19-8

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

2003-P-0806

BOARD OF APPEALS WAYLAND vs. HOUSING APPEALS COMMITTEE & another

ENTRY DATE	06/11/03	CASE STATUS	Closed: Rescript issued
STATUS DATE	11/03/04	CASE NATURE	Zoning appeal: c 40A
APPELLANT	P	SUB NATURE	Comprehensie permit
READY DATE	08/19/03	ARGUED/SUBMTD	03/05/04
PANEL	L DO CO	DECIDED	08/25/04 PUBLIC y
DISPOSITION		OPINION TYPE	1:28 CASE TYPE Civil
TRIAL JUDGE	Brady Patrick F.	TRIAL CT	Middlesex Superior Court
TC ENTRY DATE	08/16/02	TC DOCKET NO	MICV2002-03463
SJ DOCKET NO		CITATION	61 Mass. App. Ct. 1123

Board of Appeals Wayland
Plaintiff/Appellant
Blue brief & appendix filed
Active 06/11/03

Mark J. Lanza, Esquire
9 Damonmill Square
Suite 4A4
Concord MA 01742-2614
Phone: 978-369-9100
549994 Active 06/11/03 Notify

Housing Appeals Committee
Defendant/Appellee
Red brief filed
Active 06/11/03

Susan Paulson, A.A.G.
Office of the Attorney General
One Ashburton Place, Room 2019
Boston MA 02108-1698
Phone: 617-727-2200 2080
Fax: 617-727-5785
634714 Active 06/11/03 Notify

Rocco Scippa
Defendant/Appellee
Red brief filed
Active 06/11/03

Edith M. Netter, A.A.G.
Edith M. Nettter & Associates, P.C.
375 Tottem Pond Road
Waltham MA 02451
Phone: 781-290-0505
Fax: 781-290-5850
546937 Active 06/11/03 Notify

Middlesex Superior Court
(Lower Court: Civil or General)
Clerk for Civil Business
40 Thorndike Street
East Cambridge MA 02141
Phone: 617-494-4003
Active 06/11/03

* * * D O C K E T * * *

PAPER	DATE	ENTRY
1.0	06/11/03	Entered.
2.0	07/21/03	SERVICE of brief & appendix (3 vol 2 sets) for Plaintiff/Appellant Board of Appeals Wayland.

Return to
EDITH M NETTER PC
375 TOTTEN POND RD
WALTHAM MA 02451-2019

OWNER OF RECORD
ETHEL CARPENTER,
aka "T"
TR10824-83 Estate

2003-P-0806

BOARD OF APPEALS WAYLAND vs. HOUSING APPEALS COMMITTEE & another

* * * D O C K E T * * *

PAPER	DATE	ENTRY
3.0	08/19/03	SERVICE of brief for Defendant/Appellee Rocco Scippa.
4.0	08/20/03	SERVICE of brief for Defendant/Appellee Housing Appeals Committee.
5.0	02/24/04	Notice of 03/05/2004, 9:30 A.M. argument sent.
	03/05/04	Oral argument held. (L DO CO).
6.0	08/25/04	Decision: Rule 1:28 (L DO CO). Judgment affirmed. Notice. (See image on file.)
	09/14/04	Copy of FAR application of Board of Appeals Wayland.
	10/29/04	FAR DENIED (on 10/27/04).
	10/29/04	RESCRIPT to Trial Court.
	11/03/04	FAR DENIED (on 10/27/04).

APPEALS COURT
Date: 4-26-05
A true copy.
ATTEST: _____
ASSISTANT CLERK

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

SCIPPA

v.

WAYLAND BOARD OF APPEALS

No. 00-12

DECISION

July 17, 2002

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

Rocco SCIPPA, Appellant v. WAYLAND BOARD OF APPEALS, Appellee	No. 00-12

DECISION

I. PROCEDURAL HISTORY

In April 2000, a developer, Rocco Scippa, submitted an application to the Wayland Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build affordable homeownership housing near the center of the Cochituate section of Wayland, to be financed under the New England Fund (NEF) of the Federal Home Loan Bank of Boston. After due notice and public hearings, the Board denied the permit by decision of November 3, 2000. From this decision the developer appealed to the Housing Appeals Committee.[1] The Committee held a conference of counsel, conducted a site visit, and held four days of de novo evidentiary hearings, with witnesses sworn, full rights of cross-examination, and a verbatim transcript. Following the presentation of evidence, counsel submitted post-hearing briefs.

