

The June 22, 2011 meeting of the Walpole Zoning Board of Appeals was held in the Main Meeting Room of Town Hall.

Chairman Susanne Murphy called the meeting to order at 7:00 P.M. with the following members present:

Susanne Murphy, Chairman
James M. Stanton, Vice Chairman
Daniel J. Cunningham, Jr., Clerk
Ted C. Case, Member (not present)
James S. DeCelle, Member

Matthew Zuker, Associate member

7:00 p.m. – Sean and Jessica Dacey – Case #15-11

Ms. Murphy read the public hearing notice for **Sean and Jessica Dacey, Case #15-11**, with respect to property located at 31 Chandler Ave., Walpole and shown on the Assessors Map as Lot No. 39-35, Residence A Zone.

The application is for:

A Variance from Section 6.B.1 of the Zoning Bylaws to allow for a front entrance mud room, to be built at 20.4 feet where 30 feet is required.

Mr. Dacey explained that when the Variance for 6 feet was approved in 2010 because the Board included an overhang on the addition, he misconstrued that as being a total of 9 feet approved. In the meantime, his builder recommended he use that 3 feet and enlarge the addition without an overhang. When he came in for a Building Permit he was informed by the Building Inspector that he had to go back before the Board in order to increase the addition to 9 feet. The addition would be 9 feet by 16 ½ feet. The existing house is on a slab.

Mr. DeCelle requested a floor plan showing the dimensions of the addition including the jog; Ms. Murphy requested a plan that shows the setbacks for the two abutting houses, the plan to show what the addition would look like from the front and sides, and the elevations of the addition.

A motion was made by Ms. Murphy, seconded by Mr. Cunningham, on behalf of the applicant to continue the hearing to July 20, 2011 at 8:00 p.m.

The vote was **5-0-0 in favor.** (Murphy, Stanton, Cunningham, DeCelle, Zuker voting)

DISCUSSION

5th Fairway Development – Case #18-08 – Decision

Attorney Ilana Quirk reviewed the draft decision and asked for the Board's comments. The Board members made various comments regarding language within the draft.

8:00 p.m. – Xtreme Action Sports, LLC – Case #09-11 (cont'd from 6/8) (Murphy, Cunningham, DeCelle, Zuker) - request to withdraw

Ms. Murphy read the public hearing notice for a Special Permit under Section 5.B.4.r of the Zoning Bylaws to allow expansion of the existing Special Permit to include outdoor use and or any other relief required by the Board.

Ms. Murphy read the letter from Mr. Sudman requesting to withdraw his application.

Mr. Cunningham did not want to approve the withdrawal because the Board has conducted three hearings on the application, each member of the Board did a site visit, and numerous abutters have attended the hearings opposing the application. He wanted the record to reflect the opposition in case there is another request in the future.

Mr. Zuker felt that Mr. Sudman did the right thing by withdrawing in deference to the neighbor's concerns.

VOTE OF THE BOARD:

A motion was made by Ms. Murphy, seconded by Mr. Zuker, on behalf of the applicant Xtreme Action Sports, LLC, to grant a request to withdraw without prejudice Case #09-11.

The vote was **3-1-0 in favor**; therefore the application for Case #09-11 is hereby **withdrawn without prejudice**. (Murphy, DeCelle, Zuker voting in favor, Cunningham opposed)

REASONS FOR DECISION:

It is the finding of the Board that the applicant requested withdrawal without prejudice at the hearing on June 22, 2011 and the Board had no reason to deny the request.

This decision is consistent with the purpose and intent of the Zoning By-Laws.

The grant of relief under this decision is limited to the relief expressly granted hereunder; and any other relief sought is hereby denied.

5th Fairway Development – Case #18-08 – Decision

Attorney Ilana Quirk reviewed the draft decision page by page and notated the votes of the Board as reflected in the following decision.

A motion was made by Ms. Murphy, seconded by Mr. Cunningham, on behalf of the applicant, to consider the waivers requested by the applicant

**WALPOLE ZONING BOARD OF APPEALS
COUNTRY CLUB HEIGHTS AT WALPOLE, MA
5TH FAIRWAY DEVELOPMENT, LLC
JUNE 22, 2011 REMAND DECISION**

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TOWN CLERK

This remand decision is rendered by the Walpole Zoning Board of Appeals (the "Board") in response to the November 18, 2010 Order of Remand issued by the Housing Appeals Committee in a proceeding known as 5th Fairway Development, LLC v. Walpole Zoning Board of Appeals, HAC No. 09-09, regarding an appeal filed by 5th Fairway Development, LLC ("5th Fairway") from the July 13, 2009 grant by the Board of a comprehensive permit to allow 5th Fairway to construct 16 to 18 condominium units at property known as 156 Baker Street, Walpole, MA, which consists of 3.57 acres of land and fronts on Baker Street for approximately 100 feet (the "Property").

