

SJC10628

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2009 - P - 1053

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JENNIFER DIRICO, HELEN K. GAVIN AND  
MILDRED M. LEONARDI

*Plaintiffs-Appellants,*

v.

TOWN OF KINGSTON, PAUL L. ARMSTRONG, IN HIS  
CAPACITY AS BUILDING INSPECTOR AND ZONING  
ENFORCEMENT OFFICER OF THE TOWN OF KINGSTON,  
MARY O'DONNELL AND ROBERT MOAKLEY, AS  
TRUSTEES OF THE O'DONNELL FAMILY REALTY  
TRUST, AND THORNDIKE DEVELOPMENT  
CORPORATION

*Defendants-Appellees*

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ON APPEAL FROM THE JUDGMENT OF THE  
LAND COURT FOR PLYMOUTH COUNTY

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**BRIEF OF APPELLANTS  
AND  
ADDENDUM**

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Submitted By:  
DAVID H. ABBOTT, BBO# 634896  
WILLIAM S. ABBOTT, BBO# 010342  
WILLIAM S. ABBOTT, P.C.

*Attorneys for Appellants*  
50 Congress Street, Suite 925  
Boston, MA 02109  
(617) 523 - 5521

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### STATEMENT OF THE ISSUES

1. WHETHER THE LAND COURT ERRED IN AWARDING SUMMARY JUDGMENT TO THE DEFENDANTS WHERE THE MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT'S ("DHCD") APPROVAL OF THE ZONING AMENDMENT AT ISSUE (THE "40R AMENDMENT"), WHICH APPROVAL WAS A PREREQUISITE FOR ADOPTION OF THE 40R AMENDMENT, WAS BASED ON AN APPLICATION THAT THE TOWN KNEW, OR SHOULD HAVE KNOWN, WAS MATERIALLY INCORRECT.
2. WHETHER THE LAND COURT ERRED IN AWARDING SUMMARY JUDGMENT TO THE DEFENDANTS WHERE THERE WERE GENUINE ISSUES OF MATERIAL FACT CONCERNING WHETHER THE 40R AMENDMENT BORE A SUBSTANTIAL RELATIONSHIP TO G. L. C. 40R'S PURPOSE OF ENCOURAGING LAND DEVELOPMENT AND HOUSING PRODUCTION WHILE PRESERVING CRITICAL ENVIRONMENTAL AREAS, AND WHETHER THE TOWN OF KINGSTON ADEQUATELY CONSIDERED THAT ISSUE.

### STATEMENT OF THE CASE

This appeal is from the judgment of the Land Court dismissing the Plaintiffs' First Amended Petition to Determine Validity of Zoning By-Law (the "Amended Complaint"). Record Appendix ("A") A01570. The Plaintiffs filed their original Complaint on November 14, 2007. A00001. In the Complaint, the Plaintiffs challenged the validity of an amendment to the Zoning By-law of the defendant Town of Kingston (the "Town") that was adopted on April 11, 2007, by a vote of the Kingston Town Meeting pursuant to G. L. c. 40R ("Smart Growth Zoning and Housing Production")(said amendment hereinafter referred to as the "40R Amendment"). A00006-A00052.

On December 11, 2007, the Town Defendants filed a motion to dismiss the Complaint (the "First Motion to Dismiss"). A00002. Defendants Thorndike Development Corporation ("Thorndike") and O'Donnell Family Realty Trust ("O'Donnell") thereafter submitted documents supporting or joining in the First Motion to Dismiss. A00002. On January 31, 2008, the Plaintiffs filed an opposition to the First Motion to Dismiss. A00002. On March 14, 2008, the Plaintiffs submitted an amended Petition to Determine Validity of Zoning By-Law (the "Amended Complaint"). A00003. The Amended Complaint challenged the 40R Amendment on five separate grounds denominated as follows: (Count I) denial of procedural due process; (Count II) action contrary to the best interest of Kingston and offensive to general public policy; (Count III) arbitrary and unreasonable exercise of zoning power; (Count IV) denial of substantive due process; and (Count V) violation of G. L. c. 40R, § 4(a) and G. L. c. 30, § 62. A00118-A00122. On March 24, 2008, the Land Court allowed the Defendants' First Motion to Dismiss as to Counts I, II and V.<sup>1</sup> A00003; A00166-A00174. On April 14, 2008, the Town and Thorndike moved to dismiss Count IV of the Amended Complaint (the "Second Motion to Dismiss"). A00003. On

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<sup>1</sup> The Plaintiffs filed a motion for reconsideration of the dismissal of Count V of their Amended Complaint, which motion for reconsideration was denied on April 22, 2008. A00003.

May 14, 2008, the Plaintiffs filed their opposition to the Second Motion to Dismiss. A00003. On June 4, 2008, the Land Court allowed the Second Motion to Dismiss and ordered the dismissal of Count IV of the Amended Complaint. A00004.

On November 21, 2008, the Defendants filed a Joint Motion for Summary Judgment on the sole remaining count (Count III) of the Amended Complaint (the "Summary Judgment Motion"). A00004. On December 22, 2008, the Plaintiffs filed their opposition to the Summary Judgment Motion. A00004. On March 10, 2009, the Land Court granted the Summary Judgment Motion and entered judgment dismissing the Amended Complaint.<sup>2</sup> A00005; A01561-A01570. The Plaintiffs filed their Notice of Appeal on April 9, 2009. A01577.

In this appeal, the Plaintiffs' claims of error relate to the Land Court's award of summary judgment to the Defendants on Count III of the Amended Complaint, and the Land Court's entry of final judgment dismissing the Amended Complaint. The Plaintiffs do not seek this Court's review of the Land Court's dismissal of Counts I, II, IV or V of their Amended Complaint.

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<sup>2</sup> On March 20, 2009, the Plaintiffs served a motion for reconsideration of the Land Court's March 10, 2009 order and judgment, which motion for reconsideration was denied by the Land Court on April 7, 2009. A01571-A01575; A00005.

## STATEMENT OF THE FACTS

In February, 2006, the Town was approached by Thorndike to determine whether the Town was interested in adopting a zoning amendment that would create a so-called "smart growth" zoning district, pursuant to G. L. c. 40R, on a 109-acre site in Kingston owned by Defendant O'Donnell Realty Trust. A00467. Thorndike had acquired an option to purchase the site and was interested in building a large, multi-use development to be called "1021 Kingston's Place". A00208. Thorndike proposed to construct on a 106-acre site within the new "40R" zoning district approximately 730 new residences, 50,000 square feet of new retail space, and 250,000 square feet of new office space, all as purportedly permitted by the 40R Amendment. A00208. The Plaintiffs all own property and reside on land either abutting or in very close proximity to the proposed 40R zoning district. A00115; A01341.

On or about June 29, 2006, the Town of Kingston submitted an application (the "Town's Application") to the Department of Housing and Community Development ("DHCD") pursuant to G. L. c. 40R, § 4 and 760 CMR 59.03 for approval of the proposed 1021 Kingston's Place smart growth zoning overlay district. A01059. The Town's Application certified to DHCD that the proposed 40R zoning district consisted of 109 acres, of which 69.6

acres (or 63.9% of the district) consisted of "Developable Land". A01059. The Town's Application further certified to DHCD that the proposed district included 11.2 acres (or 10.3%) of "Environmentally constrained land". A01060. According to the Town's Application, none of the environmentally constrained land identified therein included rare species habitat designated under state or federal law. A01082.

All of the acreage figures included in the Town's Application were generated not by the Town, but rather by Thorndike. A01170-A01171. The Town did not take any substantive steps to determine the accuracy of the figures submitted to it by Thorndike, including the figures with respect to the acreage and percentage of environmentally constrained land that were included in the Town's Application. A01172. The Town's Application certified that the proposed district could support 730 "Total Future Zoned Units". A01159.<sup>3</sup> After the Town submitted its Application to DHCD, its representatives communicated with DHCD frequently with respect to the contents of its Application in an effort to ensure that DHCD's concerns were satisfied, and to ensure that the Applications contained accurate and up to date information. A01181.

