

Commonwealth of Massachusetts  
County of Middlesex  
The Superior Court

*File  
Pleadings*

CIVIL DOCKET#: MICV2002-03071-B

RE: Butt v Somerville Board Of Appeals et al

TO: Douglas H Wilkins, Esquire  
Anderson & Kreiger LLP  
43 Thorndike Street  
East Cambridge, MA 02141

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**CLERK'S NOTICE**

**SEE ATTACHED COPIES.**

Dated at Cambridge, Massachusetts this 26th day of May,  
2005.

Edward J. Sullivan,  
Clerk of the Courts

BY: Michael Powers  
Assistant Clerk

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss:

18  
SUPERIOR COURT  
CIVIL ACTION NO:  
MICV2002-03071-B

MOHAMED HANIF BUTT

vs.

ZONING BOARD OF APPEALS OF THE CITY OF  
SOMERVILLE & others<sup>1</sup>

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT ON  
PLAINTIFF'S G. L. C. 40A, § 17 APPEAL

I. INTRODUCTION

This action arises out of the June 26, 2002 decision ("Decision"<sup>2</sup>) by the Zoning Board of Appeals of the City of Somerville ("ZBA") to grant defendant Emerald Development Group, Inc. ("Emerald") a special permit with site plan review, with conditions, to construct a 14 unit condominium complex ("Project") at 343-349 Summer Street, Somerville, Massachusetts ("Site"). Pursuant to G. L. c. 40A, § 17, plaintiff, Mohamed Hanif Butt ("Dr. Butt") has brought this action to annul the Decision. The court conducted a trial which included on a view of the locus and adjacent land. After considering all the evidence presented at trial as well as the submissions of the parties, the Court finds and rules as follows.

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<sup>1</sup> Philip J. Ercolini, Gerald McCue, Herbert F. Foster, Jr., Maryann Heuston, Mary Jeka, Esq., Richard J. Daley, Jr. and Stuart J.L. Gardner, as they are members of the Zoning Board Of Appeals Of The City Of Somerville, Massachusetts Bay Transportation Authority and Emerald Development Group, Inc.

<sup>2</sup> Filed with the Somerville City Clerk on July 9, 2002.

## II. FINDINGS OF FACTS

### **A. The Parties**

Dr. Butt, an orthodontist, owns, resides and conducts his profession at 341 Summer Street, Somerville, Massachusetts, (the "Property") directly abutting the proposed Project along the Site's easterly side and rear lot lines. The ZBA is the duly constituted Zoning Board of Appeals of the City of Somerville, a municipal corporation in Middlesex County, Massachusetts, with a principal place of business at Somerville City Hall, 93 Highland Avenue, Somerville, Massachusetts 02143. The defendant, Emerald Development Group, Inc. ("Emerald"), is a Massachusetts corporation with an address and a place of business at 103 Morse Street, Watertown, MA. It was the developer of the proposal to build the Project at the Site. The defendant, Massachusetts Bay Transportation Authority ("MBTA"), is an independent authority of the Massachusetts Executive Office of Transportation and Construction, with a principal office at 10 Park Plaza, Boston, Massachusetts. It owned the Site at the time of the Decision, but no longer owns the Site. The MBTA is sometimes listed as an applicant for the Project. The remaining named defendants are members of the ZBA and reside in Somerville, Massachusetts.

### **B. The Ordinance**

The parties stipulated to the authenticity of the Somerville Zoning Ordinance as adopted on March 23, 1990, and as amended. The Site is in the Central Business District under the Ordinance<sup>3</sup>.

### **C. Plaintiff's Property**

The Property consists of a 2½ story wood-frame structure to which has been appended a 1½ story block warehouse building and a two-story barn ("the warehouse/barn-apartments") that had been converted to housing prior to Dr. Butt's ownership. The 2½ story wood-frame structure on the Property, originally built as two-family residence, is currently used for Dr. Butt's orthodontist office on the first floor and his residence on the second floor.

