SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS

SJC NO. _____

APPEALS COURT NO. 2025 -P- 0698

NORTHLAND TPLP LLC,

Defendant/Appellant

v.

TOWN OF WESTBOROUGH,

Plaintiff/Appellee

DEFENDANT/APPELLANT NORTHLAND TPLP LLC'S APPLICATION FOR DIRECT APPELLATE REVIEW

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Dated: June 27, 2025

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INTRODUCTION AND REQUEST FOR DIRECT APPELLATE REVIEW

Northland TPLP LLC ("Northland") respectfully requests that this Honorable Court grant direct appellate review of and reverse the decision by the Massachusetts Land Court (Rubin, J). This case presents an important public policy issue and the case's unique facts present an issue of first impression in this Court's jurisdiction of the Comprehensive Permit Statute, G.L. c. 40B, §§ 20-23 (the "Act" or "Chapter 40B"). The Land Court incorrectly determined that a comprehensive permit issued in 1994 by the state's Housing Appeals Committee ("HAC") that called for the Massachusetts Housing Financing Agency ("MassHousing") to decide the period of "long term affordability" for the permitted housing fell within the scope of this Court's 20+ year-old decision in *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. P'ship*, 436 Mass. 811 (2002) ("*Ardemore*"). Based on that error, the Land Court then held that the Chapter 40B housing units in question must be kept affordable in perpetuity. This too was error.

This case, thus, presents a unique opportunity for the Court to clarify the correct scope of *Ardemore*'s holding and to restore predictability in the Act's

permitting process both for municipalities and for private-sector housing developers who must make economically-driven decisions whether to embark on the long and often daunting process of developing Chapter 40B housing projects in Massachusetts.

The Act was enacted "to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing." *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 354 (1973). To advance this goal, the Act establishes a streamlined approval process for affordable housing projects and allows developers exemptions from zoning restrictions under certain conditions. *See Ardemore*, 436 Mass. at 815. Central to the permitting process under the Act is a developer's right to apply to the local zoning board for a "comprehensive permit" that governs the terms of a project, instead of needing to obtain approval from various municipal bodies that would otherwise have jurisdiction to regulate such projects. *Id.* To be eligible to apply for a comprehensive permit, the proposal must meet certain criteria, including that the proposal must be "fundable" under a subsidy program.

See 760 CMR 31.01(1) (effective January 4, 1991).[1] Each subsidy program is administered by a designated "subsidizing agency" – most commonly MassHousing – which reviews proposals to see whether they meet regulatory standards for fundability. *See id.*

In *Ardemore*, this Court held that when a comprehensive permit is ***silent*** on affordability duration and there is no express agreement by the town otherwise, the Act does not allow an affordability restriction to be terminated without the town's assent or while the Chapter 40B project does not conform with town zoning by-laws for the land on which it sits. *See id. at* 813. But in this case, the comprehensive permit ***itself*** states that unit affordability would be subject to a term and expressly identified MassHousing as the body that would establish the duration of the term. MassHousing did exactly that, ultimately setting a specific affordability end date of September 25, 2022, thus achieving the 1994 comprehensive permit's mandate of long-term affordability. The Town of Westborough ("Town" or "Westborough") assented to the HAC's comprehensive

[1] 760 CMR 31.01 was later superseded by 760 CMR 56.04(1), which maintains the fundability requirement for project eligibility.

permit provision that made unit affordability subject to a term to be set by MassHousing, and that provision fully aligned with the understanding and intent of the parties throughout the years-long permitting process that led to the issuance of the comprehensive permit. In addition to the Town's decades-long understanding that the units' affordability would expire, Northland reasonably relied on the September 2022 expiration date when Northland decided to acquire the development from the original builder nearly 20 years ago.

Because the outcome of this case will affect the entire Chapter 40B development community, Northland respectfully asks this Court to directly review the question of whether Northland is entitled to terminate the affordability housing restriction for the affected units (24) given the expiration of the term set forth by MassHousing — the agency to which the Town delegated authority to determine the period of "long-term affordability" to be provided for under the comprehensive permit at issue.

STATEMENT OF PRIOR PROCEEDINGS

On August 25, 2022, the Town commenced an action in the Massachusetts Land Court against Northland. Add. 030. The Town sought, under Count I, a declaratory

judgement to enforce the affordability provisions of the comprehensive permit issued to Northland's predecessor in title; and, under Count II, to enjoin Northland from allegedly violating Chapter 40B. Add. 040. On September 6, 2022, Northland filed a notice of removal of the case to the U.S. District Court District of Massachusetts (the "U.S. District Court").

On September 19, 2022, Northland filed its responsive pleadings in the U.S. District Court. On or about October 31, 2022, the U.S. District Court issued a Memorandum and Order of Remand returning the case to the Land Court. *See* Add. 031. In the Land Court, the parties filed cross-motions for summary judgment; both were denied in January 2024. Add. 033,034. This case was tried on October 29 and October 30, 2024, in the Land Court and the closing arguments were held on January 29, 2025. Add. 037,038, 047. On March 12, 2025, the Land Court issued a final decision and judgment against Northland on both counts of the Town's Complaint. Add. 038-041. On June 6, 2025, Northland filed a timely notice of appeal at the Massachusetts Appeals Court.

STATEMENT OF RELEVANT FACTS

A. The Chapter 40B Development

Northland owns the property located at 101 Charlestown Meadow Drive in Westborough, known as "The Residences at Westborough Station" (the "Development"), which is the subject of the present action. Add. 128 (¶1). The Development is a 120-unit affordable housing complex constructed under the Act. Twenty-four (24) of the 120 units were restricted as affordable. Add.128(¶¶2,23). The Development is located in the Single Residence ("R") zoning district in Westborough, in which multi-family apartment buildings, such as this development, are prohibited outside of the context of Chapter 40B or other law authorizing exemption from municipal zoning bylaws. Add. 130(¶25).

Northland bought the Development in 2007 from then owner Avalon Properties, Inc. ("Avalon"), which had previously bought it from the original developer, CMA, Inc. ("CMA") in 1994. Add. 129-130(¶¶7,16).

B. The Permitting Process and Comprehensive Permit

CMA began the process of constructing the Development by applying to the Westborough Zoning Board of Appeals ("ZBA") for a comprehensive permit under Chapter 40B to construct 274 units of subsidized,

affordable housing. Add. 128(¶3). In 1989, after the public hearing concluded, the ZBA voted to deny CMA's application for a comprehensive permit. Add. 128(¶4). CMA then appealed the ZBA's denial to the HAC. Add. 128(¶5).

On June 25, 1992, the HAC rendered a decision (the "1992 HAC Decision") ordering the issuance of a comprehensive permit pursuant to Chapter 40B for the construction of no more than 120 units of housing and imposing various other conditions on the project. Add. 128(¶6). The 1992 HAC Decision required submission of a new plan complying with these conditions for final approval by the HAC. *Id.*

After the HAC issued the 1992 HAC Decision, but without an actual comprehensive permit having issued, Avalon purchased the project from CMA. Add. 129(¶7). Avalon modified the existing 120-unit site plan for the project and requested that the ZBA approve its modified plan and several other proposed changes to the original proposal, including authority to finance the project with MassHousing. Add. 220-222; *see also* Add. 129(¶8). The ZBA, however, requested that the proposed changes be submitted directly to the HAC because no comprehensive permit had yet been issued and because the 1992 HAC

Decision indicated that the HAC intended to retain jurisdiction. Add.128(¶9).

On or about April 27, 1994, following a conference of counsel with the HAC, the Town and Avalon reached agreement on all open issues with the modified proposal except for water and sewer fees, and memorialized their agreement in a Joint Status Report and Recommendation dated June 7, 1994. Add. 129(¶10).

On July 20, 1994, HAC issued an "Order to Transfer of Permit [sic]" ("1994 HAC Order"). Add. 129(¶12). Footnote 1 of the 1994 HAC's Order stated that the HAC was "confident that the MHFA [MassHousing] will ensure that twenty percent of the units are set aside for tenants with incomes no higher than fifty percent of median income, that long-term affordability will be assured, and that the other normal requirements for subsidized housing are met." Add. 129(¶14).

The Town never issued its own comprehensive permit, but rather treated the 1994 HAC Order, along with the 1992 HAC Decision (collectively, the "HAC Decisions"), as the comprehensive permit for the Development.

C. The Parties' Conduct Pursuant to the HAC Decisions

Following the 1994 HAC Order, CMA conveyed title to the Development to Avalon by deed dated December 16, 1994. Add. 129(¶16). In December 1996, representatives of Avalon and MassHousing signed a series of regulatory agreements concerning, *inter alia*, the construction of the Development, its financing, and the implementation of affordability requirements. Add. 233-251 and 252-261. These documents included the Regulatory Agreement and a Land Use Restriction Agreement, both recorded with the Worcester County Registry of Deeds (the "Registry"). Add. 233-251 and 252-261.

The Land Use Restriction Agreement, which was incorporated by reference into the Regulatory Agreement, provided for a 15-year affordability restriction period for the Development. Add. 253. Although the Town was not party to the Regulatory Agreement or the Land Use Restriction Agreement, the 15-year affordability period set forth in those documents was consistent with the HAC Decisions' provision that MassHousing would ensure the long-term affordability of the units, as well as with the Town's understanding during the ZBA and HAC hearings

on the planned duration of affordability. *See* Add. 161, 272, 228, and 300.

Avalon then constructed the Development in accordance with the comprehensive permit statute, Chapter 40B. Add. 130(¶17). On September 25, 2007, Avalon conveyed the Development to Northland by virtue of a quitclaim deed recorded with the Registry. Add. 130(¶18). That same date, Northland and MassHousing executed an Amendment to Regulatory Agreement, also recorded with the Registry, which amended the Regulatory Agreement for the Development to, *inter alia*, substitute Northland for Avalon as the owner. Add. 262- 266. The Amendment to Regulatory Agreement also extended the affordability restriction for a new 15-year period from the date of the agreement (i.e., extending the restriction to September 25, 2022). Add. 262. This extension of the restriction was required by MassHousing to approve the transfer of ownership to Northland. Add. 288-294.

In or about December 2011, Northland paid off the remaining balance of the mortgage on the Development, thus completing its financing obligations to MassHousing. A document titled Satisfaction/Discharge of Avalon's Mortgage and Termination of Land Use Agreement

was recorded at the Registry. Add. 130(¶22). On October 18, 2018, Northland and MassHousing executed a Second Amendment to Regulatory Agreement, recorded at the Registry, which maintained the September 25, 2022 affordability restriction end date. Add. 267-271.

D. The Town Confirms the 2022 Expiration Date

In September of 2021, Northland provided notice to the tenants in the Development's 24 affordable units that as of September 25, 2022, Northland would be converting their units to market rate. Add. 130(¶24). Some of these tenants then notified the Town.

After investigating the affordability termination date, Town officials confirmed multiple times – both internally and to Northland – that the September 25, 2022, termination date for the Development was accurate. Add. 298-299. In response to the Community Economic Development Assistance Corporation's[2] suggestion that Town officials "get a copy of the original Chapter 40B decision to ensure that the units are not affordable in perpetuity or have an additional term of affordability,"

[2] Community Economic Development Assistance Corporation is an organization that advises municipalities and non-profit entities on affordable housing and community development matters.

Westborough Select Board Chair Allen Edinberg stated: "We have confirmed that the affordability provisions are not in perpetuity and are set to expire." Add. 298-299.

In a memorandum from Town officials to Northland dated February 15, 2022, the Town stated:

> Our understanding of the affordability provisions for the 24 units is as follows. Please correct or refine the information as appropriate.
>
> - Northland acquired the property in 2007, paying of [*sic*] the MassHousing Financing Authority note.
>
> - Northland agreed to maintain the 24 affordable, SHI compliant units, for fifteen (15) years.
>
> - The 15-year period expires in September 2022.

Add. 296.

However, on August 25, 2022, the Town filed an action against Northland in the Land Court to stop the conversion of the affordable units to market rate from occurring in September 2022, and taking the position that the units must be affordable in perpetuity. *See* Add. 030,040.

ISSUES OF LAW RAISED BY THIS APPEAL

Northland seeks Direct Appellate Review on the following issue that was properly raised and preserved in the Land Court:

Whether Northland is entitled to terminate an affordability restriction governing a multi-family housing development located in Westborough, Massachusetts, and approved in 1994 under M.G.L. c. 40B, §§ 20-23, when

a. the operative Chapter 40B comprehensive permit for the development stated that the affordability restriction would be subject to a term and that MassHousing would determine the duration of the term;
b. the Town agreed to such provisions in the comprehensive permit, including that the affordability restriction was not in perpetuity; and
c. MassHousing then determined that the development's affordability restriction would end on September 25, 2022.

ARGUMENT

I. This appeal raises a novel issue law that falls outside of *Ardemore*: whether an owner of a Chapter 40B development may terminate an affordability restriction on the date set by the subsidizing agency, where the comprehensive permit states that affordability will be subject to a term and gives the agency the authority to set the date for the expiration of such term.

This appeal presents an issue of law fundamentally different from that addressed in *Ardemore* or any other reported decision. In *Ardemore*, the Court rejected the argument that the Act incorporates the terms of subsidy programs and therefore allows affordability restrictions to terminate in accordance with the terms of such programs. *Ardemore*, 436 Mass. at 820. Instead, the Court held that affordability restrictions may be terminated only if allowed under the comprehensive permit, which embodies the town's express agreement on the project's terms. *Id*. at 813, 825. Here, by contrast, the comprehensive permit documents ***themselves*** expressly state that affordability duration is governed by the subsidizing agency and that MassHousing, as that agency, "will ensure that... long-term affordability will be assured." Add. 129 (¶12), 226- 232. This appeal therefore raises an important and novel legal question that warrants resolution by this Court.

As background, *Ardemore* involved a 36-unit apartment project that included nine units required to be rented to individuals with low or moderate income. 436 Mass. at 816. During the permitting process, the developer and the Town of Wellesley never discussed whether the affordability restriction would end. *See* Mem. of Dec. & Order on Cross-Mots. for Summ. Judgmt. *Zoning Board of Appeals of the Town of Wellesley et al. v. Ardemore Apartments Limited Partnership et al.*, *Mass. Sup. Ct., Norfolk Cnty., C.A. 99-0991 (Sept. 28, 2000) at* p. 3. Add. 082 ("The issue of how long the owners of the property would be required to keep a portion of the units affordable to low and moderate income persons ***was never discussed***.") (emphasis added). Nor did the HAC decision ordering the issuance of the permit say anything about affordability duration. *Ardemore*, 436 Mass. at 818-19. Consistent with the absence of such discussion, the comprehensive permit issued by Wellesley stated nothing whatsoever about affordability duration and, therefore, there was no basis on which to infer any expiration was ever intended by the parties. *Id.* at 813, 819.

After the comprehensive permit was issued, the owner entered financing agreements with MassHousing

providing that the affordability restriction could be terminated after fifteen years in accordance with the subsidy programs for the project. *Id*. at 812-13, 817. Later, in connection with the bankruptcy reorganization of a subsequent owner of the development, Wellesley filed suit seeking a declaration that the owner had no right to terminate the restriction, despite the terms of the financing agreements. *Id*. at 817-18.

Although the comprehensive permit and the HAC decision ordering its issuance were silent on affordability duration, the developer contended the Act itself allows for the termination of affordability restrictions, irrespective of the town's assent. *Id*. at 813. The developer argued that, because "the Act itself defines low and moderate income housing by referring to State and Federal construction subsidy programs," then the Act contemplates that affordable housing may be terminated in accordance with the terms of such programs. *Id*. at 820.

The *Ardemore* Court rejected this argument, holding that the Act does not allow affordability restrictions to be terminated without the town's agreement. *Id*. at 813, 825. First, because the issue presented was "solely one of statutory interpretation," the Court looked to

the legislative purpose of the Act. *Id*. at 818, 820-28. The Court reasoned that the legislative purpose would be undermined if developers could terminate such housing without the town's assent. *Id*. at 818-19, 826. The Court further reasoned that, unless the comprehensive permit provided otherwise, it would be unjust for a developer to terminate a restriction through financing agreements that the town "had no ability to control or influence." *See id*. Finally, the Court reasoned that the Legislature was free to "invoke Federal and State Federal and State standards to define 'low or moderate income housing' without incorporating the affordability expiration terms of such programs." *Id.* at 825-26.

Thus, in sum, *Ardemore* indicated that the comprehensive permit, which embodies a town's express agreement on the terms of a project, must allow for an affordability restriction to be terminated. *Id*. at 825, 828. As the Court stated: "Whatever the merit of these arguments concerning construction financing subsidies from State and Federal authorities, ***they do not vitiate the restrictions that attach to comprehensive permits***." *Id*. at 828 (emphasis added).

The present case is distinguished from *Ardemore* in three material ways, each of which renders the holding

in *Ardemore* inapplicable to Northland's right to terminate the affordability restriction.

First, in *Ardemore*, the developer and town never discussed whether the affordability restriction would end. *See supra* at 18. By contrast, here, the fact that the restriction would end was discussed at length with the Westborough ZBA and before the HAC.

Second, in *Ardemore*, the town issued a comprehensive permit. *Ardemore*, 436 Mass. at 819. Here, the Town never issued its own comprehensive permit to amplify, clarify, or refine the terms and conditions of the development, but rather adopted the HAC Decisions as the effective comprehensive permit for the development. The Town opted twice not to put its local stamp on a comprehensive permit: first in April of 1994, when the ZBA declined to take up the matter of the transfer of permit rights to Avalon and stated it would instead defer to the HAC, Add. 224-225, and, later, after the HAC issued the 1994 HAC Order. Westborough allowed the 1994 HAC Order, including its designation of MassHousing as the determiner of "long-term affordability," to stand as the functional comprehensive permit. The Town's decisions stand in stark contrast to the Town of Wellesley in *Ardemore*, where the town "had no ability to

control or influence the[] terms" of the affordability restriction.

Third and finally, in *Ardemore*, the comprehensive permit stated nothing about the duration of the affordability restriction. *Id*. at 813, 819. Here, the effective comprehensive permit (i.e., the HAC Decisions) expressly stated that the restriction would be subject to a term and that MassHousing would determine the duration of that term, which MassHousing then did.

These distinctions support Northland's right to terminate the affordability restriction. Indeed, the central policy concern in *Ardemore* – that Chapter 40B's purpose would be undermined if an affordability restriction could be terminated without the town's assent – is not implicated here. Westborough ***did assent*** to language in the 1994 HAC Order – which itself was the product of the parties' "Joint Recommendation" – stating that MHFA a/k/a MassHousing would determine the duration of the affordability restriction. Westborough could have challenged this language or issued a comprehensive permit without such language. Westborough did not do so. Instead, Westborough adopted the 1994 HAC Order as it was written, which is unsurprising given the evidence that Westborough had well understood since the ZBA

hearing that the restriction would be subject to a finite term. There is nothing in *Ardemore* that could support Westborough evading the terms of the HAC-issued comprehensive permit or its own understanding that the restriction would end. Westborough must be bound by the terms of the comprehensive permit.

REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE AND SHOULD BE GRANTED

Direct appellate review is warranted in this case for two reasons. First, this application for an appeal raises "questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court." Mass. R. App. P. 11(a)(1). To resolve this appeal, this Court should determine whether an owner of a Chapter 40B development may terminate an affordability restriction on the date set by the subsidizing agency, *i.e.*, MassHousing, where the comprehensive permit states that affordability would be subject to a term to be determined by the subsidizing agency. This question, not previously considered by this Court in *Ardemore*, deserves this Court's direct consideration.

Second, the issue on appeal is "of such public interest that justice requires a final determination by the full Supreme Judicial Court." Mass. R. App.

P.11(a)(3). That Massachusetts suffers from a housing production crisis is well-recognized. *See, e.g.,* Commonwealth's *Unlocking Housing Production Commission* Report, Feb. 2025 (excerpts)(discussing need to produce approximately 222,000 more housing units statewide)). Add. 113-123. For many decades, private sector, for-profit housing developers have traditionally provided the majority of new housing stock in the Commonwealth's cities and towns. *See, e.g., Zoning Bd. of Appeals of Wellesley v. Housing Appeals Committee*, 54 Mass. App. Ct. 1113, *3 (Apr. 25, 2002) (unpublished Rule 1:28 decision) (reciting Housing Appeals Committee position that multi-family, mix-income housing developments "use little or no public housing subsidies, and [] therefore require substantial investment by private developers").

The decisions for-profit developers make on whether or not to pursue a comprehensive permit for the construction of housing are necessarily driven by economics. As Northland's President put it when she testified in the Land Court trial, "[N]o developer is going into a [40B] development and a permitting process without having done the appropriate financial analysis to determine whether the development will be viable under the terms in which the permitting authority and

the conditions that the permitting authority and the financing authority are putting on the development." Add. 156 at 154:8-15). A critical component of such financial viability analysis for Chapter 40B projects is the duration of affordability for the subsidized units "[b]ecause the affordability restrictions reduce the amount of cash flow the property can generate," which "impacts … the value of the property." Add. 153-154 at 110:23–111:2. In short, "affordability restrictions have a material impact on the underwriting for the property" and a for-profit developer's decision whether or not to pursue the Chapter 40B project. Add. 153 at(110:8-10)

If private sector housing developers in Massachusetts cannot rely on the language governing affordability restrictions set forth in comprehensive permits and agreed upon by municipalities, and those cities and towns are able to disregard such assurances years later and declare that units must remain forever restricted, companies will shy away from pursuing Chapter 40B projects. The result will be lower affordable housing production in the Commonwealth. This Court should accept this case on direct appellate review in order to fully and finally resolve this issue of significant and statewide public interest.

CONCLUSION

This case meets two Direct Appellate Review criteria. It presents an issue of first impression distinct from this Court's 2002 *Ardemore* decision and meriting the Court's clarification of those distinctions. Today's case also squarely implicates an issue of great statewide public interest, the imperative to produce more affordable housing across the Commonwealth. That critical effort will not succeed if the economic incentives for private sector housing developers to participate in it are taken away. For these reasons, Northland respectfully requests the Court allow its petition.

Respectfully submitted,

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Date: June 27, 2025

ADDENDUM

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Property Information

Charlstown Meadows
Westborough

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Events

Date	Session	Location	Type	Event Judge	Result
09/01/2022 02:00 PM	J. Rubin		Hearing on Preliminary Injunction	Rubin, Hon. Diane R.	Rescheduled
09/07/2022 03:30 PM	J. Rubin	Courtroom 401 - Fourth Floor	Hearing on Preliminary Injunction	Rubin, Hon. Diane R.	Canceled
11/30/2022 02:30 PM	J. Rubin	Courtroom 403 - Fourth Floor	Status Conference	Rubin, Hon. Diane R.	Held via video
05/02/2023 09:30 AM	J. Rubin	Courtroom 403 - Fourth Floor	Status Conference	Rubin, Hon. Diane R.	Held via video
07/19/2023 02:30 PM	J. Rubin		Status Conference	Rubin, Hon. Diane R.	Rescheduled
08/10/2023 10:00 AM	J. Rubin	Courtroom 1102 - Eleventh Floor	Status Conference	Rubin, Hon. Diane R.	Held via video
01/17/2024 02:00 PM	J. Rubin	Courtroom 403 - Fourth Floor	Status Conference	Rubin, Hon. Diane R.	Held via video
03/27/2024 02:00 PM	J. Rubin		Pre-Trial Conference	Rubin, Hon. Diane R.	Rescheduled
04/24/2024 02:00 PM	J. Rubin	Courtroom 401 - Fourth Floor	Pre-Trial Conference	Rubin, Hon. Diane R.	Held via video
05/22/2024 02:00 PM	J. Rubin		Motion in Limine	Rubin, Hon. Diane R.	Canceled
09/13/2024 10:00 AM	J. Rubin		Pre-Trial Conference	Rubin, Hon. Diane R.	Continued
09/25/2024 10:00 AM	J. Rubin	Courtroom 403 - Fourth Floor	Pre-Trial Conference	Rubin, Hon. Diane R.	Held via video
10/22/2024 12:00 PM	J. Rubin	Courtroom 1102 - Eleventh Floor	Motion in Limine	Rubin, Hon. Diane R.	Held via video
10/29/2024 09:30 AM	J. Rubin	Courtroom 1101 - Eleventh Floor	Trial	Rubin, Hon. Diane R.	Held - First Day of Trial
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Docket Information

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08/25/2022	Complaint filed.		Image
08/25/2022	Case assigned to the Average Track per Land Court Standing Order 1:04.		
08/25/2022	Land Court miscellaneous filing fee Receipt: 433599 Date: 08/25/2022	$240.00	
08/25/2022	Land Court surcharge Receipt: 433599 Date: 08/25/2022	$15.00	
08/25/2022	Land Court summons Receipt: 433599 Date: 08/25/2022	$5.00	
08/25/2022	Uniform Counsel Certificate for Civil Cases filed by Plaintiff.		Image
08/25/2022	Summons and Hearing Notice issued on Application for Preliminary Injunction. Judge: Rubin, Hon. Diane R. Event: Hearing on Preliminary Injunction Date: 09/01/2022 Time: 02:00 PM		
08/25/2022	Town of Westborough's Motion for a Short Order of Notice, filed and ALLOWED. Judge: Rubin, Hon. Diane R.		Image

Docket Date	Docket Text	Amount Owed	Image Avail.
08/25/2022	Plaintiff's Motion for Preliminary Injunction and Supporting Memorandum of Law, filed.		Image
08/26/2022	Case has been REASSIGNED to the Honorable Diane R. Rubin. Judge Rubin's Sessions Clerk is Jennifer Noonan who can be reached directly via email at jennifer.noonan@jud.state.ma.us. Please direct all correspondence for the Court to Clerk Noonan. Also, please ensure that you add the Court's initials to the end of the case number on all cover letters and documents being submitted to the court: 22 MISC 000445 (DRR). Email notice to: Attorney George X. Pucci and Attorney Devan C. Braun. Judge: Rubin, Hon. Diane R.		
08/26/2022	Event Resulted: Hearing on Preliminary Injunction scheduled on: 09/01/2022 02:00 PM Has been: Rescheduled at the emailed request of Plaintiff's counsel. Hon. Diane R. Rubin, Presiding		
08/26/2022	Summons and Hearing Notice issued on Application for Preliminary Injunction. Judge: Rubin, Hon. Diane R. Event: Hearing on Preliminary Injunction VIA ZOOM Date: 09/07/2022 Time: 03:30 PM Email notice to: Attorney George X. Pucci and Attorney Devan C. Braun.		Image
09/06/2022	Notice of Removal to United States District Court, filed.		Image
09/07/2022	Event Resulted: Hearing on Preliminary Injunction scheduled on: 09/07/2022 03:30 PM Has been: Canceled. This case has been removed to the United States District Court. Counsel will be filing a Joint Status Report on November 7, 2022 and it will be decided at that point how this case will proceed, if at all. Counsel will keep the court updated if anything happens in the District Court. Hon. Diane R. Rubin, Presiding Counsel notified via email.		
09/19/2022	Copy of Defendant Northland TPLP LLC's Answer to Plaintiff's Complaint and Affirmative Defenses, Jury Demand, and Counterclaim, filed. (THIS WAS FILED IN THE DISTRICT COURT CASE 22-11428-DJC)		Image
10/11/2022	Copy of Defendant Northland TPLP LLC's First Amended Counterclaim, filed.. (THIS WAS FILED IN THE DISTRICT COURT CASE 22-11428-DJC)		Image
10/31/2022	Copy of Plaintiff's Motion to Dismiss Northland's First Amended Counterclaim, filed. (THIS WAS FILED IN THE DISTRICT COURT CASE 22-11428-DJC)		Image
10/31/2022	Copy of Plaintiff's Memorandum in Support of its Motion to Dismiss Northland's First Amended Complaint, filed. (THIS WAS FILED IN THE DISTRICT COURT CASE 22-11428-DJC)		Image
11/04/2022	Memorandum and Order of Remand Issued on October 31, 2022.		Image
11/07/2022	Scheduled Judge: Rubin, Hon. Diane R. Event: Status Conference Date: 11/30/2022 Time: 02:30 PM Counsel notified via email.		
11/22/2022	Appearance of Meghan E Huggan, Esq. for Northland TPLP LLC, filed		Image
11/30/2022	Event Resulted: Status Conference scheduled on: 11/30/2022 02:30 PM Has been: Status conference held via videoconference. Attorneys George Pucci and Devan Braun appeared on behalf of the plaintiff and Attorneys Michael Duffy and Benjamin Tymann appeared on behalf of the defendant. Court is in receipt of the Memorandum and Order of Remand Issued on October 31, 2022, by the U.S. District Court for the District of Massachusetts. Court noted that this case is in the Land Court on remand after a Notice of Removal to United States District Court. With respect to Plaintiff's pending Motion for Preliminary Injunction, Attorney Pucci advised that the parties are working to reach a standstill agreement to obviate the need for injunctive relief. By December 9, 2022, parties to file a written stipulation to preserve the status quo, for the court's signature, with plaintiff invited to request a hearing on the motion for preliminary injunction if a stipulation cannot be achieved. Court inquired as to prospects for settlement or mediation in order to reach a mutually agreeable resolution. Following colloquy, counsel to confer with their clients as to prospects for settlement or mediation, and whether they would welcome a mediation screening order. Attorney Pucci then advised that plaintiff does not believe that discovery is necessary and intends to file a motion for summary judgment, while Attorney Tymann advised that defendant would like to conduct some discovery before filing dispositive motions. Court put in place the following discovery schedule: By April 14, 2023, discovery to be complete, to include expert designations and disclosures; and by April 21, 2023, counsel to file a joint report confirming that discovery is complete, advising as to whether any party intends to file a dispositive motion (and the basis therefore), whether a pre-trial conference should be scheduled, prospects for settlement or further mediation, and advising of any other matters necessitating the court's attention. Status conference scheduled for May 2, 2023, at 9:30 A.M. Hon. Diane R. Rubin, Presiding Counsel notified via email.		
12/05/2022	Scheduled Judge: Rubin, Hon. Diane R. Event: Status Conference Date: 05/02/2023 Time: 09:30 AM		
12/09/2022	The court is in receipt of an emailed request from counsel to extend the date of filing a Stipulation to December 13, 2022. The court has ALLOWED that request.		

Docket Date	Docket Text	Amount Owed	Image Avail.
	Counsel notified via email. Judge: Rubin, Hon. Diane R.		
12/20/2022	Order on Stipulation Issued. In the event the Court has not ruled on the merits of the Town's claim by August, 2023, Northland and the Town shall return to Court for a further status conference to discuss Northland's intentions as to maintaining the affordability restrictions in place until the Court has ruled on the merits, and the Town may renew its motion for preliminary injunctive relief in the event the parties are unable to reach agreement on the issue at that time." Counsel emailed the Order. Judge: Rubin, Hon. Diane R.		Image
04/21/2023	Joint Status Report, filed.		Image
05/02/2023	Event Resulted: Status Conference scheduled on: 05/02/2023 09:30 AM Has been: Status conference held via videoconference. Attorney George Pucci appeared on behalf of the plaintiff and Attorney Benjamin Tymann appeared on behalf of the defendant. Court is in receipt of the parties' Joint Status Report. Attorney Pucci advised that from the plaintiff's perspective, discovery is not necessary, and the case is ready for dispositive motions. Attorney Pucci further advised that plaintiff has responded to defendant's written discovery, but that he needs to confer with his client as to some purported deficiencies in those responses, as identified by defendant, and that plaintiff objects to the depositions noticed by defendant. Court discussed with Attorney Tymann whether such depositions are relevant or necessary in light of the plaintiff's claims under the Ardemore case (436 Mass. 811) and further inquired as to the Order on Stipulation. The court also inquired whether the defendant might extend its stipulation regarding the affordability restrictions through a ruling on the merits in this case, particularly in light of defendant's request for extended discovery practice. Following colloquy, counsel to confer and endeavor to resolve any discovery disputes, otherwise, any motion to compel and/or motion for protective order to be filed by May 31, 2023, with oppositions filed by June 15, 2023, replies filed by June 29, 2023, and hearing scheduled for July 19, 2023, at 2:30 P.M. Counsel further to each confer with their clients and then with each other as to prospects for a negotiated resolution. Counsel to file by July 12, 2023, a status report advising as to prospects for settlement or mediation, whether a mediation screening order may be appropriate, and whether an extended stipulation on affordability restrictions had been discussed and/or agreed to. Hon. Diane R. Rubin, Presiding Counsel notified via email.		
05/03/2023	Scheduled Judge: Rubin, Hon. Diane R. Event: Status Conference Date: 07/19/2023 Time: 02:30 PM		
05/31/2023	Counsel jointly emailed the court requesting the current tracking schedule be amended as follows which the court has adopted: - Any Discovery Motions to be filed by June 16, 2023; - Oppositions to be filed by June 28, 2023; and - Replies due July 10, 2023. The current hearing date of July 19, 2023 will remain as scheduled. Counsel notified via email. Judge: Rubin, Hon. Diane R.		
05/31/2023	Plaintiff's Motion for Protective Order, filed.		Image
06/21/2023	Opposition of Defendant Northland TPLP, LLC to the Plaintiff Town of Westborough's Motion for Protective Order, filed.		Image
07/17/2023	Joint Status Report, filed.		Image
07/17/2023	Event Resulted: Status Conference scheduled on: 07/19/2023 02:30 PM Has been: Rescheduled to August 10, 2023 at 10:00 am at the request of counsel and by agreement of the court. Hon. Diane R. Rubin, Presiding		
07/17/2023	Scheduled Judge: Rubin, Hon. Diane R. Event: Status Conference Date: 08/10/2023 Time: 10:00 AM Counsel notified via email.		
08/10/2023	Event Resulted: Status Conference scheduled on: 08/10/2023 10:00 AM Has been: Hearing held via videoconference. Attorney George Pucci appeared on behalf of the plaintiff and Attorney Benjamin Tymann appeared on behalf of the defendant, with Beth Kinsley present. Before the court were Plaintiff's Motion for Protective Order and Opposition of Defendant Northland TPLP, LLC to the Plaintiff Town of Westborough's Motion for Protective Order, with court also in receipt of the parties' Joint Status Report. Attorney Pucci advised that plaintiff has assented to the proposed Second Order on Stipulation, attached as Exhibit A to the Joint Status Report and extending the agreement to maintain affordability restrictions to June 30, 2024. Following colloquy, counsel to file a copy of the Second Order on Stipulation, executed by both parties, to be endorsed by the court. Following argument, court then ALLOWED in part and DENIED in part Plaintiff's Motion for Protective Order, for the reasons articulated on the record and as follows. Defendant contends that Zoning Bd. of Appeals of Wellesley v.		

