

## MEMORANDUM

To: Pelham Zoning Board of Appeals

From: Shatz, Schwartz and Fentin, P.C.

Date: April 26, 2021

Subj: Conditions Relating to Project Management

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### Introduction:

The purpose of this memorandum is to advise the Zoning Board of Appeals (the "ZBA") on the limitation of the Board's authority to impose conditions in the Comprehensive Permit addressing project management issues. After the discussion by the ZBA regarding the keeping of pets, we thought it would be helpful to provide this guidance regarding what is and is not within the jurisdiction of the ZBA for conditions.

### Law:

General Laws Chapter 40B, Section 21, provides that a board may attach conditions to an approval including, but not limited to, conditions relating to "height, site plan, size or shape, or building materials[.]" In Amesbury Zoning Bd. of Appeals v. Hous. Appeals Comm., 457 Mass. 748, 757-58 (2010), the court held that section 21 limits a board to imposing conditions to those that "fit within the same kind or class of local concern or issue that the examples [in section 21] address." Conditions that are not related to the examples set out in G.L. 40B, § 21, and instead relate to programmatic aspects of the development, are therefore outside of a board's authority to impose and the Housing Appeals Committee ("HAC") is empowered to strike or modify such ultra vires conditions. Id at 762.

Specifically, the HAC has struck or modified conditions requiring the applicant to furnish to the board a property management agreement addressing matters such as "building security, public access, *pet policy*, staffing, trash removal and smoking policies[.]" See, e.g., Way Finders, Inc. and Fuller Future, LLC v. Ludlow Zoning Bd. of Appeals, 2021 MA Housing P. App LEXIS 3; Falmouth Hospitality, LLC v. Falmouth Bd. of Appeals, 2020 MA Housing App. LEXIS 1, \*82. In rejecting those conditions, the HAC noted that "it is for the subsidizing agency to dictate the terms of the management and maintenance personnel on the project site." Id.

Finally, even assuming for the sake of argument that programmatic conditions (e.g., a condition limiting the number of pets allowed), were within the ZBA's authority to impose, for such conditions to be "consistent with locals needs" as required by Chapter 40B, those conditions must be "applied as equally as possible to both subsidized and unsubsidized housing." G.L. 40B, § 20; 760 CMR § 56.02 ¶ 8. Accordingly, any pet policy adopted by the Town for its residents generally would likewise be applied to the residents of the project. However, the project cannot be singled out for a stricter policy.

### Conclusion

Conditions that are not connected to issues relating to height, site plan, size or shape, or buildings materials are outside a local board's authority to impose. This limitation encompasses conditions that relate to the creation of a pet policy or other aspects of a development's management and personnel, which matters the HAC has affirmed are the within the purview of the subsidizing agency and not the local board. Additionally, appropriate conditions must not be uniquely imposed on the applicant nor the project; only conditions similarly applied to other housing types are acceptable.