Exhibit #43
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March 13, 2024
BY EMAIL

Michael McKnight, Chairman
Town of Wrentham Planning Board
79 South Street
Wrentham, MA 02093

Re: Edgewood Development Company, LLC
Application for Special Permit/Site Plan Application
10 Commerce Boulevard, Wrentham, MA

Dear Chairman McKnight and Members of the Board:

As you are aware, this office represents Helping Hands of America Foundation, Inc. ("Helping Hands"), and 574 Washington Street, LLC ("574 Washington"). This letter is submitted in further response to the events and proceedings of March 6, 2024, and in supplementation of our letters dated October 27, 2023 and January 9, 2024. In summary, our office wishes to impress upon the Board four (4) points:

1. The Applicant has, at the eleventh hour, dumped a substantial volume of traffic data, analysis and modeling on the Board *by reference to a MEPA filing with the Commonwealth*, for which our clients' traffic engineer has been asking for many months without sufficient time to vet these materials, and without any peer review, despite the presence of a traffic peer reviewer in this matter; all for the admitted purpose of avoiding a change in Board personnel.

2. To justify depriving the Board and the community of a fair opportunity properly

to vet the traffic impacts of its project, to be located at a well-known congested and dangerous corridor of Route 1, the Applicant makes the radical and radically false claim that traffic considerations are outside the purview of the Board acting on a special permit application under G.L. c. 40A, § 9, and exercising its Home Rule authority over local zoning permitting decisions. There is nothing more emblematically a classic zoning consideration than traffic impacts of a special permit application and, yet, the Applicant claims that this Board has no jurisdiction to consider traffic, here, simply because the project would be located on Route 1.

3. It has been a basic principle of zoning law in Massachusetts since before the adoption of the modern Zoning Act that a permit granting authority cannot delegate a matter of substance to some other permitting authority. The different Route 1/Hawes Street/Commerce Boulevard intersection iterations filed with the Board by the Applicant on March 6, 2024, intuitively and necessarily, entail different traffic impacts (which, again, cannot be vetted effectively in a week), and the Board must choose one. The Board cannot approve "whatever MassDOT approves," consonant with longstanding Massachusetts law.

4. As this letter demonstrates, our clients' dismissal of the appeal of the warehouse appeal should not be considered as the withdrawal of their objections to authorizing the reconfiguration and signalization of the Route 1/Hawes Street/Commerce Boulevard intersection (the "Intersection"), without sufficient vetting. The voluntary dismissal was a calculated decision based on an imminent trial, with the permitting proceedings, here, posing the potential of rendering that appeal academic, and to provide the Helping Hands family time to grieve the passing of Bob Sacchetti rather than engage in trial preparation.

If the Board were to internalize and seriously consider these points, it becomes crystal clear that, irrespective of the Applicant's desire for a quick approval, there is insufficient time for a reasoned and properly deliberate decision on March 20, 2024. While the Applicant reasonably would not relish re-starting these proceedings with a newly-constituted Board, continuing this matter and asking the Applicant to re-notice these proceedings comprise the only rational choice.

1. <u>An Eleventh-Hour Data Dump to Avoid a *Mullin*-Rule Issue is Not a *Bona Fide* Reason for the Board to Abdicate its Responsibilities</u>.

As the Applicant stated at the last hearing on March 6, 2024, the concerns raised by Shaun Kelly of Chappell Engineering ("Kelly"), the traffic engineer who has been engaged by Helping Hands and 574 Washington to review this project, are absolutely "not new." In summary, as set forth in the Power Point presentation that Kelly made to the Board on March 6, 2024, those points are, as follows:

A. The locally-submitted study from the Applicant only analyzes the Intersection in isolation, without consideration of up- and down-stream signalized intersections with Route 1 and Thurston and Madison Streets, respectively;

B. The Applicant, literally, assumes that signalization of the Intersection will equate with zero additional traffic on Hawes Street, which is facially unreasonable as Hawes Street is used today as a cut-through to Thurston Street;

C. The failure properly to account for existing queuing on the southbound lane of Route 1 extending from the signalized intersection at Madison Street, which queuing today already often stretches beyond Hawes Street at peak hours (intuitively, a traffic light at the Intersection would increase this queuing, which the Applicant's materials understate at best); and

D. The Applicant's proposal to restrict left-hand turns onto Hawes Street once the Intersection has been reconfigured and signalized comprises a blunt and problematic solution posited without properly disclosing the extent of the problem, in the first place.