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<sup>3</sup> The calculation of the number of such units is based, in part, on the amount of developable land area in the proposed district. 760 CMR 59.02.

Effective October 1, 2006, the Massachusetts Division of Fisheries & Wildlife, Natural Heritage Program, issued the 12<sup>th</sup> Edition of its Natural Heritage Atlas (the "2006 Habitat Map"). A01331; A01388. Under the 2006 Habitat Map, a substantial portion - perhaps as much as fifty percent (50%) - of the proposed 1021 Kingston's Place zoning district was mapped as Priority Habitat of state-listed rare species and Estimated Habitat of rare wildlife. A01332; A01339; A01343-A01344. Thomas Bott, who is the Town Planner for the Town of Kingston and the individual who signed the Town's Application on behalf of the Town, became aware of the 2006 Habitat Map not later than November 8, 2006. A01059; A01188-A01189; A01295B. Mr. Bott was aware at that time that the 2006 Habitat Map could have an effect on development in the vicinity of the proposed 1021 Kingston's Place zoning district. A01188-A01189; Addendum A61.

Pursuant to 760 CMR 59.05, DHCD issued a letter of eligibility to the Town on April 4, 2007. A01273. On April 11, 2007, the 40R Amendment was adopted by a vote of the Kingston Town Meeting. A00016. The 40R Amendment was thereafter approved in substantial part by the Attorney General of the Commonwealth on or about August 13, 2007. A00124. The 40R Amendment was thereafter posted, purportedly in accordance with G.L. 40, § 32, on or about August 16, 2007. Id. On August

28, 2007, DHCD issued a "final" letter of approval of the 40R Amendment pursuant to 760 CMR 59.05(4). A01297.

Notwithstanding Mr. Bott's awareness of the 2006 Habitat Map, neither he nor the Town took any steps at any time prior to DHCD's approval of the 40R Amendment to confirm the accuracy of the "environmentally constrained land" figures included in the Town's Application or to correct such figures based upon the information shown on the 2006 Habitat Map. A01172. The Town did not revise the "developable land area", "environmentally constrained land", or "Total Future Zoned Incentive Units" prior to receiving DHCD's approval of the 40R Amendment. A01184-A01185. DHCD's approval of the proposed 40R Amendment was therefore based on the Town's materially incorrect application. A01331; A01343-A01344; A01184-A01185. In the annual updates required under 760 CMR 59.07 that the Town has submitted to DHCD since the adoption of the 40R Amendment (including the most recent update dated July 30, 2008), the Town has not revised the "developable land area", "environmentally constrained land", or "Total Future Zoned Incentive Units" contained in its Application. A01183-A01185; A01289.

Prior to adopting the 40R Amendment, the Town Planner had not given any consideration to the effect that the October 1, 2006 Priority Habitat designation (as shown in the 2006 Habitat Map) would have on the

development proposed to be permitted by the 40R Amendment. A01164-A01192; A01216-A01217.

#### SUMMARY OF ARGUMENT

In reviewing zoning amendments enacted pursuant to G. L. c. 40R, courts must determine whether they violate State law or constitutional provisions, are arbitrary or unreasonable, or are substantially unrelated to the public health, safety or general welfare. Courts must also determine whether the municipality failed to analyze and consider adequately relevant land use planning considerations. Finally, courts must determine whether the amendment was enacted in accordance with G. L. c. 40R and is substantially related to the purpose of that statute (pp. 9 - 11, *infra*).

The purpose of G. L. c. 40R is to encourage housing production in areas that are not of critical environmental importance. (pp. 11 - 13, *infra*). Chapter 40R's implementing regulations - which require towns to submit to the State detailed information before the State grants approval for the proposed 40R zoning district - are specifically designed to ensure that proposed 40R zoning districts satisfy G. L. c. 40R's purpose of encouraging the production of new housing in areas that are not of critical concern. (pp. 13 - 15, *infra*).

Here, the Town failed to consider – prior to its April 11, 2007 vote on the 40R Amendment – the effect that the October 1, 2006 designation of approximately fifty percent (50%) of the proposed new zoning district as environmentally constrained land would have on the zoning district (pp. 15 – 19, *infra*). Moreover, DHCD’s approval of the 40R Amendment is invalid because it was obtained by the Town on the basis of the Town’s materially incorrect application, which application the Town had a duty to correct. (pp. 20 – 28, *infra*).

#### STANDARD OF REVIEW

In moving for summary judgment, the moving party has the burden of *affirmatively* demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings. Highlands Ins. Co. v. Aerovox, Inc., 424 Mass. 226, 232 (1997); Kourouvaclis v. General Motors Corp., 410 Mass. 706, 711-712 (1991); Mathers v. Midland-Ross Corp., 403 Mass. 688, 690 (1988). A trial court ruling on a defendant’s motion for summary judgment must assume that *all* of the facts set forth in the plaintiffs’ affidavits are true, and draw any and all inferences favorable to the plaintiffs. O’Gorman v. Antonio Rubinaccio & Sons, Inc., 408 Mass. 758 (1990); Coveney v. President & Trustees of College of Holy Cross, 388 Mass. 16 (1983). The court should not grant

summary judgment merely because the facts offered by the movant appear more plausible than those tendered in opposition, or because it appears that the nonmoving party is unlikely to prevail at trial. Flesner v. Technical Communications Corp., 410 Mass. 805 (1991); Attorney General v. Bailey, 386 Mass. 267, cert. denied 459 U.S. 970 (1982). If the nonmoving party's affidavits show a genuine issue of fact, summary judgment should not be ordered, even if those affidavits are disbelieved. Kesler v. Pritchard, 362 Mass. 132 (1972). Even where there are no material facts in dispute, a court may not grant summary judgment unless the moving party is entitled to judgment as a matter of law.

#### ARGUMENT

##### **I. THE SCOPE OF JUDICIAL REVIEW OF ZONING AMENDMENTS ADOPTED PURSUANT TO MASSACHUSETTS GENERAL LAWS, CHAPTER 40R.**

The scope of review for zoning amendments adopted solely pursuant to G. L. c. 40A (the "Zoning Act") is well known to this Court. In such cases, the "focus of review of a zoning amendment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare. Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). Where a town

fails to analyze and consider adequately land use planning considerations *before* taking the decision to enact a zoning amendment, the amendment may also be struck down as arbitrary. See, e.g., National Amusements v. City of Boston, 29 Mass. App. Ct. 305, 310 (1990); Rando v. Town of North Attleborough, 44 Mass. App. Ct. 603, 612 (1998) (declaring that town officials are required to analyze land use planning considerations prior to enacting zoning amendment).

Where a zoning amendment has been adopted pursuant to G. L. c. 40R, however, the Court must make a crucial *additional* determination. Specifically, the Court must determine that such an amendment is substantially related to the specific purpose of G. L. c. 40R, as articulated by the Legislature in G. L. c. 40R, § 1. See Sullivan v. Town of Acton, 38 Mass. App. Ct. 113 (1995) ("Upon judicial review, a showing must be made that a substantial relationship exists between the zoning amendment and the general objectives of the Legislation.") Id. at 117.

In order for a plaintiff to prevail on a claim that a zoning amendment is invalid and must therefore be annulled, the plaintiff must meet a burden of proof that is best characterized as "a preponderance of the evidence." Johnson v. Edgartown, 425 Mass. 117, 121 (1997). As this Court has observed, the "applicable principles are of judicial deference and restraint, not

abdication." Id. National Amusements, *supra* at 309.

