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March 10, 2014

VIA HAND DELIVERY

Ms. Lorraine Nessar, Clerk
Housing Appeals Committee
Dept. of Housing and
Community Development
100 Cambridge Street, 3rd Floor
Boston, MA 02114

Re: *Greendale Avenue Venture, LLC v. Needham Zoning Board of Appeals*
HAC No. 2014-02

Dear Ms. Nessar:

Enclosed for filing in the above-referenced matter is the following:

1. **APPLICANT GREENDALE AVENUE VENTURE, LLC'S MOTION FOR CONSTRUCTIVE GRANT, OR, IN THE ALTERNATIVE, MOTION TO DEEM THE DECISION OF RESPONDENT BOARD OF APPEALS A DENIAL OF GREENDALE'S COMPREHENSIVE PERMIT APPLICATION; and**

2. **MEMORANDUM OF LAW IN SUPPORT OF APPLICANT GREENDALE AVENUE VENTURE, LLC'S MOTION FOR CONSTRUCTIVE GRANT, OR, IN THE ALTERNATIVE, MOTION TO DEEM THE DECISION OF RESPONDENT BOARD OF APPEALS A DENIAL OF GREENDALE'S COMPREHENSIVE PERMIT APPLICATION.**

Thank you for your assistance in this matter.

Sincerely,

Kevin P. O'Flaherty

KPO/dam
Enclosures

cc: Jason R. Talerman, Esq. (w/enc by email and mail)
Jonathan Witten, Esq. (w/enc by email and mail)
Tristan Foley, Esq. (w/o enc)

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF COMMUNITIES AND DEVELOPMENT
HOUSING APPEALS COMMITTEE

GREENDALE AVENUE VENTURE, LLC, Applicant, v. JON D. SCHNEIDER, JONATHAN D. TAMKIN and HOWARD S. GOLDMAN, as they are and constitute the TOWN OF NEEDHAM BOARD OF APPEALS, Respondents.	)

APPLICANT GREENDALE AVENUE VENTURE, LLC'S MOTION FOR CONSTRUCTIVE GRANT, OR, IN THE ALTERNATIVE, MOTION TO DEEM THE DECISION OF RESPONDENT BOARD OF APPEALS A DENIAL OF GREENDALE'S COMPREHENSIVE PERMIT APPLICATION

Pursuant to M.G.L. c. 40B, §§ 21 and 22 and 760 CMR §§ 56.07(5)(d) applicant Greendale Avenue Venture, LLC ("Greendale") moves that the Housing Appeals Committee (the "HAC") determine that Greendale's application for comprehensive permit (the "Application") has been constructively granted due to the failure of the Respondent Zoning Board of Appeals of the Town of Needham (the "Board") to take final action on the Application and render a decision that disposed of the Application within forty (40) days of the close of the public hearing on the Application.

Alternatively, pursuant to 760 CMR 56.06(5)(b)(4), Greendale moves that the HAC deem the decision of Board that is before the Committee to be a denial of Greendale's Application rather than an approval with conditions, and, therefore, that the

HAC apply in these proceedings the applicable burdens of proof for a comprehensive permit denial under 760 CMR 56.07(2)(a)(2) and 56.07(2)(b)(2).

In support of this motion, Greendale refers to and incorporates herein the arguments made in the Memorandum of Law that Greendale files with this motion.

Respectfully submitted,

GREENDALE AVENUE VENTURE, LLC,

By its attorneys,

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Dated: March 10, 2014

and by email

CERTIFICATION OF SERVICE
I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail ~~(by hand)~~ on 3.10.14

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF COMMUNITIES AND DEVELOPMENT
HOUSING APPEALS COMMITTEE

GREENDALE AVENUE VENTURE, LLC, Applicant, v. JON D. SCHNEIDER, JONATHAN D. TAMKIN and HOWARD S. GOLDMAN, as they are and constitute the TOWN OF NEEDHAM BOARD OF APPEALS, Respondents.	)

APPLICANT GREENDALE AVENUE VENTURE, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR CONSTRUCTIVE GRANT, OR, IN THE ALTERNATIVE, ITS MOTION TO DEEM THE DECISION OF RESPONDENT BOARD OF APPEALS A DENIAL OF GREENDALE'S COMPREHENSIVE PERMIT APPLICATION

Pursuant to M.G.L. c. 40B, §§ 21 and 22 and 760 CMR §§ 56.07(5)(d) applicant Greendale Avenue Venture, LLC ("Greendale") submits this Memorandum of Law in support of its motion that the Housing Appeals Committee (the "HAC") determine that Greendale's application for comprehensive permit (the "Application") has been constructively granted due to the failure of the Respondent Zoning Board of Appeals of the Town of Needham (the "Board") to take final action on the Application and render a decision that disposed of the Application within forty (40) days of the close of the public hearing on the Application.

