

Case#: PB #2009-17

Site: 1 Benton Road

Applicant: MLM Realty Trust

### **ADMINISTRATIVE APPEAL SUPPORTING STATEMENT**

This appeal originates from the Somerville Planning Board's (the "Board") denial of MLM Realty Trust's ("MLM") application for subdivision and site plan approval under sections 8.8 and 5.4 of Somerville Zoning Ordinance ("SZO") (collectively the "Site Plan Application"). On December 29, 2009, MLM filed its Site Plan Application.<sup>1</sup> On August 24, 2010, after the issuance of several reports by the Planning Staff recommending conditional approval, submittal of multiple expert reports regarding drainage implications and traffic analysis, and public hearings on the record, the Planning Board voted to deny the application for site plan approval and issued its written decision on September 7, 2010. (Attachment A).

In bringing this appeal, MLM contends that the Planning Board's denial of its application for subdivision and site plan approval is a pretext to deny a new conforming RB lot that proposes a 3-unit use of right. The decision is arbitrary and capricious because, without limitation, it repeatedly states its intent to deny a use of right 3-unit building by first denying creation of a conforming lot (subdivision by site plan review). The decision blocks a subdivision in order to block a "use of right" 3-residential units. The decision's goal – to deny without merit a conforming lot and a 3-unit use of right – is clear: As set forth in the Planning Board's denial, "[b]ecause the subdivision would subsequently allow for the development of three units on the site by-right, the Planning Board finds that there is no reasonable condition that can mitigate this impact." (Attachment A at page 4). "Impact" is the decision's misnomer for a "use by-right." Such pretext turns zoning on its head.

MLM now seeks review of the Board's ruling and requests that the Zoning Board of Appeals (1) grant its subdivision and site plan approval, overturning the denial, or (2) remand the application for site plan approval for the subdivision to the Planning Board for approval with or without reasonable conditions.

1. The Subdivision Proposal for a Use By-Right Conforms to all Zoning Requirements under the Somerville Zoning Ordinance

Site plan review cannot be used to deny a subdivision where both lots conform to the dimensional and density requirements of the City of Somerville. MLM had met the criteria for subdivision approval. The denied lot conforms to the zoning as the minimum lot size and other dimensional requirements of the SZO are met for a proposed residential 3-unit use of right lot. The application is a minor project according to the Somerville Zoning Ordinance §5.4.5 as it was requesting the creation of only one new lot. Both proposed lots met the minimum lot size required for the RB District as one lot would be 12,296± sq. ft. and the other would be 9,622± sq. ft. See SZO §8.5; Attachment A. Thus, with regards to obtaining subdivision approval, the application is in full compliance. To date, the Board cannot point to any subdivision requirements that the Application has not met. In Factor 12, the decision admits:

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<sup>1</sup> The application was deemed complete by the Board as of March 19, 2010.

“The proposed site plan conforms to the minimum lot size and minimum frontage requirements set forth in Article 8 of the Ordinance. After subdivision, the existing structure continues to conform to other dimensional requirements such as minimum lot area per dwelling unit, floor area ratio, yard setbacks, etc. The applicant has shown that a proposed three-unit development on the new lot could also confirm (sic) to the dimensional and parking requirements.”

(Attachment A). The denial decision untenably contends that a conforming lot, fronting on an existing public way, can be denied, even though the lot hosts a use of right (residential 3-unit). It is arbitrary and capricious to deny the proposed lot, as it complies with all required dimensional and density requirements.

Further, the proposed 3-unit residential use is a use of right in the RB zone. The denial decision acknowledges that a subdivision that creates “only one new lot,” as is the case here, is classified as a “minor project” under SZO 5.4.5. (Attachment A). The decision acknowledges that the property is surrounded by one-, two-, and multi-family homes. As set forth in section 1.2 of the Somerville Zoning Ordinance, the purpose of the SZO is to “encourage housing for persons of all income levels.” The denied lot would provide, as a matter of right, three additional housing units.

2. The Application for Subdivision Approval Follows the Standards of By-Right Site Plan Review. Under By-Right Site Plan Review, the Planning Board May Impose Reasonable Terms and Conditions; Rejection is Permitted in Very Limited Circumstances.