1. The appeal was filed timely on November 22, 2000. See Tr. I, 55-59.

II. FACTUAL BACKGROUND

The proposed housing consists of twelve condominium housing units to be built in six duplex buildings on a 300-foot long cul-de-sac at 336 Commonwealth Road. Three of the units will be affordable. The 1.66-acre site is zoned "Single Residence," that is, for single-family homes on lots 20,000 square feet or larger. Pre-Hearing Order, § I-5. It is relatively flat, largely open land with an abandoned house and outbuildings. Exh. 24; Tr. I, 72; also see Tr. II, 25; III, 116.

The site is on the north side of Commonwealth Road, Route 30, a two-lane, arterial state highway. It is 700 feet east of the intersection of Commonwealth Road, East Plain Street, and School Street, which is the center of an area known as Cochituate—one of the denser areas of Wayland. Exh. 27; Tr. I, 69. At the intersection are a handful of commercial establishments. On the northeast corner of the intersection are a restaurant, a small strip mall (with another restaurant and shops), and a gas station. Tr. I, 69-71; Exh. 27. The proposed housing site is immediately adjacent to—that is, to the east of—this gas station. Id. Across the street, to the southeast of the intersection, is another gas station. Id. To the east of this gas station, on south side of Commonwealth Road, is an office building, behind which is a large assisted living facility. Id. Surrounding this entire village center, within a half-mile radius, are over 200 houses. Id. This is one of the denser sections of Wayland, with houses half-acre or smaller lots. Exh. 27, Tr. I, 69; III, 26-28. Three houses abut the site on its eastern and northern (rear) boundaries; directly across the street is an undeveloped lot. Exh. 27; Tr. I, 70-71.

III. JURISDICTION

The Board questions whether the construction financing to be received by this development under Federal Home Loan Bank's New England Fund qualifies as a subsidy for the purposes of 760 CMR 31.01(1)(b).[2] See Pre-Hearing Order, § II-1. Specifically, it notes that this Committee, in its decision in *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01 (Massachusetts Housing Appeals Committee Mar. 5, 1999), analyzed four aspects of the NEF financing mechanism to determine whether the housing met the statutory requirement that it be "subsidized by the federal or state government under any program to assist the construction of low or moderate income housing." See G.L. c. 40B, § 20; 760 CMR 31.01(1)(b). In that case, we found that the NEF met all four tests. First, the funds were for new construction; second, the NEF was a low or moderate income housing program; third the housing was subsidized; and fourth, the subsidy was from the federal government. *Stuborn Ltd. Partnership v. Barnstable, supra*, slip op. at 8-16. Here, the Board concedes that the financing meets the first two and the fourth criteria. Pre-Hearing Order, §§ I-11 to I-15. It also concedes that a reduced interest rate can be considered a subsidy. Appellee's Brief, p. 9, citing *Wellesley v. Housing Appeals Committee*, 385 Mass. 651, 655-656, 433 N.E.2d 873, 876 (1982). It argues, however, that the interest rate reduction here, however, is only one half of one percent below the lender's normal commercial rate, and that that is within the

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2. The Committee issued a joint Pre-Hearing Order (May 1, 2001), agreed to by the parties. With regard to the jurisdictional requirements found in 760 CMR 31.01(1), the parties stipulated that the developer is a limited dividend organization, and that it controls the site. Pre-Hearing Order, §§ I-8, I-9. One aspect of the fundability requirement of 760 CMR 31.01(1)(b) remains at issue.

The Board also conceded that Wayland has not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock be subsidized housing; see 760 CMR 31.04), thus foreclosing the defense that its decision is consistent with local needs asa matter of law pursuant to that section. Pre-Hearing Order, § I-6.

typical variation offered by various commercial banks and thus too small to legitimately be considered a subsidy. Appellee's Brief, p. 10.

All interest rates, including those offered under the NEF, fluctuate over time, and therefore we cannot be sure precisely how great the interest rate reduction provided by the NEF will be until a loan commitment is issued. Tr. I, 25. Further, neither party introduced detailed evidence with regard to current NEF rates, commercial rates, or the relationship between them. For the sake of argument, however, we accept the Board's assumption that the reduction will be one half of one percent. Our regulations define subsidy as "direct financial assistance [or] ... indirect financial assistance through insurance, guarantees, or other means...." 760 CMR 30.02. We conclude that the one half of one percent NEF interest rate reduction constitutes a subsidy under G.L. C. 40B, § 20.

