

**COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT**

WORCESTER, ss.

19 MISC 000551 (MDV)

DAVID W. BROSSI and
BRIGATI VILLAGE, LLC,

Plaintiffs,

v.

PLANNING BOARD OF THE TOWN OF
GRAFTON; and DAVID ROBBINS, LINDA
HASSINGER, JUSTIN WOOD, PRABHU
BALAJI VENKATARAMAN, and VIKRAM
DAVE, in their capacities as members of the
Planning Board of the Town of Grafton,

Defendants.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Rule 52, Mass. R. Civ. P.)**

They say that silence is golden. That adage isn't true in this case, as a planning board's silence has led to suspicion that it acted out of improper motives. The Court thus remands this case to the board to have it reconsider its decision or at least explain why it did what it did.

In February 2019, plaintiff David W. Brossi filed with the defendant Grafton Planning Board (the "Board"), on behalf of himself and plaintiff Brigati Village, LLC (collectively, "Brigati Village"), an application (the "Application") for a special permit and site-plan approval. Brigati Village sought to build a multi-family residential condominium, consisting of eleven buildings (the "Project"), on a 9.1-acre site at 41 Church Street and 14 West Street in Grafton,

Massachusetts (the “Site”). The Town of Grafton’s Zoning By-law (the “By-Law”) delegates to the Board the power to grant the approvals Brigati Village sought.

One finds in § 5.2 of the By-Law the standards that apply to the granting of special permits for multi-family residential developments. Those standards include this one, found at § 5.2.2.10 of the By-Law. It states:

The construction of drainage, utilities and roadways [in a multi-family development] shall be performed in accordance with the design and construction standards of the Rules and Regulations Governing the Subdivision of Land in the Town of Grafton [the “Subdivision Regulations”]. The special permit granting authority [here, the Board] shall have the right to waive any of such special requirements.

After public hearings, the Board determined that the Project didn’t comply with five of the Subdivision Regulations. The Board voted to waive four of those requirements. But by a 3-2 vote, the Board decided without explanation not to waive this requirement, found in § 4.1.6.3 of the Regulations (hereafter, the “Dead-End Street Regulation”): “[D]ead end streets and their extensions or segments, if any, shall not be shorter than one hundred fifty feet (150’), nor longer than five hundred feet (500’).”¹ The Board unanimously found that two roadways in the Project would be “dead end streets” within the meaning of the Regulation. The Board also unanimously found that each dead end would exceed 500 feet.

Because the Board didn’t waive the Dead-End Street Regulation, the Board voted unanimously to deny the Application. Brigati Village timely appealed the Board’s decision (the “Denial”) to this Court under M.G.L. c. 40A, § 17. The parties appeared for trial on October 5-7, 2021. The Court viewed the Site on the first day of trial. Having considered what it saw on the view, having heard the parties’ witnesses, having reviewed their stipulations of fact and the

¹ At points the Board’s decision mis-cites this Regulation as § 4.7.6.3. The Regulations have no § 4.7.6.3.

exhibits admitted at trial, and having heard the arguments of counsel, the Court VACATES the Denial and REMANDS this case to the Board for further proceedings.

Pursuant to Rule 52, Mass. R. Civ. P., the Court FINDS the facts recounted above as well as these:

1. The Site is in a Multi-Family Residential (R-MF) zoning district under the By-Law. The Site also is in what the By-Law calls a Low Density Residential Zoning District (R-40). The By-Law allows multi-family dwellings in the R-MF district only if the Board issues a special permit.
2. Two parcels comprise the Site. One is known as 14 West Street. Its area is 38,169 square feet. There's currently a single-family residence on 14 West Street. The parcel has frontage on West Street, a private way. West Street dead ends at 14 West Street. Across West Street from 14 West Street is another residential lot, 15 West Street. Brigati Village owns 15 West Street, but that parcel is not part of the Site.
3. The other parcel that makes up the Site is 41 Church Street. It's an undeveloped, 8.2-acre lot. It has frontage on Church Street; it currently has no frontage on West Street.
4. The Application proposed the demolition of the house on 14 West Street, followed by construction of eleven two-story townhouses of three to six units each, for a total of 57 units. A single condominium would encompass the units. The units would be sold at market rates.
5. The original design for the Project included two accessways to the Site. One was to be an extension of West Street into the 41 Church Street parcel. The other was to be a new road beginning at the Site's frontage on Church Street. Brigati Village originally proposed connecting the two accessways, and thus the original Project didn't create any dead-end roadways. (To the contrary: it would have converted the West Street dead-end into a "through" roadway.)
6. What looks good on paper can look terrible in the field. Most of the Site sits on a plateau, but the side of the Site that fronts Church Street slopes sharply downward to reach that street. To build the Church Street accessway shown in the Project's original design, Brigati Village would have had to remove an extensive number of trees, clear most of a hillside, and make extensive cuts and fills. Even with that work, the proposed entrance would meet Church Street on the inside of one of the Street's curves. Owing to the topography at the proposed entrance, drivers trying to enter or exit the entrance would have unsatisfactory views of oncoming Church Street traffic.
7. Brigati Village shared the Project's original design with the Town of Grafton's "development team." The team consisted of the Town Planner, the Town's engineering consultant, and representatives of the Town's Police and Fire Departments. The team told Brigati Village that it had "significant problems" with the proposed Church Street entrance. The

team advised Brigati Village to re-design the Project to avoid any entrance off Church Street. The team had no power, however, to reject on the Board's behalf any proposed design, and after Brigati Village met with the team, any decision to re-design the Project lay entirely with Brigati Village.

