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ELECTRONIC MEMORANDUM

TO:	Needham Zoning Board of Appeals
CC:	Needham Board of Selectmen
FROM:	Jay Talerman, Special Counsel
RE:	Opinion - Response to Memo of Goulston & Storrs, dated June 20, 2013
DATE:	July 10, 2013

Members of the Zoning Board of Appeals:

Introduction

You have asked me to provide my opinion with respect to the memorandum of the law firm of Goulston & Storrs ("G&S"), dated June 20, 2013. The memo of G&S argues that, under c. 40B, the Zoning Board of Appeals is empowered to either waive the restrictions in a certain sewer easement owned by the town; or authorize the relocation of the same. In my opinion, the conclusions of G&S are incorrect as a matter of law and are belied by the facts of this matter. As a consequence, it is my opinion that, from both a legal and practical perspective, the project, as proposed by G&S's client, is presently infeasible.

Relevant Facts

As you are aware, G&S represents Greendale Avenue Venture, LLC which has proposed, via c. 40B, a 300 unit apartment complex on a six acre property on Greendale Avenue (the "Project"). The Project has engendered a variety of concerns regarding public health and safety. Additionally, an issue has arisen regarding a certain Sewer Easement that was duly taken by the Town in 1959 (the "Easement"). A copy of the Easement is attached hereto as Exhibit A. A plan depicting the location of the Easement is depicted on Exhibit B attached hereto. G&S does not dispute the existence and location of the Easement. Nor does G&S disagree that, per the express language of the Easement, any activities that "inconsistent with the construction, maintenance, operation and repair and renewal" of a sewer or drain are prohibited. Nor does G&S disagree that, under a second restriction in the Easement, "no building, structure, foundation or building to be used for habitation shall hereafter be erected or maintained upon the premises hereby taken."

Attached hereto as Exhibit C is a plan that superimposes the Project over the Easement, which is

highlighted in yellow. Plainly, the Easement bisects the subject property and is beneath the buildings and other vital elements of the Project. Accordingly, there is no robust dispute that the above-noted language of the Easement precludes the construction of the Project, as it is presently proposed. Rather than dispute this baseline premise, G&S argues that the Zoning Board of Appeals is empowered to either waive the restrictions within the Easement or approve a relocation of the same. In my opinion, G&S's arguments are both incorrect.

Discussion

1. *The Zoning Board of Appeals does not have the authority to approve construction activities that are inconsistent with the purposes of the Easement*

As noted above, the Easement prohibits any activities that are inconsistent with the use of the area for a sewer line. This prohibition is absolute and is unlike the subsequent restriction that allows the Selectmen to approve the construction of some buildings above the easement (*see infra*). Thus, on its face, the Easement expressly prohibits any excavation, grading or infrastructure work of any kind that may potentially interfere, in any material manner, with the construction or maintenance of a sewer line. While G&S's does not squarely address this language, its memo offers the general argument that the Zoning Board of Appeals may direct the abandonment of the Town's rights under the Easement. However, for the reasons discussed below, c. 40B may not be utilized to effectuate such a result.

This issue is readily resolved by reference to the Massachusetts Supreme Judicial Court's decision in Zoning Bd. of Appeals of Groton v. Housing Appeals Committee, 451 Mass. 35 (2008). In Groton, the Supreme Judicial Court had an opportunity to consider whether the generous waiver provisions of c. 40B permitted the conveyance or abandonment of a Town's property rights. In rejecting such a proposition, and rebutting the Housing Appeals Committee's arguments, the Court ruled that municipal property rights cannot be equated to the permitting processes that are contemplated under c. 40B. The Court's analysis was, in part, premised upon the statutory requirement that the disposition of municipal property can only be authorized by Town Meeting. G.L. c. 40, §15A. As such, the Court ruled that c. 40B "may only be relied on to remove locally imposed barriers to affordable housing, not State law governing the disposition, or transfer, of land, or interests in land, owned by municipalities." 451 Mass. at 41.