All zoning amendments, including those enacted by a town meeting, are subject to judicial review under the principles set forth above. See Durand, *supra*.

**II. THE LAND COURT ERRED IN AWARDING SUMMARY JUDGMENT TO THE DEFENDANTS ON COUNT III OF THE AMENDED COMPLAINT BECAUSE THE RECORD REVEALED THAT THE 40R AMENDMENT IS NOT SUBSTANTIALLY RELATED TO AN IMPORTANT PURPOSE OF CHAPTER 40R; THE RECORD ALSO REVEALED THAT IT WAS ENACTED WITHOUT ADEQUATE PLANNING AND ON THE BASIS OF MATERIALLY INCORRECT INFORMATION WITH RESPECT TO THE PRESENCE OF CRITICAL ENVIRONMENTAL AREAS IN THE PROPOSED 40R ZONING DISTRICT.**

**A. Brief Overview of Chapter 40R, Its Purpose and the Procedure By Which Zoning Bylaws May Be Enacted Pursuant to Such Statute.**

In order to understand the manner and extent to which the 40R Amendment was enacted in contravention of the purpose of Chapter 40R and without adequate planning, it is important to highlight both the *specific* legislative purpose behind Chapter 40R, and to describe with particularity the special statutory and regulatory process by which a town may enact a zoning bylaw pursuant to the statute.<sup>4</sup>

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<sup>4</sup> Chapter 40R was enacted in 2004. There are no reported appellate decisions interpreting the provisions of Chapter 40R or its implementing regulations. Similarly, there are no reported appellate decisions involving challenges to zoning amendments purportedly enacted pursuant to Chapter 40R.

1. **The legislative purpose behind G. L. c. 40R is to encourage housing production in areas that are not of critical environmental importance.**

The legislative purpose behind G. L. c. 40R is to encourage "smart growth" and housing production. G. L. c. 40R, § 1. Importantly, G. L. c. 40R defines "smart growth" as a principle of land development that preserves critical environmental areas. Id. Chapter 40R is intended, therefore, to encourage land development and housing production in a manner that also preserves critical environmental areas.

Chapter 40R encourages "smart growth" by providing financial incentives to municipalities that adopt so-called "smart growth" zoning bylaws in conformity with the purpose and provisions of Chapter 40R. See G. L. c. 40R, § 9. These incentives include a "zoning incentive payment" which the municipality receives from the Commonwealth upon adoption of a smart growth bylaw, which payment is based, in part, on the amount of "developable land area" within the proposed smart growth zoning district.<sup>5</sup>

Consistent with its goal of encouraging housing production while also preserving critical environmental

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<sup>5</sup> Municipalities also receive from the Commonwealth "density bonus payments" upon issuance of building permits for housing units to be constructed in an approved smart growth district, and reimbursement of school costs for children living in a smart growth zoning district. G. L. c. 40R, § 9; 760 CMR 59.06; G. L. c. 40S.

areas, the Legislature defined "developable land area" under G. L. c. 40R as not including: ... (3) areas exceeding 1/2 acre of contiguous land that are unsuitable for development ... for environmental reasons." G. L. c. 40R, § 2. Subsequent to the enactment of Chapter 40R, the Department of Housing and Community Development ("DHCD") issued regulations to explain and to provide specifics for the program and its operation.<sup>6</sup> 760 CMR 59.01(1). These regulations gave further specificity to the definition of "developable land": for purposes of Chapter 40R, "developable land" shall not include areas exceeding 1/2 acre of contiguous land that are "rare species habitat designated under federal or state law."<sup>7</sup> 760 CMR 59.02.

2. **The procedure by which a zoning bylaw may be enacted pursuant to Chapter 40R is unique in that, in addition to an affirmative vote of town meeting, approvals by DHCD are required, including a "final" approval following a town meeting vote.**

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<sup>6</sup> The Legislature designated DHCD as the regulatory agency for the smart growth zoning program, and authorized it to issue regulations to assist with the implementation of Chapter 40R.

<sup>7</sup> Under Massachusetts law, rare species habitat consists of the priority habitats of state-listed rare plant and animal species, and estimated habitat for rare wildlife, as designated by the Massachusetts Division of Fisheries & Wildlife, Natural Heritage and Endangered Species Program ("NHESP"), and shown on the priority and estimated habitats contained in the Massachusetts Natural Heritage Atlas issued by NHESP. A01330-A01331.

Unlike other zoning amendments, a municipality may not vote to adopt a smart growth zoning bylaw pursuant to Chapter 40R unless the proposed bylaw has received the prior approval of the Commonwealth, acting through DHCD. G. L. c. 40R, § 4. Specifically, if a town wishes to enact a smart growth bylaw, it must first submit to DHCD an application for a "letter of eligibility". G. L. c. 40R, § 4; 760 CMR 59.03. The detailed information required in such application is set forth in both G. L. c. 40R, § 5, and in 760 CMR 59.03. The town may not vote on a proposed smart growth zoning bylaw until after it receives from DHCD the letter of eligibility. G. L. c. 40R, § 4 and 760 CMR 59.05(2).

In order to determine whether the proposed zoning district will further the purpose of Chapter 40R, the Legislature directed that a town's application identify and describe the "developable land area" within the proposed smart growth zoning district. G. L. c. 40R, § 5. More specifically, DHCD requires that a town include with its application a developable land plan that identifies on a parcel-by-parcel basis those areas within the district that qualify as developable land, and each of the other categories of land excluded from the definition of developable land (including rare species habitat), along with a calculation, in acres, of the area of each such category of land within the proposed district. 760 CMR 59.03. If DHCD determines

that the proposed district is in an eligible location and that the application satisfies the purpose and requirements of G. L. c. 40R, it may issue a letter of eligibility. 760 CMR 59.04. Upon receipt of the letter of eligibility, the town may vote on the proposed zoning bylaw. If the bylaw is approved by the town by an affirmative vote of town meeting, the town must apply to DHCD for final approval of the zoning bylaw, at which time the town must advise DHCD of any changes to the town's application or amendments to the proposed bylaw that were made subsequent to DHCD's issuance of a letter of eligibility. 760 CMR 59.04. The bylaw shall not become effective until it has received DHCD's final approval. Id.

**B. Prior to Kingston's Enacting the 40R Amendment, and Prior to the Subsequent Approval by DHC of such 40R Amendment, Neither the Town Nor DHCD Considered the Fact that *Approximately Fifty (50) Percent* of the Proposed Smart Growth Zoning District Constituted "Priority Habitat of Rare Species", and Therefore Did Not Qualify as "Developable Land" Under G. L. c. 40R.**

The Town submitted its application for a letter of eligibility in connection with the proposed 40R Amendment (the "Application") to DHCD on June 29, 2006. A01059. Although Chapter 40R, § 5 specifically requires the chief executive of the town to submit the Application and its supporting materials, and although DHCD's Smart Growth Zoning Application Form requires the

town's representative to certify that all of the information in the Application is accurate and complete, the Town apparently relied solely on a private developer (Thorndike) to provide critical information that was required to be included in the Application. A00170-A001171. Specifically, the "Developable Land Plan" included with the Application, which plan is a crucial component of the Application and is required by 760 CMR 59.03(1)(b), was prepared not by the Town, but rather by Thorndike. A01170-A01171. The "Developable Land Plan" set forth the portion of the proposed district that constituted "developable land area" pursuant to the definitions set forth in Chapter 40R and 760 CMR 59.02. The Town did not take any substantive or meaningful steps to verify the information concerning "developable land area" that it received from Thorndike. A01171; A01172-A01773. Indeed, the Town claims that it lacked the expertise or resources to do so. A01173. Based solely on information that it received from Thorndike, the Town effectively represented to DHCD that the proposed district did not include any rare species habitat designated under state law. A01059-A01084. Although this may have been true at the time that the Town originally submitted its Application to DHCD in June 2006, it was not true at the time that DHCD issued its letter of eligibility on April 4, 2007, at the time that the Town voted on the 40R Amendment on April 11,