This remand decision supersedes and replaces the Board's July 13, 2009 decision as set forth below as to the drainage and specific waiver issues remanded to the Board.

I. Prior Proceedings

On October 20, 2008, 5th Fairway filed an application for a comprehensive permit with the Board to construct 18 condominium units at the Property.

The October 20, 2008 application was accompanied by plans, dated October 1, 2008, that depicted a connection to a catch basin in Baker Street in front of the Property, a catch basin that connects to a pipe that runs under Baker Street and outlets onto private property across the street so as to carry new, excess stormwater away from the Property.

At the outset of the public hearing, 5th Fairway stated to the Board that 5th Fairway wished to revise its plans so as to eliminate the connection to the catch basin in Baker Street in front of the Property and, instead, to control all new stormwater on site. Thereafter, 5th Fairway submitted plan revisions to the Board that reduced the number of units from 18 to 16 condominium units and depicted on-site stormwater infrastructure that 5th Fairway stated would control all stormwater on the Property and eliminate the discharge of any new, excess, post-construction stormwater to off-site infrastructure.

The public hearing, which consisted of 10 sessions and extended from November 19, 2008 to June 10, 2009, mainly concerned how 5th Fairway would control stormwater drainage.

On June 10, 2009, the deadline to close the public hearing, which 5th Fairway refused to extend, 5th Fairway delivered a 29 page waiver request to the Board that included a new request that the Board approve a connection to the "Town's drainage system."

On July 13, 2009, since 5th Fairway had not formally clarified its application to indicate whether it was applying for 16 or 18 units or whether it would control stormwater on site or seek to discharge excess stormwater off site, the Board issued and filed with the Town

Clerk the 2009 Comprehensive Permit decision, which granted permission for either 16 or 18 units, which were to be supported by either a connection to a municipal drainage system, if one exists, provided certain conditions were satisfied, or to be supported by on-site drainage infrastructure which would control all stormwater on the Property, provided that certain conditions were satisfied.

The 2009 Comprehensive Permit allowed a future connection by 5th Fairway to a municipal drainage stormwater system, but conditioned that connection upon 5th Fairway:

- i) Documenting the existence of the municipal system that it wished to connect to;
- ii) Providing evidence of a Town Meeting vote that acknowledged and confirmed the existence of the municipal system and the grant of a permanent easement by Town Meeting that allows 5th Fairway to permanently connect to the system;
- iii) Providing an indemnification and hold harmless agreement with surety to the Town to compensate the Town for damages from a potential taking claim and any other damages; and
- iv) Obtaining a certificate from the Town Engineer that the new, excess stormwater introduced into the municipal system from the Project would not exceed the capacity of the system.

The 2009 Comprehensive Permit allowed an on-site drainage system to be constructed by 5th Fairway, but conditioned the approval upon 5th Fairway documenting that the final on-site drainage infrastructure design would not increase off-site flooding post-construction and that there shall be no flooding of basements and no new drainage issues created by the Project.

II. The Initial Appeal

On July 31, 2009, 5th Fairway filed its administrative appeal to the HAC and asserted that the stormwater conditions imposed by the Board in the 2009 Comprehensive Permit exceeded the Board's authority. The Initial Appeal expressly stated that:

The Applicant has no intention to connect to the Town's storm water drainage system and will construct a system consistent with the requirements of other EOCD projects with all water being contained on-site in accordance" with DEP Stormwater Policy and Guidelines "to the maximum extent practicable. The requirements contained in the decision relating to the Chessia Report renders the project uneconomic and unbuildable." (Initial Pleading, p. 4, ¶6. Emphasis added.)

III. The Amended Appeal

On June 15, 2010, 5th Fairway filed a motion with the HAC that requested permission to allow 5th Fairway to file an Amended Pleading, together with revised plans and a revised drainage report, which the Amended Pleading stated depicted "a connection to the municipal drainage system, as approved by the Board," but that would create new

drainage infrastructure in Baker Street so as to create a connection to existing stormwater drainage infrastructure that does not abut the Property. (See, Amended Pleading, p. 5, ¶6.)

On June 29, 2010, the Board opposed 5th Fairway's motion to amend the Initial Pleading to substitute the new, revised plans, unless a remand were granted by the HAC, noting that 5th Fairway had changed the design of the project's stormwater drainage infrastructure multiple times and now proposed to change it again, this time to create a new connection to existing stormwater drainage infrastructure that does not abut the Property and that had not previously been proposed to or considered by the Board or peer reviewed for the Board.

