TOWN OF ACTON

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Board of Appeals

DECISION AND NOTICE RE APPLICABLE SAFE HARBOR
#19-07 (1)

Comprehensive Permit Application
Piper Lane, LLC
Piper Lane Condominiums
90 School Street, 4 Piper Lane, 4 Piper Lane Rear, 6 Piper Lane

May 13, 2019

INTRODUCTION

This is an interlocutory Decision (the "Decision") of the Acton Zoning Board of Appeals (hereinafter the "Board") made on the application for a Comprehensive Permit under Massachusetts General Laws ("M.G.L.") Chapter 40B, §20-23 (the "Act") by Piper Lane LLC, 71 Commercial St. #263, Boston, MA 02109 (the "Applicant") for property located at 90 School Street, 4 Piper Lane, 4 Piper Lane Rear, and 6 Piper Lane in Acton, Massachusetts, Town Atlas Map H3-A parcels 3, 3-1, 3-2, and 17 (the "Site"). The proposed project consists of twenty-eight (28) dwelling units in eight (8) buildings with seven (7) units being affordable. This Decision is limited in purpose to providing notice pursuant to 760 CMR 56.03(8)(a) concerning an applicable Safe Harbor pursuant to 760 CMR 56.03(1)(e) & 56.03(7) (Related Application).

The application was received on April 2, 2019. With a written extension agreement from the Applicant's counsel, the Board opened the public hearing on May 6, 2019, and continued on May 13, 2019, in the Acton Town Hall. Present at the hearing were Kenneth F. Kozik, Chair, Adam Hoffman, Member, and Ye Emilie Ying, Associate Member. Staff present included the Planning Director Roland Bartl, Town Counsel Stephen D. Anderson, and the Board's Secretary Vivian Birchall. Also in attendance were the Applicant's manager Steve Paquette, the Applicant's counsel Louis N. Levine, and the Applicant's Engineer Bruce D. Ringwall; counsel for various neighbors Daniel C. Hill; and numerous members of the public.

At the initial public hearing on May 6, 2019, the Applicant's team provided an executive summary of the Application, after which the Board heard extensive presentations by Attorneys Levine, Hill and Anderson as to whether the Related Application Safe Harbor (or an exception thereto) applies to this matter. Given the expedited deadline and exclusive procedure set out in

760 CMR 56.03(8)(a) for addressing this issue, the Board deliberated on this issue on May 6, 2019, and at the continued hearing on Monday, May 13, 2019, and arrived at this decision.

NOTICE

Pursuant to 760 CMR 56.03(8)(a), the Board hereby provides written notice to the Applicant, with a copy to the Massachusetts Department of Housing and Community Development (the "Department" or "DHCD"), that the Board considers that a denial of the permit or the imposition of conditions or requirements would be consistent with local needs, because the Board believes that one or more of the grounds set forth in 760 CMR 56.03(1) have been met, specifically, the Related Application Safe Harbor pursuant to 760 CMR 56.03(1)(e) and 56.03(7). This Notice sets forth the grounds that the Board believes have been met, and the factual basis for that position, including any necessary supportive documentation.

FACTS

1. Related Special Permit Application

On February 26, 2018, Douglas Shaw, manager of GS Holdings, LLC, applied for a special permit pursuant to Section 8.1.5 of the Acton Zoning Bylaw[1] "to install [a] new home which is over 15% allowed" on the property at 90 School Street, Acton (Map H3-A Parcel 17), a lot having land area of 20,360± square feet and frontage of 102.30 feet on School Street, a public way (the "Special Permit Application"). See **Exhibit A** (Application and Plot Plan).[2] In the R-2 zoning district, a conforming lot must have 150 feet of frontage and 20,000 feet of lot area, so the lot's frontage is non-conforming. As shown on the plot plan submitted with the Special Permit Application, the proposed dwelling would conform to all required dimensional setbacks.

At the time of the Special Permit Application, the lot was vacant. Previously there had been a dwelling on the lot having approximately 2,670± square feet in gross floor area. However, the dwelling burned down on or about January 3, 2015. See **Exhibit B** (Acton Fire Department, Fire Investigation Team, Final Fire Investigation Final dated January 15, 2015).[3] According to this Final Report, before the fire, the prior building was unoccupied since October of 2011; power was disconnected by the Acton Wiring Inspector on March 20, 2012; the property was not serviced by any utilities and was unheated; the roof had several large holes; and the structure was deemed unsafe and placarded (with a large Red X) by the Acton Fire and Building Departments on April 25, 2013. The fire completely destroyed the house in the early AM hours of

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[1] The Acton Zoning Bylaw, current through December 2018, is posted on the Town's website at https://www.acton-ma.gov/DocumentCenter/View/659/2018-Zoning-Bylaws?bidId= and incorporated herein by reference. The provisions referenced in this decision were not amended during 2018, so the posted version reflects the applicable provisions of the Zoning Bylaw in effect at the time of the Special Permit Application.

[2] The Application and Plot Plan are posted at http://doc.acton-ma.gov/dsweb/Get/Document-62093/Application.pdf . Other documents concerning the Special Permit Application are posted on the Town's website at http://doc.acton-ma.gov/dsweb/View/Collection-9761 and incorporated herein by reference.

[3] This Final Report is posted on the Town's website at http://doc.acton-ma.gov/dsweb/Get/Document-67832/2015_0033%2090%20School%20Street%20Report%20AFD%20(redacted).pdf.

January 3, 2015. Immediately after the fire, the structure was demolished for public safety reasons on January 3, 2015.

