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June 5, 2009

Greg D. Peterson
DLA Piper LLP
33 Arch Street, 26th Floor
Boston, MA 02110-1447

Re: Request for Advisory Opinion
Stoneham Executive Center/Langwood Commons; EEA #12372

Dear Mr. Peterson:

I have received your request for an Advisory Opinion dated April 21, 2009, requesting a determination as to whether review under the Massachusetts Environmental Policy Act (MEPA), M.G.L. c. 30, §§61-62I, is required for the proposal by Fellsway Development, LLC and Simpson Housing Limited Liability Partnership (collectively, the Proponent) to construct a project that involves the redevelopment of an existing hospital building, construction of additional housing units, and continued use of several existing buildings on a parcel of land located on Woodland Road in Stoneham, Massachusetts. The parcel is an existing developed site (the Boston Regional Medical Center site) that has historically been occupied for over a hundred years by users such as a hospital, clinic, school, church and residences. The Proponent's plan is to redevelop this site into a mixed use development that will expand and upgrade the existing and previously occupied buildings. Your request for an advisory opinion was noticed in the May 6, 2009 edition of *The Environmental Monitor*, and a public comment period was held until May 26, 2009. In response to that posting, I have received over six hundred comments concerning the proposed project.

I have carefully reviewed your request, including the attached proposed Memorandum of Understanding (MOU) with the Department of Conservation and Recreation (DCR) and Transportation Safety Improvements Plan (TSI Plan), which are discussed further below. I have also carefully considered the significant volume of comments I have received from state agencies, legislators, the Cities of Melrose, Medford and Malden, environmental advocates and

many concerned residents of the areas that may be affected by this development. I acknowledge and appreciate what appears to be widespread concern about the project's potential impacts to DCR's Middlesex Fells Reservation, the historic parkway known as Woodland Road, and the surrounding communities. I also recognize the concerns raised by many commenters that the current proposal circumvents the spirit and regulatory requirements of MEPA. Indeed, as further detailed in my July 3, 2008 letter to the Proponent indicating that the project should complete review under MEPA, I too have expressed these same concerns.

However, the situation presented today differs significantly from that presented a year ago. As outlined further below, the MOU attached to your Request provides a clear mechanism for funding the type of traffic safety mitigation measures that I found were necessary in the prior review. Because the Proponent has addressed the condition upon which I based my earlier determination, and because I do not believe the project can be construed to require either a Permit or Financial Assistance from the Commonwealth as those terms are defined under MEPA, I am compelled to find that MEPA lacks jurisdiction over this private development project, subject to the Proponent fulfilling its obligations under the MOU. In addition, although it does not alter the basis for my decision in this matter, I recently received information from the Proponent indicating that the project may be significantly downsized, thereby further reducing the anticipated traffic impacts of the proposed project. I believe that the mitigation provided for in the MOU coupled with the likely downsizing of the proposed project will serve to address many of the concerns that were expressed in the comment letters I received.

Prior Determination

In reviewing the current Request, it is important to recall the basis for my July 3, 2008 letter. As outlined therein, my concern at that time was that the project would impose unacceptable impacts on DCR's parkways and threaten public safety if the project's traffic impacts were not mitigated. At that time, the Proponent had indicated that, despite outstanding requirements to present further analysis of the environmental impacts of the project in the context of an ongoing MEPA review¹, it had downsized the project to a size and scope that no longer required any state Permits. Even as reconfigured, the project was expected to generate a significant volume of daily trips to and from the site. DCR indicated in response to the Proponent's plan that measures such as traffic calming devices, traffic signals, and/or a pedestrian signal would be needed to allow for safe vehicle and pedestrian use of Woodland Road, a DCR-owned roadway. However, because the Proponent was not proposing to alter the existing site access to Woodland Road, no permit was required under DCR's regulations concerning the Use of Reservations and Parkway (350 CMR 2.00) and the required improvements would have needed to be made at DCR's expense.