IV. November 18, 2010 HAC Remand Order:

On November 18, 2010, the HAC issued a ruling that:

- (1) Allowed 5th Fairway amend its Initial Pleading so as to revise the plans under appeal in the HAC proceeding by changing the stormwater drainage infrastructure design for a fourth time, so as to propose creation of new stormwater drainage infrastructure to connect excess stormwater from the project to existing stormwater drainage infrastructure that does not abut the Property; and
- (2) Remanded 5th Fairway's revised stormwater drainage design to the Board, for the purpose of conducting a remand public hearing.

A. The Remand Public Hearing.

The November 18, 2010 Order of Remand directed 5th Fairway to identify and file with the Board specific materials within 30 days and for the Board to then, within the ensuing 30 days, open a public hearing and close it within 60 days and render a decision within 40 days of closing, unless the parties by mutual agreement extend or modify the deadlines.

On December 20, 2010, 5th Fairway submitted remand materials to the Board. On December 23, 2010 and December 30, 2010, the Board advertised a remand public hearing for January 12, 2011.

On January 12, 2011, a severe snow storm struck eastern Massachusetts and a quorum of the Board appeared at Town Hall to open the public hearing but, due to the adverse weather conditions and in the interests of public safety, immediately continued the public hearing to January 19, 2011.

On January 19, 2011, the Board reopened and continued the public hearing and took evidence and testimony from 5th Fairway, the Board's consultants, the Town Engineer and interested parties. 5th Fairway requested the Board to continue the public hearing to allow 5th Fairway with the opportunity to provide supplemental information and the Board granted the request and continued the public hearing to February 9, 2011.

On February 1, 2011, 5th Fairway submitted revised plans and materials to the Board. On February 8, 2011, however, 5th Fairway submitted correspondence to the Board and requested a continuance of the February 9, 2011 public hearing, “to allow the Applicant to pursue potential settlement discussions with the Walpole Country Club, as such settlement could potentially require revisions to the proposed drainage plan.” In its correspondence, 5th Fairway offered a 40 day extension for the public hearing process to account for the loss of time caused by the January 12, 2011 snow storm and to allow time for 5th Fairway to pursue its settlement discussions with the Walpole Country Club and pursue a different stormwater drainage design.

On February 9, 2011, the Board reopened and continued the public hearing and granted 5th Fairway’s request for a continuance and agreed to the extension of time offered by 5th Fairway and continued the public hearing to March 23, 2001.

On March 22, 2011, 5th Fairway submitted a request for a further continuance of the public hearing to the Board’s next regularly scheduled hearing date at the end of April, with a corresponding extension of time to conduct the public hearing. The purpose of the extension was to allow 5th Fairway to continue its settlement discussions with the Walpole Country Club so as to pursue a different stormwater drainage design.

On March 23, 2011, the Board reopened and continued the public hearing and granted 5th Fairway’s request for a continuance and agreed to an extension of time offered by 5th Fairway and continued the public hearing to April 27, 2011, to allow 5th Fairway a further opportunity to pursue a different stormwater drainage proposal.

On April 27, 2001, the Board reopened and continued the public hearing and took evidence and testimony. At the hearing, it was apparent that the alternative drainage proposal that 5th Fairway was pursuing with the Walpole Country Club had not come to fruition. The parties noted that the Board’s engineering consultant had not reviewed 5th Fairway’s February 1, 2011 plan revisions because 5th Fairway had given notice on February 8, 2011 that 5th Fairway was reviewing an alternate drainage design proposal. The parties agreed to extend the deadline for completion of the public hearing to May 25, 2001, to allow the Board’s engineering consultant time to review the February 1, 2011 plan revisions, and the public hearing was continued to May 25, 2011.

On May 25, 2011, the Board reopened the public hearing and received evidence and testimony and then closed the public hearing.

The Board members who were present at all sessions of the public hearing at which evidence and testimony were taken and who participated in the deliberations and voted on this matter were as follows: Susanne Murphy, Chairman; Daniel J. Cunningham, Jr., Clerk; James S. Decelle, Member; James M. Stanton, Vice Chairman; and Matthew Zuker, Alternate Member.

B. The Required Remand Materials

The November 18, 2010 Remand Order required 5th Fairway to identify and file specific materials with the Board within 30 days of November 18, 2010.

On December 20, 2010, 5th Fairway submitted a package to the Board's Office that included a letter from Attorney Theodore C. Regnante on behalf of 5th Fairway that stated that the information required under the Order of Remand was enclosed and the Board determined that the filing was sufficient or insufficient as follows:

- **Requirement A.** Identification of specific proposed drainage system.

5th Fairway Submission: Revised drainage plans, stamped by a registered professional engineer, dated February 10, 2009, as revised through December 8, 2010.

- **Requirement B.** Information detailing the location of infrastructure related to the portion of the drainage system to which the Applicant proposes to connect, the storage capacity of the drainage system and the amount of stormwater proposed or expected to be introduced into the drainage system by the project during storm events.