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	Ardemore Apartments Ltd. P'ship, 436 Mass. 811 (2002) is not dispositive of this case and that its project is not bound by permanent affordability restrictions because they read a single sentence in the 1994 HAC Order to mean that the restrictions are for a term and therefore not permanent. The provision at issue states: "We are confident that the MHFA will ensure that twenty percent of the units are set aside for tenants with incomes no higher than fifty percent of median income, that long-term affordability will be assured, and that the other normal requirements for subsidized housing are met." Defendants also allege that the town and the then-developer negotiated a termination of the restrictions that was more or less coincident with the termination of the financing agreement (and those negotiated terms resulted in the above quoted sentence from the 1994 HAC Order), though I note that the town vigorously opposes that reading. To ensure that the case is resolved efficiently so as to provide certainty for residents of these affordable units, as well as the parties, and in light of potential appellate issues, I conclude that it is most prudent to complete all discovery prior to any motion for summary judgment, to ensure complete record is before the court. Because the parties agree that the sole question before the court relates to the meaning of the 1994 HAC Order and because Defendant argues the 1994 HAC Order is ambiguous, I conclude that what happened on and around the date of that 1994 HAC Order may be relevant, however more recent statements, knowledge, or perceptions by town employees would not be relevant to the court's inquiry. Court to ALLOW deposition of James Robbins, recently retired Town Planner, who was the Town Planner at the time the 1994 HAC Order was issued and may have relevant knowledge. Accordingly, I conclude that deposition of Mr. Robbins would be reasonably calculated to lead to the discovery of admissible evidence, but that the other five depositions requested would not and would be unduly burdensome. There is no indication that the other five individuals have actual personal knowledge related to the 1994 HAC Order, such that those requested depositions are overbroad. Further, in light of the Defendant's objection, court is willing to take any further briefing on the issues of whether the recent understanding of Town employees would be relevant to the issue before the court, whether those statements would be statements of a party opponent, and/or whether there are other individuals with relevant knowledge of that time period. Once all depositions are completed, Plaintiff to file any Motion for Summary Judgment, with counsel to endeavor to file an agreed upon statement of facts, at least in part, and briefing otherwise in accordance with Land Court Rule 4. Hearing scheduled for January 17, 2024, at 2:00 P.M. Hon. Diane R. Rubin, Presiding Counsel notified via email.		
08/10/2023	Scheduled Judge: Rubin, Hon. Diane R. Event: Status Conference Date: 01/17/2024 Time: 02:00 PM		
10/26/2023	Joint Motion for Entry of Court's Second Order on Stipulation, filed.		Image
11/14/2023	Plaintiff's Motion for Summary Judgment, filed.		Image
11/14/2023	Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment, filed.		Image
11/14/2023	Agreed-Upon Statement of Undisputed Material Facts, filed.		Image
11/14/2023	Appendix to Town's Statement of Undisputed Material Facts, filed. (Courtesy copy filed 11/20/2023)		Image
11/15/2023	Second Order on Stipulation, Issued. Counsel notified via email. Judge: Rubin, Hon. Diane R.		Image Image
12/15/2023	Northland TPLP LLC's Cross-Motion for Summary Judgment, filed.		Image
12/15/2023	Northland TPLP LLC's Memorandum in Support of its Cross-Motion for Summary Judgment and Opposition to Westborough's Motion for Summary Judgment, filed. (Courtesy Copies filed December 18, 2023)		Image
12/15/2023	Supplemental Agreed-Upon Statement of Undisputed Material Facts, filed.		Image
12/15/2023	Northland TPLP LLC's Response to Westborough's Statement of Undisputed Facts, filed.		Image
12/15/2023	Northland TPLP LLC's Appendix of Summary Judgment Exhibits, filed. (Courtesy Copies filed December 18, 2023)		Image
01/05/2024	Plaintiff's Motion to Strike Certain of Northland's Evidence, filed.		Image
01/05/2024	Plaintiff's Opposition to Northland's Cross-Motion for Summary Judgment, filed.		Image
01/05/2024	Town of Westborough's Responses to the Defendant's Statement of Undisputed Facts, filed.		Image
01/12/2024	Motion of the Office of the Attorney General Seeking Leave to File an Amicus Brief in Support of the Town of Westborough, filed and ALLOWED. Counsel notified via email. Judge: Rubin, Hon. Diane R.		Image Image
01/12/2024	Amicus Brief of the Office of the Attorney General in Support of the Town of Westborough, filed.		Image
01/16/2024	Northland TPLP LLC's Reply to Westborough's Opposition Brief and Opposition to Westborough's Motion to Strike, filed.		Image
01/17/2024	Event Resulted: Status Conference scheduled on: 01/17/2024 02:00 PM		

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	Has been: Hearing on Motion for Summary Judgment held via videoconference. Attorneys Devan Braun and George Pucci appeared on behalf of the plaintiff, Attorneys Benjamin Tymann and Patrick Yerby appeared for the defendant, and Attorney Kendra Kinscherf appeared on behalf of the Office of the Attorney General. Before the court is (1) Plaintiff's Motion for Summary Judgment along with a memorandum and appendix in support thereof; (2) Northland TPLP LLC's Cross-Motion for Summary Judgment along with a Memorandum in Support of its Cross-Motion for Summary Judgment and Opposition to Westborough's Motion for Summary Judgment and appendix; (3) Plaintiff's Opposition to Northland's Cross-Motion for Summary Judgment; (4) the Agreed-Upon Statement of Undisputed Material Facts, Northland TPLP LLC's Response to Westborough's Statement of Undisputed Facts, and Town of Westborough's Responses to the Defendant's Statement of Undisputed Facts; (5) Plaintiff's Motion to Strike Certain of Northland's Evidence and Northland TPLP LLC's Reply to Westborough's Opposition Brief and Opposition to Westborough's Motion to Strike; and (6) Amicus Brief of the Office of the Attorney General in Support of the Town of Westborough. After argument, the court DENIED both parties' motions for summary judgment for the reasons articulated on the record and as follows: "Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." Ng Bros. Constr., Inc. v. Cranney, 436 Mass. 638, 643-644 (2002); Mass. R. Civ. P. 56(c). "The moving party bears the burden of affirmatively showing that there is no triable issue of fact." Ng Bros. Constr., Inc., 436 Mass. at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See Attorney Gen. v. Bailey, 386 Mass. 367, 371, cert. denied, 459 U.S. 970 (1982). As recently articulated by the Supreme Judicial Court, a court must limit itself to "logically permissible inferences" that "flow rationally from the underlying facts." Carroll v. Select Board of Norwell, 493 Mass. 178, 192 (2024) (citations omitted). Whether a fact is material or not is determined by the substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Further, "an adverse party may not manufacture disputes by conclusory factual assertions." Ng Bros. Constr., Inc., 436 Mass. at 648. "If the opposing party fails properly to present specific facts establishing a genuine, triable issue, summary judgment should be granted." O'Rourke v. Hunter, 446 Mass. 814, 821-822 (2006), quoting Cullen Enters., Inc. v. Mass. Prop. Ins. Underwriting Ass'n, 399 Mass. 886, 890 (1987). The court is cognizant of the broad language in the Zoning Board of Appeal of Wellesely v. Ardmore, 436 Mass. 811 (2002), discussing the importance of affordable housing under the statutory framework in G.L. c. 40B, as well as the distinction between zoning relief afforded by a local municipality and financial terms between a developer and its lender. Nonetheless, I conclude that the cross-motions for summary judgment must be denied due to genuine and material factual issues that appear to be in dispute as to whether the Town of Westborough (the "Town") and Avalon Properties, Inc. ("Avalon"), the predecessor-in-interest to the Defendant Northland TPLP LLC, expressly agreed to limit the duration of the affordability restrictions on the Chapter 40B development project here at issue coincident with the term of financing, and whether the footnote at issue in the 1994 Massachusetts Housing Appeals Committee order ("1994 HAC Order") reflects such an agreement. Central to the parties' dispute is the Joint Status Report and Recommendation filed by the Town and Avalon on June 6, 1994, which states that the "Town does not contest fundability¿," and Footnote 1 to the 1994 HAC Order ("Footnote 1"), where the HAC appears to have adopted the recommendation in the Joint Status Report. Footnote 1 states in pertinent part: "¿We are confident that MHFA will ensure that twenty percent of the units are set aside for tenants with incomes no higher than fifty percent of median income, that long-term affordability will be assured, and that other normal requirements for subsidized housing are met.". While the Town, together with the Attorney General's Office which files a brief as amicus curiae, contend that Footnote 1 is irrelevant, that the duration of affordable housing restrictions for the property at issue are governed by Ardmore, and that there are no material factual distinctions from the circumstances in Ardmore, the Defendants cite Footnote 1 as evidence of an agreed upon limit on the duration of the affordable housing obligations. Drawing all logically permissible inferences in favor of the Defendant, as is required on the Town's motion for summary judgment, I conclude there are a number of disputed material facts bearing a rational connection to the Defendant's position that will benefit from a full presentation at trial. See Carroll, 493 Mass. at 192. For instance, in support of its contention that an express agreement existed between the Town and Avalon to limit the duration of the obligation to provide affordable housing at the property, the Defendant has provided attested evidence of the Town's historic housing affordability inventory filings listing an end-date to the affordable status of units at the property, as well as testimony of a former Town official as to the reason for inclusion of Footnote 1 in the 1994 HAC order. This and other evidence presented at trial may clarify the meaning of Footnote 1 in the appropriate factual and procedural context and the existence of any agreement between the Town and Avalon. Following colloquy regarding an expedited trial schedule, court sets the following schedule: Pre-trial conference scheduled for March 27, 2024, at 2:00 P.M., with parties to file a joint pre-trial memorandum by March 20, 2024, including a unified statement of the issues; detailed and enumerated statements of agreed upon and disputed facts; detailed numbered lists of agreed upon and disputed exhibits (to include any document the parties intend to rely upon or produce and naming each document with specificity, i.e. title and date); identifying any witnesses; and identifying any motions in limine. Hearing scheduled for May 22, 2024, at 2:00 P.M., for the presentation of any motions in limine. Trial scheduled for May 29-30, 2024. By January 24, 2024, counsel to confer on the extension of the stipulation maintaining the affordable units for the pendency of this matter and file a report as to the stipulation and proposing a more detailed briefing and filing schedule based on the court's schedule as set forth above. Hon. Diane R. Rubin, Presiding Counsel notified via email.		
01/18/2024	Scheduled Judge: Rubin, Hon. Diane R. Event: Pre-Trial Conference Date: 03/27/2024 Time: 02:00 PM		
01/18/2024	Scheduled Judge: Rubin, Hon. Diane R. Event: Motion in Limine Date: 05/22/2024 Time: 02:00 PM		
01/19/2024	Appearance of J. Patrick Yerby, Esq. for Northland TPLP LLC, filed		Image

Docket Date	Docket Text	Amount Owed	Image Avail.
01/26/2024	Joint Report and Proposed Order on Stipulation, filed.		Image
02/05/2024	Third Order on Stipulation, filed.		Image
02/06/2024	Third Order of Stipulation Issued. Counsel notified via email. Judge: Rubin, Hon. Diane R.		Image
03/21/2024	Event Resulted: Pre-Trial Conference scheduled on: 03/27/2024 02:00 PM Has been: Rescheduled to April 24, 2024 at 2:00 pm, at the request of counsel and by agreement of the court. Hon. Diane R. Rubin, Presiding		
03/21/2024	Scheduled Judge: Rubin, Hon. Diane R. Event: Pre-Trial Conference Date: 04/24/2024 Time: 02:00 PM		
04/18/2024	Joint Pre-Trial Memorandum, filed.		Image
04/24/2024	Event Resulted: Pre-Trial Conference scheduled on: 04/24/2024 02:00 PM Has been: Pre-trial conference held via videoconference. Attorneys George Pucci and Devan Braun appeared on behalf of the plaintiff, with Town Manager Kristi Williams present, and Attorneys Benjamin Tymann and Patrick Yerby appeared on behalf of the defendant, with general counsel Beth Kinsley present. Court is in receipt of the parties' Joint Pre-Trial Memorandum. Court noted two preliminary matters indicating that this case might not be ready for trial. The first such matter being defendant's counterclaims, which had been pled in the alternative in the event that the court determines that the affordability restrictions in perpetuity, based on the Fifth and Fourteenth Amendment to and the Contracts Clause of the United States Constitution and for declaratory judgment. By way of background, Attorney Tymann explained these counterclaims had been filed in federal court and were subject to a pending motion to dismiss that has not yet been argued on remand. Court noted the Land Court's lack of subject matter jurisdiction to hear these claims as unrelated to "right, title, or interest in land," and too expansive and independent factually and legally to be appropriate for the exercise of the Land Court's ancillary jurisdiction. See G.L. c. 185, § 1(k); Ritter v. Bergmann, 72 Mass. App. Ct. 296, 302 (2008). Accordingly, Court DISMISSES the counterclaims without prejudice and without preclusive effect, such that the defendant may file those claims in a court of competent jurisdiction at a later date. Court then discussed the status of discovery, noting that the Pre-Trial Conference Memorandum appeared to indicate that neither party had finalized preparations for trial and that the court had not set a firm date for the close of discovery. Plaintiff sought leave to undertake limited and speedy discovery, while Defendant had yet to identify a witness from Avalon Properties, Inc. (the prior owner of the property). Accordingly, court to permit a further brief discovery for all purposes as follows: By June 30, 2024, parties to disclose all witnesses expected to testify at trial. By July 31, 2024, discovery to close, and to include all expert designations and disclosures. In addition, and by September 6, 2024, parties to file a revised and refined pre-trial memorandum. Pre-trial conference scheduled for September 13, 2024, at 10:00 A.M. Tentative trial dates scheduled for October 29 and 30, 2024. Hon. Diane R. Rubin, Presiding Counsel notified via email.		
04/25/2024	Scheduled Judge: Rubin, Hon. Diane R. Event: Pre-Trial Conference Date: 09/13/2024 Time: 10:00 AM		
04/25/2024	Event Resulted: Motion in Limine scheduled on: 05/22/2024 02:00 PM Has been: Canceled Hon. Diane R. Rubin, Presiding		
09/04/2024	Assented-to Motion of Defendant to Continue Final Pre-Trial Conference, filed and ALLOWED. Pre-Trial Conference continued to September 25, 2024 at 10:00 am via zoom. Counsel notified via email. Judge: Rubin, Hon. Diane R.		Image
09/09/2024	Event Resulted: Pre-Trial Conference scheduled on: 09/13/2024 10:00 AM Has been: Continued For the following reason: Request of all Parties Hon. Diane R. Rubin, Presiding		
09/09/2024	Scheduled Judge: Rubin, Hon. Diane R. Event: Pre-Trial Conference Date: 09/25/2024 Time: 10:00 AM VIA ZOOM. Counsel notified via email.		
09/23/2024	Revised Joint Pre-Trial Memorandum, filed.		Image

Docket Date	Docket Text	Amount Owed	Image Avail.
09/25/2024	Event Resulted: Pre-Trial Conference scheduled on: 09/25/2024 10:00 AM Has been: Pre-trial conference held via videoconference. Attorneys Devan Braun and Catherine Brown appeared on behalf of the plaintiff and Attorneys Benjamin Tymann and Patrick Yerby appeared on behalf of the defendant, with general counsel Beth Kinsley present. Court is in receipt of the parties' Revised Joint Pre-Trial Memorandum. Court first confirmed with counsel the issue for trial, specifically: Whether plaintiff is entitled to a declaration pursuant to G.L. c. 231A and an order that the defendant maintain affordability restrictions on property located known as The Residences at Westborough Station, located at 101 Charlestown Meadows Drive, for so long as the property does not conform with the local bylaw. Court discussed with counsel the plaintiff's position that trial should proceed on a case stated basis, since plaintiff does not intend to introduce any witnesses in its case-in-chief (although reserving the right to call any witnesses on cross examination or for purposes), as well as defendant's opposition and list of witnesses, whose testimony plaintiff intends to challenge by way of motions in limine. Court concluded that full and fair adjudication of the defense would benefit from trial with witnesses, with court taking all challenged testimony de bene. As stated in Harris-Lewis v. Mudge, "it is up to the judge's sound discretion whether evidence should be admitted de bene, subject to later motion to strike. See Ellis v. Thayer, 183 Mass. 309, 310-311 (1903); R.L. Polk & Co. v. Living Aluminum Corp., 1 Mass. App. Ct. 170, 172 (1973)." Harris-Lewis v. Mudge, 60 Mass. App. Ct. 480, 485 (2004). Accordingly, by October 11, 2024, parties to file all motions in limine, with oppositions to be filed by October 17, 2024, with counsel noting any issues that require decision prior to the presentation of the evidence instead of de bene. Hearing on motions in limine scheduled for October 22, 2024, at 12:00P.M. Following colloquy, counsel to confer and further refine and expand the parties' pre-trial conference memorandum. By October 22, 2024, counsel to file a final pre-trial memorandum to include: (1) a unified statement of the issue(s) to be tried (which may differ from the court's framing, above, if agreed), (2) an amended agreed upon statement of facts, to include the dates and book and page numbers for all documents identified therein, if applicable, and (3) agreed upon and disputed exhibit lists, identifying each document with specificity, narrowing disputed exhibits to the extent possible to streamline presentation of the evidence at trial. Also, by October 22, 2024, parties to deliver Exhibit Binders to the Land Court (one copy for the court and one copy for the witness stand). The following trial dates are confirmed: October 29 and 30, 2024, in person at the Land Court commencing at 9:30 A.M. Counsel to notify Clerk Noonan with the name and contact information of the court reporter engaged by the parties a week prior to trial. Court set the following post-trial schedule: post-trial briefs due thirty (30) days after filing of the trial transcripts (anticipated for October 29, 2024), post-trial briefs to be filed by January 10, 2024, and closing argument scheduled for January 29, 2025, at 2:30 P.M. Lastly, counsel confirmed and agreed that the stipulation on affordability restrictions would be continued in full force and effect and be extended through March 28, 2025, to be filed by October 1, 2024. Hon. Diane R. Rubin, Presiding Counsel notified via email.		
09/26/2024	Scheduled Judge: Rubin, Hon. Diane R. Event: Motion in Limine VIA ZOOM. Date: 10/22/2024 Time: 12:00 PM Counsel notified via email.		
09/26/2024	Scheduled Judge: Rubin, Hon. Diane R. Event: Trial IN-PERSON Date: 10/29/2024 Time: 09:30 AM Counsel notified via email.		
09/26/2024	Scheduled Judge: Rubin, Hon. Diane R. Event: Ongoing Trial IN-PERSON Date: 10/30/2024 Time: 09:30 AM Counsel notified via email.		
09/26/2024	Scheduled Judge: Rubin, Hon. Diane R. Event: Ongoing Trial. Closing Arguments Date: 01/29/2025 Time: 02:30 PM Counsel notified via email.		
09/26/2024	Joint Motion for Endorsement of Fourth Order on Stipulation, filed.		Image
09/26/2024	(Proposed) Fourth Order on Stipulation, filed.		Image
09/26/2024	Joint Motion for Endorsement of Fourth Order on Stipulation APPROVED and Endorsed. Counsel notified via email. Judge: Rubin, Hon. Diane R.		Image
10/11/2024	Town of Westborough's Motion in Limine to Preclude Witnesses Identified by the Defendant from Testifying at Trial, filed. (Courtesy Copy filed 10/17/2024)		Image
10/17/2024	Northland's Memorandum in Opposition to Westborough's Motion in Limine, filed.		Image

Docket Date	Docket Text	Amount Owed	Image Avail.
10/22/2024	Event Resulted: Motion in Limine scheduled on: 10/22/2024 12:00 PM Has been: Hearing on motion in limine held via videoconference. Attorneys Devan Braun and Catherine Brown appeared on behalf of the plaintiff and Attorneys Benjamin Tymann and Patrick Yerby appeared on behalf of the defendant. Court is in receipt of Joint Motion for Endorsement of Fourth Order on Stipulation, (Proposed) Fourth Order on Stipulation, Town of Westborough's Motion in Limine to Preclude Witnesses Identified by the Defendant from Testifying at Trial, and Northland's Memorandum in Opposition to Westborough's Motion in Limine. Following hearing, court DENIED plaintiff's motion to preclude witnesses identified by the defendant from testifying at trial for the reasons articulated on the record and as set forth below, provided however, court will hear the proffered evidence de bene and invites the plaintiff to file a motion to strike at the close of evidence for further consideration of the court in light of the evidence before the court at that time. Plaintiff seeks to preclude the witnesses from testifying because it argues the witnesses' testimony is irrelevant. Court notes that at this time it is not clear that the witnesses' testimony will be irrelevant. By October 25, 2024, parties to file pre-trial memorandum. Trial scheduled for October 29-30, 2024, in person at the land court, with court to entertain any requests for individual witnesses to appear via zoom. Hon. Diane R. Rubin, Presiding Counsel notified via email.		
10/24/2024	Revised Joint Pre-Trial Memorandum, filed.		Image
10/29/2024	Event Resulted: Trial scheduled on: 10/29/2024 09:30 AM Has been: Held - First Day of Trial held in person. Attorneys Devan Braun and Catherine Brown appeared on behalf of the plaintiff and Attorneys Benjamin Tymann and Patrick Yerby appeared on behalf of the defendant. Court is in receipt of Revised Joint Pre-Trial Memorandum. Court Reporter, Dawn Mack, sworn in and transcribed the proceedings. Court confirmed the issue before the court is as stated in the Revised Joint Pre-Trial Memorandum, docketed on October 24, 2024, specifically: Whether plaintiff is entitled to a declaration pursuant to G.L. c. 231A and an order that the defendant maintain affordability restrictions on property known as The Residences at Westborough Station, located at 101 Charlestown Meadows Drive, for so long as the property does not conform with the local bylaw. Parties introduced Joint Exhibits 1-25, with Parties' Statement of Agreed Facts Nos. 1-25 **stipulated** as set forth in the Revised Joint Pre-Trial Memorandum. Disputed Exhibits 1-21 were admitted de bene with respect to the issue of relevance in accordance with prior docket entries, with plaintiff to object on other grounds at the time the exhibits are introduced. Trial was held, with Town Manager, Kristi Williams, giving testimony followed by the testimony of Northland's COO and President, Suzanne Abair. At the close of the first day of trial, plaintiff filed Town of Westborough's Motion to Strike Witness Suzanne Abair's testimony, with opposition from defendant to be included in its post-trial briefing. Trial to continue on October 30, 2024, with the testimony of Mr. James Robbins via videoconference/zoom at 11:30 a.m., followed by the in-person testimony of Mr. James Malloy and Mr. Mark O'Hagan. Hon. Diane R. Rubin, Presiding Counsel notified via email.		
10/29/2024	Town of Westborough's Motion to Strike Witness Suzanne Abair's Testimony, filed.		Image
10/30/2024	Event Resulted: Ongoing Trial scheduled on: 10/30/2024 09:30 AM Has been: Held - Second Day of Trial held via videoconference. Attorneys Devan Braun and Catherine Brown appeared on behalf of the plaintiff and Attorneys Benjamin Tymann and Patrick Yerby appeared on behalf of the defendant. Court Reporter, Dawn Mack, sworn in and transcribed the proceedings. Trial was held, with defendant calling James Robbins who gave testimony via Zoom. The evidence was closed after Mr. Robbins testimony. The court confirmed the following schedule: By January 10, 2025, parties to file any post-trial briefs, and closing arguments scheduled for January 29, 2025, at 2:30 P.M., in person. Hon. Diane R. Rubin, Presiding Counsel notified via email.		
10/31/2024	Town of Westborough's Motion to Strike Witness James Robbins' Testimony, filed.		Image
12/11/2024	Transcript of October 29, 2024 October 30, 2024 before Hon. Diane R. Rubin. All briefs and/or memoranda should be submitted to the Court on or before 01/10/2025.		
12/17/2024	Withdrawal of Catherine L Brown, Esq. for Town of Westborough, by and through its Select Board, filed		Image
01/10/2025	Northland's Post-Trial Memorandum of Law, filed.		Image
01/10/2025	Northland's Proposed Findings of Fact, filed.		Image
01/10/2025	Northland's Memorandum in Opposition to Westborough's Motions to Strike Testimony of James Robbins and Suzanne Abair, filed.		Image
01/10/2025	Town of Westborough Post-Trial Memorandum of Law, filed.		Image
01/29/2025	Trial Ends.: Ongoing Trial scheduled on: 01/29/2025 02:00 PM Has been: Held - Trial Ends. Closing arguments and hearing on motions to strike held in person. Attorney Devan Braun appeared on behalf of the plaintiff, with Town Manager Kristi Williams present, and Attorneys Benjamin Tymann and Patrick Yerby appeared on behalf of the defendant, with general counsel Beth Kinsley present. Court is in receipt of Town of Westborough's Motion to Strike Witness James Robbins' Testimony, Northland's Post-Trial Memorandum of Law, Northland's Proposed Findings of Fact, Northland's Memorandum in Opposition to Westborough's Motions to		

Docket Date	Docket Text	Amount Owed	Image Avail.
	Strike Testimony of James Robbins and Suzanne Abair, and Town of Westborough Post-Trial Memorandum of Law. Counsel presented their closing arguments, followed by their arguments on the plaintiff's motions to strike. Following argument, court encouraged the parties to consider the possibility of settlement and took the matter under advisement, with a decision to issue. Hon. Diane R. Rubin, Presiding		
01/29/2025	Case taken under advisement.		
03/12/2025	Decision issued. (Copies emailed to Attorneys George Pucci, Devan Braun, Benjamin Tymann, Michael Duffy, Meghan Huggan, and J. Yerby) Judge: Rubin, Hon. Diane R.		Image
03/12/2025	Judgment after trial entered. (Copies emailed to Attorneys George Pucci, Devan Braun, Benjamin Tymann, Michael Duffy, Meghan Huggan, and J. Yerby) Judge: Rubin, Hon. Diane R.		Image
03/28/2025	Notice of Appeal by Northland TPLP LLC to the Appeals Court filed.		Image
03/31/2025	Notice of Service of Notice of Appeal sent to George X Pucci, Esq., Devan C Braun, Esq.		
05/28/2025	Notice of Assembly of Record on Appeal sent to the Clerk of the Appeals Court.		
05/28/2025	Notice of Assembly of Record on Appeal sent to all counsel of record.		
06/10/2025	Case entered in the Appeals Court as Case No. 2025-P-0698.		

Financial Summary

Cost Type	Amount Owed	Amount Paid	Amount Dismissed	Amount Outstanding
Cost	$260.00	$260.00	$0.00	$0.00
	$260.00	$260.00	$0.00	$0.00

Receipts

Receipt Number	Receipt Date	Received From	Payment Amount
433599	08/25/2022	Pucci, Esq., George X	$260.00
			$260.00

Case Disposition

Disposition	Date	Case Judge
Judgment after trial entered.	03/12/2025	Rubin, Hon. Diane R.

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

WORCESTER, ss. Case No. 22 MISC 000445 (DRR)

TOWN OF WESTBOROUGH, by and through its Select Board

Plaintiff,

v.

NORTHLAND TPLP, LLC,

Defendant.

JUDGMENT

Plaintiff Town of Westborough (the "Town") commenced this action in the Land Court on August 25, 2022, by filing a two-count Verified Complaint against Defendant Northland TPLP, LLC ("Northland"). Count I seeks a declaratory judgement to enforce the affordability provisions included in a comprehensive permit issued to Northland's predecessor in title (G.L. c. 231A, § 1); and Count II seeks to enjoin Northland from violating G.L. c. 40B, §§ 20-23. On September 19, 2022, Northland filed its Answer to the Town's Complaint and Affirmative Defenses, Jury Demand, and Counterclaim in the U.S. District Court, then filed a First Amended Counterclaim on October 11, 2022. On October 31, 2022, the Town filed its Motion to Dismiss Northland's First Amended Counterclaim along with a memorandum in support and the U.S. District Court issued a Memorandum and Order of Remand returning the case to the Land Court

that same day.[1] On October 29 and 30, 2024, the case was tried, with closing arguments held on January 29, 2025 (Rubin, J.).

In a decision of even date, the court has made findings of fact and rulings of law, concluding that the Town is entitled to a declaratory judgment precluding Northland from terminating the affordability restrictions at The Residences at Westborough Station, located at 101 Charlestown Meadows Drive (the "Property") until such time as the development complies with local zoning. In accordance with the court's decision, it is hereby

ORDERED, ADJUDGED and DECLARED on Count I of the Verified Complaint, that the affordability restrictions at the Property located at 101 Charlestown Meadows Drive, Westborough, shall remain in full force and effect as to Northland TPLP, LLC and any successor in interest for so long as the Property does not conform with the Town's Zoning Bylaw. It is further

ORDERED and ADJUDGED on Count II of the Verified Complaint, that the defendant Northland TPLP, LLC shall maintain the affordability restrictions currently in effect at the Property located at 101 Charlestown Meadows Drive, Westborough, for so long as the Property does not comply with the Town's Zoning Bylaw. It is further

ORDERED and ADJUDGED on Count II of the Verified Complaint, that the defendant Northland TPLP, LLC shall promptly notify the affected tenants of today's Decision and order. It is further

[1] Following remand and a status conference on November 30, 2022, the parties worked together to reach a standstill agreement to obviate the need for injunctive relief during the pendency of this action. The first Order on Stipulation was endorsed by the court December 20, 2022, wherein Northland agreed to maintain affordable rents through August 31, 2023, which has been extended most recently through March 28, 2025.

ORDERED that today's Decision, and this Judgment issued pursuant thereto, dispose of this entire case; the court has adjudicated or dismissed all claims by all parties in this action and has not reserved decision on any claim or defense, and it is further

ORDERED, ADJUDGED, and DECLARED that upon payment of all required fees, this Judgment or a certified copy of this Judgment, may be recorded at the Worcester District Registry of Deeds and marginally referenced on all relevant documents.

ORDERED that no costs, fees, damages or other amounts are awarded to any party.

So Ordered.

By the Court (Rubin, J.). */s/ Diane R. Rubin*

Attest: */s/ Deborah J. Patterson*
Deborah J. Patterson, Recorder

Dated: March 12, 2025

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

WORCESTER, ss. Case No. 22 MISC 000445 (DRR)

TOWN OF WESTBOROUGH, by and through its Select Board

Plaintiff,

v.

NORTHLAND TPLP, LLC,

Defendant.

DECISION

In September of 2021, the defendant Northland TPLP, LLC ("Northland"), which owns a residential rental property located at 101 Charlestown Meadows Drive, Westborough, notified tenants occupying twenty-four (24) apartments subject to affordability restrictions under Chapter 40B that Northland intended to convert those apartments to market rate rents. After negotiations between the parties faltered, the plaintiff Town of Westborough (the "Town") filed this action seeking a declaration that permanent affordability is required for those units because the development is located in an area of the Town zoned as a single-family district, in accordance with the Supreme Judicial Court's ruling in *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. P'ship*, 436 Mass. 811, 814-15 (2002) ("*Ardemore*"). Northland disagrees.

For the reasons discussed below, I find and conclude that Northland's proposed market rate conversion runs afoul of *Ardemore*.

PROCEDURAL HISTORY

The Town, by and through its Select Board, filed a two count Verified Complaint against Northland on August 25, 2022: Count I seeks a declaratory judgement to enforce the affordability provisions included in a comprehensive permit issued to Northland's predecessor in title (G.L. c. 231A, § 1); and Count II seeks to enjoin Northland from violating G.L. c. 40B, §§ 20-23. The Town also filed a Motion for Preliminary Injunction and Supporting Memorandum of Law. In response, Northland filed a Notice of Removal to the United States District Court on September 6, 2022. Northland followed by filing its Answer to the Town's Complaint and Affirmative Defenses, Jury Demand, and Counterclaim in the U.S. District Court on September 19, 2022, and then a First Amended Counterclaim on October 11, 2022.[1] On October 31, 2022, the Town filed its Motion to Dismiss Northland's First Amended Counterclaim along with a memorandum in support. That same day, the U.S. District Court issued a Memorandum and Order of Remand returning the case to the Land Court.

Following remand and a status conference on November 30, 2022, the parties worked together to reach a standstill agreement to obviate the need for injunctive relief. The first Order on Stipulation was endorsed by the court December 20, 2022, wherein Northland agreed to

[1] Northland's First Amended Counterclaim set forth five counts. Count I alleged a regulatory taking in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution and 42 U.S.C. § 1983. Count II alleged that the Town's action sought to impair an obligation of contract and of Northland's contractual rights in violation of the Contract Clause in Article 1, Section 10 of the U.S. Constitution. Count III sought a declaratory judgment that the Town's interference with the Regulatory Agreement created a conflict with federal statutes and regulations with the U.S. Department of Housing and Urban Development's Housing Agency Risk-Sharing Program for Insured Affordable Multifamily Project Loans. Count IV alleged that to the Town's actions prohibited Northland from terminating its affordability restrictions violated the substantive due process component of the Fourteenth Amendment of the U.S. Constitution. Count V sought injunctive relief under G.L. c. 185, § 25 to enjoin the Town from taking any action to interfere with Northland's market rate conversion plans.

maintain affordable rents through August 31, 2023, which stipulation has been extended most recently through March 28, 2025.[2]

On May 31, 2023, with discovery underway, the Town filed a Motion for Protective Order. That motion was allowed in part and denied in part on August 10, 2023, permitting Northland's deposition of James Robbins, recently retired Town planner, but concluding that Northland's proposed depositions of five additional Town officials and consultants were unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.[3]

On November 14, 2023, the Town filed its Motion for Summary Judgment along with supporting memorandum, an Agreed-Upon Statement of Undisputed Facts, and appendix. On December 15, 2023, Northland filed its Cross-Motion for Summary Judgment, supporting memorandum and opposition, a Supplemental Agreed-Upon Statement of Undisputed Material Facts, response to the Town's statement of facts, and an appendix. On January 5, 2024, the Town

[2] The parties' Joint Motion for Endorsement of Fourth Order on Stipulation was approved and endorsed on September 26, 2024.

[3] The docket of August 10, 2023, states, in pertinent part: "Defendant contends that *Zoning Bd. of Appeals of Wellesley* v. *Ardemore Apartments Ltd. P'ship*, 436 Mass. 811 (2002) is not dispositive of this case and that its project is not bound by permanent affordability restrictions because they read a single sentence in the 1994 HAC Order to mean that the restrictions are for a term and therefore not permanent. The provision at issue states: 'We are confident that the MHFA [Massachusetts Housing Financing Agency] will ensure that twenty percent of the units are set aside for tenants with incomes no higher than fifty percent of median income, that long-term affordability will be assured, and that the other normal requirements for subsidized housing are met'. Defendants also allege that the town and the then-developer negotiated a termination of the restrictions that was more or less coincident with the termination of the financing agreement (and those negotiated terms resulted in the above quoted sentence from the 1994 HAC Order), though I note that the town vigorously opposes that reading. To ensure that the case is resolved efficiently so as to provide certainty for residents of these affordable units, as well as the parties, and in light of potential appellate issues, I conclude that it is most prudent to complete all discovery prior to any motion for summary judgment, to ensure complete record is before the court. Because the parties agree that the sole question before the court relates to the meaning of the 1994 HAC Order and because Defendant argues the 1994 HAC Order is ambiguous, I conclude that what happened on and around the date of that 1994 HAC Order may be relevant, however more recent statements, knowledge, or perceptions by town employees would not be relevant to the court's inquiry. Court to ALLOW deposition of James Robbins, recently retired Town Planner, who was the Town Planner at the time the 1994 HAC Order was issued and may have relevant knowledge. Accordingly, I conclude that deposition of Mr. Robbins would be reasonably calculated to lead to the discovery of admissible evidence, but that the other five depositions requested would not and would be unduly burdensome. There is no indication that the other five individuals have actual personal knowledge related to the 1994 HAC Order, such that those requested depositions are overbroad."

filed its Opposition to Northland's Cross-Motion for Summary Judgment, Responses to Northland's statement of facts, and a Motion to Strike Certain of Northland's Evidence.[4] Northland filed a Reply to the Town's opposition brief and an opposition to the Town's motion to strike on January 16, 2024. In addition, the Attorney General of Massachusetts filed an amicus brief in support of the Town on January 12, 2024. After hearing on January 17, 2024, the court denied both parties' motions for summary judgment finding a number of disputed material facts.[5]

[4] The Town specifically sought to strike Northland's reliance on portions of James Robbins' testimony at Exhibit W to Northland's Appendix, Northland's reliance on the Zoning Board of Appeals; "meeting minutes showing that CMA's counsel told the ZBA that the affordability restriction would remain in effect for '15 years;'" and Exhibit T to Defendant's Appendix (emails between representatives of Northland and representatives of MHFA on Aug. 9, 2007).