See **Exhibit 1** attached hereto – a true and accurate copy of Kelly's Power Point presentation to the Board on March 6, 2024. In particular, as to issue (C), Kelly has strongly recommended, again, for many months, that the Applicant's traffic engineer conduct more detailed modeling to ascertain the extent to which the signalized intersection at Madison Street already fails properly to function at peak traffic hours, under existing conditions, and then the impact of the project on those "F" existing conditions.

What is "new" is that, on the afternoon of March 6, 2024, the Applicant finally purported *to file with the Commonwealth* the materials, data and modeling that Kelly has been requesting for many, many months. The idea that those materials could be reviewed, vetted and commented upon, including by the Board's peer reviewer, within two weeks, is quite-frankly and, to put it bluntly, fanciful. The relevant corridor of Route 1 is too congested and too dangerous simply to take an Applicant's word for the assertion that "there's nothing to see here" with a reconfiguration and signalization of an existing intersection with a municipal public way.

The sole practical reason why the Board is being asked not to vet the Applicant's voluminous SFEIR filing with MEPA on traffic impacts, purporting to include the very data and modeling for which Kelly has been asking for months, is that there will be a change in personnel in April as to three (3) members of the Board. As the Applicant forthrightly acknowledges, this change in the constitution of the Board poses a problem under Mullin v. Planning Bd. of Brewster, 17 Mass. App. Ct. 139 (1983); which holds that only those members who hear evidence during the public hearing process may vote on special permit applications. See id. at 141-142. New Board members, taking their positions in April 2024, will not have heard the evidence in support and

opposition to this application and, so, this application would have to be re-noticed and the hearings re-commenced. Again, our office can fully relate to why an applicant would find this eventuality less than ideal.

However, to be fair, the Applicant has been on notice of the materials that Kelly has advised are lacking ***since October 2023***! The Applicant has had plenty of time to collect data and conduct the recommended analysis and modeling. ***It has chosen to wait until the eleventh hour to do this work and, even still, has only provided this work product to the Commonwealth*****!** This is no way to conduct public hearings on a special permit application, and the time pressure is wholly self-inflicted. And, re-starting the proceedings does not mean starting from scratch, practically.

Once properly re-noticed, the Applicant can take full advantage of the iterative improvements that have been made to its application materials since filing, and would merely need to re-present what it presented on March 6, 2024. Otherwise, the Applicant would only be called upon to respond to further commentary from Kelly and the Board's peer reviewer, Environmental Partners ("EP"), once their review has been completed. In terms of atypical process and procedure, the Board should be reminded that, to date, EP only has reviewed the Applicant's original, initial traffic materials. Despite having a traffic peer reviewer engaged, there has, literally, been no substantive traffic peer review conducted since the initial filing, despite multiple letters from Kelly raising empirically-based constructive criticism of the Applicant's traffic analysis. Now the Applicant has purported to have conducted a significant amount of that additional analysis, and the Board appears poised to approve this application without actually reviewing and vetting these materials, again, related to a particularly congested and dangerous corridor of Route 1. This is really, with due respect to the Board's discretion, unacceptable.

In light of the foregoing, the following actions should be taken:

1. The SFEIR Should be Filed with the Board. The Applicant should be directed by the Board to file with the Board the traffic analysis and modeling materials filed as part of the Applicant's SFEIR MEPA filing with the Commonwealth on March 6, 2024.