Section 8.8 of the Somerville Zoning Ordinance provides the review procedures for subdivision applications under the city’s own ordinances, namely that “[t]he subdivision of any parcel of land shall be subject to Site Plan Approval under the procedure set forth in Section 5.4 herein.” SZO §8.8. The review here is “site plan review” not “special permit” review. There is no special permit required for this subdivision, creation of one new conforming residential lot. There is no doubt based on the plain language of the ordinance that all subdivision requests fall under the analytical structure of a routine site plan request. In fact, the name of the provision itself, “Site Plan Approval for Subdivisions”, reiterates the city’s desire to use site plan procedures, not special permit procedures, to make decisions regarding applications for subdivision approvals.

Massachusetts permissive attitude towards requests for by-right site plan approval cannot be underestimated in light of the appeal at hand. Traditional site plan review, as opposed to special permit approval, is a deferential zoning regulation according to Massachusetts law. Site plan approval is to be used only “as a permissible regulatory tool for controlling the aesthetics and environmental aspects of land use.” Dufault v. Millennium Power Partners, L.P., 49 Mass. App. Ct. 137, 138-39 (2000). The planning board may only evaluate the proposal and impose reasonable terms and conditions on the proposed use [by-right]. Quincy v. Planning Bd. of Tewksbury, 39 Mass. App. Ct. 17, 21-22 (1995). See also Prudential Ins. Co. of Am. v. Bd. of Appeals of Westwood, 23 Mass. App. Ct. 278, 284 n.9 (1986). Proposal of reasonable conditions is a key factor. As an example, “imposing a condition that requires [a party] to

completely redesign the interior and exterior of each building to add multiple entrances to accommodate vague exterior aesthetic concerns is not reasonable and exceeds the board's authority." Castle Hill Apartments Ltd. P'ship v. Planning Bd. of Holyoke, 65 Mass. App. Ct. 840, 844 N.E.2d 1098, 1104-05 (2006).

Rejection of a by-right site plan is limited to very narrow circumstances: where the application fails to provide adequate information on the considerations at issue as part of the application, and where "the site plan, although proper in form, may be so intrusive on the needs of the public ... [that] despite best efforts, no form of reasonable conditions could be devised to satisfy the problem with the plan." Prudential Ins. Co. of Am., 23 Mass. App. Ct. at 284 n.9. Such is not the case here. See SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 106 n. 12 (1984) ("[I]f the specific area and use criteria stated in the by-law were satisfied, the board did not have discretionary power to deny a permit, but instead was limited to imposing reasonable terms and conditions on the proposed use."). The criteria for denial of a site plan application is stringently upheld by the court and seldom met.

In contrast, the planning board has the discretion to deny a special permit. MacGibbon v. Bd. of Appeals of Duxbury, 356 Mass. 635, 638 (1970). Denial of a special permit by the planning board is permitted even if the facts showed that a permit could be lawfully granted. ACW Realty Mgmt. Inc. v. Planning Bd. of Westfield, 40 Mass. App. Ct. 242, 246 (1996) (citing Zaltman v. Board of Appeals of Stoneham, 357 Mass. 482, 484 (1970)).

Had the City intended a special permit-type review, then the City would have enacted such provisions instead of site plan review. Somerville chose to use the more permissive standard of site plan review where the Board's authority is limited to approval with reasonable conditions and denial is an abuse of discretion. SZO §5.4.4(c) is consistent with an approval with reasonable conditions. SZO §5.4.6 speaks of approval with or without conditions. Consistent with site plan review authority, pertinent sections of the SZO make no mention of denial.

The permissive nature of this standard was not unknown nor overlooked by the Planning Board. When asked by the Planning Board whether it could "deny the application for site plan approval involving a use permitted as of right under the Somerville Zoning Ordinance, relative to the subdivision of an existing parcel into two separate parcels", the Planning Staff noted that there have been no appellate court decisions upholding the denial of a site plan application on the grounds that no reasonable conditions could be satisfy the deficiencies with the plan. In the opinion of David Shapiro, Assistant City Solicitor for the City of Somerville, Massachusetts, "site plan approval may be withheld for a use permitted as of right only where the problem cited by the board is 'so intractable that it could admit of no reasonable solution.'" See May 1, 2010 Memorandum of the Law Department of the City of Somerville, Massachusetts (Attachment B).

3. MLM's Application for Site Plan and Subdivision Approval was Denied even though the Planning Staff had Urged Conditional Approval on Several Occasions.