5th Fairway Submission: Revised plans and revised Stormwater Report.

The Board also voted to find that the information was incorrect as it was based upon erroneous assumptions about the existing conditions and overestimated the size of the pipe into which the stormwater is flowing, by over 60%, by stating that the pipe has a diameter of 24 inches, when it has a diameter of only 15-inches and to find that the assumptions used by 5th Fairway regarding the stormwater that would be controlled on site were erroneous.

- **Requirement C.**

Information regarding the size, type and pitch of proposed pipes for the extension of the Baker Street drainage system to the Carriage Lane drainage system, as well as the connection type for the connection to the Carriage Lane drainage system.

5th Fairway Submission: Revised plans, with the connection to the so-called Carriage Lane drainage system to be made at the manhole located in Baker Street, with no work in Carriage Lane.

- **Requirement D.**

Identification and inclusion of drainage calculations for the proposed drainage plan, including pre and post-construction drainage calculations to identify: 1) existing stormwater runoff rate (both rate and volume); 2) locations to which stormwater now runs (as to rate and volume); and 3) post-construction stormwater rate and volume and location proposed. The calculation shall show the impact of any increased volume of runoff from the proposed connection to the municipal drainage system on Allen Dam Pond for the 1, 10,

25 and 100-year storm if all water was released to the pond at a single moment.

5th Fairway Submission: The proposed drainage system does not increase either the rate or volume of runoff from the site and “there will be no increased volume of runoff to Allen Dam Pond.”

The Board also voted to find that the information was incorrect as it was based upon erroneous assumptions about the existing conditions and overestimated the size of the pipe into which the stormwater is flowing, by over 60%, by stating that the pipe has a diameter of 24 inches, when it has a diameter of only 15-inches.

- **Requirement E.**

A list of requested waivers.

5th Fairway Response:

The waivers requested are in a waiver request, dated December 16, 2010.

- **Requirement F.** Advertisement Fee to be paid by 5th Fairway..

5th Fairway Response: To be paid later.

Board Vote: On December 20, 2010, 5th Fairway paid the \$55 advertising fee.

- **Requirement G.** \$3,000 consulting fee

5th Fairway: \$3,000 provided.

Board Vote: The \$3,000 was provided and spent during December 2010 and January 2011. Since 5th Fairway revised its plans and they had to be reviewed again, the Board and the Town incurred additional costs of \$1,782.50 were incurred, but 5th Fairway refused to reimburse the Board and the Board will seek an order from the HAC requiring reimbursement as this cost was incurred due to a revised filing made by 5th Fairway.

- **Drainage Rights**

On December 20, 2010, 5th Fairway provided deeds and a legal opinion that “the Town has the clear right to allow connections to the municipal drainage system over” private properties that are located at 137 Baker Street and the Walpole Country Club. On May 23, 2011, 5th Fairway provided a legal opinion stating that the Board has the authority to allow connections to a municipal drainage system.

On December 20, 2010, the Board received a package of information from Town Counsel that included the history of the development of Baker Street, Carriage Lane and surrounding ways and the development of the existing drainage infrastructure running from the ways to Allen Dam Pond. The Board also received information regarding the existing drainage conditions from the Town Engineer and the Board's engineering consultant and from engineers and attorneys representing the Walpole Country Club.

C. REMAND FINDINGS OF FACT

1. The final drainage information submitted by 5th Fairway, to detail the proposed new drainage connection, was dated February 1, 2011 in correspondence and plans prepared on behalf of 5th Fairway by GLM Engineering Consultants, Inc. ("GLM") (the "Plans").
2. The Plans consisted of three sheets, which were numbered 10 of 17; 11 of 17 and 17 of 17, and were dated February 10, 2009, as revised through February 1, 2011, as prepared by GLM and stamped by Registered Professional Engineer Paul E. Truax on February 1, 2011.
3. Plan Sheet numbered 17 of 17 was entitled "Country Club Heights Construction Details Baker Street, Walpole, Mass." and showed the proposed drainage connection details and the existing conditions for the existing stormwater drainage infrastructure to which a connection was proposed (the "2011 Drainage Plan Sheet").
4. The 2011 Drainage Plan Sheet and the February 1, 2011 correspondence from GLM described 5th Fairway's drainage design proposal as draining stormwater runoff from the Property into an 18-inch pipe that would exit the Property and then run up Baker Street and then empty into an existing manhole located in Baker Street at the intersection of Baker Street and Carriage Lane (the "Baker/Carriage MH") and then run into a 24-inch pipe that runs down Baker Street. 5th Fairway would install the 18-inch pipe from the Property to the Baker/Carriage MH, as that pipe does not presently exist.
5. The 2011 Drainage Plan Sheet depicts the existing conditions for the Baker/Carriage MH. It depicts three pipes which run into the Baker/Carriage MH (i.e., three pipes which run down Carriage Lane and then empty into the Baker/Carriage MH) and depicts one pipe which exits the Baker/Carriage MH. The 2011 Drainage Plan Sheet depicts the three pipes that carry water to the Baker/Carriage MH as consisting of one 18-inch cross country pipe and two 12-inch lateral pipes (that run from two nearby catch basins), and one 24-inch pipe that carries water away from the Baker/Carriage MH and carries it down stream.
6. 5th Fairway's drainage calculations are based upon the stated existing conditions for the Baker/Carriage MH.