MEPA establishes jurisdiction over those aspects of a project undertaken by a private proponent that are within the subject matter of any required state Permit, or over any private

¹ This project and prior iterations of it have been reviewed by MEPA under EEA file No. 12372 since 2000, and there have been numerous MEPA filings made in connection with prior plans for the Site. Without detailing all of that lengthy history, at the time the Proponent downsized the project to avoid state permitting requirements, there was an outstanding Scope for a Supplemental Final Impact Report to be submitted for review.

project that involves Financial Assistance or a Land Transfer from a state agency. *See* M.G.L. c. 30, §62A; 301 CMR 11.01(2)(a)(1). My authority to compel review of a project through MEPA is consequently circumscribed to those situations where one of these Agency Actions is required. As noted above, although the project was redesigned such that it successfully avoided all state permitting requirements, the Proponent's plan was predicted to cause significant traffic-related impacts and required DCR to expend public funds to remedy those impacts. Faced with this undesirable prospect, I issued the July 3rd letter outlining my belief that the project required an Agency Action for the purposes of conferring MEPA jurisdiction because DCR's efforts to address traffic and safety problems caused by project-related vehicle trips would be a form of indirect Financial Assistance to the project (as those terms are defined in the MEPA regulations). My intent was to ensure that the Proponent did not avoid paying its fair share for mitigating the predicted impacts of a private development on a public parkway.

Response to Request for Advisory Opinion

The current Request for Advisory Opinion presents new, and I believe compelling, facts in a situation characterized by unique circumstances. In particular, the Request for Advisory Opinion details a proposed MOU under which the Proponent would provide DCR \$1.8 million in funding to design, permit, and construct the TSI Plan, which is designed to include safety features to calm vehicular traffic, provide new pedestrian crossings, and promote enhanced recreational use of the Middlesex Fells Reservation by pedestrians and bicyclists. The TSI Plan is premised upon an updated traffic safety and operational analysis conducted by the Proponent's consultant Vanasse Hangen Brustlin, Inc., and was developed in coordination with DCR. Under this plan, existing safety deficiencies on Woodland Road will be addressed along with the expected impacts from the proposed development. The improvements are designed to calm traffic by reducing vehicular travel speeds, to create a safer environment for both pedestrians and motorists, and to provide more efficient vehicular operations. Notably, the plan will allow for future conversion of the southbound lanes of Woodland Road into a dedicated bicycle and pedestrian path, as was contemplated in the "Vision Plan" DCR previously undertook for this area. The improvements are therefore consistent with DCR's previously articulated long-term plans for the Middlesex Fells Reservation. In addition, the MOU indicates that the Proponent will provide, at its sole expense, interim traffic details to manage traffic flow and public safety should the proposed project be constructed prior to the completion of DCR's roadway safety improvements. In sum, under this revised scenario, the Proponent has agreed to compensate DCR for the expected traffic mitigation related to the project, and DCR no longer must use public funds to remedy traffic and safety impacts of this abutting project.

In response to the Request for Advisory Opinion, DCR has indicated that, subject to the Proponent's compliance with the commitments memorialized in the MOU, the proposed project will not require a DCR Permit nor require Financial Assistance from DCR. I have also received comments from the Department of Environmental Protection (MassDEP) indicating that the project will not require any approvals from that agency that meet the definition of a Permit under the MEPA regulations. As such, there do not appear to be any state Permits required to construct the Proponent's planned development. I note, however, that the proposed TSI plan will be subject to state review for both historic and environmental impacts when DCR undertakes the project. Since the TSI plan necessarily involves alterations to Woodland Road, which is listed on the National and State Registers of Historic Places, the Massachusetts Historical Commission

(MHC) has provided comments indicating that any changes to the roadway layout undertaken by DCR will require consultation with MHC pursuant to 950 CMR 71.07. In addition, because the improvements would involve alteration of a roadway listed in the State Register of Historic Places and is being undertaken by a state agency, the TSI Plan would also require review under MEPA. *See* 301 CMR 11.03(10)(b)(1). Therefore, I expect that DCR will file an Environmental Notification Form with the MEPA Office when the Department is prepared to move forward.

In reviewing this Request for Advisory Opinion, I am mindful of my legal duty to apply the requirements of MEPA within the statutory and regulatory limits of my jurisdiction. Although MEPA is an important tool for review of environmental impacts caused by private projects proposed in the Commonwealth, I have no legal authority to compel MEPA review of such projects unless they require a Permit, a Land Transfer or Financial Assistance, regardless of the magnitude of their potential impacts. Therefore, after careful consideration of your Request and of the many comments received in response, I must find that the project as currently designed to avoid any and all state permitting requirements or indirect financial subsidies, is not subject to MEPA jurisdiction as long as the Proponent executes the proposed MOU and provides the agreed-upon funds for traffic mitigation to DCR. I have made this determination notwithstanding my prior assertion of jurisdiction in light of the significantly changed circumstances presented in your Request, which no longer require either direct or indirect public Financial Assistance.