MLM's application for subdivision and site plan approval received high marks and conditional approval throughout the tenure of debate over the application. In the April 12, 2010

report, the Planning Staff recommended the approval of the Site Plan Application. (Attachment C). “Based upon this standard [SZO §5.4.6] and the above findings, the Planning Staff *recommends conditional approval* of the requested site plan approval. The Applicant has provided a complete application, reasonable conditions can be placed on the proposal to ensure that the project conforms to the standards and criteria set forth in Section 5.4.6, and the project complies with applicable requirements of the Somerville Zoning Ordinance.” (emphasis added). On May 4, 2010, the Planning Staff *again recommended* the conditional approval of the Site Plan Application after the April 15, 2010, public hearing. (Attachment D) (emphasis added).

Despite the Planning Staff’s recommendations, the Board denied the site plan application on August 24, 2010. When evaluating under site plan review SZO §5.4.6, there are twelve (12) boilerplate concepts. The applicant’s compliance with nine (9) of the twelve concepts is admitted in the decision or acknowledged as capable of fulfillment with reasonable condition(s) (Attachment A):

- Under No. 1, the Board acknowledges that the property is not located in an overlay district, and therefore, there is no overlay concern.
- In No. 2(a), the Board acknowledges that there are no wetlands, floodplains or hilltops, and therefore, there are no such concerns.
- In No. 2(e), the decision acknowledges that new deciduous trees would be planted, and the only substantial trees removed are dead.
- In No. 3, the decision acknowledges that water supply and sewage disposal are not a problem as concerns a new conforming RB lot.
- In No. 4, the decision acknowledges that development of the lot (3-family use of right) would be required to conform to the City Engineering Department storm water management which the applicant will comply with (i.e. a reasonable approval condition).
- In No. 5, the decision states, “The subdivision would not place any unforeseen demand on municipal service and infrastructure.” This is a clear acknowledgement that there is no municipal problem associated with a new conforming RB lot and/or 3-unit use of right.
- In No. 8, the applicant would meet the City’s electric, telephone, cable TV and other utility installation requirements.
- In No. 9, the decision acknowledges that the proposed use is residential, specifically, a new 3-family and boilerplate No. 9 does not apply because a new RB conforming lot with 3-units of right does not include “exposed storage, machinery, service areas, truck loading areas, utility buildings or structures” requiring screening.
- In No. 10, the decision acknowledges that a shadow study can be submitted prior to construction on the new lot.
- In No. 11, the decision acknowledges that a lighting plan was submitted and that a 3-unit residential use would not cause unreasonable glare on public roads, ways, or onto neighboring properties.

- In No. 12, the decision acknowledges that the proposed site plan conforms to the minimum lot size and minimum frontage requirements, SZO, Art. 8. The decision further states: “The applicant has shown that a proposed three-unit development on the new lot could also confirm (sic) to the dimensional and parking requirements.”

The Planning Board’s denial uses Factors 2, 6 and 7 as a pretext to deny a new conforming RB lot that proposes a 3-unit use of right, claiming that all of the following deficiencies were so intractable that no reasonable conditions could mitigate their impact:

- Failure to preserve natural or historic features (SZO §5.4.6(2)(b));
- Failure to maximize open space retention (SZO §5.4.6(2)(c));
- Failure to preserve scenic views from publicly accessible locations (SZO §5.4.6(2)(d));
- Failure to provide for safe vehicular and pedestrian movement within the site and to adjacent ways, including sidewalks, cross-walks and the like (SZO §5.4.6(6));
- Failure to ensure that the building design and landscaping shall be in harmony with the prevailing character and scale of buildings in the neighborhood through the use of appropriate building materials, screening, and other architectural techniques (SZO §5.4.6(7));
- Failure to comply with all zoning requirements, in particular failure to conserve the value of land and buildings and to preserve historical and architectural resources of the City (SZO §5.4.6(12)).

In essence, the Planning Board denied the Site Plan Application on two grounds, both of which are unfounded. First, the Board contends that the intersection of Benton Road and Summer Street is an area of safety concerns due to vehicular and pedestrian traffic, both of which would be augmented with construction of the new units. According to the Board, no adjustments to site plan could diminish the traffic and vehicular safety concerns present at that intersection. Second, the Board states that the proposed development is not in harmony with the Local Historic District adjacent to the Property or the structures nearby within the National Register District and the constructions plans cannot be revised so as to conform to the character of the neighborhood. Neither conclusion is merited.

4. The Traffic Concerns Cited By the Planning Board are Unfounded and Unreasonable in Light of the Evidence Presented During the Site Approval Process.

