(SEAL)

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS.

MISCELLANEOUS
CASE NO. 325072 (CWT)

KEVIN DOUGLAS, as Trustee of D & L REALTY TRUST,

Plaintiff

v.

TIMOTHY L. GLYNN, PATRICK K. LAWTHORNE, CHARLES IOVEN, ARNOLD M. KAUFMAN, ROBERT FOLEY, DIANE M. CHUHA, HATTIE BROOME, DAVID D'ARCANGELO and JOHN SPADAFORA, as they constitute, the Planning Board of the City of Malden, and THE PLANNING BOARD OF THE CITY OF MALDEN

Defendants.

ORDER ALLOWING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This action, filed by Kevin Douglas as Trustee of D&L Realty Trust ("D&L" or "Plaintiff"), is an appeal pursuant to G.L. c. 41, § 81BB of a decision of the Planning Board of the City of Malden ("Planning Board") denying approval of a definitive subdivision plan concerning a 6.7 acre parcel of land owned by D&L. Pursuant to G.L. c. 41, § 81BB and Mass. R. Civ. P. 56(c), the Plaintiff asks this Court to enter summary judgment in his favor (i) vacating the disapproval filed by the Planning Board on June 15, 2006 with respect to the set of Plans entitled "Williams Street in Malden, MA", dated October 29, 2003 ("2003 Plan"), and (ii) ordering the Planning Board to endorse the 2003 Plan.

Background

D&L's efforts to subdivide the 6.7 acres of land ("the Property") stem back to 1996 when it first submitted to the Planning Board a subdivision plan comprising 27 lots, 26 of which were buildable ("1996 Subdivision Plan"), pursuant to the Rules and Regulations then in effect. Those Rules and Regulations were adopted on September 27, 1962 and revised on May 18, 1987 ("1987 Rules"). In February of 1997 the Planning Board issued a decision disapproving the 1996 Subdivision Plan ("First Disapproval"), basing its disapproval on its anticipation that D&L would not be able to meet 37 conditions set forth in a Planning Staff report adopted by the Planning Board. D&L appealed the First Disapproval to the Land Court ("First Land Court Appeal"), and because the Planning Board did not clearly articulate grounds for its disapproval of the 1996 Subdivision Plan, this Court (Scheier, C.J.) remanded the matter to the Planning Board with instructions to issue a "Clarified Decision" identifying the specific subdivision rules and regulations the Board relied on in deciding that the subdivision should not be approved. Douglas v. City of Malden Planning Board, 8 LCR 358, 358 (2000). The Planning Board subsequently submitted the Clarified Decision to this Court specifying the Rules and Regulations on which its disapproval was based.

After holding a trial on the merits, and reviewing the Planning Board's "Clarified Decision," the Court upheld the First Disapproval ("2000 Decision"), ruling, however that only five of the thirty-seven reasons given by the Board for its disapproval of the 1996 Plan were valid. Following this decision, D&L submitted a number of preliminary and definitive subdivision plans, seeking to remedy the specific grounds on which the First Disapproval was upheld by this court. All were disapproved by the Board ("Second Disapproval"). The Plan at

issue in this action was filed under the 1987 rules on October 31, 2003 ("2003 Subdivision Plan").

After the filing of the 2003 Subdivision Plan, the Planning Board approved amendments to the 1987 Rules ("2003 Amendments") in order to address the deficiencies therein that had resulted in the Court declaring invalid thirty-two of the grounds on which the 1996 subdivision Plan was disapproved. Following the adoption of the 2003 Amendments, the Planning Board scheduled a hearing on the 2003 subdivision Plan for January 14, 2004. However, the Planning Department later informed Douglas that because D&L Trust did not publish the required legal notice of the hearing, the public hearing could not be held as scheduled. D&L was also informed that due to the lack of a timely public hearing, the Planning Board could not make a decision based on the 1987 Rules and Regulations. The Board then rescheduled the hearing and subsequently disapproved D&L's 2003 application because of its purported failure to comply with the statutory requirements ("Third Disapproval"). It did so based on its newly adopted Rules and Regulations, ruling that the 1987 Rules and Regulations were no longer in effect.