[5] The docket of January 17, 2024, stated, in pertinent part: "'Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law.' *Ng Bros. Constr., Inc.* v. *Cranney*, 436 Mass. 638, 643-644 (2002); Mass. R. Civ. P. 56(c). 'The moving party bears the burden of affirmatively showing that there is no triable issue of fact.' *Ng Bros. Constr., Inc.*, 436 Mass. at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See *Attorney Gen*. v. *Bailey*, 386 Mass. 367, 371, cert. denied, 459 U.S. 970 (1982). As recently articulated by the Supreme Judicial Court, a court must limit itself to 'logically permissible inferences' that 'flow rationally from the underlying facts'. *Carroll* v. *Select Board of Norwell*, 493 Mass. 178, 192 (2024) (citations omitted). Whether a fact is material or not is determined by the substantive law. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, 'an adverse party may not manufacture disputes by conclusory factual assertions.' *Ng Bros. Constr., Inc.*, 436 Mass. at 648. 'If the opposing party fails properly to present specific facts establishing a genuine, triable issue, summary judgment should be granted.' *O'Rourke* v. *Hunter*, 446 Mass. 814, 821-822 (2006), quoting *Cullen Enters., Inc.* v. *Mass. Prop. Ins. Underwriting Ass'n*, 399 Mass. 886, 890 (1987).

The court is cognizant of the broad language in the *Zoning Board of Appeal of Wellesley* v. *Ardemore*, 436 Mass. 811 (2002), discussing the importance of affordable housing under the statutory framework in G.L. c. 40B, as well as the distinction between zoning relief afforded by a local municipality and financial terms between a developer and its lender. Nonetheless, I conclude that the cross-motions for summary judgment must be denied due to genuine and material factual issues that appear to be in dispute as to whether the Town of Westborough (the "Town") and Avalon Properties, Inc. ("Avalon"), the predecessor-in-interest to the Defendant Northland TPLP LLC, expressly agreed to limit the duration of the affordability restrictions on the Chapter 40B development project here at issue coincident with the term of financing, and whether the footnote at issue in the 1994 Massachusetts Housing Appeals Committee order ("1994 HAC Order") reflects such an agreement. Central to the parties' dispute is the Joint Status Report and Recommendation filed by the Town and Avalon on June 6, 1994, which states that the "Town does not contest fundability," and Footnote 1 to the 1994 HAC Order ("Footnote 1"), where the HAC appears to have adopted the recommendation in the Joint Status Report. Footnote 1 states in pertinent part: 'We are confident that MHFA will ensure that twenty percent of the units are set aside for tenants with incomes no higher than fifty percent of median income, that long-term affordability will be assured, and that other normal requirements for subsidized housing are met.'

While the Town, together with the Attorney General's Office which files a brief as amicus curiae, contend that Footnote 1 is irrelevant, that the duration of affordable housing restrictions for the property at issue are governed by Ardemore, and that there are no material factual distinctions from the circumstances in Ardemore, the Defendants cite Footnote 1 as evidence of an agreed upon limit on the duration of the affordable housing obligations. Drawing

At an initial pre-trial conference on April 24, 2024, the court dismissed without prejudice Northland's counterclaims based on the Fifth and Fourteenth Amendments and the Contracts Clause of the U.S. Constitution for lack of jurisdiction.[6] Further, with no firm date set for the close of discovery, the court set a deadline. On September 25, 2024, the court held a further pre-trial conference, where the court confirmed with counsel the issue for trial, specifically: Whether plaintiff is entitled to a declaration pursuant to G.L. c. 231A and an order that the defendant maintain affordability restrictions on property known as The Residences at Westborough Station, located at 101 Charlestown Meadows Drive (the "Property"), for so long as the Property does not conform with the local bylaw. The court also set a deadline for filing motions in limine.

On October 11, 2024, the Town filed a Motion in Limine to preclude Northland's proposed witnesses from testifying at trial, and on October 17, 2024, Northland filed a memorandum in opposition. Following a hearing on October 22, 2024, the court denied the Town's motion in limine, concluding that it was not clear that the testimony of Northland's witnesses would be irrelevant with Northland's proffered evidence *de bene*, subject to the

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all logically permissible inferences in favor of the Defendant, as is required on the Town's motion for summary judgment, I conclude there are a number of disputed material facts bearing a rational connection to the Defendant's position that will benefit from a full presentation at trial. See Carroll, 493 Mass. at 192. For instance, in support of its contention that an express agreement existed between the Town and Avalon to limit the duration of the obligation to provide affordable housing at the property, the Defendant has provided attested evidence of the Town's historic housing affordability inventory filings listing an end-date to the affordable status of units at the property, as well as testimony of a former Town official as to the reason for inclusion of Footnote 1 in the 1994 HAC order. This and other evidence presented at trial may clarify the meaning of Footnote 1 in the appropriate factual and procedural context and the existence of any agreement between the Town and Avalon."

[6] The docket of April 24, 2024, states, in pertinent part: "The first such matter being defendant's counterclaims, which had been pled in the alternative in the event that the court determines that the affordability restrictions in perpetuity, based on the Fifth and Fourteenth Amendment to and the Contracts Clause of the United States Constitution and for declaratory judgment. By way of background, Attorney Tymann explained these counterclaims had been filed in federal court and were subject to a pending motion to dismiss that has not yet been argued on remand. Court noted the Land Court's lack of subject matter jurisdiction to hear these claims as unrelated to 'right, title, or interest in land,' and too expansive and independent factually and legally to be appropriate for the exercise of the Land Court's ancillary jurisdiction. See G.L. c. 185, § 1(k); *Ritter v. Bergmann*, 72 Mass. App. Ct. 296, 302 (2008)."

Town's filing a motion to strike at the close of evidence. On October 24, 2024, the parties filed a Revised Joint Pre-Trial Memorandum.

Trial commenced on October 29 2024, in person, the court confirming the single issue for trial. Parties introduced Agreed Upon Exhibits 1-25, with Parties' Statement of Agreed Facts Nos. 1-25 stipulated as set forth in the Revised Joint Pre-Trial Memorandum. Contested Exhibits 1-21 were admitted de bene as to relevance, with Town to raise any other objection at the time an exhibit is introduced. Town Manager, Kristi Williams ("Williams"), testified on behalf of the Town, followed by Suzanne Abair ("Abair"), Northland's Chief Operating Officer and President, on behalf of Northland. At the close of the first day of trial, plaintiff filed Town of Westborough's Motion to Strike Witness Suzanne Abair's testimony, with opposition from defendant to be included in its post-trial briefing. Trial continued on October 30, 2024, with the testimony of Mr. James Robbins via videoconference. After receipt of the trial transcripts and post-trial memoranda, closing argument was held on January 29, 2025, and I took this matter under advisement.

FINDINGS OF FACT

Based on the facts stipulated by the parties, the documentary and testimonial evidence admitted at trial, and my assessment as the trier of fact of the credibility, weight, and inferences reasonably to be drawn from the evidence admitted at trial, I make factual findings as follows:

The Property, its Permitting, Financing, and Development

1. The defendant, Northland TPLP LLC, owns the Property. At the time of Northland's acquisition in 2007, a residential rental apartment building with 120 units was located on the Property. Twenty-four of those units are subsidized and subject to the affordability restrictions at issue. The development constructed at the Property was permitted under the

authority of the Massachusetts comprehensive permit statute, G.L. c. 40B, §§ 20-23 (the "Act"). Statement of Agreed Facts by Plaintiff and the Private Defendant, filed with their Joint Pre-Trial Memorandum, on October 24, 2024 ("SOF"), ¶¶ 1, 2.

2. CMA, Inc. ("CMA"), the prior owner of the Property, began its efforts to develop the Property by submitting an application for a comprehensive permit to the Town's Zoning Board of Appeals ("ZBA") in 1988. CMA sought to construct 274 units of subsidized, affordable housing in three buildings on a parcel of 11.1 acres, and later modified its proposed project to 180 units in three buildings on a slightly smaller parcel. At the time, the Property was located in an industrial district. Funding for the project was proposed under the Commonwealth's Tax Exempt Local Loan to Encourage Rental Housing ("TELLER"). SOF, ¶ 3; Tr. Exs. 2, 19.

3. In 1989, after a public hearing, the ZBA voted to deny CMA's application for a comprehensive permit. SOF, ¶ 4; Tr. Ex. 2.

4. CMA then appealed from the ZBA's denial decision to the Massachusetts Housing Appeals Committee ("HAC"). SOF, ¶ 5; Tr. Ex. 2.

5. On June 25, 1992, the HAC rendered a decision finding, inter alia, that: (a) the ZBA's decision was not consistent with local needs; (b) a project with of 120 units in two buildings was consistent with local needs and ordered the issuance of a comprehensive permit for the construction of no more than 120-units of housing (the "1992 HAC Decision"). The 1992 HAC Decision included various conditions and required CMA to file with the HAC modified plans for its review and approval by final order. SOF, ¶ 6; Tr. Ex. 2.

6. Among other things, the 1992 HAC Decision required that "construction in all particulars shall be in accordance with all presently applicable zoning and other by-laws except those

which are not consistent with this decision." Further: "When a Final Order is issued in this case, the Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant without delay." The HAC retained jurisdiction over the proposed project to issue a final permit for the project. Tr. Ex. 2, ¶ .

7. After the HAC issued the 1992 HAC Decision, but without an actual comprehensive permit having issued, a subsequent developer, Avalon Properties, Inc. ("Avalon") reached an agreement with CMA to purchase the Property. SOF, ¶ 7; Tr. Ex. 3.

8. Avalon requested that the ZBA approve certain proposed changes to the development in a letter dated March 15, 1994. That letter states: "In order to proceed, certain changes to and/or clarification of the Permit are necessary. Under the terms of the HAC decision and the Comprehensive Permit regulations, we are uncertain whether these changes/clarifications should be sought from the HAC or ZBA. We do not believe any of these changes are substantial." Among those requested changes was authority to use either TELLER or Massachusetts Housing Finance Agency ("MHFA") (or MIFA) financing. SOF, ¶ 8; Tr. Ex. 3.

9. In a letter dated April 5, 1994, the ZBA requested that the proposed changes be submitted to HAC because no comprehensive permit had issued yet and because the 1992 HAC Decision indicated that the HAC intended to retain jurisdiction.[7] SOF, ¶ 9; Tr. Ex. 4, at 1-2.

10. On or about April 27, 1994, following counsel's conference with the HAC, the Town and Avalon reached agreement and on June 6, 1994, submitted a Joint Status Report and Recommendation regarding Avalon's proposal. SOF, ¶ 10; Tr. Ex. 5.

[7] Specifically, the letter states: "The Board made this determination as a result of the fact that a Comprehensive Permit has not yet been issued by the Appeals Committee and that the Committee's decision of June 25, 1992 contained language indicating that the Committee has retained jurisdiction in this matter."

11. In that Joint Status Report, the Town and Avalon reported that they had reached agreement on certain issues, but failed to reach agreement on others. The Town and Avalon recommended that the HAC issue a final comprehensive permit, subject to the resolution of the unresolved issues. Specifically, the parties agreed, *inter alia*, that: (a) the plans submitted by Avalon to the HAC complied with the 1992 HAC Decision; (b) the ZBA did not object to Avalon's proposed change in building type; (c) the Town's Board of Selectmen had voted a partial waiver of sewer and water fees; (d) the HAC be requested to approve in writing the transfer of the comprehensive permit from CMA to Avalon; (e) the development was fundable, Avalon having submitted a project eligibility letter from MHFA; and (f) that Avalon would confirm that the project did not require the filing of an Environmental Impact Report with the Massachusetts Executive Officer of Environmental Affairs under the Massachusetts Environmental Policy Act. SOF, ¶ 11; Tr. Ex. 5.

12. The Joint Status Report was signed by counsel for the both the Town and Avalon. It includes no mention of an agreed upon end date for affordability restrictions at the Property. Tr. Ex. 5.

13. On July 20, 1994, the HAC issued an "Order to Transfer of Permit " (the "1994 HAC Order"), after receiving the Joint Status Report, convening a conference of counsel and conducting an evidentiary hearing. The 1994 HAC Order began by stating:

> Because Avalon still intends to develop the site as affordable housing pursuant to the comprehensive permit, and because there is general agreement that the changes represent improvements in the design, most of the outstanding issues have been resolved by the Joint Recommendation. The major issue left unresolved is that of water and sewer fees imposed by the Town.
>
> Tr. Ex. 6.

14. The 1994 HAC Order went on to: (a) approve the proposed changes to the project plans; (b) approve the change in funding source from the TELLER program to the MHFA; (c) render a

decision on the water and sewer fees; (d) approve the transfer of comprehensive permit from CMA to Avalon; and (e) condition its order on certification that an Environmental Impact Report was not required.

15. With respect to the permit transfer, the 1994 HAC Order stated: "All conditions contained in the [1992 HAC Decision] , except those modified in this order, will apply to the transferees…" It concluded by stating: "[i]t is hereby ORDERED that the comprehensive permit be transferred and modified as set out above." SOF, ¶¶ 12, 13; Tr. Ex. 6, at 5-6.

16. The 1994 HAC Order also contained a footnote to the section approving the change in funding source from the TELLER program to the MHFA. That footnote stated:

> Exhibit G is a March 21, 1994 letter from the MHFA confirming its interest in financing the proposal. This letter would not be sufficient to constitute a determination of project eligibility under 76 C.M.R. 31.01 (2) at the beginning of the comprehensive permit process. *But at this point, since project eligibility was previously established and fundability is not contested by the Board, the letter is acceptable. We are confident that the MHFA will ensure that twenty percent of the units are set aside for tenants with incomes of no higher than fifty percent of median income, that long-term affordability will be assured, and that the other normal requirements for subsidized housing are met*. ("Footnote 1") (emphasis supplied).
>
> The italicized language is relied upon by Northland in support of an end date to the affordability restrictions. SOF, ¶ 14; Tr. Ex. 6, at 3.

17. Twenty percent of the 120 units is equivalent to 24 units. SOF, ¶ 15.

18. The HAC, the ZBA, Avalon, and Northland all treated the 1992 HAC Decision and the 1994 HAC Order as the operative comprehensive permit for the Property. SOF, ¶ 29; Tr. Exs. 7, 9, 10, 24.

19. Following issuance of the 1994 HAC Order, CMA conveyed title to the Property to Avalon by deed dated December 16, 1994. SOF, ¶ 16.[8]

[8] Quitclaim Deed for Avalon's acquisition of property was executed on December 16, 1994, and recorded at the Registry, at Book 16777, Page 344.

20. Thereafter, Avalon developed the subsidized housing development at the Property, with 120 units, in accordance with the 1992 HAC Decision, the 1994 HAC Order, and the Act. SOF, ¶ 17.

21. On December 10, 1996, Avalon and MHFA entered into a series of regulatory documents concerning the Property and implementation of affordability requirements. These included a Regulatory Agreement and a Land Use Restriction Agreement. The latter, which was incorporated by reference into the former, contains a fifteen-year affordability restriction. The Town was not a party to either of these agreements. Tr. Exs. 7, 8, at 2-3.

22. In connection with this transaction, also on December 10, 1996, the law firm Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. ("Mintz Levin"), which acted as special counsel to Avalon, rendered an opinion to MHFA that the comprehensive permit issued to Avalon pursuant to the Act was a valid comprehensive permit. It further stated: "[t]he Project does not violate the applicable provisions of the Westborough Zoning By-Law." Tr. Ex. 24.

Northland's Acquisition of the Property and Amendments to Financing Agreements

23. On September 25, 2007, Avalon conveyed the Property to Northland's single purpose entity, by quitclaim deed. SOF, ¶ 18.[9]

24. Northland is a sophisticated real estate private equity firm with a "focus on the acquisition, development, long-term ownership, and management of mixed use and multi-family assets." It owns 94 properties comprised of over 26,000 multi-family housing units across sixteen states. Northland manages approximately eight billion dollars in assets and generates about 600 million dollars in annual revenue. Tr. I, 97, 140-141.

[9] Quitclaim Deed for Avalon's acquisition of property was executed on September 25, 2007, and recorded at the Registry, at Book 41842, Page 117.

25. Abair joined Northland in 2004, as general counsel. She is now the Chief Operating Officer and President. Previously, she was a corporate attorney at Mintz Levin. Abair's first involvement with the Property began in 2007, when she oversaw legal aspects of the acquisition. At that time, according to Abair, the end date for the affordability restrictions was 2011. She testified that as a condition of approving Northland's acquisition of the Property, MHFA required Northland to extend the affordability restrictions for fifteen years, until 2022. Tr. I, 98-99, 101, 103, 108-109.

26. Northland executed two amendments to the financing agreement with MHFA. The first is dated September 25, 2007, and was recorded on September 25, 2007 at the Worcester County Registry of Deeds (the "Registry"), at Book 41842, Page 143 (the "2007 Amendment to Regulatory Agreement"). Northland's Second Amendment to the Regulatory Agreement with MHFA, is dated October 18, 2018, and was recorded on October 26, 2018 at the Registry, at Book 59605, Page 245 (the "2018 Amendment to Regulatory Agreement"). SOF, ¶ 19; Tr. Exs. 9, 10.

27. The 2007 Amendment to Regulatory Agreement states, in Paragraph 1:

> Extension of Affordability Restrictions. The Owner covenants and agrees for itself and any successors and assigns that the provisions contained in Section 1 and 2 of the Regulatory Agreement (the Affordability Restrictions") shall continue in effect *for a period of fifteen years* from the date of this Amendment. The covenant contained in the preceding sentence shall run with the land, be binding upon the Owner and any successors and assigns to the fullest extent permitted by law, be for the exclusive benefit of [MHFA], be enforceable solely by [MHFA], its successors and assigns and shall survive the foreclosure of the Mortgage and be binding upon and enforceable against any purchaser at a foreclosure sale. [MHFA] and its successors and assigns, as sole beneficiary of the covenants provided by the Owner herein, may release the Owner from its obligations herein if [MHFA] determines that such release will preserve affordable housing that would otherwise be converted to market rate housing, or if [MHFA] otherwise finds that such release will further the specific purposes of the Enabling Act (emphasis supplied).

In 2018, Northland refinanced its loan obligations and entered into the 2018 Amendment to Regulatory Agreement with MHFA. As a result of these regulatory agreements, Northland was obligated to MHFA to maintain the affordability restrictions for fifteen years until September 25, 2022. SOF, ¶ 20; Tr. I, 108-109, 112; Tr. Exs. 9, 10.

28. The Town is not a party to the initial Regulatory Agreement or its amendments, nor was the Town was not included in negotiations with MHFA. SOF, ¶ 21; Tr. Exs. 9, 10.

29. In or about December 2011, Northland paid off the remaining balance of its mortgage on the Property, thus completing its financing obligations to MHFA. SOF, ¶ 22; Tr. Ex. 22.[10]

30. On April 18, 2013, MHFA sent a letter to the Town Manager reporting that the mortgage loan for the Property had been paid off in full. Further, "Because the project has repaid its mortgage in full, [MHFA] has no regulatory authority to continue monitoring the project for compliance with Chapter 40B and is referring this project to the Town of Westborough for its attention in that regard." Tr. Ex. 21.

31. Abair testified that Northland understood when they purchased the Property that it could terminate the affordability restrictions in 2022 and would not have purchased the Property without the ability to convert the affordable units to market rate at that time. Tr. I, 112-113.

Northland's Notice of Conversion to Market Rate

32. In September of 2021, Northland gave written notice to the tenants residing in the 24 affordable units at the Property that as of September 25, 2022, Northland would convert those units to market rate rent and terminate the affordability restrictions. SOF, ¶ 24.

33. In the fall of 2021, the Town received telephone calls from affected residents, reporting that Northland planned to end the affordability restrictions. After learning of Northland's

[10] Satisfaction/Discharge of Avalon's Mortgage and Termination of Land Use Agreement dated December 12, 2011 and recorded December 23, 2011 at the Registry, at Book 48316, Page 20.

intention, the newly formed Westborough Affordable Housing Trust (the "Trust") scrambled to find programs or grants that might be able to assist the affordable housing tenants at the Property bridge the gap to the proposed increased rents. Tr. I, 91-92; Tr. Ex. 13.

34. The Trust also hired a housing consultant to assist the search for subsidy programs. Although the consultant reported being unable to identify any available subsidy programs, he did alert the Trust and the Town to the Supreme Judicial Court's decision in *Ardemore*. Tr. I, 43-45; Tr. Ex. 14.

35. On June 16, 2022, on behalf of the Select Board, Town Manager Williams wrote to Northland's Managers (Abair included), stating an expectation that Northland would continue to comply with the terms of the Regulatory Agreement since the development does not comply with the local zoning bylaw and referencing *Ardemore*. The letter stated, *inter alia*:

> The *Ardemore* decision stands for the proposition that when a comprehensive permit does not expressly limit the duration of the affordable housing restriction (and the Permit for the development does not limit the term), the property developed pursuant to the comprehensive permit must stay affordable for so long as the development does not comply with the zoning bylaws.
>
> The letter invited Northland's Managers to attend a Select Board's meeting to confirm that Northland would continue to rent the affordable housing units to low-income households. Tr. I, 45; Tr. Ex. 15.

36. Abair testified that her reaction to the letter from Williams was disbelief. Northland's Managers tried to gain an understanding of the Town's position in light of the preceding 26 years of the course of dealing regarding the applicability of *Ardemore*, they did so in light of their course of dealing. Tr. I, 134.

37. On June 28, 2022, Beth Kinsley, Northland's General Counsel ("Kinsley"), wrote to Williams stating Northland's disagreement that the affordability restrictions for the 24 units in question had to be maintained in perpetuity, in part because Northland did not regard the *Ardemore* decision as controlling under the circumstances. The letter did agree to meet with Williams and the Select Board. Tr. Ex. 16.

The Commonwealth' s Subsidized Housing Inventory

38. The Massachusetts Department of Housing and Community Development ("DHCD") maintains an inventory of housing units in the Commonwealth's cities and towns that are subject to affordability restrictions under Chapter 40B. It regularly prepares lists of those units called Subsidized Housing Inventory ("SHI") lists. The SHI lists display in spreadsheet format each municipalities affordable housing properties and include a column entitled "Affordability Expires." SHI lists for Westborough dated 9/24/08 (Tr. Ex. 20), 4/22/22 (Tr. Ex. 11), and 11/16/22 (Tr. Ex. 12) were introduced into evidence. The SHI dated September 24, 2008 lists the 24 units at the Property, with an expiration date of "2025". This SHI, like others admitted into evidence, includes a footnote that reads: "This data is derived from information provided to [DHCD] by individual communities and is subject to change as new information is obtained and use restrictions expire." Tr. Exs. 11, 12, 20.

39. On November 21, 2008, George Thompson, then-Chairman of the Town's Board of Selectmen ("Thompson") wrote to the Office of Chief Counsel at DHCD, with copies to James Robbins, then-Town Planner ("Robbins") and Steven Liedell, then at the Westborough Housing Partnership. The letter requested several edits to the Town's entries on the 2008 SHI, but did not request that DHCD edit the affordability expiration date for the Property. Tr. Ex. 20.

40. The SHI list dated 10/31/23 lists the expiration date for the Property as "Perp," in other words perpetual. At this point, the name of the agency had been changed from DHCD to the Executive Office of Housing and Livable Communities ("EOHLC"). EOHLC corrected its records after the Town reached out to communicate the "2025" expiration date was in error. Tr. I, 47-50; Tr. Ex. 17.

41. According to Robbins, this isn't the only time that the SHI lists contained errors. For instance, another affordable housing property in Westborough, the Parc Westborough, previously stated an expiration date of "2045," but was later corrected to state "perp[etuity]." Although there have been instances in the past where MHFA declined to make changes requested by the Town, MHFA did make the change to "perp[etuity]" when alerted by the Town." Tr. 1, 94; Tr. II, 57-58; Tr. Exs. 11, 17.

42. Williams testified that she did not know why the two 2022 SHI lists included an expiration date of 2025 for the Property, but that DHCD is ultimately responsible for making changes to SHI lists, and that all a Town can do is make requests for changes to the SHI lists. I credit this testimony, which was uncontradicted by Northland. Tr. I, 47-50.

43. Robbins was the Town Planner from 1993 until 2023. He testified that he had no involvement in the comprehensive permit here at issue or the affordability restrictions at the Property. I credit Robbins' straightforward testimony. When asked about the SHI list, he paused, appearing to probe his memory thoughtfully, and stated clearly and directly that he was not responsible for compiling the number of units to be included in SHI lists, nor did he investigate the accuracy of the SHI reporting information. He never discussed affordability restrictions with Avalon. Rather, according to Robbins, the Town's Zoning Enforcement Officer (Joseph Inman in the 1990s) was responsible for maintaining data for the SHI lists. I

find that Robbins had no knowledge as to why the three SHI's listed "2025" as the expiration date for affordability restrictions at the Property, nor was he involved in how expiration dates on were identified, listed, or transmitted. Tr. II 51-56.

44. In the absence of any evidence indicating the 2022 and the SHI lists accurately reflected an end date for the affordability restrictions at the Property, I find that there is no reasonable explanations as to why the SHI lists show an expiration date. Those entries well be an error. Notably, there are no SHI lists or any documentation contemporaneous with the 1994 HAC Order reflecting an end to the affordability restrictions. I further find and conclude that the SHI lists cannot and do not constitute an agreement by the Town to an end date to the affordability restrictions.

The Zoning Status of the Property

45. Williams testified that she reviewed the minutes of meetings of the Board of Selectmen from 1994 onward and found no vote by the Board of Selectmen to agree to an expiration date for the affordability restrictions at the Property. In comparison, for instance, on May 24, 1994, the Board of Selectmen voted in favor of a motion to waive water and sewer fees for the Property's 24 affordable units, but did not vote on an end date for affordability restrictions at that meeting. I credit Williams' testimony and find that the Board of Selectmen did not vote to approve an expiration date for the affordability restrictions at the Property. Tr. I, 51-52, 95; Ex. 23.

The Property's Zoning Status and the Town's Affordable Housing Inventory

46. Today, the Property is located in a Single Residence ("R") zoning district. Multi-family apartment buildings, such as this development, are prohibited outside of the context of

Chapter 40B or other law authorizing exemption from municipal zoning bylaws. SOF, ¶ 25; Tr. Ex. 18.

47. Since the initial development of the affordable housing development to date, at least twenty percent of the units, or 24 units total, have been rented to low-income families and individuals. SOF, ¶ 23.

48. At present, 11.7 percent of the Town's total housing units are classified as subject to affordability restrictions. In the event the 120 units at the Property are to be omitted from this calculation, the Town's percentage of affordable housing units would fall closer to the ten percent threshold that it needs to maintain in order to gain the benefits of the safe harbor provisions of Chapter 40B.[11]

DISCUSSION

I. STANDARD OF REVIEW

"The land court... may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby... in any case in which an actual controversy has arisen and is specifically set forth in the pleadings." G.L. c. 231A, § 1. To establish subject matter jurisdiction for a declaratory judgment to issue under G.L. c. 231A, "the plaintiff must demonstrate that an actual controversy exists and that he has legal standing to sue." *District Attorney for the Suffolk Dist. v. Watson*, 381 Mass. 648, 659 (1980), citing *Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins.*, 373 Mass. 290, 292 (1977). "The purpose of both the actual controversy and the standing requirements is to ensure the effectuation of the statutory purpose of G.L. c. 231A, which is to enable a court 'to afford relief from . . .

[11] Once a municipality has met its minimum obligations for affordable housing under Chapter 40B, § 20, local zoning requirements are deemed consistent with local needs and the HAC is without authority to order a local zoning bord to issue a comprehensive permit. See *Ardemore*, 436 Mass. at 824, citing *Zoning Bd. of Appeals of Wellesley* v. *Housing Appeals Comm*., 385 Mass, 651, 657 (1982)

uncertainty and insecurity with respect to rights, duties, status, and other legal relations.'" *Galipault v. Wash Rock Invs., LLC*, 65 Mass. App. Ct. 73, 84-85 (2005), quoting G.L. c. 231A, § 9; see *Sahli v. Bull HN Info. Sys., Inc.*, 437 Mass. 696, 705 (2002). Declaratory judgment proceedings are "concerned with the resolution of real, not hypothetical, controversies; the declaration issued is intended to have an immediate impact on the rights of the parties." *Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc.*, 373 Mass. at 292-93. Chapter 231A is remedial in nature and is to be liberally construed. G.L. c. 231A, § 9.

Here, the requirement of an actual controversy is satisfied by Northland's stated intention to convert 24 units of affordable housing to market rate. Because the Town has an interest in the continued vitality of the affordable housing restrictions at the Property, the loss of which would impact its ability to take advantage of the safe harbor provisions of Chapter 40B, the Town has standing to seek a declaration as to the legality of this intention.

II. CHAPTER 40B AND THE *ARDEMORE* DECISION

The comprehensive permit statute, General Laws c. 40B, §§ 20-23 (the "Act") was enacted "to provide relief from exclusionary zoning practices which prevented the construction of badly needed low- and moderate-income housing." *Zoning Bd. of Appeals of Amesbury v. Hous. Appeals Comm.*, 457 Mass. 748, 760 (2010). Because one of the functions of the Act is to allow for the development of multi-family housing in areas zoned for only single-family housing when certain parameters are met, it is sometimes referred to as the anti-snob zoning act. *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. P'ship*, 436 Mass. 811, 814-15 (2002). The Act establishes a comprehensive permit process allowing developers to file a singular application with a local zoning board. *Id.* at 815. In the event an application for a comprehensive permit is denied by a local zoning board (as happened in this case), the Act provides recourse for

a developer to appeal that denial to the HAC. The HAC then decides whether a local board's denial or imposition of conditions was "reasonable and consistent with local needs." G.L. c. 40B, § 23. If it finds that "the need for low or moderate income housing in a town outweighs the valid planning objections to the proposal …," the HAC has the authority to issue a comprehensive permit. *Ardemore*, 436 Mass. at 815.

At issue in *Ardemore* was a comprehensive permit issued by the Town of Wellesley's Zoning Board of Appeals in July of 1982 to Cedar Street Associates, approving construction of a thirty-six unit apartment building in a district zoned for single-family dwellings. *Id.* at 812, 816. The comprehensive permit was issued by the Town upon an order from the HAC and included language virtually identical to the HAC order. It did "not specify for how long the project was to remain affordable to low or moderate income persons; it [was] silent on the point." *Id.* at 813. Financing for the development was provided by MHFA and the State Housing Assistance for Rental Production Program ("SHARP"). *Id.* at 819. "As a condition of obtaining construction financing from MHFA, the owner agreed to rent twenty per cent of the units to low- or moderate-income persons or families under a land use restriction agreement, and twenty-five per cent of the units to persons or families of low income under the SHARP agreement, at least until July 8, 2000." *Id.* The Town "was not a party to the construction financing agreements and had no ability to control or influence their terms." *Id*. In June of 1996, Cedar Street Associates sold the development to Ardemore Apartments Limited Partnership (the "*Ardemore* Developer"). The *Ardemore* Developer entered into several agreements to assume Cedar Street's obligations under the financing agreements and also executed a new regulatory agreement with MHFA, which together governed operation and management of the development. *Id.* at 816.

In the ensuing litigation, the *Ardemore* Developer claimed that it could convert all nine of the low- or moderate-income units at the development to market rate rentals in July 2000. In support of its position, the *Ardemore* Developer relied on fixed terms in its financing agreements with MHFA which provided that the affordability restrictions expired after 15 years, in 2000. *Id.* at 813. The Supreme Judicial Court disagreed and concluded that the affordability restrictions must be maintained so long as the development remained out of compliance with local zoning. *Id.* In sum, the *Ardemore* Developer's financing obligations were separate and distinct from its obligation to comply with local zoning. Wellesley was not a party to the financing agreements and had no ability to control or influence their terms.

In reaching this conclusion, the Supreme Judicial Court undertook a comprehensive analysis of the Legislature's history of the Act, concluding that it was "abundantly clear" that the Legislature intended the statute to be a "long-term" solution to the "'acute shortage of decent, safe, low and moderate cost housing throughout the commonwealth.'" *Id.* at 814, 820, quoting *Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 363 Mass. 339, 351 (1973); Report of the Committee on Urban Affairs (quoting 1969 House Doc. No. 5429, at 2). The argument of the *Ardemore* Developer ran counter to the Legislature's intent.

> [T]he Act reflects a legislative intent to provide an incentive to developers to build affordable housing in cities and towns that are deficient in affordable housing, and a developer's commitment to help a city or town achieve its statutory goal is the raison d'etre for the override of inhibiting zoning practices. But if housing developed under a comprehensive permit is "affordable" only temporarily…, a city or town may never achieve the long-term statutory goals: each time an affordable housing project reverts to market rentals, the percentage of low income housing units in municipality decreases, the percentage of market rage units increases, and access to a new round of comprehensive permits is triggered. We see nothing to suggest that the Legislature had in mind such an endless revolving cycle, or contemplate that over time an ever increasing number of multi-family buildings could be constructed on vacant land in areas zoned for single-family homes, as multi-family housing building were first added to and then subtracted from a town's statutory goal.

Ardemore, 436 Mass. at 824.

The Supreme Judicial Court further reasoned: "Because local municipalities are not parties to financing agreements involving Federal and State construction subsidy programs, and because the terms of these programs fluctuate over time, it would be illogical to interpret G.L. c. 40B, §§ 20-23 as requiring municipalities to be bound by such agreements. *Id.* If the Legislature intended financing agreements between State or Federal funding agencies and third-party owners to govern the terms of a comprehensive permit, it could have made that explicit. *Id.* at 826.[12] "Thus, [where a comprehensive permit is issued under the Act] unless otherwise expressly agreed to by a town, so long as the project is not in compliance with local zoning ordinances, it must continue to serve the public interest for which it was authorized." *Id.* at 825. An owner must "maintain the units as affordable for as long as the housing is not in compliance with local zoning requirements, regardless of the terms of any attendant construction subsidy agreements." *Id.* at 813.

III. THIS CASE IS GOVERENED BY *ARDEMORE*

The circumstances underlying this case are closely akin to those in *Ardemore*. In both cases, the developments at issue are subject to financing agreements with the Commonwealth's agencies. Northland's acquisition of the Property was financed by MHFA, via the Regulatory Agreement which incorporated the Land Use Restriction Agreement; while the *Ardemore* Developer had the benefit of financing agreements with MHFA loan and a SHARP loan. In both

[12] Northland mistakes its obligations to MHFA under the financing agreements with its wholly independent obligation to the Town to comply with local zoning. As explained in *Ardemore*, Chapter 40B is zoning statute, not a financing statute – it provides no funding to developers. The requirement in Chapter 40B that developers comply with federal and state subsidy programs is "more properly viewed as a statutory mechanism to determine the threshold eligibility for the developer of a housing project to seek a comprehensive permit." *Ardemore,* 436 Mass. at 825-826.

cases, the financing agreements included a requirement that the owners maintain affordability restrictions for fifteen years. In each case, only the owners and lenders were parties to the financing agreements; in neither case did the municipality sign the financing agreements, nor did it participate in the financing negotiations. In both cases, the projects constructed do not conform with the requirements for the zoning district in which constructed.

Despite these similarities, Northland asks the court to determine that Northland is not bound to maintain affordability restrictions at the Property. According to Northland, the comprehensive permit at issue differs materially from that at issue in *Ardemore*. Specifically, Northland contends that Footnote 1 in the 1994 HAC Order evidences the Town's express agreement to limit the affordability restrictions at the Property to the duration of Northlands' financing obligations to MHFA. Footnote 1 states:

> Exhibit G is a March 21, 1994 letter from the MHFA confirming its interest in financing the proposal. This letter would not be sufficient to constitute a determination of project eligibility under 76 C.M.R. 31.01 (2) at the beginning of the comprehensive permit process. But at this point, since project eligibility was previously established and fundability is not contested by the Board, the letter is acceptable. *We are confident that the MHFA will ensure that twenty percent of the units are set aside for tenants with incomes of no higher than fifty percent of median income, that long-term affordability will be assured, and that the other normal requirements for subsidized housing are met*. (emphasis supplied).