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<sup>3</sup> Art. 6 § 6.1.5

Sometime prior to Dr. Butt's purchase of the Property, a previous owner made alterations and extensions to the Property without the benefit of a building permit from the City of Somerville. These alterations and extensions were done to, *inter alia*, connect the warehouse/barn-apartments to the main house. They also created an encroachment over the defendant's property line by virtue of a roof projection. Certificates of Occupancy for the residential units authorizing "2 & 2 family with general contractor rear", issued on April 20, 1990, pre-dated the illegal alterations and are, therefore, immaterial to this case. Dr. Butt purchased the Property on or about September 29, 1999, aware that the property had insufficient access. On May 17, 2000, Plaintiff attempted to remedy his lack of legal access by offering to purchase an easement from the MBTA, the former owner of the Defendant's property, but was refused.

Dr. Butt's property is a non-conforming use because it is being used, in part, for residential use not permitted by right in the Central Business District and because it does not conform to current dimensional requirements set forth in Table 8.5 of the Somerville Zoning Ordinance. On or about March 22, 2000, plaintiff was cited for numerous building code violations. More recently, on December 21, 2001, Dr. Butt obtained a Certificate of Occupancy solely for his orthodontist office, which does not address the legality of the other uses on the Property. Dr. Butt has been cited on several occasions for violations of the Building code and Safety Codes and is currently in violation of numerous building codes.

#### **D. The Site**

The Site is in the Davis Square Central Business District ("CBD") District. The Site consists of "the assemblage of what were three continuous, vacant parcels of land identified as 343, 345 and 349 Summer Street, Somerville, and containing approximately 4,000± square feet, 6,250± square feet and 6,550± square feet, respectively, for a total of approximately 16,800± square feet ... and is identified on the Somerville Assessor's plans as Lots 25-D, 33, 34 and 35." The Site has 128 feet of frontage on Summer Street, a public way. Each of the three lots comprising the Site is rectangular. Assembled together, the Property is roughly rectangular in shape with the exception of the rear corner of lot 343, which extends several feet beyond the adjacent rear property line and renders the 6-sided lot into "a lot of odd shape" for purposes of Section 2.2.94 of the Ordinance. Specifically, the

Site's rear lot lines run virtually parallel to the front lot line in three segments of 44', 42' and 42', respectively. Thus, the shape of the Site generally looks like an "L".

This is a single lot for the purposes of this petition and zoning determination and has been treated as such since the MBTA purchased the property in the 1980's as part of a project to extend the Red Line rapid transit system to the Alewife Station. The site was conveyed to Dakota Partners, LLC as a single lot by deed dated December 13, 2002, recorded on December 18, 2002, recorded in Book 37414, Page 63. The manager and 100% owner of Dakota Partners, LLC is Emerald Development Group, Inc. The Site abuts residences on two sides. It contains a ventilation shaft for the MBTA's Red Line, which runs underneath a portion of the site. The ventilation shaft measures 55 feet in diameter and greatly impacts the Site. There is a setback around the shaft prohibiting construction. The Site is the only such shaft site in the City of Somerville and one of only two such shaft sites in the Somerville-Cambridge area. As such it presents a unique challenge to any prospective owner to design and erect a building that best utilizes the site and benefits the neighborhood.

#### **E. The Project**

Emerald applied for a Special Permit/Finding under Section 7.11.1.c of the Ordinance in order to construct a four-story apartment building with 16 units. Emerald engaged in an extensive participatory process with the city planning officials and neighbors alike. Dr. Butt made no effort to obtain information and chose to attend only one of several neighborhood meetings held before the public process at the Planning Board. As a result of the public review process, Emerald reduced the height of the building and reduced the number of units after meeting with neighbors and officials. Specifically, Emerald reduced the number of units to 14 by proposing to place the two affordable units off site.

The Project entails placing the proposed new building's exterior wall between 11.24' and 0.55' from Dr. Butt's buildings. Under the Somerville Zoning Ordinance, Emerald may as a matter of right erect a four-story commercial building of 32,000 square feet with no setback required for Dr. Butt's side lot line.<sup>4</sup>

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<sup>4</sup> See Zoning Ordinance of the City of Somerville (Trial Exhibit 1) and Trial Exhibit 31 which summarizes the required or allowed dimensional ranges for the Site.