On February 2, 2004, D&L appealed the Third Disapproval to the Land Court and on May 26, 2005, moved for summary judgment seeking to annul the third disapproval pursuant to G.L. c. 41, § 81BB. On March 15, 2006 this Court (Trombly, J.) issued a decision ("2006 Ruling") ruling that the responsibility of publishing the legal notice rested with the Planning Board, <u>not D&L</u>, and granting D&L summary judgment concerning its claim that the procedural justification for the Third Disapproval constituted an abuse of discretion. Accordingly, this court remanded the matter to the Board for a public hearing regarding the 2003 Plan based on the 1987 rules.

At the public hearing on June 14, 2006, the Planning Staff recommended disapproval of the 2003 Plan citing eight reasons, some of which overlap: (1) D&L's alleged failure to pay outstanding real estate taxes; (2) non-compliance of the proposed street and roadway with the minimum width requirements for Class A roadways and streets; (3) non-compliance with the length of block requirements and; (4) their conclusion that the proposed street system is not connected to a public way having sufficient width, suitable grades, and adequate construction for the needs of vehicular traffic. The Malden Department of Public Works ("DPW") also submitted a memorandum stating it planned to disapprove the 2003 subdivision, citing six reasons without detail.

By a vote of seven to none the Board disapproved the 2003 Plan and filed the decision at issue here ("Fourth Disapproval") with the City Clerk on June 15, 2006. The Board's decision cited eight reasons for its disapproval of the Plan, including the planning staff's recommendation and the DPW's memorandum. The Board based its decision on the following grounds: (1) pursuant to § V.A.1.(a) (Connection to Public Way), the proposed street system of the subdivision is not connected with a public way having suitable grades for the needs of vehicular traffic; (2) pursuant to § V.A.3.(a) (Minimum Street and Roadway Width) the proposed streets and roadways do not comply with the requirements of a Class A street; (3) pursuant to § V.C.1. (Length of Block), the proposed plan does not comply with the requirement that no block shall be more than one thousand feet in length measured between the centerlines of intersecting streets; (4) pursuant to § V.A.6.(a) (Dead End Streets) streets designated to have one end permanently closed will not be approved and the plan proposes two dead-end streets that would be permanently closed; (5) pursuant to § V.A.1(c), the design of the streets in the subdivision

will not provide safe vehicular travel; and (6) because the DPW recorded disapproval with the Planning Board.[1]

It is D&L's contention in this appeal that the basis for the Fourth Disapproval of the 2003 subdivision Plan is not supported by the 1987 Rules, is precluded by *res judicata* and judicial estoppel, is based on rules which are indefinite, and otherwise exceeds the Board's authority.

Discussion

Rule 56(c) of the Massachusetts Rules of Civil Procedure provides that a party is entitled to summary judgment where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991). The moving party must affirmatively demonstrate the absence of a triable issue of fact. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). Pursuant to G.L. c. 41, § 81BB, the court hears the evidence de novo and, on the facts found, determines the validity of that decision. Fairbairn v. Planning Bd. of Barnstable, 5 Mass. App. Ct. 171, 173 (1977). Review of the planning board's decision is limited to the reasons set forth in the decision. Id. This Court's review must be confined to the reasons for disapproval of the subdivision plan stated by the planning board. Daley Constr. Co. Inc. v. Planning Bd. of Randolph, 340 Mass. 149, 152 (1959). When the planning board relies on a subdivision rule or regulation "they must be comprehensive, reasonably definite, and carefully drafted, so that owners may know in advance what is or may be required of them and what standards and procedures will be applied to them." Castle Estates, Inc. v. Park & Planning Bd. of Medfield, 344 Mass. 329, 334 (1962).

[1] The Planning Board also cited failure to pay outstanding real estate taxes as a reason for disapproval. It later conceded that the taxes had, in fact, been paid.

