- C.7 Hours: The hours of operation for any construction activities on-site shall be between 7:00 am and 7:00 pm, Monday thru Friday, 8:00 am and 5:00 pm on Saturdays, and no work shall be allowed on-site on Sundays or on holidays as recognized by the Commonwealth of Massachusetts.
- C.8 Dust: The Applicant shall implement dust control operations, in an approved manner, whenever necessary or when directed by the Building Commissioner or the Town Engineer, even though other work on the Project may be suspended as a result thereof. Methods of controlling dust shall meet all air pollution standards as set forth by federal and state regulatory agencies.
- C.9 Noise: The Applicant shall implement measures to ensure that noise from project construction activities does not exceed acceptable levels, as set forth by federal and state regulatory agencies. The Applicant shall cease any excessively loud activities when directed by the Building Commissioner.
- C.10 Vibration: The Applicant shall implement necessary controls to ensure that vibration does not extend beyond the subject Site and create a nuisance or hazard for property abutters.
- C.11 Traffic: The Applicant shall implement necessary traffic safety controls to ensure a safe and convenient vehicular access in and around the Site. Any traffic problems that occur as a result of site operations and construction shall be mitigated immediately, at the expense of the Applicant. Additional traffic mitigation measures may be required as necessary, or as directed by the Building Commissioner.

- C.12 Roads: The Applicant is responsible for the sweeping, removal of snow and sanding of the internal roadways permitting access to residents and emergency vehicles during construction.
- C.13 Lighting: All outdoor lighting installations shall comply with Section 10.6 of the Zoning Bylaw unless the Applicant has, in the opinion of the Zoning Enforcement Officer, not been able after a reasonably thorough effort to obtain equipment and luminaries that meet the requirements of the Zoning Bylaw. In that case, the Zoning Enforcement Officer may approve outdoor lighting that complies as closely as possible with the requirements of the Zoning Bylaw based on information provided by the Applicant's lighting engineer or designer. For purposes of this paragraph, the property lease boundary lines shall be treated as lot lines as defined in the Zoning Bylaw.
- C.14 Burial of any stumps or debris onsite is expressly prohibited. Localized burial of stones and/or boulders is prohibited to prevent the creation of voids from soil settlement over time.
- C.15 Soil material to be used as backfill for pipes, roads, and/or structures shall be tested at the expense of the Applicant, by a firm selected by the ZBA. Testing of said backfill shall be performed in conformance with standards and frequencies established by the Building Commissioner.
- C.16 Utilities, including but not necessarily limited to electric, cable and telephone, shall be located underground. A final utility plan approved by the applicable public utilities shall be submitted to and approved by the ZBA prior to the issuance of any building permits.
- C.17 Stabilization Requirements: No building areas shall be left in an open, unstabilized condition longer than sixty (60) days. Temporary stabilization shall be accomplished by hay bales, hay coverings or matting. Final stabilization shall be accomplished by loaming and seeding exposed areas.
- C.18 Construction vehicles shall be parked on the Site or adjacent streets, and they shall not be parked on adjacent properties, including without limitation Charter Road.
- C.19 The Applicant shall ensure that plastic stakes are installed on all of the bounds of the leased area for the Project, and the Approved Plans will include a note stating that these stakes will be preserved and reset as necessary by a professional land surveyor.

**D. Legal Requirements**

- D.1 Any transfer of rights or interests in all or any part of the Site shall include a condition that successors are bound to the terms and conditions of this comprehensive permit, and any such transfer shall be subject to the

approval that is required under Section 13.1 of the Lease. This comprehensive permit may not be transferred without the written approval of the ZBA and the execution of any instruments or documents that may be required for the enforcement of this comprehensive permit pursuant to Town Counsel's direction.

- D.2 The Applicant and/or subsequent lessees of the Site shall be bound by all conditions and requirements set forth in this comprehensive permit.
- D.3 The driveways, utilities, drainage systems, and all other infrastructure shown in the Approved Plan shall remain private. The Town of Acton shall not have any legal responsibility for the operation or maintenance of the infrastructure, including but not limited to snow removal and trash collection, for the Project.