2007, or at the time that DHCD issued its final approval on August 28, 2007. That is because, on October 1, 2006, a substantial amount (and perhaps as much as one-half (1/2)) of the proposed district was designated by the Massachusetts Department of Fisheries and Wildlife, Natural Heritage and Endangered Species Program ("NHESP") pursuant to G. L. c. 131A and its implementing regulations as both priority habitat for rare plant and animal species and estimated habitat for rare wildlife. A01331; A01338-A01340; A01162-A01163; A01300-A01324. In light of Chapter 40R's purpose of preserving critical environmental areas, the impact of the habitat designation on the advisability of the proposed rezoning is clear. Priority habitats of rare species are critical environmental areas that the Legislature and DHCD have clearly indicated should not be impaired by development authorized pursuant to Chapter 40R. See A01331-A01332; G. L. c. 40R, § 2; 760 CMR 59.02. Rezoning an area of priority habitat for rare species to permit high density residential and commercial development is entirely inconsistent with both the purpose of Chapter 40R and sound land use planning principles. A01331-A01332.

Notwithstanding the obvious importance of the fact that much of the proposed district was no longer "developable land area" under Chapter 40R, there was absolutely no consideration by the Town of Kingston, its

boards, officials, or Town Meeting of the effect of the October 1, 2006 habitat designation on the advisability of the proposed rezoning. The materials submitted by the Defendants in support of their motion for summary judgment did not reflect any such consideration. Indeed, Kingston's Town Planner testified that he did not make any effort to determine whether the October 1, 2006 habitat designation had any affect on the amount of developable land in the proposed 40R district, and that he is not aware of anyone else in the Town of Kingston who analyzed or considered the effect of such habitat designation on the proposed 40R district. A01188.

The record reveals, therefore, that no consideration whatsoever was given to the effect that the habitat designation would have on development within the proposed district<sup>8</sup> or whether, in light of the habitat designation, enacting the proposed zoning would be in accordance with sound land use planning principles. The Town's utter failure to consider the effect of the habitat designation on the proposed zoning bylaw prior to its enactment is even more egregious in light of the specific purpose of Chapter 40R – namely,

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<sup>8</sup> The impact could be profound. According to the Secretary of Environmental Affairs, one of the rare species on the property is the Eastern Box Turtle. A01300-A01324. In the case of this particular species, the Natural Heritage program typically employs as a performance standard a 70% habitat protection formula as the beginning basis for a finding of "insignificant

to encourage land development and housing production while preserving critical environmental areas such as priority habitat for rare or endangered species.

The Town's failure to consider the effect of the habitat designation on the amount of developable land in the proposed district also caused an important error in the "fiscal planning" associated with the 40R Amendment. The 40R Amendment was presented to, and enacted by, the Town's voters in April, 2007, on the belief that the Town would receive from the Commonwealth a \$600,000 "zoning incentive payment" pursuant to G. L. c. 40R, § 9. A01085; A01169. However, "zoning incentive payments" are determined based, in part, on the amount of "developable land" in the proposed district. If the "developable land area" in a proposed district will not support at least 501 units of new housing, then the town would not be entitled to receive \$600,000 from the Commonwealth. 760 CMR 59.06. Here, due to the fact that the correct amount of "developable land" is substantially less than that identified in the Town's Application, the Town may well be required to repay a portion of the \$600,000 zoning incentive payment that it received from the Commonwealth once DHCD becomes aware of the Application's misrepresentation as to the true

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impact" in compliance with the Massachusetts Endangered Species Act (G. L. c. 131A). See A01329.

amount of "developable land" in the smart growth district. See 760 CMR 59.06.

**C. The 40R Amendment Is Invalid Because It Was Approved by DHCD on the Basis of The Town's Materially Incorrect Application.**

In this case, the Town secured DHCD's approval of the 40R Amendment on the basis of a materially incorrect application that the Town's own Town Planner knew, or should have known, was incorrect. A01059; A01331; A01343-A01344; A01188; A01291-A01292. Therefore, the conclusion is inescapable that DHCD was unable to reach an accurate determination that the 40R Amendment was consistent with the purposes of Chapter 40R, including the preservation of critical environmental areas.

The Town's Application represented that there were 69.6 acres of developable land, and it identified 0 acres of rare species habitat. A01059. Had the Town corrected its Application, it would have shown as much as one-half (1/2) of the proposed district as rare species habitat. A01331; A01343-A01343. Since rare species habitat cannot be included as "developable land", the amount of developable land would have been reduced by about fifty percent (50%). Again, in light of the fact that one of the chief purposes of Chapter 40R is to preserve critical environmental areas, it is obvious that DHCD should have been timely advised of the fact that much of the proposed district was no longer

"developable land" under Chapter 40R. If the Town had corrected its Application to reflect the actual amounts, percentages, and locations of "developable land" and "rare species habitat", DHCD would have been reviewing a very different application – an application to create a proposed smart growth zoning district that would permit highly dense residential and other development in and adjacent to critical environmental areas, contrary to the articulated legislative purpose of Chapter 40R.

However, the Town did not correct its Application, even though it appears that the Town's top planning official was aware of the revised habitat designation as early as November 19, 2006. See A01188-A01190; A01291-A01292. Despite the fact that the Town continued to supplement its Application and communicate with DHCD through at least December, 2006, and even though DHCD did not issue its letter of eligibility until April 4, 2007, the Town took no steps to correct its Application. A01181; A01184-A01185; A01296. Again, the Town had more than four (4) months from the date that its Town Planner apparently became aware of the habitat designation within which it could have corrected its Application to reflect the true amount of developable land area and rare species habitat. The Town chose not to do so, thereby depriving DHCD of critical information necessary

for its review of the Application.<sup>9</sup> The Town also did not correct its Application – or otherwise inform DHCD of the October 1, 2006 habitat designation – when it applied to DHCD for final approval of the 40R Amendment after its adoption by the Kingston Town Meeting on April 11, 2007, which final approval was issued by DHCD on August 28, 2007.<sup>10</sup> In reliance on the incorrect Application, DHCD authorized the Town to receive a \$600,000 “zoning incentive payment”, to which payment the Town would not have been entitled if, based on the actual amount of developable land, the district could not support at least 501 new housing units in accordance with the densities permitted by the 40R Amendment. See 760 CMR 59.06.

In light of the fact that the purpose of Chapter 40R is to encourage housing production while preserving

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<sup>9</sup> It appears that the Town may have been concerned that corrections or changes to its Application could have – at a minimum – caused a delay in DHCD’s approval of the Application, which delay the Town apparently wished to avoid in order to receive expeditiously the \$600,000 payment from DHCD. A01270.

<sup>10</sup> Indeed, although the Town is required to file annual updates with DHCD in connection with which the Town must “re-certify” the amount of “developable land area” in the approved district, the Town has continued to fail to disclose to DHCD the correct amount of “developable land area” in light of the habitat designation. A01285-A01290. According to the Town’s representative who has been designated to certify and submit such updates, the Town does not believe it is under any obligation to “update” DHCD with respect to the amount of developable land area in the district. A01190-A01191. Of course, 760 CMR 59.07 clearly requires the Town to do so, as the Land Court properly determined. A01568.

critical environmental areas, the Town's failure to consider the effect that the designation of a substantial portion of the proposed district as rare species habitat prior to enacting the 40R Amendment demonstrates an egregious lack of planning. It also raises substantial doubt as to whether the 40R Amendment is substantially related to the purpose of Chapter 40R.