The questions before this court are whether the Planning Board is estopped by *res judicata* to re-litigate issues settled by this court in Douglas v. City of Malden Planning Bd., and whether the Fourth Disapproval is supported by the 1987 rules. This Court deems that insofar as the Board's disapproval is based on reason Two (V.A.3.a) as stated above, there are questions of material fact to be determined at trial. However, this Court finds that reasons One, Three, Four, Five, and Six are not valid reasons for disapproval under the 1987 Rules and under the principles of *res judicata.*

Res Judicata comprises both claim preclusion and issue preclusion also known as collateral estoppel. Heacock v. Heacock, 402 Mass. 21, 23 n.2 (1988). Claim preclusion "makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been litigated in the action." Id. Claim preclusion requires three elements: (1) identity or privity of the parties to the present and prior actions; (2) identity of the cause of action; and (3) prior final judgment on the merits. Kobrin v. Board of Registration in Med., 444 Mass. 837, 843 (2005). Issue preclusion prevents the re-litigation of an issue determined in an earlier action when that issue subsequently arises in another action based on a different claim between the same parties. Id. Pursuant to the doctrine of collateral estoppel and issue preclusion, a party is precluded from re-litigating an issue where: (1) there was a final judgment on the merits in a prior adjudication; (2) the party was a party, or in privity with a party to the prior adjudication; and (3) the issue in the prior adjudication is identical to the issue in the current adjudication. Tuper v. N. Adams Ambulance Serv., Inc., 428 Mass. 132, 134 (1998). The guiding principle in determining whether a party should be precluded from re-litigating an issue is whether that party had a "full and fair opportunity to litigate the issue in the first action." Treglia v. Macdonald, 430 Mass. 237, 240 (1999). Issue preclusion also includes findings not

strictly essential to final judgment where they are the product of "full litigation and careful decision." Jarosz v. Palmer, 436 Mass. 526, 533 (2002).

§V.A.1(a) Connection to Public Way

The Planning Board maintains that the width, grade, and construction of the public way to which the subdivision roads will connect are insufficient to support the 18 buildable lots specified in the 2003 Plan. Pursuant to the doctrine of claim preclusion, this Court finds that the Planning Board is precluded from setting forth this new rationale for disapproval, as the opportunity and obligation to raise this issue was presented when this Court directed the Board to set out the specific reasons for disapproval in the "Clarified Decision." In the 2000 decision, this Court ordered the Board to identify each of the subdivision rules and regulations upon which the Board relied in its decision. The connection to a suitable public way was not identified as a rule that had not been met by the Plaintiff. Every element necessary for claim preclusion is met with respect to this basis for disapproval because the issue is identical in that Williams Street was the connecting public way in the 1996 Plan, and there is no variation with regard to Williams Street as the connecting public way in the 2003 Plan.

§V.C.1. Length of Block

For the same reasons set fourth above, claim preclusion applies because the Board failed to raise §V.C.1 as a reason for its disapproval of the 1996 Plan. Again, the elements of claim preclusion are met because the issue here is identical to what was at stake during litigation over the 1996 Plan, and the length of blocks in the 2003 Plan is no different than those proposed in the previous Plan. Pursuant to the 1987 Rules, the Planning Board was obligated to raise any objections it had at that time and failed to do so.

§V.A.6(a) Dead End Streets

Pursuant to §V.A.6.(a), "Streets designated to have one end permanently closed will not be approved unless, in the opinion of the Planning Board, the configuration of natural or man-made features makes no other solution practical." The Planning Board cited this exact subsection of its 1987 Rules in its Clarified Decision as a reason for disapproval, and this Court held that "a dead-end street over 1,000 feet in length is not specifically regulated under the Board rules and may not constitute a denial of the Plan." Douglas, 8 LCR at 368. This Court found that the "steep grades and other natural features of Locus and the surrounding area prevent the construction of through roads within the subdivision," and held that no other practical alternative existed to dead-end streets. Id. at 361. This Court finds that the elements of issue preclusion are met, and the Planning Board may not re-litigate the issue as it was fully litigated in the prior 2000 Decision.