**E. Traffic and Safety Conditions**

- E.1 Traffic signage shall be consistent with the requirements of the current edition of the Manual for Uniform Traffic Control Devices.
- E.2 The mile marker sign that is currently located on the Site shall be relocated in accordance with the requirements of MassHighway.
- E.3 Appropriate driveways, sidewalks and curbing, sufficient for the safe separation of pedestrians from moving vehicles, shall be provided throughout the Site to allow safe vehicular and pedestrian access within the Site.
- E.4 The Applicant shall ensure that detail is added to sheet C-5 of the Plans to show the end of the curb at the road and sidewalk ramping down to become flush with the pavement.
- E.5 Prior to the issuance of a building permit for the Project, the Applicant shall submit a revised version of the plan that is attached hereto as Exhibit A to the Acton Engineering Department for review and approval with respect to SU-30 turning movement into the Site. The revised plan shall be dated, and it shall contain a title block and an engineer's stamp.
- E.6 All such improvements and changes shall be completed in accordance with the standards set forth in the most recent edition of the Federal Highway Administration's Manual on Uniform Traffic Control Devices and shall be in place prior to project occupancy.
- E.7 Each unit in the Project shall be equipped with fire and carbon monoxide detection systems and shall comply with the applicable state Building Code and Fire Safety Code provisions. The fire and carbon monoxide detection system for each unit in the Project shall be subject to the approval of the Fire Chief consistent with his authority under said codes.

E.8 No building permit for the Project shall be issued until the Applicant has obtained approvals from the Engineering Department, Police Chief and Fire Chief concerning the street address for the Project.

**F. Landscaping Conditions**

F.1 Prior to the issuance of a building permit for the Project, the Applicant shall deliver a revised Landscaping Plan that shows where the gas line between the street and the building on the Property will be located to reduce or eliminate conflict with the fence posts to be installed on the Property, and the revised Landscaping Plan shall be acceptable to the Engineering Department and Zoning Enforcement Officer.

F.2 Prior to the issuance of any occupancy permit, the Applicant shall have fully completed the improvements and plantings shown on the Landscaping Plan, last revised on September 8, 2008 and as amended in accordance with Section F.1 above, including without limitation the natural screening around the dumpster on the Site.

**G. Affordability Requirements**

G.1 Pursuant to 760 CMR 56.02, the Project shall be subject to the following Use Restrictions, which shall run with the land and which shall restrict the occupancy of each Low or Moderate Income Housing unit in the Project to Income Eligible Households during the term of affordability:

G.2 Affordable Units: Four (4) of the Units (the “50% Units”) shall be made available for rental by households whose aggregate income is no greater than 50% of the area median income (the “Area Median Income”) as published by the Department of Housing and Urban Development for the Boston Primary Metropolitan Statistical Area; ten (10) additional Units (the “60% Units”) shall be made available for rental by households whose aggregate income is no greater than 60% of the Area Median Income; and three (3) additional Units shall be market rate rental units (the 50% Units and the 60% Units are referred to collectively herein as the “Affordable Units”). The 50% Units shall consist of one studio, one one-bedroom unit, one two-bedroom unit and one three-bedroom unit. The 60% Units shall consist of one studio, three (3) one-bedroom units, five (5) two-bedroom units and one three-bedroom unit. The market rate units shall consist of one one-bedroom unit and two (2) two-bedroom units. Tenants of the rental units shall occupy the units as their domiciles and principal residences.

G.3 Rental Prices: The Affordable Units shall be rented to qualified households at prices deemed affordable utilizing cost assumptions developed under the DHCD Comprehensive Permit Program. The applicable household sizes shall be determined in accordance with DHCD

regulations. The maximum rental prices for the Affordable Units shall be reviewed and approved by the Monitoring Agent.

- G.4 Monitoring Agent: Pursuant to 760 CMR 56.04(8)(a), the Subsidizing Agency shall be responsible for the monitoring and enforcement of these Use Restrictions, subject to the Subsidizing Agency's right to delegate such functions as set forth in 760 CMR 56.02 (the Subsidizing Agency or its delegee of such functions is referred to herein as the "Monitoring Agent"). Any modification or deviation from the designation of affordable units as set forth herein shall be subject to approval of the Monitoring Agent and the ZBA.
- G.5 Selection of Tenants for Affordable Units: The Applicant shall obtain the Monitoring Agent's approval of the tenant selection plan for the rental of the Affordable Units prior to conducting the tenant selection process for the Affordable Units. Tenants shall be selected through a fair lottery process (the "Lottery") in accordance with DHCD requirements.
- a) To the maximum extent permitted by law, the Lottery shall give first preference for the rental of the Affordable Units so as to conform to the "Acton Connection" preference criteria set forth in Section 9.1 of the Lease.

