

**Town of Southborough
Board of Appeals
Southborough, Massachusetts 01772**
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P.O. Box 9109
Southborough, MA 01772-9109
508-485-0710

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SOUTHBOROUGH, MA *YJH*

Paul J. Berry
Town Clerk
Town House
Southborough, MA 01772

Book: 42985 Page: 198

**NOTICE OF DECISION
ON AN APPLICATION FOR A VARIANCE**

**Absolut Realty Trust
0 Oregon Road
(15-16)**

Background and Procedural History

1. The applicant, William Depietri, as Trustee of Absolut Realty Trust, is the owner of 6.56 acres of land at 0 Oregon Road in Southborough (the "site"). In a decision dated October 21, 2010, the Southborough Zoning Board of Appeals (the "Board") had previously approved the applicant's proposal to develop a 15-unit affordable housing complex on the site in accordance with M.G.L. Chapter 40B.

2. Responding to what he feels are changes in the real estate market, the applicant is now considering the development of an over-55 condominium community on the site rather than the Chapter 40B project. Under the applicant's new proposal, the project would still consist of 15 units and would be built in accordance with the previously-approved plans and conditions for the 40B project, except for those conditions unique to a Chapter 40B affordable housing project.

3. In order to construct the over-55 condominium community rather than the 40B project, Mr. Depietri, in the application that he filed with the Board on May 19, 2011, requested several variances, including variances under Section 174-8 (Schedule of Use Regulations); Section 174-8.3 (Residential B District); and Section 174-8.3(D) (lot area, frontage, front and rear setbacks). The applicant's request for a variance is the first step in a process that would also require approval of the Planning Board.

4. On July 27, 2011, this Board held a public hearing in this matter, during which the applicant and his representatives provided an overview of the proposed over-55

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project and the Board asked questions about his proposal. Members of the public also weighed in on the proposal. The public hearing was continued until August 24, 2011.

5. Prior to the public hearing on August 24, 2011, the applicant revised his plans. The revised plan shows the access road into the project as a 50' right of way, eliminating the need for a frontage variance. The proposed 50' right of way will require approval by the Southborough Planning Board for a single lot subdivision on a road built to Town of Southborough subdivision standards. Assuming the Planning Board approves the applicant's subdivision proposal, the only variance required under the applicant's revised plan is relief from the rear yard setback in the vicinity of Unit 15, which at its closest point would be located nine (9) feet from the rear property line as opposed to the required thirty-five (35) feet.

6. In support of his application for a variance, the applicant submitted a colorized plan showing the revised Over 55 Residential Condominium Housing Project. A true and accurate copy of this plan is attached hereto as **Exhibit 1**. The plan was prepared by Connorstone Engineering, Consulting Civil Engineers and Land Surveyors, 10 Southwest Cuffoff, Suite 7, Northborough, MA 01532.

7. The applicant also submitted a marked-up version of the Decision of the Board of Appeals on a Comprehensive Permit, Absolut Realty Trust, 0 Oregon Road (15-16), originally filed with the Southborough Town Clerk on October 22, 2010. A true and accurate copy of this document is attached hereto as **Exhibit 2**. This document deletes those conditions that concerned the affordable housing aspects of the previously-approved Chapter 40B project that would not pertain to an over-55 housing project. Except for those deleted conditions, the applicant indicated that the proposed Over 55 housing project would be built according to the previously-approved plans and conditions approved by this Board for the Chapter 40B project. The only other change would be the elimination of any three bedroom units.

8. At the public hearing on August 24, 2011, the applicant and his representatives described his revised plans for an over-55 community and explained the reasons why he believes the Board should approve his request for a variance. Over the course of a lengthy hearing, the Board asked numerous questions of the applicant and his representatives and also considered input from the public, including neighbors who live in the vicinity of O Oregon Road. The Board then closed the public hearing and began its deliberations.