## F. Administrative Proceedings

The Planning Board made 31 specific findings as to the petition, which findings were incorporated into the decision by the ZBA. These findings included the following public benefits:

1. all parking will be underground as opposed to surface parking that could be put on site as a matter of right.
2. the project will provide two units to the Somerville Housing Authority.

The project represents an appropriate transitional use between the Central Business Zone west of the locus and Residence B district to the north and south

On June 26, 2002, the ZBA voted unanimously to grant Emerald a special permit to construct a 14-unit residential building on its property. The relief sought and granted was limited to permitting the use of the locus for residential purposes. No other relief was needed.

The petition complies with all the dimensional requirements of a Central Business District. The ZBA made the findings required by the Somerville Zoning Ordinances. As part of its decision, the Board suggested in Condition #1 that Emerald "*shall attempt to increase the setback from the lot line on the east side where possible*". (emphasis added). This refers to the area beside Emerald's proposed building along the side yard where it came nearest to Dr. Butt's property line. The point at which the building was closest to the lot line was limited to a length of less than twenty feet (20'). Emerald, in accordance with the ZBA's request, attempted to increase the setback but could not do it. Emerald fully complied with the Board's Condition #1 by making the effort to attempt to increase the setback.

The Board's decision also contained certain conditions that purported to delegate several ministerial functions to related municipal entities with particular expertise. Any such delegation by the ZBA was peripheral to the Special Permit petition and proper.

On or about January 7, 2004, this Court entered an order granting Emerald a limited remand for the purpose of curing any ambiguities in the decision as alleged by Dr. Butt. Plaintiff opposed the increased setback. Dr. Butt testified at trial that the proposed setback was not enough and that he wanted a 10' setback. As a result, the Planning Board refused to recommend the increased setback to the Zoning board for consideration.

### **G. Odd-Shaped Lot**

The subject 6-sided lot is an odd-shaped lot under the Somerville Zoning Ordinances. The subject lot is similar to the diagram included under Section 2.2.94 of the Somerville Zoning Ordinances. There is no rear setback required for the property other than that required for the furthest most boundary line. Emerald meets these setback requirements. The only rear lot line is the boundary line shown on the plan that is furthest from Summer Street. Under the Somerville Zoning Ordinance, Emerald has the right to erect a four-story commercial building with no setback required for Dr. Butt's side lot line. Therefore, the grant of the Special Permit leaves Dr. Butt in no worse position than he would be absent the permit.

### **H. Plaintiff's Light and View**

The Project entails placing the proposed new building's exterior wall between 11.24' and 0.55' from the Dr. Butt's buildings and constructing a 60 foot tall, 4+ story building. Dr. Butt's residence/professional structure is 2 stories high, with a gabled attic providing an additional ½ floor. Above ground, the proposed new condominium building would not only be visible from Dr. Butt's house, but would block the view to the west by placing the building's exterior wall between 11.24' and 0.55' from the plaintiff's buildings. Dr. Butt lives on the second floor of his building, the view from which, and light to which, would be somewhat reduced by the proposed placement of the proposed building. Views from the first floor of Dr. Butt's building would also be affected by the Project. In addition, at certain times during the day and during certain seasons, the Project will cast some shadows on Dr. Butt's building. However, Dr. Butt's light and view could be affected in exactly the same way by any commercial structure erected as a matter of right on the subject property.

Dr. Butt has produced no evidence that the Emerald permit will:

- a. Constitute a fire hazard;
- b. Damage the foundation of plaintiff's building;
- c. Cause a drainage problem;
- d. Have a significant impact on shadows;
- e. Restrict plaintiff's ability to improve his property.

Finally, the ZBA' decision approving the Special Permit was not arbitrary or capricious.