Tenants whose selection is based on any of the "Acton Connection" preference criteria shall meet at least one of these criteria continually from the time of selection to the time of rental of an affordable unit. Such a tenant's failure to meet any of the criteria during this time period shall be a cause for that tenant's disqualification and selection of a new tenant in accordance with the procedures of the Lottery.

The selection of tenants for the Affordable Units, including the administration of the Lottery, shall be administered by a consultant retained by the Applicant, subject to the Monitoring Agent's approval. The Lottery shall be implemented pursuant to a Lottery Plan developed by the lottery consultant and approved by the Monitoring Agent. The Monitoring Agent shall oversee the Lottery.

The Monitoring Agent may develop rules and guidelines (consistent with the requirements of this decision) to carry out its responsibilities under the provisions of this section, as necessary. Income eligibility shall be governed by the rules and standards employed by the Department of Housing and Urban Development in the selection of income-eligible households for publicly subsidized housing.



Disputes concerning income qualifications and Acton Connection qualifications shall be resolved in the first instance by the Monitoring Agent. A party aggrieved by qualification-related decision of the Monitoring Agent may appeal the decision to the ZBA for a final determination.

The provisions of this section are intended to complement and not to override or supersede any applicable fair marketing regulations of the Department of Housing and Community Development, the Massachusetts Commission Against Discrimination, or any authority with jurisdiction and like purpose, to provide low and/or moderate income housing.

- G.6 Rental Timing for Affordable Units: Affordable Units shall be rented contemporaneously with the market rate units in the Project.
- G.7 Affordability Restriction and Term of Affordability: The Affordable Units in the Project shall be rented to households consistent with, and at rental prices in accordance with, the requirements of this decision throughout the term of affordability. In accordance with the requirements of MGL Chapter 184, §31-33,<sup>2</sup> the term of affordability shall extend for the greater of (a) the entire term of the Lease, as that term may be extended by written agreement of the Lessor and Lessee, subject to early termination of the Lease by the Lessor in accordance with its terms, or (b) for as long as the Project is occupied for residential purposes pursuant to this decision and the use of the land and any buildings and improvements thereon does not strictly and fully conform to the requirements of the Acton Zoning Bylaw.
- G.8 Regulatory Agreement: Prior to the issuance of any building permits, a Regulatory Agreement, in a form reasonably acceptable to the Subsidizing Agency and Town Counsel, shall be executed and recorded which shall incorporate the provisions of these Use Restrictions. The Applicant shall use its best efforts to cause to be included in the Regulatory Agreement provisions that ensure that these Use Restrictions shall apply to the maximum extent allowable by law, and the Regulatory Agreement shall provide mechanisms to enforce these requirements.

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<sup>2</sup> Pursuant to MGL Chapter 184 §31, an affordable housing restriction means “a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition in any deed, mortgage, will, agreement, or other instrument executed by or on behalf of the owner of the land appropriate to (a) limiting the use of all or part of the land to occupancy by persons or families of low or moderate income in either rental housing or other housing or (b) restricting the resale price of all or part of the property in order to assure its affordability by future low and moderate income purchasers or (c) in any way limiting or restricting the use or enjoyment of all or any portion of the land for the purpose or encouraging or assuring creation or retention of rental and other housing for occupancy by low and moderate income persons or families” (emphasis added).

In the event that the Applicant shall submit to the ZBA written evidence of the Applicant's efforts to secure approval of the Use Restrictions by DHCD and the Subsidizing Agency, the written denial thereof and the grounds for denial, the Applicant shall submit to the ZBA a proposed alternative form Regulatory Agreement which, when approved by the ZBA and Town Counsel, shall be the Regulatory Agreement for the Project.