DPW Memorandum

This Court finds that nowhere in the 1987 Rules is authority given to the DPW to disapprove a subdivision plan. While this court recognizes that the DPW plays an important role once a Plan is approved, it finds no authority enabling the DPW to cause the disapproval of a plan pursuant to the 1987 Rules, the Rules under which the 2003 Plan must be considered.

§V.A.3(a) Minimum Street and Roadway Width

The Board disapproved the 2003 Plan on grounds that the proposed street and roadway did not meet the requirements for Class A streets and roadways pursuant to §V.A.3.(a). In its 2000 Decision regarding the 1996 Plan, this court stated that "the roadways on the Plan are Class B roads under the Board Rules," and now the Board has declared the street and roadway are

Class A pursuant to the 1987 Rules. Douglas, 8 LCR at 368. Because the 2003 Plan is slightly different from the 1996 Plan with regards to density and roadway and street widths, this Court finds that this basis for disapproval cannot be dismissed without fleshing out the specific details of the most recent Plan. By so ruling, this Court is not maintaining that *res judicata* is not applicable to the Board's claim that the street and roadways are Class A. Rather this Court is of the opinion that further proceedings are necessary to determine if the elements of issue or claim preclusion have been met, since the 2003 Plan has made adjustments which may effect the analysis of the classification of the street and roadway.

§V.A.1(c) Safe Vehicular Travel

The Board disapproved the 2003 Plan on grounds that the proposed streets in the subdivision would not provide safe vehicular travel pursuant to V.A.1(c). In the 2000 Decision this Court ruled that "where the proposed streets within the subdivision otherwise comply with the applicable Board rules, a section which generally requires that streets will 'provide safe vehicular travel' cannot constitute a separate grounds for denial of the plan." Id. at 367. In so far as the Board relies on "safe vehicular travel" as a separate ground for disapproval, the Court finds no merit to the claim. However, as to whether the Plan is subject to the requirements of Class A or Class B streets and roadways, this Court cannot dismiss this basis for disapproval until the classification of the roadway and streets have been addressed. To the extent that the Board cites "safe vehicular travel" as a separate basis for denial of the 2003 Plan, if this Court finds that all of the 1987 Rules have been met, rule V.A.1(c) cannot serve as an independent basis for disapproval and will be dismissed accordingly.

For the reasons set fourth above, the Plaintiff's motion for summary judgment is granted in part and denied in part. The only ground for the disapproval that has factual issues which

must be resolved after trial is the classification of the roadway and streets. The Plaintiff's motion is granted with regard to the other reasons for the disapproval.

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is **GRANTED** in part and **DENIED** in part. Attorneys for both parties should contact sessions clerk Frank Richmond at 617-788-7408 to schedule a pre-trial conference.

So ordered.

CWT

By the Court (Trombly, J)

Attest

Deborah J. Patterson
Recorder

Dated: November 20, 2007

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

COMMONWEALTH OF MASSACHUSETTS

(SEAL)

LAND COURT

DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss

MISCELLANEOUS
CASE NO. 325072 (CWT)

KEVIN DOUGLAS, as Trustee of D&L REALTY TRUST,

Plaintiff

v.

TIMOTHY L. GLYNN, PATRICK K. LAWTHORNE, CHARLES IOVEN, ARNOLD M. KAUFMAN, ROBERT FOLEY, DIANE M. CHUHA, HATTIE BROOME, DAVID D'ARCANGELO, and JOHN SPADAFORA, as members of the PLANNING BOARD OF THE CITY OF MALDEN, and
THE PLANNING BOARD OF THE CITY OF MALDEN,

Defendants

JUDGMENT[1]

This action was commenced by plaintiff, Kevin Douglas, as Trustee of D&L Realty Trust on June 21, 2006, appealing a decision of defendant, the Planning Board of the City of Malden, pursuant to G.L. c. 41, § 81BB. The Planning Board's decision denied approval of a definitive subdivision plan, filed by plaintiff on October 31, 2003, concerning a parcel of real property located off Williams Street in Malden.