Northland focuses its attention on the italicized sentence in Footnote 1 which states: "We are confident that the MHFA will ensure that twenty percent of the units are set aside for tenants with incomes of no higher than fifty percent of median income, that long-term affordability will be assured, and that the other normal requirements for subsidized housing are met." According to Northland, this statement evidences the Town's agreement to delegate to MHFA the authority to determine the end date of the affordability restriction because MHFA would assure "long-term

affordability." On this basis, Northland reasons that once it has satisfied its extended financing obligations to MHFA, the 24 units could be converted to market rate.

For the reasons discussed below, I conclude that the plain language of Footnote 1 is an insufficient expression of the Town's express agreement to limit affordability restrictions to satisfy the rigorous standard in *Ardemore*. HAC adjudicatory decisions, like municipal permits, are construed subject to the rules of statutory construction and interpretation, rather than contractual principles. See *Zoning Bd. of Appeals v. Hous. Appeals Comm.*, 457 Mass. 748, 757 (2010) (in which the court applied the rules of statutory construction to the HAC's interpretation of G.L. c. 40B, §§ 20-23); *Scituate Zoning Bd. of Appeals v. Herring Brook Meadow, LLC*, 20 LCR 376, 381 (2012) (10 PS 432685) (Grossman, J.) (where the court applied common rules of statutory construction to HAC's interpretation of its own regulations). See *Whittaker* v. *Town of Brookline*, 318 Mass. 19, 23 (1945), citing G.L. (Ter. Ed.) c. 4, § 6 (Where the terms are plain and unambiguous, they are interpreted according to the customary and ordinary usage.) *Ardemore* requires that a municipality's agreement be express. See, e.g., *Grant* v. *Carlisle*, 328 Mass. 25, 29 (1951) (the word "express", "signifies a contract where the terms are expressly stated in contradistinction to an implied contract where an agreement is inferred from the conduct of the parties and from the attendant circumstances"). Agreement cannot be implied or inferred.

Consideration of Footnote 1 reveals, most simply, that it does not include a specific termination date for the Property's affordability restrictions. MHFA's assurance of "long-term affordability" is not equivalent to the Town's explicit agreement to limited duration. Footnote 1 does not define a specific number of years until an end date. It does not delineate a specific duration. Nor does Footnote 1 expressly state that MHFA would be responsible for determining

the duration of the affordability restrictions. Had the Town intended to express its agreement to time-limited affordability restrictions in exchange for zoning relief, it could have done so. It did not.

Also instructive, is the placement of the phrase "long-term affordability" in a footnote in the 1994 HAC Order. It is unlikely that if the Town had intended to expressly agree to set an end to the affordability restriction, such an important term would appear in an offhand manner in a footnote, instead of featuring prominently in the body of the order. Also instructive is the placement of Footnote 1 at the end of a sentence acknowledging the change of funding source for the project from the TELLER program to a MHFA program. This placement indicates that Footnote 1 is intended to expand upon or clarify the preceding sentence, rather than to introduce an entirely new and material term. See e.g. *Berman* v. *Coutinho*, 20 Mass. App. Ct. 969, 970 (1985) ("plaintiffs' interpretation … overlooks the placement of the footnote reference in the body of the dimensional schedule. As referenced, the footnote is relevant only to the minimum front yard requirement). Because Chapter 40B requires developments be fundable by a subsidizing agency under a low- or moderate-income housing subsidy program in order to be eligible for a comprehensive permit, it is far more reasonable to conclude that Footnote 1 was included to explain that the source of funding was modified when Avalon assumed the development, than to conclude that the parties buried a critically important term in a footnote. The discussion of funding in Footnote 1 does not constitute the type of express agreement by the Town to limit the duration of the affordable housing restriction contemplated by *Ardemore*.

Northland also attempts to distinguish its situation from that in *Ardemore* by highlighting that Wellesley issued a comprehensive permit to CMA, whereas here the Town instead adopted the 1992 HAC Decision and 1994 HAC Order as the comprehensive permit. According to

Northland, the Town's reliance on the 1992 HAC Decision and 1994 HAC Order -- and failure to issue its own comprehensive permit with express language requiring permanent affordability -- demonstrates its intent that MHFA would hold the reigns in determining the duration of the development's affordability restrictions. However, there is nothing in *Ardemore* to suggest that a court considering possible expiration of affordability restrictions at a Chapter 40B project should consider which entity issues the comprehensive permit.[13] *Ardemore* simply instructs that in all cases a Town must expressly indicate its agreement to time-limited affordability restrictions in order to relieve the developer of its zoning obligations. In this context, I decline to infer express intent from the circumstances. See *Dagastino* v. *Commissioner of Correction*, 52 Mass. App. Ct. 456, 458-59 (2001) (government can only make binding contracts with express authority; apparent authority is insufficient to find an agreement).

I note also that the preface to the 1994 HAC Order also omits any mention of an express end date, even while summarizing the status of the open issues and describing the proposed project as modified by Avalon:

> Because Avalon still intends to develop the site as affordable housing pursuant to the comprehensive permit, and because there is general agreement that the changes represent improvements in the design, most of the outstanding issues have been resolved by the Joint Recommendation. The major issue left unresolved is that of water and sewer fees imposed by the Town. Tr. Ex. 6.

There is no mention that the Town agreed to an end date for the affordability restrictions. Accordingly, the Act requires Northland to maintain 24 units of affordable housing at the

[13] In accordance with 760 C.M.R. 56.07(6)(b) and (c): "The Committee shall have the same power to issue permits or approvals as any Local Board which would otherwise act with respect to an application;" and "A Comprehensive Permit issued by order of the Committee shall be a master permit which shall subsume all local permits and approvals normally issued by Local Boards, in accordance with 760 CMR 56.05(10)."

Property for as long as the development is not in compliance with local zoning requirements, regardless of the terms of any attendant construction subsidy agreements.

IV. NORTHLAND FAILED TO PRODUCE EXTRINSIC EVIDENCE OF THE TOWN'S INTENT TO LIMITED AFFORDABILITY

I next consider and reject Northland's alternate argument that the language in the HAC Order was ambiguous regarding an end-date to the affordability restrictions at the Property. "Contract language is ambiguous 'where the phraseology can support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken.'" *President & Fellows of Harvard College v. PECO Energy Co.*, 57 Mass. App. Ct. 888, 896 (2003) (quoting *Suffolk Constr. Co. v. Lanco Scaffolding Co.*, 47 Mass. App. Ct. 726, 729 (1999)). In such cases, courts consider extrinsic evidence, "in order to give a reasonable construction in light of the intentions of the parties at the time of the formation of the contract." *Id.* (citing *Hubert v. Melrose-Wakefield Hosp. Assn.*, 40 Mass. App. Ct. 172, 177 (1996). "When such evidence is considered, it may be that a logical answer consistent with the purposes of the agreements and the intentions of the parties will emerge." *Id.*

Northland failed to present extrinsic evidence indicating an express agreement between the Town and Avalon that the affordability restrictions would expire. In an attempt to elucidate the meaning of Footnote 1 and the Town's intents, Northland focused on the Joint Status Report, presented the testimony of two witnesses, Abair (Northland's Chief Operating Officer and President), and Robbins (recently retired Town planner), and also relied upon a number of SHI's dating from 2008 to 2022.[14]

I begin with the Joint Status Report. Northland focuses on the following sentence in the parties' Joint Status Report to the HAC as evidence of the Town's intent to limited the duration

[14] The Town has moved to strike the testimony of Abair and Robbins. I decline to do so, as discussed below.

of the affordability restrictions: "The Town does not contest fundability, and the parties recommend that the Committee find the development to be fundable." I disagree. This sentence does not amount to an express agreement to limited the duration of the affordability restrictions. Indeed, review of the Joint Status Report as a whole shows that although the Town and Avalon agreed on six topics in the Joint Status Report, none of those concerned the duration of the affordability restrictions at the Property. Nowhere does the Joint Status Report mention an agreed-upon end date for the affordability restrictions.

With respect to the two witnesses, neither Abair nor Robbins had any personal knowledge of deliberations between the Town and Avalon leading up to the filing of the Joint Status Report. Neither participated in drafting the Joint Status Report. Although Robbins began as Town Planner in 1993, he testified that he had no involvement in the comprehensive permit at issue or the affordability restrictions at the Property. As detailed above, Robbins testified credibly that he never discussed the affordability restrictions with Avalon. Abair first learned about the Property in 2007, when she oversaw Northland's acquisition. That was thirteen years after the 1994 HAC Order.

Northland also presented three Chapter 40B SHI lists from the DHCD [defined previously on page 15] dated September 24, 2008; April 22, 2022; and November 16, 2022. According to the column on those three SHI's labeled "Affordability Expires," the affordability restrictions on the Property would expire in 2025. When asked about these SHI's, Robbins paused, appeared to probe his memory thoughtfully, and stated clearly and directly that he was not responsible for compiling the number of units to be included in SHI lists, nor did he investigate the accuracy of the SHI reporting information. I credit Robbins' straightforward testimony. According to Robbins, the Town's Zoning Enforcement Officer, Joseph Inman, was

independently responsible for maintaining data for the SHI lists. Robbins had no knowledge as to how or why the 2025 expiration date appeared included on the three SHI lists for the Property. Current Town Manager Kristi Williams also testified that she had no personal knowledge as to why the date "2025" appeared on the three SHI's and could not confirm the accuracy of the SHI reporting information. There was no evidence to support an inference that three SHI's dating from more than twenty years *after* the 1994 HAC Order were accurate or reflected an express agreement by the Town that the affordability restrictions would expire in 2025.[15]

In sum, there is no extrinsic evidence that might suggest that the Town intended limited affordability or that the Town agreed to limited affordability. Indeed, there is evidence to the contrary -- the Town's Board of Selectmen never voted to limit the duration of the affordability restrictions at the Property. I credit Williams' testimony that she reviewed the minutes of meetings of the Board of Selectmen from 1994 onward and found no vote by the Board of Selectmen to agree to an expiration date for the affordability restrictions at the Property. Williams' review revealed that although the Board did discuss the Property and proposed 40B project, it did so only when voting in favor of a motion to waive water and sewer fees. Nor are there minutes or any evidence to indicate that the ZBA voted on any limited affordability duration.

III. MOTIONS TO STRIKE

The Town has moved to strike the testimony of Abair and Robbins as lacking in the foundational prerequisite of relevance.[16] Northland offered their testimony as extrinsic evidence

[15] The lack of rational basis for the appearance of the date "2025" in the SHI's is further supported by the fact that Northland's obligations to MHFA expired in 2022, not 2025.

[16] The testimony of Abair and Robbins was admitted by the court *de bene*, subject to a later motion to strike. "[I]t is up to the judge's sound discretion whether evidence should be admitted *de bene*, subject to later motion to strike." *Harris-Lewis* v. *Mudge*, 60 Mass. App. Ct. 480, 485 (2004). See *Ellis* v. *Thayer*, 183 Mass. 309, 310-311 (1903); *R.L. Polk & Co*. v. *Living Aluminum* Corp., 1 Mass. App. Ct. 170, 172 (1973).

to clarify the meaning of Footnote 1 and the question of whether the Town expressly agreed to a limited affordability duration at the Property. Thus, the disputed testimony might only be relevant if the meaning of Footnote 1 is ambiguous. Having concluded that Footnote 1 is not ambiguous and does not amount to an express agreement of limited affordability, I need not consider this testimony. Nonetheless, I do so for the sake of completeness and because consideration of the disputed evidence supports this Decision and underlying reasoning.

It is appropriate for an opposing party to move to strike an affidavit or portions thereof, if evidence is not admissible because it is irrelevant or on other grounds. See Mass. R. Civ. P. 12(f) (a motion to strike may be made to exclude "redundant, immaterial, impertinent, or scandalous matter"). See also *Fowles v. Lingos*, 30 Mass. App. Ct. 435, 439-40 (1991); *Leahy v. Brown*, 16 LCR 586, 594 (2008) (Misc. Case No. 04 MISC 300916) (Sands, J.); "Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action." *Lacetti v. Ellis*, 102 Mass. App. Ct. 416, 419 (2023), quoting *Laramie v. Philip Morris USA Inc.*, 488 Mass. 399, 412 (2021); Mass. G. Evid. § 401. "A trial judge has substantial discretion to decide whether evidence is relevant." *Lacetti*, *supra*, at 419, quoting *Commonwealth v. Mason*, 485 Mass. 520, 533 (2020). Whether certain evidence is relevant has two components: "(1) the evidence must have some tendency to prove a particular fact; and (2) that particular fact must be material to an issue in the case." *Commonwealth v. Cavitt*, 460 Mass. 617, 634 (2011), quoting *Harris-Lewis*, 60 Mass. App. Ct. at 485.

On October 29, 2024, the Town filed its motion to strike Abair's testimony pursuant to Mass. R. Civ. P. 12(f). Abair testified that she – and Northland – read Footnote 1 to mean that the affordability restrictions at the Property would expire concurrent with the end of Northland's

financing obligations. According to the Town, even if the meaning of Footnote 1 is ambiguous, Abair's testimony should be stricken because she was not involved with the Property during the critical period between 1992 to 1994 and could have no personal knowledge about the meaning of Footnote 1. I concur that Abair's involvement with the Property was too far distant in time to assist in clarifying the terms of any agreement between Avalon and the Town relative to the duration of affordability.

However, I decline to strike her testimony, because it clarifies the similarities between Northland's circumstances and those of the *Ardemore* Developer. Similar testimony was specifically discounted by the Supreme Judicial Court in *Ardemore*. Like Abair, the *Ardemore* Developer also,

> claimed that it purchased the project on the "understanding" that the affordable housing requirements of the MHFA loans and the SHARP loan would cease [after 15 years], and that the project could thereafter be rented, sold, or converted to condominium units at market rates on satisfaction of the MHFA loans and SHARP contract. Whatever the validity of [the *Ardemore* Developer's] "understanding," it does not inform the court's analysis of the [Act]."

Ardemore, 436 Mass. at 820, n. 17. Perhaps in light of this excerpt, Northland concedes that it "does not offer Ms. Abair's testimony to show Northland's understanding of affordability duration," See Northland's Memorandum in Opposition to Westborough's Motion to Strike Testimony of James Robbins and Suzanne Abair, .. Northland attempts to distinguish Abair's testimony from that at issue in *Ardemore* by arguing that it illustrates that MHFA had the authority to ensure "long-term affordability" (as that term appears in Footnote 1) and exercised that authority by the terms of its initial financing with Avalon and then by requiring that Northland extend the duration of affordability obligations when Northland financed its acquisition of the Property. According to Northland, Abair's testimony demonstrates "the link between MHFA's actions and its authority to enforce 'long-term affordability.'" This attempted

distinction is tenuous; Abair, just like the *Ardemore* Developer, hoped to share the successor owner's view of the duration of the affordability restrictions in support of conversion to market rate.

The Town likewise asks the court to strike Robbins' testimony. Again, the Town argues that Robbins' testimony is irrelevant because he had no involvement in the 1992 HAC Decision or the 1994 HAC Order, and therefore no personal knowledge about any alleged agreement with Avalon about the duration of the affordability restrictions. Northland, on the other hand, asks the court to draw inferences from Robbin's testimony about how the Town's SHI lists were maintained and the import of those lists. As discussed above, I find that Robbins had no personal knowledge about the SHI lists or any idea why the date "2025" appeared in the expiration column. Nor was he involved in discussions with Avalon about the duration of the affordability restrictions. His testimony made it clear that Northland's reliance on the end date of "2025" in the SHI's from 2008 and 2022 was wholly speculative and misplaced. I decline to strike Robbins' testimony, because it was helpful in understanding the lack of support for Northland's argument that the Town expressly agreed to a limited affordability duration at the Property.

IV. CONCLUSION

For the reasons stated above, the Town is entitled to a declaratory judgment precluding Northland from terminating the affordability restrictions at the Property until such time as the development complies with local zoning. Judgement to enter accordingly.

SO ORDERED.
By the Court (Rubin, J.)

Attest:
/s/ Diane R. Rubin

/s/ Deborah J. Patterson
Deborah J. Patterson, Recorder

Dated: March 12, 2025

54 Mass.App.Ct. 1113
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

WELLESLEY ZONING BOARD OF APPEALS & another, [1]

v.

HOUSING APPEALS COMMITTEE & others [2] (and a companion case). [3]

No. 00-P-245.
|
April 25, 2002.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** This is an appeal from a judgment of the Norfolk Superior Court dismissing certain challenges to the Housing Appeals Committee's (HAC) approval of a comprehensive permit to build low and moderate income housing in Wellesley. The appellants, the Zoning Board of Appeals [4] (ZBA) and the neighbors (see n. 3, *supra*), have raised a number of procedural arguments and also assert that the HAC's January 8, 1998, decision is not supported by substantial evidence. We affirm.

Background. General Laws c. 40B, §§ 20-23 (the Act), and the regulations adopted thereunder, 760 Code Mass. Regs. §§ 30.02 *et seq.* (1993), were enacted and promulgated to eliminate impediments to developers seeking to build low or moderate income housing. *Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm.,* 15 Mass.App.Ct. 553, 555 (1983), citing *Board of Appeal of Hanover v. Housing Appeals Commn.,* 363 Mass. 339, 353-354 (1973). The Act permits limited dividend or nonprofit organizations proposing to build low or moderate income housing to submit a single application to the board of appeals of a city or town in lieu of separate applications to the usual local boards or officials. G.L. c. 40B, § 21. The fact that a community's total housing consists of less than 10% low or moderate income housing constitutes compelling evidence that the regional need for housing outweighs objections to the proposed development. *Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm., supra* at 557. The parties agree that Wellesley has fallen short of this threshold and is in dire need of affordable rental housing.

The paramount issue before the HAC was whether the building permit, as approved by the ZBA, was financially feasible within the meaning of the relevant regulation, 760 Code Mass. Regs. § 31.06 (1993), and if so, whether the conditions placed on that permit were consistent with Wellesley's needs. 760 Code Mass. Regs. § 31.06(7) (1993). In examining the HAC's conclusions on these points, we are mindful that "[f]undamental precepts of judicial review mandate judicial deference to any expert agency's interpretation and application of the statute within its charge." *Hotchkiss v. State Racing Commn.,* 45 Mass.App.Ct. 684, 691-692 (1998). See also G.L. c. 30A, § 14(7)(g), as amended by St.1973, c. 1114, § 3 (the "court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it"). Where the agency's interpretation is reasonable and consistent with the law, we should defer to it. *Hotchkiss v. State Racing Commn., supra* at 691-692.

Facts and prior proceedings. We recount the facts briefly and provide further detail as our subsequent analysis requires. On June 23, 1994, Hastings Village, Inc. (Hastings) applied for a comprehensive permit to build an eighty-seven unit, mixed income apartment building on a 2.19 acre lot on Hastings Street near Route 9 in Wellesley. The application was denied by the ZBA which claimed that, among other things, the funding agency relied upon by Hastings did not meet the standards set out in the relevant regulations. See 760 Code Mass. Regs. § 31.01(1)(b) (1993). On appeal, the HAC agreed with the ZBA, but granted Hastings additional time to cure the technical defects in its application.

***2** On March 18, 1997, Hastings notified the HAC that it had obtained the proper financing through the Massachusetts Home Financing Agency (MHFA) and that it had reduced its proposal from an eighty-seven unit building to a three building, fifty-two unit complex. As a result of these changes, the HAC remanded Hastings's application to the ZBA on April 8, 1997, for further proceedings.

On May 21, 1997, the ZBA granted a comprehensive permit subject to conditions, the most notable being the reduction of the project from fifty-two units to thirty-two. The ZBA reasoned that the project needed to be curtailed because of density, traffic circulation, and environmental concerns.

Following the ZBA's grant, the proceedings before the HAC resumed in the form of an appeal. A hearing was held to determine whether the conditions imposed on the comprehensive permit rendered the project uneconomic and, if so, whether the conditions were consistent with local needs. After hearing seven days of testimony, conducting a site visit, and reviewing post-hearing briefs from counsel, the HAC determined that conditions placed on the comprehensive permit by the ZBA would not permit Hastings to realize a reasonable economic return on the project. Additionally the HAC weighed Wellesley's need for affordable housing against Wellesley's particular zoning and planning needs, and determined that the conditions imposed by the ZBA were not consistent with local needs. As a result, it ordered the ZBA to issue a comprehensive permit for construction of a fifty-two unit complex, subject to some conditions but substantially similar to the plan originally submitted to the ZBA in May 1997.

The neighbors and the ZBA then appealed the HAC's decision to the Superior Court pursuant to G.L. c. 40B, § 22 and G.L. c. 30A, § 14. The Superior Court affirmed the HAC's decision.

The following arguments are raised by the ZBA and the neighbors on appeal: (1) Hastings's appeal of the ZBA's decision to the HAC was unperfected, thereby stripping the HAC of its jurisdiction; (2) the HAC decision was erroneous because it found the conditions imposed by the ZBA to be uneconomic despite the absence of a proper definition of "reasonable return"; (3) the HAC decision was unsupported by substantial evidence, arbitrary, capricious, in excess of authority, and based on an error of law; and (4) the Superior Court erred in failing to remand the matter back to the HAC based upon certain representations made by Hastings during settlement negotiations. We are not persuaded by any of these arguments.

Perfection of appeal. Pursuant to G.L. c. 40B, § 22 and 760 Code Mass. Regs. § 30.06(8) (1993), a party has twenty days after a local zoning board issues a decision in which to file a notice of appeal containing a "clear and concise statement of the prior proceedings before the [ZBA]." 760 Code Mass. Regs. § 30.06(1)(a)(1993). The ZBA argues that Hastings failed to provide a statement of the prior proceedings and, as a result, the HAC was without jurisdiction to hear the appeal. We disagree.

***3** The ZBA's argument ignores the procedural posture of this matter. Prior to the ZBA's grant of a comprehensive permit, this case had already been taken before the HAC. At that time, the HAC granted Hastings an opportunity to repair some of the technical defects in its application. It then remanded the matter to the ZBA for the limited purpose of evaluating the changes in Hastings's application on an expedited schedule. In doing so the HAC retained jurisdiction while aiming to narrow the issues on appeal and encourage settlement.

The HAC's continued jurisdiction is well evidenced in the record by its ongoing dominion. After remand, but prior to the ZBA's decision granting the comprehensive permit, the HAC sent notice scheduling the case for a conference. Then, on the same day the ZBA issued its decision, the HAC sent a Pre-Hearing Order to the parties setting forth the issues raised on appeal. It is apparent that the HAC kept jurisdiction to review the matter.

Given that the HAC maintained jurisdiction over Hastings's appeal, a renewed "initial pleading" was not required. Furthermore, under these circumstances the ZBA cannot claim that it was harmed by any lack of notice regarding the certainty of appeal or the issues presented therein.

The remaining procedural claims of error made by the ZBA and the neighbors are without merit. [5]

Reasonable return. Where a comprehensive permit is approved with conditions, as is the case here, the burden on appeal is with the applicant (Hastings) to show that the conditions imposed render the proposed project uneconomic. In order to meet this burden, the applicant must show that "the conditions imposed by the Board make it impossible to proceed in building or operating low or moderate income housing and still realize a reasonable return as defined by the applicable subsidizing agency." 760 Code Mass. Regs. 31.06(3)(b) (1993). The ZBA contends that the HAC's decision (holding the conditions imposed uneconomic) must be reversed because the subsidizing agency (the MHFA) did not define "reasonable return" as required by regulation. We disagree.

On September 9, 1997, the Chairman of the HAC, with the approval of all parties, wrote a letter to the MHFA inquiring whether the MHFA "define[s] 'reasonable return' as distinct from maximum allowable profit on return." The MHFA responded as follows:

> "MHFA does not define 'reasonable return' as distinct from maximum allowable profit or return. However, it has been MHFA's experience that the profit limits outlined [earlier in the letter (15% of total development costs or 10% of a developer's equity in a project)] to a large extent act as minimum thresholds which are required to provide adequate incentives for developers to engage in the business of affordable housing development. Once again, this is particularly true in the case of [mixed-income developments like the one contemplated here] which use little or no public housing subsidies, and which therefore require substantial investment by private developers in the form of staffing, overhead, and capital outlays for predevelopment costs and other costs of real estate development."

***4** Contrary to the ZBA's argument on appeal, the MHFA's response did not require the HAC to "abruptly stop" the proceedings until the MHFA developed a policy regarding what constituted a "reasonable return." It is true that the MHFA's letter indicated that this subsidizing agency had no strict, written definition of "reasonable return." It cannot be said, however, that the MHFA had no working policy or understanding of the return necessary to attract developers to projects of this nature. The MHFA was quite clear in explaining that the concept of "reasonable return" was largely defined by the maximum allowable profit margins. Given that the maximum allowable profit on these types of developments was well defined in the MHFA's letter, so too was the MHFA's stance on "reasonable return." To be certain, even the ZBA's own financial consultant testified before the HAC that the MHFA defines "reasonable return" as ten per cent, the same figure used to define the maximum allowable profit.

The term "reasonable return" is important in allowing the HAC to determine whether the conditions imposed by the ZBA render the project uneconomic. The critical aspect of our analysis, therefore, is whether the information supplied by the MHFA was sufficient to permit the HAC to make the required determination.

There can be no doubt that the MHFA's response was sufficient to permit the HAC to determine if the conditions imposed rendered the project uneconomic. General Laws c. 40B, § 20 defines "uneconomic" as:
"any condition brought about by any single factor or combination of factors to the extent that it makes it impossible ... for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency." G.L. c. 40B, § 20, inserted by St.1969, c. 774, § 1.

The MHFA set out its understanding of the necessary return required for developers to engage in building low and moderate income housing. It stated that the maximum allowable profit limits "to a large extent act as minimum thresholds which are required to provide adequate incentives for developers to engage in the business of affordable housing development." Accordingly, the MHFA's understanding of "reasonable return" was expressed in a manner consistent with the ultimate question

to be asked by the HAC: how much of a return is required for developers to proceed in building this type of housing. From this response the HAC was able to determine whether the conditions imposed on the comprehensive permit rendered the project uneconomic as that term is defined by the relevant statute. G.L. c. 40B, § 20.

Substantial evidence. The HAC's decision will be upheld if it is supported by substantial evidence. "Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion." *Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm.,* 385 Mass. 651, 657 (1982). "In order to be supported by substantial evidence, an agency conclusion need not be based on the 'clear weight' of the evidence ... or even a preponderance of the evidence, but rather only upon 'reasonable evidence." ' *Lisbon v. Contributory Retirement Appeal Bd.,* 41 Mass.App.Ct. 246, 257 (1996). Our review is highly deferential to the agency, and accords "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as ... the discretionary authority conferred upon it." *Flint v. Commissioner of Pub. Welfare,* 412 Mass. 416, 420 (1992), quoting from G.L. c. 30A, § 14(7)(g), as amended by St.1973, c. 1114, § 3 (internal quotation marks omitted). Our review is not de novo on the record that was before the administrative board, and we are not free to "displace an administrative board's choice between between two fairly conflicting views" even if, sitting de novo, we may justifiably have reached a different conclusion. *Labor Relations Commn. v. University Hospital, Inc.,* 359 Mass. 516, 521 (1971). *Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm.,* 385 Mass. at 657-658.

***5** The neighbors and the ZBA challenge the two predominant determinations in the HAC's decision. The neighbors claim that the HAC wrongly determined that the conditions imposed on the comprehensive permit rendered the project uneconomic. The ZBA argues that the HAC erred in holding that the need for affordable housing in Wellesley outweighed the project's negative impact on local concerns. We disagree on both accounts. The HAC's rulings were supported by ample evidence.

We need not recite the appellants' arguments on these points. It is enough to point out that the HAC held exhaustive hearings on this matter and examined the testimony of financial consultants and experts, from all parties, regarding the economic viability of the project as well as the development's density, intensity, sewerage, traffic and parking. The HAC rendered its decision based on a thorough assessment of the relative credibility of each expert analyzing, in turn, each witness's expertise and the basis of his or her testimony.

Regarding the various financial consultants and experts, the HAC found that Hastings's consultant provided the most consistent and credible information, whereas the ZBA's consultant was not sufficiently familiar with the type of subsidies being used in this case and the neighbors' consultant was unconvincing. The issues of density, intensity, sewerage, traffic and parking also involved a battle of the experts. Each side offered substantial evidence which was criticized and attacked by the other side. Accordingly, the crux of these issues largely rested upon the HAC's choice between fairly conflicting viewpoints. In light of the discretion we afford the HAC on matters, like the ones presented here, that require specialized knowledge and expertise, and for the reasons stated in the HAC's brief at pages 34-49, we conclude that there is ample evidence to support the HAC's decision.

New evidence. Finally, the neighbors argue that the Superior Court erred in failing to remand the matter to the HAC in light of newly discovered evidence. According to the neighbors, that evidence consisted of Hastings's admission that a twenty-four unit development is financially feasible, and served to rebut the HAC's conclusion that the conditions placed on the comprehensive permit rendered the project uneconomic.

The neighbors' motion was brought pursuant to G.L. c. 30A, § 14(6). Section 14(6) allows a court to remand a matter to the agency for a review of additional evidence if the party seeking to present such evidence can show that: (1) the evidence is material to the issues presented; and (2) there was good reason for failing to bring the evidence to the agency's attention in the first instance. G.L. c. 30A, § 14(6). See also *Northeast Metropolitan Regional Vocational Sch. Dist. Sch. Comm. v. Massachusetts Commn. Against Discrimination,* 35 Mass.App.Ct. 813, 817 (1994). The decision is left to the sound discretion of the court, and will not be disturbed absent an abuse of that discretion. *Ibid.* "To justify the exercise of such authority, particularly at this late stage in the proceedings, a substantial showing must be made." *Id.* at 818.

***6** The evidence submitted by the neighbors fails the materiality prong of the above test. The fifty-two unit development approved by the HAC contemplates rented apartments to be financed by the MHFA, whereas the twenty-four unit development, which Hastings discussed with the neighbors, contemplates a "for-sale" condominium development to be financed through a different program (the New England Fund Program [NEF] of the Federal Home Loan Bank of Boston). The pertinent issue before the HAC was whether the conditions imposed on the comprehensive permit made it impossible to realize a "reasonable return" as that term is "defined by the applicable subsidizing agency." 760 Code Mass. Regs. 31.06(3)(b)(1993). G.L. c. 40B, § 20. Accordingly, the evidence concerning a different type of development, through a different subsidizing agency, has no relevance to the issue which was presented to the HAC. Furthermore, the neighbors have provided no indication that the twenty-four unit project being negotiated with Hastings would have fulfilled Wellesley's need for low and moderate income rental housing. We discern no abuse of discretion, therefore, in the Superior Court's denial of the neighbors' motion where there is no basis to determine that the new evidence would be material to the issue presented before the HAC.

The neighbors further claim that Hastings should now be estopped from asserting that the conditions imposed by the ZBA rendered the project uneconomic and that Hastings should be prevented from withdrawing its efforts to approve a twenty-four unit condominium development. The argument has no merit. In the letter from Hastings, on which the neighbors rely, Hastings specifically reserves its rights to continue pursuing the present litigation. The letter states in its first paragraph that:

> "[s]ince [the parties] are still in litigation, [Hastings] must point out that [the proposal to pursue a 24-unit development]-and any plans, drawings and other documents that will be submitted to [the neighbors] ... are for settlement discussion purposes only, and shall not be construed as a waiver or compromise of [Hastings's] rights, which [Hastings] expressly reserves."

The letter goes on to state further that:

> "[i]f the request for modification [from a fifty-two unit to a twenty-four unit development] is granted [by the ZBA], and the appeal period expires without the filing of any appeals, then [Hastings] would proceed with this modified project. However, [Hastings] would reserve his rights under the Housing Appeals Committee Decision on the 52 unit MHFA project until he has full approval from the subsidizing agency (NEF) and the building permit in hand."

The neighbors cannot now reasonably contend that Hastings is estopped from asserting its rights under the HAC decision where those rights were expressly reserved. Hastings never agreed to forego such rights, and the neighbors were at no point denied an opportunity to pursue their own rights to appeal the HAC decision. Accordingly, there was no abuse of discretion in denying the neighbors' motion to remand the case to the HAC for consideration of any estoppel.

***7** Accordingly, we discern no error or abuse of discretion in the ruling of the Superior Court upholding the HAC's decision. The judgment is thereby affirmed.
Judgment affirmed.

All Citations

54 Mass.App.Ct. 1113, 766 N.E.2d 912 (Table), 2002 WL 731689

Footnotes

1 Town of Wellesley.

2 Hastings Village, Inc., and Sheridan Hills Comm.

3 Richard Woerner and James Arthur, members and representatives of Sheridan Hills Comm., an unincorporated assoc., *vs.* Housing Appeals Comm.; Hastings Village, Inc.; Wellesley Zoning Bd. of Appeals; and the Town of Wellesley. Woerner, Arthur, and Sheridan Hills Comm. are referred to collectively as "the neighbors."

4 Where we refer to the arguments set forth on appeal by the Zoning Board of Appeals we include, by reference, the Town of Wellesley, as these appellants filed a joint brief.

5 The ZBA contends that Hastings did not attain "limited dividend organization" status as required by 760 Code Mass. Regs. § 30.02 (1993). To become a "limited dividend organization" a developer must receive approval from a subsidizing agency that imposes a limited dividend on equity. Hastings received such approval from the MHFA. Accordingly, Hastings is, by definition, a "limited dividend organization." See *Board of Appeal of Hanover v. Housing Appeals Comm.,* 363 Mass. at 379; *Board of Appeals of Maynard v. Housing Appeals Comm.,* 370 Mass. 64, 67 (1976).

The ZBA further contends that the eligibility letter provided by the MHFA is incomplete and, as a result, the HAC lacked jurisdiction. At the hearing before the HAC the ZBA moved to obtain and offer additional evidence regarding the absence of documentary support for factual assertions in the eligibility letter. That motion was denied as untimely by separate order of the Superior Court as was a subsequent motion to reconsider. The ZBA has not challenged the court's rulings on those motions. Instead it offers an affidavit from an executive secretary claiming that certain relevant documents were missing from the file approximately two weeks before the ZBA granted the comprehensive permit and nearly one year after the date of the eligibility letter. This evidence alone is insufficient to rebut the presumption of eligibility raised by the letter from the MHFA.

The neighbors challenge the HAC decision on the ground that the Chairman, as opposed to the board as a whole, presided over the proceedings. Although the argument appears to have been waived because it was not raised before the HAC, we discern no error in these proceedings. See 760 Code Mass. Regs. § 30.09(5) (1993) (HAC proceedings "shall be conducted before the whole Committee, before one or more members of the Committee, or before any hearing officer appointed by the Chairman").

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 99-0991

ZONING BOARD OF APPEALS of the TOWN OF WELLESLEY, and the TOWN OF WELLESLEY, acting by and through its BOARD OF SELECTMEN,
Plaintiffs

vs.