The property sat vacant well beyond January 3, 2017, the two year deadline under Section 8.3.4[4] of the Zoning Bylaw for filing an application for a special permit for reconstruction after a fire. No such application was filed. Instead, the February 26, 2018 Special Permit Application sought relief under Section 8.1.5[5] of the Zoning Bylaw for a new dwelling with approximately 3,422± sf in net floor area. Compared to the vacant nonconforming lot at the time of the Special Permit Application, this proposal constituted 100% completely new construction. Compared to the gross floor area of the former house, it represented an area increase of more than 28%. The Special Permit Application presented the question whether an applicant was eligible to apply under Section 8.1.5 after missing the deadline under Section 8.3.4, and if so whether the special permit should be granted based on the Bylaw's criteria.

The Board convened for a duly noticed public hearing on the Special Permit Application on April 9, 2018, May 7, 2018, and June 4, 2018. On each occasion, the full Board, representatives of Town staff, and numerous members of the public were in attendance. However, the petitioner was not present on any of these occasions.

On June 4, 2018, because the petitioner or his representative made no attempt to participate in multiple scheduled hearings before the Board, the Board closed the hearing and voted unanimously to deny the special permit. The Board filed its written denial with the Town Clerk on June 15, 2018. See **Exhibit C** (Board's Decision Denying Special Permit).[6] Given this denial, state law imposed a two year ban on reapplication for the same zoning relief, absent certain conditions being met. See M.G. L. c. 40A, § 16.[7]

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[4] Section 8.3.4 provided: "Restoration. If a nonconforming STRUCTURE, or a STRUCTURE on a nonconforming LOT that cannot be built on under the requirements of Section 8.1, is damaged by fire, flood or similar disaster to an extent greater than 50% of its fair market value before it was damaged, it shall not be rebuilt or reconstructed without a special permit from the Board of Appeals. No such special permit shall be granted unless the application for such special permit is filed within two years from the date on which the damage occurred and the Board of Appeals finds that 1) such rebuilding or reconstruction will not be detrimental to the neighborhood, and 2) to the extent possible the STRUCTURE will be rebuilt."

[5] Section 8.1.5 provided: " In all other cases, the Board of Appeals may, by special permit, allow such reconstruction of or extension, alteration or change to a Single- or Two-FAMILY residential STRUCTURE on a nonconforming LOT including the reconstruction anywhere on the lot of a larger structure than otherwise allowed under Section 8.1.3, where it determines either that the proposed modification does not increase the nonconformity, of if the proposed modification does increase the nonconformity, it will not be substantially more detrimental to the neighborhood than the existing STRUCTURE on the nonconforming LOT."

[6] The Board's written decision is posted on the Town's website at https://www.acton-ma.gov/ArchiveCenter/ViewFile/Item/10339.

[7] Section 16 provides: "No appeal, application or petition which has been unfavorably and finally acted upon by the special permit granting or permit granting authority shall be acted favorably upon within two years after the date of final unfavorable action unless said special permit granting authority or permit granting authority finds, by a unanimous vote of a board of three members or by a vote of four members of a board of five members or two-thirds vote of a board of more than five members, specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the record of its proceedings, and unless all but one of

2. Acquisition of Site Control for Comprehensive Permit Application

Before the Special Permit Application was filed and while it was pending, Steven Paquette and David Russell, who later became the managers of Piper Lane, LLC,[8] acquired control of the property that later became the Site of the Comprehensive Permit Application as follows (*see* Comprehensive Permit Application,[9] Appendix H (PDF pages 47-60) (attached hereto as **Exhibit D**) and Appendix N (PDF pages 191-250) (attached hereto as **Exhibit E**)):

- 4 Piper Lane (Map H3-A Parcel 3-2),
  4 Piper Lane Rear (Map H3-A Parcel 3), and
  6 Piper Lane (Map H3-A Parcel 3-1):

  By Purchase and Sale Agreement dated November 7, 2017, as amended, Brian J. Magoon and Susan Hadley-Magoon, as Sellers, agreed to convey to Steven Paquette and David Russell or nominee, as Buyer, for $900,000,[10] the land at 4-6 Piper ~~Road~~Lane, Acton.[11] Paragraph 9 of the P&S states that "the Buyer intends to construct a so-called 40B development containing no less than 28 detached or multifamily homes …" which will require a "Comprehensive Permit under General Laws Chapter 40B." The Eighth Amendment dated February 1, 2019, to the P&S Agreement added Piper Lane, LLC as an additional Buyer which would take title to the property at closing.

- 90 School Street (Map H3-A Parcel 17):

  By Purchase and Sale Agreement dated May __, 2018, as amended, GS Holdings, LLC, as Seller, agreed to convey to Steven Paquette and David Russell or nominee, as Buyer, for $350,000, the land at 90 School Street, Acton.[12] Paragraph 9 of the P&S Agreement states that "the Buyer intends to construct a so-called 40B development containing no less than 36 detached or multifamily homes …" which will require a "Comprehensive Permit under General Laws Chapter 40B." The First Amendment dated February 1, 2019, assigned the P&S Agreement to Piper Lane, LLC as the Buyer.

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the members of the planning board consents thereto and after notice is given to parties in interest of the time and place of the proceedings when the question of such consent will be considered."

[8] According to the online records of the Secretary of State's Office, Steven Paquette and David Russell are the managers of the Applicant, Piper Lane, LLC. See http://corp.sec.state.ma.us/corpweb/CorpSearch/CorpSearch.aspx.

[9] Documents concerning the Comprehensive Permit Application are posted on the Town's website at http://doc.acton-ma.gov/dsweb/View/Collection-10922.

[10] The Seventh Amendment dated June __, 2018, reduced the purchase price under the P&S Agreement to $850,000.