7. On May 24, 2011, the Town Engineer provided a report to the Board regarding the existing stormwater drainage infrastructure within Baker Street and leading downstream to Allen Dam Pond, which was based upon field observations and measurements that were performed by the Walpole Highway Department, under the Town Engineer's direction, during May 2011.
8. The Town Engineer's May 24, 2011 report stated that, based upon the May 2011 field observation and measurements, there are three pipes that empty stormwater into the Baker/Carriage MH and one pipe that carries water away from the Baker/Carriage MH; however, the report disputed the factual assumptions contained in 5th Fairway's 2011 Drainage Sheet and its consultant's report as follows:

<u>Item</u>	<u>5th Fairway's Plan</u>	<u>Town Field Measurements</u>
Carriage Lane Trunk Pipe	18 inches	15 inches
Carriage Lane Lateral Pipes	12 inches	12 inches
Baker St. Exiting Pipe	24 inches	15 inches

9. The Board rejected the 5th Fairway information and adopted the Town's field measurements.
10. The Board adopted the following findings from the Town's Engineer's Report and the May 2011 field data relied upon and from deeds and other information provided by Town Counsel:
 - Baker Street was accepted as a public way in 1878 and had no formal drainage infrastructure.
 - Alton Street and Rockwood Street were created as private ways by a private developer (i.e., the Allen family), in the 1950's.
 - In 1962, the private developer of Alton Street and Rockwood Street (i.e., the Allen family) granted drainage easements to the Town to support the acceptance of Alton and Rockwood Streets as public ways, with the drainage easement allowing the stormwater from these ways to drain onto the Allen's private land, which is now 157 Baker Street and the land of the Walpole Country Club.
 - The 1962 drainage easement is a 20-foot wide easement that allows stormwater to drain from Alton and Rockwood Streets into a pipe that runs from the end of Alton Street and then to and under Baker Street and then over what was once the Allen family's private land (now 157 Baker Street and land of the Walpole Country Club) and then to Allen Dam Pond.
 - During 1964, the Town voted to accept Alton and Rockwood Streets as public ways.

- In 1973, the Walpole Country Club purchased 100 acres of land including the Allen land where the 1962 drainage easement is located, west of Baker Street.
- In 1977, the Walpole Country Club developed one or more residential subdivisions, which resulted in the creation of Carriage Lane and the installation of the existing 15-inch drainage pipe that runs under Carriage Lane and Baker Street and empties into the Baker/Carriage MH and then runs down Baker Street and then into the Baker/WCC MH and then onto what is now 157 Baker Street and the land of the Walpole Country Club, that was the subject of the 1962 drainage easement held by the Town, but that, in 1977, was land that was owned by the Walpole Country Club.
- In 1981, the Town voted to accept Carriage Lane as a public way and the acceptance included the 15-inch drainage pipe running under Carriage Lane, but did not include the Baker/Carriage MH or the 15-inch pipe that runs from the Baker/Carriage MH to the Baker/WCC MH.
- On May 7, 2007, the Town adopted a Stormwater Management and Erosion Control Bylaw (the “2007 SW By-law”).
- The 2007 SW By-law predates 5th Fairways’ application for a comprehensive permit.
- The stated purposes of the 2007 SW By-law are to:
 - (1) Protect water resources;
 - (2) Eliminate soil erosion;
 - (3) Control the volume and rate of stormwater runoff resulting from land disturbance activities in order to minimum potential impacts of flooding;
 - (4) Manage and treat stormwater runoff generated from new development;
 - (5) Protect groundwater and surface water from degradation;
 - (6) Promote infiltration and recharge of groundwater;
 - (7) Maximize recharge of groundwater in the Resource Protection Overlay District;
 - (8) Prevent pollutants from entering the municipal storm drain system;
 - (9) Ensure that soil erosion and sedimentation control measures and stormwater runoff management practices are incorporated into the site planning and design process and are implemented and maintained;
 - (10) Ensure adequate long-term operation and maintenance of structural stormwater best management practices;
 - (11) Require practices to control waste;
 - (12) Comply with state and federal requirements; and