IV. COMPLETENESS OF APPLICATION

The Board argues that its denial of a comprehensive permit should be upheld because the developer failed to submit a landscape plan and an existing-conditions plan with its local application. Pre-Hearing Order, § III-2. Though the burden of proof with regard to this issue is on the Board, little evidence was presented by either party. It appears from the application itself that the developer originally submitted a certified plot plan, architectural plans, and other, unnamed documents. Exh. 7. The local hearing was conducted on five separate dates extending from mid-May 2000 through the end of September 2000. There is no evidence that the developer at any point refused to provide additional relevant documentation to the Board. In fact, during the hearing, in June 2000, the developer did submit a full traffic impact and access study, which (as discussed in section V-A, below) arguably was

unnecessary. Exh. 1, p. 4; 13. At the same time, also in June 2000, a detailed landscape plan was prepared. See Exh. 28. A thorough existing conditions plan was already in existence, having been prepared in 1998. Exh. 24. It defies logic that the developer would not have provided these plans to the Board upon request.

We have said in many previous cases that comprehensive permit application requirements are "to be applied in a common-sense rather than an overly technical manner." *Southbridge Housing Auth. v. Southbridge*, No 91-09, slip op. at 8 (Mass. Housing Appeals Committee Feb. 16, 1994); also see *CMA, Inc. v. Westborough*, No. 89-25 (slip op. at 12-13 (Mass. Housing Appeals Committee Jun. 25, 1992); *Dartmouth West Housing Assoc. v. Dartmouth*, No. 71-04 (Mass. Housing Appeals Committee Aug. 27, 1973). "Failure to submit a particular item shall not necessarily invalidate an application." 760 CMR 31.02(2). "Where the Board did not make a written record [during the hearing] of any failure by the developer to comply with a reasonable request for additional information..., minor shortcomings are not sufficient to justify the denial of a comprehensive permit." *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. at 2 (Mass. Housing Appeals Committee Jan. 16, 1991).

We find that the Board has not sustained its burden of proving that the developer's application was incomplete. Further, even if we were to find that the information submitted locally was inadequate, because the Board delved into the merits of the proposal we would not simply uphold the Board's denial, but rather would require submission of the missing information during our own de novo hearing. *CMA, Inc. v. Westborough*, *supra*, slip op. at 17-19 (includes detailed discussion of the Board's options); also see *Woodridge Realty Trust v. Ipswich*, No. 00-04, slip op. at 9-11 (Mass. Housing Appeals Committee Jun. 28, 2001).

The landscape plan and existing conditions plan that were introduced into evidence in our hearing are certainly adequate. Exh. 24, 28.

V. SUBSTANTIVE ISSUES

Where the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a prima facie case by showing that its proposal complies generally with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern, which supports the denial, and second, that such concern outweighs the regional need for housing. 760 CMR 31.06(6); also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

The Board has raised a number of local concerns: traffic safety, the adequacy of the septic system, the possibility of hazardous materials on the site, and the density of the housing in comparison with the surrounding neighborhood. See Pre-Hearing Order, § III-1.

A. Traffic Safety

Because this is a small project for which the traffic impact is likely to be negligible, a simple description of traffic patterns within the existing conditions report submitted with the developer's application might well have sufficed. See 760 CMR 31.02(2)(b); Tr. II, 48, 86. (The parties stipulated that the proposed housing will not have a significant impact on traffic volume on Route 30, and that sight distances to and from the development are adequate. Pre-Hearing Order, § I-10.) Nevertheless, the developer hired a traffic engineer to prepare a full traffic impact and access study. This study, together with the testimony of the engineer and the stipulations, clearly established that the proposal conforms to commonly recognized standards for traffic safety. See Exh. 13; Tr. II, 49-59, 67; also see Exh. 15; Tr. II, 51.

The Board offered little to meet its burden of establishing a legitimate local concern with regard to traffic safety. The town planner testified that during rush hours, Commonwealth Road is heavily congested, "stop-and-go" traffic. Tr. III, 41-42; II, 69. But he did not identify any hazard related to the proposed housing. See Tr. III, 40-43, 50-52, 57-59, 64. The civil engineer hired by the town to assess traffic safety issues confirmed that with some trimming of shrubbery, sight distance would be adequate in both directions from the site. See Tr. III, 85.

The one area where some improvement seems to be needed is in the provision of sidewalks. Though little evidence was introduced on this topic, we will require a sidewalk within the site to connect to the existing sidewalk along Commonwealth Road. See section VI-1(b), below; Tr. III, 39, 55-56.

B. Septic System Design

The developer's engineer testified that the development's septic system has been designed to comply with both state Title 5 requirements and the Wayland Board of Health's more stringent requirements (which assume daily flows of 165 gallons per bedroom rather than Title 5's 110 gallons). Tr. I, 89-90.