2. Continue these Proceedings to Provide Adequate Time to Review the SFEIR. The Board should continue these proceedings to afford Kelly and EP sufficient time to review, and comment upon the SFEIR.

3. Re-Engage the Peer Reviewer. The Board should direct EP to review the SFEIR and provide comments upon the same, for the benefit of the Wrentham community that will bear the impacts of this project.

As detailed directly below, the Applicant's legal rationalization for why there is no need for further delay is frivolously false. Traffic in the Town of Wrentham, including on Route 1, is certainly

within the Board's Home Rule jurisdiction over local zoning. And, it would most certainly be unlawful for the Board to delegate to the Commonwealth, MEPA and/or the Massachusetts Department of Transportation ("MassDOT"), the decision of what iteration of this project, including the concomitant intersection layout, would best mitigate traffic-based impacts, under the Wrentham Zoning Bylaw (the "Bylaw").

2. <u>Consideration of Traffic is Well Within the Purview and Jurisdiction of this Board When Approving or Denying Applications for Special Permits</u>.

The Applicant, in furtherance of its efforts to jam through a vote on the Project, has made the facially ridiculous claim that traffic considerations are outside the jurisdiction of the Board when considering the grant of a special permit in this instance. That Route 1 is a state road is wholly irrelevant. Under the Zoning Act, the Bylaw, and prevailing case law, the Board's special-permit granting authority encompasses and, in fact, requires and mandates review and consideration of traffic impacts and implications. To contend otherwise would deprive the Board of one of its most fundamental powers, and is quite-frankly legally frivolous.

In general, traffic and traffic impacts of development comprise a chief concern of zoning. Section 2A of 1975 Mass. Acts 808, the legislation that created the Zoning Act, states, in relevant part, as follows: objectives for which zoning might be established which include, but are not limited to, the following:— *<u>to lessen congestion in the streets</u>*; to conserve health; to secure safety from fire, flood, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land, to avoid undue concentration of population; to encourage housing for persons of all income levels; *<u>to facilitate the adequate provision of transportation</u>*, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements; to conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment; to encourage the most appropriate use of land throughout the city or town . . ."(Emphases added). In particular, the Bylaw expressly incorporates by reference Section 2A's zoning policy objectives, and creates local zoning jurisdiction to safeguard these equities: Section § 390-1.2A provides that the Bylaw was adopted "[t]o ensure realization of the general statement of purpose" contained in Section 2A of Chapter 808 of the Acts of 1975.[1] Thus, traffic and traffic impacts, categorically, fall within any board's jurisdiction under the Bylaw.

Indeed, voluminous binding Massachusetts case law holds that traffic is within the scope of concern of local zoning laws. <u>See</u> <u>Marashlian v. Zoning Bd. of Appeals of Newburyport</u>, 421 Mass. 719, 722 (1996) ("[Traffic] concerns are legitimately within the scope of the zoning laws") (citation omitted). <u>See</u> <u>also</u> <u>Picard v. Zoning Bd. of Appeals of Westminster</u>, 474 Mass. 570, 574 (2016) (traffic a "typical" zoning concern); <u>Perez v. Bd. of Appeals of Norwood</u>, 54 Mass. App.

[1] The actual text of the Bylaw says "MGL c. 40A, § 2A", which, pursuant to Editor's Note, is a misnomer and was intended to be Section 2A of Chapter 808 of the Acts of 1975.

Ct. 139, n.3 (2002) (same); Bedford v. Trustees of Boston University, 25 Mass. App. Ct. 372, 376-378 (1988) (same). As far back as 1949, before the adoption of the modern Zoning Act, the Supreme Judicial Court expressly recognized traffic as within the purview of zoning. See Circle Lounge & Grille, Inc. v. Bd. of Appeal of Boston, 324 Mass. 427, 430 (1949). No case stands for the idea that a municipality may not consider the traffic impacts upon a state-owned road when deliberating upon an application for a special permit.