8. Brigati Village took the team's advice. Its final Application revised the Project's proposed access, and called for creation of two interconnected lanes, "Drive A" and "Drive B," both extending south from the existing dead end on West Street. From that dead end, Drive A would enter the Site, then loop west and intersect with itself (the "Loop"). The final segment of Drive A, within the Loop, was to be a "Gated Green Emergency Vehicle Access" area (the "Gated Area"). The Gated Area was to be built out of pervious pavers, to provide a stable driving surface while not increasing the Project's impervious surfaces. Drive B was proposed to branch east from Drive A, eventually reaching a T-shaped turnaround.

9. Section 1.5.5 of the By-Law, "Conditions for Granting Special Permits," provides in pertinent part (bold in original):

Special Permits may be granted only for uses which are in harmony with the general purpose and intent of this By-Law. The special permit granting authority shall deny an application for a special permit when it determines that a nuisance, hazard, or congestion will be created, or for any other reason there will be substantial harm to the neighborhood or derogation from the general purpose and the intent of the By-Law, or where the special permit is determined not to be in the public interest, or that the stated district objectives or applicable use criteria will not be satisfied. The special permit granting authority [here, the Board] shall make findings on which to base its determination on the specific issues of:

- a. Ingress and egress to property and proposed structures thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow and control and access in case of fire or catastrophe. . . .

10. Section 1.5.6 of the By-Law, "Review and Reports," provides in pertinent part:

When acting as Special Permit Granting Authority, the . . . Board, upon the receipt of any application for a special permit and the required plans and documents, shall file . . . one copy with . . . the Fire Department [and other boards and officers] for their review and recommendation. These boards and officers shall submit reports to the . . . Board within [35] days of the receipt of the application and supporting documents from the . . . Board. Failure to report shall be deemed to be lack of opposition thereto

11. Section 2.1.1.8 of the Subdivision Regulations defines "Driveway, Common" in pertinent part as a "driveway which provides access to more than one lot, each of which has at least the minimum frontage on a Town street as required by the [By-Law]."

12. Section 2.1.1.11 of the Regulations defines “Lot” as “[a]n area of land in one (1) ownership with definite boundaries used, or available for use, as the site of one (1) or more buildings”

13. Section 2.1.1.24 of the Regulations defines “Roadway” as “[t]hat portion of a way which is designed and constructed for vehicular travel.”

14. Section 2.1.1.27 of the Regulations defines “Street, Dead-End” as “[a] street, extension of a street, or system of streets connected to another street at one (1) point only. Any proposed street which intersects with a dead-end street shall be deemed to be an extension of the dead-end street.”

15. Section 2.1.1.28 of the Regulations defines “Street, Major” as

A street which, in the opinion of the Board, is or will be used as a roadway within the Town of Grafton and which will connect towns, or which will carry more than fifteen hundred (1500) vehicles per day; or a street intersecting one (1) or more streets which, in the opinion of the Board, is or will be used to carry a substantial volume of traffic from such streets to another major street or community facility; normally including a principal entrance street to a shopping center, industrial park, cluster development, planned unit development, or a large subdivision, or group of subdivisions, and any principal circulation street within such developments, or a street which will connect subdivisions.

16. Section 2.1.1.29 of the Regulations defines “Street, Minor” as “[a] street which, in the opinion of the Board, is being used or will be used primarily to provide access to abutting lots and which will not be used for through traffic.” Section 2.1.1.29 goes on to define three subcategories of Minor Streets. A Minor Street – A is “[a] residential street expected to carry less than 1500 vehicles per day.” A Minor Street – B is “[a] residential street expected to carry less than 500 vehicles per day.” A Minor Street – C is “[a] residential street expected to carry less than 250 vehicles per day.”

17. The Regulations for “dead end streets” are, in pertinent part, these:

4.1.6.1 Dead end streets shall be discouraged by the Board, except where such streets create frontage for lots in excess of minimum area requirements of the . . . By-Law and which are served by minor streets or common driveways.

4.1.6.2 The length of dead end streets shall be measured from the right-of-way line of the intersecting street to the center of the turnaround.