On December 13, 2006, plaintiff filed a motion for summary judgment. Defendants opposed the motion on February 7, 2007. The motion was argued before the Court on the same day and taken under advisement. The Court (Trombly, J.) issued an Order on November 20, 2007, allowing in part and denying in part, the plaintiff's motion for summary judgment. The Court ruled that with one exception, the grounds on which

[1] If not specifically defined herein, each term carries the same definition employed in the Decision.

the Planning Board denied the approval of the plaintiff's subdivision plan were barred by the doctrine of *res judicata* and otherwise invalid under the Malden Planning Board Subdivision Regulations, as they stood at the time the subdivision plan was filed. The Court further determined that the question of whether the board properly denied the subdivision plan on the ground that the proposed streets and roadways did not comply with the requirements of a Class A street, pursuant to § V.A.1.(a) of the Subdivision Regulations, remained an unresolved question of material fact, requiring a trial and determination by the Judge.

Trial was held on February 22, 2008, on this limited issue. Karen Smith was sworn to take the testimony. Testifying were Paul A. Marchionda for plaintiff and Michelle A. Romero for defendants. Seven exhibits were admitted into evidence and chalks "A" and "B," marked for identification. Both parties filed a post-trial memorandum.

After careful consideration of all of the evidence, the Court entered a Decision today, reversing the decision of the Planning Board.

In accordance with that Decision, it is hereby

ADJUDGED and ORDERED that the issue of whether the Proposed Roadways meet the requirements for a Class "A" road is precluded by the doctrine of *res judicata*;

ADJUDGED and ORDERED that defendant, the Planning Board of the City of Malden is barred by the doctrine of judicial estoppel from now arguing that the requirements for a Class "A" road apply to the Proposed Roadways;

ADJUDGED and ORDERED that the decision of defendant, the Planning Board of the City of Malden is REVERSED; and it is further

ADJUDGED and ORDERED that defendant shall endorse the definitive subdivision plan of plaintiff, Kevin Douglas, as Trustee of D&L Realty Trust, originally submitted on October 31, 2003.

Curt

By the Court (Trombly, J.).

Attest:

Deborah J. Patterson
Recorder

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

Dated: February 17, 2009

file pleadings

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss

MISCELLANEOUS
CASE NO. 325072 (CWT)

KEVIN DOUGLAS, as Trustee of D&L REALTY TRUST,

Plaintiff

v.

TIMOTHY L. GLYNN, PATRICK K. LAWTHORNE, CHARLES IOVEN, ARNOLD M. KAUFMAN, ROBERT FOLEY, DIANE M. CHUHA, HATTIE BROOME, DAVID D'ARCANGELO, and JOHN SPADAFORA, as members of the PLANNING BOARD OF THE CITY OF MALDEN, and
THE PLANNING BOARD OF THE CITY OF MALDEN,

Defendants

DECISION

This action was commenced by plaintiff, Kevin Douglas, as Trustee of D&L Realty Trust on June 21, 2006, appealing a decision of defendant, the Planning Board of the City of Malden, pursuant to G.L. c. 41, § 81BB. The Planning Board's decision denied approval of a definitive subdivision plan, filed by plaintiff on October 31, 2003, concerning a parcel of real property located off Williams Street in Malden.

On December 13, 2006, plaintiff filed a motion for summary judgment. Defendants opposed the motion on February 7, 2007. The motion was argued before the Court on the same day and taken under advisement. The Court (Trombly, J.) issued an Order on November 20, 2007, allowing in part and denying in part, the plaintiff's motion for summary judgment. The Court ruled that with one exception, the grounds on which the Planning Board denied the approval of the plaintiff's subdivision plan were barred by the doctrine of *res judicata* and otherwise invalid under the Malden Planning Board Subdivision Regulations, as they stood at the time the subdivision plan was filed. The Court further determined that the question of whether the board properly denied the subdivision plan on the ground that the proposed streets and roadways did not comply with the requirements of a Class A street, pursuant to § V.A.1.(a) of the Subdivision Regulations, remained an unresolved question of material fact, requiring a trial and determination by the Judge.