- (13) Establish the Town's authority to ensure compliance with this by-law.
- The 2007 SW By-law applies to any activity that will increase the impervious area of a parcel of land, that will result in an increased amount or change in drainage patterns of stormwater runoff or pollutants flowing from the property onto or into a public way or property.
 - The 2007 SW By-law requires a Land Disturbance Permit for land disturbance greater than 40,000 s.f., associated with construction; development that all together disturbs 40,000 s.f. or more of land, paving or other surface change over an area of 40,000 s.f., construction of a new drainage system or alteration of an existing drainage system or conveyance serving a drainage area of more than 40,000 s.f., any other activity altering the surface of an area exceeding 40,000 s.f. that will or may result in increased stormwater runoff flowing from the property in to a public way or the municipal storm drain system.
 - On November 14, 2007, the Town adopted Regulations to support the SW Bylaw (the "2007 SW Regulations").
 - The 2007 SW Regulations predate 5th Fairway's application for a comprehensive permit.
 - The 2007 SW Regulations expressly provide that: "All sites shall be design[ed] so that post development rates of run-off equal pre-development rates of runoff."
 - 5th Fairway's project triggers the requirement for a Land Disturbance Permit.
 - 5th Fairway asserted in the December 20, 2010 correspondence of its counsel that its "proposed drainage system does not increase either the rate or volume of runoff from the site."
 - The Board's consultant engineer concluded that there are stormwater design assumptions in 5th Fairways drainage calculations that are flawed and the Board finds that 5th Fairway did not establish that there would be no increase in either the rate or volume of runoff from the site, post-construction.
 - 5th Fairway proposes to take its off-site drainage and to pipe it in an 18-inch pipe that exits the Property and then would run in a totally new direction and into infrastructure that does not abut the Property and then drain it onto privately owned land (i.e., 157 Baker Street and the Walpole Country Club) and into the 1962 easement held by the Town.
 - The Board finds and determines that the existing 15-inch drainage pipe in Baker Street, into which 5th Fairway wishes to connect, was not designed or built by the Town and the Town has not accepted ownership of this pipe.

- The evidence provided established to the Board's satisfaction that the 15-inch drainage pipe in Baker Street, into which 5th Fairway wishes to connect, was designed and built by a private developer to handle stormwater draining from private ways and that did not include the land where the Property is located.
- The evidence provided established to the Board's satisfaction that the 15-inch drainage pipe in Baker Street, into which 5th Fairway wishes to connect, has never been accepted by the Town.
- The evidence provided established to the Board's satisfaction that the 15-inch drainage pipe in Baker Street, into which 5th Fairway wishes to connect, functions properly now and is adequate to serve the land which it was designed to serve.
- The evidence provided established to the Board's satisfaction that the 15-inch drainage pipe in Baker Street, into which 5th Fairway wishes to connect, currently operates at capacity.
- 5th Fairway proposes to add stormwater from a new 18-inch pipe into the Baker/Carriage MH and the Board found that the evidence provided established to the Board's satisfaction that this manhole has stormwater entering into it that flows from two 12-inch pipes and a 15 inch pipe and then empties into a 15-inch pipe.
- The Board found, based upon its engineering expert's report, that 5th Fairway's proposal to introduce stormwater from an 18-inch pipe into a manhole that exits into a 15-inch pipe violates the standard practice of either maintaining the same pipe size as or increasing the pipe size as the stormwater flow advances so as to maintain the hydraulic grade line. The Board found that connecting the 18-inch pipe proposed by 5th Fairway to a manhole that has a 15-inch manhole outlet would create a restriction that would result in surcharging which could cause the manhole to overflow and flood the street in a large storm. In addition, the Board found that this problem would be exacerbated by the fact that the subject manhole already has a 15-inch and two 12-inch stormwater pipes that carry stormwater into it.
- The Board heard evidence that established to the Board's satisfaction that, while the existing stormwater drainage system that runs from the Baker/Carriage MH to its outlet is adequate for current stormwater flows, the addition of the proposed 18-inch pipe tie-in would result in flows in excess of the existing system's capacity.
- The Board heard evidence that established to the Board's satisfaction that the cost of increasing the size of the 15-inch pipe in Baker Street cannot be properly estimated until Baker Street is opened and examined, so as to allow a full investigation to determine what conflicts with other existing utilities may

exist (i.e., water, sewer, gas and other lines) so as to require relocation of a larger pipe and the possible cost of acquiring new land or easements, but the cost would be very high and would include surveying, design, engineering, construction, equipment, materials, labor, police details and disposal of debris.