[11] Brian J. Magoon and Susan Hadley-Magoon had acquired these parcels as follows: (1) 4 Piper Lane, from Brian J. Magoon for $1.00 by deed dated December 20, 2006, and recorded on December 26, 2006; and (2) 4 Rear and 6 Piper Lane, from Ernest A. and June L. Magoon for $10,000 by deed dated May 14, 1993 and recorded on May 17, 1993.

[12] GS Holdings, LLC, had acquired the property at 90 School Street from Sarah T. Jodka for $150,000 by deed dated February 12, 2015, and recorded on February 13, 2015.

3. Comprehensive Permit Application for Piper Lane Condominiums

On April 2, 2019, the Applicant Piper Lane, LLC applied for approval of a Comprehensive Permit on the Site. The Applicant proposes twenty-eight (28) dwelling units with seven (7) units being affordable. See Comprehensive Permit Application, Appendix A (PDF pages 9-10) (attached hereto as **Exhibit F**).[13]

The Site Plan prepared by Goldsmith, Prest & Ringwall, Inc. ("GPR") for the Piper Lane Condominiums submitted with the Comprehensive Permit Application for the proposed 40B development indicates that the total area of the Site is 6.59± acres (286,978± square feet). See **Exhibit G** (Site Plan), Sheet C1.1).[14] The area of 90 School Street (Map H3-A Parcel 17) is 20,360± square feet, or 7.1± percent of the overall area of the Site. See **Exhibit A**.

By contrast, the agreed purchase price for 90 School Street ($350,000) is 29.2 percent of the total agreed purchase price for the entire 40B Site ($350,000 plus $850,000), or four times its relative percentage of the overall area of the Site. The reason for this discrepancy is apparent: As shown on GPR's Site Plan, the Site's only feasible frontage on and access from and to a public way is provided by the parcel at 90 School Street (Map H3-A Parcel 17). See **Exhibit G** (Site Plan), and *compare* Existing Condition Plan Sheet C3.2 *with* Master Plan Sheet C2.1. Without the inclusion of 90 School Street in the Site, the proposed 40B development would not be feasible because the balance of the Site (consisting of 4 Piper Lane (Map H3-A Parcel 3-2), 4 Piper Lane Rear (Map H3-A Parcel 3), and 6 Piper Lane (Map H3-A Parcel 3-1)) is effectively landlocked. Accordingly, the land at 90 School Street is essential to the proposed development.

4. Comprehensive Permit for Avalon Phase II

By comprehensive permit for Avalon Phase II dated April 8, 2019, filed with the Town Clerk on April 9, 2019, the Board has recently approved 86 new 40B rental units. See **Exhibit H**. By letter dated April 9, 2019, the Town of Acton has requested a two-year Safe Harbor certification from DHCD of compliance with its approved Housing Production Plan ("HPP") because these 86 units exceed the Town's 1% threshold of 85 units. See **Exhibit I**. By letter dated May 6, 2019 (**Exhibit J**), DCHD notified the Town that DHCD intends to get an appraisal of the land

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[13] The Project Eligibility Letter submitted with the Comprehensive Permit Application (PDF pages 17-24 of Appendix C of the application at http://doc.acton-ma.gov/dsweb/View/Collection-10922) stated that the Applicant "proposed to build forty (40) homeownership units, including ten (10) affordable units" and provided that the "approval is expressly limited to the development of *no more than forty (40) homeownership units* under the terms of the Program, of which not less than ten (10) of such units shall be restricted as affordable." Emphasis added. Issuance of a determination of Project Eligibility "shall be considered by the Board … to be conclusive evidence that the Project and the Applicant have satisfied the project eligibility requirements of 760 CMR 56.04(1)." See 760 CMR 56.04(6). Any perceived discrepancy between the number of units referenced in the Project Eligibility Letter and in the Comprehensive Permit Application can be trued up in accordance with the procedure set forth in 760 CMR 56.04(5) and does not represent a material, jurisdictional defect with respect to the Comprehensive Permit Application.

[14] The Site Plans are posted on the Town's website at http://doc.acton-ma.gov/dsweb/Get/Document-67579/Piper%20Lane%20Condominiums%20Site%20Plans.pdf.

pursuant to 760 CMR 56.04[4](e),[15] after which the Town would submit a new certification request concerning certification of the units for the HPP Safe Harbor. If and when certified, the HPP Safe Harbor period will be deemed effective on April 9, 2019, the date upon which the Town achieved its numerical target for the calendar year in question. See 760 CMR 56.03(2).

5. Summary Chronology

Attached as **Appendix 1** is a Chronology briefly summarizing the foregoing events for ease or reference in connection with the disposition below. The dates highlighted in yellow pertain to the duration of the Related Application Safe Harbor relative to the date of the Comprehensive Permit Application (highlighted in blue) and to the potential Housing Production Plan Safe Harbor (highlighted in green).

LAW

1. Methods to Measure Progress Toward Local Affordable Housing Goals

DHCD's regulations under Chapter 40B, 760 CMR 56.03(1), establish the following safe harbors:

> A decision by a Board to deny a Comprehensive Permit, or (if the Statutory Minima defined at 760 CMR 56.03(3)(b) or (c) have been satisfied) grant a Comprehensive Permit with conditions, shall be upheld if one or more of the following grounds has been met as of the date of the Project's application:
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> a) the municipality has achieved one or more of the Statutory *Minima,* in accordance with 760 CMR 56.03(3);
> b) the Department has certified the municipality's compliance with the goals of its approved Housing Production Plan, in accordance with 760 CMR 56.03(4);
> c) the municipality has made recent progress toward the Statutory *Minima,* in accordance with 760 CMR 56.03(5);
> d) the project is a large project, as set forth in 760 CMR 56.03(6); or
> e) a related application has previously been received, as set forth in 760 CMR 56.03(7).