The proposal – a conforming lot with a 3-unit use of right – provides for safe vehicular and pedestrian movement. Any objections by Planning Board due to traffic and safety are unfounded in light of the weight of evidence already on record and the reasonable conditions that were proposed:

- MLM’s outside consultant, Design Consultants, Inc., conducted a traffic impact assessment which concluded that “low traffic volumes generated by the residential development will have little measurable impact on the safe and efficient flow of traffic in the vicinity” (May 3, 2010 Report, Attachment E) and that “the proposed development

will have no measurable impact on the safe and efficient flow of traffic in the vicinity” (June 3, 2010 Report, Attachment F);

- Fort Hill Infrastructure prepared a separate Traffic Memorandum which concurred with the findings of Design Consultants, Inc. The report found that “a safety problem does not exist based on the accident history and accident rate” and noted that “several reasonable safety measures can be taken however unnecessary or unrelated to the addition of the new 3-story building they may be” (Attachment G);
- MLM has repeatedly adjusted the site plan so as to reduce the curb cut, minimize the visibility of asphalt, increase on-street parking, among other adjustments to the plan (April 12, 2010 Report, Attachment C);
- Somerville’s own Traffic and Parking division had no objections to the application as set forth in the May 4, 2010 Planning Staff Report (Attachment D);
- The Planning Staff noted in its May 18, 2010 memorandum regarding pedestrian and vehicular safety that the vehicles utilizing the Summer Street driveway would be exiting the driveway in a forward fashion, in contrast to 22 of the 29 other driveways off Summer Street where cars already back out onto the street (Attachment H);
- Terence Smith, Somerville Traffic Engineer, stated in a August 19, 2010 e-mail that the recommendations presented by Fort Hill Infrastructures “would be of benefit to an already safe intersection.” (emphasis added) (Attachment I).

The proposal – a conforming lot with a 3-unit use of right – provides for safe vehicular and pedestrian movement. The decision uses No. 6 as a pretext to deny a new conforming lot with a use by-right with minimal or negligible impact(s). The evidence on the record clearly demonstrates that (a) there are no traffic or pedestrian safety problems around the 1 Benton Road property, and/or (b) if such problems exist, they can be remedied through reasonable and appropriate conditions. See May 18, 2010, Planning Staff memorandum outlining several alternative configurations which could decrease traffic/safety concerns (Attachment H); June 3, 2010, Design Consultants, Inc. Report (Attachment F); Fort Hill Infrastructure Traffic and Safety Memorandum (Attachment G).

Where reasonable conditions are available to remedy a traffic problem, denial of a site plan application must be overturned. Quincy, 39 Mass. App. Ct. at 22 (finding that the Board “had made no effort to impose reasonable and appropriate conditions on the permitted use. More important, the board presented no competent evidence at trial, either through a properly qualified expert or an independent traffic study, of a traffic problem ‘so intractable that it could admit of no reasonable solution.’”); Prudential Ins. Co. of Am., 23 Mass. App. Ct. at 283 (“He determined, in a decision supported by exhaustive factual findings, that the view of the traffic situation suggested by Prudential's consultants and their plans to alleviate the board's concerns were sound, rejecting in the process the board's contrary views.”). See also Wolcott-Marshall, Inc. v. Town of Rutland, 7 LCR 119 (1999). Thus, the weight of the evidence and Massachusetts law supports site plan approval and reversal of the Planning Board’s denial.

5. Denial of the Site Plan Application due to Concerns over Historical Consistency with Adjacent Historical Districts is Equally Unreasonable and Unfounded.

The Planning Board's denial of the Site Plan Application due to architectural and aesthetic deficiencies is equally without merit.