The Groton Court also reasoned that a presiding zoning board's authority is limited to the "'power to issue permits or approvals as any local board or official who would otherwise act with respect to such application.' G. L. c. 40B, § 21." Id. at 40. Therefore, a zoning board's (or the HAC's) potential order directing the conveyance or abandonment or other disposition of an easement:

> cannot logically or reasonably derive from, or be equated with, a local board's power to grant "permits or approvals." The phrase "permits or approvals," read in the context of the entire Act, refers to building permits and other approvals typically given on application to, and evaluation by, separate local agencies, boards, or commissions whose approval would otherwise be required for a housing development to go forward.

Id. Based upon Groton Court's reasoning in this regard, there can be no reasonable argument in support of the premise that the Needham Zoning Board of Appeals has the authority to waive, abandon or otherwise dispose of this element of the Easement.

2. *The Zoning Board of Appeals does not have the authority to make decisions on behalf of the Selectmen with respect to the Easement.*

The primary focus of G&S's memorandum is focused upon the second element of the Easement's restrictive language, which affords the Selectmen some authority to allow the construction of residential structures upon the Easement area. There is no disagreement that this language allows the Selectmen to authorize certain limited activities without a vote of Town Meeting. However, there is no support for G&S's argument that the Zoning Board of Appeals may make this decision on behalf of the Board of Selectmen.

Again, G&S's thesis is undone by the conclusions reached by the Groton court. As noted above, the powers conferred upon a zoning board under c. 40B are limited to the typical permitting processes for a development project and cannot be extended to the disposition of property interests. The Groton Court went on to say: "the interpretation is further supported by the examples expressly cited in [c. 40B], § 21, namely, action typically required by local permitting authorities with respect to 'height, site plan, size or shape, or building materials.'" 451 Mass. at 40.

The mere fact that the Selectmen have the authority to permit certain activities under the Easement does not somehow transform the Easement into a traditional permitting scheme that is then subjected to the Zoning Board's jurisdiction under c. 40B. G&S's argument to the contrary has no support under Groton case or any other case decided under c. 40B. There are thousands upon thousands of easements in the Commonwealth that permit municipal authorities to make decisions on the activities regulated thereunder. Each of these decision-making processes is part and parcel of a municipality's ability to use and enjoy the property rights conveyed under the easement. That an easement may have terms that are *fluid* or that impose processes does not make it less of a property right that, per Groton and the cases cited therein, cannot be disposed of or affected by a zoning board's authority under c. 40B.

Furthermore, G&S errs in its argument that the Groton case cannot be extended to the Easement because "the phrase 'requirements and regulations' in § 20 describes 'limitations on *an owner's use of his property*' (emphasis supplied), *Chelmsford v. DiBiase*, 370 Mass. 90 , 94 (1976), not to the use of someone else's property." Groton, 451 Mass at 41. By this reference, G&S appears to be suggesting in a roundabout manner, that, because the Easement is on the development locus, it must be treated as a "requirement or regulation" that can be subsumed into the 40B process. To follow this argument, one must conclude that the Easement is not the Town of Needham's property. However, it is axiomatic that an easement, itself, is a cognizable property interest. Accordingly, due to the fact that the Easement is a property interest belonging to the Town, G&S's opinion not only misplaces reliance on this aspect of Groton, but is, in the final analysis, belied by the exact language upon which its argument is premised.

3. The Zoning Board of Appeals may not "relocate" the easement

In its memo, G&S also suggests, without any factual or legal support, that the Zoning Board of Appeals may relocate the Easement to another portion of the subject property where it would not adversely impact the Project. Even assuming, for the sake of argument, that the Zoning Board of Appeals had the authority to permit construction atop the easement (which it does not, *see supra*), the Zoning Board does NOT have the authority to relocate the easement. Stated differently, G&S conflates the issue of permissive construction upon the Easement with relocation of the Easement altogether.

As noted above, the Easement is a Town-owned property interest that is controlled by the Board of Selectmen. As also noted above, the reach of the Zoning Board of Appeals under c. 40B does not extend to the disposition of the Easement. The Easement is defined with exacting metes and bounds and with reference to a specific plan. Accordingly, per G.L. c. 40, §15A, any abandonment of the present Easement location would be subject to the approval of the Town Meeting.