ARDEMORE APARTMENTS LIMITED PARTNERSHIP[1] & others,[2]
Defendant

MEMORANDUM OF DECISION AND ORDER
[On Cross-Motions for Summary Judgment]

The plaintiffs, the Zoning Board of Appeals of the Town of Wellesley and the Town of Wellesley[3] (the "Town"), move for summary judgment The Town seeks a judgment ordering that nine (9) low income rental units located in the building owned by defendant, Ardemore Apartments Limited Partnership ("Ardemore"), remain low income for as long as the building stands noncompliant with local zoning requirements [4] Ardemore objects, and also moves for summary judgment, seeking a declaration that it is no longer required to maintain the nine (9) low income rental units because all of its obligations under the loans from the Massachusetts Housing Finance Agency (MHFA)

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[1] By American Landmark Real Estate Corporation, its General Partner

[2] Massachusetts Housing Finance Agency and Housing Appeals Committee

[3] Acting by and through its Board of Selectmen

[4] The Town also sought a judgment ordering that the two commercial units located in the building be vacated forthwith, but Ardemore has conceded that its rental of the units to commercial tenants violated local zoning requirements and has agreed to have the commercial tenants vacate the building

are satisfied After hearing and for the reasons set forth below, the Town's motion for summary judgment is **ALLOWED** and Ardemore's motion for summary judgment is **DENIED**

BACKGROUND

The undisputed material facts are as follows. In June, 1979, Cedar Street Associates ("Cedar") applied to the Zoning Board of Appeals of the Town of Wellesley (the "ZBA") for a comprehensive permit to construct a thirty-six (36) unit apartment building on Cedar Street in Wellesley (the "subject property") Cedar applied for the comprehensive permit pursuant to G L c. 40B, §§ 20-23,[5] commonly known as the "Anti-Snob Zoning Act" (the "Act"), because the subject property was zoned single-family The Act allows for the override of local zoning requirements when a developer seeks to construct low or moderate income housing, provided certain conditions are met See G L c 40B, §§ 20-23 The purpose of the Act was to provide a mechanism to circumvent the exclusionary zoning practices of the suburbs to allow for the construction of low and moderate income housing Cedar intended to dedicate twenty-five (25) to one hundred (100) percent of the units affordable to low and moderate income persons

The ZBA denied the application, and Cedar appealed the decision to the Housing Appeals Committee ("HAC") HAC found the ZBA's decision unreasonable and not consistent with local needs, and ordered the ZBA to issue the comprehensive permit to Cedar for the purposes stated in its application. See Cedar Street Assoc v.

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[5] As in effect June 29, 1979

Zoning Board of Appeals of Wellesley, Civil No 79-05 (Hous App. Comm , March 4, 1981). The Supreme Judicial Court affirmed HAC's decision in Zoning Board of Appeals of Wellesley v. Housing Appeals Committee, 385 Mass 651 (1982)

Pursuant to these decisions, the ZBA granted the comprehensive permit with the conditions outlined in HAC's decision The issue of how long the owners of the property would be required to keep a portion of the units affordable to low and moderate income persons was never discussed.

Cedar financed the project with a mortgage loan from MHFA and a subsidy from the State Housing Assistance for Rental Production Program ("SHARP"), each secured by a note The Mortgage Note was issued pursuant to, secured by, and entitled to the benefits of the Mortgage, Contract Documents and the Developer Agreement The SHARP Note was subject to the Mortgage Note, the Contract Documents as defined in the Mortgage securing the Note and the SHARP Contract

Cedar was required to rent twenty-five (25) percent, or nine (9), of the units at rates affordable for low and moderate income persons. The Mortgage Note did not have a termination date, but such a date was to be determined upon the issuance of Funds Bonds by MHFA The Subsidy Repayment Note was to be paid by December 1, 2016. Various documents contain a "cliff date," whereby the Notes could not be paid off before the expiration of fifteen (15) years. The cliff date for the subject property was July 8, 2000. Ardemore purchased the property from Cedar, and assumed the loans, in 1996

In June, 1999, prior to the payment of the MHFA loans, the Town commenced an action for declaratory judgment seeking an order that the nine (9) low income units

remain for as long as the building stands noncompliant with local zoning requirements Ardemore contends it was only obligated to maintain the nine (9) low income units for fifteen (15) years. Once the cliff date passes, Ardemore asserts the low income units may be sold or rented at market rate Both parties move for summary judgment

DISCUSSION

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass R. Civ P. 56(c) The moving party bears "the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings " Mathers v. Midland-Ross Corp., 403 Mass 688, 690 (1988) (quoting Attorney General v. Bailey, 386 Mass. 367, 371 (1982)) The burden then shifts to the non-moving party "to show with admissible evidence the existence of a dispute as to material facts." Godbout v Cousens, 396 Mass 254, 261 (1985)

A. History.

In 1967, the General Court directed the Legislative Research Council (the Council) "to undertake a study and investigation relative to the feasibility and implications of restricting the zoning power to cities and county governments with particular emphasis on the possibility that the smaller communities [were] utilizing the zoning power in an unjust manner with respect to minority groups . . ." 1967 Senate Doc No 933 While the Council did not find any evidence of zoning practices

discriminatory to minorities, it did receive numerous complaints of "the alleged 'economic discrimination' in local zoning which reportedly impair[ed] the effort of low and modest income people of all racial and religious origins to find homes within their financial means." Report of the Legislative Research Council Relative to Restricting the Zoning Power to City and County Governments, 1968 Senate Doc. No. 1133 at 28. The Council found "the housing shortage problem had reached crisis proportions," Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339, 349 (1973), and "concluded with the dire prediction that if existing exclusionary zoning practices by municipalities were left unregulated, the supply of vacant land would be eliminated by the 1990's . . ." Id. at 349-50.

This report prompted the introduction of five (5) bills in the 1969 Legislative Session, all of which provided for State control over the exercise of exclusionary zoning practices by the suburbs. See id. at 350. These bills were then referred to the Committee on Urban Affairs (the "Committee"), which reported out House Bill No. 5429 in 1969. See id. at 350-51. The Committee also attached a report explaining the bill's purpose. The report stated that "[t]he committee on urban affairs [had] found that there [was] an acute shortage of decent, safe, low and moderate cost housing throughout the commonwealth." Report of the Committee on Urban Affairs on the Attached Legislation, 1969 House Doc. No. 5429 at 2. It also indicated that land in "less densely populated areas," which was necessary to help solve the housing crisis, was either not available because of local zoning restrictions or very difficult and costly to obtain. See id. The Committee concluded its report by stating that:

The accompanying bill, while not permitting cities or towns to unreasonably

> obstruct the construction of a limited amount of adequate low cost housing, encourages such communities to establish conditions on such housing which will be consistent with local needs This measure provides the least interference with the power of a community to plan for its own future in accommodating the housing crisis which we face

Id. After some minor revisions and amendments, House Bill No. 5429 became St 1969, c 774 § 1, which inserted the Anti-Snob Zoning Act, G L c 40B, §§ 20-23, into the General Laws See Hanover, 363 Mass. at 351

The Anti-Snob Zoning Act provides that any public agency, limited dividend or nonprofit organization that proposes to build low or moderate income housing[6] may submit one application to the local board of appeals, as opposed to submitting separate applications to each applicable local board. G L c 40B, § 21 (1994 ed & Supp 2000) This application is called a "comprehensive permit" See id. The Act provides a right of appeal to HAC whenever a comprehensive permit application is denied by the local board of appeals or "granted with such conditions and requirements as to make the building or operation of such housing uneconomic" G L. c 40B, § 22 (1994 ed & Supp 2000) [7]

After hearing, HAC shall determine whether the decision of the board of appeals

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[6] "Low or moderate income housing" is defined as "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization" G L c 40B, § 20 (1994 ed & Supp 2000)

[7] The conditions attached to a comprehensive permit are deemed "uneconomic" if it would be "impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing ." G L c 40B, § 20

was consistent with local needs See G L. c 40B, § 23 (1994 ed & Supp 2000) HAC is limited to the issues of reasonableness and consistency with local needs

> [R]equirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. G L. c. 40B, § 20 (1994 ed. & Supp 2000)

If the decision of the board of appeals was "unreasonable and not consistent with local needs, [HAC] shall vacate such decision and shall direct the board to issue a comprehensive permit or approval to the applicant." G.L c 40B, § 23 HAC may not override the decision of the board of appeals if the municipality already has low or moderate income housing in at least ten (10) percent of its housing units or on at least one and a half percent of the total land area zoned for residential, commercial or industrial use.[8]

The Anti-Snob Zoning Act, which addresses the construction of low or moderate income housing, allows HAC to override local zoning requirements when a municipality has not met its responsibility of providing its proportionate share of affordable housing The Legislature chose to override local zoning in order to "provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing" Hanover, 363 Mass. at 353-54 The Legislature did

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[8] HAC also may not override the decision of the board of appeals if the developer proposes the construction of low or moderate income housing on a site that is more than three-tenths of one percent of the land zoned for residential, commercial or industrial use, or ten (10) acres, whichever is larger. See G L c 40B, § 20

not, however, choose to include in the statute a specified time period in which the zoning override would remain in effect

B. The parties' positions.

The Town asserts it is entitled to a judgment ordering Ardemore to maintain the nine (9) low income units as long at the building stands noncompliant with local zoning requirements It contends a contrary finding would negate the legislative intent behind the enactment of the Anti-Snob Zoning Act The subject property could not have been constructed without the override of local zoning requirements, based on the inclusion of low or moderate income units, pursuant to the comprehensive permit issued under the Act The Town argues Ardemore should not be allowed to receive a windfall by converting the low income units to market rate because the only reason the building was constructed on that site was to provide affordable housing to low and moderate income persons Finally, the Town asserts a distinction exists between the issues of zoning override and the mortgage financing It contends the payoff of the mortgage does not impact the zoning override

Ardemore, however, seeks a declaration that the units are available for sale or rent at market rate because the cliff date passed on July 8, 2000. It contends the financing restrictions in the mortgage and subsidy documents govern the amount of time it is required to maintain low income units in the building, and that it is therefore no longer obligated to maintain those units because the financing restrictions have expired. Ardemore relies in part on G L c 23A App , § 1-5 (f) (1994 ed & Supp. 2000), entitled "Amortization and Refinancing " Finally, Ardemore contends the Legislature incorporated the cliff dates of the MHFA mortgage and subsidy into the Act through its

definition of "low or moderate income housing as "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute . . " G L c 40B, § 20 Therefore, Ardemore asserts, it is no longer required to maintain the low income units in the subject property

C. The documents.

Several documents covering the construction of the subject property (the "Project") were executed on July 8, 1985 First, there is a Mortgage Note for $2,434,556 between MHFA and the borrower, Cedar. Cedar and MHFA also entered into a "Mortgage Security Agreement" to secure the Mortgage Note. This agreement states the "Contract Documents shall consist of the Construction Loan Agreement, Regulatory Agreement, Land Use Restriction Agreement and Development Fund Agreement," as well as all other agreements relating to the provisions of "mortgage, rental or interest subsidies for the Project " (Mortgage Security Agreement and Assignment of Leases and Rents at 2) The second note executed was in the amount of $1,642,950 It is entitled "Subsidy Repayment Note," with a payment date of December 1, 2016, and incorporates by reference the SHARP Contract The Town is not a party to any of the Project documents.

Ardemore argues the amount of time it is required to maintain low income units in the building is governed solely by the financial restrictions incorporated in the Project documents The sole reason the developer of the subject property was able to construct the apartment building, and hence obtain the mortgage and subsidy, was

because the Legislature gave HAC the power to override local zoning with the enactment of G L c 40B, §§ 20-23 The court agrees with the Town's position that a distinction exists between the ability to override local zoning requirements and the restrictions placed on the financing of a project [9]

Further, the Project documents themselves do not support Ardemore's assertion that its obligation to maintain the nine (9) low income units ceases when the mortgage is paid off and the subsidies cease An analysis of the SHARP Contract and the SHARP Program Guidelines (the "guidelines") indicate the low income units shall remain after the cliff date passes.

The SHARP Contract provides that twenty-five (25) percent of the Project units will be occupied by low and moderate income persons and families for at least fifteen (15) years (SHARP contract, par 14) After the expiration of the fifteen (15) year term, there is no legal obligation under the contract imposing on the mortgagor the obligation to subsidize rents for the low income tenants Id This cannot be read to convert the nine (9) low income units to market rate, but rather relates to the termination of the SHARP subsidies Such an interpretation is confirmed by reference to the guidelines, which are imposed on the parties by paragraph fifteen (15) of the SHARP Contract

Section II of the guidelines is entitled "Financing " It reads in part:

> When applying for SHARP, developers should explain how the interests of low income residents of the development will be protected after the SHARP subsidy ends (SHARP Program Guidelines at 6)

The guidelines proceed to set forth examples of how the developer can protect the

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[9] However, as will be discussed later, the result is the same whether one approaches the argument either from zoning or from financing

interests of low income residents, such as a transfer of the low income units to the local housing authority. In addition, one of the minimum standards in Section III of the guidelines, entitled "Project Selection Criteria," requires "the project [to] demonstrate that it will be able to sustain itself after the term of the SHARP subsidy has run out." Id. The guidelines contain a decline scale of SHARP subsides for a fifteen (15) year period, from $2,998 to $200. Id. at 4.

Clearly the guidelines intended that the low income units continue after the mortgage is paid and the SHARP subsidies end. It is incumbent on the developer to demonstrate how the low income residents will be protected from exclusionary zoning, which once again could prohibit badly needed low and moderate income housing, in order to obtain the SHARP subsidies.

Ardemore argues that, because the Legislature made reference in the Act to certain provisions of federal and state housing subsidy programs, it incorporated all of aspects of those programs, including the cliff dates, into the Act. More specifically, Ardemore claims that because the Legislature defined "low or moderate income housing" in accordance with state and federal housing assistance programs' definitions of "low and moderate income housing," it thereby incorporated any and all provisions of those statutes into the Act. Section 20 of the Act defines "low or moderate income housing" as "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute . . ." G.L. c. 40B, § 20. This clause refers to the financing for construction of low and moderate income housing through subsidies. As previously discussed, the Project documents, which control the rights and obligations of

the parties, do not envision a termination of the low and moderate income units simply upon the payoff of the mortgage and subsidy notes

D. The zoning.

The zoning power is one of the independent municipal powers granted to cities and towns by the adoption of Article 89 § 6 of the Amendments to the Massachusetts Constitution, also known as the Home Rule Amendment. See Mass. Const Art Amend. 2, as amended by art 89. The Legislature chose to grant HAC the power to override this important local interest only in cases where a municipality has failed to shoulder its proportionate responsibility of providing low income housing The Legislature did not grant MHFA or any other housing subsidy program the power to override local zoning Here, the single family residential zoning was over-ridden in order to construct a multi-family unit containing nine (9) units for low and moderate income families. The Legislature did not grant HAC the power to override the zoning at the end of fifteen (15) years or by default to convert the use of the nine (9) units to market rate

E. Application and interpretation of the Act.

It is not for the court to "read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose " Duracraft Corporation v Holmes Products Corporation, 42 Mass App. Ct 572, 579 (1997) (quoting King v. Viscoloid Co., 219 Mass. 420, 425 (1914)); also Commonwealth v. Vickey, 381 Mass 762, 767 (1980) (stating that "a basic tenet of statutory construction is to give the words their plain meaning in light of the aim of the Legislature, and when the statute appears not to provide for an eventuality, there is no

justification for judicial legislation").[10] This court is not the proper body to impose a time limitation on the obligation to maintain low income housing when none appears in the statute; rather, this a matter to be addressed by the Legislature.

Further, the court's decision not to impose a time limitation on maintaining the low income units is consistent with Legislature's intent in enacting G.L. c. 40B, §§ 20-23. "The general rule of statutory construction is that a statute must be interpreted according to the intent of the Legislature . . . considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Mellor v. Berman, 390 Mass. 275, 281 (1983) (citations and quotations omitted). The Legislature enacted the Anti-Snob Zoning Act both to provide relief from exclusionary zoning practices and to address the need for low and moderate income housing. The court's refusal to impose a time limitation on maintaining affordable housing when the statute is silent on the matter furthers the Legislature's intent of providing affordable housing for low and moderate income persons.

ORDER

For the foregoing reasons, this court **ORDERS** that the Town's motion for summary judgment be **ALLOWED**, and Ardemore's motion for summary judgment be **DENIED**

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[10] The court is mindful of the possibility that the Legislature did not consider that its silence on this issue would result in the requirement that the low income units remain for as long as the building stands noncompliant with local zoning requirements. However, it is not for the court to impose a time restraint on maintaining low income units when none appears in the text of the statute.

Elizabeth Bowen Donovan
Justice of the Superior Court

Dated: September 28, 2000

A TRUE COPY
Attest: _____
Deputy Assistant Clerk
9/29/00

Part I ADMINISTRATION OF THE GOVERNMENT

Title VII CITIES, TOWNS AND DISTRICTS

Chapter 40B REGIONAL PLANNING

Section 20 DEFINITIONS

Section 20. The following words, wherever used in this section and in sections twenty-one to twenty-three, inclusive, shall, unless a different meaning clearly appears from the context, have the following meanings:—

"Low or moderate income housing", any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization.

"Uneconomic", any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government on the size or character of the development or on the amount or nature of the subsidy or on the tenants,

rentals and income permissible, and without substantially changing the rent levels and units sizes proposed by the public, nonprofit or limited dividend organizations.

"Consistent with local needs", requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use or (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year; provided, however, that land area owned by the United States, the commonwealth or any political subdivision thereof, or any public authority shall be excluded from the total land area referred to above when making such determination of consistency with local needs.

"Local Board", any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen.

Part I ADMINISTRATION OF THE GOVERNMENT

Title VII CITIES, TOWNS AND DISTRICTS

Chapter 40B REGIONAL PLANNING

Section 21 LOW OR MODERATE INCOME HOUSING; APPLICATIONS FOR APPROVAL OF PROPOSED CONSTRUCTION; HEARING; APPEAL

Section 21. Any public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing may submit to the board of appeals, established under section twelve of chapter forty A<\/centy>;;;MI;;0000000;<\/centr>, a single application to build such housing in lieu of separate applications to the applicable local boards. The board of appeals shall forthwith notify each such local board, as applicable, of the filing of such application by sending a copy thereof to such local boards for their recommendations and shall, within thirty days of the receipt of such application, hold a public hearing on the same. The board of appeals shall request the appearance at said hearing of such representatives of said local boards as are deemed necessary or helpful in making its decision upon such application and shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are

consistent with the terms of this section. The board of appeals, in making its decision on said application, shall take into consideration the recommendations of the local boards and shall have the authority to use the testimony of consultants. The board of appeals shall adopt rules, not inconsistent with the purposes of this chapter, for the conduct of its business pursuant to this chapter and shall file a copy of said rules with the city or town clerk. The provisions of section eleven of chapter forty A<\/centy>;;;MI;;0000000;<\/centr> shall apply to all such hearings. The board of appeals shall render a decision, based upon a majority vote of said board, within forty days after the termination of the public hearing and, if favorable to the applicant, shall forthwith issue a comprehensive permit or approval. If said hearing is not convened or a decision is not rendered within the time allowed, unless the time has been extended by mutual agreement between the board and the applicant, the application shall be deemed to have been allowed and the comprehensive permit or approval shall forthwith issue. Any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section seventeen of chapter forty A.

[Text of section effective until May 30, 2023. For text effective May 30, 2023, see below.]

Section 22. Whenever an application filed under the provisions of section twenty-one is denied, or is granted with such conditions and requirements as to make the building or operation of such housing uneconomic, the applicant shall have the right to appeal to the housing appeals committee in the department of housing and community development for a review of the same. Such appeal shall be taken within twenty days after the date of the notice of the decision by the board of appeals by filing with said committee a statement of the prior proceedings and the reasons upon which the appeal is based. The committee shall forthwith notify the board of appeals of the filing of such petition for review and the latter shall, within ten days of the receipt of such notice, transmit a copy of its decision and the reasons therefor to the committee. Such appeal shall be heard by the committee within twenty days after receipt of the applicant's statement. A stenographic record of the proceedings shall be kept and the committee shall render a written decision, based upon a majority vote,

stating its findings of fact, its conclusions and the reasons therefor within thirty days after the termination of the hearing, unless such time shall have been extended by mutual agreement between the committee and the applicant. Such decision may be reviewed in the superior court in accordance with the provisions of chapter thirty A.

Chapter 40B: Section 22. Appeal to housing appeals committee; procedure; judicial review

[Text of section as amended by 2023, 7, Sec. 159 effective May 30, 2023. See 2023, 7, Sec. 298. For text effective until May 30, 2023, see above.]

Section 22. Whenever an application filed under the provisions of section twenty-one is denied, or is granted with such conditions and requirements as to make the building or operation of such housing uneconomic, the applicant shall have the right to appeal to the housing appeals committee in the executive office of housing and livable communities for a review of the same. Such appeal shall be taken within twenty days after the date of the notice of the decision by the board of appeals by filing with said committee a statement of the prior proceedings and the reasons upon which the appeal is based. The committee shall forthwith notify the board of appeals of the filing of such petition for review and the latter shall, within ten days of the receipt of such notice, transmit a copy of its decision and the reasons therefor to the committee. Such appeal shall be heard by the committee within twenty days after receipt of the applicant's statement. A stenographic record of the proceedings shall be kept and the committee shall render a written decision, based upon a majority vote, stating its findings of fact, its conclusions and the reasons therefor within thirty days after the termination of the hearing, unless such time shall have been extended by mutual agreement between the committee and the applicant. Such decision may be reviewed in the superior court in accordance with the provisions of chapter thirty A.

Part I ADMINISTRATION OF THE GOVERNMENT

Title VII CITIES, TOWNS AND DISTRICTS

Chapter 40B REGIONAL PLANNING

Section 23 HEARING BY HOUSING APPEALS COMMITTEE; ISSUES; POWERS OF DISPOSITION; ORDERS; ENFORCEMENT

[First paragraph effective until May 30, 2023. For text effective May 30, 2023, see below.]

Section 23. The hearing by the housing appeals committee in the department of housing and community development shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was reasonable and consistent with local needs and, in the case of an approval of an application with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs. If the committee finds, in the case of a denial, that the decision of the board of appeals was unreasonable and not consistent with local needs, it shall vacate such decision and shall direct the board to issue a comprehensive permit or approval to the applicant. If the committee finds, in the case of an approval with conditions and requirements imposed, that the decision of the board makes the building or operation of such housing uneconomic and is not consistent with local needs, it shall order such board to modify or remove

any such condition or requirement so as to make the proposal no longer uneconomic and to issue any necessary permit or approval; provided, however, that the committee shall not issue any order that would permit the building or operation of such housing in accordance with standards less safe than the applicable building and site plan requirements of the federal Housing Administration or the Massachusetts Housing Finance Agency, whichever agency is financially assisting such housing. Decisions or conditions and requirements imposed by a board of appeals that are consistent with local needs shall not be vacated, modified or removed by the committee notwithstanding that such decisions or conditions and requirements have the effect of making the applicant's proposal uneconomic.

[First paragraph as amended by 2023, 7, Sec. 160 effective May 30, 2023. See 2023, 7, Sec. 298. For text effective until May 30, 2023, see above.]

The hearing by the housing appeals committee in the executive office of housing and livable communities shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was reasonable and consistent with local needs and, in the case of an approval of an application with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs. If the committee finds, in the case of a denial, that the decision of the board of appeals was unreasonable and not consistent with local needs, it shall vacate such decision and shall direct the board to issue a comprehensive permit or approval to the applicant. If the committee finds, in the case of an approval with conditions and requirements imposed, that the decision of the board makes the building or operation of such housing uneconomic and is not consistent with local needs, it shall order such board to modify or remove any such condition or requirement

so as to make the proposal no longer uneconomic and to issue any necessary permit or approval; provided, however, that the committee shall not issue any order that would permit the building or operation of such housing in accordance with standards less safe than the applicable building and site plan requirements of the federal Housing Administration or the Massachusetts Housing Finance Agency, whichever agency is financially assisting such housing. Decisions or conditions and requirements imposed by a board of appeals that are consistent with local needs shall not be vacated, modified or removed by the committee notwithstanding that such decisions or conditions and requirements have the effect of making the applicant's proposal uneconomic.

The housing appeals committee or the petitioner shall have the power to enforce the orders of the committee at law or in equity in the superior court. The board of appeals shall carry out the order of the hearing appeals committee within thirty days of its entry and, upon failure to do so, the order of said committee shall, for all purposes, be deemed to be the action of said board, unless the petitioner consents to a different decision or order by such board.

760 CMR 31.00: HOUSING APPEALS COMMITTEE: CRITERIA FOR DECISIONS UNDER M.G.L. c. 40B, ss. 20-23

Section

31.01: Jurisdictional Requirements

(1) To be eligible to submit an application for a comprehensive permit or to file or maintain an appeal before the Committee, the applicant and the project shall fulfill the following jurisdictional requirements:

(a) The applicant shall be a public agency, a non-profit organization, or a limited dividend organization.

(b) The project shall be fundable by a subsidizing agency under a low and moderate income housing subsidy program.

(c) The applicant shall control the site.

(2) A project shall be presumed fundable if a subsidizing agency makes a written determination of Project Eligibility or Site Approval. Thereafter, the project shall be considered fundable unless there is sufficient evidence to determine that the project is no longer eligible for a subsidy.

(3) Either a preliminary determination in writing by the subsidizing agency that the applicant has sufficient interest in the site, or a showing that the applicant, or any entity fifty percent or more of which is owned by the applicant, owns a fifty percent or greater interest, legal or equitable, in the proposed site, or holds any option or contract to purchase the proposed site, shall be considered by the Board or the Committee to be conclusive evidence of the applicant's interest in the site.

(4) A determination of Project Eligibility or Site Approval shall be for a particular financing program. A change in the program under which the applicant plans to receive financing shall require a new determination, and may be deemed a substantial change pursuant to 760 CMR 31.03. An applicant may proceed under alternative financing programs if the application to the Board or appeal to the Committee so indicates and if full information concerning the project under the alternative financing arrangements is provided.

(5) Failure of the applicant to fulfill any of the requirements in 760 CMR 31.01(1) may be raised by the Committee, the Board, or a party at any time, and shall be cause for dismissal of the application or appeal. No application or appeal shall be dismissed, however, unless the applicant has had at least sixty days to remedy the failure.

31.02: Local Action Prerequisite

(1) In order to appeal to the Committee, an applicant shall have applied to the Board for a comprehensive permit in accordance with M.G.L. c. 40B, s. 21 and shall have been denied such permit or shall have been granted such permit with conditions which it alleges make the building or operation of such housing uneconomic.

(2) In order to appeal to the Committee, the applicant shall have submitted to the Board an application and a complete description of the proposed project. The items listed below will normally constitute a complete description. Failure to submit a particular item shall not necessarily invalidate an application. Upon motion by either party during an appeal, the Committee may determine whether such item, or any further item not listed, should have been submitted to the Board or should be submitted to the Committee.

31.02: continued

(a) preliminary site development plans showing the locations and outlines of proposed buildings; the proposed locations, general dimensions and materials for streets, drives, parking areas, walks and paved areas; and proposed landscaping improvements and open areas within the site. An applicant proposing to construct or rehabilitate four or fewer units may submit a sketch of the matters in 760 CMR 31.02(2)(a) and 31.02(2)(c) which need not have an architect's signature. All structures of five or more units must have site development plans signed by a registered architect;
(b) a report on existing site conditions and a summary of conditions in the surrounding areas, showing the location and nature of existing buildings, existing street elevations, traffic patterns and character of open areas, if any, in the neighborhood. This submission may be combined with that required in 760 CMR 31.02(2)(a);
(c) preliminary, scaled, architectural drawings. For each building the drawings shall be signed by a registered architect, and shall include typical floor plans, typical elevations, and sections, and shall identify construction type and exterior finish;
(d) a tabulation of proposed buildings by type, size (number of bedrooms, floor area) and ground coverage, and a summary showing the percentage of the tract to be occupied by buildings, by parking and other paved vehicular areas, and by open areas;
(e) where a subdivision of land is involved, a preliminary subdivision plan;
(f) a preliminary utilities plan showing the proposed location and types of sewage, drainage, and water facilities, including hydrants;
(g) documents showing that the applicant fulfills the jurisdictional requirements of 760 CMR 31.01;
(h) a list of requested exceptions to local requirements and regulations, including local codes, ordinances, by-laws or regulations.

The applicant may submit with its initial pleading to the Committee copies of such of these items as may be relevant to its appeal.

(3) Pursuant to M.G.L. c. 40B, s. 21, as amended by stat. 1989, c. 593, the Board shall adopt rules, not inconsistent with M.G.L. c. 40B, for the conduct of its business and shall file a copy of said rules with the city or town clerk. The Committee may in the course of an appeal properly before it pursuant to 760 CMR 31.02(1) determine that a particular local rule is consistent or not consistent with M.G.L. c. 40B, but no appeal shall be heard solely for the purpose of determining the validity of a rule, unless the rule is the sole basis for the denial or conditioning of a comprehensive permit. (For related requirements applying to Boards, see M.G.L. c. 44, s. 53G.)

(a) The Committee shall from time to time prepare model local rules for the benefit of Boards, and serve them upon the Boards by first class mail pursuant to 760 CMR 30.08(1). Rules adopted by a Board shall be presumed consistent with M.G.L. c. 40B to the extent that they conform to such model rules. If a Board does not adopt and file rules, it shall conduct business pursuant to the model rules.

31.03: Changes in Applicant's Proposal

(1) Substantial Changes. If an applicant involved in an appeal to the Committee desires to change aspects of its proposal from its content at the time it made application to the Board, it shall notify the Committee in writing of such changes and the Committee shall determine whether such changes are substantial. If the Committee finds that the changes are substantial, it shall remand the proposal to the Board for a public hearing to be held within thirty days and a decision to be issued within forty days of termination of the hearing as provided in M.G.L. c. 40B, s. 21. Only the changes in the proposal or aspects of the proposal affected thereby shall be at issue in such hearing. If the Committee finds that the changes are not substantial and that the applicant has good cause for not originally presenting such details to the Board, the changes shall be permitted if the proposal as so changed meets the requirements of M.G.L. c. 40B and 760 CMR 31.00.

(2) Commentary and Examples. The statute requires that an applicant present its application first to a local Board of Appeals before appealing to the

31.03: continued

Housing Appeals Committee. If on appeal to the Committee the applicant wishes to make changes in its proposal from its content as originally presented to the Board, the Board should have an opportunity to review changes which are substantial.

Following are some examples of what circumstances ordinarily will and will not constitute a substantial change of the kind described above:

(a) The following matters ordinarily will be substantial changes:

1. An increase of more than 10% in the height of the building(s);
2. An increase of more than 10% in the number of housing units proposed;
3. A reduction in the size of the site of more than 10% in excess of any decrease in the number of housing units proposed;
4. A change in building type (e.g., garden apartments, townhouses, high-rises);
5. A change from rental property to homeownership or vice versa;

(b) The following matters ordinarily will not be substantial changes:

1. A reduction in the number of housing units proposed;
2. A decrease of less than 10% in the floor area of individual units;
3. A change in the number of bedrooms within individual units, if such changes do not alter the overall bedroom count of the proposed housing by more than 10%;
4. A change in the color or style of materials used;
5. A change in the financing program under which the applicant plans to receive financing, if the change affects no other aspect of the proposal.

(3) Changes after Issuance of a Permit.

(a) If after a comprehensive permit is granted by the Board or the Committee, an applicant desires to change the details of its proposal as approved by the Board or the Committee, it shall promptly notify the Board in writing, describing such change. Within twenty days the Board shall determine and notify the applicant whether it deems the change substantial or insubstantial.

(b) If the change is determined to be insubstantial or if the Board fails to notify the applicant, the comprehensive permit shall be deemed modified to incorporate the change.

(c) If the change is determined to be substantial, the Board shall hold a public hearing within thirty days of its determination and issue a decision within forty days of termination of the hearing, all as provided in M.G.L. c. 40B, s. 21. Only the changes in the proposal or aspects of the proposal affected thereby shall be at issue in such hearing. A decision of the Board denying the change or granting it with conditions which make the housing uneconomic may be appealed to the Committee pursuant to M.G.L. c. 40B, s. 22; a decision granting the change may be appealed to the superior court pursuant to M.G.L. c. 40B, s. 21 and M.G.L. c. 40A, s. 17.

(d) The applicant may appeal a determination that a change is substantial by filing a petition with the Committee within twenty days of being so notified. Such an appeal will stay the proceedings before the Board.

1. If the Committee rules that the change is insubstantial, it shall modify the comprehensive permit.
2. If the Committee rules that the change is substantial, it shall remand the proposal for a hearing pursuant to 760 CMR 31.03(3)(c).

31.04: Computation of Statutory Minima

(1) Housing Unit Minimum. For purposes of calculating whether the city or town's low and moderate income housing units exceed ten percent of its total housing units, pursuant to M.G.L. c. 40B, s. 20:

(a) There shall be a presumption that the latest Executive Office of Communities and Development Subsidized Housing Inventory contains an accurate count of low and moderate income housing. If a party introduces evidence to rebut this presumption, the Board or Committee shall on a case by case basis determine what housing or units of housing are low or moderate income housing. In examining particular housing developments or units, it shall first be guided by the intent expressed in the regulations

31.04: continued

governing the program under which the housing is financed (e.g., 760 CMR 45.06 for the Local Initiative Program and 760 CMR 37.10 for the HOP program). It shall also be guided by the latest Executive Office of Communities and Development Listing of Chapter 40B Low or Moderate Income Housing Programs. Only units occupied, available for occupancy, or under building permit shall be counted and no unit shall be counted more than once because it is the subject of subsidies from two or more programs.

(b) The total number of housing units shall be that total number of units enumerated for the city or town in the latest available United States Census; provided that evidence that net additional units have been occupied, have become available for occupancy, or are under building permit or that total units have decreased between the latest Census and the date of initial application shall be considered.

(2) General Land Area Minimum. For the purposes of calculating whether low and moderate income housing exists in the city or town on sites comprising more than one and one half percent of the total land area zoned for residential, commercial, or industrial use, pursuant to M.G.L. c. 40B, s. 20:

(a) Total land area shall include all districts in which any residential, commercial, or industrial use is permitted, regardless of how such district is designated by name in the city or town's zoning by-law;

(b) Total land area shall include all unzoned land in which any residential, commercial, or industrial use is permitted;

(c) Total land area shall exclude land owned by the United States, the Commonwealth or any political subdivision thereof, the Metropolitan District Commission or any state public authority;

(d) Total land area shall exclude any land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the Department of Environmental Protection pursuant to M.G.L. c. 131, s. 40A. No other swamps, marshes, or other wetlands shall be excluded;

(e) Total land area shall exclude any water bodies;

(f) Total land area shall exclude any flood plain, conservation or open space zone if said zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial or industrial use are completely prohibited.

Only sites of low and moderate income housing units inventoried by the Department or established according to 760 CMR 31.04(1)(a) as occupied, available for occupancy, or under building permit as of the date of the applicant's initial submission to the Board, shall be included toward the one and one half percent minimum.

(3) Annual Land Area Minimum. For purposes of calculating whether the application before the Board would result in the commencement in any one calendar year of construction of low and moderate income housing on sites comprising more than three tenths of one percent of the city or town's land area or ten acres pursuant to M.G.L. c. 40B, s. 20:

(a) Total land area of the municipality and the land area occupied by low or moderate income housing shall be calculated in the manner provided in 760 CMR 31.04(2);

(b) If three tenths of one percent of total land area is less than ten acres, the minimum for sites occupied by low and moderate income housing shall be ten acres;

(c) The relevant calendar year shall be the calendar year period of January 1 through December 31 inclusive which includes the applicant's projected date for initiation of construction;

(d) Ordinarily any low or moderate income housing for which construction is expected to commence within the calendar year, other than that proposed by the applicant, must have received a firm funding commitment by the subsidizing agency prior to the date of the applicant's initial submission to the Board, in order to be included towards the .3 percent or ten acres;

(e) Development and construction work in connection with low or moderate income housing shall be proceeding in good faith to completion insofar as is reasonably practicable, in order for such housing to be included towards the .3 percent or ten acres minimum.