- G.9 Profit Cap: The Applicant's profit from the development shall be limited in accordance with 760 CMR 56.04(8)(b) for Rental Projects as to Development Fees and Distributions from Operations, and the Regulatory Agreement shall provide mechanisms to enforce this requirement (the "Profit Cap"). The Monitoring Services Agreement shall provide that the Monitoring Agent shall regularly review the financial records of the Project to determine whether the Applicant is conforming to the Profit Cap requirements of this decision. If the Applicant exceeds the Profit Cap, the Applicant shall donate the excess profit above the Profit Cap to the Town of Acton to be used in the discretion of the Board of Selectmen for the express purpose of promoting, encouraging, creating, improving or subsidizing the construction or rehabilitation affordable housing in the Town of Acton.
- G.10 Monitoring Services Agreement: Prior to commencement of any construction on the Site, the Applicant shall enter into a Monitoring Services Agreement, in a form approved by the Subsidizing Agency and Town Counsel, with the Monitoring Agent. The Applicant shall pay a reasonable monitoring services fee to the Monitoring Agent as determined by the Monitoring Agent.
- G.11 Comparability of Units: The market rate units and the Affordable Units shall be indistinguishable from the exterior, and the Affordable Units shall be evenly distributed throughout the Project. In addition, all Affordable Units must contain complete living facilities including but not limited to a stove, kitchen cabinets, plumbing fixtures, washer/dryer hookup, operational HVAC, and other amenities all as more fully shown on the final Approved Plans.

## H. Security

- H.1 Performance Guaranty: As security for the anticipated costs of the Town to secure the Site if the Applicant abandons the Project, the Applicant shall deliver a performance guaranty of at least \$30,000 that is satisfactory to the Planning Director of the Town of Acton prior to the issuance of any building permit for the Project. For the purposes of this decision, the term "Project" shall not include any roof replacement work that is completed prior to the work shown on the Plans.

H.2 Completion of Infrastructure: No occupancy permit for any Unit shall be issued, and no rental of any Unit shall be permitted, until: (1) the infrastructure related to the Project as shown on the Approved Plans, including, but not limited to, the driveway, sidewalks, parking areas, common areas, drainage facilities, utilities, landscaping, and all necessary sewer, water and utility service connections (the "Infrastructure"), has been constructed or installed so as to adequately serve said building and the units; and (2) all conditions of this comprehensive permit that require action or resolution by the Applicant prior to the issuance of occupancy permits have been completed to the satisfaction of the Building Commissioner. All water connections shall be approved by the Acton Water District and completed in accordance with Acton Water District rules and regulations.

**I. Drainage Conditions**

- I.1 No building permit for the Project shall be issued until the Applicant has performed adequate deep test holes and permeability tests to ensure that all drainage systems for the Project are capable of handling any excess from the drywells up to or as nearly as possible to the 10-year storm as represented in the "Wescott" drainage calculations dated September 9, 2008, and such tests and the results thereof are approved by the Acton Engineering Department and/or the drainage system has been altered to satisfy the Acton Engineering Department in its reasonable discretion in light of the percolation test results (alternative drainage solutions may be considered).
- I.2 The location of the roof drainage drywell on the west side of the existing building shall be subject to the approval of the Tree Warden with the objective of preserving the nearby large yellow birch tree and avoiding and/or minimizing disturbances or damage to its root system.
- I.3 No building permit for the Project shall be issued until the Applicant has included a note that addresses how the drainage system for the Project will function during a 100-year storm in the drainage report for the Project, and said note and the proposed function must be acceptable to the Acton Engineering Department.
- I.4 Stormwater shall be managed in accordance with the Massachusetts Stormwater Policy Handbook.
- I.5 All stormwater drainage basins shall be located as to facilitate the maintenance and operation of the basins or drainage utility.

**J. Parking**

- J.1 The Project shall provide for on-site parking as shown on the Approved Plans, and each Affordable Unit and each comparable market rate unit shall have the same reasonable access to on-site parking.
- J.2 No on-site parking shall be sold to, rented to, licensed to or otherwise conveyed to persons who are not occupants of premises located on the project Site.
- J.3 All parking spaces shall conform to the requirements of the Acton Zoning Bylaw, Section 6.7, unless specifically provided otherwise herein.

**K. Sewage Treatment**

- K.1 All Units shall be connected to the Town of Acton's municipal sewer system as shown on the final Approved Plans. Unless expressly waived by this decision, the Applicant shall pay to the Town of Acton all required sewer privilege fees established by the Board of Selectmen acting as the Town's Sewer Commissioners.
- K.2 The sewer privilege fee for each Unit shall be paid prior to the issuance of any building permit therefor.
- K.3 The Applicant shall obtain all necessary permits for connection of the Project to the Acton municipal sewer system, including those necessary to excavate any abutting streets to install the connection.
- K.4 No Unit shall ever be converted, altered or expanded to add bedrooms.

**L. Taxes**

The Applicant and all successor lessees of the Property shall pay taxes on the Project in accordance with standard tax rates for similar properties that are owned in fee in Acton. In the event that the Applicant or any successor lessee of the property is a non-profit entity or another entity that is exempt from local real estate taxes, the Applicant or the successor Lessee shall make payments in lieu of taxes to the Town of Acton for the tax liability referenced above.