In fact, as our office has already substantiated in prior correspondence, concerns relating to traffic reflect specific criteria for Board review of special permit applications under the Bylaw. Section 390-9.2(2) requires the Board to consider, verbatim, "[t]he impact of vehicular and pedestrian traffic on the neighborhood and the primary and secondary roads and intersections serving the project area". It does not get more clear than this provision; the Board plainly has jurisdiction to consider traffic impacts. And yet, traffic also appears elsewhere in the Bylaw relative to special permit criteria. In Section 390-9.1A, the Bylaw exhorts that "[n]one of the uses allowed by special permit under these bylaws may be authorized by the Planning Board or the Board of Appeals unless the use: [s]hall not have vehicular and pedestrian traffic of a type and quantity so as to adversely affect the immediate neighborhood".

Accordingly, and in sum, the Applicant's contention that traffic impacts lie outside of the jurisdiction of Board review, here, is patently and frivolously false. It is the very essence of special permit review under the Bylaw, and throughout the Commonwealth, to consider traffic impacts. It is clear that the Applicant is merely making this false legal claim as a pretext and rationalization to provide cover for this Board to not review its voluminous March 6, 2024 traffic analysis filing with the Commonwealth, before rendering a decision. (It is also likely for this reason that the Applicant has failed to provide the SFEIR materials themselves to the Board, and only filed characterizations of the conclusions of those materials.) Review of traffic impacts, however, is required and, to properly discharge this mandate, the Board could not rationally approve this application without reviewing the Applicant's SFEIR materials, first.

3. **The Board Cannot Delegate its Local, Zoning Decision-Making Power to the Commonwealth.**

It is indisputable that the Commonwealth will make the final determination as to whether or not to allow the signalization of the Intersection. However, that does not divest this Board of its responsibility to properly adjudicate the special permit application for the relevant fueling station. The Applicant has, in its most recent letter, presented three possible iterations of a traffic signal and Intersection reconfiguration. The Board must either deny the permit or pick a single concept, and approve based on that concept alone. It is always possible that MassDOT will later approve a different signalization and Intersection schema; if so, the Applicant will need to return to this Board for a modification of its special permit. This is how the process works.

A "permit granting authority in a zoning case . . . may not delegate to another board, or

reserve to itself for future decision, the determination of an issue of substance, *i.e.*, one central to the matter before the permit granting authority". Tebo v. Bd. of Appeals of Shrewsbury, 22 Mass. App. Ct. 618, 624 (1986). The Board cannot defer a "determination[] of substance to a later date or delegate that determination to others." Cormier v. Bergeron, 30 LCR 432, 447 (2022) (21 MISC 000423) (Roberts, J.), citing Weld v. Board of Appeals of Gloucester, 345 Mass. 376, 378 (1963). Indeed, as per the Supreme Judicial Court's decision in Weld, supra, this non-delegation principle has been the binding law of Massachusetts in the zoning sphere since before the adoption of the modern Zoning Act. The rule makes practical sense: *quasi*-judicial boards have to approve concrete proposals; they cannot approve an indeterminate thing to be set, in the future, by another permit granting authority.

The Board, here, needs to make such a concrete decision. It cannot rest issuance of the special permit, or operation thereof, upon the determination of the Commonwealth, regardless of the Commonwealth's jurisdiction over Route 1 and signalization. The Board should consult with its expert peer reviewer, and then must decide upon a signalization concept that is acceptable to the Town of Wrentham. A condition that simply defers to MassDOT and rubber-stamps whatever decision the agency makes, in the future, does not pass legal muster.

4. **Our Clients' Voluntary Dismissal of the Warehouse Special Permit Appeal, in No Way, Means that they Have Withdrawn their Objections Here.**

As this letter demonstrates, Helping Hands and 574 Washington, in no way, have withdrawn their objections to the present application, and the concomitant reconfiguration and signalization of the Intersection contemplated and required thereby. The Applicant ascribes too much meaning to our clients' decision voluntarily to dismiss their appeal of the special permit for the warehouse project at 15 Commerce Boulevard; which special permit, like the one under consideration, is conditioned on the reconfiguration and signalization of the Intersection. It is telling that the Applicant wishes, when it is convenient and suitable for its purposes, alternately and incoherently, to distance the two projects from each other, or tie them together, when the same representatives and professionals have appeared before the Board on both applications.