31.05: Scope of the Hearing

(1) General Principle. Consistency with local needs is the central issue in all cases before the Committee. Not only must all local requirements and regulations applied to the applicant be consistent with local needs, but decisions of the Board and the Committee must also be consistent with local needs.

(2) Denial. In the case of the denial of a comprehensive permit, the issue shall be whether the decision of the Board was consistent with local needs.

(3) Approval with conditions. In the case of approval of a comprehensive permit with conditions or requirements imposed, the issues shall be:

(a) first, whether the conditions considered in aggregate make the building or operation of such housing uneconomic, and

(b) second, whether the conditions are consistent with local needs.

Commentary. A condition which makes a project uneconomic will not be removed or modified if as a result of such action the project would not be consistent with local needs.

31.06: Burdens of Proof

Applicant's Case

(1) The applicant shall have the burden of proving that it has met the jurisdictional requirements of 760 CMR 31.01(1).

(2) In the case of a denial, the applicant may establish a prima facie case by proving, with respect to only those aspects of the project which are in dispute, that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of local concern.

(3) In the case of an approval with conditions, the applicant shall have the burden of proving that the conditions make the building or operation of the housing uneconomic. That is, the applicant has the burden of proving that, within the limits set by the subsidizing agency and without substantially changing the rent levels and unit sizes proposed,

(a) in the case of a public agency or non-profit organization, the conditions make it impossible to proceed in building or operating low or moderate income housing without financial loss,

(b) in the case of a limited dividend organization, the conditions imposed by the Board make it impossible to proceed in building or operating low or moderate income housing and still realize a reasonable return as defined by the applicable subsidizing agency, or

(c) alternatively, in either case, the conditions would result in a subsidizing agency refusal to fund. See 760 CMR 31.07(1)(f).

(4) In the case of either a denial or an approval with conditions, the applicant may prove that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing. The applicant shall have the burden of proving such inequality.

Board's Case

(5) In any case, the Board may show conclusively that its decision was consistent with local needs by proving that one of the statutory minima described in 760 CMR 31.04 has been satisfied. The Board shall have the burden of proving satisfaction of such statutory minima.

(6) In the case of denial, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other local concern which supports such denial, and then, that such concern outweighs the regional housing need.

31.06: continued

(7) In the case of an approval with conditions in which the applicant has presented evidence that the conditions make the project uneconomic, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other local concern which supports such conditions, and then, that such concern outweighs the regional housing need.

(8) In the case of either a denial or an approval with conditions, if the denial or conditions are based upon the inadequacy of existing municipal services or infrastructure, the Board shall have the burden of proving that the installation of services adequate to meet local needs is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly.

Applicant's rebuttal

(9) In the case of a denial or an approval with conditions, the applicant shall have the burden of proving that preventive or corrective measures have been proposed which will mitigate the local concern, or that there is an alternative means of protecting local concerns which makes the project economic.

31.07: Evidence

(1) Presumptions. The following shall be rebuttable presumptions:
(a) Fundability/Project Eligibility or Site Approval - See 760 CMR 31.01(2).
(b) Site Control - See 760 CMR 31.01(3).
(c) Housing Unit Minimum/Subsidized Housing Inventory - See 760 CMR 31.04(1)(a).
(d) Consistency with local needs/Certificate of Performance - Where a municipality has received Certification of Performance, a Board decision made pursuant to the Housing Development Action Plan approved by the Executive Office of Communities and Development shall be presumed consistent with local needs. See 760 CMR 46.09.
(e) Regional housing need/Statutory minima - Proof that a town has failed to satisfy one of the statutory minima described in 760 CMR 31.04(1) and (2) shall create a presumption that there is a substantial regional housing need which outweighs local concerns. Board of Appeals of Hanover v. H.A.C., 363 Mass. 339, 367, 294 N.E.2d 393, 413 (1973).
(f) Uneconomic/Agency refusal to fund - Proof that the subsidizing agency will not fund the project because of a condition imposed by the Board, that the applicant has requested a waiver of the subsidizing agency requirement that leads to this result, and that the subsidizing agency has denied a waiver, shall be conclusive evidence that the condition of the Board makes the project uneconomic.

(2) Balancing. If a town or city attempts to rebut the presumption that there is a substantial regional housing need which outweighs local concerns,
(a) the weight of the housing need will be commensurate with the proportion of the city or town's population that consists of low income persons; if few or no low income persons reside in the city or town, the strength of housing need will consist of regional need alone,
(b) the weight of the local concern will be commensurate with the degree to which the health and safety of occupants or town residents is imperiled, the degree to which the natural environment is endangered, the degree to which the design of the site and the proposed housing is seriously deficient, the degree to which additional open spaces are critically needed in the city or town, and the degree to which the local requirements and regulations bear a direct and substantial relationship to the protection of such local concerns, and
(c) a stronger showing shall be required on the local concern side of the balance where the housing need is relatively great than where the housing need is not as great.

31.07: continued

(3) Evidence to be Heard. The Committee will hear evidence only as to matters actually in dispute. Below are examples of factual areas in which evidence may be heard if it is relevant to issues in dispute. These examples are not all inclusive.

(a) Health, Safety, and the Environment. The Committee may receive evidence of the following matters:

1. Structural soundness of the proposed building;
2. Adequacy of sewage arrangements;
3. Adequacy of water drainage arrangements;
4. Adequacy of fire protection;
5. Adequacy of the applicant's proposed arrangements for dealing with the traffic circulation within the site, and feasibility of arrangements which could be made by the city or town for dealing with traffic generated by the project on adjacent streets;
6. Proximity of the proposed site to airports, industrial activities, or other activities which may affect the health and safety of the occupants of the proposed housing;

(b) Site and Building Design. The Committee may receive evidence of the following matters:

1. Height, bulk, and placement of the proposed housing;
2. Physical characteristics of the proposed housing;
3. Height, bulk, and placement of surrounding structures and improvements;
4. Physical characteristics of the surrounding land;
5. Adequacy of parking arrangements;
6. Adequacy of open areas, including outdoor recreational areas, proposed within the building site;

(c) Open Space. The Committee may receive evidence of the following matters;

1. availability of existing open spaces, as defined in 760 CMR 30.02, in the city or town;
2. current and projected utilization of existing open spaces and consequent need, if any, for additional open spaces, by the city or town's population including occupants of the proposed housing;
3. relationship of the proposed site to any city or town open space or outdoor recreation plan officially adopted by the planning board, and to any official actions to preserve open spaces taken with respect to the proposed site by the town meeting or city council, prior to the date of the applicant's initial submission. The inclusion of the proposed site in said open space or outdoor recreation plan shall create a presumption that the site is needed to preserve open spaces unless the applicant produces evidence to the contrary;
4. relationship of the proposed site to any regional open space plan prepared by the applicable regional planning agency;
5. current use of the proposed site and of land adjacent to the proposed site;
6. inventory of sites suitable for use as open spaces, and available for acquisition or other legal restriction as open spaces, in the city or town, provided that the Committee shall admit no evidence of any open space plan adopted only by the local conservation commission or other local body but not officially adopted by the planning board.

(4) Evidence Not to be Heard. The following matters shall normally be within the province of the subsidizing agency and the Committee will not hear evidence concerning them except for good cause:

(a) Fundability of the project by a subsidizing agency. In order to rebut the fundability presumption in 760 CMR 31.01(2), however, the Board may present evidence as to the status of the project before the subsidizing agency.

(b) Marketability of the project.

(c) The applicant's ability to finance, construct, or manage the project.

(d) The financial feasibility of the project, what constitutes a reasonable return for a limited dividend developer, or whether the applicant is likely to earn reasonable return, except that evidence may be heard which is directly relevant to the issue of whether conditions make the project uneconomic (see 760 CMR 31.06(3)).

(e) Tenant selection procedures.

31.08: Decision and Appeal

(1) Decision. In accordance with M.G.L. c. 40B, s. 22, the Committee shall render a written decision, based upon a majority vote, stating its findings of fact and conclusions, within thirty days after termination of the hearing unless such time has been extended by consent of the applicant.

(a) If the Committee finds, in the case of a denial, that the decision of the Board was not consistent with local needs, it shall vacate such decision and shall direct the Board to issue a comprehensive permit to the applicant.

(b) If the Committee finds, in the case of conditions imposed by the Board that the conditions render the project uneconomic and that the conditions are not consistent with local needs, the Committee shall direct the Board to remove any such condition or to modify it so as to make the proposal economic.

(c) If the Committee finds, in the case of conditions imposed by the Board, that the conditions render the project uneconomic and that the conditions are consistent with local needs, but that the conditions can be modified so as to make the project economic and to adequately protect health, safety, environmental, design, open space, and other local concerns, the Committee shall so modify the conditions.

(2) Conditions. The Committee or the Board shall not issue any order which would allow the building or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency. The Committee or the Board, in its decision, may make a comprehensive permit subject to any of the following conditions or requirements:

(a) The grant of a subsidy by a state or federal subsidizing agency;

(b) Compliance with any requirement imposed by the subsidizing agency;

(c) A finding by the subsidizing agency that the applicant is a public agency, a non-profit or limited dividend organization, or that the applicant has suitable interest in the proposed site;

(d) The securing of the approval of any state or federal agency with respect to the proposed housing which the applicant must obtain before building;

(e) Complete or partial waiver by the Board or the Committee of fees assessed or collected by local boards;

(f) Other directions or orders to local boards designed to effectuate the issuance of a comprehensive permit and the construction of the approved housing, or

(g) Any other condition consistent with the statute and with these regulations.

(3) Massachusetts Environmental Policy Act (MEPA). All projects before the Committee are subject to the MEPA, M.G.L. c. 30, ss. 61-62H.

(a) Where no Environmental Impact Report (EIR) is required, no M.G.L. c. 30, s. 61 finding shall be required in the Committee's decision. In any such case, however, prior to issuance of a decision, the applicant shall serve upon the Committee pursuant to 760 CMR 30.08 the following:

1. a Certificate of the Secretary of Environmental Affairs pursuant to 301 CMR 11.06(1) that no EIR is required, or

2. a certificate from the subsidizing agency or the Executive Office of Communities and Development pursuant to 760 CMR 30.06(9)(a) and 301 CMR 11.03(2) that no Environmental Notification Form (ENF) must be filed. (This certificate need not be refiled if it was served with the initial pleading; if such a certificate is not available, the Committee may rely on evidence admitted at the hearing or thereafter.)

(b) Where an EIR is required and a Final Environmental Impact Report (FEIR) has received a Certificate of the Secretary of Environmental Affairs of compliance pursuant to 301 CMR 11.09(4), the Committee may take official notice of the FEIR without prior notice to the parties pursuant to 760 CMR 30.10(2), and shall include in its decision findings as required by M.G.L. c. 30, s. 61.

(c) Where an EIR is required and the FEIR has not received a Certificate of the Secretary of Environmental Affairs of compliance pursuant to 301 CMR 11.09(4), the Committee may delay its decision or it may render its decision, provided that the decision shall be subject to the following conditions:

31.08: continued

1. that the comprehensive permit shall not be implemented until the Committee has fully complied with MEPA, and
2. that the Committee shall retain authority to modify the decision based upon findings or reports prepared in connection with MEPA. Board of Appeals of Maynard v. H.A.C., 370 Mass. 64, 67, 345 N.E.2d 382 (1976).

(4) Lapse of Permits. If construction authorized by a comprehensive permit has not begun within three years of the date on which the permit becomes final, the permit shall lapse. The permit shall become final on the date of the Board or Committee decision if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of. The Board or the Committee may set an earlier or later expiration date and may extend any expiration date. An extension may not be unreasonably denied nor denied due to other projects built or approved in the interim.

(5) Transfer of Permits. No comprehensive permit shall be transferred to a person or entity other than the applicant without the written approval of the Board or the Committee.

(6) Appeal. Any decision of the Committee may be reviewed in the superior court in accordance with the provisions of M.G.L. c. 30A.

(7) Appeal in MEPA Cases. Judicial review of a Committee decision which does not contain Massachusetts Environmental Policy Act findings, but rather contains the conditions required by 760 CMR 31.08(3)(c) shall not be delayed by such conditions.

31.09: Enforcement

(1) The Board shall carry out an order of the Committee within 30 days of its entry, and, upon failure to do so, the order of the Committee shall for all purposes be deemed the action of the Board.

(2) The Board and the Committee shall have the same power to issue permits or approvals as any local board which would otherwise act with respect to an application.

(3) A comprehensive permit issued by a Board or by order of the Committee shall be a master permit which shall subsume all local permits and approvals normally issued by local boards. Upon presentation of the comprehensive permit and subsequent detailed plans, all local boards shall issue all necessary permits and approvals after reviewing such plans only to insure that they are consistent with the comprehensive permit and applicable state and federal codes.

(4) After the issuance of a comprehensive permit, the Committee or Board may issue such orders as may aid in the enforcement of its decision. Also see 760 CMR 30.09(5)(c).

(5) The Committee or the applicant may enforce an order of the Committee in the Superior Court.

31.10: Revocation of Outstanding Regulations

All outstanding rules and regulations for the conduct of hearings by the Housing Appeals Committee, previously promulgated, are hereby revoked.

REGULATORY AUTHORITY

760 CMR 31.00: M.G.L. c. 23B; c. 40B.

(PAGES 325 AND 326 ARE RESERVED FOR FUTURE USE.)

UNLOCKING HOUSING
PRODUCTION COMMISSION

Building for Tomorrow

Recommendations for addressing Massachusetts' housing crisis

February 2025

Contents

Acknowledgments

Governor Maura T. Healey established the Unlocking Housing Production Commission in October 2023 via Executive Order #622.[1] The Commission's charge was to report to the Governor and Lieutenant Governor on:

> *How state and local laws, regulations, and practices could be revised so as to increase the supply of housing that is affordable across a wide range of incomes and available throughout a broad spectrum of neighborhoods.*[2]

The Commission's sixteen members (see below), appointed by the Governor, represent diverse government, civic, and business interests in housing production. Chaired by Executive Office of Housing and Livable Communities (HLC) Secretary Ed Augustus, the Commission includes representatives of the Executive Office of Energy and Environmental Affairs (EEA), the Executive Office of Economic Development (EOED), and the Executive Office for Administration and Finance (A&F). Regional councils of government, municipalities, building and fire code authorities, single- and multi-family housing developers, and advocates for affordable housing and smart growth are also represented on the Commission.

UNLOCKING HOUSING PRODUCTION COMMISSION
BUILDING FOR TOMORROW

Unlocking Housing Production Commission

NAME	ORGANIZATION
Secretary Edward M. Augustus, Jr. (Chair)	Executive Office of Housing and Livable Communities (HLC)
Bran Shim	Executive Office for Administration and Finance (A&F)
Kurt Gaertner	Executive Office of Energy and Environmental Affairs (EEA)
Ashley Stolba	Executive Office of Economic Development (EOED)
Jeffrey Brem	Home Builders & Remodelers Association of Massachusetts
Dr. Vanessa Calderon-Rosado	Inquilinos Boricuas en Acción
Jesse Kanson-Benanav	Abundant Housing Massachusetts
Mayor Nicole LaChapelle	City of Easthampton
David Linhart	Goulston & Storrs
Rich Marlin	Massachusetts Building Trades Unions
Peter Ostroskey	Former Massachusetts State Fire Marshal, Department of Fire Services
Jeanne Pinado	Colliers International
Jennifer Raitt	Northern Middlesex Council of Governments
Levi Reilly	Marcus Partners
Tamara Small	NAIOP Massachusetts
Clark Ziegler	Massachusetts Housing Partnership (MHP)

The Commission convened in January 2024 and worked through December 2024, identifying possible areas for legislative or regulatory action, conducting an extensive analysis of options, and developing targeted recommendations. Throughout its work, the Commission consulted with dozens of additional stakeholders, including municipal leaders and public officials, housing advocates, housing developers, land-use attorneys, modular manufacturers, climate and environmental justice advocates, and others. This report reflects the Commission's extensive stakeholder engagement and intensive deliberation, and it calls for major changes in several areas of law and regulation to unlock housing production.

Staff from HLC, the Massachusetts Housing Partnership (MHP), and other organizations represented on the Commission provided extensive technical expertise and facilitated consultations with key housing production stakeholders. The Consensus Building Institute (CBI) supported the Commission's deliberations, organizing meetings and assisting in subcommittee discussions. HLC staff played a leading role in the drafting of this report.

UNLOCKING HOUSING PRODUCTION COMMISSION
BUILDING FOR TOMORROW

Executive Summary

Massachusetts is in the midst of a housing crisis that threatens the Commonwealth's long-term economic growth, affordability, and livability. Decades of restrictive zoning, fragmented regulatory frameworks, and slow housing production have resulted in a severe supply-demand imbalance, driving home prices and rents to unsustainable levels. As a result, hundreds of thousands of households are priced out of homeownership, struggle to find suitable rental housing, or face displacement from their communities. Employers cite the housing shortage as a key challenge in attracting and retaining talent, while municipalities grapple with balancing local control and the need to accommodate new growth.

Recognizing the urgent need for on-going action, Governor Maura Healey established the Unlocking Housing Production Commission (UHPC) to identify and advance policy solutions that remove barriers to housing production.[3] The Commission was tasked with examining the structural, regulatory, and financial constraints that have limited housing development and identifying reforms that will ensure Massachusetts can produce the housing necessary to meet growing

demand. At the core of this effort is the recognition that Massachusetts has a 222,000-unit housing deficit—a shortfall that must be addressed to bolster economic stability, improve affordability, and meet the needs of future generations.[4]

This report presents a comprehensive set of policy recommendations designed to modernize Massachusetts' housing policies, lower production costs, increase housing supply, and ensure that growth occurs in a sustainable and equitable manner. The Commission's recommendations are organized into four major focus areas *(note: the order in which these topics and recommendations are presented does not necessarily reflect priority status)*:

1. **Economic Incentives and Workforce Development**
   Housing production is inherently tied to infrastructure (particularly water and wastewater systems) availability and capacity as well as workforce capacity. The Commission explores solutions to expand regional infrastructure access, increase financial incentives for modular and cost-efficient construction, and strengthen the state's skilled trades workforce to ensure that housing production can keep pace with demand.

2. **Land Use and Zoning**
   The Commission examined the ways in which outdated zoning laws have restricted housing development and contributed to rising costs. Recommended reforms focus on increasing housing density, reducing regulatory barriers, and fostering local zoning that aligns with long-term planning and state housing goals.

3. **Regulations, Codes, and Permitting**
   The complexity and unpredictability of Massachusetts' regulatory landscape and permitting processes significantly slow housing development. The Commission recommends limiting excessive regulations and ensuring that state and local approval processes support timely and cost-effective housing production.

4. **Statewide Planning and Local Coordination**
   Many housing markets function at a regional level, yet permitting and zoning decisions remain highly localized. The Commission recommends implementing policies that compel all municipalities to contribute to housing development, encouraging intermunicipal collaboration to streamline decision-making and establishing a structure for facilitating interagency coordination at the state level.

The Affordable Homes Act, a record-breaking $5.2 billion housing bond bill spearheaded by the Healey-Driscoll Administration, provides a historic foundation for addressing these challenges.[5] However, funding alone will not resolve

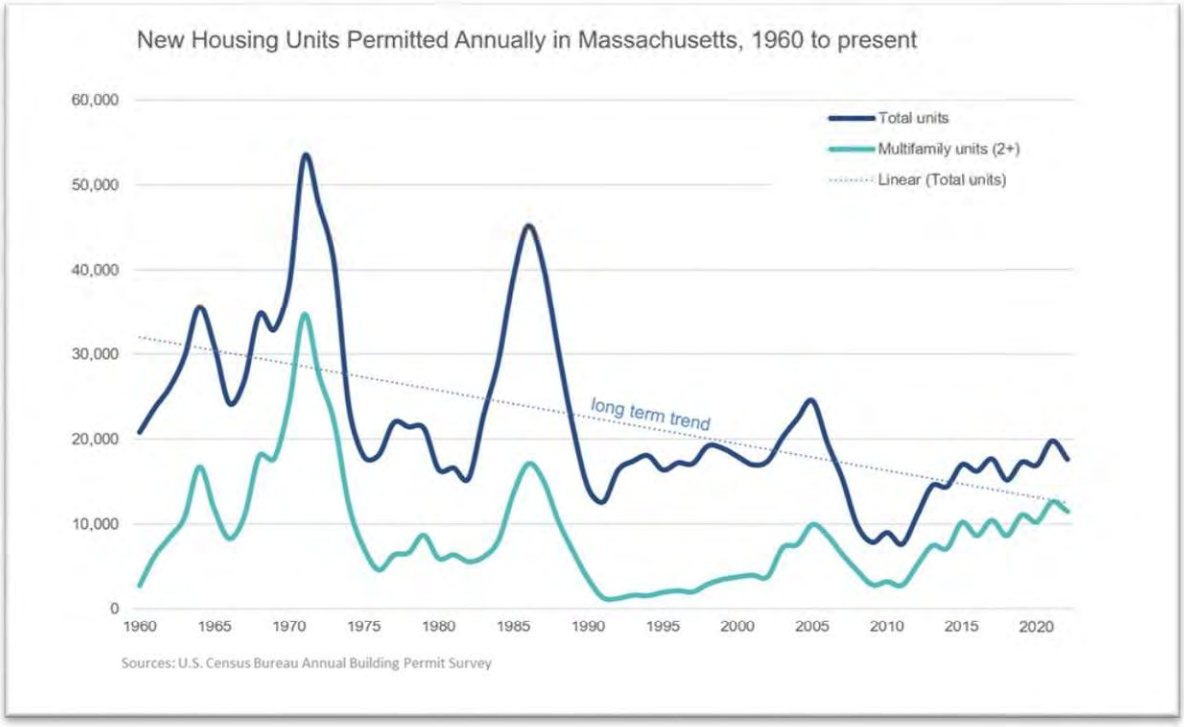
Massachusetts' housing shortage. Without significant zoning and regulatory reforms that maximize the impact of available state funding, housing production will remain slow, unpredictable, and insufficient to meet resident demand. The recommendations in this report provide a clear framework for unlocking housing production by addressing the root causes of Massachusetts' supply constraints.

The Commonwealth has an opportunity to lead the nation in smart, sustainable, and equitable housing growth. The time for incremental change has long passed. Bold, decisive, continued action is essential to ensuring that Massachusetts remains a place where people can afford to live, businesses can thrive, and communities can grow.

UNLOCKING HOUSING PRODUCTION COMMISSION
BUILDING FOR TOMORROW

Understanding the Housing Crisis in Massachusetts

From the 1960s through the 1980s, Massachusetts produced an average of nearly 30,000 units of housing each year, enough to keep up with a rising population. From the 1990s onward, housing production fell by half, failing to meet rising demand for either single or multifamily homes. The modest recovery in the 2010s was followed by a significant fall in production during and after COVID.



Source: MHP 2023[16]

As a result, housing prices have risen faster than inflation, and faster than incomes for most residents. Today, Massachusetts has among the highest home values in the country.[17] Over the past five years, the median sales price for a home in the Commonwealth has increased by more than 50%, escalating a growing problem into an acute affordability crisis.[18]

The low supply and high cost of housing have major impacts on the citizens of Massachusetts. For most households, rent and mortgage payments represent the largest share of monthly expenses. These high housing costs have positioned the

Commonwealth as a high-cost state and undermined its appeal to attract and retain residents. Home equity is the single largest source of wealth for most families, yet homeownership in Massachusetts has grown progressively less attainable. Today, a household needs to be earning upwards of $215,000 to afford a median-priced home in Eastern Massachusetts.[19]

The high cost of home ownership, along with longstanding exclusionary zoning policies, reinforces economic and racial segregation. The average Black or Hispanic family can afford to buy a home in only 4% of Massachusetts census tracts.[20] The average White family can afford a home in just 22% of census tracts.[21]

For the state's businesses, the high cost of housing makes employment less attractive, drives up the wages necessary to attract and retain talented employees, and raises the cost of doing business. In a recent survey conducted by the Massachusetts Business Roundtable, more than 80% of members reported that high housing and living costs were likely to impact their decisions on whether to grow or shrink their presence in Massachusetts.[22]

The environment also suffers from the pattern of low-density, single-family homes spread across the suburban and exurban landscape. This sprawl fuels reliance on automobile use and increases traffic, air and water pollution, and infrastructure and

other development costs. It also consumes an excessive amount of land and natural resources, making it harder to achieve land conservation and climate change mitigation and resiliency goals.

One of the most significant drivers of Massachusetts' housing crisis is the low allowable density (housing units per acre) for new housing development. Zoning regulations that favor large single-family homes, along with environmental and other regulatory constraints on multifamily housing construction, have become the most significant contributors to the housing affordability crisis. These barriers drive up production costs and severely limit the ability to build sufficient multifamily housing and single-family "starter homes" to meet demand.

This Commission is not the first to note that zoning regulations, building codes, and environmental regulations can create major barriers to multi-family housing in Massachusetts. Nor has the current Administration been idle in addressing this challenge. As this report notes, the current crisis has spurred the Administration to take bold and unprecedented action through the signing of the monumental Affordable Homes Act, establishment of the Commonwealth's first comprehensive statewide housing plan, implementation of the MBTA Communities Act, and more. However, without further steps to eliminate additional barriers to housing production, even the boldest reforms and historic investments may fall short.

The stakes could not be higher – Massachusetts is at a tipping point. If the housing crisis continues unchecked, it risks becoming intractable, threatening the state's long-term social, economic, and political strength and altering the lives of every Massachusetts resident.

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

LAND COURT
DOCKET NO. 22 MISC 000445-DRR

TOWN OF WESTBOROUGH, by and through its Select Board,

Plaintiff

v.

NORTHLAND TPLP LLC,
Defendant.

REVISED JOINT PRE-TRIAL MEMORANDUM

In accordance with the Court's Order issued in the above-captioned matter dated September 25, 2024, the undersigned parties, acting through their counsel, hereby submit this Final Revised Joint Pre-Trial Memorandum in advance of trial scheduled for October 29 and 30, 2024.

A. LEGAL ISSUES, CLAIMS, AND DEFENSES

Unified Statement of the Issue to be Tried:

Whether plaintiff Town of Westborough is entitled to a declaration under G.L. c. 231A and an order that defendant Northland TPLP LLC maintain affordability restrictions on property located at 101 Charlestown Meadows Drive, Westborough, Massachusetts, known as The Residences at Westborough Station ("Property"), for so long as the Property does not conform with the local bylaw.

Town's Additional Statement of the Issues:

This case is governed by the comprehensive permit statute, G.L. c. 40B, §§ 20-23, and the Supreme Judicial Court's decision in Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments

Ltd. P'ship, 436 Mass. 811 (2002) ("Ardemore"), notwithstanding Northland's regulatory agreement and amendments thereto, which set a termination date of September 25, 2022.

Northland claims that a footnote in a 1994 Housing Appeals Committee Order evidences an "express agreement" with the Town to have set a termination date for the affordability restriction. The Town's position, as detailed in its papers on summary judgment, which are expressly incorporated herein by reference, is that the 1994 HAC footnote, by its plain and unambiguous terms, was discussing a matter of fundability or project eligibility which the Town did not contest. The footnote does not evidence the terms of any "express agreement" with the Town with respect to an affordability duration. Indeed, even if the Court accepted the footnote as operative under Ardemore, the footnote does not set forth a time limit, and provides only that long-term affordability will be assured. When considered in light of the subsequent Ardemore decision, that footnote means that long term affordability will be assured in perpetuity, where the property does not comply with local zoning.

The sole issue remaining for trial in this matter is whether the 1994 HAC footnote evidences the terms of an "express agreement" between the Town and Northland to set a termination date of September 25, 2022 for the affordability restrictions at the Property. Indeed, this Court previously ordered that "what happened on and around the date of that 1994 HAC Order may be relevant, however more recent statements, knowledge, or perceptions by town employees would not be relevant to the court's inquiry." See Court's Order, dated August 10, 2023. The Town reiterates its position that a case-stated trial is more appropriate here, as there is no testimony from anyone with personal knowledge as to the meaning of the 1994 HAC footnote (as the Town Planner—the only individual employed by the Town during that time—testified he was not involved), where the 1994 footnote is contained in a document which is subject to interpretation

and any factual inferences as necessary, and where witness testimony as to more recent perceptions or understandings will not assist the Court in determining the meaning of the 1994 footnote.

Northland's Additional Statement of the Issues:

Northland seeks a determination that it has the right to terminate the affordability restriction covering 24 units at the Chapter 40B development at issue (the "Development"). Northland has this right for several reasons. First, the Town adopted the 1994 Housing Appeals Committee Order (the "1994 HAC Order") as the effective comprehensive permit for the Development, and therefore the 1994 HAC Order governs the terms of the Development including affordability duration. Ex. 6. Second, the 1994 HAC Order states that "MHFA will ensure… that long-term affordability will be assured…." That language can be reasonably interpreted to mean only one thing: MassHousing would determine the affordability end date. And in accordance with that order, MassHousing determined that the restriction could be terminated on September 25, 2022. Exs. 9 & 10. Finally, evidence shows that at all relevant times the Town and Northland's predecessors understood that affordability would end, and that the Town assented to this term in the effective comprehensive permit. Accordingly, the Town presents too narrow a construction in its statement above that the "sole issue remaining for trial in this matter is whether the 1994 HAC footnote evidences the terms of an 'express agreement' between the Town and Northland to set a termination date of September 25, 2022 for the affordability restrictions at the Property." Contrary to the Town's suggestion, the Court's prior rulings did not so hold. While the issue of an agreement between the Town and Northland's predecessor will be an important one at trial, in presenting its defense against the Town's claims Northland intends to continue to press each of the ways this case is factually distinct from the *Ardemore* case.

The following legal issues should be determined at trial:

1. Does the 1994 HAC Order provide Northland the right to terminate the affordability restriction? Yes. The 1994 HAC Order was adopted by the Town as the effective comprehensive permit for the Development and therefore governs the terms of the Development, including the affordability restriction.

The 1994 HAC Order stated:

> [S]ince project eligibility was previously established and fundability is not contested by the [Westborough ZBA], the [MHFA project eligibility] letter is acceptable. ***We are confident that the MHFA will ensure that twenty percent of the units are set aside for tenants with incomes no higher than fifty percent of median income, that long-term affordability will be assured, and that the other normal requirements for subsidized housing are met***.

(Emphasis added.)

Although the Court in its January 17, 2024, decision considered this language to be ambiguous, the most logical interpretation of this language is that MassHousing would determine the affordability end date. Indeed, this language is irreconcilable with affordability continuing in perpetuity. Moreover, evidence shows that the Town and Northland's predecessors understood and agreed that the restriction would end.

2. Does *Ardemore* hold that, unless a comprehensive permit states a specific affordability end date, then affordability must continue in perpetuity? No. *Ardemore* addressed the issue of whether developers have an inherent right under Chapter 40B to terminate an affordability restriction if the comprehensive permit contains no indication of the restriction duration. *See Ardemore*, 436 Mass. at 813-14. Northland does not argue that it has such an inherent right, and nor does it need to. Rather, Northland's right to terminate the affordability restriction is based on the comprehensive permit itself, i.e., the 1994 HAC Order. Thus, the holding in *Ardemore* requires that the plain terms of the comprehensive permit be enforced, and MassHousing was within its

authority to establish the restriction termination date of September 25, 2022.

3. **Was the HAC within its authority to allow MassHousing to determine affordability duration? Yes**. Nothing in *Ardemore* prohibits the HAC from allowing MassHousing to determine affordability duration. In fact, in *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Committee*, the SJC held that matters such as affordability restrictions are properly "within the responsibility of State or Federal funding and supervising agencies," such as MassHousing. 457 Mass. 748, 763-66 (2010). Additionally, the Town declined to issue its own comprehensive permit and instead adopted the 1994 HAC Order as the effective comprehensive permit for the Development and assented and agreed to its terms.

II. FACTUAL ISSUES

(a) Statement of Agreed Facts

1. The Defendant, Northland TPLP LCC, owns the Property located at 101 Charlestown Meadow Drive in Westborough, Massachusetts, known as "The Residences at Westborough Station" (the "Property"). Northland acquired the Property, including a 120-unit subsidized affordable housing development in the Town of Westborough in 2007.

2. The 120-unit affordable housing development constructed at the Property was permitted under the authority of G.L. c. 40B, §§ 20-23.

3. Specifically, the prior owner of the Property, CMA, Inc., submitted an application to the Westborough Zoning Board of Appeals ("ZBA") for a comprehensive permit under G.L. c. 40B, §§ 20-23, to construct 274 units of subsidized, affordable housing. Ex. 2 at 1.

4. In 1989, after a public hearing, the ZBA voted to deny the application for a comprehensive permit. Ex. 2 at 2.

5. CMA, Inc. then appealed from the ZBA's denial decision to the Massachusetts Housing Appeals Committee ("HAC"). Ex. 2 at 1-2.

6. On June 25, 1992, the HAC rendered a decision ordering the issuance of a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 for the construction of no more than 120-units of housing, with various conditions, including the submission of a modified plan. Ex. 2 at 41-44.

7. After the HAC issued that decision, but without an actual comprehensive permit having issued, a subsequent developer, Avalon Properties, Inc. ("Avalon") purchased the Property from CMA, Inc. to develop a modified affordable housing proposal pursuant to G.L. c. 40B, §§ 20-23. Ex. 3 at 1.

8. Avalon requested that the Westborough Zoning Board of Appeals approve the proposed changes for the development. Ex. 3 at 2.

9. The Zoning Board, however, requested that the proposed changes be submitted to HAC because no comprehensive permit had issued yet and because the HAC's June 25, 1992 decision indicated that the HAC intended to retain jurisdiction. Ex. 4 at 1-2.

10. On or about April 27, 1994, following a conference of counsel with the HAC, the Town and Avalon reached agreement on and submitted a Joint Status Report and Recommendation regarding the proposal, dated June 7, 1994. Ex. 5.

11. In that Joint Status Report, the Town and Avalon agreed, *inter alia,* that: 1) the plans submitted by Avalon to the HAC comply with the June 25, 1992 HAC decision and requested that the HAC issue the final comprehensive permit, subject to resolution of other issues noted; 2) that the ZBA did not object to the change in building type; 3) that the Town's Board of Selectmen had voted a partial waiver of sewer and water fees; 4) that the HAC be requested to approve in writing the transfer of the comprehensive permit from CMA, Inc. to Avalon; 5) that the development was fundable by a qualified subsidizing agency; and 6) that Avalon would confirm that the project did not require the filing of an Environmental Impact Report with the Massachusetts Executive Office of Environmental Affairs under the Massachusetts Environmental Policy Act. Ex. 5.

12. On July 20, 1994, HAC issued an "Order to Transfer of Permit [sic]" ("Order of Transfer"). Ex. 6.

13. In the Order of Transfer, the HAC: 1) approved the changes to the project plans; 2) approved the change in source of the required subsidy from the Commonwealth's Tax Exempt Local Loan to Encourage Rental Housing ("TELLER") to the Massachusetts Housing Finance Agency ("MHFA"); 3) rendered a decision on the fee waiver issues; 4) approved the transfer of comprehensive permit rights from CMA, Inc. to Avalon; and 5) conditioned its order on certification that an Environmental Impact Report was not required. The HAC concluded by stating: "[i]t is hereby ORDERED that the comprehensive permit be transferred and modified as set out above." Ex. 6 at 6.

14. The Order of Transfer also contained a footnote stating that HAC was "confident that the MHFA will ensure that twenty percent of the units are set aside for tenants with incomes no higher than fifty percent of median income, that long-term affordability will be assured, and that the other normal requirements for subsidized housing are met." Ex. 6 at 3.