### III. RULINGS OF LAW AND DISCUSSION

#### A. The Legal Standard

When a zoning decision is appealed to the Superior Court, the court is required to hear the matter de novo and determine the legal validity of the decision of the zoning board upon the facts found by him. G.L. ch. 40A § 21; *Josephs v. Board of Appeals of Brookline*, 362 Mass. 290, 295 (1972). However, only a “person aggrieved” may challenge a decision of a zoning board of appeals. G.L. ch. 40A § 17; *Marashlian v. Zoning Board of Appeals of Newburyport*, 421 Mass. 719 (1996). A plaintiff is a “person aggrieved” if he suffers some infringement of his legal rights. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427, 430 (1949). The injury must be more than speculative, *Tsaronis v. Board of Appeals of Wareham*, 415 Mass. 329, 335 (1993) (Abrams, J., dissenting), but the term “person aggrieved” should not be read narrowly. *Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 204 (1957). “Aggrieved person” status is a jurisdictional prerequisite. *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. 129, 131 (1992).

A plaintiff, who is a “party in interest” as defined by G.L. ch. 40A § 11, enjoys a presumption that he or she is a “person aggrieved.” *Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 204 (1957); *Watros v. Greater Lynn Mental Health & Retardation Association, Inc.* 421 Mass. 106, 111 (1995). Abutters and abutters to abutters enjoy a presumption of aggrieved person status. *Marashlian*, 421 Mass. at 721. This presumption is rebuttable, however, and recedes when a defendant challenges the plaintiff’s status as an aggrieved person and offers evidence supporting his or her challenge. *Watros*, 421 Mass. at 111. When a defendant challenges the plaintiff’s standing and supports that challenge with evidence of lack of aggrievement, the jurisdictional issue must be decided on the basis of the evidence without reference to the presumption. *Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 204 (1957). Once standing is adequately challenged, “the plaintiff must put forth credible evidence to substantiate his allegations,” and the question of standing then becomes a question of fact for the trial judge. See *Marashlian v. Zoning Bd. of Appeals of Newburyport*, *supra*. The plaintiff’s evidence must be more than unsubstantiated claims or speculative personal opinions. See *Monks v. Zoning Bd. of Appeals of Plymouth*, 37 Mass. App. Ct. 685, 688 (1994). Ultimately, standing is a question of fact for the judge. *Bell v. Zoning Board of Appeals of Gloucester*, 429 Mass. 551, 554 (1999).

## B. The Quantum of Evidence To Sustain or Attain Standing

*Marashlian* did not establish any specific standard for the type or amount of direct evidence a plaintiff must advance to attain standing. Nor did *Barvenik* address the quantum of evidence required. Although expert testimony may not be necessary,<sup>5</sup> the plaintiff's testimony must assert relevant and admissible facts rather than speculation and inadmissible opinions. See *Jaffe v. Zoning Board of Appeals of Newton*, 34 Mass. App. Ct. 929, 930-31 (1993)<sup>6</sup>.

## C. Rebuttal of the Presumption of Aggrievement

As stated above, a plaintiff who is a "party-in-interest" enjoys a presumption that he is "an aggrieved person." *Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 204 (1957). Although this presumption is rebuttable, the precise amount and nature of the evidence needed to rebut the presumption has not been established. The Court in *Barvenik* addressed this issue in a footnote,<sup>7</sup> indicating the different articulations of the standard to be employed in determining whether the presumption was rebutted. However a court may articulate the standard, the party seeking to rebut the presumption must come forward with sufficient evidence which would provide a trier of fact with a factual basis to find facts contrary to the presumed ones. See *Liacos*, Massachusetts Evidence 53-54 (5th ed. 1981) ("A presumption is rebutted by evidence warranting a finding contrary to the presumed fact"); *Barvenik*, 33 Mass. App. at 131, fn. 7. The one thing which the party seeking to rebut the presumption may not do is to offer the findings of the zoning board as sufficient evidence. *Watros v. Greater Lynn Mental Health & Retardation Association, Inc.* 421 Mass. 106, 111 (1995) ("The findings of the board, resulting in the decision that the plaintiffs are challenging, cannot be given evidentiary weight.").

