

December 24, 2024

VIA ELECTRONIC MAIL: gchimento@doverma.gov

Mr. George Chimento, Chair
Zoning Board of Appeals, Town of Dover
Dover Town House
5 Springdale Avenue
Dover, MA 02030

Re: Application for Comprehensive Permit for 81-85 Tisdale Drive, Dover, Massachusetts—Water Access

Dear Chairman Chimento and Members of the Zoning Board of Appeals:

On behalf of our client, Tisdale Land, LLC (the “Applicant”), this correspondence serves to remind the Zoning Board of Appeals (the “Board”) of the limits of its jurisdiction under G.L. c. 40B, i.e., the Comprehensive Permit Act. The Applicant is compelled to bring this issue to the Board’s attention because of concerns over: 1) the tenor of the most recent hearing of the Board, on December 12, 2024 (the “December 12th Hearing”); and 2) the Board’s extensive discussions regarding water access for the proposed residential apartment building at 81-85 Tisdale Drive (the “Project”).

The Board has afforded the public with more than ample opportunity—on repeated occasions—to express concern over the how the Project may impact the quality and/or water supply for the Tisdale neighborhood. However, as articulated more fully below, case precedent dictates that this Board cannot delay or deny issuing a comprehensive permit based on limitations imposed by a public water supplier. Lack of capacity to provide water service, by itself, is not a valid local concern which warrants the denial of a comprehensive permit. Accordingly, the Board must set aside any further discussion regarding water concerns and focus on the issues over which it has jurisdiction under G.L. c. 40B, that is, removing locally imposed barriers to affordable housing, including but not limited to Dover’s rules, regulations, and zoning bylaws. *See Bd. of Appeals of Hanover v. Hous. Appeals Comm. in Dep’t of Cnty. Affs.*, 363 Mass. 339, 355 (1973).

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I. The Board Lacks Authority Under G.L. c. 40B to Deny A Comprehensive Permit Based on Lack of Water Supply.

Aquarion Water Company (“Aquarion”) is identified on the website¹ for the Town of Dover (the “Town”) as a “public water supplier who services approximately one third of Dover residences.” Further, the Town’s website states that, as a public water supplier, Aquarion is regulated by the Massachusetts Department of Environmental Protection (“MassDEP”) for water quality and the Massachusetts Department of Public Utilities for rates. As you are aware, in a letter penned by the Town Manager, dated October 27, 2023, to Michael Busby, Relationship Manager with the Massachusetts Housing Finance Agency (hereinafter the “Town’s October 2023 Letter”), the Town admits that water capacity and quality are town-wide concerns. Specifically, the Town states as follows:

Water is already a significant issue in Dover in general Due to concerns about the supply of water in Dover going forward, the Board of Selectmen retained a consultant to investigate connecting the Town to the MWRA. Those preliminary estimates indicate that such a connection could necessitate that the Town make an investment of over \$100,000,000. . . .

The topic of Aquarion looking to connect with the facilities of the Massachusetts Water Resource Authority (the “MWRA”) also was discussed during the December 12th Hearing. During this discussion, the Chairman intimated that an interconnection with the MWRA would be very expensive for the Town, and, because of that fact, Town Meeting would never vote to approve the Town becoming an MWRA Community.

It is undisputed that the Town has been historically struggling with water quality and access issues for some time. However, the Housing Appeals Committee (the “HAC”)² has long held that possible inadequacies of water supply do not justify denial of a comprehensive permit where the proposed development would impose new demands upon the town’s water supply, and would accentuate an existing acute shortage of water, especially where the entire town would benefit from various needed improvements in regard to which the town had been derelict. *Millhaus Trust of Upton v. Upton*, No. 74-08, slip op. at 20-21 (Mass. Housing Appeals Committee, July 8, 1975)

¹ <https://www.doverma.gov/567/Dover-Water-Resource-Information>

² The HAC has jurisdiction over a comprehensive permit dispute when the applicant appeals the decision of a zoning board of appeals, pursuant to G.L. c. 40B, §22.