Alternatively, pursuant to 760 CMR 56.06(5)(b)(4), Greendale moves that the HAC deem the decision of Board that is before the Committee to be a denial of Greendale's Application rather than an approval with conditions, and, therefore, that the

HAC apply in these proceedings the applicable burdens of proof for a comprehensive permit denial under 760 CMR 56.07(2)(a)(2) and 56.07(2)(b)(2).

SUMMARY OF ARGUMENT

In April 2013, Greendale filed an application for a comprehensive permit (the "Application") seeking approval from the Board for a 300-unit rental development on a 6.02-acre property located on Greendale Avenue in Needham, MA (the "Property"). In the course of the public hearings on the Application, Greendale agreed to reduce the number of units in the development to 268 (the "Project").

The Board conducted a public hearing on the Application over the course of about 8 months. The public hearing was closed on December 19, 2013. Accordingly, pursuant to G.L. C. 40B, § 21 the Board had forty (40) days from that date (or until January 28, 2014) within which to take final action on the Application and render a decision to dispose of the Application by: denying the Application; or approving the Application, as submitted; or approving the Application with conditions.

On January 23, 2014, the Board issued a purported decision (the "Decision") to approve the Project subject to 37 conditions. The first condition was a dramatic reduction of the Project from the proposed 268 units to 108 units. The reduction was not based on Board concerns regarding the surroundings or the site, but on the fact that under Needham zoning the most density allowed for apartments is 18 units per acre. The Board made no attempt to justify or connect the 18 unit per acre limit to any local concern. The units-per-acre number was simply transported from zoning and the resulting 108-unit

limit was the product of mere math—the multiplication of the 18-unit per acre zoning density by the number of acres on the site.

Because no plans for a 108-unit project existed, another condition of the purported approval (Condition 4) sent Greendale back to the drawing board to create those plans from scratch; required Greendale to submit those plans to the Board; provided that the Board would then conduct a review (and perhaps a peer review) of those plans during a new public hearing; and would, thereafter, determine whether or not to approve the new 108-unit plan. In requiring Greendale to: produce new plans for a completely different project; return to the Board for a public hearing on those new plans; and await a subsequent decision by the Board to approve or deny those plans, the Decision, on its face, is not a decision at all. The Decision does not by its own terms dispose of or take a final action on Greendale's Application. Instead the Decision purports to grant the Board an indefinite extension of time for the Board to take final action on and dispose of Greendale's Application. Accordingly, the Board failed to render a decision on the Application within the requisite time and the HAC should rule that the Application has been constructively granted.

Alternatively, should the HAC find that there has not been a constructive grant, the HAC should determine that the Decision is a *de facto* denial of the Application, not a conditional approval. The Board's attempt to mask the truth of what it has done cannot bear the slightest scrutiny. The Board has rejected Greendale's Application and its 268 unit plan, instructed Greendale to go back to the drawing board to create a new 108-unit

plan which the Board will then subject to peer review, further public hearing and a future vote to approve or deny the 108-unit plan. The HAC should call the Decision what, in fact, it is—a denial of Greendale's Application—and should apply the applicable burdens of proof for a denial in the adjudication of Greendale's appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The Application and Hearings

On April 12, 2013, Greendale submitted its Application to the Board. Decision (**Exhibit A** hereto) at 30. The Application proposed a development of 300 units of rental apartments on a 6.02 acre site located on Greendale Avenue, Needham MA. Decision at 30.

The Board opened its public hearing on the Application on May 23, 2013; continued it over six subsequent sessions; and closed it on December 19, 2013. Decision at 33. During the course of the public hearing, Greendale reduced the number of units in its proposed Project to 268. Decision at 33.