Certain commenters have suggested that DCR has implied legal authority to require the Proponent to apply for a DCR approval of the traffic increase, because of DCR's general statutory authority to "preserve and protect the scenic and historic integrity of its roadways and boulevards" under M.G.L. c. 92, §35. I cannot agree that this broad language, standing alone, authorizes this action, particularly because DCR's current regulations expressly require an approval only when there is a physical alteration of a DCR roadway, as opposed to an increase in traffic upon it. It could threaten the predictability that MEPA affords both project proponents and the public if agencies began to require additional permits or approvals based upon a general grant of authority, even where their own regulations do not provide for such permitting requirements. DCR has never previously taken the broad interpretation of its statute that is suggested, and I likewise decline to do so here. Other comments have suggested that the MOU is itself a Permit under the statute. Again, I cannot support such a broad interpretation of the statute and regulations. The MOU is an agreement specifying the terms under which the Proponent will provide mitigation for project impacts; such an agreement is clearly distinct from the approvals or other entitlements for use that are described in the MEPA regulations and which contemplate a request for project approval pursuant to a regulatory requirement rather than the provision of mitigation funds.

This Advisory Opinion is also based upon several other facts and circumstances that merit additional discussion. To begin with, I have made this determination subject to the requirement that DCR use the escrowed funds to directly address safety issues on Woodland Road in the project vicinity. Although the MOU does not by its terms obligate DCR to undertake the work (a fact noted by many commenters), failure to do so would result in unacceptable adverse impacts to public safety, as has been detailed in DCR's prior comments on this project. I find that DCR must therefore use any funds obtained in a manner consistent with the purposes spelled out in the MOU. In issuing that directive I recognize however that the

specific details of the TSI Plan may evolve over time with the benefit of further public input. Many of the comments I have received have questioned the design changes to Woodland Road detailed in the TSI Plan. As noted above, before that plan can be implemented it will require review under MEPA and consultation with MHC. Both of these are public processes that will afford an opportunity for interested stakeholders and members of the public to weigh in on the design changes proposed. I am therefore confident that the work ultimately undertaken by DCR will receive the public input and scrutiny that is appropriate for proposed alterations to such a high-profile and historic DCR parkway.

I have also received many comments expressing the view that the arrangement proposed in the Request for Advisory Opinion and MOU violates the anti-segmentation provisions of the MEPA regulations at 301 CMR 11.01(2)(c). While I agree that the anti-segmentation requirements of the MEPA regulations require a broad view of what comprises a "Project" under MEPA, I do not find the anti-segmentation provisions applicable to the limited and particular circumstance currently before me. In determining whether a Project undertaken by a person other than a state agency is subject to MEPA jurisdiction, the starting point for the inquiry is whether the project undertaken by that person will require the state to issue a Permit or involve state Financial Assistance. *See, e.g.,* M.G.L. c. 30, §§62 and 62A; and 301 CMR 11.02, definition of Project. As outlined above, I do not think the current proposal can be so construed, and there is therefore no jurisdiction over the Proponent's plan to construct a private project. Although comments concerning this issue have asserted that, viewed from the other perspective, the safety improvements to be undertaken by DCR constitute a Project undertaken by an Agency that is broad enough to include the Proponent's development plans, I cannot agree with that interpretation. Under 301 CMR 11.01(2)(c), in assessing segmentation I shall consider whether the activities, taken together, comprise a common plan. While there is no dispute that DCR's roadway safety improvement plans will address traffic resulting from the Proponent's development proposal, it is hardly fair to say that the hospital redevelopment and construction of housing units on the site are part of any cooperative plan by DCR to facilitate that development. Moreover, the work that DCR will be pursuing has public benefits that are independent of the Proponent's development project. The traffic calming measures proposed along Woodland Road, and eventual conversion of lanes into pedestrian and bike trails, were developed as part of an extensive "Vision Plan" exercise conducted several years ago, and will improve the experience of the park. Thus, I cannot conclude that DCR's roadway work, and the Proponent's Redevelopment work, are one project. In any event, in the absence of a request for a permit or direct or indirect Financial Assistance from the Proponent, I do not have the authority to assert MEPA jurisdiction over the private development.

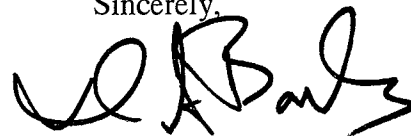
That said, let me emphasize that the facts presented in this case are unique and unlikely to be repeated. Had this project been proposed adjacent to state highway controlled by the Massachusetts Highway Department (MHD), the requirement to obtain a permit for indirect impacts would have been clear from the beginning, and there could have been no argument that the project was subject to review under MEPA. This is because MHD regulations not only require a permit when a private party seeks to physically alter an MHD roadway, but also when a party causes substantial increases in traffic using an existing curb-cut. In contrast, the current DCR regulations only require a DCR curb-cut approval when there is a physical alteration of the DCR roadway; an increase in traffic, even a substantial one, does not trigger this permitting requirement.