Trial was held on February 22, 2008, on this limited issue. Karen Smith was sworn to take the testimony. Testifying were Paul A. Marchionda for plaintiff and Michelle A. Romero for defendants. Seven exhibits were admitted into evidence and chalks "A" and "B," marked for identification. Both parties filed a post-trial memorandum. This is the matter presently before the Court.

After reviewing the record before the Court, I find that the following facts:

1. Plaintiff, Kevin Douglas, as Trustee of the D&L Realty Trust, is the owner of a parcel of land located off Williams Street in Malden (the Property).

2. On July 23, 1996, plaintiff submitted a definitive subdivision plan (the 1996 Plan) for approval by the Planning Board of the City of Malden. On or about February 13, 1997, the Planning Board issued a decision denying the approval the 1996 Plan.

3. On March 3, 1997, plaintiff filed an appeal of the board's denial of the 1996 Plan to the Land Court, Misc. Case No. 236452.

4. The Court (Scheier, J.) issued a Decision on August 30, 2000, upholding the 1997 Disapproval of the Planning Board. In its Decision, the Court found that the proposed roadway in the 1996 Plan is properly classified as a Class "B" road under § V.A.1.d. of the Malden Planning Board Subdivision Regulations (the Subdivision Regulations).

5. On October 31, 2003, plaintiff filed a definitive subdivision plan (the 2003 Plan) for approval by the Planning Board.[1]

6. The 2003 Plan constitutes certain alternations to the 1996 Plan. Both plans propose access to the subdivision by a public way with a forty foot layout and twenty feet of roadway surface. The proposed access road is a dead-end street in both plans.

7. The 2003 Plan proposes roadways within the subdivision that are wider than the proposed roadways in the 1996 Plan (the Proposed Roadways).

8. The roadways proposed in the 2003 Plan meet the requirements of Class "B" roads, pursuant to § V.A.3.a. of the Subdivision Regulations.

9. The 2003 Plan proposes eighteen (18) lots rather than the twenty-six (26) of the 1996 Plan.

10. The 2003 Plan proposes thirty-two (32) dwelling units rather than the forty-five (45) of the 1996 Plan.

11. After a public hearing on June 14, 2006, the Planning Board voted to deny the approval of the 2003 Plan.[2] The board issued a decision on June 15, 2006, finding that the 2003 Plan failed to meet certain requirements of the Subdivision Regulations.

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[1] Following the Decision in Land Court Misc. Case No. 236452, plaintiff submitted a number of preliminary and definitive subdivision plans to the Planning Board. The board denied approval of each of these plans.

[2] On or about November 12, 2003, the Planning Board approved amendments to the existing subdivision regulations, originally adopted on September 27, 1962 and revised on May 18, 1987 (the 1987 Regulations).

A public hearing was scheduled for January 14, 2004, concerning the 2003 Plan; however, on December 5, 2003, the board informed plaintiff that the required legal notice of the hearing had not been published, and therefore, the public hearing could not be properly held as scheduled. The Planning Board then denied approval of the 2003 Plan on the ground that plaintiff failed to comply with the statutory requirements.

On February 2, 2004, plaintiff filed an appeal of the Planning Board's first denial of the 2003 Plan to the Land Court, Misc. Case No. 296455. The Court (Trombly, J.) issued a Decision on March 15, 2006, reversing the denial and remanding the case to the board for public hearing and application of the 1987 Regulations.