Nor is G&S's citation to Russell v. Canton (361 Mass. 727 (1972)) supportive of its argument. G&S claims that a phrase in a footnote in the Canton case authorizes the Selectmen (and ostensibly the Zoning Board in its stead) to abandon the present Easement and relocate it without a Town Meeting Vote. G&S's argument suggests that the Canton court ruled that, because the Selectmen's authority derives from a Special Act, Town Meeting action is unnecessary. However, the Canton case does not offer any such dictate. At best, the Canton case merely stands for the proposition that a Board of Selectmen has discretionary authority as to whether to take all, a portion or none of a particular parcel after a town meeting has authorized a taking. Accordingly, G&S's citation to Canton is entirely *off-point.* Moreover, the Canton case, expressly reinforces the statutory prerequisite, under G.L. c. 40, §14, that all municipal takings are dependent on a Town Meeting vote.

Practical and legal impact of the Easement

There has been no vote by the Selectmen to allow any construction of the Project within or upon the Easement. In fact, the Selectmen signaled, at the last session of the Zoning Board's public hearing, that no such vote would be forthcoming. Furthermore, there has obviously been no Town Meeting vote to relocate or abandon the easement and it does not appear that any such vote is on the horizon.

Additionally, given the Project's necessary excavation, grading, infrastructure installation, paving and building construction, it is beyond dispute that the Project and the purposes and the sewer Easement are fundamentally incompatible. Per the restrictions contained within the Easement, this incompatibility must be resolved in favor of the Easement - i.e., the Project must yield to the Easement. Stated more bluntly, for all practical purposes, the Project, as proposed, cannot be constructed due to the restrictions in the Easement.

From a legal perspective, the Easement raises the issue of "Site Control." Under 760 CMR 56.04(1)(c), "[t]o be eligible to submit a [40B] application to a [Zoning] Board," an applicant

must affirmatively demonstrate that it "control[s] the site." While this requirement does not quite rise to a *jurisdictional* prerequisite, proof of "Site Control" is nevertheless an essential component of a "successful applicant's prima facie case for entitlement to a particular government benefit, in this case, a comprehensive permit." Town of Middleborough v. Housing Appeals Committee, 449 Mass. 514, 521 (2007), *emphasis supplied.*

Here, the applicant cannot reasonably contend that it has established a *prima facie case* that it has adequate site control to enable it to construct the Project. The United States Supreme Court, in Virginia v. Black, 538 U.S. 343, 369 (2003), endorsed the following definition of prima facie evidence:

> [t]ypically, 'prima facie evidence' is defined as:
> Such evidence as, in the judgment of the law, is sufficient to establish a given fact ... and which if not rebutted or contradicted, will remain sufficient. [Such evidence], if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but [it] may be contradicted by other evidence. *citing* Black's Law Dictionary 1190 (6th ed.1990).

The Massachusetts courts have agreed. The evidence required to establish a prima facie case cannot rely on conjecture or speculation, but rather, must be evidence which "standing alone and unexplained maintains the proposition and 'warrants the conclusion to support which it is introduced.'" Coghlan v. White, 236 Mass. 165, 169 (1920) (*quoting* Emmons v. Westfield Bank, 97 Mass. 230, 243 (1867)).

In this matter, there can be no material dispute that the Easement exists and deprives the applicant of the necessary property rights to develop the Project as proposed. Neither the applicant nor G&S has presented any colorable facts to the contrary. Nor, as illustrated above, has G&S presented a legal argument that could lead a reasonable person or judge to conclude that, at present, the Project can be constructed without violating the restrictions in the Easement. Finally, G&S has, in my opinion, failed to present a persuasive legal argument in support of the premise that the Zoning Board of Appeals can waive the restrictions contained within the Easement and/or relocate the Easement altogether. Accordingly, the applicant has failed to establish a "prima facie case" with respect to the vital issue of Site Control.