- D. **The 40R Amendment Is Invalid Because The Town of Kingston Was Under A Duty To Notify DHCD Of The Changes In The Amounts Of "Developable Land" And "Environmentally Constrained Land" In The Proposed New Zoning District Prior To DHCD's Final Approval Of The 40R Amendment On August 28, 2007.**

The Land Court's award of summary judgment to the Defendants on Count III of the Amended Complaint was based, in part, on its conclusion that the Town was not under any duty to correct the errors in the Town's Application concerning the amounts of developable land and environmentally constrained land in the proposed new zoning district prior to April 11, 2007 -- the date that the 40R Amendment was approved by the Town. A01568-01569. That conclusion, and therefore the Land Court's award of summary judgment, were incorrect for the reasons set forth below.

Under G. L. c. 40R and 760 CMR 59.05(4), a zoning amendment does not become "final" for purposes of G. L. c. 40R until the amendment receives a "Letter of Approval" from DHCD. Therefore, with respect to the

Plaintiffs' challenge to the 40R Amendment, the critical date prior to which the Town is under a duty to correct errors in the Town's Application is not the date that the 40R Amendment was approved by the Town (ie, April 11, 2007), but rather the critical date was August 28, 2007, which was the date that the 40R Amendment received the final Letter of Approval from DHCD. The question, then, is whether the Town was under a duty to notify DHCD of the substantial changes in the amounts of Developable Land, environmentally constrained land and "Total Future Zoning Incentive Units" in the proposed 40R district prior to DHCD's issuance of the Letter of Approval on August 28, 2007.<sup>11</sup>

1. **Under 760 CMR 59.05(4), following the adoption of the 40R Amendment by town meeting, the Town was under a duty to notify DHCD of the substantial reduction in the amount of "Developable Land" and the substantial increase in the amount of "environmentally constrained land" in the proposed new zoning district prior to DHCD's issuance of its Letter of Approval on August 28, 2007.**

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<sup>11</sup> In addition to those specific duties imposed by Chapter 40R's implementing regulations (see 760 CMR 59.05(4)(2d para.) and 760 CMR 59.07(1)(a)), the Plaintiffs contend that the Town was under a common law obligation to advise DHCD of material errors in its application of which the Town became aware after it submitted its application but before DHCD issued its letter of eligibility on April 4, 2007 and its letter of approval on August 28, 2007. See Backman v. Polaroid Corp., 910 F.2d 10, 16-17 (1st Cir. 1990) (observing that "a statement, correct at the time, may have a forward intent and connotation upon which parties may be expected to rely. If this is a clear meaning, and there is a change, correction, more exactly, further disclosure, may be called for"). A failure to correct such material errors on an application of which an applicant becomes aware amounts to misrepresentation.

Under 760 CMR 59.05(4) ("Final Approval by the Department"), after a municipality has adopted a zoning bylaw pursuant to G. L. c. 40R, it must notify DHCD of all differences between the proposed bylaw as set forth in the original application and the bylaw as adopted by the municipality, and, importantly, it must also notify DHCD of "any other changes to the original application." Such changes would obviously include substantial changes in the amount of developable land and environmentally constrained land in the proposed district. If there have been any changes to the bylaw or to "any other element of the original application", then DHCD may treat the municipality's post-adoption submission as an amendment to its application and determine whether the application, as amended, complies with Chapter 40R and its implementing regulations. 760 CMR 59.05(4). Here, because the Town learned in November, 2006, that the amount of developable land and environmentally constrained land contained in the proposed district changed substantially after the Town submitted its Application, the Town was under a duty to notify DHCD of those changes following the Town's adoption of the 40R Amendment on April 11, 2007. See 760 CMR 59.05(4)(2d para.). Notwithstanding its duty, the Town failed to provide such notice to DHCD.

2. **The Town was also under a duty, pursuant to 760 CMR 59.07(1)(a), to notify DHCD of the substantial reduction in the amount of "Developable Land" in the proposed new zoning district prior to DHCD's issuance of its Letter of Approval on August 28, 2007.**

As the Land Court observed in its decision allowing the Summary Judgment Motion, a municipality "that either contains a District that had been Approved by the end of the previous fiscal year ending on June 30, or had filed an application for a proposed district within that fiscal year" must file an update of the developable land area with DHCD by July 31st of each year. A01568; 760 CMR 59.07(1)(a). These updates are known as "Annual Updates." 760 CMR 59.02 (defining "Annual Update" as "information provided to [DHCD] on an annual basis by each Municipality with an Approved District or a District for which an application has been filed.") Although the Land Court concluded that the Town's obligation to file an Annual Update with DHCD had not yet arisen as of the date that the Town adopted the 40R Amendment (ie, April 11, 2007), A01569, the Town's obligation arose not later than July 31, 2007, which was prior to the date that the 40R Amendment received final approval from DHCD (ie, August 28, 2007). Notwithstanding its obligation under 760 CMR 59.07(1)(a), the Town failed to file an Annual Update in the form required by that regulation prior to July 31, 2007, and, therefore, it did not submit to DHCD "updated"

information concerning the developable land area and environmentally constrained land area prior to that date.<sup>12</sup>

In summary, the Town's failure to correct its application prior to DHCD's issuance of its Letter of Approval on August 28, 2007 to reflect the substantial decrease in Developable Land and the substantial increase in environmentally constrained land constituted a violation of the Town's duties under Chapter 40R and 760 CMR 59.05(4) and 760 CMR 59.07(1)(a). The Town therefore obtained DHCD's approval of the 40R Amendment (which approval was required in order for the 40R Amendment to be valid) in violation of Chapter 40R and its implementing regulations. The Plaintiffs respectfully submit that the 40R Amendment is therefore void.

#### CONCLUSION

For all of the foregoing reasons, the Land Court's March 10, 2009 decision allowing the Defendant's motion for summary judgment, and its judgment dismissing the Amended Complaint should be vacated, and Count III

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<sup>12</sup> Similarly, in the Annual Update dated July 30, 2008 that the Town submitted to DHCD, the Town failed again to revise the "developable land area", "environmentally constrained land area" or "Total Future Zoned Incentive Units" contained in its application. A01183-A01185; A01289.

should be reinstated for further proceedings consistent with this Court's opinion.

Respectfully submitted,

Date: July 14, 2009



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William S. Abbott, BBO# 010320  
David H. Abbott, BBO# 634896  
WILLIAM S. ABBOTT, P.C.  
50 Congress Street  
Boston, Massachusetts 02109  
(617) 523 - 5521

ADDENDUM

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SEAL

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

PLYMOUTH, ss.

07 MISC 359307 (KFS)

JENNIFER DIRICO, HELEN K. GAVIN,  
and MILDRED M. LEONARDI,  
Plaintiffs

v.

TOWN OF KINGSTON, PAUL L.  
ARMSTRONG, in his capacity as Building  
Inspector and Zoning Enforcement Officer  
of the Town of Kingston, Mary O'Donnell  
and Robert Moakley, as Trustees of the  
O'DONNELL FAMILY REALTY TRUST  
and THORNDIKE DEVELOPMENT  
CORPORATION,  
Defendants

**DECISION GRANTING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

Plaintiffs initiated this action by filing a complaint pursuant to G. L. c. 240, § 14A, on November 14, 2007, challenging the adoption of an amendment to the Town of Kingston Zoning Bylaw (Bylaw) in accordance with G. L. c. 40R (40R Amendment). On December 11, 2007, Defendants filed a Motion to Dismiss. Plaintiffs opposed the motion through a written opposition filed on January 31, 2008. On March 7, 2008, this court (Lombardi, J.) held a hearing on Defendants' motion, at which all parties were heard. On March 14, 2008, Plaintiffs filed a First Amended Petition to Determine Validity of Zoning By-Law (Amended Complaint). The Amended Complaint added two new counts to this action but did not add any factual allegations.

