

City of Methuen  
COMMUNITY DEVELOPMENT BOARD

**CERTIFICATE OF DENIAL**

80 Myrtle Street –Definitive Subdivision Plan

Owner/Applicant: Wayne Capolupo, Manager, Colchester Properties LLC  
Tavern Realty Trust, Michael E. Condon, Trustee  
Premises Affected: 80 Myrtle Street, Methuen  
Assessors Map: 216-129B-44A  
Zoning District: Rural Residential (RR)

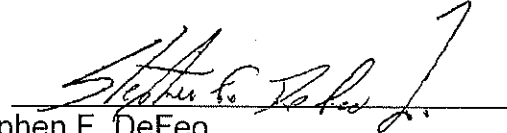
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CITY OF METHUEN  
CITY CLERK'S OFFICE  
110 STATE STREET  
METHUEN, MA 01844

At a public meeting held on March 14, 2019, the Community Development Board voted UNIMOUSLY (5-0) to DENY the Definitive Subdivision Plan for a 9 lot subdivision located on a 174,247 SF parcel of land located at 80 Myrtle Street in Methuen, Massachusetts.

This is to certify that the above action was taken in compliance with the statutory requirements as set forth in Chapter 41 of the General Laws, and that a copy of this decision was filed with the City Clerk on March 29, 2019.

CITY OF METHUEN  
COMMUNITY DEVELOPMENT BOARD

By:   
Stephen F. DeFeo  
Chairman, Community Development Board

Any appeal of this decision shall be made pursuant to the requirements of Massachusetts General Laws, and shall be filed within twenty (20) days after the date the notice of decision was filed with the Methuen City Clerk.

I hereby certify that no appeal has been filed in the Methuen City Clerk's Office, within the twenty (20) day appeal period.

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John R. Wilson, Methuen City Clerk

**PROCEDURAL HISTORY:**

On June 1, 2015 Wayne Capolupo, Manager, Colchester Properties LLC ("the Applicant") submitted an Application for Approval of a Preliminary Plan and a plan titled "Preliminary Subdivision Plan, Subdivision Plan in Methuen, MA, showing a proposed subdivision at 80 Myrtle Street" with the Methuen City Clerk. The Preliminary Plan was prepared by Millennium Engineering, Inc.; dated May 28, 2015; prepared for Colchester Properties, LLC, 98 Elm Street, Salisbury, MA, on land owned by Tavern Realty Trust, Michael E. Condon, Trustee. The property is located in the Rural Residential - RR Zone and contains approximately 174,247 SF<sub>[CMM1]</sub>. This Preliminary Plan shown a 15-lot subdivision relying upon Section VI-D of the City's Zoning Ordinances (the "LID Ordinance"), which allowed for smaller lots with less frontage and reduced setbacks than would otherwise be permitted, provided the applicant employs Low Impact Development techniques, as provided in the Board's Subdivision Rules and Regulations. The Board took no action on the preliminary plan.

On December 2, 2015 Wayne Capolupo, Manager, Colchester Properties, LLC (the "Applicant") submitted an application for approval of a definitive subdivision plan and plan titled "Proposed Subdivision for 80 Myrtle Street in Methuen, MA, November 2015", prepared by Millennium Engineering, Inc., dated Nov. 23, 2015, containing 10 sheets, Assessor Map 216-1298-44A. The owner of recorded is Tavern Realty Trust, Michael E. Condon, Trustee. The property is located in the Rural Residential - RR Zone and contains approximately 174,247 SF. Like the preliminary plan, the definitive plan showed a 15-lot subdivision relying upon the LID Ordinance.

Following the public hearing, the Board determined that the plan did not comply with the subdivision control law and the rules and regulations of the Board, and therefore, the Board voted unanimously to deny the definitive subdivision.

On August 12, 2016, the Applicant filed an appeal from the Community Development Board's action under G.L. c. 41, § 81BB in Land Court in the matter of Colchester Properties, LLC v. Joseph Leone et al.

On May 10, 2018 a Judgment of Remand was issued by the Land Court in the matter of Colchester Properties, LLC v. City of Methuen Community Development Board, Case No. 16-MISC-000461, whereby the Board would consider up to a 13-lot subdivision for this site and apply the LID Ordinance and other LID techniques in accordance with Said Judgment of Remand.