The Board primarily questions the adequacy of the testing done to prepare the design. See, e.g., Exh. 19. There was little specific testimony that the system as designed is actually inadequate.[3] See, e.g., Tr. III, 73-90, 115. Nevertheless, we will address both questions, focusing—as the parties did—on the question of whether the ground water level was properly established.

The leaching fields for the septic system consist of two areas of approximately 2,500 square feet; next to each is an "expansion area" set aside in case the leaching fields should fail at some time in the future. Exh. 4. In April and May 1998, thirteen deep test holes and seven percolation test holes were dug on the site. Exh. 26. They were witnessed by a representative of the Wayland Board of Health, and the Board of Appeals' expert agrees that 1998 testing is recent enough to be valid. Tr. III, 84, 102; Tr. IV, 56; Exh. 25, 26, 29, 30. In addition, the experts referred to the results of testing conducted in 1994, at which time seven different test holes were dug. Exh. 29.

The Board argues that more test pits should have been dug since the location of the leaching fields has changed as the development proposal changed. Two of the 1998 pits

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3. The Board also alluded to a concern that the development's storm water drainage system might interfere with the operation of the septic system. See Tr. III, 139. The only specific testimony on this issue, however—which we find to be credible—was that this would not be a problem. Tr. IV, 70.

were in one of the primary fields as currently proposed, and three of them were in that field's proposed expansion area. Exh. 4, 4A; Tr. I, 91-95, 106; IV, 49-53. No pits were dug in the other primary leaching field, which is immediately adjacent, but a pit was dug a few feet on the other side of it. Exh. 4; Tr. IV, 82. Two of the 1994 pits were located in the primary leaching areas, and several others were close by. Tr. IV, 63. These tests were clearly sufficient for the preliminary design required for issuance of a comprehensive permits. Tr. IV, 67-68; 760 CMR 31.02(2)(f).

Generally, the tests showed ground water at a consistent elevation of 156.5 feet, ranging from between 14 and 17 feet below the surface due to the surface topography, which is more than sufficient for proper functioning of the septic system. Tr. I, 78-79, 90, 95; IV, 59, 65; Exh. 25, 26, 29, 30. But the test pits also revealed mottling or staining of the soil at a distance below the surface that ranged from 36 inches to 64 inches. Exh. 26; Tr. I, 82-83; IV, 51, 53. This could be an indication of a perched water table, which might interfere with the septic system. That is, it could be that during certain times of the year, a dense layer of soil could cause water to collect at a particular, relatively high level rather than continuing to infiltrate through the soil to the true water table. Tr. II, 119; IV, 54. Alternatively, however, the markings could simply be a historical oddity reflecting where the water table was hundreds or even thousands of years ago. Tr. I, 83. The most detailed testimony, and the preponderance of the evidence, however, is that there is no perched water table. Tr. IV, 55, 58, 66; Exh. 26, 29; cf. Tr. III, 118, 145; IV, 88. And even if there were a perched water table, the dense, restraining layer of soil could be removed during construction of the leaching field. Tr. III, 120-121.

We find that the developer has proven that the ground water level was properly determined in designing the septic system, and that this has not bee rebutted by the Board. The system can be built in full compliance with state and local requirements, subject only to final confirmation of the consistency of soil conditions at the exact location of the leaching fields and expansion areas immediately prior to construction. See Tr. I, 110; III, 143.

C. Hazardous Materials

The Board argues that there has not been sufficient, recent testing to ensure that there has been no contamination of the site by petroleum products from the neighboring gas station. It is by no means clear, however, that this is a local concern that should be addressed under the Comprehensive Permit Law. Typically, hazardous materials of this sort are not regulated by local bylaw, regulation, or practice since adequate protection is provided by state and federal laws. Cf. *Hamlet Development Corp. v. Hopedale*, No. 90-03, slip op. at 6-15 (Mass. Housing Appeals Committee Jan. 23, 1992). But in any case, a full environmental site assessment (a "21E study" under G.L. c. 21E) was commissioned by a previous owner in November 1997, and found no hazardous materials on site. Exh. 16, p.10; Tr. I, 25-26. The licensed site professional who conducted that assessment, a professional chemical engineer and a member of the Wayland Conservation Commission, confirmed this in detailed testimony before the Committee. Tr. III, 134-156. The Board introduced no affirmative evidence to the contrary, and thus has failed to establish the existence of a legitimate local concern.