Once the public hearing was closed on December 19, 2013, the Board had forty (40) days to take final action on and dispose of the Application by approving it, approving it with conditions, or denying it.

On January 23, 2014, the Board filed with the Needham Town Clerk the Decision, which purported to be an approval subject to thirty-seven (37) conditions. Decision at 1 and 40.

The first condition is that the number of units shall not exceed 18 units per acre or 108 units. Decision at 40. Condition 4 of the Decision purports to require that Greendale create new plans for the 108 unit project and that those plans be presented to the Board, subjected to peer review, examined and debated at a new public hearing after the Board would approve or deny those new plans. Decision at 41.

Greendale's Appeal to the HAC

Following the issuance of the Decision, Greendale timely filed an Initial Pleading with the HAC on February 11, 2014. Initial Pleading at 1. Thereafter, on February 27, 20124, Greendale filed a Motion to Amend its Initial Pleading in order to more specifically set forth the issues it would present with respect to the Board's action and the relief it would seek from the HAC. The HAC held a Conference of Counsel before Presiding Officer Shelagh A. Ellman-Pearl on February 28, 2014 at which point Greendale advised the Presiding Officer and those present at the Conference of Counsel that it intended to file a motion that the HAC determine the Application to have been constructively granted or, in the alternative, a motion that the HAC deem the Decision to be a denial and not an approval with conditions.[1]

ARGUMENT

POINT 1: The Application Has Been Constructively Granted

The HAC has the power to determine that a comprehensive permit has been constructively granted due to the failure of a board to meet one of the deadlines in G.L. c. 40B, §21. See 760 CMR 56.07(5)(d).[2] This determination is properly made on a preliminary motion pursuant to 760 CMR 56.06(5)(b)(4). As set forth below, the circumstances presented by this case are such that the HAC should exercise its power to determine that Greendale's Application has been constructively granted.

When the hearing on Greendale's Application was closed on December 19, 2013, a forty day clock began to run on the Board within which the Board was required by law to take final action and render a "decision" that would "dispose of" the Application. See G.L. c. 40B, § 21. Pursuant to the regulations promulgated pursuant to Chapter 40B, the Board was required within that 40-day period to make a "decision" that "dispose[d] of the application" in one of three manners: approve the comprehensive permit on the terms and conditions set forth in the Application; approve the comprehensive permit "with conditions with respect to height, site plan, size, shape or building materials that address matters of Local Concern"; or "deny a Comprehensive Permit as not Consistent with

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[1] Besides the Town and Greendale, an intervener, Matthew Howell, was present and represented by counsel at the Conference of Counsel.

[2] In such case, the permit shall be granted for the number of housing units proposed in the application and the HAC shall impose reasonable conditions to address material local concerns. Id.

Local Needs if the Board finds that there are no conditions that will adequately address Local Concerns." See 760 CMR 56.05(8)(b)(1-3).

On January 23, 2014, the Board filed with the Town clerk a document in which it purported to approve the Application subject to 37 conditions. In the first condition of the so-called Decision, the Board drastically reduced the number of units in the Project from the 268 proposed by Greendale to 108. The condition which imposed this 60% reduction in units did not attempt to justify the reduction by reference to any considerations regarding the site or its surroundings. The condition simply states that the "number of units shall not exceed 18 units per acre for a total project not to exceed 108 units." Decision at 40. The Decision indicates that the 18-unit per acre number was taken from the Needham Zoning By-Law, which provides a density for apartments of 4, 8 or 18 units per acre "depending on the district." Decision at 39. The Board took zoning's maximum 18-unit per acre density, multiplied 18 by the number of acres in the site (6) and determined that the maximum density that should be built on the site was 108 units. Condition 1 of the Decision makes no attempt whatsoever to justify the 18-unit per acre limit based on considerations of the site or its surroundings. There is no discussion in Condition No. 1 or elsewhere in the Decision as to why, given certain site circumstances or surroundings, 18-units-per acre is the right density limit as opposed to 20-units-per acre or 40-units-per acre. The density limit is simply the mathematical result of applying zoning's 18-unit per acre maximum for market rate housing to the site's 6 acre size. The density limit is not the result of any reasoned analysis of the appropriate

Project size or density given the site or its surroundings. As such, Condition 1 is, at its core, an arbitrary and legally untenable condition.