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<sup>5</sup> *Barvenik* strongly implies that expert testimony corroborating a plaintiff's fears is an important element of standing. 33 Mass. App. Ct. at 136. However, neither *Barvenik* nor *Marashlian* holds that expert testimony is a prerequisite of standing. (The plaintiff in *Marashlian*, where standing was proper, did rely on an expert's report, but it appears from the Appeals Court's *Marashlian* decision that only "one sentence" of this report was used to support the plaintiff's standing. 37 Mass. App. Ct. at 932. The report was not mentioned in the SJC's opinion.

<sup>6</sup> However, the *Jaffe* court pointed out that the party's lay opinion that he felt that "our property values are affected adversely" probably would not be sufficient without an opinion from a real estate expert. *Id.* 34 Mass. App. Ct. at 931.

<sup>7</sup> *Barvenik*, 33 Mass. App. at 131, fn. 7.

With these principles in mind, this Court turns to the instant plaintiff.

#### **IV. Standing and Aggrievement Rebutted**

##### **A. Rebuttable Presumption Of Standing**

Because Dr. Butt is an abutter he has a rebuttable presumption of standing to challenge the Zoning Board's decision in this case. However, Emerald has offered credible evidence, as described below, that rebuts the presumption. Further, Emerald has demonstrated that Dr. Butt has failed to establish that he will suffer legitimate harm as result of the Project or as the result of the construction of a larger four story office building as of right. The harm that Dr. Butt claims that he will suffer is either speculative or unsubstantiated. Consequently Dr. Butt is bound to come forward with credible evidence of significant harm to support his allegations. See *Barvenik*, 33 Mass. App. Ct. at 131. (Once a defendant in a zoning appeal challenges the plaintiff's standing and offers evidence to support the challenge, the issue of standing is decided on the basis of the evidence with no benefit to the plaintiff from the presumption.)

##### **B. The Insufficiency of the Plaintiff's Evidence**

Dr. Butt claimed that the Project would partially block his view from his building and subject his property to unwanted shadows. With respect to blocking his view, Dr. Butt failed to acknowledge that a four story office building built as of right would likewise partially block the view from his building. In fact Dr. Butt's view would be more substantially blocked by the office building since the as of right four story office building would be taller than the Project. Dr. Butt also claimed that the proposed 6' fence around the Project would likewise block his view. However the 6' fence can be constructed as a matter of right. Moreover, Dr. Butt acknowledged that the windows to his building would overlook the fence. More importantly, Dr. Butt failed to offer any evidence that the fence would otherwise cause any harm or danger to his property.

Although Dr. Butt claimed that the Project would cause more shadow to fall upon his building, he offered no evidence other than his uninformed lay opinion. In contrast, Emerald offered a professionally developed shadow study, demonstrating that only at limited times throughout the year, the Project will cast a shadow on a portion of Dr. Butt's property in addition to the shadows that other adjacent buildings presently cast upon Dr.

Butt's property. Further, as with blocking Dr. Butt's view, the Project will not cast as great a shadow as taller four story office building that can be erected on the Site as of right. Dr. Butt offered no competent testimony to rebut Emerald's shadow study. Ironically, at trial, Dr. Butt submitted photographs, demonstrating that at present some rooms in his building were encompassed by shadows during the time these photographs were taken—even though the Site is a vacant lot. However, Dr. Butt was unable to testify as to when and at what time of day the photographs were taken. The Court does not credit Dr. Butt's testimony regarding the effect of potential shadows on his property.

Although Dr. Butt claims that the Project introduces a fire hazard danger to his property, he provided no evidence of such risk other than mere speculation. Again, he ignores the fact that a building constructed as a matter of right would be the same distance from his property which is only 2 feet from the lot line. Dr. Butt also claimed that construction of the Project would cause damage to the foundation to his building. However, Dr. Butt had no evidence whatsoever to support his claim that there would be a problem with drainage or damage to the foundation. To the contrary, William Lovallo, the expert structural engineer for Emerald, testified that the project could be done without damage to foundation and without going on plaintiff's property.