**M. Repair of Old High School Sign**

No occupancy permit for the Project shall be issued until the Applicant has repaired the old high school sign on the Site pursuant to plans that are approved in writing by the Acton Historical Commission, the Massachusetts Historical Commission and the United States Secretary of the Interior before the repair is completed. This requirement shall be waived in the event that such repair is not permitted by either the Massachusetts Historical Commission or the Secretary of

the Interior. If this is the case, the decision of the Secretary of the Interior shall control.

**N. Material Changes**

If, between the date this decision is filed in the office of the Acton Town Clerk and the completion of the Project, the Applicant desires to change in a material way and/or to a significant degree the proposed Project as reflected in and approved by this decision, such changes shall be governed by 760 CMR 56.05(11). In no case shall the Applicant be allowed to implement a Project change that increases the number of units, changes the mix of affordable and market rate units, or increases the height of the building on the Site without submitting a new application and undergoing a new public hearing and decision process. Without limitation, in the event any subsequent permitting process (such as any state or federal governmental approvals) results in a change to the Approved Plans that triggers the need for further waivers from local bylaws, rules, or regulations, any such matter shall be treated as a project change and the procedures in 760 CMR 56.05(11) shall be followed.

**O. Expiration Date**

If construction authorized by this comprehensive permit has not begun within three (3) years from the date on which the permit becomes final, the permit shall lapse. The permit shall become final on the date that the written decision is filed in the office of the town clerk if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of. The ZBA may grant an extension of the three-year lapse date for good cause shown, which shall include without limitation delay (notwithstanding the Applicant's diligent efforts) in the issuance of a governmental permit or approval or delay occasioned by a third party appeal of a governmental permit or approval required for the Project.

**P. Notice to Abutters**

At least seven (7) days prior to the start of construction, the Applicant shall provide written notice to the ZBA and to the abutters of the Project of the anticipated construction start date and the anticipated construction schedule.

**Q. Self-Correcting Provision**

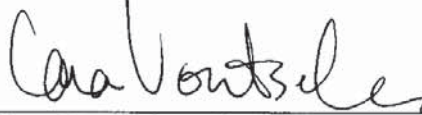
In the event a typographical error renders this decision and the final Approved Plans inconsistent as to the number of units, number of bedrooms, or similar objective characteristic of the Project, the provisions of the final Approved Plans shall control on the point of inconsistency. Otherwise this decision shall be given full force and effect on its terms, unless amended by the ZBA in writing.

**XI. CONCLUSION**

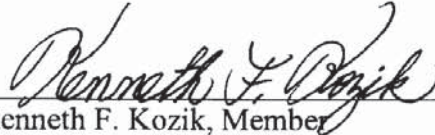
The Application for a comprehensive permit for the Project is granted for the reasons stated above subject to the conditions provided herein.

This concludes the decision of the Board.

THE ACTON ZONING BOARD OF APPEALS



Cara Voutselas, Chair



Kenneth F. Kozik, Member



Francis Mastroianni, Alternate Member

Dated: October \_\_, 2008

**CERTIFICATION**

I, Eva K. Taylor, Town Clerk of the Town of Acton, Massachusetts do hereby certify that twenty days have elapsed since the above referenced decision of the Board of Appeals, which was filed in the office of the Town Clerk on \_\_\_\_\_, 2008, and that no appeal has been filed with the Town Clerk.

*see attached*

\_\_\_\_\_  
Eva K. Taylor  
Town Clerk  
Acton, Massachusetts

Dated: \_\_\_\_\_, 2008



EVA K. TAYLOR  
TOWN CLERK

**TOWN OF ACTON**  
472 MAIN STREET  
ACTON, MASSACHUSETTS, 01720  
TELEPHONE (978) 264-9615  
FAX (978) 264-9630  
[clerk@acton-ma.gov](mailto:clerk@acton-ma.gov)

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June 5, 2009

**TO WHOM IT MAY CONCERN:**

This is to certify that the attached Board of Appeals Decision (#08-04) on an application of Common Ground Development Corporation for a Special Permit for property located at 3 Charter Road, Acton, Massachusetts was filed with the Town Clerk's Office on October 23, 2008.

This is to certify that the 20 day appeal period on this decision has passed and there have been no appeals made to this office.

Eva K. Taylor  
Town Clerk