4.1.6.3 However, if they are necessary for subdivisions with minor streets or common driveways, dead end streets and their extensions or segments, if any, shall not be shorter than one

hundred fifty feet (150’), nor longer than five hundred feet (500’).

4.1.6.4 In the unusual event that topography or other site conditions justify a dead end street longer than five hundred feet (500’), and where there is a substantial public or conservation benefit to be achieved, the . . . Board may relax these standards. Any waiver request regarding this provision shall require the Board to specify the particular public and/or conservation benefit to be realized, and shall be referred by the applicant to the Police Chief, Fire Chief, Director of Public Works and Conservation Commission for their review and comment on this specific issue prior to the Board’s action on such request.

...

4.1.6.7 Dead end streets shall be provided at the closed end with a turnaround having an outside right of way diameter of one hundred feet (100’) unless a greater diameter is required by the Board. The turn-around or stub shall be located at the property line. . . .

18. The existing dead-end portion of West Street that approaches the Site is 312.1 feet long, from the right-of-way line of Church Street at its intersection with West Street (the “Right of Way Line”).

19. In its eighteen-page Denial, the Board found (see Denial, F20), and the Court agrees, that the total length of Drive A from the Right of Way Line to the furthest point on Drive A (that is, not counting those parts of the Loop that circle back towards the Right of Way Line) is 926.6 feet.

20. In the Denial, the Board further found (see Denial, F16), and the Court agrees, that the total length of Drive B is 1,052.8 feet, comprised of the length of existing West Street (312.1 feet), plus the length of proposed Drive A from the existing end of West Street to the beginning of Drive B (385.8 feet), plus the length of Drive B from Drive A to Drive B’s terminus (354.9 feet).

21. The Board opened its public hearing on the Application in March 2019. The hearing didn’t close until August 12, 2019, owing to intervening resignations of members of the Board and delays in filling their vacancies. After closing the hearing, the Board scheduled a meeting for October 15, 2019, to vote on the Application.

22. At some point during the hearing process, the Board suggested that Brigati Village include affordable units in the Project, even though the By-Law at that time didn’t require the Project to include such units. Brigati Village declined the suggestion.

23. The Denial recites the “items . . . submitted to the Board for its consideration of this application . . .” (Denial, 2.) The Denial lists 57 exhibits and various other materials. The Denial doesn’t list any exhibit as coming from the Fire Department.

24. The Denial also doesn’t mention a one-page memorandum prepared by Joseph Laydon, Grafton’s Town Planner, to the Board (the “Laydon Memo”). The Memo’s dated October 15, 2019. The subject line of the Memo reads, “Dead End Streets in RMF District.” The Memo states in full:

The following list contains lengths of existing dead-end streets for developments within the RMF District. GIS images are also included on the following pages.[²]

1. Azalea: 925’
2. Blackberry & Juniper: 596’ and 551’
3. Church Street: 420’
4. Coventry & Gordon: 501’ and 545’
5. Lordvale, Edward, and Lincoln: 1,514’, 1,522’, and 852’
6. Pullard Road: 689’

Note, many developments included loops and the distance that was measured was to the farthest point of the loop.

25. While the Denial doesn’t mention the Laydon Memo, the Board called Mr. Laydon as a witness at trial. In 2019, Laydon was the Grafton Town Planner, but he wasn’t a Town employee at the time the roads described in his Memo were built. He testified that he provided to the Board the Memo. Laydon also testified that the Board discussed the Memo’s contents in the presence of Brigati Village’s development team. The Denial doesn’t mention that discussion. The Court nevertheless concludes from the Memo and from Laydon’s testimony that the Board had the Memo, and had reviewed the Memo, by the time of the Board’s October 15, 2019 meeting.

26. In the Denial, the Board unanimously found, among other things, the following:

- Drives A and B were to “be privately maintained and not to be accepted as town roads.” (Denial, F11.)
- “The proposal was reviewed with the Police Department, Fire Dept, DPW, engineering and Town Administrator and the proposal (Exhibit 41) was supported.” Denial, F34. The “Exhibit 41” to which finding F34 refers is a plan entitled “Figure 1: Roadway Improvements, Church Street and West Street, Grafton, MA.” Furthermore, starting two findings before finding F34, the Denial begins a discussion of Brigati Village’s plans to mitigate various traffic issues outside of the Site. The Court thus finds that the “proposal” that

² The copy of the memo introduced at trial doesn’t have any attachments.

finding F34 says various Town officials supported was solely Brigati's traffic-improvements plan.

- “With regard to Section 1.5.5(a) of the [By-law], that *based upon the Findings stated within this [Denial]*, ingress and egress to the property and proposed structures thereon with particular reference to . . . access in case of fire or catastrophe, are adequate in that the Applicant has committed to mitigation at the intersection of Church Street and West [S]treet . . . and that Fire Department access and circulation has been accommodated as shown on Sheet EX1.02 (Exhibit 36).” Denial, F48 (emphasis added). Brigati Village didn't put the referenced Exhibit 36 into the trial record, and thus this Court can't put finding F48 in its full context.
- “[F]or the reasons stated within the Findings of this [Denial], the special permit application is in harmony with the general purpose and intent of the [By-Law].” Denial, F58.