Dr. Butt claims that the project would affect emergency access from his building. However, when questioned whether his emergency access is over Emerald property, Dr. Butt acknowledged that he attempted to purchase an easement from the MBTA to provide access because he has insufficient space from the rear of his building for emergency egress. Put more bluntly, Dr. Butt presently has a problem with emergency egress from the rear of his building. Dr. Butt has offered no evidence other than speculation that the Project, which did not cause the present egress problem, will make it worse.

Dr. Butt alleges that because of the Project, he will not be able to improve his property. However, because his property is non-conforming, he presently has potential difficulties in improving his property that have nothing to do with Emerald's efforts to improve its property. Specifically, any change to plaintiff's property would be an extension of non-conforming use that requires a special permit. Further, Dr. Butt offered no credible evidence that Emerald's use of its own property restricts his right to develop his own property.

Dr. Butt made much of the fact that the ZBA suggested on page 5, ¶1 in its decision that Emerald “shall attempt to increase the building setback from the lot line on the east side where possible.”<sup>8</sup> Dr. Butt argues that this language means that the ZBA found that the Project would have an adverse effect upon the plaintiff or his property, that the setback is mandatory, and that it constitutes an unlawful delegation of the ZBA’s authority to Emerald. However, this Court finds that nowhere in its decision did the ZBA conclude that that the building’s easterly face would have an adverse effect upon the plaintiff and his property, nor do they make any requirement of increased setbacks. Rather, the ZBA merely directed Emerald to make a good faith effort to increase the setback, which Emerald, in fact, attempted. Further, the ZBA’s suggestion did not constitute improper delegation of its duties and authority. Having found that a setback was not required, it nevertheless chose to suggest to the applicant that it attempt a building setback anyways. If effect, the ZBA was requesting but not requiring Emerald, as a good neighbor, to improve the Site beyond the minimum required by the ZBA’s final decision.

In addition to the above findings, this Court takes into account that a four story office building of 32,000 square feet could be constructed on the Site as a matter of right. In addition with such an office building, there would be surface parking and reduced setbacks. Any building will block Dr. Butt’s view and provide some shadows. Therefore, the impact of the Project and use approval by the ZBA is less on the plaintiff than a building constructed as a matter of right.

In short, Emerald has offered evidence that this Court finds to be credible in addition to the ZBA’s findings sufficient to defeat the rebuttable presumption of standing that Dr. Butt had. Further, Emerald has offered credible evidence that establishes that Dr. Butt’s assertion of harm to himself and his property, if the Project is built on the Site, is based upon speculation and conjecture, and is not supported in the evidence presented in the trial of this matter.

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<sup>8</sup> The language in context reads:

Approval is based upon the submitted floor plans and elevations received by the Planning Department on May 10, 2002, Site Plan and Landscaping Plan submitted on February 26, 2002. However, the Applicant shall attempt to increase the building setback from the lot line on the east side where possible. ZBA Decision, Page 5, ¶ 1.

### V. Adequacy of the ZBA's Findings

This Court finds that the ZBA made all the required findings on the Project. Beginning on page 4 of the ZBA's Decision and continuing through page 6, the ZBA listed specific findings and rulings, including expressly incorporating the June 6, 2002 detailed findings of fact and conditions of the Planning Board, relative to the defendant's application for a special permit that went considerably beyond merely parroting the zoning bylaws. In particular, the Board's decision does make specific findings in eleven areas<sup>9</sup> while the Planning Board report contains findings in 31 areas<sup>10</sup>.