In order to make certain that this situation does not arise again, I have directed DCR to issue revised regulations that will require approvals when there are substantial traffic increases to an existing curb-cut, similar to MHD's requirements. I expect those regulations to be published in draft form for public comment shortly. Consequently, I do not believe that this fact pattern is likely to arise again. Therefore, this Advisory Opinion shall be constrained to its factual premises, and shall not serve as a precedent for other private project proponents to avoid state environmental review.

Finally, although it does not alter the legal interpretation I have offered above, I have also become aware of a possible change in circumstances that will result in significantly reduced traffic volumes and other environmental impacts originating at the site. Specifically, I have been advised by the Proponent in a letter dated June 4, 2009, a copy of which is attached hereto, that the Proponent and Massachusetts Water Resources Authority (MWRA) have entered into an agreement in principle to transfer approximately six acres of the project site to the MWRA for use as a covered storage water supply facility. This arrangement will result in a downsizing of the project from 405 to 310 additional residential units, a reduction of approximately 25% that will serve to reduce the traffic impacts of the project correspondingly. In addition, I understand that the MWRA intends to make this 6 acre area publicly available if the transaction is completed, allowing the area to become an additional recreational resource for users of the Middlesex Fells Reservation. When coupled with the mitigation payments that will be made to DCR under the MOU, the current development therefore appears to pose considerably reduced impacts to the Middlesex Fells Reservation than what was contemplated during the prior MEPA review of this project.

For all of the above reasons, and subject to the conditions expressed herein, I find that the project is no longer subject to MEPA jurisdiction.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ian A. Bowles', written in a cursive style.

Ian A. Bowles

cc: Richard Sullivan, Commissioner of the Department of Conservation and Recreation
Alicia McDevitt, Assistant Secretary and MEPA Director



THE GUTIERREZ COMPANY

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June 4, 2009

RECEIVED

JUN 5 2009

Ian Bowles, Secretary
Executive Office of Energy and Environmental Affairs
MEPA Office
100 Cambridge Street, Suite 900
Boston, MA 02114

MEPA

Re: Stoneham Executive Center/Langwood Commons, EOEEA No. 12372

Dear Secretary Bowles:

Reference is hereby made to that certain Request for an Advisory Opinion for the above-referenced property filed on behalf of Fellsway Development LLC ("Fellsway") and Simpson Housing Limited Liability Partnership, by our attorneys, DLA Piper LLP, dated April 21, 2009 (the "Request"). In connection therewith, this letter shall serve to update you on certain negotiations that have occurred between Fellsway and the MWRA since our filing of the Request with respect to a portion of the property. Specifically, Fellsway and the MWRA have reached agreement in principal on a sale transaction whereby Fellsway shall convey a parcel of land located at the northeast corner of the site containing approximately six (6) acres to the MWRA to be used for a covered water supply storage facility. We are currently negotiating the terms and conditions of a mutually agreeable purchase and sale agreement and hope to reach an agreement within the coming days. As such, the Third Redevelopment (as such term is defined in the Request) would be reduced by eliminating the 95 garden-style condominiums entirely, thereby reducing the overall project to a total of 310 residential units, of which 25% or approximately 77 units shall be dedicated as affordable units. The remainder of the Third Redevelopment as described in the Request shall remain unchanged.

There are several benefits in the event that the project is downsized following a conveyance to the MWRA as described above, including without limitation, a reduction in the traffic impact to the site and a reduction in the overall development (i.e. density) impact within the Fells Reservation. Further, the MWRA's construction of a new covered water supply storage facility in the area will assist the MWRA in meeting its regional needs for water supply adequacy and reliability serving the neighboring communities.




Ian Bowles, Secretary
June 4, 2009
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If a purchase and sale is in fact executed, we will inform you of the anticipated closing date. In the interim, should you have any questions, please do not hesitate to contact us. Thank you for your continued assistance in this matter.

Very truly yours,

FELLSWAY DEVELOPMENT LLC

By: THE GUTIERREZ COMPANY,
Manager



Gloria M. Gutierrez
Executive Vice President
and Corporate Counsel

GMG/ram

cc: Arthur J. Gutierrez, Jr.
Spencer Welton
Bill Caulder
Greg D. Peterson, Esq.