(citing *Daley Construction, Inc. v. Planning Bd. Of Randolph*, 340 Mass. 149 (1960)). In *Millhaus*, the HAC cites to decisions of the Supreme Judicial Court for the principle that “a municipality is under a legal duty to provide an adequate water supply to the site.” *Millhaus* (slip op. at 20-21) (citing *B&B Amusement Enterprises, Inc. v. City of Boston*, 297 Mass. 307, 308 (1937) (“the ... landowner had a right to a supply of water, which it was the duty of the city as the operator of a public utility [citing *Loring*] to furnish on the same terms on which it furnished water to others”); and citing *Loring v. Commissioners of Boston*, 264 Mass. 460, 464 (1928) (“[p]rovision for an ample supply of water for the use of those who dwell or do business in crowded centers of population is manifestly a public utility of first importance”). Moreover, it is worth noting that the towns of Dover and Upton (the town at issue in *Millhaus*) are comparable in that they both are relatively small towns.³ Applying the ruling in *Millhaus* to the Project here, the Town has been derelict in its duty to ensure that the residents of Dover have an adequate water supply. Under the principles cited in *Millhaus*, the Board cannot now use that dereliction as justification for denying the Project’s application for a comprehensive permit.

Similarly, the Board cannot require the Project to remedy existing infrastructure problems that may be exclusive to the Tisdale neighborhood. See *Hilltop Preserve* 2002 WL 34082289, at *8, citing *North Attleborough, Dexter Street L.L.C. v.*, No. 00-01, slip op. at 17 (Mass. Housing Appeals Committee Jul. 12, 2000) (partial sewer blockage and manhole surcharging problem unaddressed for fifteen years may not be used as the basis for denial of permit); *Franklin Commons Ltd. Partnership v. Franklin*, No. 00-09, slip op. at 15 (Mass. Housing Appeals Committee Sep. 27, 2001) (long-standing sewer capacity problems related to inflow and infiltration were not sufficient justification for denial of permit).

II. Mitigation Measures / Conditions May Be Discussed At the End of the Public Hearing Process.

The Board has the authority, pursuant to G.L. c. 40B, to require that the Project provide limited water services or mitigate specific problems if necessitated by the Project itself. See *Hilltop Preserve*, *supra*, at *8. As indicated in my letter to you, dated December 6, 2024, and as discussed during the December 12th Hearing, the Project has proposed water mitigation measures in its project plans. Specifically, the Project proposes to install an underground storage tank and associated infrastructure of sufficient size to store water for the mandated fire suppression needs

³ According to the 2000 Census, the population of Upton was 8,000, and the town measures 21.7 square miles in area. In comparison, the population of Dover in 2023 was 5,864 measures 15.4 square miles in area.

for the property, to be filled from external sources other than Aquarion. Further, the Project intends to use drought resistant landscaping and/or a low volume on-site well to meet irrigation needs.

The Board also has the authority to place the Project on a wait list for a municipal water connection; however, such a wait list must be applied to the Project on equal terms as with other users. *See Peppercorn Village Realty Trust Appellant Hopkington Board of Appeals, Appellee*, 2004 WL 5052501. In *Peppercorn*, the HAC held that a 40B development project may be placed on a waiting list for connection to town water, “and if and when other residential or commercial users are permitted to connect to the municipal system, this development must be permitted to connect.”

III. Conclusion

For all of the foregoing reasons, the lack of capacity of Aquarion and/or the Town to provide water service to the Project is not a valid local concern which would warrant the denial of a comprehensive permit. This topic has been raised and thoroughly discussed before the Board. Accordingly, at this juncture, the Board must set aside any further discussion regarding water concerns and focus on the issues over which it has jurisdiction under G.L. c. 40B, that is, removing locally imposed barriers to the Project.

Thank you for your time and kind attention to this correspondence.

Sincerely,

MIRRIONE, SHAUGHNESSY
& UTTI, LLC

Tanya D. Trevisan

Tanya D. Trevisan, Esq.

cc: Tisdale Land, LLC
Dillon G. Brown, Esq. (via email: dbrown@meeb.com)