The truth of the matter is that the two projects are obviously linked in that they both will share the signalization condition, if the present application were to be approved. They are also related in that, based on MassDOT signal warrant requirements, both projects would need to be fully permitted locally in order for a signal warrant to issue for the Intersection. Either alone would be insufficient.

Dismissal is not a decision that our clients took lightly. This decision was made within the procedural and substantive context of that Land Court zoning appeal, and our clients' personal lives. This past fall the Land Court scheduled a week-long trial in the warehouse appeal to be conducted in late April into early May 2024. In January 2024, our clients filed a motion to stay and continue that trial pending the outcome of these very proceedings, because, if the requested

special permit for the fueling station were to be denied, then the Intersection signalization that so concerns our clients would be so unlikely to occur that there would be no point in proceeding with the scheduled trial. Conversely, if this application were to be granted, then the two appeals should have been consolidated and heard together. It would make little sense to conduct a trial about inadequate trip generation for a signal warrant, if this Board were to grant this application, and would push the traffic generation of the two projects, together, over the signal warrant threshold. And, at the same time, as illustrated by our correspondence to date, there are plenty of legal defects with this application that warrant judicial review, unless and until they are addressed by the Applicant and this Board.

After hearing before the Land Court, Judge Smith, in his discretion, denied the motion to stay and continue the trial; effectively requiring our clients to pick which case they care more about. This letter should lay to rest any question about that calculus. In addition, Bob Sacchetti, one of the principals of Helping Hands, passed away on February 20, 2024. Particularly in light of that heavy personal cost, the idea that our clients should personally endure the time and expense of preparing for trial was an obvious bridge too far.

This is all to say that the voluntary dismissal should not be construed, in any way, as our clients' having withdrawn their concerns about this application, and the reconfiguration and signalization of the Intersection contemplated and required by it. To date, the Applicant has not met its burden of proving that this application meets the traffic-oriented criteria for the grant of the requested relief. Instead, at the eleventh hour, the Applicant filed a large volume of traffic data, analysis and modeling *with the Commonwealth* and filed a letter to this Board, referring to those unfiled materials, as satisfying its burden of proof. Reference to a *MEPA* filing *with the Commonwealth* is no substitute for proving entitlement to the requested *local, discretionary zoning relief*. Minimally, the Applicant should be directed to file the relevant materials with the Board, and this matter continued to a date and time by which those materials can be properly reviewed and commented upon. Failing this course of action, and if the Applicant insists on a premature vote, this application should be denied.

Sincerely,

/s/ Nicholas P. Shapiro
Nicholas P. Shapiro

NPS/hs

cc: Clients
Enclosure

EXHIBIT "1"

Traffic Review
Proposed Gas Station-Convenience Store
10 Commerce Boulevard, Wrentham, MA