Findings and Decision

9. The site is located in the Residence “B” district, which requires a minimum rear setback of 35 feet. The applicant has requested a variance from the rear setback so that Unit 15 can be built within nine feet of the rear property line. This request implicates Section 174-25(A)(3) of the Southborough Zoning Code, which provides in relevant part:

Variances. The Board of Appeals shall have the power to grant, upon appeal or upon petition, variances from the terms of this chapter, including use variances, where the Board finds that, due to circumstances relating to soil conditions, topography or shape of land or structures and especially affecting such land or structures but not affecting generally the zoning district in which they are located, literal enforcement of this chapter would involve substantial hardship to the appellant or petitioner and that the desired relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of this chapter. The Board of Appeals may impose conditions, limitations and safeguards not based on the continued ownership by the applicant, petitioner or any owner.

10. In support of his request for a variance, the applicant emphasized that under his revised subdivision plan, the only variance that he is requesting is a dimensional variance from the rear yard setback. The applicant’s attorney, Angelo P. Catanzaro, Esq., argued that where only a dimensional variance is involved, even a relatively minor hardship can justify a variance. *See* Letter to the Board from Attorney Catanzaro dated August 24, 2011.

11. Attorney Catanzaro argued that the applicant had satisfied the test for a variance because the site, unlike most parcels in the zoning district, is of an irregular shape and contains wetlands. Because of these unique features, the applicant argued that he needs to build Unit 15 within the rear yard setback.

12. When asked by the Board whether Unit 15 could be eliminated altogether, the applicant indicated that he needs all fifteen units to make the project economically feasible – that is, without the variance to the rear yard setback, the number of units would be reduced to fourteen, which would jeopardize the economic feasibility of the project, according to the applicant.

13. The applicant also argued that the rear yard variance is mitigated by the fact that the rear yard abuts conservation land, with little if any likelihood of future development.

14. Finally, the applicant emphasized that the proposed development would comply with all of the conditions set forth in the Board’s decision regarding the

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previously-approved Chapter 40B proposal, with the exception of those conditions that relate to affordable housing, as shown in **Exhibit 2**. According to the applicant, an over 55 housing project would have reduced traffic levels as compared to the already-approved Chapter 40B project and would have less of an impact on the school system.

15. During the public hearing, several abutters – including Lisa Braccio (13 Oregon Road) and Kevin and Meme Luttrell (19 Oregon Road) – spoke out in opposition to the applicant’s proposal. The Luttrells also submitted a letter to the Board dated July 26, 2011 in opposition to the applicant’s request for a variance.

16. In opposing the applicant’s request for a variance, the abutters expressed concern about the density of the site – concerns that they had previously expressed in opposing the applicant’s request for a comprehensive permit under Chapter 40B. The abutters argued that building fifteen units on this six acre site would leave little room for yard area, would require decks to be built very close to the wetland “no touch” area, and would leave insufficient room for parking, among other concerns. The abutters also expressed concerns about the environmental impact of the proposed development, arguing that “the density of this project and the proximity of the homes to the wetlands create a situation where continual wetland disturbance is almost guaranteed.” *See* Letter from Kevin and Meme Luttrell dated July 26, 2011.

17. In considering these important concerns, the Board is mindful of the fact that if it denies the applicant’s request for a Variance, the applicant would still be authorized to proceed with the development of a nearly identical 15-unit complex under Chapter 40B. While the applicant’s request for a variance is a separate application that must rise and fall on its own merits, the Board cannot ignore the fact that, barring some unforeseen obstacle, development of the 15 unit complex will proceed as currently planned, under either the previously-approved Chapter 40 B comprehensive permit or in accordance with the applicant’s new plans for over-55 community (subject, of course, to the approval of the Planning Board).

18. After careful consideration, the Board voted (4-1) to grant the variance with the conditions reflected in **Exhibit 2**. The variance sought is the first step in a process that will seek permission for construction of a 15-unit age restricted townhouse community on a lot in excess of six acres that presents significant physical constraints due to soil, shape and topographical limitations. As the applicant will also be seeking Subdivision Approval for a single lot subdivision on a road built to town subdivision standards, the only variance requested is a dimensional variance that would allow for the construction of one residential structure within the rear yard setback area. Without the requested variance, the applicant would be unable to locate the proposed dwelling on the parcel, limiting the total number of units to 14, and creating a substantial economic hardship.