On July 19, 2018 the Applicant provided notice to the Methuen City Clerk of the submission to the Community Development Board of a subdivision plan pursuant to

Mass. Gen. Laws c. 41 §81T in the event and to the extent that said section applies to the submission by the Applicant following the judgment of remand. The definitive subdivision plan submitted is as follows: "Proposed Subdivision for 80 Myrtle Street in Methuen, MA, November 2015", prepared by Millennium Engineering, Inc., dated Nov. 23, 2015 and revised through 6/26/18, containing 11 sheets, Assessor Map 216-1298-44A; prepared for Colchester Properties, LLC. The property is located in the Rural Residential - RR Zone and contains approximately 174,247 SF. The owner of the land is Michael E. Condon, Trustee, Tavern Realty Trust.

The public hearing was duly advertised in the Eagle Tribune on September 25, 2018 and October 2, 2018 for a public hearing date of October 10, 2018 and notice was sent as required by M.G.L. Ch. 41 Section 81-T. However due to a lack of a quorum on the part of the Community Development Board the hearing was rescheduled. The new public hearing date of November 20, 2018 was duly advertised in the Lawrence Eagle Tribune on November 5 and 12, 2018 and notice was sent as required by M.G.L. Ch. 41 Section 81-T.

On November 20, 2018 the Board opened the public hearing at 7:30 p.m. As there were only four (4) Board members out of a total of seven (7) possible members present Attorney William Sheehan, on behalf of the Applicant, requested a continuance to the December 18, 2018 Board meeting. Attorney Sheehan agreed to extend the time frame for the Board to make a decision on the application to February 4, 2019. On a motion by Attorney Perrault, seconded by Mr. Bores the Board voted unanimously to accept the extension of time to February 4, 2019. On a motion by Mr. Comei, seconded by Attorney Perrault the Board voted unanimously to continue the public hearing to December 18, 2019.

On December 18, 2019 Attorney Carolyn Murray, on behalf of the Community Development Board provided the history of this Application and reviewed the Judgment of Remand with the Board. Attorney Sheehan and Eric Botterman of Millennium Engineering spoke on behalf of the Applicant. The Board heard testimony from several abutters in opposition. On a motion by Mr. Comei, seconded by Mr. Boes, the Board voted unanimously to continue the public hearing to January 9, 2019.

Due to a malfunctioning elevator rendering the City Hall non handicapped accessible, the public hearing was held on January 17, 2019. The Applicant requested a continuance to the February 13, 2019 meeting as they needed additional time to respond to the issues raised at the December 18, 2018 hearing. The Applicant also granted an extension of time for the Board to make a decision to February 28, 2019. On a motion by Mr. Comei, seconded by Mr. Boes, the Board voted unanimously to accept the applicant's request for an extension time to February 28, 2019. On a motion by Mr.

Comei, seconded by Mr. Boes, the Board voted unanimously to continue the public hearing to February 13, 2019.

On February 13, 2019, Wayne Capolupo spoke on behalf of the Applicant. The Board heard testimony from several abutters in opposition. The Applicant granted an extension of time for the Board to make a decision to March 31, 2019. On a motion by Attorney Perrault, seconded by Mr. Hatem, the Board voted unanimously to accept the applicant's request for an extension time to March 31, 2019. On a motion by Attorney Perrault, seconded by Mr. Hatem, the Board voted 4-1 to continue the public hearing to March 13, 2019.

Due to unexpected elevator repairs at City Hall, the rescheduled public hearing was held on March 14, 2019. Wayne Capolupo spoke on behalf of the Applicant. The Board heard testimony from several abutters in opposition. On a motion by Mr. Comei, seconded by Attorney Perrault, the Board voted to close the public hearing.

The Board moved forward to vote on the requested waivers.

Attorney Perrault made a motion to waive Section 4.2 Street Design – Sloped granite edging along roadway. No one seconded the motion. Attorney Perrault made a motion to waive Section 4.2 Street Design – Sidewalks shall be provided on both sides of the road. No one seconded the motion. Attorney Perrault made a motion to waive Section 4.2.2.8 Dead ends. No one seconded the motion. Attorney Perrault made a motion to waive the Typical Roadway Section which requires a 2% crown from the center of the roadway to the edge. No one seconded the motion. Attorney Perrault made a motion to waive Section 4.2 Street Design – requiring 26 foot pavement width to allow pavement width of 24 foot. No one seconded the motion.

Failing to receive a second to any of the above motions, the motions failed, and therefore, no waivers were granted.

On a motion by Mr. Comei, seconded by Mr. Boes the Board voted UNIMOUSLY (5-0) to **DENY** the subdivision.