If this were all that the Board did in its purported Decision, it might not be a basis for the HAC to rule that a constructive grant had occurred. However, the Board went further and set out a condition which demonstrates unequivocally that the so-called Decision was not a decision at all and did not, by its express terms, "dispose of" Greendale's Application in one of the three statutorily prescribed manners.

Condition No. 4 of the Decision provides as follows:

> Plans for the revised project must be approved by the Board after a public hearing. Project plans must have requisite detail to assess compatibility with generally accepted standards for engineering and site development and should contain the information set forth in the plans filed during the hearing. Peer review may be required to address issues that were unresolved in the Board's hearings or new issues created by the modified plans.

This condition makes clear that the Decision was not an approval of Greendale's proposed 268-unit Project with conditions as it purports to be, because it expressly requires that Greendale scrap its 268 unit plans and create a new set of plans for a 108-unit project. The Decision also is not a conditional approval of the 108 unit project because it expressly provides that the new 108-unit plans **"must be approved by the Board after a public hearing."** Plans which must be created, reviewed in a future public hearing process and then be either approved or denied clearly have not been "approved" conditionally or otherwise. Accordingly, the Decision is no decision at all

and does not dispose of Greendale's Application. It purports to defer a decision on Greendale's Application to an indefinite future date.

The law does not empower the Board "to decide not to decide." The law does not empower the Board to unilaterally grant itself an extension of time within which it is to take final action on Greendale's Application beyond the statutorily prescribed 40 day period. The law requires the Board to render a "decision" within the 40 day period. See Cardwell, et al. v. Board of Appeals of Woburn, 61 Mass.App.Ct. 118, 119-120 (2004)(the board is required to "render a decision... within forty days after the termination of the public hearing," and if a decision is not rendered, "the application shall be deemed to have been allowed and the comprehensive permit or approval shall forthwith issue.") Id.[3] Because the Board here indisputably failed to render a decision on the Application in the requisite 40 day period, but instead attempted to grant itself the right to kick the Application down the road for future public hearing and future decision, the Application has been constructively granted. This result is mandated by the plain language of Chapter 40B and its implementing regulations. It also is mandated by the legislative purpose which is at the heart of Chapter 40B—"to effect an expedited

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[3] The issue presented in Cardwell was whether the board's failure to issue a written notice of decision within 40 days after the public hearing resulted in constructive approval of a comprehensive permit application. The Court in Cardwell ruled that a constructive grant had not occurred when the board failed to issue a notice of decision within 40 days of the hearing. The issue in this case is whether the Board's purported "Decision" is a decision at all, or, as Greendale submits, a non-decision by which the Board has put off a decision on the Application to some indeterminate date in the future in derogation of its statutory obligation to decide (e.g. "dispose of") the matter within 40 days of the close of the public hearing.

procedure" for action on an application for a comprehensive permit. See Milton Commons Assoc. v. Board of Appeals of Milton, 14 Mass.App.Ct. 111, 118 (1982). Allowing the Board to effectively extend the time within which it must decide would derogate from that purpose and would allow a board to put an applicant on a never ending merry-go-round of application and re-application while continuing to defer the ultimate decision on the application to some indefinite future date.

POINT 2: Alternatively, the Decision is a *De Facto* Denial.

Should the HAC find that the circumstances presented above do not mandate a determination that the Application has been constructively granted, Greendale is entitled to a ruling that the Decision is at least a *de facto* denial and not a conditional approval of Greendale's Application.

As noted above, the Decision provides no "logical connection between [specified ZBA] concerns and the elimination of…units." Instead, as the Decision makes clear, the reduction of units is "based on" a mechanical application of the maximum allowed density under Town zoning for market rate apartment developments. The reduction of units is not based on articulated concerns regarding the site or surroundings. There is no analysis provided by the Board as to why a density of 18 units per acre is the right number given the Project site or its surroundings. The mandated density reduction is simply the result of the application of the maximum density for apartment developments under Town zoning.