By Order dated March 24, 2008, this court (Lombardi, J.) dismissed counts I, II, and V of Plaintiffs' Amended Complaint. On April 6, 2008, Defendants filed a Motion to Dismiss Count IV of the Amended Complaint. Plaintiffs opposed this second motion to dismiss through a written opposition filed on May 14, 2008. A hearing on the second motion to dismiss was held on June 2, 2008, at which all parties were heard. By order

dated June 4, 2008, this court (Lombardi, J.) dismissed Count IV of Plaintiffs' Amended Complaint. Following issuance of the two orders, Plaintiffs' sole remaining challenge is Count III of the Amended Complaint, which seeks to invalidate the 40R Amendment on the basis of Plaintiffs' allegation that the Town "failed to analyze and consider adequately relevant land use planning considerations including traffic impacts, the character of the neighborhood, the prevention of blight and pollution of the environment, and the encouragement of the most appropriate use of land throughout the town."

On November 21, 2008, Defendants filed a motion for summary judgment on Count III of Plaintiffs' Amended Complaint. Plaintiffs opposed this motion through a written opposition filed on December 22, 2008. A hearing was held on January 16, 2009, at which all parties were heard. The summary judgment record includes affidavits of Angus Jennings, Principal Planner for Concord Square Planning & Development, Inc.; Thomas Bott, Kingston Town Planner; Lloyd Geisinger, President of Thorndike Development Corp.; Plaintiff Helen K. Gavin; C. Diane Boretos, professional wetland scientist; and an authenticating affidavit of David Abbott, Esq., Plaintiffs' counsel; as well as a copy of the Bylaw, in addition to the parties' briefs and submissions filed in compliance with Land Court Rule 4. The material facts are not in dispute.

The Town of Kingston is a coastal community in southeastern Massachusetts that experienced a 60% growth in population from 1980 to 2000. Defendant Thorndike Development, Inc. (Thorndike) is a real estate development and construction company headquartered in Norton, Massachusetts. In February of 2006, the Town was approached by Thorndike about possibly adopting a zoning amendment that would create a smart growth zoning district, pursuant to G. L. c. 40R, on property located less than one-half mile from the Kingston MBTA station (Property). The Property consists of 109 acres and includes an excavated sand pit. Thorndike had acquired an option to purchase the Property and was interested in developing a smart growth development to be called 1021 Kingston Place (Kingston Place). As conceived, Kingston Place would consist of up to 730 residential units, 50,000 square feet of retail space, and 250,000 square feet of commercial space.

In February of 2006, the Town requested a preliminary letter of eligibility from the Director of Smart Growth Zoning at the Department of Housing and Community

Development (DHCD) that the Property qualified as an “eligible location” under 760 CMR 59.04, the applicable regulation promulgated pursuant to G. L. c. 40R. Included in the Town’s submission was a certification of the amount of “developable land” in the proposed smart growth district. Under 760 CMR 59.02, “developable land” may not include “areas exceeding one-half acre of contiguous land that are . . . rare species habitat[s] designated under federal or state law.” After review, DHCD issued its preliminary Letter of Eligibility. The Town subsequently applied for and received a Priority Development Fund grant from DHCD for the purpose of planning a smart growth zoning district. The \$50,000 grant was used to engage outside consultants who assisted in the process of creating design review standards and drafting the smart growth zoning bylaw. The Town then hired Concord Square Planning and Development, Inc. (Concord Square), which had played an active role in the Legislature’s adoption of G. L. c. 40R, and provides ongoing consulting to the Commonwealth Housing Task Force.

In June of 2006, the Planning Board appointed a 40R Design Review Drafting Committee (Design Review Committee) which worked closely with Concord Square and the Town Planner to develop design standards and draft a smart growth zoning bylaw. The Design Review Committee also worked closely with The Cecil Group, Inc., a design consultant. As part of its due diligence, the Design Review Committee conducted site visits to Thorndike’s smart growth developments in Norton and Quincy and met regularly through the summer of 2006 and into the fall. These meetings were televised and the meeting minutes and progress documents were made available on the Town’s website.

On March 19, 2007, the Planning Board approved the 40R design standards, which had previously been approved by DHCD. The design standards are set forth in an eighty-six page document which supplements the 40R Amendment and includes binding standards for compliance and non-binding principles for development, to be used by the Planning Board in reviewing projects proposed pursuant to the 40R Amendment. Between February of 2006, and April of 2007, the 40R proposal was reviewed, studied, and revised at numerous open meetings including seven community meetings, nine Board of Selectmen meetings, eight Water Commission meetings, ten meetings of the Sewer Commission, fourteen Planning Board meetings, one meeting of the Open Space Committee, two meetings of the Conservation Commission, one Master Planning

Implementation Committee meeting, ten Design Review Committee meetings, one meeting of the Secure Energy Future Committee, and one meeting of the Finance Committee.

Throughout the 40R Amendment process the Town was assisted by outside engineering, architectural, design, financial, and legal consultants. Additionally, prior to the Town's adoption of the 40R Amendment, Thorndike and the Town both commissioned studies and analyses, as well as peer reviews and independent studies, that included a traffic impact and analysis study dated January 31, 2006; a traffic impact and analysis study dated September 2006; a fiscal impact review and fiscal impact analysis presentation dated October 2006; a traffic peer review letter from Greenman-Pedersen, Inc., evaluating traffic studies prepared by Thorndike's traffic consultant; fiscal impact analysis report dated November 2006; alternative improvement evaluation for Route 3 at Exit 8, dated December 2006; a traffic impact and analysis study dated February 2007; a fiscal impact review dated March 2007; a community information bulletin of March 2007, prepared by the Kingston Finance Committee; and a traffic peer review letter from Greenman-Pedersen, Inc., dated March 26, 2007.

On or about June 29, 2006, the Town submitted its "Smart Growth Zoning Overlay District Program (c. 40R) Application Form" to DHCD. Included in the application was a calculation of the "developable land" based on a survey of the Property entitled "Existing Conditions Plan, Marion Drive, Kingston, Massachusetts," prepared by Harry R. Feldman, Inc. The survey was commissioned by Thorndike and the Town accepted that calculation without performing an independent calculation of the developable land area. The application was approved by DHCD on April 4, 2007, and on April 9, 10, and 11, 2007, the Town debated the 40R Amendment which would add Section 4.15 "1021 Kingston's Place Smart Growth District," at its Annual Town Meeting. By the time the Town voted to approve the 40R Amendment, six hours of discussion and debate had taken place over three nights. During the 15-month process of preparing and adopting the 40R Amendment, the Town Planner determined that the benefits of the 40R Amendment would outweigh concerns over its impact on the community. He determined the benefits would include the creation of affordable housing, protection from Chapter 40B permit proposals, the imposition of exacting

design standards, substantial mitigation payments and improvements by the developer, substantial financial incentives from the Commonwealth pursuant to Chapter 40R, significant infrastructure improvements and creation and preservation of parks and open spaces, and the development of a smart growth district that includes a mix of residential styles and affordability levels in a pedestrian-friendly setting close to public transportation.

The challenge to the 40R Amendment is before this court pursuant to Defendants' Motion for Summary Judgment. "Rule 56 (c) of the Massachusetts Rules of Civil Procedure . . . provides that a judge shall grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Attorney General v. Bailey, 386 Mass. 367, 370-71 (1982) (internal quotations omitted). In reviewing a motion for summary judgment, the court shall not assess "the credibility of witnesses or the weight of the evidence or make its own decision of facts." Hub Assocs. v. Goode, 357 Mass. 449, 451 (1970) (quoting Gordon v. American Tankers Corp., 286 Mass. 349, 353 (1934)). A motion for summary judgment will not be granted "merely because the facts [the movant] offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial." Bailey, 386 Mass. at 371 (quoting Hayden v. First Nat'l Bank, 595 F.2d 994, 997 (5<sup>th</sup> Cir. 1979)).