15. Twenty percent of the 120-units is equivalent to 24 units.

16. Following the Order to Transfer from HAC, CMA, Inc. conveyed title to the Property to Avalon by deed dated December 16, 1994, recorded with the Worcester County Registry of Deeds at Book 16777, Page 344.

17. Thereafter, Avalon developed the subsidized housing complex at the Property in accordance with the comprehensive permit statute, G.L. c. 40B, §§ 20-23.

18. On September 25, 2007, Avalon conveyed the Property to Northland, by virtue of a quitclaim deed recorded with the Worcester County Registry of Deeds at Book 411842, Page 117.

19. Thereafter, Northland executed two amendments to the financing agreement with MHFA. Ex. 9 (Northland's Amendment to the Regulatory Agreement with MHFA, dated September 25, 2007 and recorded on September 25, 2007 at the Worcester County Registry of Deeds, Book 41842, Page 143); Ex. 10 (Northland's Second Amendment to the Regulatory Agreement, dated October 18, 2018 and recorded on October 26, 2018 at the Worcester County Registry of Deeds, at Book 59605, Page 245).

20. The amendments provide a term limit to the affordability restrictions for low-income tenants. Specifically, the amendments to the Regulatory Agreement state that the term limit lapses on September 25, 2022. Exs. 9, 10.

21. The Town is not a party to the Regulatory Agreement or its amendments. See Exs. 9, 10.

22. In or about December 2011, Northland paid off the remaining balance of the mortgage on the Development, thus completing its financing obligations to MassHousing. Ex. 22 (Satisfaction/Discharge of Avalon's Mortgage and Termination of Land Use Agreement dated December 12, 2011 and recorded December 23, 2011 at the Worcester County Registry of Deeds, at Book 48316, Page 20).

23. Since the initial development of the affordable housing complex to present date, at least twenty percent of the units, or 24 units total, have been rented out to low-income families and individuals.

24. In September of 2021, Northland provided notice to the tenants in the 24 affordable units at the Property that as of September 25, 2022, it would be converting the low-income units at the Property to market rate units, and therefore, would be terminating the affordability restrictions.

25. The Property is located in the Single Residence ("R") zoning district, in which multi-family apartment buildings, such as this development, are prohibited outside of the context of Chapter 40B or other law authorizing exemption from municipal zoning bylaws. Ex. 18.

(b) Statement of Contested Facts

26. The ZBA meeting minutes from January 9, 1989, include the following language: "[ZBA member] asked for clarification on the TELLER program. [Developer counsel] stated: "The TELLER program has to give their stamp of approval. Twenty percent overall units for low and moderate income. These units must be mixed in and remain so for 15 years." Ex. 1.

Northland's Position: This fact is not reasonably contested as it is set forth in a public record, and demonstrates that a 15-year affordability period was discussed and understood by the Town and original developer.

Town's Position: Meeting minutes cannot be used as substantive evidence of what the proponent stated, Building Inspector of Chatham v. Kendrick, 17 Mass. App. Ct. 928, 930 (1983), other than to demonstrate "the date of each meeting, the motions made, the vote upon each motion, the board members present and absent, and the reasons formally stated for each decision," as other statements are inherently unreliable and therefore inadmissible. Id. at 931. See also Schramm v. Zoning Bd. of Appeals of Cohasset, 81 Mass. App. Ct. 1124 (2012) (Rule 23.0) ("Minutes of the board hearings are hearsay, and do not constitute evidence (except, under the public records exception, as to questions of procedure before the board)"); Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica, 454 Mass. 374, 387 n.31 (2009) ("The minutes of meetings of the board, standing alone, are not admissible to prove the truth of the evidence before the board recorded in the minutes" (citation and quotation omitted)). In any event, even if admissible for substantive purposes, one Board member specifically asked "if after 15 years could this be a non-subsidized apartment complex?" and the developer's counsel did not represent that it would be converted to market rate units after that initial period, only that "it depends on the Town." Ex. 1 at 7.

The minutes may, in any event, affirmatively be used to show that the Board unanimously voted to reject the comprehensive permit application, ostensibly demonstrating its rejection of any 15-year affordability limit under the TELLER program. Ex. 1 at 15.

27. The HAC hearing record includes (1) pro forma analyses expressly premised on a 15-year affordability period, Pr. Ex. 20, and (2) a detailed written summary of the TELLER program, its 15-year affordability restriction period, and copies of the TELLER state regulations in effect at that time. Ex.19.

Northland's Position: This fact is not reasonably contested as it is set forth in a public record, and demonstrates that a 15-year affordability period was discussed and understood by the Town and original developer.

Town's Position: The pro forma analyses are irrelevant because they do not show any express agreement with the Town to an affordability limit of 15 years. The Town did not sign, or otherwise somehow expressly agree, to a 15-year period by virtue of the developer's having submitted a pro forma to HAC.

28. On December 10, 1996, Avalon executed a Regulatory Agreement with MHFA for the project development, which stated that "not less than 20% of the units shall be rented

at all times to low income persons ... [emphasis added]." Ex. 7. A copy was recorded with the Property in the Worcester County Registry of Deeds at Book 18464, Page 118.

Town's Position: This fact is not reasonably contested as it is set forth in a document recorded with the Property, and demonstrates that Northland was on notice of the affordability restrictions in perpetuity at the time it acquired the Property.

Northland's Position: The quoted language was excerpted by the Town in a misleading manner and presented to mean something different that it does. The Regulatory Agreement Amendments themselves, which explicitly state an affordability end date of September 25, 2022, also use this same "shall be rented as all times to low income persons" language, thus making it even clearer that that the quoted Regulatory Agreement language was in no way conveying "notice of the affordability restrictions in perpetuity," as the Town asserts.

29. The Town and Avalon treated the HAC's June 25, 1992 decision (Ex. 2) and the July 20, 1994 Order of Transfer (Ex. 6) as the operative "comprehensive permit" issued under the G.L. c. 40B, §§ 20-23. See also Ex. 24 at 1-2 (Avalon's special counsel noting that the June 25, 1992 HAC Decision and the July 20, 1994 HAC Decision, along with other documents, are "collectively, the 'Comprehensive Permit'" and that those combined documents constitute a "valid comprehensive permit issued pursuant to G.L. c. 40B, §§ 20-23").

Town's Position: At all times, the parties treated these two documents as the comprehensive permit and then the modification of the comprehensive permit, as set forth in the terms of the documents themselves.

Northland's Position: As a threshold matter, it is immaterial whether the 1992 HAC decision is technically part of the effective comprehensive permit because (1) the parties agree that the 1994 HAC Order is, at a minimum, part of the effective comprehensive permit and includes the critical language in Footnote 1, and (2) nothing in the 1992 HAC decision controverts or undermines the plain meaning of Footnote 1. Nonetheless, the 1992 HAC decision expressly ordered the Town to issue a comprehensive permit. Thus, on its face the 1992 HAC decision acknowledged that such a permit had not yet been issued. Moreover, all parties as well as the HAC acknowledged prior to the 1994 HAC proceedings that no comprehensive permit had yet been issued. The 1994 HAC Order became the effective comprehensive permit once it was issued by the HAC and adopted by the Town without objecting to or appealing any of its terms.

30. The Property was constructed in violation of the Town's Zoning Bylaws, Ex. 18, and remains noncompliant with current zoning requirements.

Town's Position: The Development does not comply with the requirements of the Zoning District in which it is located, as demonstrated by the Zoning Bylaw and Table of Uses.

Northland's Position: Northland does not dispute that, but for the Town's adoption of the 1994 HAC as the effective comprehensive permit, the Development would not comply with the Town's Zoning Bylaws.

31. The Westborough Zoning Board of Appeals ("ZBA") and Avalon agreed to the following provision in their 1994 Joint Stipulation to the HAC:

> Avalon requests that the Committee [HAC] find the proposed development to be fundable. At the Conference of counsel ... Avalon submitted a project eligibility letter from the Massachusetts Housing Finance Agency dated March 21, 1994. The Town does not contest fundability, and the parties recommend that the Committee find the development to be fundable.

Ex. 5 at 5, § 5.

Northland's Position: This portion of the Westborough-Avalon Stipulation constituted the Town's agreement in 1994 to abide by MHFA's determinations on all matters of "fundability," a Chapter 40B term which encompasses not just financing but all programmatic rules of the subsidizing agency, including tenant income limits and unit affordability restrictions.

Town's Position: This portion of the Joint Stipulation constituted the Town's agreement not to contest fundability by MHFA in 1994, as it did in 1992 under the TELLER program. Where the MHFA letter would otherwise be insufficient to constitute a determination of project eligibility (including fundability) under the comprehensive permit regulations, the HAC noted that it would nonetheless approve the transfer because it was "confident" that "MHFA will ensure that twenty percent of the units are set aside for tenants with incomes no higher than fifty percent of median income, that long-term affordability will be assured, and that the other normal requirements of subsidized housing are met." There was no agreement by the Town to abide by an affordability termination date as determined by MHFA either implicit or explicit in the agreement not to contest project fundability by MHFA.

32. In December 1996, representatives of Avalon and MHFA (a/k/a MassHousing) signed a series of regulatory documents concerning, *inter alia*, the development of Charlestown Meadows, its financing, and the implementation of affordability requirements. These documents included the Regulatory Agreement (Ex. 7) and a Land Use Restriction Agreement (Ex. 8). The latter document, which was incorporated by reference into the Regulatory Agreement, contained the 15-year affordability restriction. ("Restriction Period").

Northland's Position: the Restriction Period further evidences that affordability duration was always contemplated as a separate issue from financing, project eligibility, or concepts the Town seeks to conflate with the duration of affordability.

Town's Position: The regulatory documents and land use restriction agreement speak for themselves, as between MHFA and Avalon. The Town is not bound by a Restriction Period

in any agreements to which it is not a party, as the Supreme Judicial Court noted in *Ardemore*.

33. As a pre-condition to approving the transfer, MassHousing informed Northland it would require affordability of the 24 units to be extended for a fresh 15-year term beginning in 2007. This extension was memorialized in the Amendment to Regulatory Agreement, which stated in its first paragraph:

> **Extension of Affordability Restrictions.** The Owner covenants and agrees for itself and any successors and assigns that the provisions contained in Sections 1 and 2 of the Regulatory Agreement (the "Affordability Restrictions") shall continue in effect for a period of fifteen years from the date of this Amendment. The covenant contained in the preceding sentence shall run with the land, be binding upon the Owner and any successors and assigns to the fullest extent permitted by law, be for the exclusive benefit of MassHousing, be enforceable solely by MassHousing, its successors and assigns and shall survive the foreclosure of the Mortgage and be binding upon and enforceable against any purchaser at a foreclosure sale. MassHousing and its successors and assigns, as sole beneficiary of the covenants provided by the Owner herein, may release the Owner from its obligations herein if MassHousing determines that such release will preserve affordable housing that would otherwise be converted to market rate housing, or if MassHousing otherwise finds that such release will further the specific purposes of the Enabling Act.

Ex. 9, at 1.

Northland's Position: This provision too evidences that affordability duration was always contemplated as a separate issue from financing, project eligibility, or concepts the Town seeks to conflate with the duration of affordability. Moreover, here MassHousing was fulfilling the role the 1994 HAC Order and comprehensive permit had expressly delegated to the agency, i.e., assuring affordability for a "long term" that MassHousing would determine.

Town's Position: The Amendment to the Regulatory Agreement speaks for itself, as between MHFA and Northland. The Town is not bound by any agreements to which it is not a party, as the Supreme Judicial Court noted in *Ardemore.*

34. On February 16, 2022, Edward Behn from Westborough's Affordable Housing Trust emailed a memorandum to Northland representative Stacy Arce, which stated: (1) "Northland agreed to maintain the 24 affordable, SHI compliant units, for fifteen (15) years."; and (2) "The 15-year period expires in September 2022." Pr. Ex. 8.

Northland's position: This fact is not reasonably contested as it is a communication from the Town and demonstrates that the Town understood that the affordability restriction was subject to the termination date established by MassHousing in accordance with Footnote 1 of the 1994 HAC Order.

Town's Position: The emailed memorandum is a communication from individual volunteers, not the "Town," and in any event, does not evidence any express agreement between the Town and Avalon/Northland to be bound by a 15-year time limit, it is simply reiterating what the Town understood Northland's position to be under the terms of the regulatory agreement and amendments it executed. As the Court stated in Ardemore, the developer's "understanding that the affordable housing requirements of the MHFA loans and the SHARP loan would cease on July 8, 2000, and that the project could thereafter be rented, sold, or converted to condominium units at market rates on satisfaction of the MHFA loans and SHARP contract … does not inform our analysis of the statute," which applies in perpetuity for so long as a project does not comply with zoning. Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. P'ship, 436 Mass. 811, 820 (2002). Once the Town had cause to look into the issue further, it realized that Northland's position that the 15-year period expired in September 2022 was contrary to law and contrary to the applicable documents, and acted accordingly.

35. James Robbins, Westborough's 30-year Town Planner until his recent retirement, was identified by the Town in this litigation as a person most knowledgeable about "[i]nformation regarding the Town's affordable housing and planning efforts, [Subsidized Housing Inventory ("SHI")] count, and correspondence with Northland regarding the enforcement of the affordability restrictions." He began working in Westborough as its Town Planner in 1993. Mr. Robbins has testified under oath that, as far back as he could recall, he believed that the Development's affordability restriction would terminate – in 2025, as stated in years and years' worth of SHIs sent to the state's Department of Housing and Community Development. Significantly, Mr. Robbins testified that he based his longstanding view of a finite affordability restriction on two things: (1) the SHI's statement, made consistently over many years, of an end date (2025) for the Development's affordability restriction; and (2) "negotiations around the comprehensive permit between the developer at that time and the town," as "told to [Robbins]" by the then-Building Inspector and Zoning Enforcement Officer, the late Joseph Inman, who was responsible for compiling Westborough's SHI in the 1990s.

> Northland's Position: Mr. Robbins' testimony supports the existence of an agreement and understanding between the Town and Avalon at the time of the 1994 HAC Order that affordability would be subject to a term rather than in perpetuity. This understanding by the official in charge of such matters for the Town in 1994, Mr. Inman, is completely consistent with the language of the 1994 HAC Order's footnote.
>
> Town's Position: James Robbins was Westborough's 30-year Town Planner from 1993 until 2023 and was identified by the Town in this litigation as a person having "[i]nformation regarding the Town's affordable housing and planning efforts, [SHI] count, and correspondence with Northland regarding the enforcement of the affordability restrictions." Mr. Robbins, however, testified that he had no involvement in the comprehensive permit at issue or the affordability restriction, which was prior to his tenure. He also testified that he never worked with Joseph Inman on this project or any others relating to the Town's SHI. He stated that anything regarding an expiration date was based on assumptions he had made or

information he had taken for granted, and was not based upon personal knowledge or information that he was told from Mr. Inman regarding an affordability restriction, which in any event, is inadmissible hearsay.

III. WITNESSES

Town's Position:

The Town submits that no witnesses are necessary or appropriate in this case, as "all the material ultimate facts on which the rights of the parties are to be determined by the law," such that the action may proceed on a "case stated" basis for a decision of the Court. Town of Ware v. Town of Hardwick, 67 Mass. App. Ct. 325, 326 n.2 (2006). Upon a case stated by agreement, the Court "is at liberty to draw from the [stipulated] facts and documents stated in the case any inferences of fact which might have been drawn therefrom at a trial, unless the parties expressly agree that no inferences shall be drawn." Id. at 326, quoting Nolan & Henry, Civil Practice § 33.7 (3d ed. 2004). The label is not the determinative factor in treating an action as a "case stated," but rather the court looks to the substance of the agreement. Id.

Here, the material ultimate facts are all set forth in the pertinent documents. The sole issue remaining for trial in this matter is whether the 1994 HAC footnote evidences the terms of an "express agreement" between the Town and Northland to set a termination date of September 25, 2022 for the affordability restrictions at the Property. In fact, this Court previously ordered that "what happened on and around the date of that 1994 HAC Order may be relevant, however more recent statements, knowledge, or perceptions by town employees would not be relevant to the court's inquiry." See Court's Order, dated August 10, 2023.

In this case, there is no testimony from anyone with personal knowledge as to the meaning of the 1994 HAC footnote (as the Town Planner testified he was not involved in this project or the affordability restrictions set forth therein), and all other deposed Town staff and consultants were

not in the Town's employ at that time. Where the 1994 footnote is contained in a document subject to interpretation by this Court and the drawing of any factual inferences as necessary, a case-stated trial is appropriate.

That said, the Town understands that the Court disagrees that a case-stated trial is appropriate here. The Town has filed motions in limine seeking to preclude irrelevant testimony of the witnesses identified by Northland below. If the Town's motion(s) in limine are denied, the Town intends to present its legal argument and position based on a presentation of the agreed-upon trial exhibits, during or shortly after opening argument, at the Court's preference, but reserves its right to call any of the witnesses identified by Northland below in the Town's rebuttal case, in addition to Mr. Frederick Lenardo (he/him), the Town of Westborough's Community Development Director and Zoning Enforcement Officer; Mr. Allen Edinberg (he/him), of the Westborough Affordable Housing Trust; and/or Edward F. Behn (he/him) of the Westborough Affordable Housing Trust.

Northland's Position:

As the Court stated in its January 17, 2024 decision, evidence of the parties' intent, including testimony of former Town officials, "may clarify the meaning of Footnote 1 in the appropriate factual and procedural context and the existence of any agreement between the Town and Avalon," as well as other factual distinctions between this case and *Ardemore*. It is therefore appropriate for the Court to hear witnesses who can testify regarding the parties' intent and understanding in the 1990s relating to the 1994 HAC Order and the issue of affordability duration.

Northland reserves the right to call the following fact witness at trial:

1. Mr. James Robbins (he/him) – Pomfret, Connecticut. Mr. Robbins was the Town Planner during the relevant time period and is expected to testify regarding the Town's

understanding of affordability duration during the permitting process for the Development.

2. Mr. James Malloy, former Town Manager of Westborough. Mr. Malloy was Town Manager in Westborough from 2009 to 2018. He can testify as to SHIs the Town sent to DHCD over many years showing the Development's affordability restriction would expire. Mr. Malloy also received the letter from MassHousing in 2013 notifying the Town that Northland had fulfilled all financing obligations in 2011.
3. Suzanne Abair (she/her) – President and Chief Operating Officer, Northland – Newton, Massachusetts. Ms. Abair was in a senior position at Northland at the time it acquired the Development from Avalon in 2007, at which time Northland also negotiated a renewed 15-year affordability period ending in 2022. Ms. Abair was closely involved in this acquisition and negotiation with MassHousing. Ms. Abair's testimony will focus on Northland's understanding of the duration of affordability restriction when it acquired the Development in 2007.
4. Kristi Williams (she/her) – Westborough Town Manager. Ms. Williams, who was deposed in this action, was identified in the Town's Answers to Interrogatories as a person with knowledge of "[t]he Town's discovery of Northland's intended conversion of the affordable rental units to market rate rental units at the Subject Property, correspondence with Northland, affordable housing trust efforts, and enforcement affordability efforts."
5. Mark O'Hagan (he/him), Westborough's affordable housing consultant. Mr. O'Hagan, who was deposed in this action, was identified in the Town's Answers to Interrogatories

as a person hired by the Town "to assist with seeking grants under subsidy programs that might provide relief both for Northland and the Town.

6. Any Town witnesses

7. Rebuttal witnesses

IV. EXHIBITS

(a) Agreed-Upon Exhibits

The parties agree that the Agreed-Upon Exhibits are admissible evidence.

1. Westborough Zoning Board's Meeting Minutes for CMA Inc.'s Comprehensive Permit, dated January 9, 1989-March 28, 1989.

2. HAC Decision in the matter of CMA, Inc. v. Westborough Zoning Board of Appeals, No. 89-25, dated June 25, 1992.

3. Letter from Avalon's Senior Vice President, Bryce Blair, to Zoning Board Chair, Donald Gillis, re: M.G.L. Chapter 40B Permit Granted to CMA, Inc. for the Charlestown Meadows Development, dated March 15, 1994.

4. Letter from Zoning Board's Chair, Donald Gillis, to Avalon's Senior Vice President, Bryce Blair, re: Comprehensive Permit – CMA, Inc. Charlestown Meadows Development, dated April 5, 1994.

5. Joint Status Report and Recommendation in the matter of CMA, Inc. v. Westborough Zoning Board of Appeals, No. 89-25, dated June 7, 1994.

6. HAC's Order to Transfer of Permit, in the matter of CMA, Inc. v. Westborough Zoning Board of Appeals, No. 89-25, transferring the Comprehensive Permit from CMA, Inc. to Avalon, dated July 20, 1994.

7. Regulatory Agreement between Avalon Town Meadows, Inc. and Massachusetts Housing Finance Agency ("MHFA"), dated December 10, 1996, recorded on December 12, 1996 in the Worcester County Registry of Deeds, at Book 18464, Page 115.

8. MHFA Land Use Restriction Agreement with Avalon, dated December 10, 1996, recorded on December 12, 1996 at the Worcester County Registry of Deeds, at Book 18464, Page 134.

9. Northland's Amendment to the Regulatory Agreement with MHFA, dated September 25, 2007 and recorded on September 25, 2007 at the Worcester County Registry of Deeds, Book 41842, Page 143.

10. Northland's Second Amendment to the Regulatory Agreement, dated October 18, 2018 and recorded on October 26, 2018 at the Worcester County Registry of Deeds, at Book 59605, Page 245.

11. Department of Housing and Community Development ("DHCD") Chapter 40B Subsidized Housing Inventory ("SHI") for Westborough, generated and dated April 22, 2022.

12. DHCD Chapter 40B SHI for Westborough, generated and dated November 16, 2022.

13. Letter from Edward F. Behn, Chair of the Westborough Affordable Housing Trust and Allen Edinberg, Trustee of Westborough Affordable Housing Trust and Chair of the Westborough Select Board to Stacy Arce, Regional Property Manager at Northland re: Maintaining Affordable Housing Inventory at Westborough Station, dated February 15, 2022.

14. Letter from Edward F. Behn and Allen Edinberg to Stacy Arce re: Maintaining Affordable Housing Inventory at Westborough Station, dated June 7, 2022.

15. Letter from Town Manager Kristi Williams to Suzanne Abair, Beth Kinsley, Matthew Gottesdiener, and Lawrence Gottesdiener re: Residences at Westborough Station – Survival of Affordability, dated June 16, 2022.

16. Letter from Beth Kinsley, General Counsel at Northland, to Town Manager Kristi Williams re: The Residences at Westborough Station, dated June 28, 2022.

17. DHCD Chapter 40B SHI for Westborough, List of the Town's SHI Inventory, generated and dated October 31, 2023.

18. Town's Zoning Bylaw, generated and dated October 21, 2024, and Zoning Map, revised March 8, 2022.

19. Summary of the "TELLER" Program as created by Chapter 233 of the Acts of 1984.

20. Letter from Chair of the Westborough Select Board to DHCD's Office of Chief Counsel re: 2008 Subsidized Housing Inventory for Westborough, dated November 21, 2008, Enclosing DHCD SHI, generated and dated September 24, 2009.

21. Letter from Henry Mukasa, MassHousing Director of Rental Management, to James Malloy, Westborough Town Manager, re: Residences at Westborough Station Compliance Monitoring for Chapter 40B Project, dated April 18, 2013.

22. Satisfaction/Discharge of Avalon's Mortgage and Termination of Land Use Agreement, dated December 12, 2011 and recorded December 23, 2011 at the Worcester County Registry of Deeds, at Book 48316, Page 20.

23. Board of Selectmen Meeting Minutes, dated May 24, 1994.

24. Letter from Mintz Levin to MHFA re: Avalon Town Meadows, Inc. Avalon West Apartments, Gleason and Fisher Streets, Westborough, Massachusetts, dated December 10, 1996.

25. MassHousing Tenant Selection Plan for Northland's 80/20 Loan executed by Northland's Treasurer, Mark Consoli, dated October 1, 2007.

(b) Contested Exhibits

The parties raise no authentication objections to any of the Contested Exhibits.

1. Emails between representatives of Northland, Mary Lee Moore, and MHFA's John McGinty, re: Prepayment Language in Avalon West's Mortgage, dated August 9, 2007

2. Emails between and among James Malloy, James Robbins, and Mark Silverberg re: Affordable Housing Analysis, dated July 5 – July 18, 2017, with attached Affordable Housing Analysis spreadsheet.

3. Letter from Town Community Development Director Frederick J. Lonardo to DHCD's General Counsel re: Subsidized Housing Inventory Biennial Update, dated May 26, 2022, with attached DHCD SHI Inventory.

4. Emails between the Town's Director of Planning, Jenny Gingras, and DHCD re: Westborough SHI, dated October 30-31, 2023, with attached DHCD List of SHI Inventory.

5. Email between Town Manager Kristi Williams and DHCD re: Westboro Biennial Update Mailing 2022, dated May 4, 2022, with attachment.

6. Letter from Benjamin B. Tymann, Esq. to Town Manager Kristi Williams re: the Residences at Westborough Station, dated July 22, 2022, with numerous attachments.

7. Letter from Benjamin B. Tymann, Esq. to Town Manager Kristi Williams re: the Residences at Westborough Station, dated August 23, 2022.

8. Email from Edward F. Behn to Stacy Arce re: Memo to Northland – Residences at Westborough Station, dated February 16, 2022, with attached February 15, 2022 Memorandum.

9. Email from James Robbins to Stacy Arce re: Northland Investment property: Charlestown Meadows, Westborough, dated February 10, 2022.

10. Email from Allen Edinberg to Linda Strand re: Time Sensitive Question, dated January 26, 2022.

11. Email from Allen Edinberg to CEDAC's Bill Brauner re: Update on Charlestown Meadows – Call with Bill Brauner of CEDAC, dated January 13, 2022.

12. Letter from MCO Housing Services' Mark O'Hagan to Edward F. Behn re: Residences at Westborough Station Expiring Use Restriction, dated May 6, 2022.

13. Letter from Town Manager Kristi Williams to DHCD re: Preservation of Affordable Housing, dated September 23, 2022.

14. Email from Stacy Arce to DHCD re: Affordability Requirements for Charlestown Meadows: Westborough, dated November 22, 2021.

15. Email from James Robbins to James Malloy et al. re: Westborough's SHI Listing, dated July 19, 2017 (Malloy Depo. Ex. 2).

16. Emails between Jonathan Steinberg, James Robbins, and James Malloy re: Affordable Housing, dated July 18, 2017 (Malloy Depo. Ex. 3).

17. Emails between Edward Behn, Northland's Alisha Penka, and MCO Housing's Maureen O'Hagan et al. re: the Residences at Westborough Station, dated April 6, 2022 (O'Hagan Deposition).

18. Letter from Edward F. Behn and Allen Edinberg to DHCD re: Emergency Actions to Prevent Evictions of 24 Households at the Residences at Westborough Station (100 Charlestown Meadow Drive, Westborough MA 01581), dated October 13, 2022 (Williams Depo. Ex. E).

19. HAC Exhibit List in *CMA, Inc. v. Westborough Zoning Board of Appeals*, No. 89-25.

20. HAC Hearing Exhibit 23, Adams, Harkness, and Hill, Inc., Pro Forma Documents, dated November 1, 1989.

21. Email from Mary Lee Moore to Werner Lohe re: Existing 40B Project, dated August 10, 2007; Email from Fransisco Stork to Mary Lee Moore re: Avalon West Amendment to Regulatory Agreement, dated September 14, 2007; and Email from Fransisco Stork at MHFA to Beth Kinsley re: Residences at Westborough Station, dated December 16, 2011 (*with redactions).

Respectfully Submitted,

PLAINTIFF,

TOWN OF WESTBOROUGH, BY AND THROUGH ITS SELECT BOARD,
By its attorneys,

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NORTHLAND TPLP LLC,
By its attorneys,

/s/ J. Patrick Yerby
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October 24, 2024

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DOCKET NO.: 22 MISC 000445-DRR

WORCESTER, SS.

TOWN OF WESTBOROUGH, by and through its SELECT BOARD,
Plaintiff,

vs.

NORTHLAND TPLP LLC,
Defendant.

TRIAL PROCEEDINGS, DAY 1

BEFORE THE HONORABLE JUDGE DIANE R. RUBIN

3 PEMBERTON SQUARE, BOSTON, MASSACHUSETTS

Tuesday, October 29, 2024

9:30 a.m. to 12:49 p.m.

Reported by:

Dawn Mack-Boaden

Registered Professional Reporter; CSR# 153120

APPEARING REMOTELY FROM NORFOLK COUNTY, MA

APPEARANCES:

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EXAMINATION

AGREED-UPON EXHIBITS

AGREED-UPON EXHIBITS (continued)

CONTESTED EXHIBITS

CONTESTED EXHIBITS (continued)

THE WITNESS: Thank you.

THE COURT: Attorney Braun.

MS. BRAUN: Thank you, Your Honor. Thank you, Ms. Williams.

The Town has no further witnesses to call on its behalf and would rest.

THE COURT: Thank you very much. Counsel now for the defendant's case.

MR. TYMANN: Yes, thank you, Your Honor.

Defendant Northland calls its COO and president Suzanne Abair.

SUZANNE ABAIR, a witness first having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TYMANN:

Q. Good morning, Ms. Abair.

A. Good morning.

Q. How are you?

Could you please state your full name and business address for the record.

A. Suzanne Abair. Northland Investment Corporation; 2150 Washington Street, Newton, Mass.

Q. And what is your position at Northland Investment Corporation?

A. President and chief operating officer.

Q. And how long have you been at Northland?

A. Twenty years.

Q. And what are your duties and responsibilities as the COO and president of Northland?

A. I have oversight of all of the operations of our management company.

Q. And could you please describe for us the core business of Northland, as you see it.

A. Sure. Northland is a real estate private equity firm where they focus on the acquisition, development, long-term ownership, and management of mixed use and multi-family assets.

Q. And how many property does -- properties does Northland own nationally?

A. Currently, 94.

Q. Okay. And how long has Northland been doing business in Massachusetts?

A. Since 1970.

Q. When did you begin working for Northland? You said 20 years ago?

extension of the affordability restrictions as they did?

A. Well, in 1994 in the order to transfer the permit from CMA to Avalon, the -- both the Town of Westborough and Avalon agreed that MassHousing would be the agency that would set the term for the affordability restrictions.

And so they had the authority to do it, and they required it as a condition of our purchase of the property.

Q. And were there any other reasons why Northland was willing to accept an extension of affordability to that specific 2022 date?

A. Yeah. You know, in connection with the acquisition, we did the financial analysis to determine what the impact would be on both the operations and the value of the property, knowing that the affordability restrictions would end in 2022.

Based on that financial analysis, based on that end date in 2022, we made the investment decision to acquire the property on the terms that we did.

Q. And why was that important to have an end

date?

A. Again, because the affordability restrictions reduce the amount of cash flow that a property can generate, and while the -- the income is reduced on the affordable units, expenses are not reduced. Taxes, insurance, turn cost; everything remains the same.

So affordability restrictions have a material impact on the underwriting for the property.

Also, as you reduce the cash flow, it reduces the potential value of the property because real estate investment property is typically valued by using an income approach. You reduce the income, you reduce the value.

Q. Okay. And had there been no assurance in 2007 of an end date for the affordability restriction for these units, would that have changed Northland's analysis of whether to move forward with the acquisition?

A. Absolutely.

Q. Why is that?

A. Again, because the affordability restrictions impact both the cash flow, which

impacts the operations, and the value of the property.

Q. Would Northland have acquired this project without an end date to the affordability restrictions?

A. No. And certainly not at the purchase price we paid.

Q. Did you consider at the time that an extension of an extra 11 years or 15 years from the '07 acquisition totaling from 1996 to 2022, 26 years, to be long term?

A. Yes.

Q. I'd like to show you another document. It's stipulated Exhibit 9. So that's, again, going to be in the first section of the binder?

THE COURT: Exhibit 9?

MR. TYMANN: Exhibit 9, yes, Your Honor.

BY MR. TYMANN:

Q. And, Ms. Abair, this document is the amendment to the regulatory agreement dated September 25th, 2007; is that right?

A. Yes.

Q. Okay. And if you look at Paragraph 1 on page 1, it's entitled Extension of Affordability

developer in Ardemore also argued that it purchased the property on an understanding that it had the right to terminate those units after 15 years and then make a profit on the market rate units?

A. So I'm not sure what you mean when you use air quotes. So if that's meant to convey something, I'm not sure what it is.

Q. It's meant to convey a quote from the SJC's decision in Ardemore; the understanding being in quotes.

A. So you're going to have to please repeat the question.

Q. Are you aware that the developer in Ardemore also argued that it purchased the project on the understanding that the affordability requirements of the MassHousing loans would terminate after 15 years?

MR. TYMANN: Objection, Your Honor. Just repeated with respect to comparative analysis on the cases, which I think this is straying into legal arguments.

THE COURT: Overruled.

THE WITNESS: I don't. And let's be clear. Every developer does a financial

analysis, whether you put quotes around it or not, because how else would you determine the viability or financial performance of whether you can build the development or not?

BY MS. BRAUN:

Q. Certainly.

A. So no developer is -- no developer is going into a development and a permitting process without having done the appropriate financial analysis to determine whether the -- the development will be viable under the terms in which the permitting authority and the conditions that the permitting authority and the financing authority are putting on the development.

Q. Certainly. And are you aware that the Supreme Judicial Court in Massachusetts rejected the developer's argument in that case?

A. Rejected their argument about what?

Q. That they purchased the project on the understanding that the affordable units would terminate after 15 years then --

A. Because they had never discussed with the Town --

THE STENOGRAPHER: Hold on.

THE COURT: Hold on. You have to let her finish the question. Because otherwise we don't get a good record.

BY MS. BRAUN:

Q. Would terminate after 15 years and then convert to market rate units, at which point it would be allowed to receive more income and a higher project value based on the market rate income -- the market rate units.

A. Yeah; the Supreme Court disagreed with that because the Town and the developer had never had that discussion.

As opposed to, in this case, the Town was a party to the Housing Appeals Committee agreement -- or Housing Appeals Committee process. It was a party to that proceeding. It had been working with Avalon for years.

And when that Housing Appeals Committee decision was issued in 1994, the Town knew and had tacitly approved in that Housing Appeals Committee proceeding, that MassHousing would be the agency that would set the term for those affordability restrictions. And it does not just relate to the

C E R T I F I C A T E

COMMONWEALTH OF MASSACHUSETTS
Norfolk, SS.

I, DAWN MACK-BOADEN, CSR #153120, RPR, and a Notary Public duly qualified in and for the Commonwealth of Massachusetts, do hereby certify that:

THE TRIAL PROCEEDINGS SET FORTH ABOVE, AND ALL TESTIMONY GIVEN HEREIN, is a true and correct transcription of my original stenographic notes taken in the forgoing matter, to the best of my knowledge, skill and ability.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition is taken; and furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties thereto or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial seal this 6th day of December, 2024.

_____
Dawn Mack-Boaden, RPR
Notary Public

My Commission Expires: August 26, 2027

THE FOREGOING CERTIFICATION OF THIS TRANSCRIPT DOES NOT APPLY TO ANY REPRODUCTION AND/OR DISTRIBUTION OF THE SAME BY ANY MEANS UNLESS UNDER THE DIRECT CONTROL AND/OR SUPERVISION OF THE CERTIFYING COURT REPORTER.