Conclusion

The issues raised herein have a significant impact on the Zoning Board of Appeals' ongoing hearing of the Project. As a threshold matter, I recommend that the Board of Selectmen or Zoning Board of Appeals refer this matter to the applicant's subsidizing agency, MassHousing. Under the c. 40B regulations, MassHousing may withhold or rescind *Project Eligibility* if Site Control is not established.

In the interim, the Zoning Board of Appeals has several options in dealing with this issue within its ongoing public hearing on the Project. Those options include, but are not limited to: truncating the hearing altogether; or directing the Applicant to redesign the project so as to comply with the Easement; or taking no action until all other evidence is received; or some

combination of these various options.

I look forward to working with the Board as it considers these and other issues regarding the Project. In the meantime, please do not hesitate to contact me with any questions that you may have.

Sincerely,

Jay Talerman

EXHIBIT A

3743
551

JUL 16 1959 , 19

TO THE REGISTER OF DEEDS FOR THE COUNTY OF Norfolk

[illegible] .... [illegible]

[illegible] ....

The attachment of the real estate (in said county)

of Julius Doliner

.... Defendant,

made on the 16th day of June, 1959

in an action commenced in the

District Court of East Norfolk Court

by Natick Trust Company Plaintiff,

duly recorded in the said Registry of Deeds in Book 3734 Page 260, [illegible]

[illegible]

[illegible], [illegible], [illegible], is hereby released and discharged.

CURHAN & KAUFMAN

By Nathan J. Curhan

Attorney for the Plaintiff

The Commonwealth of Massachusetts

Suffolk ss. JUL 16 1959, 19

Then personally appeared the above named

Nathan J. Curhan

and acknowledged the foregoing instrument to be his free act and deed, before me

Lillian R. Rogers

Notary Public

My commission expires: March 5, 1960

Recorded July 16,1959 at 2h.34m.P.M.

SEWER EASEMENT Order No. 1959-4

Greendale Avenue to Route 128

WHEREAS under Chapter 59 of the Acts of 1924, the Town of Needham was authorized among other things, to lay out, construct, maintain and operate a system of main drains and common sewers, and to make, lay and maintain drains for the purpose of providing better surface or other drainage, and to elect a board of Sewer Commissioners, and

WHEREAS the said Town of Needham did, at a meeting the Town duly called and held on the thirteenth day of March, 1933, vote to accept Chapter 190 of the Acts of 1932 which authorized the Board of Selectmen to act as a Board of Public Works exercising the powers of Sewer Commissioners and certain other Boards; and

WHEREAS said Board of Selectmen, acting on behalf of said Town by virtue of the authority conferred by said Chapter 59 of the Acts of 1924, and by every other authority

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552

in said Board hereto enabling, desires to take by eminent domain under the provisions of General Laws, Chapter 79 certain rights and easements for the purpose of making, laying and maintaining a main drain and common sewer,

NOW therefore, the said Board acting for and on behalf of said Town does hereby order, declare and specify that said Board takes by right of eminent domain for said Town of Needham an easement for sewer purposes in the following described parcel of land in Needham, Norfolk County, Massachusetts, as shown on a plan, to be recorded herewith, entitled: "Easement to be acquired in Needham, Mass., Greendale Ave. to Route 128, scale 1 in = 40 ft., H. Gordon Martin, Town Engineer", dated June, 1959, the centerline of said 20.00 ft. wide easement being located and described as follows:

Beginning at a point on the northeasterly sideline of Greendale Ave., said point being 81.75 ft. N52°06'34"W from the northerly end of a curve of 2039.93 ft. radius; thence 212.72 ft. N40°51'43"E, 125.23 ft. N63°33'27"E and 65.16 ft. N82°24'13"E to the southwesterly sideline of the State Circumferential Highway (Rte. 128) as laid out by the Commonwealth of Massachusetts in 1953.