Further, the ZBA committed no error in not requiring a rear lot line setback from Mr. Butt's building. The rear lot line is the furthest line that runs parallel to Summer Street. The property line of Dr. Butt that runs parallel to Summer Street is not a rear lot line because the Site is a six sided odd-shaped lot that looks like an "L", to which Section 2.2.94 of the Zoning Ordinance<sup>11</sup> applies. This means that that the only rear setback, i.e., the line furthest from the street, would be the line at the extreme rear of the parcel, which line runs parallel to Summer Street. Dr. Butt's interpretation of Section 2.2.94 of the Zoning Ordinance to the contrary is incorrect. Finally, the ZBA did not impermissibly delegate any of its responsibilities to other Somerville officials or agencies. Rather the several conditions listed by the ZBA (condominium documents, landscaping, fencing,

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<sup>9</sup> 1. Beneficial to the neighborhood; 2. Reduced height and reduction of units; 3. Acceptance of two inclusionary housing units; 4. Increase landscaping and open space; 5. Project meets with the standards set forth in the Somerville Zoning Ordinance; 6. Residential use; 7. Consistency of purpose; 8. Promotes Somerville Zoning Ordinance §6.1.5 "to provide for intergraded (sic) structure of the uses of the City, to encourage the most appropriate use of land throughout the City ... to encourage housing for persons of all incomes."; 9. Architectural style; 10. Development limited due to the shaft and the easement; 11. Parking underground.

<sup>10</sup> 1. Compliance with standards; 2. Consistency with purposes; 3. Construction schedule; 4. Surrounding neighborhood; 5. Parking; 6. Lighting; 7. Emergency Access; 8. Utilities; 9. Screening; 10. Trash; 11. Impact on public systems; 12. Landscaping; 13. Land form and open space; 14. Relation of buildings to the environment; 15. Historic significance; 16. Enhancement of appearance; 17. Impacts on neighborhood, including parking, traffic and aesthetics; 18. Affordable housing; 19. Fire; 20. Traffic and parking; 21. Engineering and drainage; 22. Conservation.

<sup>11</sup> 2.2.94 of the Ordinance defines a rear lot line as follows:

2.2.94 Lot Line, Rear. Any lot line which is parallel to or within forty-five (45) degrees of being parallel to a front lot line, except for a lot line that is itself a front lot line. In the case of a lot having no street frontage or a lot of odd shape only the one lot line furthest from any street shall be considered a rear lot line.

(emphasis added)

lighting, parking, housing, fire access and construction management) are peripheral to the central issue of the granting of the special permit and amount to the ZBA's reminding the petitioner to follow the appropriate ordinances and laws. The ZBA was exercising its discretion to impose appropriate conditions and safeguards in the granting of special permits. See *Shoppers' World, Inc. v. Beacon Terrace Realty, Inc.*, 353 Mass. 63, 69-70 (1967) (the restriction that the petitioner shall comply with the recommendation of the planning board with regard to ingress and egress was no more than an appropriate condition and safeguard.)

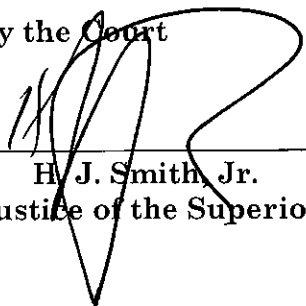
In conclusion, this Court finds that the special permit is in harmony with the general purpose and intent of the Somerville Zoning By law (G.L. c. 40A §9). By incorporating the findings of the Planning Board, as well as its own findings, the ZBA found that the location, size, nature and intensity of use, size of the site in relation to the use, the location, nature and height of structures; the effect of the proposed use on adjacent property and necessary off-street parking were in harmony with the general purpose and intent of the ordinance (G.L. c. 40A §9). This Court finds that the ZBA's decision was not based on any legally untenable ground, and was not arbitrary nor unreasonable. Accordingly, this Court shall affirm the ZBA's grant of the special permit to Emerald.

**ORDER**

The June 26, 2002 decision by defendant Zoning Board of Appeals of the City of Somerville to grant defendant Emerald Development Group, Inc. a special permit with site plan review and conditions, to construct a 14 unit condominium complex at 343-349 Summer Street, Somerville, Massachusetts is hereby **AFFIRMED**.

**DATED: May 24, 2005**

By the Court

  
\_\_\_\_\_  
H. J. Smith, Jr.  
Justice of the Superior Court

*Entered 5/26/05*

*Copies  
HJS filed  
5/26/05*