**DECISION:**

- 1) The Board reviewed the application and plan in accordance with the Judgment of Remand.
- 2) The Board considered whether the City of Methuen Comprehensive Zoning Ordinance ("Zoning Ordinance"), including, without limitation, Section VI-D, as existing in form, substance, and legal effect on June 1, 2015 (LID Provision), governs the plan to be submitted for approval.

- 3) The LID Ordinance, Section VI-D, provided that lot area, frontage and setback requirements could be reduced if an applicant employed LID techniques in the design of a subdivision "and in accordance with LID requirements of the Subdivision Rules and Regulations." The Board's Subdivision Rules and Regulations were never amended to include specific provisions for LID techniques, nor were the Subdivision Rules and Regulations amended to include a density bonus for the use of LID techniques. The<sup>[CMM2]</sup> Board sought to define the usages of the phrases "LID" and "LID techniques" as used in the LID Provision by considering:
- a) Section XI-D (17) (A) (g) and (l) (d) of the Zoning Ordinance. These sections are found in the Open Space Residential Development Special Permit section of the Zoning Ordinance and was referenced in the Judgment of Remand as an appropriate provision to which the Board could look to for defining LID techniques. The Board found that this section is applicable however an analysis of this section as it relates to the application and plan demonstrates that zero (0) lots can be created as the site does not contain sufficient frontage to create one lot in the Rural Residential (RR) Zoning District. Moreover, the Open Space Residential Development Special Permit section of the Zoning Ordinance requires 50% open space; here, the applicant only provided 30% open space,
  - b) 310 CMR 10.04: "Low Impact Development Techniques". The Board reviewed 310 CMR 10.04, which was referenced in the Judgment of Remand as an appropriate provision to which the Board could look to for defining LID techniques, and found that this definition is more fully defined in the Massachusetts Storm water Management Standards, more specifically in the Low Impact Development (LID) Site Design Credits. The Board reviewed each individual Low Impact Development (LID) Site Design Credit and determined that the application and plan did not meet this definition.
- 4) The Board considered the following proposed development techniques to determine if they are "LID "or LID" techniques:
- a) The reduction of lot sizes, setbacks, and frontage. The Board determined that reduced lot areas and frontage setbacks without the corresponding open space are counter to the intent of LID, and therefore, this is not a LID technique. A true LID requires a significant portion of the property to be preserved as open space in exchange for reduced lots areas, etc.
  - b) The increased planting of trees along the roadway. Note 7 on Sheet 5 of 11 of the Subdivision Plan revised through 2/28/19 states that street trees shall be planted as per sections 4.7.1 and 4.7.2 of the Methuen Subdivision Rules and

Regulations; therefore no planting of trees is proposed above and beyond the requirements of the Subdivision Rules and Regulations. The Board found that simply satisfying required tree planting is not a LID technique.

- c) The use of bioretention areas within the cul-de-sac. The Subdivision Plan revised through 2/28/19 does not show any bioretention areas within the cul-de-sac.
- d) The disconnection of each individual roof runoff from the roadway drainage system to discharge into separate rain gardens. Although directing rooftop runoff to a "qualifying area" is a LID technique, this project does not meet the requirements for this technique as set forth in the Credit 2 Rooftop Runoff Directed to Qualifying Areas of the Mass DEP Massachusetts Stormwater Handbook.
- e) The maintenance of a fifty (50') foot buffer zone around wetland resource area. The Board determined that this is not a unique LID technique. All definitive subdivisions must comply with the Methuen Conservation Commission rules and regulations. According to their regulations all activity within 50 feet of any wetland will have a significant adverse impact on the wetland and shall not be permitted. The Applicant's plan to maintain a fifty foot buffer zone around the wetland resource areas is not a unique LID technique but is a requirement of the Methuen Conservation Commission.
- f) The implementation of a Contech unit to provide total suspended solids removal<sub>[CMM3]</sub>. The Board found that this is not a LID technique.
- g) The omission of sidewalks from the plan. The Board determined that the omission of sidewalks without the corresponding open space is counter to the intent of LID, and therefore this is not a LID technique. A true LID requires a significant portion of the property to be preserved as open space in exchange for reduced pavement and impervious surface.
- h) The implementation of grass swales in lieu of sloped granite curbing. The proposed "country drainage" does not recharge the groundwater as it merely redirects the street drainage into an existing conventional system, and is therefore, not a LID technique.
- i) The implementation of driveway culverts with twelve (12") inches of cover. The Subdivision Plan revised through 2/28/19 does not show driveway culverts.