27. By a 3-2 vote, the Board further found that “the special permit application if granted would not create a nuisance, hazard or congestion.” Denial, F59. The Board members who cast “no” votes on finding F59 also later voted against waiving the Dead-End Streets Regulation. But the third Board member who voted against that waiver, Linda Hassinger, voted with the majority in *favor* of finding F59.

28. One of the four waivers of the Subdivision Regulations that the Board granted for the Project pertains to § 4.1.6.7 of the Regulations (the “T Waiver”). That waiver allowed Brigati Village to have a “T”-shaped turnaround at the end of Drive B, instead of a circular turnaround with a 100-foot radius. The Denial contains no reasons why the Board granted the T Waiver. The Denial also contains no reasons for the Board's refusal to waive the Dead-End Streets Regulation with respect to the length of Drives A and B. No Board members testified at trial either.

29. In July 2003, the Board granted a special permit and site-plan approval for a multi-family development known as Hill View Estates I. If the trial record is complete, Hill View Estates I is the only other multi-family development considered by the Board under § 5.2 of the By-Laws prior to the Denial.

30. The site of Hill View Estates I was a seventeen-acre lot. The development has two parts. One, the “northwest” part, has access to Providence Road (a public way) via a dead-end “driveway” now called Blackberry Lane (one of the roads mentioned in the Laydon Memo). The distance from Providence Road to the end of Blackberry Lane is 593 feet. Blackberry Lane provides access to four buildings. A dead-end “driveway” called Juniper Lane (another road mentioned in the Laydon Memo) branches from Blackberry Lane. The distance from Providence Road to the end of Juniper Lane (via part of Blackberry Lane) is 557 feet. Juniper Lane provides access to three buildings. Together, Blackberry Lane and Juniper Lane afford access to 42 residential units.

31. The other part of Hill View Estates I is its “southerly” part. Five buildings comprise the southerly part of Hill View Estates I. A dead-end “driveway” called Azalea Lane (yet another road discussed in the Laydon Memorandum) provides access to those buildings. Azalea Lane branches off dead-end roadway now called Avalon Way. Avalon Way leads to Providence Road. The distance from Providence Road to the end of Azalea Lane (including a portion of Avalon Way) and is 927 feet. Azalea Lane serves 26 units. At some point after 2003, Avalon Way became a public way.

32. In its decision approving Hill View Estates I, the Board characterized Blackberry Lane, Juniper Lane, and Azalea Lane as “access drives” or “access driveways.” The Board never described them as “streets.” The Board nevertheless applied the Dead-End Streets Regulation to each of the three Lanes and insisted that Hill View’s developer request waivers of the Regulation. (See Trial Exhibit 4, F12 and F15.) The Board granted those waivers. The sole evidence introduced at trial concerning those waivers is found in Trial Exhibit 4. The Court gleans the following from that exhibit:

- Pursuant to § 1.5.5(a) of the By-Law, the Board unanimously found that “ingress and egress to the property and proposed structures thereon with particular reference to . . . access in case of fire or catastrophe, are adequate.” (Trial Exhibit 4, F27.)
- Pursuant to § 1.5.5. of the By-Law, the Board unanimously found that “for the reasons stated with the Findings of this Decision, the special permit application is in harmony with the general purpose and intent of the [By-Law].” (Trial Exhibit 4, F37.)
- Also pursuant to § 1.5.5, the Board unanimously found that “the special permit application if granted would not create a nuisance, hazard or congestion.” (Trial Exhibit 4, F38.)
- Also pursuant to § 1.5.5., the Board unanimously found that “for the reasons stated within the Findings of this Decision, the special permit application if granted would not derogate from the general purpose and intent of the By-[L]aw or the stated district objectives or applicable use criteria.” (Trial Exhibit 4, F40.)
- The Board voted 3-2 to grant a waiver of the Dead-End Streets Regulation to allow dead-end roads (more specifically, the access driveways for the multi-family development) In voting this waiver request, the Board notes the mitigation proposed . . . to address this condition, including the turn-around areas at the end of the driveways serving the multi-family buildings and the access driveway constructed of grass pavers between the upper and lower

driveways serving the buildings on the westerly side of the Site.^[3]
The Board also notes the comments from the Grafton Fire
Department . . . in voting this request.

(Trial Exhibit 4, page 11.)

- The Board prohibited any construction, however, “until a definitive subdivision plan showing the lot configurations used in making this Special Permit decision is submitted, approved and endorsed by the Planning Board.” (Trial Exhibit 4, Page 12.)
- The access driveways were to

remain private drives Maintenance and repair of said driveways shall be the responsibility of the Applicant/developer until such time an association or organization of [condominium] unit owners . . . is established. After such association or organization is created, maintenance and repair of said driveways shall be the responsibility of such entity. . . .