A consistent theme throughout the Planning Board's decision is the detrimental impact of the proposed subdivision and site plan upon the adjacent Local Historic District and structures within the National Register District.<sup>2</sup> While historical aesthetic and consistency are important factors to review in a site plan and subdivision application, there are limits on the spectrum of influence of a National Register or Local Historic District. 1 Benton Road is outside of the Westwood/Benton Local Historic District and is not itself listed on the National Register of Historic Places. As such, the property is beyond the control of the Historic District and beyond the authority the Somerville Historic Preservation Commission. See M.G.L. c. 40C, §6 (“*no building or structure within an historic district shall be constructed or altered in any way that affects exterior architectural features unless the [Historic] [C]ommission shall first have issued a certificate of appropriateness ...*”) (emphasis added); Good Builders, Inc. v. Falmouth Historic Dist. Comm’n, No. 05686, 2007 WL 5447459, at \*1 (Mass. Sup. Ct. July 10, 2007) (ruling that the Falmouth Historic Districts Commission “must confine itself to reviewing those portions of the project which lie within the district vis-à-vis the surrounding properties that lie within the district”); Warner v. Lexington Historic Dist. Comm’n, 64 Mass. App. Ct. 78, 79-80 (2005) (“The role of the commission is to police the construction, alteration, and demolition of visible buildings and structures *within the defined district*, including changes of color and posting of signs.”) (emphasis added). To the extent that a Planning Board may take into consideration various historic aspects of a property, the historic district designation is given weight only where the property itself is a historic site. See Meyer v. Planning Bd. of Westport, 29 Mass. App. Ct. 167, 174 (1990) (“Prescinding from the question whether consideration of historicity is within the scope of a planning board’s powers ... [t]here was no evidence of current historical investigation on the locus or designation of it as a historic site.”). In fact, MLM can find no cases in which the historical considerations of an adjacent property so outweighed the proposed site plans or zoning proposals such that the denial of the application was upheld.

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<sup>2</sup> The opinion includes references to the Historic District and National Register district in several sections: Factor 2(b) (“[t]he project does not protect the value and the nature of the structures within the National Register district and the adjacent Local Historical District”); Factor 2(c) (“[t]he Planning Board finds that the proposal does not maximize open space retention by allowing the development of a large three-family structure on a historic rear yard adjacent to a Local Historic District”); Factor 2(d) (“[t]he Planning Board finds that the proposal does not preserve scenic views from publicly accessible locations by allowing the development of a large three-family structure on a historic rear yard adjacent to a Local Historic District and forever altering the scenic nature of the neighborhood”); Factor 7 (“[t]he architectural elevations incorporate elements of historic buildings in the area, but the development of a new residential structure in a rear yard adjacent to a Local Historic District is not in harmony with the prevailing character and scale of buildings within the neighborhood”); and Factor 12 (“[t]he application proposes a subdivision to allow a new three-family dwelling in a location that is within a National Register historical district and adjacent to a Local Historic District .... [T]he application will allow an owner to place a new structure on the site, forever altering the historic character of the neighborhood”).

Even if MLM were to concede that the Historic Commission and/or the Planning Board has the authority to make determinations regarding 1 Benton Road in light of its physical location next to, but not part of, a historic district, their powers are limited. Like the criteria for by-right site plan approval, the Historic Commission may only recommend adjustments to a proposed site plan; its conclusions cannot form the basis for site plan rejection. Historical Comm'n v. Marquis, No. 317771 (KCL), 2008 WL 921709, at \*4 (Mass. Land. Ct. April 7, 2008) (“G.L. c. 40, §8D does not grant a historical commission enforcement power, rather it grants it the power to ‘make such recommendations as it deems necessary.’”) (internal citations omitted).

Here, the Historic Preservation Commission did extend its assistance in crafting reasonable conditions for the development of the lot. In its April 14, 2010 Letter to the Planning Board, the Historic Preservation Commission “respectfully request[ed] the opportunity to work with the Planning Board Staff, or their designee, as part of their continuing review and approval of the site and building plans.” (Attachment J) (emphasis added). The Commission did not encourage the rejection of the application on the grounds of aesthetic inconsistency; instead, it encouraged the development of complimentary and compatible development.

Likewise, close scrutiny over the specific factors cited by the Planning Board demonstrate the defenseless nature of the decision.

First, boilerplate subcategory 2(b) calls for “*to the extent feasible*” “preserve[ation] [of] natural or historic features.” The decision contends that this prohibits a new conforming lot in the RB district. However, the first paragraph of the decision acknowledges that the “subject property” has not been designated part of a local historic district (Attachment A). The decision argues that mere subdivision of the land, without the building of any structure on the land, ruins the “natural” and “historic” features of a single undivided lot. Under this analysis, a subdivision of one lot into two conforming lots could always be denied even if no structure is built. What good are the dimensional requirements defining a conforming lot if the SZO protection of a conforming lot (fronting on an existing public way) is denied because a Board does not want a use of right building? The decision provides no evidence as to why one new conforming lot, regardless of any proposals for a new structure on the new lot, “does not protect the value and the nature of the structures within the National Register district and the adjacent Local Historical District.”