In considering the materials in support of any motion for summary judgment, "the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." Hub Assocs. v. Goode, 357 Mass. 449, 451 (1970) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). The moving party bears the burden of affirmatively showing that there is no triable issue of fact, even if that party would not have such a burden if the case were to go to trial. See Ng Bros. Constr., Inc. v. Cranney, 436 Mass. 638, 644 (2002). "The burden on the moving party may be discharged by showing that there is an absence of evidence to support the non-moving party's case. A complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial." Kourouvacilis v. GM Corp., 410 Mass. 706, 711 (1991). "[A]lthough that supporting

material need not negate, that is, disprove, an essential element of the claim of the party on whom the burden of proof at trial will rest, it must demonstrate that proof of that element at trial is unlikely to be forthcoming.” Id. at 714.

The sole remaining count of Plaintiffs’ challenge to the Town’s 40R Amendment asserts that the Town failed to conduct adequate due diligence before adopting the 40R Amendment. Plaintiff’s burden is significant as “[t]he enactment of a zoning bylaw by the voters at town meeting is not only the exercise of an independent police power; it is also a legislative act.” Durand v. IDC Bellingham, LLC, 440 Mass. 45, 50 (2003). Therefore, it should not be undone unless it is arbitrary and unreasonable or substantially unrelated to the public health, safety, or general welfare. Id. at 51. Moreover, if the reasonableness of the amendment is *even fairly debatable*, the court must uphold its enactment. Id. (citing Crall v. Leominster, 362 Mass. 95, 101 (1972)) (emphasis added); *see, e.g.,* Hanna v. Town of Framingham, 60 Mass. App. Ct. 420, 427 (2004). In reviewing the adoption, the 40R Amendment is entitled to every presumption in its favor and the court must not substitute its judgment for that of the town. Andrews v. Town of Amherst, 68 Mass. App. Ct. 365, 369 (2007). Consequently, if reasonable minds can differ as to whether the 40R Amendment should have been adopted based on the Town Meeting’s assessment of its benefit to the Town, then the amendment cannot be invalidated. Simon v. Town of Needham, 311 Mass. 560, 564 (1942) (citations omitted.)

G. L. c. 40R was enacted “to encourage smart growth and increased housing production in Massachusetts.”

Smart growth is a principle of land development that emphasizes mixing land uses, increases the availability of affordable housing by creating a range of housing opportunities in neighborhoods, takes advantage of compact design, fosters distinctive and attractive communities, preserves open space, farmland, natural beauty and critical environmental areas, strengthens existing communities, provides a variety of transportation choices, makes development decisions predictable, fair and cost effective and encourages community and stakeholder collaboration in development decisions.

G. L. c. 40R. In providing for smart growth zoning, Chapter 40R provides a detailed framework for municipalities to follow when adopting a 40R amendment. A municipality must first obtain a determination from DHCD that the proposed smart

growth district is an eligible location. The statute defines “eligible location” as “areas near transit stations. . . areas of concentrated development. . . [and] areas that by virtue of their infrastructure, transportation access, existing underutilized facilities, and/or location make highly suitable locations for residential or mixed use smart growth zoning districts.” Once DHCD makes its preliminary determination of an eligible location, the municipality must submit an application to DHCD. The application must contain: a map of the proposed district and its location relative to transit stations and water and sewer lines, a developable land plan, a plan showing the maximum residential density of the underlying zoning district, a plan showing the residential density through smart growth zoning, the proposed zoning ordinance, the text of the zoning ordinance for the underlying district, an assessment of the municipality’s housing needs, a showing of sufficient public notice, and a showing that the proposed district will not overburden the municipality’s infrastructure. 760 CMR 59.03(1). Additionally, DHCD must review the draft of the zoning bylaw to ensure that it complies with the requirements of G. L. c. 40R, §6. Section 6 requires that the bylaw provide for housing for the elderly and for persons with special needs, that at least 20% of all housing will be affordable, and that all housing will be consistent with neighborhood building patterns. G. L. c. 40R, § 6.

The record establishes that the Town engaged in an extensive and thorough review of the 40R Amendment before it was put to a vote at Town Meeting. The 40R Amendment was discussed at approximately seventy open public meetings and hearings over a fifteen month period. Studies of the impact of this amendment were commissioned by the Town and by Thorndike on traffic, financial, and environmental issues. Further, the record in this case establishes that DHCD analyzed the Town’s 40R Amendment in accordance with the statutory and regulatory requirements applicable to its review.

It is well-settled that where the municipality has engaged in “some meaningful analysis” of the potential effects of the amendment on the public health, safety, and welfare, the amendment should be upheld. Durand v. IDC Bellingham, LLC, 440 Mass. 45, 56 (2003). This court finds that the Town engaged in a meaningful analysis of the 40R Amendment prior to its adoption by Town Meeting.

Plaintiff has not put forth facts which compel a different view of the process leading to and including the Town Meeting adoption of the 40R Amendment. Conversely, the summary judgment record establishes that Plaintiffs will not be able to sustain their burden at trial that the Town “failed to analyze and consider adequately relevant land use planning considerations including traffic impacts, the character of the neighborhood, the prevention of blight and pollution of the environment, and the encouragement of the most appropriate use of land throughout the town.” The record clearly and overwhelmingly establishes that Plaintiffs will not be able to establish that this question is not “even fairly debatable.” See Durand, 440 Mass. at 51.

This determination, however, does not end this court’s inquiry because Plaintiffs have raised an additional challenge to the 40R Amendment. They contend that the Town failed to update DHCD as to a change in the area of “developable land” upon learning, in November 2006, that the Natural Heritage and Endangered Species Program (NHESP) had designated a portion of the Property as a Priority Habitat under the Massachusetts Endangered Species Act (MESA) in October 2006. As Plaintiff correctly asserts, the timing of this classification meant that the Town’s calculation of developable land area might have been incorrect at the time DHCD issued its letter of approval of the Town’s 40R application and at the time the 40R Amendment was adopted by Town Meeting.<sup>1</sup> Even assuming that there was an error in the application to DHCD, Defendants argue, and this court agrees, that such an error does not invalidate the 40R Amendment.

Under 760 CMR 59.07 a municipality “that either contains a District that had been Approved by the end of the previous fiscal year ending on June 30, or had filed an application for a proposed District within that fiscal year” must file an update of the developable land area with DHCD by July 31<sup>st</sup> of each year. Other than that, there is no requirement in G. L. c. 40R that a town update its application to DHCD if and whenever the identification of a rare species habitat changes the calculation of the developable land area. Therefore, while the Town is under a continuing duty to inform DHCD of any changes in developable land area going forward, that duty to supplement pursuant to 760

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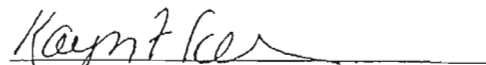
<sup>1</sup> Defendants neither concede nor dispute that the calculation of developable land changed after the certification of a rare species habitat by the NHESP, but they contend that it is immaterial to Plaintiffs’ challenge. This court must draw all inferences in favor of Plaintiffs, the non-moving party, in ruling on this motion. Therefore this court takes as an undisputed fact that the calculation of developable land had changed prior to DHCD’s final approval and Town Meetings’ adoption of the 40R Amendment.