(Trial Exhibit 4, Page 15.)

33. While the Board’s Hill View Estates I decision mentions Avalon Way, the Board first approved that Way (a 560-foot dead-end street) in connection with granting in 2003, for “Hill View Estates II,” a special permit for a “minor residential development” within an R-MF district, plus a preliminary approval of a subdivision plan.

34. The By-Law allows minor residential developments in R-MF districts by special permit, see By-Law § 3.2.3.1, but such developments are not subject to § 5.2 of the By-Law. Instead, to receive a special permit for a minor residential development in the R-MF district, Hill View Estates II’s developer had to meet only the criteria for special permits found in § 1.5 of the By-Law. Section 1.5 does not contain or impose design standards for roadways.

35. Thus, while the 2003 Hill View Estates II approval contains a waiver of the Dead-End Streets Regulation, the Board granted that waiver as part of an approval of a preliminary subdivision plan, and not in conjunction with a special permit under § 5.2 of the By-Law. The Board reaffirmed its waiver of the Dead-End Streets Regulation for Hill View Estates II when it approved the definitive subdivision plan for Hill View Estates II, in 2004.

36. The Board did not waive the Dead-End Streets Regulation for another project cited by Brigati Village, Lordvale Acres. The Board first approved Lordvale Acres as a definitive subdivision plan. One of Brigati’s witnesses, engineer Wayne Bellec, asserted that the first 1,304 feet of what the definitive plan calls Lordvale Boulevard is a dead end. (The Laydon Memorandum likewise mentions “Lordvale.”) Trial Exhibits 21 and 22 show that Lordvale

³ None of the parties submitted a plan showing the location of the grass pavers. The Court nevertheless credits the testimony of Brigati Village’s principal, Mr. Brossi, that a “paved strip” connects the ends of Blackberry and Juniper Lanes.

Boulevard is, however, a double-width street (even engineer Bellec called it a “boulevard”), wider than the nearest public way, Deernolm Street.

37. The Court concludes from Trial Exhibit 7 (especially pages 6-8), Trial Exhibit 21, and Trial Exhibit 22 that by constructing a double-width street, the developer of Lordvale Acres avoided making the first 1,304 feet of Lordvale Boulevard a “dead-end street” for purposes of the Subdivision Regulations. Trial Exhibit 22 further shows that, after the first 1,304 feet of Lordvale Boulevard, all approved ways within Lordvale Acres that exceed 500 feet (such as Edward Lane, another road described in the Laydon Memo) loop. In any event, the Board approved Lordvale Acres as a subdivision, and not as a multi-family residential development under § 5.2 of the By-Law.

38. Relying on the Laydon Memo, Brigati Village claims there are three other instances in which the Board approved long dead-end roads. One is a way off Church Street. It serves three lots, but it’s only 420 feet long. Brigati also introduced no evidence showing that the Board approved that way (or, if so, under what By-Law or rules). The second and third instances involve two adjacent looped drives, Coventry Circle and Gordon Circle. The furthest paved distance along Coventry Circle is 501 feet, and the furthest paved distance along Gordon Circle is 545 feet. Brigati introduced no evidence showing, however, that the Board approved either circle (or, if so, under what By-Law or rules). Page 4 of Trial Exhibit 23 also shows a way connecting the ends of each circle.

..*

Under c. 40A, § 17, a court may not disturb a municipal board’s denial of a special permit “unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.” *Davis v. Zoning Bd. of Chatham*, 52 Mass. App. Ct. 349, 355 (2001), quoting *Roberts v. Southwestern Bell Mobile Sys., Inc.*, 429 Mass. 478, 486 (1999). Even if the record reveals that the board could have lawfully granted the requested special permit – that is, even if the applicant’s evidence demonstrates that the applicant satisfied the municipality’s standards for granting a special permit – “the board retains discretionary authority to deny the permit, so long as that denial is not based upon a legally untenable or arbitrary and capricious ground.” *Davis*, 52 Mass. App. Ct. at 355 (citations omitted). But that last quoted phrase is key: a board may not rest the exercise of its discretionary authority upon “legally untenable,” arbitrary or capricious reasons.

Brigati Village challenges the Denial on two grounds. Brigati Village first argues that Drives A and B, as a matter of law, aren't subject to regulation as "streets." Brigati Village also contends that, even if Drives A and B were "streets," the Board's refusal to grant a waiver from the Dead-End Streets Regulation is arbitrary and marks an unreasonable departure from the Board's practices in similar cases.⁴ The first argument fails, but the second argument has force.