- j) The use of dead-end roadway ending in a cul-de-sac. The Board determined that the use of a dead-end road without the corresponding open space is counter to the intent of LID, and therefore this is not a LID technique. A true LID requires a significant portion of the property to be preserved as open space in exchange for reduced pavement and impervious surface.
  - k) The reduction of pavement width from the previously waived twenty-six (26') feet to twenty-four (24') feet. The Board determined that the reduction of pavement without the corresponding open space is counter to the intent of LID, and therefore this is not a LID technique. A true LID requires a significant portion of the property to be preserved as open space in exchange for reduced pavement and impervious surface.
- 5) The Board determined that the requested waivers from the Methuen Subdivision Rules and Regulations are not reasonable, in the public interest and are inconsistent with G.L. c. 41, §§ 81K to 81GG, the Subdivision Control Law as follows:
- a) Section 2.3.3 Compliance with zoning ordinances: This section of the rules and regulations states that the Community Development Board will not approve or modify any plan of a subdivision of land unless all buildings, structures and lots shown on said plan comply with the Zoning Ordinance of the City of Methuen. The Table of Dimensional Regulations requires that all lots in the Rural Residential (RR) Zone contain a minimum of lot area of 80,000 SF, minimum frontage of 200 feet, minimum width of 200 feet, minimum front yard setback of 40', side yard setback of 30' and rear setback of 30', a maximum lot coverage of 25% and contain 10% open space. The site contains approximately 174, 247 SF of area and 163.44 feet of frontage therefore the site does not provide sufficient frontage sufficient for even one house lot in the Rural Residential Zoning District. The Applicant proposes 9 lots. None of the lots meet the requirements of the Rural Residential Zoning District. Only the Zoning Board of Appeals may grant variances from these dimensional requirements, and lacking such variances, the application does not conform to the City's existing Zoning Ordinances as required by G.L. c. 41, §81Q or Section 2.3.3 of the Board's Subdivision Rules and Regulations.
  - b) Section 4.2 Street Design: Typical sections for principal roads and secondary roads shall conform to the City of Methuen standards.
    - i) The Typical Section for a Secondary Roadway requires 26 feet of pavement width. The Applicant requested a waiver from this requirement to provide 24 feet of pavement width.

- ii) The Typical Section for a Secondary Roadway requires sloped granite edging along the edge of the pavement. The Applicant requested a waiver from this requirement and proposes to construct grass swales as a Low Impact Development technique.
  - iii) The Typical Section for a Secondary Roadway requires that sidewalks be provided on both sides of the roadway. The Applicant requested a waiver from this requirement as they have proposed grass swales as a Low Impact Development technique.
  - iv) The Typical Section for a Secondary Roadway requires a 2% crown from the center of the roadway to the edge of the pavement. The Applicant requested a waiver to provide a 1% slope from the center island to the edge of the pavement to allow the roadway to drain to the grass swales.
- c) Section 4.2.2.8 Dead Ends: Dead ends, defined as a street or way with only one access/egress point, shall not be permitted, except where, in the opinion of the Board, such dead ends are deemed necessary and in the public interest. The proposed roadway on the definitive plan filed with the application is a dead-end. The Applicant requested a waiver from this section of the rules and regulations. The Board determined on March 14, 2019 that in accordance with section 1.3 of the Subdivision Rules and Regulations a waiver of this section is not in the public interest of the City and that the Applicant provided an insufficient basis upon which to grant said request. In addition the Applicant failed to demonstrate, to the satisfaction of the Board, that the Applicant lacks rights in the existing 50' Access Easement as shown on the plan to create a through connection to Arrowood Street.
- d) Section 4.6 Open Spaces: Before approval of a plan the Community Development Board may also require the plan to show usable open space suitably located for playground or recreation purposes or for providing light and air. The park or parks shall not be unreasonable in area in relation to the land being subdivided and to the prospective use of such land. The Applicant has designated 174,247 SF (30.8%) of the site as Open Space which is insufficient in the opinion of the Board. The Board found that preserving 30% of the site as open space, in relation to a 9-lot subdivision, is contrary to recognized LID techniques.
- e) Section 4.7 Protection of Natural Features:
- i) The subdivider shall make every effort consistent with sound planning to preserve natural features such as large trees marked to be preserved, water



courses, scenic points, historic spots and similar community assets, which, if preserved will add attractiveness and value to the subdivision. The applicant is proposing to clear and grade approximately 70% of the site therefore very little of the existing natural features will be preserved. The plan does not indicate any "large trees marked to be preserved".