- The Board heard evidence that established to the Board's satisfaction that the 1962 easement that the Town holds that runs from the Baker/WCC MH to Allen Dam Pond may be overburdened, possibly because the Walpole Country Club added its then private drainage to this easement area in the 1970's and 1980's as the Walpole Country Club had the right to do and the Board heard further testimony from the Walpole Country Club that the 1962 easement does not allow the Town to increase the drainage into the easement from any source other than the pipes shown on the plan attached to the 1962 easement.
- The Board heard evidence that established to the Board's satisfaction that any effort to increase the size of the existing pipe that flows under 157 Baker Street and onto the Walpole Country Club (and then to Allen Dam Pond) would cost between \$300,000 and \$550,000 and it might not be physically possible due to the slope of the land to properly site a larger pipe without placing the pipe above ground and that it might not be legally possible to site a larger pipe as it would create a new point source that would be prohibited.
- 5th Fairway provided no evidence to the Board that it obtained permission to connect to the land where the Town's 1962 drainage easement is located, to the west of Baker Street, either from Town Meeting or the Walpole Country Club or the owner of 157 Baker Street or that 5th Fairway has obtained the permission in the form of an easement from the owner of the 15-inch pipe that runs from the Baker/Carriage MH to the Baker/WCC MH to connect to that pipe.
- 5th Fairway argued to the Board that the Ridder v. Town of Hanson case supports the grant by the Board, while standing in the shoes of the highway surveyor, of permission to allow 5th Fairway to connect to the Town's municipal drainage system.
- The Board found that 5th Fairway did not establish that there is a municipal drainage system that exists in the form of the Baker/Carriage MH and the 15-inch pipe that exits that manhole as there was no evidence and, indeed, there was evidence to the contrary, that this infrastructure was not designed, built or accepted by the Town.
- The Board did not find 5th Fairways' argument regarding the Ridder case persuasive. The Board found that the Ridder case expressly stated that the highway surveyor needed permission from the board of selectman to allow private surface water to discharge onto land in which the town had an interest (because control of interests in land rested with the board of selectmen under

G.L. c.40, §3) and the Ridder case further expressly held that, even if the selectmen's permission were granted (which would not involve a local permit, but rather a disposition of an interest in land), the selectmen would not have had the authority to grant permission to allow a private party to discharge water permanently because the "permanent right to drain surface water" from a developer's land "into the town's drainage system ... would amount to the grant of an easement" and "a vote of the town would have been required to authorize the grant of an easement to the plaintiffs."

- 5th Fairway argued that the HAC's decision in Tiffany Hill, Inc. v. Norwell Board of Appeals, 04-14 (September 18, 2007) requires the Board to grant an unconditional connection to the drainage infrastructure. The Board did not find this argument persuasive as the HAC specifically stated in the Tiffany Hill case that there was no assertion in that case, as in the current circumstance, that the developer did not have the right to access the town's drainage system.
- 5th Fairway argued that the HAC's decision in Southbridge Housing Authority v. Southbridge Zoning Board of Appeals, 91-09 (September 26, 1996) requires that the Board grant an unconditional connection to the drainage infrastructure. The Board did not find this argument persuasive because in that case, unlike in this case, there was no question that the drainage system belonged to the municipality and there was no question of an easement being needed as the appellant in that case was a town agency.
- 5th Fairway argued that the HAC's decision in CMA Inc. v. Westborough Board of Appeals, No. 89-25 (June 25, 1992) requires the Board to grant an unconditional connection to the infrastructure at issue. The Board did not find this argument to be persuasive as in that case, unlike in this case, there was permission to connect and the developer agreed to replace an existing pipe with a larger pipe. The Board notes that even if there were a clear municipal system and even if there were permission, in the form of an easement, 5th Fairway has not agreed to bear the cost of the improvements that would be necessary to upgrade the infrastructure to serve 5th Fairway's project.
- The Board heard evidence that established to the Board's satisfaction that the cost to increase the size of the 15-inch pipe in Baker Street and the pipe that runs under 157 Baker Street and then over the Walpole Country Club's land and then to Allen Dam Pond would be cost prohibitive to the Town, up to \$550,000 to improve the pipe running to Allen Dam Pond and an unknown and unknowable cost for an increase in the 15-inch running under Baker Street, with a potential cost of \$1,000,000 or more and no willingness by 5th Fairway to pay the cost, which it should pay as the improvements would be only to benefit 5th Fairway as the existing system is adequate for current flows for which the Town is responsible. The Board believes that the potential costs to the Town, especially in these fiscally challenged times, cannot be borne by the Town's taxpayers. A cost of up to \$1,000,000.00 to the Town, in order to create four additional units of affordable housing would be cost prohibitive.