Brigati Village begins its first argument by pointing out that § 5.2.2.10 of the By-Law requires construction of "roadways" in accordance with the Subdivision Regulations. Brigati Village notes that while the Regulations contain standards for the *construction* of "streets and roadways," see Regulations at § 5.2, they don't set forth requirements for the *design* of all "roadways."⁵ Instead, Brigati Village argues that for purposes of design, the Regulations classify "roadways" as either "major streets," "minor streets," or "common driveways." See *id.* at § 4.1.1; see also Findings ## 11, 15-16 (defining each term). Brigati Village further contends that under the Regulations, only "streets" can be "dead-end streets," since § 2.1.1.27 of the Regulations defines "dead-end street" as "[a] *street, extension of a street, or system of streets* connected to another street at one (1) point only. Any proposed *street* which intersects with a dead-end street shall be deemed to be an extension of the dead-end street." (Emphases added.) Brigati Village asserts that Drives A and B aren't streets; instead, according to Brigati Village,

⁴ In its pretrial brief and at trial, Brigati Village raised two other challenges. The first was that the Board arbitrarily measured the lengths of Drives A and B for purposes of applying the Dead-End Streets Regulation. At the conclusion of Brigati Village's case, the Court directed a finding against Brigati Village on this issue: § 4.1.6.2 of the Subdivision Regulations describes how the Board should measure a dead-end street, and the Denial shows that the Board followed § 4.1.6.2 in determining the dead-end lengths of Drives A and B. Brigati Village's other challenge is that, by granting the T Waiver, the Board implicitly approved Drives A and B and granted by implication all waivers necessary for Brigati Village to build those Drives. Brigati Village offers no authorities for its argument. The Denial is express that the Board didn't approve the Drives, because they don't comply with the Dead-End Streets Regulation. The Court thus rejects Brigati Village's implied-waiver argument.

⁵ The By-Law doesn't define the term "roadways," but the Subdivision Regulations do. Section 2.1.1.24 of the Regulations defines "roadway" as "[t]hat portion of a way which is designed and constructed for vehicular travel." The parties agree that Drives A and B are "roadways" for purposes of both the By-law and the Regulations.

the Drives are simply “drives.”⁶ Brigati Village argues that “drives” aren’t subject to any design standards under the Regulations, including the Dead-End Streets Regulation.

The Board’s counterargument is simple: (a) § 5.2.2.10 of the By-Law requires “roadways” in multi-family projects to meet the design standards of the Subdivision Regulations; (b) § 5.2.2.10 doesn’t specify which of the various design standards found in the Regulations applies; but (c) the Board always has construed § 5.2.2.10 as applying the “street” design standards under the Regulation to all roadways associated with multi-family projects. The Board’s counterargument prevails.

We determine the meaning of a bylaw “by the ordinary principles of statutory construction.” We first look to the statutory language as the “principal source of insight into legislative intent.” When the meaning of the language is plain and unambiguous, we enforce the statute according to its plain wording “unless a literal construction would yield an absurd or unworkable result.” We “endeavor to interpret a statute to give effect ‘to all its provisions, so that no part will be inoperative or superfluous.’”

Shirley Wayside Ltd. P’ship v. Board of Appeals of Shirley, 461 Mass. 469, 477 (2012) (citations omitted), quoting *Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 290 (1981); *Adoption of Daisy*, 460 Mass. 72, 76 (2011); and *Connors v. Annino*, 460 Mass. 790, 796 (2011). A court also must “accord deference to a local board’s reasonable interpretation of its own zoning bylaw, with the caveat that an ‘incorrect interpretation of a statute . . . is not entitled to deference.’” *Shirley Wayside Ltd. P’ship*, 461 Mass. at 475 (citations omitted), quoting *Atlanticare Med. Ctr. v. Commissioner of the Div. of Med. Assistance*, 439 Mass. 1, 6 (2003)).

⁶ The Board agrees the Drives aren’t “major streets” under the Regulations. Brigati Village contends the Drives also aren’t “minor streets” under the Regulations, as neither Drive “provide[s] access to abutting lots”; instead, Brigati Village argues that both Drives are interior to a single lot. That contention is only half true: while Drive B is wholly internal to the 41 Church Street lot, Drive A provides access to that lot and the 14 West Street lot. (Drive A also may offer access to a third lot owned by Brigati Village, 15 West Street, but the plans in the trial record aren’t clear about that.)

The Court concurs with the Board’s central argument, that § 5.2.2.10 of the By-Law is ambiguous. As Brigati Village concedes, the Subdivision Regulations don’t contain design standards for “roadways.” It’s thus unclear whether § 5.2.2.10 incorporates the differentiations the Regulations make among various ways for purposes of design, or whether in adopting § 5.2.2.10, Grafton’s Town Meeting wanted the Board to apply to roadways in multi-family developments (a concept that appears nowhere in the Subdivision Regulations⁷) a single set of design standards. Section 5.2.2.10’s context doesn’t make things any clearer: none of the other parts of § 5.2 of the By-Law hints at which interpretation is correct.