Planning Board Hearing
March 6, 2024

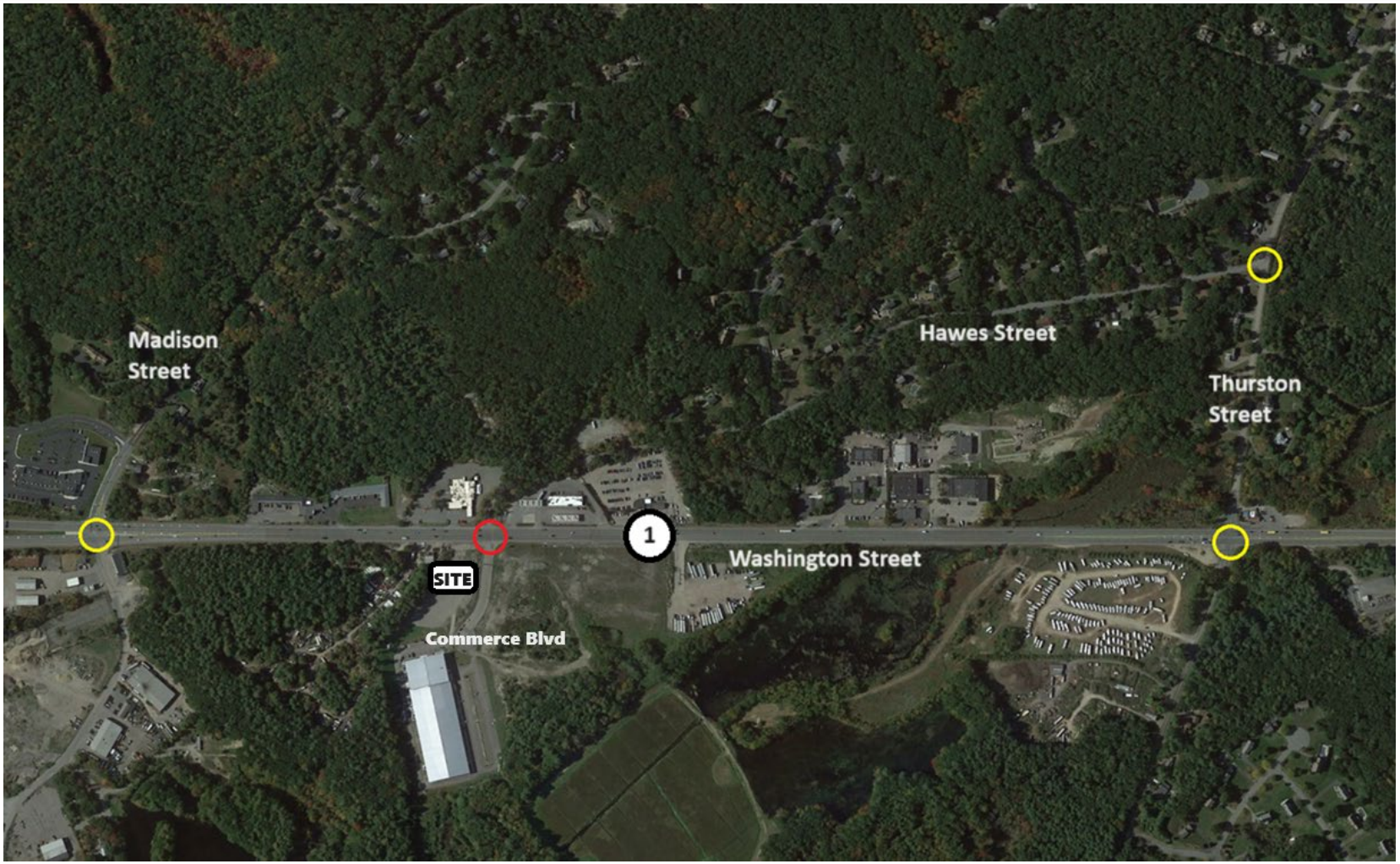
CHAPPELL ENGINEERING ASSOCIATES, LLC

Civil • Structural • Transportation • Surveying

Traffic Review Summary

- Locally submitted study area includes only Route 1 at Hawes Street/Commerce Boulevard
- Trip distribution assumes the project and new traffic signal will add no traffic to Hawes Street
- Queuing impacts from Madison Street remain unaccounted for
- Alternative layout restricting left-turns onto Hawes Street

Site Location Map



CHAPPELL ENGINEERING ASSOCIATES, LLC

Civil • Structural • Transportation • Surveying

Recommendations

- Expand the study area to include Route 1/Madison Street, Route 1/Thurston Street and Thurston Street at Hawes Street
- Evaluate the potential for increased traffic along Hawes Street, both project-related and existing diverted traffic
- Evaluate the impacts of queuing from Madison Street through Hawes Street
- Ensure access to Hawes Street from Route 1 northbound is maintained and adequately designed for