12. Plaintiff appeals that decision here.

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The standard of review in an appeal, pursuant to G.L. c. 41, § 81BB, is *de novo* review of the decision of the municipal board. See Batchelder v. Planning Bd. of Yarmouth, 31 Mass. App. Ct. 104, 106, *further appellate review denied*, 411 Mass. 1101 (1991). However, such review is limited to the reasons for disapproval stated by the board. See Fairbairn v. Planning Bd. of Barnstable, 5 Mass. App. Ct. 171, 173 (1977). While a trial judge may not substitute his or her own judgment for that of the planning board, the board's decision will not be sustained where it has exceeded its authority under the subdivision control law. See Strand v. Planning Bd. of Sudbury, 5 Mass. App. Ct. 18, 21 (1977). "If...reasonable minds might in good faith differ,...the conclusion reached by the planning board should be sustained...and the role of the court is merely to ascertain whether the board exceeded its authority." Arrigo v. Planning Bd. of Franklin, 12 Mass. App. Ct. 802, 809 (1981). The burden of proof to establish that the board exceeded its authority rests on the party challenging the board's action. See Selectmen of Ayer v. Planning Bd. of Ayer, 3 Mass. App. Ct. 545, 548 (1975).

As a result of this Court Order of November 20, 2007, the only issue remaining in the case is whether the Planning Board of the City of Malden properly denied the approval of the 2003 Plan on the ground that the Proposed Roadways did not meet the requirements for Class "A" roads, pursuant to § V.A.3.a. of the Malden Planning Board Subdivision Regulations. Specifically, the Court required further facts in order to determine whether or not the alterations to the Proposed Roadways from the 1996 Plan to the 2003 Plan were sufficiently insignificant such that the application of § V.A.3.a. had

been determined and the further argument that the roadways had to meet the requirements of Class "A" was barred by the doctrine of *res judicata*. It is undisputed that the roadways proposed in the 2003 Plan meet the requirements of Class "B" roads pursuant to the Subdivision Regulations. Therefore, this remaining issue must be precluded.

The doctrine of *res judicata* comprises both claim preclusion and issue preclusion, also known as collateral estoppel. Heacock v. Heacock, 402 Mass. 21, 23 n. 2 (1988). "Claim preclusion 'makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been litigated in the action." Petrillo v. Zoning Bd. of Appeals of Cohasset, 65 Mass. App. Ct. 453, 457 (2006), quoting Jarosz v. Palmer, 436 Mass. 526, 530-31 n.3 (2002). The elements required are: "(1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." Id.

Issue preclusion prevents re-litigation of an issue determined in an earlier action, where the same issue arises in the next action. For there to be issue preclusion, "a court must determine that (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication." Id. In addition, "the issue decided in the prior adjudication must have been essential to the earlier judgment[, and i]ssue preclusion can be used only to prevent litigation of issues actually litigated in the prior action." Id.

In Douglas v. The City of Malden Planning Board, the defendant in the instant case argued that the proposed roadways in the 1996 Plan did not meet the requirements of Class "B" roads, pursuant to § V.A.3.a. 8 LCR 358 (2000) (Misc. Case No. 236452)

(Scheier, J.). Defendant did not then claim that the proposed roadways fell under the classification of Class "A" roads and were subject to the requirements of that classification under the Subdivision Regulations. Because the parties in the prior case are the same as in the instant matter, the only issue is whether the 1996 Plan and the 2003 Plan are sufficiently similar so as to render the identities of that prior adjudication and the instant litigation, the same. The facts demonstrate that the alterations from the 1996 Plan to the 2003 Plan brought the Proposed Roadways within the requirements of Class "B" roads. The 2003 Plan makes substantial changes to the subdivision itself, decreasing the density and, thereby, the traffic on the Proposed Street. The 2003 Plan proposes eighteen (18) lots, rather than the twenty-six of the 1996 Plan, and thirty-two (32) dwelling units, rather than forty-five.