If one may interpret a zoning bylaw in multiple ways, a court reviewing a board’s decision under c. 40A, § 17 must defer to the interpretation the board has chosen, so long as that interpretation’s reasonable. See *Perry v. Zoning Bd. of Appeals of Hull*, 100 Mass. App. Ct. 19, 21 (2021). The Board’s interpretation of § 5.2.2.10 is such. The trial record also shows that the Board didn’t arrive at its interpretation for the first time in considering Brigati Village’s Application: the Board developed that interpretation in 2003, when the Board reviewed the only other multi-family development discussed at trial, Hill View Estates I. As with Brigati Village, the developer of Hill View Estates I described Blackberry, Juniper and Azalea Lanes as “access drives” or “driveways.” Hill View’s developer designed the three Lanes to be interior to a single lot, just like Drive B (but not Drive A – see note 6 above). The Board nevertheless applied to Hill View’s three Lanes the design requirements found in the Subdivision Regulations for streets. The Board also insisted (as the Board demanded of Brigati Village) that Hill View’s developer apply for waivers of the Dead-End Streets Regulation.

⁷ In fact, § 2.4 of the Subdivision Regulations provides: “No more than one (1) building designed or available for use for dwelling purposes shall be erected or placed, or converted to use as such, on any lot in a subdivision, without the consent of the Board. *Such consent may be conditional upon the providing of adequate ways furnishing access to each site for such buildings in the same manner as otherwise required for lots within a subdivision.*” (Emphasis added.)

The Board's interpretation of § 5.2.2.10 also is consistent with public policy. Planning boards adopt subdivision regulations limiting dead-end streets "because of a concern that the blocking of a dead-end street, as by a fallen tree or an automobile accident, will prevent access to the homes beyond the blockage particularly by fire engines, ambulances, and other emergency equipment" *Wheatley v. Planning Bd. of Hingham*, 7 Mass. App. Ct. 435, 451 (1979). But subdivision regulations usually apply only to applications for definitive subdivision approval – that is, requests to divide a lot into two or more buildable lots. See G.L. c. 41, § 81L (defining "subdivision control" as "the power of regulating the subdivision of land," and defining "subdivision" generally as "the division of a tract of land into two or more lots . . ."). Had Brigati Village sought to subdivide the Site and place each of its proposed buildings on its own lot, the Subdivision Regulations would have assured the owners of those buildings (absent a waiver) that they'd be no more than 500 feet from a street that wasn't a dead end.

Of course, Brigati Village's Project doesn't involve a subdivision: the Project will sit on two preexisting lots, both of which will be owned by a single condominium. (Section 5.2.2.6 of the By-Law expressly condones that.) But Brigati Village nevertheless proposes to build eleven separate buildings, hosting a total of 57 units. It's hard to fathom why the interests of the citizens of Grafton in avoiding long dead-end streets would disappear if instead of being sited on eleven individual lots, a development's eleven buildings were subject to a single condominium that occupied one big lot (or one big lot and a small appendage, like 14 West Street). The Board's interpretation of § 5.2.2.10, which makes the Regulations' "street design" requirements applicable to all multi-family projects and their roadways, serves the public's interest in assuring emergency access regardless of how a developer structures a multi-family project, or how it is owned.

Having agreed that the Board properly construed § 5.2.2.10 of the By-Law, the Court turns to the more problematic aspect of the Denial. Relying primarily on the Laydon Memo, Brigati Village contends that the Board routinely has waived the Dead-End Streets Regulation in circumstances that aren't all that different from those present here. Brigati Village further argues that the Board denied a waiver in this case because Brigati Village declined to add affordable housing to the Project. (The Court credits the testimony of Brigati Village's principal, Mr. Brossi, that the Board asked for such housing, and that Brigati Village refused the request.)

Trial has shown that the bulk of Brigati Village's examples of alleged prior waivers are inapposite. Brigati Village offered no evidence that connects the Board with any approval of the lengths of Pullard Road, a way off Church Street (which doesn't exceed 500 feet anyway), Coventry Circle, or Gordon Circle. Brigati Village also failed to prove that the Board waived the Dead-End Streets Regulation for any of the roads in Lordvale Estates. Brigati Village did prove that the Board waived that regulation for Avalon Way, but the Board did so for purposes of the Subdivision Control Law only, and not in the exercise of its discretion under § 5.2.2.10 of the By-Law. Brigati Village offers no arguments or authorities that the Board's responsibilities under § 5.2 of the By-Law are identical to those under the Subdivision Control Law.