Said rights and easements are hereby taken without prejudice to, or interference with the rights of the public or the rights of any person, corporations, Town of Needham or any authorized agent, over said described premises except in so far as is necessary for the exercise of the rights and easement hereby taken. The surface of the above described premises shall upon completion of any work, be restored as far as can reasonably be done, to the condition at the date of the commencement of said construction and may be used thereafter by the owners of the fee, their heirs, and assigns, for all legal purposes not inconsistent with the construction, maintenance, operation and repair and renewal of said sewer or drain, except that no building, structure, foundation of building or structure to be used for habitation shall hereafter be erected or maintained upon the premises hereby taken except in a manner satisfactory to the Selectmen. Garages of any kind and wooden buildings not used for habitation, less than fourteen (14) feet high, may be erected on the premises hereby taken. Anything to the contrary herein contained notwithstanding said garages and wooden buildings shall be erected in accordance with the building By-Laws of the Town of Needham, which may now or hereafter be in force. In the event of the erection upon said premises of a garage of any kind containing a foundation, or any wooden building, containing a foundation, the bottom of the foundation of any such building shall not be built deeper than three feet from the top of the line of sewer or drain, unless prior to the construction of said foundation a concrete cradle is constructed by the owner of the fee, his heirs or assigns, sufficient in strength to support the weight of the building to be erected, without damage to the pipe of said sewer or drain.

The names of the owners of the land as herein stated are assumed to be accurate, but the aforesaid rights and easement are hereby taken whether the said ownership of such land is as stated or not. The land is taken under the provisions of law authorizing the assessment of betterments and the Selectmen adjudge that none of the abutting owners nor

any other person or corporation has sustained any damage or damages for this taking, and therefore, no damages are awarded.

The following is a list of the owners and mortgagees of the land through which said easement is hereby taken:

Owner	Mortgagee
Vincent P. & Mary D. Bordis	No Mortgagee Known

It is ORDERED that a main drain and common sewer be constructed and maintained in that portion of said land as hereby taken; and said Board hereby certifies that it is expected that the parcel or areas adjoining said taking will receive a benefit or advantage other than the general advantage to the community for said improvement, that is, from the construction of said main drain and common sewer but the Board of Selectmen doth hereby adjudge that none of the said owners nor any other person or corporation shall be assessed.

It is further ORDERED that written notices be given to every person having any interest in the said land, whose property is taken by this order or who is otherwise entitled to damages on account of this taking, together with a statement that any person having an interest in said land who is dissatisfied with the award of damages may petition this Board within thirty (30) days from date hereof for an award of damages, and that any person having an interest in said land is allowed one year from the date hereof or such other time as may now or hereafter be provided by statute to bring a petition in the Superior Court, Norfolk County, to have his damages assessed; and

It is further ORDERED that trees or structures on said parcel of land be and the same are hereby not taken and the owners of the land through which said sewer or drain passes be allowed ten (10) days from the date of this order to take off their trees, fences and other structures which may obstruct the construction or operation of said drain or sewer.

It is further ORDERED that a copy hereof together with plan above referred to, be recorded in the Registry of Deeds, Norfolk County, and that a notice of this order be sent forthwith by registered mail to each owner or mortgagee.

IN WITNESS WHEREOF Clarke H. Wertheim, Peter W. Carre, J. Roland Ackroyd, Philip F. Foss and Marian F. Keith, duly elected Board of Selectmen of the Town of Needham acting for and on behalf of said Town of Needham having first read and approved the foregoing, do hereby subscribe our names and cause the Town Seal to be affixed this 14 day of