In its Decision in the prior Land Court action, the Court found that the proposed roadways on the 1996 Plan fall under the classification of Class "B" roads. The alterations to that plan, rather than so changing the nature of the roads to allow for new claims, bring the Proposed Roadways further into conformity with the requirements for Class "B" roads and reduce the characteristics of the neighborhood which might have qualified the roadways for Class "A" status. The prior case having been brought to final judgment on the merits, and defendants not having raised the issue of Class "A" requirements, the matter is precluded.[3]

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[3] Even if the matter were not precluded, I do not see how the Proposed Roadway qualifies for Class A road status. Section V.A.1.d. of the Subdivision Regulations defines "Class "A" Streets" as "streets appearing as Major Streets or serving land designated for High Density Residential, Commercial or Industrial Uses." The same section defines "Class "B" Streets" as "streets servicing land designated for Medium Density Residential use and not a Major Street." The term "Major Street" is not defined in the regulations. It is undisputed that the 2003 Plan proposes a low-density residential use and that even at the maximum allowable density in the Residence A Zoning District—the zoning district in which the Proposed Subdivision lies—a subdivision could only attain medium-density residential use status, but never high-density residential use. Therefore, defendants' only argument can be that the 2003 Plan proposes a Major

In addition, plaintiffs argue that the doctrine of judicial estoppel should be applied to prevent defendant from now arguing that the requirements of a Class "A" road apply to the Proposed Roadways. The doctrine of judicial estoppel "is an equitable doctrine which precludes a party from asserting a position in one legal proceeding which is contrary to a position it has already asserted in another." Fay v. Fed. Nat'l Mortgage Ass'n, 419 Mass. 782, 788 (1995), quoting Patriot Cinemas, Inc. v. Gen. Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987). The Commonwealth has recognized judicial estoppel, "at least where the party to be estopped had been successful in its first assertion of its inconsistent position." East Cambridge Sav. Bank v. Wheeler, 422 Mass. 621, 623 (1996).

In the instant matter, the Planning Board previously denied the 1996 Plan on the ground, *inter alia*, that the roadways proposed therein did not meet the requirements as Class "B" roads. In affirming that decision, The Court relied on the implicit determination of the board, that the proposed roadways were properly classified as Class "B" roads. Plaintiffs have now relied on these determinations by attempting to meet the requirements for Class "B" roads. It would be inequitable to allow defendants to subject the subdivision to different requirements, and so, this Court prohibits them from doing so.

CONCLUSION

For the foregoing reasons, the Court concludes that the issue of whether the Proposed Roadways meet the requirements for a Class "A" road is precluded by the

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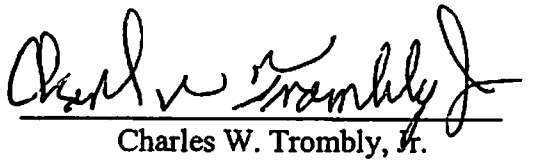
Road. Principal Planner for the City of Malden, Michelle A. Romero appears to admit that among the criteria for determining whether a road is a Major Road is whether it is a through street. Defendants point to two roads classified as Class "A" in the City of Malden. Each of these examples serves neighborhoods of one hundred residential units or more. Without determining the meaning of a Major Road, it is clear that the Proposed Roadway, a dead-end street, servicing thirty-two residential units does not fall within this definition.

doctrine of *res judicata*. The parties previously litigated the same issue. In the instant case, although plaintiff made alterations from the 1996 Plan to the 2003 Plan, these changes brought the Proposed Roadways further into conformity with the requirements for Class "B" roads and reduced the characteristics of the neighborhood which might have qualified the roadways for Class "A" road status. In addition, the Planning Board is barred by the doctrine of judicial estoppel from now applying the new requirements of Class "A" roads on the Proposed Roadways. The Court and plaintiff have relied on the Planning Board's assertion that the proposed roadways of the 1996 Plan must meet the requirements as Class "B" roads, and it would be inequitable for the board to now alter that position. This being the only matter remaining in this litigation, the decision of defendant, the Planning Board of the City of Malden is hereby REVERSED.

Judgment to issue accordingly.



Charles W. Trombly, Jr.
Justice

Dated: February 17, 2009

Tolym
CHR