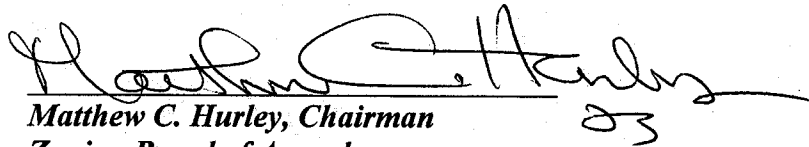
19. The Board further finds that owing to circumstances relating to the soil conditions, shape and/or topography of the land, especially affecting the site but not

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affecting generally the zoning district in which the site is located, a literal enforcement of the provisions of the Town of Southborough By-laws would involve substantial hardship, financial and otherwise, to the applicant and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent and purpose of MGL Chapter 40A and the town's by-laws.

On a motion by Board Member Hurley, seconded by Board Member Bhisitkul, the Board voted (4-1) in favor of Granting the Variance:

Yea: Hurley, Bayko, Bartolini, Bhisitkul
Nay: Estella


Matthew C. Hurley, Chairman
Zoning Board of Appeals

Sitting as a Board:

Matthew C. Hurley, Chairman
Edward D. Estella
Leo F. Bartolini, Jr.
Thomas Bhisitkul
Tara Bayko

For Petitioner:

Angelo P. Catanzaro, Esq.
100 Waverly Street
Ashland, MA 01721

Notice: Appeals, if any, shall be made pursuant to Massachusetts General Law, Chapter 40A, s.17, and shall be filed within twenty (20) days after the filing of this notice in the Office of the Town Clerk, Town Hall, Southborough, Massachusetts.

Variance Rights: If the rights authorized by a variance are not exercised within one year of the date of grant of such variance, such rights shall lapse; provided, however, that the permit granting authority in its discretion and upon written application by the grantee of such rights may extend the time for exercise of such rights for a period not to exceed six months; and provided further, that the application for such extension is filed with such permit granting authority prior to the expiration of such one year period. If the permit granting authority does not grant such extension within thirty days of the date of application therefor, and upon the expiration of the original one year period, such rights may be re-established only after notice and a new hearing pursuant to the provisions of Massachusetts General Laws, Chapter 40A, section 10.



The Commonwealth of Massachusetts
Town of Southborough
Board of Appeals

Date: August 24, 2011

Certificate of Granting of a Variance
(General Laws Chapter 40A, Section 11)

The Board of Appeals of the Town of Southborough hereby certifies that a Variance has been granted:

To: **Absolut Realty Trust**
 0 Oregon Road
 (15-16)

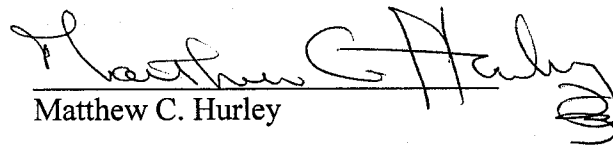
Town: **Southborough, MA 01772**

affecting the rights of the owner with respect to land or buildings at:

0 Oregon Road (15-16)
Southborough, MA

And the said Board of Appeals further certifies that the decision attached hereto is a true and correct copy of its decision granting said special permit, and that copies of said decision, and of all plans referred to in the decision, have been filed with the Planning Board and the Town Clerk.

The Board of Appeals also calls to the attention of the owner or applicant that General Laws, Chapter 40A, Section 11 (last paragraph) provides that no variance or special permit, or any extension, modification or renewal thereof, shall take effect until a copy of the decision bearing the certification of the Town Clerk that twenty days have elapsed after the decision has been filed in the Office of the Town Clerk and no appeal has been filed or that, if such appeal has been filed, that it has been dismissed or denied, is recorded in the registry of deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The fee for such recording or registering shall be paid by the owner or applicant.


Matthew C. Hurley

Town Clerk