CMR 59.07 had not yet arisen when the 40R Amendment was adopted at the Town Meeting. While Plaintiffs imply that the Town failed to update the DHCD application to protect the viability of its proposed smart growth zoning district, the motives of those voting at Town Meeting in support of the 40R Amendment cannot be considered by this court. Durand, 440 Mass. at 51; see also Morgan v. Banas, 331 Mass. 694, 698 (1954) (“Courts cannot, for the purpose of determining the validity of legislation, receive evidence of the inducements and motives of the legislators in enacting it.”); Boston v. Talbot, 206 Mass. 82, 91 (1910) (quoting Soon Hing v. Crowley, 113 U.S. 703, 710-711 (1885)) (“The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.”).

While Plaintiffs argue that the Town had a duty to supplement its application to DHCD upon becoming aware of the rare species habitat designation, this court can find no duty to supplement the application in the statute or regulations, other than that imposed by 760 CMR 59.07. Importantly, the approval of DHCD is not the final step for Thorndike in completing its proposed development. Indeed, there are many permits still required before Thorndike can begin its project, including permitting processes through which the specific question of impact on endangered species will be vetted.

The crucial inquiry for this court is whether Plaintiffs have proved “facts which compel a conclusion that the question [of the validity of the 40R Amendment] is not even fairly debatable.” Crall v. Leominster, 362 Mass. 95, 103 (1972). On the summary judgment record, this court concludes that Plaintiffs have not met, and will not be able to meet, their burden at trial, and the adoption of the 40R Amendment must be upheld.

Judgment to issue accordingly.

  
Karyn F. Scheier  
Chief Justice

Dated: March 10, 2009

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

PLYMOUTH, ss.

07 MISC 359307 (KFS)

JENNIFER DIRICO, HELEN K. GAVIN,  
and MILDRED M. LEONARDI,  
Plaintiffs

v.

TOWN OF KINGSTON, et al,  
Defendants

JUDGMENT

Plaintiffs initiated this action by filing on November 14, 2007, pursuant to G. L. c. 240, § 14A, challenging the adoption of an amendment to the Town of Kingston Zoning Bylaw pursuant to G. L. c. 40R (40R Amendment). This court (Lombardi, J.) previously dismissed counts I, II, IV, and V, of Plaintiffs' "First Amended Petition" (Amended Complaint), leaving only Count III for disposition.

Through Count III, Plaintiffs seek to invalidate the 40R Amendment because the Town "failed to analyze and consider adequately relevant land use planning considerations including traffic impacts, the character of the neighborhood, the prevention of blight and pollution of the environment, and the encouragement of the most appropriate use of land throughout the town."

The Town moved for summary judgment on Count III, and a decision of today's date has issued granting its motion. In accordance with today's decision and with the orders previously issued by the court on March 24, and June 4, 2008, it is

**ADJUDGED and ORDERED** that Plaintiffs' First Amended Petition hereby is **DISMISSED**.



By the Court (Scheier, C.J.)

Attest:

Deborah J. Patterson  
Recorder

Dated: March 10, 2009

A TRUE COPY  
ATTEST:

*Deborah J. Patterson*  
RECORDER



Office of  
Kingston Board of Appeals  
Town House  
26 Evergreen Street  
Kingston, MA 02364

Zoning Board of Appeals  
November 8, 2006  
Business Meeting Minutes

Members Present: John Haas, Paul Dahlen, Larry Hunt; David Rose; George Boerger, Carl Pike, Martha Lane  
Others Present: Jonathan Silverstein, Town Counsel; Tom Bott, Town Planner; Bruce Babcock, Town  
Consultant.

Mr. Haas opened the meeting at 7:05 pm and introduced the members.

General Business

The minutes of October 4, 2006 were approved as amended.  
The minutes of October 18, 2006 were approved as amended.

7:10 Indian Pond Estates

Attorney Robert Devin, Fred Tonsberg and Mark Flaherty were present for the hearing.

Mr. Rose read the public hearing notice.

Mr. Haas went over the list on the letter to finalize outstanding issues. Mr. Haas requested that the applicant do the initial draft the decision. The hearing will not be closed until we get the draft and to provide the opportunity to receive additional information as well.

The issue of age restriction was discussed. Attorney Devin indicated he would like to see the requirement that only one occupant be over 55 with the exception of the unregulated sections.

The Board was polled and Ms. Lane, Mr. Boerger, Mr. Rose, Mr. Dahlen and Mr. Hunt felt that if there was a reduction in the number of units, they would be inclined to be in favor of one occupant over 55.

Pine Dubois, of the Jones River Watershed stated her continued concern with the septic. The Title V requirement for a reduced volume of 155 gallons per day pertains to all occupants being over 55. If the requirement is for only one occupant, then this calculation will not apply. It was further discussed that these are

all three bedroom units and 3 bedroom units are not subject to the lower flow, so the issue of one occupant over 55 versus two over 55 does not apply

Jean Landis Nauman stated her concern that the septic plans are adequate for the family units.

Mr. Haas referenced a letter from the Board of Health dated November 8, 2006. Mr. Flaherty indicated that the Board of Health is holding up the units in the water overlay resource district.

Mr. Lanza stated that he is in favor of decreasing the number of units if the requirement is that only one occupant be over the age of 55.

There were discussions concerning the Condominium Association. It was agreed that it is reasonable that the condominium documents be reviewed and that it could be a condition post permit.

Environmental issues were discussed. The applicant stated that a November 25<sup>th</sup> meeting with Conservation Commission was scheduled and that everything has been filed. Mr. Devin stated that they will render a legal opinion that all work is outside of its jurisdiction. Mr. Devin stated that they are taking the position that they don't need local approval. Mr. Silverstein suggested to keep the hearing open because it will be evidence that will be submitted.

Mr. Bott asked if the revised habitat map will have an impact on development. Mr. Flaherty stated that there is a possibility there will be a MEPA review and follow up.

Mr. Haas suggested it could be conditioned. Mr. Flaherty and Mr. Tonsberg stated that if they have to go through Natural Heritage, then they will.

Erosion and site control was discussed. Pine Dubois stated that she would like to see the requirement that they are not going to affect any additional loading in the water. Mr. Hunt stated he would like to see the plan. Mr. Flaherty stated that there are plans in place that Mr. Babcock has reviewed and is satisfied with. Mr. Haas stated that there will be a strict enforcement of the plan. Mr. Flaherty stated that the plans show erosion will mostly be on site.

The Title V waiver was discussed. Mr. Flaherty stated that there is a requested waiver on the water resource overlay district. The applicant stated they have approval from the Water Department

Parking was discussed. Mr. Boerger stated he would like to see additional spaces by the pool. Mr. Tonsberg responded that he does not want to add additional parking and that there is already four places for each unit.

Mr. Haas requested copies of the responses and letters back and forth between the engineers.

The issue of the existing road condition was discussed. The Board can only enforce parts of the road that are affected by this project. There was discussion regarding bonding the roadways and that the Board has jurisdiction on 40B projects. Mr. Tonsberg added that prior to an occupancy permit issuing, all the units must be complete including driveways. Mr. Silverstein suggested that there be a condition that no certificate of occupancy can issue until the road standards are acquired.

Mr. Lanza stated his concern about the roads being completed and is also concerned about landscaping and

architectural plans. Mr. Silverstein stated that there could be a reasonable condition with the bond that no certificate of occupancy issue until landscape is complete

The waivers were discussed and reference was made to the October 24, 2006 letter with the list of waivers. The applicant stated that a waiver for age restriction will be added.

There were discussions on the scheduling of construction. Mr. Tonsberg stated that once approvals are done, the front entry way can be completed.

Mr. Bott requested an additional \$5000 from the applicant.

It was agreed that a draft decision will be provided by November 29<sup>th</sup> by Attorney Devin.

Mr. Boerger moved to continue the hearing to December 6, 2006 at 8:30 pm. Mr. Hunt seconded. All in favor.

#### General Business

There were discussions regarding the Moreau Realty Trust Decision.

It was voted to adjourn at 9:05 pm.