D. Density

The Board alleges that although the developer purchased the site for $945,000, the value of the site under existing zoning is only $325,000. Appellee's Brief, p. 5. It notes that the price was set "by agreeing to pay the same purchase price that a prior potential purchaser was willing to pay ... [to] build an assisted living in facility." Id., Tr. I, 39. It then argues that the developer's decision with regard to how many housing units to propose for the site was determined by his land cost, and that for this reason the comprehensive permit should be denied. Appellee's Brief, p.15.

This argument misconstrues the nature of the comprehensive permit review process at both the local level and before this Committee. The Comprehensive Permit law gives the developer the right to propose housing as he sees fit. The role of the Board and this Committee is not to speculate about the developer's motives, but rather to determine whether the proposed housing is consistent with local needs, that is, whether the housing can be built without impinging unduly on local planning and environmental concerns. If the development overburdens the site, the permit must be denied even if the developer overpaid for the land and will be left in dire financial straights.[4] But neither the cost of the land nor the developer's financial circumstances are evidence that the housing overburdens the site, as the Board seems to argue.

Substantively, the density of housing proposed here is appropriate. The developer presented detailed testimony from a well-recognized land use planner that the proposal meets

4. Land acquisition cost is of course an important issue. Since any increase in the value of the land resulting from the comprehensive permit should accrue to the affordable housing development, it is common practice for subsidizing programs to limit the acquisition value carried in pro forma financial

generally recognized standards. The Board introduced only the most general testimony. See Tr. III, 34-37, 67-68. Its primary concern seemed to be about setbacks and on-site buffers, and yet the town planner testified without having reviewed the landscape plan. Tr. III, 49.

We accept the testimony of the developer's expert. She noted that buildings will cover only 14% percent of the site—below the Wayland Zoning Bylaw's maximum building coverage requirement of 20%. Exh. 20, p. 19913; Tr. II, 96-97. Sixty-five percent of the site will be open space, and more importantly, much of that space is contiguous, so that a large, open, grassy area will be available as a play area for children. Tr. II, 108. Setbacks from adjoining properties are adequate. Tr. II, 98-100; 113-114. The lot is currently largely open, but existing trees and shrubs at the edges of the property will be protected during construction and left as a buffer. Tr. II, 13, 23, 31-32, 34, 100-101; Exh. 24, 28, 28-A. And, as the developer's landscape architect testified, on the east side, where there is less vegetation, evergreens will be planted as a buffer.[5] Tr. II, 14, 28, 100-101.

Finally, though the density proposed here is greater than the surrounding neighborhood, the development is appropriate since the housing is on the highway, not one of the local streets, and because the site is transitional[6] between the commercial area with its shops and gas stations and the residential area. Tr. II, 104, 107. See *Hastings Village, Inc. v. Wellesley Board of Appeals*, No. 95-05, slip op. at 24-25 (Mass. Housing Appeals Committee, Jan. 8, 1998).

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statements to the lesser of "the 'as is' appraised market value... or the purchase price... plus... carrying costs....".]" MassHousing Acquisition Value Policy, *http://mhfa.com/dev/db_policies_acqval.htm.*

5. The proposal includes extensive, high quality landscaping: eighteen white pine trees, over a dozen substantial pin oak trees, and many other smaller trees and shrubs, costing a total of between $90,000 and $95,000. Exh. 28; Tr. II, 43.

6. The boundary that this site shares with the gas station is also the boundary between a "Business District A" zone and the single-family, "Residence" zone. Exh. 20-A (inset 13); Pre-Hearing Order, § I-5.

VI. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Wayland Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

1. The comprehensive permit shall be subject to the following conditions:

   (a) The development shall be constructed as shown on drawings entitled "336 East Commonwealth Road," dated July 19, 2000, signed and stamped by Robert A. Gemma, P.E. (Exhibit 3).

   (b) The developer shall provide a sidewalk within the development to connect to the existing sidewalk on Commonwealth Road.

   (c) Storm water drainage system pipes in the vicinity of the septic system leaching fields shall have glued joints. See Tr. III, 104; IV, 68-69.

   (d) Prior to construction, the developer shall execute a Regulatory Agreement in the form of Exhibit 6-A.

   (e) Three affordable units in the development shall be sold subject to deed riders as described in the Regulatory Agreement and in a form approved by the Federal Home Loan Bank of Boston so that they will remain affordable to low- or moderate-income households in perpetuity.

(f) To provide for long-term monitoring of this development, the developer shall enter into a Monitoring Services Agreement in the form of Exhibit 6-B.

2. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: July 17, 2002

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Mark Siegenthaler

Frances C. Volkmann

LPc\w-d

Middlesex S. Register