This decision focuses on the fifth safe harbor, 760 CMR 56.03(1)(e), referred to herein as the Related Application Safe Harbor. DHCD's regulations provide that, "If the Board wishes to deny an application on one or more of the grounds set forth in 760 CMR 56.03(1), it must do so in accordance with the procedure set forth in 760 CMR 56.03(8), or it shall be deemed to have waived its rights." 760 CMR 56.05(3).

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[15] That regulation provides that a "determination of Project Eligibility, to be issued by the Subsidizing Agency ... shall make the following findings, based upon its review of the application, and taking into account information received during the site visit and from written comments:... (e) that an initial pro forma has been reviewed, including a land valuation determination consistent with the Department's guidelines, and the Project appears financially feasible and consistent with the Department's guidelines for Cost Examination and Limitations on Profits and Distributions (if applicable) on the basis of estimated development costs."

Accordingly, pursuant to 760 CMR 56.03(8)(a), within 15 days of the opening of the local hearing, the Board hereby provides timely written notice to the Applicant, with a copy to the DHCD, that the Board considers that a denial of the permit or the imposition of conditions or requirements would be consistent with local needs based on the application of the Related Application Safe Harbor. The Board notes that any determination that the Comprehensive Permit Application was filed during the protected period created by the Related Application Safe Harbor "triggers an irrebuttable presumption that [a] denial of [the] application is consistent with local needs" which "requires that the [] denial of the comprehensive permit be upheld." See *Grandview Realty, Inc, Appellant Lexington Zoning Board of Appeals, Appellee*, 2006 MA. HAC. 05-11, 11, 2006 WL 3520449, at *5 (citing 760 CMR 31.07(1)(h), which is now numbered 760 CMR 56.07(3)(a)).[16]

2. **Definition of Related Application**

For purposes of the Related Application Safe Harbor established by 760 CMR 56.03(1)(e), DHCD's regulation at 760 CMR 56.03(7) defines a "related application" as follows (emphasis added):

> Related Applications. For the purposes of this subsection, a related application shall mean that **less than 12 months has elapsed between the date of an application for a Comprehensive Permit and any of the following**:
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> (a) the date of filing of **a prior application for a** variance, **special permit,** subdivision, or other approval **related to construction on the same land**, if that application was for a prior project that was principally non-residential in use, or **if the prior project was principally residential in use, if it did not include at least 10% SHI Eligible Housing units**;
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> (b) **any date during which such an application was pending before a local permit granting authority**;
>
> (c) **the date of final disposition of such an application** (including all appeals); or
>
> (d) the date of withdrawal of such an application.
>
> An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.

[16] In this case, such a denial based on the Related Application Safe Harbor would take on added significance as to the Housing Production Plan Safe Harbor established by 760 CMR 56.03(1)(b): If and when the Department certifies the Town's compliance with the goals of its approved Housing Production Plan as a result of the addition of the 86 new 40B rental units in the Avalon Phase II approved by comprehensive permit on April 9, 2019, the two-year Housing Production Plan Safe Harbor running from that date may bar any re-application for the comprehensive permit after a denial under the Related Application Safe Harbor. See *Zoning Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 90 Mass. App. Ct. 111, 115–16, *further app. rev. den.* 476 Mass. 1107 (2016) (case citations and footnotes omitted) (describing the qualification for and effect of the Housing Production Plan Safe Harbor).

Based on the analysis below, the Board finds that each of the factors set forth in the regulation establishing the Related Application Safe Harbor is satisfied, and that the exception set forth in the final sentence is not applicable.

3. Rules for Interpreting the Related Application Safe Harbor Regulation

The Board interprets 760 CMR 56.03(7) "in the same manner as a statute, ... according to traditional rules of construction" and consistent with "the plain terms of the regulation itself." *Zoning Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 90 Mass. App. Ct. 111, 117 (2016); (citations omitted). See also *Ten Local Citizen Grp. v. New England Wind, LLC*, 457 Mass. 222, 229 (2010) ("We interpret a regulation in the same manner as a statute.... We accord the words of a regulation their usual and ordinary meaning." (internal citations and quotations omitted)); *Biogen IDDC MA, Inc. v. Treasurer & Receiver Gen.*, 454 Mass. 174, 190 (2009) ("Principles governing statutory construction and application also apply to regulations.").

"It is a standard canon of statutory construction that 'the primary source of insight into the intent of the Legislature is the language of the statute.'" *Com. v. Clerk-Magistrate of W. Roxbury Div. of Dist. Court*, 439 Mass. 352, 355 (2003) (citation omitted). Similarly, the language of a regulation "is the principal source of insight into legislative intent." See *Rosa v. Billerica Planning Bd.*, 2013 WL 3776958, at *6 (Mass. Land Ct. July 15, 2013); *McAuley v. Aldenberg*, 2011 WL 5117062, at *4 (Mass. Land Ct. Oct. 24, 2011) (same). Where the language of a statute or a regulation is clear and unambiguous, it is conclusive as to its intent. See *Clerk-Magistrate of W. Roxbury Div. of Dist. Court*, 439 Mass. at 355-56.