- ii) The existing wood framed structure, known as the Thomas Dow House, was built in 1776 and is an "historic spot" and "community asset" to be preserved. The Thomas Dow House is inventoried as a Historic Asset of the Commonwealth Massachusetts and locally with the Methuen Historic Commission. It is eligible for listing in the National Register of Historic Places, and has been determined to be historically significant by the Methuen Preservation Committee. The applicant is proposing to demolish the existing historic structure and has not taken any steps to preserve this historic site.
- 6) The Board determined that the proposed water main as shown on the Subdivision Plan revised through 2/28/19 conforms to Section 5.6.1 of the City of Methuen Subdivision Rules and Regulations.
- 7) The revised definitive subdivision plan dated 2/28/19 fails to address the comments from the Department of Public Works Engineering Division specifically that the fundamental principle of Low Impact Development has not been met due to the fact that the project density does not meet the zoning requirements and a significant portion of the site has not been left undisturbed. Furthermore the Applicant has not demonstrated compliance with the all of the requirements necessary to qualify for each LID Credit under the MassDEP Stormwater Handbook.
- 8) The revised definitive subdivision plan dated 2/28/19 fails to address the comments from the Community Development Board's Peer Review Agent, TEC stating that the Applicant must install an advanced warning sign (W10-1) on Myrtle Street approximately 100-125 feet north of the proposed site drive, and provide vegetation trimming along the intersection to provide adequate sight distance. In addition, the Applicant failed to meet the three Low Impact Development (LID) "Site Design Credits" requirements of the MassDEP Stormwater Handbook.
- 9) Under Section 2.3.3 of the Board's subdivision rules and regulations, the Community Development Board determined that the revised definitive subdivision plan dated "2/28/19 does not comply with the City of Methuen Comprehensive Zoning Ordinance as follows:
  - a) The Subdivision Rules and Regulations, Section 2.3.3, states that the Community Development Board will not approve or modify any plan of a

subdivision of land unless all buildings, structures and lots shown on said plan comply with the Zoning Ordinance of the City of Methuen. The Board asserts that the plan as submitted does not comply with the Zoning Ordinance. See Paragraph 1(a) and as discussed further below.

- b) However, the Applicant asserts that the plan is in conformance with the Zoning Ordinance under a provision previously contained in the City's Comprehensive Zoning Ordinances at Section VI-D, Table of Dimensional Regulations. This paragraph, which has been repealed, stated as follows:

"Notwithstanding the Table of Dimensional Regulations, where Low Impact Development (LID) techniques are employed in the design of a subdivision and in accordance with the LID requirements of the Subdivision Rules and Regulations, the minimum dimensional requirements on a lot shall be fifty (50) feet of frontage and 5,000 square feet of area with not less than a 20 foot setback from other structures on the same or adjacent lots and a front and rear setback of no less than 20 feet."

- c) Notwithstanding the Applicant's claim that the second paragraph VI-D of the Zoning Ordinance is applicable, even if it were, the Board determined that the Applicant failed to design a project that employed sufficient LID techniques as envisioned by that provision, as noted above.

**10) The following plans and documents are incorporated herein by reference:**

- a) Subdivision Plan in Methuen, MA, Proposed Subdivision for 80 Myrtle Street in Methuen, MA, June 2016; dated Nov. 23, 2015, rev. 2/28/19; prepared for: Colchester Properties, LLC.; prepared by: Millennium Engineering, Inc.; containing 11 sheets.
- b) Stormwater Management Report; for Colchester Properties, LLC, Definitive Subdivision, 80 Myrtle Street, Methuen, MA; prepared by Millennium Engineering, Inc.; dated November 11, 2015; rev. Feb. 28, 2019.
- c) Traffic Impact and Access Study; dated February 23, 2016; prepared by VHB, prepared for Wayne Capolupo, Colchester Properties, LLC.
- d) E/One Pressure System Design Report for 80 Myrtle Street, Methuen, MA, November 22, 2015; prepared by F.R. Mahoney & Associates, Inc.

**VOTE:**

On a motion made by Mr. Comei and seconded by Mr. Boes, the Board voted unanimously (5-0) to DENY the Application of Wayne Capolupo, Manager, Colchester Properties, LLC (the "Applicant") for a revised definitive subdivision plan prepared by Millennium Engineering, Inc., revised through 2/28/19, containing 11 sheets. ,

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Stephen F. DeFeo, Jr., Chairman  
Charles Perrault, Esq., Vice Chairman  
Michael Comei Secretary  
Brian Boes  
Ronald Hatem