Second, contrary to the decision, subcategory 2(b) does not mention “value.” An excess yard or a backyard to a “Benton Corwin house” is not an “historic feature.” The decision admits that it is denying the subdivision, albeit on specious grounds, to block a use of right on a conforming lot, a right which is normally protected.

Third, subcategory 2(c) provides “to the extent feasible” “maximize open space retention.” The decision untenably uses 2(c) to deny a conforming lot with a use of right, even though “open space” on the new lot complies, or can be conditioned to comply with, the SZO, Article 8, open space requirement. To impose something higher than the open space requirement of Article 8 is, without limitation, an abuse of discretion. The decision’s apparent intent is to



impose some arbitrary open space requirement, higher than the open space requirement within Article 8, in order to deny a new conforming lot in the RB zone with a use of right (3 residential units). Without evidence or reference to compliance with SZO, the decision simply states: “[t]he Planning Board finds that the proposal does not maximize open space retention by allowing the development of a large three-family structure on a (sic) historic rear yard adjacent to a Local Historic District. Because the subdivision would subsequently allow for the development of three units on the site by right, the Planning Board finds that there is no reasonable condition that can mitigate this impact.” The decision obstructs creation of a conforming lot in order to prevent a residential “use by- right.”

Fourth, subcategory 2(d) provides “to the extent feasible” to “preserve scenic views from publicly accessible locations.” The decision denies rights normally secured (a conforming lot and a residential use of right) because the proposed 3-unit structure allegedly alters “the scenic nature of the neighborhood.” That is not a finding consistent with the boilerplate standard. The standard, preserve scenic views to the extent feasible, is not intended to deny a conforming lot and a 3-unit residential use of right. Such pretext turns zoning on its head.

Fifth, subcategory 7, design in approval with reasonable condition(s) consistent with site plan review, is similarly used as a pretext for denial, and not a good faith design review. The decision acknowledges reasonable design, stating “[t]he architectural elevations incorporate elements of historic buildings in the area ....” However,

the Planning Board finds that any new development on this site, regardless of its design, would not be in harmony with the prevailing character and scale of a neighborhood that has stood for a long time with very large homes on larger-than-normal lots. Furthermore, no reasonable condition can be places on this application to address this concern.

(Attachment A). This is unbridled discretion run amok. A conforming RB lot is denied because of the residential use by-right that would follow. This finding is averse to the standard itself which provides no support for blocking a use of right building. Contrary to the decision, guideline No. 7 provides that “[b]uilding design and landscaping shall be in harmony with the prevailing character and scale of buildings in the neighborhood through the use of appropriate building materials, screening and other architectural techniques.” There is nothing in this standard that calls for denying a use of right residential structure.

While the Board’s determination in subcategory 12 admits that the new lot and the lot with the existing building are in conformance with zoning requirements, the decision makes clear its intent to deny a conforming lot in order to block a residential use by-right. Although zoning compliance is largely determined by whether the new lot is conforming and whether the use is one of right, the decision selectively alleges “purposes” of the SZO that allegedly are not, or cannot, be met in order to fabricate a “zoning” attack. The Board’s denial ignores the SZO “purpose” of providing housing, and most importantly, an applicant’s reasonable expectation that a conforming lot and a use of right will be approved under the SZO and applicable law(s). See SZO §1.2 (finding that one of the purposes of zoning is “to encourage housing for persons of all income levels ....”).

6. The Planning Board's Denial May Amount to a Regulatory Taking of 1 Benton Road.

The gravity of the Planning Board's actions in denying the Site Plan Application cannot be understated. The Board has denied MLM the right to subdivide its property, despite the application's compliance with the zoning requirements outlined in the Somerville Zoning Ordinance. It has also denied MLM the right to develop the remainder of the lot, claiming that no reasonable conditions can ensure that the project will conform to the criteria and standards of the Ordinance. In essence, the Planning Board's denial amounts to a regulatory taking of 1 Benton Road. See FIC Homes of Blackstone, Inc. v. Conservation Comm'n. of Blackstone, 41 Mass. App. Ct. 681, 688 (1996); Wilson v. Commonwealth, 31 Mass. App. Ct. 757, (1992) ("[A] taking may still occur if the State regulates property in such a way that it 'does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.'") (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

Therefore, MLM respectfully requests that the Zoning Board of Appeals overturn the decision of the Planning Board and permit the subdivision of 1 Benton Road.