4. The Related Application Safe Harbor Applies to this Case

Under the "plain terms of the regulation itself," the Special Permit Application filed on February 26, 2018, and denied by the Board's decision filed with the Town Clerk on June 15, 2018, was a prior application for a special permit related to construction on the same land for a project that was principally residential in use and which did not include at least 10% SHI Eligible Housing units. When the Comprehensive Permit Application was filed on April 2, 2019, "less than 12 months [had] elapsed between the date of [the] application for a Comprehensive Permit" and both "any date during which ... [the Special Permit Application] was pending before a local permit granting authority" and "the date of final disposition of [the Special Permit Application]." 760 CMR 56.03(7)(b) and (c).

The Board notes that the phrase in 760 CMR 56.03(7)(a) "related to construction on the same land" is not the same as "for construction on the same land" or "covering the same land" or words of similar import. In this case, the Special Permit Application (which proposed to install a completely new, larger home on the non-conforming lot at 90 School Street) "related to construction on the same land" because 90 School Street is an integral part of the land comprising the Site of the Comprehensive Permit Application and it provides the proposed 40B development's only feasible frontage on and access to a public way. Construction of the new home on 90 School Street as proposed by the Special Permit Application would be inconsistent with construction of Summit Drive, the 40B development's proposed access drive, as shown on the Comprehensive Permit Application Site Plans. Compare Plot Plan submitted with Special Permit Application with Roadway Plan Sheet C6.1 of Comprehensive Permit Application. As

such, the proposed construction under the Special Permit Application "*related to* construction on the same land" as the Comprehensive Permit Application. Emphasis added.

5. The Exception in 760 CMR 56.03(7) (Final Sentence) is Not Applicable

The definition of a Related Application in 760 CMR 56.03(7) (final sentence) contains the following exception:

> An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.

At the public hearing and in separate correspondence with legal citations, counsel for the Applicant and for the neighbors vigorously disagreed as to the proper interpretation of this exception. Their arguments may be briefly summarized as follows:

> Applicant's position: The phrase "insubstantial construction or modification of the preexisting use of the land" is disjunctive; the "most natural and sensible reading," of the language is that the modifier applies to the nearest or adjacent noun and not to other nouns separated by the disjunctive "or" or by other sentence structure;[17] the adjective "insubstantial" therefore modifies only the noun "construction"; it does not modify the phrase "modification of the preexisting use of the land"; such that the disjunctive final clause of the exception must be read as follows: "An application shall not be considered a prior application if it concerns … modification of the preexisting use of the land." Applying this construction, the Applicant contends that the exception applies to the Special Permit Application.
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> Neighbors' position: The phrase "insubstantial construction or modification of the preexisting use of the land" should not be read as disjunctive where "the context and the main purpose of all the words demand otherwise;"[18] the disjunctive interpretation is not consistent with an overriding principle of statutory construction, that a "literal construction [of a statute of regulation] which leads to unreasonable results is to be avoided when 'the language to be construed is fairly susceptible to a construction that would lead to a logical and sensible result'";[19] such that the final clause of the exception must be read as follows: "An application shall not be considered a prior application if it concerns insubstantial … modification of the preexisting use of the land." Applying this construction, the neighbors contend that the exception does not apply to the Special Permit Application.

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[17] Citing *Commonwealth v. Jean-Pierre*, 65 Mass. App. Ct. 162, 163 (2005). See also *Taylor v. Burke*, 69 Mass. App. Ct. 77,79-80 (2007).

[18] Citing *Anderson v. Attorney General*, 479 Mass. 780, 791-792 (2018) quoting *Eastern Mass. St. Ry. v. Massachusetts Bay Transp. Auth.*, 350 Mass. 340, 343 (1966). See also, *McCarthan v. Director of Goodwill Indus. Suncoast, Inc.*, 851 F.3d 1076, 1087 (2017), quoting, A. Scalia & B.A. Garner, *Reading Law: The Interpretation of Legal Texts* 122 (2012) ("Although the disjunctive 'or' may suggest separate meanings for the two terms ... , it does not require mutual exclusivity. The word 'or' commonly introduces a synonym or 'definitional equivalent.'").

[19] Citing *Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 409 Mass. 514, 518-519 (1991), quoting, *Lexington v. Bedford*, 378 Mass. 562, 570 (1979).

The Board concludes that the latter interpretation of the exception is more persuasive. "It is fundamental to statutory construction that the word 'or' is disjunctive 'unless the context and the main purpose of all the words demand otherwise.'" *Anderson v. Attorney Gen.*, 479 Mass. 780, 792 (2018). However, the word "or" "often is construed as 'and' in order to accomplish the intent manifested by the entire act or instrument in which it occurs.... It is not synonymous with 'and' and is to be treated as interchangeable with it only when the obvious sense requires it, or when otherwise the meaning is dubious." *Id.* at 792 n. 7 (citation omitted). It is construed as meaning "and" "only when the context and the main purpose to be accomplished by all the words used seems to demand it." *Id.* That is precisely the case here.

As to context, the definition of a Related Application in 760 CMR 56.03(7) creates a general rule followed by a limited exception. As such, the exception must be narrowly construed. See *Woods v. Exec. Office of Communities & Dev.*, 411 Mass. 599, 604–05 (1992) ("It is a cardinal rule of interpretation that '... where a provision, general in its language and objects, is followed by a proviso, ... the proviso is to be strictly construed, as taking no case out of the provision that does not fairly fall within the terms of the proviso, the latter being understood as carving out of the provision only specified exception, within the words as well as within the reason of the former.'") (citations omitted). The main purpose to be accomplished by all the words in the exception ("An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.") is that a prior application which concerns the "insubstantial" does not qualify as a Related Application. The word "insubstantial" in the exception is intended to modify two items: (a) "insubstantial construction" and (b) "insubstantial ... modification of the preexisting use of the land." To accomplish this and to avoid a situation where the exception would swallow the general rule, the word "or" must be construed as "and" in order to accomplish the intent manifested by the entire general definition and its narrow exception.