EXHIBIT B

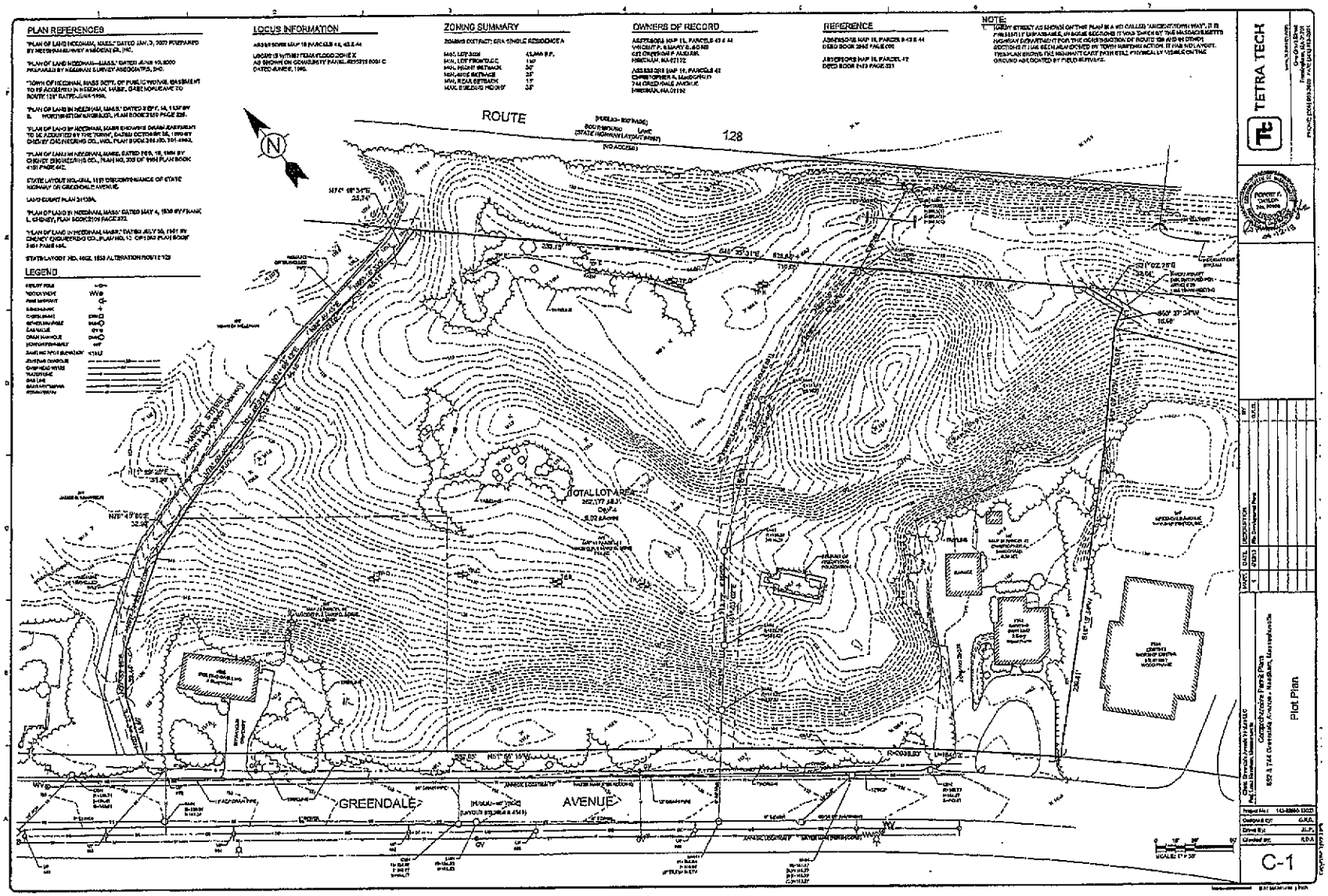
PLAN REFERENCES
LOCUS INFORMATION
ZONING SUMMARY
OWNERS OF RECORD
REFERENCE
NOTE:
LEGEND
ROUTE
128
GREENDALE
AVENUE
TOTAL LOT AREA
TETRA TECH
Comprehensive Permit Plans
652 & 744 Greendale Avenue • Needham, Massachusetts
Plot Plan
C-1

EXHIBIT C

NEEDHAM / WELLESLEY
13593 (ROUTE 128) TIP - BRIDGE #

STATE	FED AID PROJ. NO.	SHEET NO.	TOTAL SHEETS
MASS.	XXXXXXX	2	25

PROJECT FILE NO. 600111

DRAINAGE AND UTILITY PLANS
SHEET 2 OF 25