Second, the Decision does not ask Greendale to make specified changes to its

268 unit plan. Instead, the Decision expressly requires Greendale to throw its 268 unit plan aside, completely redesign its project and come back to the Board with an entirely new set of plans which will then be reviewed at a public hearing, after which the Board will either approve or deny the new plans. This is not a conditional approval of Greendale's Application. It is a flat out denial of the Application with an express instruction to start over and come back later with plans for a completely different project that will then be subjected to a new comprehensive approval process.

The HAC has consistently held that it has the power to determine whether a board's purported approval with conditions is, in fact, a denial. See Settler's Landing Realty Trust v. Barnstable, No. 01-08, slip op. at 3-4 (Mass. Housing Appeals Committee Ruling September 22, 2003). See also, Oceanside Village, LLC c. Scituate Zoning Board of Appeals, No. 05-03, slip op. at 4 (Mass. Housing Appeals Committee Ruling dated January 6, 2006); Lever Development v. West Boylston Zoning Board of Appeal, No. 04-10, slip op. 6-10, (Mass Housing Appeals Committee Ruling dated Dec. 6, 2005); and Tiffany Hill, Inc. v. Norwell Board of Appeal, No. 04-15, slip op. 2-5 (Mass. Housing Appeals Committee Ruling dated June 24, 2005). The regulations which govern the Comprehensive Permit process also expressly give the HAC the power to determine whether a Board's decision is a *de facto* denial. See 760 CMR 56.06(5)(d)(5). Those regulations have the force of a legislative act and are entitled to deference. See, Borden, Inc. v. Commissioner of Pub. Health, 388 Mass. 707, 723 *cert. denied sub nom.*

Formaldehyde Inst., Inc. v. Frechette, 464 U.S. 936, 104 S.Ct. 345, 78 L.Ed.2d 312 (1983).

However, in 2008, the Supreme Judicial Court held that the HAC is not empowered to find that a condition which drastically reduces the number of proposed units in a proposed 40B project is in effect a denial. See Zoning Board of Appeals of Woburn v. Housing Appeals Committee, 461 Mass. 581 (2008). In that case, a local board of appeals had conditionally approved a comprehensive permit. One of the conditions slashed the number of units from the proposed 640 to 300. In subsequent litigation, the Superior Court ruled that the drastic reduction resulted in a *de facto* denial, relying on HAC decisions such as Settler's Landing. But on appeal the Supreme Judicial Court ruled that the HAC does not have the statutory authority to treat such a condition as a *de facto* denial.

Here, however, the Board did much more than impose a drastic unit reduction and the reasoning of Woburn v. Housing Appeals Committee is inapposite. Here, as noted above, Condition No. 4 requires Greendale to create an entirely new set of plans for a 108-unit development that has never been designed much less reviewed by the Board; submit those new plans to the Board; go through an entirely new public hearing; and then await the Board's decision to approve or deny the new plans. Greendale well understands that the mere fact that a board might require a 40B applicant to make some adjustments to aspects of its project (including a unit reduction) or to revise some elements of its plans does not necessarily constitute a denial of the application. But that

is not what the Board has done here. Here the Board did not require a redesign of certain specified aspects of Greendale's proposed 268-unit plan based on articulated Local Concerns. The Board sent Greendale back to the drawing board to create plans for a wholly different project. The fact that the Board then required a new public hearing on those plans and reserved for the future the right to approve or reject the new project makes crystal clear that the Board here did not approve Greendale's Application subject to certain conditions. The Board here rejected the Application and told Greendale to come back with an entirely new proposal that would then have to run the 40B approval gauntlet anew. The HAC should call the Decision what it is—a *de facto* denial—and should proceed to adjudicate Greendale's challenge of the Decision under the burdens of proof applicable to denials.

CONCLUSION

For the reasons stated above, the HAC should determine that Greendale's Application has been constructively granted. Alternatively, if the HAC should determine that no constructive grant has occurred, the HAC should rule that the Decision is a *de facto* denial of Greendale's Application and should order that the respective burdens of proof in this matter shall be those applicable to a denial.

Respectfully submitted,

GREENDALE AVENUE VENTURE, LLC,

By its attorneys,

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Dated: March 10, 2014

CERTIFICATION OF SERVICE
I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail ~~(by hand)~~ and email on 3.10.14