Under this interpretation, the Special Permit Application did not concern "insubstantial construction or modification of the preexisting use of the land" under 760 CMR 56.03(7) (final sentence). At the time of the Special Permit Application, the nonconforming lot at 90 School Street had been vacant for over two years. Previously there had been a 2,670± sf gross floor area dwelling on the lot which burned down on January 3, 2015. The owner never applied for a special permit under Zoning Bylaw Section 8.3.4 to rebuild or reconstruct the burned-down house, and, by January 3, 2017, was time-barred from doing so. Over time, from October of 2011 through January 3, 2017, what had once been a lawful preexisting use of the land (*i.e.* an occupied, 2,670± sf single family dwelling on a nonconforming lot) had degenerated into an unoccupied, unsafe, placarded, burned-down, and demolished structure (see **Exhibit C** (AFD Final Report), and the lawful preexisting use of the nonconforming lot had effectively ceased to exist.

The Special Permit Application was for a proposed new 3,422± sf net floor area dwelling on the vacant, non-conforming lot. This structure represented not only a 28%± increase compared to area of the former, burned-down house previously on the lot but also a 100% increase compared to the absence of any lawful structure on the lot at the time of the Special Permit Application. Had the hearing under the Special Permit Application proceeded on the merits, there was a material question whether the Section 8.1.5 of the Zoning Bylaw authorized the grant of a special

permit where the prior dwelling had burned down and the owner did not timely apply for a special permit under Section 8.3.4, the specific provision of the Zoning Bylaw applicable to reconstruction after a fire. Even if it did, constructing and enlarging a completely new residential dwelling on the vacant nonconforming lot was subject to a discretionary special permit by the Board.

Accordingly, as proposed by the Special Permit Application, construction of the proposed new 3,422± sf dwelling on the vacant nonconforming lot is *not* "insubstantial construction or modification of the preexisting use of the land" within the meaning of 760 CMR 56.03(7) (final sentence).

6. Housing Appeals Committee's Administrative Decisions

The Board believes that its decision in this matter is wholly consistent with the regulations establishing the Related Application Safe Harbor, 760 CMR 56.03(1)(e) and 56.03(7). In distinguishable, unrelated administrative decisions, DHCD's Housing Appeals Committee ("HAC") has made certain general statements concerning the Related Application Safe Harbor which are not determinative of the merits of the present matter.

First, HAC has stated that:

> The Committee's regulations establish a twelve-month protective period for zoning boards when a comprehensive permit developer has had a related application pending on the same property site. The developer is not prohibited from filing a comprehensive permit application within the same period. However, any decision issued by the zoning board must be upheld as a matter of law if a related application has previously been received, as set forth in 760 CMR 56.03(7).

In the Matter of Stoneham Bd. of Appeals & Weiss Farm Apartments, LLC, Appellee, 2015 MA. HAC. 14-10, 9–10, 2015 WL 4061439, at *9-10 (emphasis added). See also *Grandview Realty, supra,* 2006 WL 3520449, at *6-7.

The regulations establishing the Related Application Safe Harbor, 760 CMR 56.03(1)(e) and 56.03(7), nowhere require that the "comprehensive permit developer" must have had a related application pending "on the same property site" for the safe harbor to apply. Rather, the regulation simply requires "a prior application for a variance, special permit, subdivision, or other approval related to construction on the same land …." The regulation does not require that the "comprehensive permit developer" be the prior applicant;[20] and the phrase describing the

[20] Here, the Special Permit Applicant, GS Holdings, LLC, is the owner of 90 School Street (a portion of the Site under the Comprehensive Permit Application). GS Holdings is the Seller under the P&S Agreement, in privity of contract with the Comprehensive Permit Applicant Piper Lane, LLC, the Buyer under the P&S Agreement. That Agreement provides Site control, a jurisdictional requirement under c. 40B, with respect to the 90 School Street portion of the Site. The P&S Agreement was negotiated in whole or in part while Special Permit Application was pending. GS Holdings, as the owner of 90 School Street, has signed onto the Comprehensive Permit Application. Simply put, without GS Holdings, LLC's participation and privity of contract, there would be no Site control, no jurisdiction, and no Comprehensive Permit Application. As such, that Application overlaps with and relates to the prior Special Permit Application.

prior application as "related to construction on the same land" is far more flexible than the more limiting phrase "on the same property site."[21] HAC is bound by its own regulations, *Restaurant Consultants, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 167, 170 n.8 (1987); it "must follow its own regulations even in the face of inconsistent internal guidelines," *Town of Northbridge v. Town of Natick*, 394 Mass. 70, 76 (1985); it cannot add words to the regulation that the regulation does not contain, *Clerk-Magistrate of W. Roxbury Div. of Dist. Court*, 439 Mass. at 355-56; *cf. New England Wind*, 457 Mass. at 229 ; *Biogen*, 454 Mass. at 190; and it cannot "brush[] aside the language of the governing ... regulations of the department" because it would, "in so doing, exceed[] its authority." *Bd. of Appeals of Woburn v. Hous. Appeals Comm. of Dep't of Hous. & Cmty. Dev.*, 451 Mass. 581, 590 (2008). The Board's interpretation of the Related Application Safe Harbor regulations, 760 CMR 56.03(1)(e) and 56.03(7), is completely consistent with these principles.

Second, HAC decisions suggest that "the purpose and overall policy of the related application provision" is:

> to prevent developers from using the Chapter 40B process to coerce or intimidate local zoning boards and communities with respect to traditional zoning applications. ... It is also intended to discourage developers from maintaining multiple pending applications for the same property. ... Chapter 40B affords developers great flexibility in developing affordable housing projects for submission to local zoning boards for approval. This flexibility is not intended, however, to grant them additional leverage with respect to conventional applications they may pursue.