But one prior Board decision remains: Hill View Estates I. Like Brigati Village's Project, Hill View Estates I was a multi-family residential development requiring a special permit under § 5.2 of the By-Law (and, by extension, compliance with § 5.2.2.10 of the By-Law). The 2003 Board waived the Dead-End Streets Regulation with respect to Hill View's Azalea, Blackberry, and Juniper Lanes. The 2003 Board explained why. See Finding # 32. The 2003 Board also made corollary findings that "ingress and egress to the property and proposed structures thereon with particular reference to . . . access in case of fire or catastrophe, are

adequate,” see *id.*, that “the special permit application if granted would not create a nuisance, hazard or congestion,” *id.*, and that granting the application “would not derogate from the general purpose and intent of the By-[L]aw,” *id.* The trial record establishes many of the features of those approved Lanes: the far ends of Blackberry and Juniper Lanes are connected; Azalea Lane ends in a “T”; the “dead-end distance” of Blackberry Lane is 593 feet; that same distance for Juniper Lane is 557 feet; and the same distance for Azalea Lane is 927 feet.

How do Drives A and B compare with Blackberry, Juniper, and Azalea Lanes? Yes, Drives A and B are considerably longer than Blackberry and Juniper Lanes, but one could conclude that for purposes of the Dead-End Streets Regulation, Drives A and B are not that different from Azalea Lane. The 2003 and 2019 Boards nevertheless found, unanimously, that their respective multi-family residential projects had adequate “ingress and egress to the property and the proposed structures thereon with particular reference to . . . access in case of fire or catastrophe,” something that sounds very similar to what *Wheatley* describes as the whole point of dead-end street regulations. The 2003 and 2019 Board also unanimously found their respective projects to be in harmony with the By-Law. A majority of the 2019 Board (and the entire 2003 Board) found their respective projects “would not create a nuisance, hazard or congestion.” The Boards also had before them, in each case, one dead-end road that ended in a “T,” and another road (or in Hill View’s case, two roads) linked by an emergency accessway.

The 2019 Board contends that there’s a key difference between Hill View Estates I and Brigati Village’s Project: the Town’s Fire Department approved the Hill View waiver, but didn’t support one for Brigati Village. The 2019 Board hasn’t proved either fact. All the trial record contains about the Hill View waiver is what appears in Trial Exhibit 4. There the 2003 Board wrote only that it “*notes the comments* from the Grafton Fire Department . . . in voting this

[waiver].” (Emphasis added.) One can’t tell from Trial Exhibit 4 what those comments said or advised. Similarly, the 2019 Board’s Denial doesn’t say whether the Department supported, opposed, or took any position on a waiver of the Regulation for Brigati Village. In fact, the Denial doesn’t list any report whatsoever from the Department, except with respect to Brigati Village’s proposed roadway improvements (which the Denial says the Department supported). Section 1.5.6 of the By-Law states that when those who are supposed to review special-permit applications, such as the Department, don’t submit reports to the Board, the Board is to deem the reviewer as having no objection to the application. The trial record thus contains no evidence of the Department’s position on either the Hill View waiver or the proposed Brigati waiver. Compounding matters further, none of the members of the 2019 Board testified at trial. The 2019 Board’s actual reasons for denying Brigati Village a waiver of the Dead-End Streets Regulation thus remain a mystery, even after trial.

There are many cases that observe that a local board needn’t provide detailed findings when it denies a special permit. See, for example, *Board of Aldermen of Newton v. Maniace*, 429 Mass. 726, 732 (1999); *ACW Realty Mgmt., Inc. v. Planning Bd. of Westfield*, 40 Mass. App. Ct. 242, 246 (1996); see also *Davis v. Zoning Bd. of Chatham*, 52 Mass. App. Ct. 349, 356 (2001) (court must uphold a local board’s denial of a special permit, “[e]ven when [the] board cites no particularized reasons or any specific evidence for its denial,” if the court can find in the record a rational basis supporting denial). But when a board is aware (as the 2019 Board, by virtue of the Laydon Memo, was aware, or should have been aware) that it has taken one action with respect to one application, but is thinking of doing something substantially different with respect to a later application, that board should explain why – or risk that a reviewing court will remand the case to the board for an explanation. See *Wendy’s Old Fashioned Hamburgers of*

N.Y., Inc. v. Board of Appeals of Billerica, 454 Mass. 374, 387 (2009) (a court reviewing a special permit decision under c. 40A, § 17 is “not obliged to search for facts in the record to support a rationale that the board did not itself provide”); *Maniace*, 429 Mass. at 732-733 (“a court’s exercise of its remand authority is the proper, and most expeditious, remedy where any defects exist in the statement of reasons filed by a board to support its decision on a special permit application”).

An explanation is particularly warranted in this case. Brigati Village suggests the 2019 Board’s denial of a waiver turned on Brigati Village’s refusal to offer affordable units in the Project. Brigati Village hasn’t proven – yet – that the 2019 Board linked the two. But given that the Board granted a dead-end streets waiver to Hill View Estates I, declined without explanation Brigati Village’s request for the same waiver, and offered no witness at trial who explained the different results (or even testified that the waiver in Hill View Estates I was, in retrospect, a bad idea), this Court can only wonder what happened here.

Judgment to enter accordingly.

/s/ Michael D. Vhay
Michael D. Vhay
Associate Justice

Dated: December 9, 2021