- The Board finds that 5th Fairway's drainage proposal to connect an 18-inch pipe to the Baker/Carriage MH and the downstream infrastructure is not consistent with local needs for the following reasons:
 - i. 5th Fairway has not established even a colorable right to connect to the various parts of the subject drainage infrastructure to which it seeks to connect;
 - ii. The subject drainage infrastructure, to which 5th Fairway seeks to connect, currently is adequate to serve the areas that it was designed and built to serve and it would be overwhelmed by the new drainage that 5th Fairway seeks to introduce.
 - iii. The cost to upgrade the drainage infrastructure that 5th Fairway proposes to connect to would be cost prohibitive to the Town and 5th Fairway has stated no willingness to pay for the improvements.
 - iv. If 5th Fairway were allowed to connect to the existing drainage infrastructure as proposed and no improvements were made, the Board found that surcharging of the system would occur and flooding of Baker Street and the 1962 Town drainage easement would occur in high volume storm events, causing danger from flooding to area homes and pedestrians and motor vehicle operators who use Baker Street and that this danger outweighs the regional need to add four units of affordable housing.
 - v. Finally, the Board found that the on-site drainage assumptions used by 5th Fairway were flawed and so 5th Fairway did not establish that there would be no increase, post-development, in the rate and volume of stormwater exiting the Property and found that this violates the 2007 SW By-law and the 2007 SW Regulations and that this violation would cause area flooding that would endanger the public and that this danger outweighs the regional need to add four units of affordable housing.

D. DETERMINATIONS

MOTION: Member Murphy moved and Member Cunningham that the Board vote to adopt the Findings as set forth above.

The Motion was approved: 5 to 0.

MOTION: Member Murphy moved and Member Cunningham seconded that the Board vote to determine that the revised drainage plan would endanger the health and safety of the occupants of the project and the public and would not be consistent with local needs and would not outweigh the regional need for affordable housing.

The Motion was approved 5 to 0.

MOTION: Member Murphy moved and Member Cunningham seconded that the Board vote to deny the comprehensive permit as amended by the revised drainage proposal.

The Board approved the motion 5 to 0.

MOTION: Member Murphy moved and Member Cunningham seconded that the Board vote to deny the waivers requested by 5th Fairway on December 20, 2011 as set out in a document entitled "Addendum 3," dated December 16, 2011 without prejudice as set forth below.

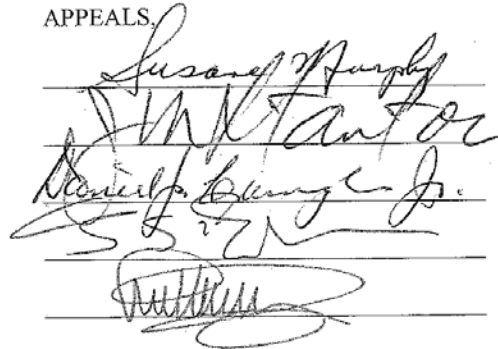
MOTION: Member Murphy moved and Member Cunningham seconded that the Board vote not to amend the comprehensive permit granted to 5th Fairway as modified by the revised drainage plans noted above for the reasons set forth in the Findings.

The Board approved the motion 5 to 0.

E. APPEALS

In accordance with the Order of Remand, if 5th Fairway wishes to contest the Board's decision on remand, it shall file a notice of appeal with the Committee, the Board and the Town clerk within 20 days of the filing of the decision with the Town Clerk's office; otherwise all drainage issues shall be deemed resolved and only non-drainage aspects of the prior appeal shall go forward. If other parties are aggrieved, they may file an appeal in accordance with G.L. c.40B.

WALPOLE ZONING BOARD OF
APPEALS.



Date: June , 2011
Filed with Town Clerk:
Mailed by Certified Mail to Applicant:

cc: Board of Selectmen
Building Commissioner
Conservation Commission
Planning Board
Water and Sewer Commission
Town Engineer

427744/WALP/0271

EXHIBIT A**WAIVERS**

The Board considered waivers requested by the Applicant in Addendum 3 dated December 16, 2010 and received on December 20, 2010 and voted 5 to 0 to deny them without prejudice and to be further reviewed and considered if a revised project is presented in the future.

Regulation 401 Road and Street Opening Permit**Trench Regulations****Subdivision Regulations**

Section IV Design Standards, §IV. Drainage System, ¶(c)(8)

Section IV Design Standards, Catchbasins

Section IV Design Standards, §IV-6, ¶d

Section IV Design Standards, §IV-6, Drainage. ¶(i)

Section V. ¶V-1. General (a)

Section V. ¶V-1. General (b)

Section V, ¶V-3 Utilities (a)

Section V, ¶V-4. Underground structures. ¶(b)

Section V-6 Roadways, ¶b

Section V-6 Roadways, ¶c

Section V-7 Curbs, ¶(a)

Section VI. ¶V-1 General (a)

Section VI, ¶V-1 General (b)

Section VI-2 Roadways, ¶(b)

Section VI-3 ¶(a)

Sewer and Water Commissioners Regulations

Drainage – Entire Section

377976/WALP/0271

There being no further business, the meeting was closed at 10:00 p.m.

Daniel J. Cunningham, Jr.
Clerk

ev

Minutes were approved on August 10, 2011.