See *Grandview Realty, supra*, 2006 WL 3520449, at *5, citing *Stanley Realty Holdings, LLC v. Watertown*, No. 04-04, slip op. at 3 (Mass. Housing Appeals Committee Apr. 15, 2004); *Apple Farm Estates, LLC v. Medway*, No. 04-26, slip op. at 3 (Mass. Housing Appeals Committee Ruling Feb. 16, 2005).

The regulation establishing the Related Application Safe Harbor as written certainly helps to accomplish those purposes; however, the regulation does not require any showing that the Chapter 40B process is being used "to coerce or intimidate local zoning boards and communities" and is not limited to "discourag[ing] developers from maintaining multiple pending applications for the same property." Rather, the Related Application Safe Harbor regulation is written more broadly to accomplish other, equally important purposes such as (a) creating an incentive for 40B applicants and land owners to utilize the 40B program from the outset, thereby expediting and promoting the construction of affordable housing; (b) discouraging land owners from driving up the price of land needed for a 40B development by

[21] The regulation requires only a prior application "related to construction on the same land ..." The 90 School Street lot is "related to construction on the same land ..." because it provides Site's only feasible frontage on and access to a public way (See Site Plan Sheets C3.2 and C2.1); its price under the P&S Agreement is four times its relative percentage of the overall area of the Site (7.1% of the overall area and 29.2% of the overall purchase price); and without it, the proposed 40B development would not be feasible because the balance of the Site is effectively landlocked. In short, it not only "related to construction on the same land ..." but also it is essential to the proposed 40B development.

filing and leveraging during P&S negotiations a special permit or other zoning application related to construction on the same land, thereby keeping 40B land more affordable and freeing up resources to construct more affordable housing units; (c) protecting cities and towns and the public from the adverse effects of repetitive applications as happened here; and (d) respecting state law enacted "to give finality to administrative [zoning] proceedings and to spare affected property owners from having to go repeatedly to the barricades on the same issue,'" *Hall v. Zoning Bd. of Appeals of Edgartown*, 40 Mass. App. Ct. 918, 918 (1996), citing *Ranney v. Bd. of Appeals of Nantucket,* 11 Mass. App. Ct. 112, 115 (1981) (citing M.G. L. c. 40A, § 16's two year ban on reapplication for the same zoning relief).

By applying the Related Application Safe Harbor regulation as set forth herein, the Board's decision advances all of these readily apparent purposes without creating <u>any</u> conflict with either HAC's narrower statement of purpose in distinguishable administrative cases or with the primary purpose of Chapter 40B itself.[22]

7. <u>Enforcing the Related Application Safe Harbor Is Fair</u>

Given the chronology summarized in Appendix 1, there was ample opportunity in this case for the managers of Piper Lane, LLC (the Comprehensive Permit Applicant) to protect against the potential consequences of the Related Application Safe Harbor, but they did not do so. Thus, Steven Paquette and David Russell (who became the managers of Piper Lane, LLC) entered into a Purchase and Sale Agreement dated November 7, 2017, to acquire the land at 4-6 Piper ~~Road~~<u>Lane</u>, Acton "to construct a so-called 40B development containing no less than 28 detached or multifamily homes ..." which will require a "Comprehensive Permit under General Laws Chapter 40B." P&S Agreement ¶ 9. To ensure feasible access to a public way from this effectively land-locked land, they knew or should have known at that time that they also needed an agreement to acquire the access parcel at 90 School Street.

From the date of the first P&S Agreement (November 7, 2017), they had almost four months to put the access parcel at 90 School Street under agreement before the owner of 90 School Street filed the Special Permit Application on February 26, 2018. They did not do so. In addition, they had another month after the Special Permit Application was filed on February 26, 2018, to negotiate with and convince the owner of 90 School Street to withdraw the Special Permit Application before the Board duly noticed the public hearing on the Special Permit Application for April 9, 2018. They did not do so. Had they done either, they would have been completely outside the one-year Related Application Safe Harbor when Piper Lane, LLC filed the Comprehensive Permit Application on April 2, 2019, because the Safe Harbor would have ended

[22] "The primary purpose of the act is 'to provide relief from exclusionary zoning practices which prevent[ ] the constructon of badly needed low and moderate income housing.'" See *Bd. of Appeals of Woburn v. Hous. Appeals Comm. of Dep't of Hous. & Cmty. Dev.*, 451 Mass. 581, 582–83 (2008)). There is no evidence whatsoever that the Town of Acton has enacted or enforced exclusionary zoning practices. Rather, the Town has an approved, inclusive Housing Production Plan, and the Town has made significant progress to create new affordable housing under the Plan. As such, the primary purpose of Chapter 40B is fully protected while enforcing the Related Application Housing Production Plan Safe Harbors in this case.

– at the latest – a year after the Special Permit Application was withdrawn. See 760 CMR 56.03(7)(d).

Instead, when the Special Permit Application was filed and remained pending, Town staff and numerous members of the public were forced to convene on April 9, 2018, May 7, 2018, and June 4, 2018, in an effort to address the Special Permit Application. Ironically, even in May 2018, when Messrs. Paquette and Russell had the property at 90 School Street under agreement, they took no action to cause the owner to withdraw the Special Permit Application before the Board's June 4, 2018, hearing and vote.

To the extent that Piper Lane, LLC "jumped the gun" when it prematurely filed the Comprehensive Permit Application on April 2, 2019 while the Related Application Safe Harbor was still in effect,[23] it has only itself and the owner of 90 School Street to blame. Accordingly, enforcing the Related Application Safe Harbor is fair in this case.

FINDINGS & CONCLUSIONS

The Related Application Safe Harbor established by 760 CMR 56.03(1)(e) & 56.03(7) applies to this case.

The exception to the Related Application Safe Harbor in 760 CMR 56.03(7) (Final Sentence) is not applicable to this case.

The Related Application Safe Harbor will not expire until June 15, 2019, one year after the Board filed its denial of the Special Permit Application. See 760 CMR 56.03(7)(c).

Piper Lane, LLC filed the Comprehensive Permit Application on April 2, 2019 while the Related Application Safe Harbor was still in effect.

Pursuant to 760 CMR 56.03(8)(a), a denial of the comprehensive permit or the imposition of conditions or requirements would be consistent with local needs, because the grounds for the Related Application Safe Harbor pursuant to 760 CMR 56.03(1)(e) and 56.03(7) have been met.

Such a denial would be without prejudice, and it shall not preclude re-filing of the Comprehensive Permit application at a later date. 760 CMR 56.03.

[23] The Related Application Safe Harbor will not expire until June 15, 2019, one year after the Board filed its denial of the Special Permit Application. See 760 CMR 56.03(7)(c).

NOTICE

For the forgoing reasons, pursuant to 760 CMR 56.03(8)(a), the Acton Zoning Board of Appeals provides this written notice to the Applicant, Piper Lane, LLC, with a copy to the Massachusetts Department of Housing and Community Development, that the Board considers that a denial of the comprehensive permit or the imposition of conditions or requirements would be consistent with local needs, because one or more of the grounds set forth in 760 CMR 56.03(1) have been met, specifically, the Related Application Safe Harbor pursuant to 760 CMR 56.03(1)(e) and 56.03(7).

RIGHT TO CHALLENGE

This interlocutory decision is not a final decision of the Board on the merits of the Comprehensive Permit Application. Rather, pursuant to 760 CMR 56.03(8)(a), if the Applicant wishes to challenge the Board's assertion that the Related Application Safe Harbor pursuant to 760 CMR 56.03(1)(e) and 56.03(7) applies, the Applicant must do so by providing written notice to the Massachusetts Department of Housing and Community Development, with a copy to the Board, within 15 days of its receipt of the Board's notice, including any documentation to support its position. The Massachusetts Department of Housing and Community Development shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials. Any failure of the Department to issue a timely decision shall be deemed a determination in favor of the municipality. See 760 CMR 56.03(8)(a).

TOLLING

The hearing on the Comprehensive Permit Application remains pending. However, please be advised that this notice invoking the procedures set forth in 760 CMR 56.03(8)(a) shall toll the requirement to terminate the hearing on the Comprehensive Permit Application within 180 days.

BOARD ACTION AND VOTE

The foregoing notice and decision was moved, seconded, voted, and unanimously approved by the Board on May 13, 2019.

Respectfully submitted,

TOWN OF ACTON ZONING BOARD OF APPEALS,

Kenneth F. Kozik, Chair

Adam Hoffman, Member

Ye Emilie Ying, Associate Member

APPENDIX 1 (CHRONOLOGY)

Date	Event
Nov. 7, 2017	P&S Agreement for 4-6 Piper ~~Road~~ Lane for $900,000 (later reduced by 7th Amendment to $850,000) • Seller = Brian J. Magoon and Susan Hadley-Magoon • Buyer = Steven Paquette and David Russell or nominee; later amended to Piper Lane, LLC • To "construct a … 40B development [with] no less than 28 detached or multifamily homes"
Feb. 26, 2018	GS Holdings, LLC files Special Permit Application for 90 School Street
April 9, 2018	First Public Hearing Date for GS Holdings' Special Permit Application
May 7, 2018	Second Public Hearing Date for GS Holdings' Special Permit Application
May __, 2018	P&S Agreement for 90 School Street (20,360± sf, site of burned down house) for $350,000 • Seller = GS Holdings, LLC • Buyer = Steven Paquette and David Russell or nominee; later amended to Piper Lane, LLC • To "construct a … 40B development [with] no less than 36 detached or multifamily homes"
June 4, 2018	Third Public Hearing Date for GS Holdings' Special Permit Application
June 4, 2018	Board Votes to Deny Special Permit Application
June 15, 2018	Board Files with Town Clerk Written Decision Denying Special Permit Application
April 2, 2019	Piper Lane, LLC Applies for Comprehensive Permit for 90 School St. & 4, 4 Rear and 6 Piper Lane • Total Land Area = 6.59± acres (286,978± sf) (see Plan Sheet C1.1). • 90 School Street = 7.1% of Land Area but 29.2% of the Overall Agreed Purchase Price • 90 School Street = Only Viable Access to a Public Way (see Plan Sheets C3.2 and C2.1)
April 8, 2019	Board Votes to Grant Comprehensive Permit for Avalon Phase II for 86 New 40B Rental Units
April 9, 2019	Comprehensive Permit for Avalon Phase II Filed with Town Clerk
April 9, 2019	Town of Acton Requests Two-Year Safe Harbor Certification from DHCD
May 6, 2019	Initial Public Hearing on Piper Lane, LLC's Comprehensive Permit Application
May 9, 2019	DHCD's Determination on HPP Safe Harbor Due
May 21, 2019	15 Day Deadline to Provide Written Notice of Reliance on Safe Harbor(s)
June 15, 2019	Expiration of Related Application Safe Harbor (if applicable)
April 9, 2021	Expiration of Housing Production Plan Safe Harbor (if applicable)