TOWN OF WESTBOROUGH
MASSACHUSETTS

BOARD OF APPEALS

TOWN HALL, WEST MAIN STREET
WESTBOROUGH, MA 01581

CMA, INC. - COMPREHENSIVE PERMIT
HEARING MEETING MINUTES

January 9, 1989

The Westborough Board of Appeals, acting under the Westborough Zoning By-Laws and General Laws, Chapter 40B, held a public hearing on January 9, 1989 in the Westborough Town Hall to hear the petition of CMA, Inc. for a Comprehensive Permit. The petitioner seeks a Comprehensive Permit for the construction of 274 residential apartment units on property containing 11.1 acres of land, more or less, located at the intersection of Fisher and Gleason Streets, under the "TELLER" program.

Board members present: Chairman Donald M. Gillis, John E. Rainey, Richard Pedone, William J. Kosciak, and Carol Thomas from Thomas Planning Services.

Richard E. Wood, attorney, represented the applicant, CMA, Inc. The proposal is for 274 residential rental units on 11.1 acres of land. About 30 abutters were present.

Wood explained that a CMA, Inc. is a limited dividend organization as set forth in the TELLER program. There will be 55 low or moderate priced apartments. All units will be rentals. This is under Chapter 774. Currently Westborough has 3-3.7% of low or moderate income housing. The suggested requirement is 10%.

Currently there are 88 units at Beach Street and it is assumed that within the next year or two these will no longer be low or moderate housing units. Wood noted that the total number of units - 274 - can be applied to the 10% suggested requirement by the State. Carol Thomas took acception to this. Ms. Thomas stated that the Housing Appeals Committee says the Towns must pro-rate this. Kosciak asked Wood for a written statement. He stated he would try.

Wood continued that the area consists of 11.1 acres at the corner of Fisher and Gleason. It is away from any large concentration of residential units. Access is from many different ways - Fisher, Gleason, Smith Valve Parkway to Otis Street. It is relatively close to BJ's and the new,

under construction Stop & Shop. There is no need of a large amount of traffic to come into Westborough Center unless to shop. There will not be a big impact to residential areas. Wood stated that the Fisher Street bridge is still closed.

Wood explained that with the limited dividend partnership, no state or Federal funds will be used to construct this project. For a two bedroom unit, the maximum rent is $535. The tenant will pay a portion of this; the balance will be paid by state or federal; utilities may not be added onto the tenant's rent.

Pedone stated relief from the Zoning By-Laws compensates for the economic benefit of these low income units.

Gilbert Stiles, 54 Arch Street, asked how many single family homes could be built. Rainey stated roughly ten, minus streets and parking. The petitioner proposes 274 units.

The architect, Loren Belida from O. E. Nault, presented the plans. They have done other work in Westborough such as the library addition and the fire station addition. He stated the top of the property is a rolling meadow. There will be two entrances - one off Gleason, one off Fisher. They are proposing to take the nob off Gleason Street and fix the bend. They will be building four buildings plus the one existing duplex will stay. All buildings are 100% accessible by the fire ladder truck.

Gillis stated for reference the Willows complex is 11 acres.

Rainey stated the application stated total coverage is 71%; 29% of the site is open space. Wood concurred. However for garden apartments in Westborough maximum lot coverage is 20% with a minimal open space of 40%. The proposed foot print is 15%; 56% is paved. Wood stated that the parcel is in an industrial zone.

Wood stated that a fire sprinkler system is proposed for the entire complex. There will be pools, basketball court, etc. for recreational facilities. The buildings will appear to e 3½ stories. There will be 5% handicapped units. Seventy-five percent of the units will be two story units with a living level and a bedroom level. There are five levels of units; by the building code there are four levels. The maximum height is, relative to median grade, 35 feet. They may be as high as 45 feet. The printed material says 35 feet. Pedone asked for clarification. The building height average mean grade - average of gable end - by their definition may conform. The proposed maximum lot coverage is 30%; industrial B zone is a minimum open space of 40%. This applicant proposes 29%. The minimum habitable floor area requirement is 720 sq ft. Twenty four of the units will have only 584 sq ft. They explained that the dormers

are liveable area. Regarding parking spaces, the requirement is two spaces per unit; they propose 535 spaces for the 274 units. The one bedroom garden apartment will have less than 600 sq ft; the three bedroom apartments will have 1300 sq ft. A two bedroom town house apartment will have 900-1100 sq ft. Each unit will have a half bath on the first floor; two entrances - a formal one and one in the rear. The two bedroom units will have a full bath and a full laundry unit and full walk-in closet. Each unit will be independently heated and cooled. All vent stacks will e conceiled in chimneys and in widow walks. Most units will have an outside egress which is much safer. The materials will be brick and clapboard, built with a wood frame and sheet rock.

Kosciak asked for clarification on the TELLER prorgram. Wood stated the TELLER program has to give their stamp of approval. Twenty percent overall units for low and moderate income. These units must be mixed in and remain so for 15 years. This is not a blighted open area. It is a mixed income area.

Kosciak noted that most drawings are not drawn to scale and that all are preliminary. There are no sidewalks or street widths noted on the drawings. Wood took exception to this. He stated the statuate allows for preliminary drawings. Ms. Thomas asked for dumpster sites. They are not marked. Wood noted that the basic roadway width is 25 feet and that is a valid point about the missing dumpster locations.

Brian Pehl stated there are three plans included in the Board's package drawn to scale. Kosciak stated it is not written on them.

Mr. Belida stated there are sidewalks, about five feet wide. The landscape plans includes parking, green space, sidewalk, more green space and then garden area.

Rainey noted that there are a number of things missing from the submittal. He asked when the petitioner would be submitting them to the Board. (Note: The Board's consultant had previously sent a check list to the petitioner noting missing items according to CMR.) Rainey noted specifically (1) evidence of organization was missing - Wood stated he will submit this; (2) dimensions - Wood stated they are on the plan and the Board could measure the maps themselves; (3) street elevations - Wood stated they are on the plot plan - Pedone stated this plan is illegible and asked Wood to read it for him. Wood objected. Kosciak asked for some ideas on grades on roadways. Pedone stated the information submitted is not sufficient. The contour lines are shown but not grade of streets. A discussion continued about road grades and elevations on Fisher Street and Gleason and roadways within the project.

Ms. Thomas asked for clarification on street widths and location of surrounding buildings on surrounding parcels. Rainey asked for an Assessor's Map with location of houses and buildings noted on it.

A traffic report was submitted. Rainey asked for a summary of where traffic will go and a summary of the level of service. Pehl pointed it out to him.

Regarding the drawing of property lines which was requested of the petitioner, Pedone and Ms. Thomas stated it is illegible. The petitioner stated he would supply a plan of dimensions and widths of roadways.

The petitioner had not submitted a document showing why waivers from the Zoning By-Laws were being requested and how it makes it economically feasible. Ms. Thomas asked for a financial statement which shows a cash flow under the different scenarios - a pro forma. Rainey asked why 55 low income units. He asked for a pro forma which should be submitted according to CMR. Rainey also questioned assuming no waivers were granted, how many units could be built. Wood stated he would supply this information.

Mrs. Lillian Harding asked where the buildings will be located and where the culvert is. Stelmach stated the buildings will be more than 100 feet away. The wetlands end of the property will not be built on. Pehl showed on the plans the wetlands and stated they will be more than 100 feet from the wetlands. Wood explained that the petitioner still has to go before the Conservation Commission.

Richard Sundstrom, Planning Board, stated the Planning Board had a written statement on this proposal and he read it. He asked for a resume from the traffic consultant. Gillis asked that the traffic consultant appear before the Board at the next hearing. Sundstrom asked why 575 parking spaces. He questioned if maybe some spaces could be left green.

Jacqueline Tidman, Historical Commission, stated her Board will be reporting to the Board in writing.

Steve Young, Housing Partnership, stated MEPA required an EIR and asked if this has been published yet. Pehl stated they just received it today. He stated that traffic, site impact, drainage, sewerage, and archeological artifacts are major concerns. Mrs. Tidman asked that all Boards receive a copy of the EIR.

Ms. Thomas asked that the petitioner supply three pro forma - one under conventional zoning, one half way in between, and one at 75%. Rainey asked for pro formas at the proposal level; one with no zoning variances; and one at the 75% level.

Gillis asked that someone from the traffic consultant's office be present at the continuation of this hearing.

Mr. Ward, Shrewsbury, asked if Town sewer will be used. Wood stated the Town sewer line will be there by the time of construction. Ward asked about the aquifer from the Town well site. Pehl stated it is very far away.

Lois Stiles, Arch Street, asked about traffic from Smith Valve when it is rented and what about the additional 21 acres. Bob Oriel, Mill Road, Conservation Commission, suggested that the applicant schedule a working session with the Conservation Commission.

Gilbert Stiles, Arch Street, asked about the viability of this site. What about the potential liability of the future health risks of future tenants. This site is about 1000 feet from one of the "Hot 100" sites as stated by MEPA.

Rainey adjourned the hearing to February 6, 1989 at 7:30pm to allow the petitioner to supply the additional information requested by the Board. With no future questions, the hearing was adjourned to February 6th.

CONTINUATION OF PUBLIC HEARING
February 6, 1989

Board members present: Chairman Donald M. Gillis, James B. Johnson, Richard Pedone, John E. Rainey, and William J. Kosciak. The Board's consulant, Carol Thomas from Thomas Planning Services was also present. About 30 abutters were present.

Attorney Wood submitted additional information to the Board in response to the Board's request. The petitioner had met with the Westborough Housing Authority on January 26, 1989 and they reaffirmed their support of this project. Wood submitted their letter to the Board. They have also met with the Board of Selectmen. Wood noted that the petitioners have met with the Westborough Housing Authority several times over the past year. Wood submitted a letter from the Mass. Housing Authority confirming that all 274 units would be applied to the 10% number for the Town because this project is in the TELLER program.

Lillian Harding, Gleason Street, asked about wetlands and how close the parking lot will be to her boundary. Wood stated there has been a Notice of Intent filed with the Conservation Commission. There will be a hearing set before the Conservation Commission after this Board acts.

Pedone asked for a map with surrounding buildings and property lines designated.

The Board of Selectmen have showed concern regarding the number of school children who might live in these units. The petitioner did a study and have come up with an average per unit. Wood stated Fountainhead has 576 units and has 30 school children. Windsor Ridge has an average of .349 children per unit. They estimate .165 children per unit with this project. They estimate a total of 45 children.

Howard Garsman, South Street, Shrewsbury, questioned the validity of the numbers presented regarding school children. He stated the apartment complexes Wood compared this project to do not have any subsidized units. Wood stated he didn't have figures from Beach Street which is subsidized. Wood and Garsman argued this point of numbers of children in the complex for some time. Wood then discussed density. Fountainhead is 37.5 units per acre; Carlton Garden is 13.8 units per acre; Park Village is 16.8 and Windsor Ridge is 15.2. They are proposing 24.7 units per acre.

Rainey asked if this property was brought before Town Meeting last year for re-zoning. Wood stated it was for apartment buildings and they were defeated. Rainey stated then that the Town has said they do not want apartments on this property.

Pedone stated that the petitioner is using the Comprehensive Permit process to get these apartments in. Wood stated no, they are trying to utilize this land for the best purpose.

Rainey asked where the residential lots are in Shrewsbury. Garsman stated about half a mile from the project.

Gillis read a letter from the Shrewsbury Planning Board, Joseph Allen, strongly opposing this project. Pedone asked if the developer had talked with the Town of Shrewsbury. Wood stated no. They have worked with the Town of Westborough DPW and have agreed to widen and improve Gleason Street for a distance. They would have to get water and sewer from Smith Valve Parkway to Otis Street. They have agreed to do a substantial amount of improvements in this area.

David Kenline, South and Walnut Street, Shrewsbury, stated his home is a short distance from this project.

Rainey stated it seems we need a map showing roads and abutting area in the Town of Shrewsbury. This parcel abuts Shrewsbury but it is not noted on any maps. Pedone asked about sewer and widening the streets. He asked where in the petition does it state in writing exactly what the petitioner is going to do and where do the costs show up on

the pro forma. Wood responded the sewer line will cost $189-190K; upgrading of the pumping station is questionable depending on how much work needs to be done but will be in the area of $50-100K; water main on Gleason Street (1,000') $45K; Gleason Street improvements $76-90K. Pedone stated if they add this up, improvements will be a total of between $360-$450K. He asked Wood to confirm this. Wood stated this is correct. This information is not in writing in the petitioner's application, however.

Wood also stated that the petitioner will be subsidizing some units. For example, the two bedroom subsidized unit will rent for $535/month plus owner has to supply utilities. The market value units will be approximately $800/month plus utilities. If a tenant comes in and can only pay $250/month, the State will subsidize the difference between $250 and $535 but the developer picks up the heat, electricity, etc. They figure they will subsidize $3M over 15 years. Stelmach stated this high density is the only way they can make this project work.

Pedone stated Town Meeting said no apartments on this property. Now they are saying they are willing to give 55 tenants a $3M subsidy over a 15 year period so that they can receive a 10.32% return on their project. Rainey questioned the rates of return.

Dick Sundstrom, Planning Board, stated some facts about the number of school children in the last 129 homes built in Westborough. On the average there are two children from each home. Also as a consideration, Champlain Gas is planning a natural gas line which may go straight through this property. Sundstrom submitted a letter to the Board and also asked for the financial impact this project will have on the Town.

Pedone stated that in the pro forma for 274 units it states a rate of return of 1.23% - isn't this illegal according to the terms of a limited partnership. Hobbs stated no. Rainey stated we are look for a rate of return by State guidelines. The information submitted by the petitioner does not shown this. Hobbs and Pedone discussed the percent of return for some time. Hobbs stated this project is well below the 10% return. Fifty-five units is the mininum number of subsidized units.

One abutter asked if the developer could sell the property within the 15 years. Yes, if they sold it to another limited partnership. Wood stated the 15 years start when the first 10% of the units are available. Pedone asked if after 15 years could this be a non-subsidized apartment complex. Wood stated it depends on the Town. The Town could buy these units at 10% lower than market rate. Wood stated he is working with the Board of Selectmen and Housing

Authority to purchase these and this is not important to the ZBA. Pedone took exception to this. Wood stated this is beyond the scope of the Comprehensive Permit.

Pedone asked about increase in drainage. Paul Cielak, Gerard Survey, stated by increasing the pipe this will help the surrounding area. Gillis asked if the petitioner had talked to DPW. Pehl stated he talked mostly with John Walden.

The square footage of the footprint of the building is 73,908 sq ft. The size of the most expensive apartment is around 1200 sq ft an rent will be about $1,000/month.

Mr. Ward from Shrewsbury asked how wide the road will be widened. Wood stated 24' and they are working on trying to straighten out a small curve.

Pehl stated the maximum rent per square foot is $10; industrial space is $4-6/sq ft.

Kosciak asked what would the impact be on the Town if this project goes broke in five years. Stelmach stated no. Wood stated the State will review this project carefully. The Westborough Housing Authority is the Board who screens tenants. Wood estimated that construction will take three years.

Carol Thomas stated 29% of the land will be now be impervious surface. Knowing the character of the Town with wetlands, have they worked on any numbers. Stelmach stated the only way they could lower this percentage is to build higher or the parking spaces would be reduced. They plan on 535 parking spaces, maybe the Board could reduce this number. Pedone stated with two working people in apartments, there would be two cars per unit. Wood suggested building so many parking spaces and leaving so much green space for future spaces as they are needed.

Mr. John Gillman, traffic consultant, stated he has been in the traffic engineering field since 1971. He reviewed his qualifications for the Board. He stated they took into consideration the Digital plan and Olde Shrewsbury Village. Rainey asked about the Otis Street to Route 9 intersection. Currently it is C level and will go to D level.

Carol Thomas asked for number of trips/bedrooms. Gillman stated he used trips per unit. Projected build out is 18 months to three years. Pedone took exception to a 5 % increase, he thought it should be more. Wood stated the traffic report has been filed and that are the numbers.

Gillman stated the level of service will not change dramatically. The increase in traffic will not change

dramatically. There will not be any noticeable change in level of service. It was noted that the traffic counts were taken while the Smith Valve building was closed. Gillman stated this would be used for light industry and would not increase traffic at peak hours. One abutter asked about traffic accident reports. Walnut Street in Shrewsbury is very narrow and dangerous.

At 10:15pm, Gillis suggested that the Board continue this hearing to February 27, 1989 at 8:30pm. Wood objected to the continuation of the public hearing. Rainey stated the Board needs additional time to review the additional information submitted by the petitioner. The Board voted to continue the hearing to February 27th.

CONTINUATON OF PUBLIC HEARING
February 27, 1989

Board members present: Chairman Donald M. Gillis, James B. johnson, John E. Rainey, Richard Pedone, William J. Kosciak and the Board's consultant, Carol Thomas. About 75 abutters were present from both Shrewsbury and Westborough.

Carol Thomas stated that Thomas Planning Services has reviewed all documents submitted by the applicant. Ms. Thomas stated that several items required by CMR have not been submitted by the applicant yet. Also there are some major concerns. One major concern on this proposal is density. They are proposing 25 units per acre. Also they are proposing that 75% of the site will be impervious. This is in excess. The height of the building is also a concern. There is little or no buffer to wetlands. Another concern is lack of open space and tot lots. Traffic is another concern. There are discrepancies in traffic counts. She stated the existing counts should be same as those submitted by the Fisher/Mill Road project traffic report and they are not. Also the developer has proposed no mitigation measures for traffic. Some minor concerns are there are discrepancies between plans submitted. These need to be corrected. Also the pro forma was done on three levels of construction - 274 units; 206 units; and 137 units. There are some confusing issues here also. The site improvement costs do not increase when the number of units increase. Ms. Thomas' comments are specifically outlined in her written report to the Board.

Janice Chumsey, Arch Street, Shrewsbury, asked the Board why she was never notified by the Board of the public hearings. She is an abutter in Shrewsbury. State Representative Peter Blute stated he feels the residents of Shrewsbury abutting this project should have been notified earlier in this

process. Blute questioned the legality of the public hearings. He noted that the Smith Valve building has recently been rented. There are many farm roads in the area. The petitioner has made no mitigation measures for roadways in Shrewsbury. He stated there aren't many Westborough residents in this area. The Shrewsbury residents are closer. They wish they had been notified earlier. They would like more answers to their concerns.

Gillis asked if Smith Valve occupation was taken into consideration. Pedone stated he had asked the traffic consultant if Smith Valve employees were taken into consideration and the answer was no.

Blute stated the traffic count should reflect these new employees. Howard Garsman, Shrewsbury, asked if the developer could put up funds for an independent traffic study. He stated this is not uncommon for a project this big.

Don Foley, past Selectman for Shrewsbury and an abutter, was concerned about far reaching impact of this size of a project. He expressed concern that the Board use caution with this project.

Skip Stiles, Arch Street, Westborough, questioned the legal notices in the paper.

Ms. Gliston, South Street, Shrewsbury, asked if traffic analysis was done on Gleason Street or South Street. Pehl stated MEPA told them exactly what traffic analysis had to include and that is what they did. Carol Thomas addressed this in general. There will be a reduction in the level of service. Any development on this land will increase the traffic. The traffic report took into consideration Smith Valve but that the building would be used for light industry or a 7am to 3pm shift.

G. Peters, South Street, stated the traffic issue is a very great one. He asked if there was any way they could get an independent traffic study. He asked if the study took into account the number of accidents at the intersections in Shrewsbury.

Ted Doyle, 34 Arch Street, wanted to place emphasis on density. The proponants are proposing 274 units on 11 acres. They by-laws would allow 6 or 7 single family dwellings. Also Town Meeting defeated this project for 100 garden apartments. Now they are coming back with 274 units. The real issue is not traffic but density on this 11 acre parcel. Doyle proposed 2-4 units per acre on this parcel. This is mandated by the Commonwealth of Massachusetts. Density is the main issue.

Linda Donnelly, Arch Street, Shrewsbury, stated she is not opposed to development but 25 units per acre is absurd. Also the marshland across the street is a very delicate area. It is a breeding ground for blue heron. She noted that Bose Corp is renting the Smith Valve building with two shifts of 600 people. Also there are school bus problems on Arch Street now. This is an outrageous proposal.

Pedone clarified the Comprhensive Permit process.

Sherry Clark, Walnut Street, stated this will be about a 7% increase in population for Westborough.

Mr. Foley asked a technical question - have they applied to the ZBA for consideraton or have they gone to the State Department of Housing? Carol Thomas stated they have applied for a Comprehensive Permit to the Westborough ZBA under Chapter 40B. They cannot go to the State until this is approved.

Rainey asked the developer why is 26-27 units per acre reasonable for this parcel. Wood stated this is the fourth densest project in Westborough. The density is not that great. Rainey stated that those more dense, the developments were on Route 9. This project is not. Rainey asked again for the figures of the projects Wood compared this one to. Wood stated he did not think they have to give this information now. Rainey asked for more information on this impact. Wood stated Fountainhead is far denser. Rainey stated but its right on Route 9.

Doyle stated these other units Wood is using for comparison were built before zoning was put into place. Fountainhead should not be used for comparison. This is eronous. Garsman, Arch Street, Shrewsbury, stated that at the last hearing Wood's comparisons were like comparing apples to oranges. They were ridiculous and totally out of wack.

Kosciak asked what is the developers guarantee that the state subsidized building will be finished. Two years from now, what if the State runs out of money, then what? Stelmach stated it is backed by the State's bonds. Garsman asked if they are willing to put this money into escrow.

Mr. Ward asked about the proposed gas line going through this area. It takes a 100 foot path. How will this affect this project. Wood stated "no comment".

Doyle stated he would like to get a Planning Board vote to the ZBA for the Board makes it final decision. They will not be giving more input but just a formal vote.

Skip Stiles, stated he has the impression the State has a gun at the Board's head for affordable housing. Have we

filled our quota in any way. Pedone stated we a law that we have to act within based on the input we get.

One abutter asked if we have to accept this project as proposed. Carol Thomas stated the Board has several options. She stated there are five stories essentially. Also the applicant can ask for waivers from any zoning to make this project economically feasible. That is why we have questions about the pro forma. The Board several options - deny; approve; or approve with conditions. In ideal situations, the applicant and Board work together. In this situation, Ms. Thomas questions the site improvement costs.

Abutters and the Board discussed reasonable issues. Gursman asked what guarantees that the State funding will remain available through the entire project. Gillis - none.

Another abutter stated that there are several buildings on Otis Street that are about ready for occupancy. This will increase traffic also. The hazardous waste site next door was discussed.

Skip Stiles, Arch Street, stated the Town has a need for affordable housing. The proponants have a piece of land. He would like to see a scaled down plan - 50-100 units on this piece of property.

Pedone asked Wood if the petitioner would entertain a working session to try to resolve some of the differences we have received through the previous hearings and public input. Wood stated he did not think it necessary. Pedone reiterated by stating and questioning that the petitioner is not willing to sit down with the Board to negotiate or make any changes to this project. Wood asked what time. Pedone stated the Board meets Monday nights. Wood then stated no. He will not go into a negotiating session with the Board in a public hearing. Pedone reminded Wood of the Open Meeting Law. Gillis suggested that Wood talk to his client.

Mr. Foley from Shrewsbury stated that in any other situation in Shrewsbury the petitioner asked abutters to meetings to explain the project before the public hearings, this was not done in this case.

Gillis suggest a ten minute break.

Wood stated the petitioner would be happy to negotiate with the Board on March 13th, if the public hearing is closed tonight. Gillis stated that if we should negotiate any changes there has to be some kind of open session for comments by abutters and Town boards. Rainey motioned that Wood's proposal is unacceptable. We have told the petitioner that negotiating in a closed session is

unacceptable. All voted that Wood's proposal is unacceptable. Rainey motioned that the public hearing be closed.

Pedone asked one more time if the petitioner would be willing to sit with the Board in an open negotiating session, on March 13, to talk about this project in general and any changes we may make at that time. Wood stated his answer has been given - no.

Rainey stated the issues and concerns have been brought up. The developer does not want to negotiate. If there are any other issues that we are not aware of, that's what we need to hear at this point.

One abutter asked about the overall height about ground. Pedone asked Wood to clarify the drawings. It states 35 feet to one point and then there is no figure from that point to the top of the drawing. Wood stated he couldn't comment on that. Rainey stated it looks about 51 feet including the chimney.

The Town of Shrewsbury opposes this project and has put it on record as such. Pehl stated the Town of Shrewsbury recently approved 340 units very similar to this. Blute stated yes but directly on Route 9. One asked if all runoff would be retained on site. Rainey stated yes.

Sue Wilkinson, South Street, asked if any other documents can be taken into consideration. Ms. Thomas stated the record closed at the close of the public hearings. The Board could read it but it would not be part of the official record.

Rainey then motioned that the public hearing be closed. Pedone stated he is very much disappointed with the developer's unwillingness to sit in open session to discuss problems with the project. He has general disappointment and wish somehow they would reconsider their decision. Wood had no comment. Kosciak seconded Rainey's motion. All voted to close the public hearing. The meeting was adjourned at 10:30pm.

DECISION MEETING MINUTES
March 13, 1989

Board members present: Chairman Donald M. Gillis, John E. Rainey, James B. Johnson, Richard Pedone, and William J. Kosciak.

Carol Thomas, Thomas Planning Services, read her letter to the Board dated March 9th. The letter addressed density and specifically traffic, safety, and wetlands. This parcel could support approximately 72 units. If there is not local support, density cold be reduced to 22 units considering the neighborhood's density. Carol stated she is looking for direction from the Board.

Rainey motioned that the Board tentatively deny the proposal pending final write up from Carol Thomas based on density, safety, and all other reasons stated in Ms. Thomas's memo to the Board. We have have tried to talk with the developer to make adjustments and they were not willing to negotiate. Rainey, Pedone, and Gillis are voting members.

Gillis accepted letters from abutters, one from Wood, and one from the Plannin Board. All are on file. Gillis seconded Rainey's motion.

Rainey stated density is real issue. Carol's memo addresses the issues. Also during the public hearings, the petitioner's attorney had a lot of "no comment" on certain issues. Pedone specifically asked the developer for a working session and he did not want it. Johnson stated its too much on too little. Also the traffic study did not address Shrewsbury. Gillis stated the Town's guideline of four units per acre is greatly exceeded. There is absolutely no recreational area on the parcel.

The Board discussed with their consultant the write up of the final decision. Gillis, Pedone, and Rainey voted in favor of Rainey's motion to deny this Comprehensive Permit. A final vote will be taken after the Board has read and reviewed the written decision. The meeting adjourned at 9:35pm.

DECISION MEETING MINUTES
March 28, 1989

Board members present: Chairman Donald M. Gillis, John E. Rainey, William J. Kosciak, Richard Pedone, and consultant, Carol Thomas.

Ms. Thomas gave her final report regarding the denial of this Comprehensive Permit. Carol stated each area of major concern and noted each specific item listed under each category.

Rainey motioned that the Comprehensive Permit requested by CMA, Inc. be denied based on these findings as written in the final report of the Board. Gillis seconded this.

The draft report will be transformed into the final decision of the Board. All voted in favor of denying this Comprehensive Permit.

The Board will sign the decision on April 3, 1989 and it will be filed with the Town Clerk shortly after that date. Gillis adjourned this meeting at 7:20pm.

Donald M. Gillis, Chairman

Richard Pedone

John E. Rainey

C O M M O N W E A L T H O F M A S S A C H U S E T T S

H O U S I N G A P P E A L S C O M M I T T E E

CMA, INC.

v.

WESTBOROUGH ZONING BOARD OF APPEALS

No. 89-25

DECISION

June 25, 1992

Housing Appeals Committee

Maurice Corman, Chairman

Werner A. Lohe Jr., Counsel

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COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

CMA, INC., Appellant	)	
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DECISION

I. PROCEDURAL HISTORY

On December 6, 1988, CMA, Inc. submitted an application to the Westborough Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build 274 units of subsidized, affordable housing under the Commonwealth's Tax Exempt Local Loan to Encourage Rental Housing (TELLER) program. After due notice and public hearings, the Board voted to deny the permit on March 28, 1989. From this decision the developer appealed to the Housing Appeals Committee. The Committee held a conference of counsel, conducted a site visit, and held a de novo evidentiary hearing, with witnesses sworn, full rights of cross-examination, and

a verbatim transcript.[1] The hearing was one of the longest the Committee has encountered, extending to 12 evidentiary sessions with over 1600 pages of transcript. Following the presentation of evidence, counsel submitted post-hearing briefs.

II. FACTUAL BACKGROUND

The developer initially proposed to build 274 rental units in three nearly identical buildings on a 11.1 acre parcel of land in Westborough on the Shrewsbury town line. The site is zoned industrial, though it is in a suburban area in a transitional location between commercial uses and single family houses. It is located at the intersection of

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[1] A group of 26 abutters and the town of Shrewsbury moved separately to intervene in the proceedings before the Committee. These were granted the status of amici curiae, and through counsel were permitted to participate fully in the hearing, examining witnesses, presenting argument, and submitting briefs.

Despite full participation in the hearing, Shrewsbury continues to argue in its brief that it should formally be granted full intervenor status. There is logic to this position since one factor to be considered with regard to intervention is whether it can fairly be assumed that the Westborough Board of Appeals will "diligently represent [the] interests" of the proposed intervenor. 760 CMR 30.04(2), 30.04(3)(c). But the only issue raised by Shrewsbury concerns traffic, which has an even greater, if slightly different, impact on Westborough. This sort of impact is not at all uncommon, and we believe that the legislature, which could have foreseen this and similar regional effects of subsidized housing, would have included neighboring town participation in the comprehensive permit process had it so desired. Since it did not, since Shrewsbury participated fully here, and since Shrewsbury's formal status before us does not effect its appeal rights (which are determined under G.L. c. 30A, § 14 via G.L. c. 40B, § 22), we deny the motion to intervene.

two rural roads, and is near two very heavily travelled highways, Route 9 and Route 20.

In July, 1990, the size of the project was reduced to 194 units. Thereafter, part of the site, a 0.8 acre lot that was owned by a corporation related to CMA, Inc. was foreclosed upon. This lot was removed from the parcel, and the proposal was further modified to consist of 180 units on the remaining 10.3 acres. Despite being reduced in size, the three buildings remain little changed in appearance or in their location on the site.

III. PROCEDURAL ISSUES

A. Jurisdiction

Two of the three jurisdictional requirements in 760 CMR 31.01(1) are not in dispute.[2] First, the developer clearly controls the site.[3] Exh. 2. Second, the Board did not contest the developer's status as a limited dividend organization, a matter which in any case will be assured by the subsidizing agency at the time of final funding approval. See Hanover v. Housing Appeals Committee, 363 Mass. 339, 294 N.E.2d 393, 420-421 (1973).

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[2] In addition, the parties stipulated that the town has not met any of the statutory minima defined in G.L. c. 40B, § 20 (see 760 CMR 31.04), thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Tr. I, 3; VII, 141.

[3] A small lot has been removed from the parcel. See § II, above. This in no way affects site control over the remaining portion of the site.

The third requirement is that the project be fundable by a subsidizing agency. At several points in the hearing the Board questioned this project's fundability. The issue was particularly confusing to the parties in this case because the project is proposed under the TELLER program, which is administered jointly by two subsidizing agencies, the local housing authority and the Executive Office of Communities and Development (EOCD). Since the relationship between the fundability requirement before this Committee and the continuing role of the subsidizing agency is very complex, and because so much time was devoted to it at the hearing, we will review the requirement and its historical background at length.

In order to submit an application to the Board and to maintain an appeal before the Committee, the project must be "fundable by a subsidizing agency." 760 CMR 31.01(1)(b). A project is "presumed fundable if a subsidizing agency makes a written determination of Project Eligibility or Site Approval. Thereafter, the project shall be considered fundable unless there is sufficient evidence to determine that the project is no longer eligible for a subsidy." 760 CMR 31.01(2).

Since the enactment of the comprehensive permit law, fundability has not often been a significant issue before this Committee. Typically, a project has received a "site approval letter" from the Massachusetts Housing Finance

Agency (MHFA), which disposes of the matter. MHFA has a great deal of familiarity with the comprehensive permit process and has traditionally reviewed projects with the requirements of the process in mind. Thus, while the site approval letter creates only a presumption of eligibility, boards of appeals have rarely challenged that presumption by introducing evidence to rebut it. This is because an MHFA site approval letter has carried with it a number of assurances.

To begin with, it indicates that the project has undergone an extensive preliminary review. That is, it provides the assurance that the site has been visited and found acceptable, that the architectural design of both the site and the individual buildings has been reviewed by design professionals and approved, that programmatic aspects of the project (e.g., the mix of market rate and affordable units, eligibility standards for occupants, the duration of the use restrictions or "lock-in period," ownership versus rental use) are acceptable, that pro forma financial statements have been reviewed by staff with financing expertise and the profit margins found to be sufficient so that the project will be financially feasible and yet not excessive, that the developer's credentials and experience have been reviewed to insure that it is qualified to handle the particular project, and finally that market conditions have been examined to insure that the completed project will be marketable.

Equally important, however, has been the implicit assurance that MHFA will continue to be involved with the project, monitoring changes and providing an even more thorough review of all the above issues before construction is permitted to begin.

While all of the matters overseen by the MHFA and addressed in the site approval letter are crucial to an ultimately successful project, they fall into three categories in relationship to the comprehensive permit process. First are the health, safety, and design issues which are the local concerns at the heart of any comprehensive permit review. MHFA's responsibility to insure that the project is well designed overlaps with the local board's and the committee's responsibilities. That is, MHFA sees to it that the project complies with both generally recognized standards and its own, more rigorous standards. Nevertheless, even a design approved by MHFA may not meet still more stringent local zoning and other requirements. The central role of the comprehensive permit process is to determine whether such local requirements are reasonable, and to the extent a local board and the MHFA differ on such questions, the MHFA is bound by the outcome of the comprehensive permit process.

The second category comprises legal issues within the subsidy program. For instance, if MHFA were to create an affordable housing program with a very short lock-in period

or a very low percentage of affordable housing or excessive developer profit, a local board might appropriately question whether the housing created should be considered low and moderate income housing under the statute. The Housing Appeals Committee and ultimately the courts would also be the arbiter of such a challenge.

The last group of issues are those that are characteristically within the province of the subsidizing agency. That is, issues such as the financing arrangements, the profit projections, the developer's qualifications, and marketability are issues which were not intended to be reviewed in detail within the comprehensive permit process. These clearly are not matters of local concern in the usual sense. As the Committee pointed out in its decision in the Hanover case, the local board has a limited interest in insuring that the developer is eligible for funding so that an unrealistic proposal will not proceed toward financial disaster or the site will not be unnecessarily tied up by a comprehensive permit. Country Village Corp. v. Hanover, No. 70-03, slip op. at 8 (Housing Appeals Committee Sep. 13, 1971). But its interest does not go beyond that. Thus, as the Supreme Judicial Court elaborated on appeal in Hanover the board or the Committee may require full disclosure and compliance with the funding program requirements to protect everyone involved, but the ultimate determination of such issues is "properly left to the appropriate State or Federal

funding agency."[4] Hanover v. Housing Appeals Committee, 363 Mass. 339, 294 N.E.2d 393, 420 (1973).

As was the case in Hanover, all issues involving fundability are usually resolved during the hearing by the introduction of the site approval letter into evidence. *Id.* at 421. In the unusual case where there is some uncertainty about fundability, the board or the Committee does not supplant the subsidizing agency and conduct a full review of these issues. Rather, "[t]he best evidence on these subjects is in the negotiations between the developer and the subsidizing agency." Stoneham Heights Ltd. Partnership v. Stoneham, No. 87-04, slip op. at 29, 32 (Mass. Housing Appeals Committee Mar. 20, 1991). (*Also see* Stoneham, slip

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[4] There are at least two exceptions to this rule. The financing arrangements are at issue before the Committee when a comprehensive permit is granted with conditions. In that case, the statute specifically provides a different standard of review, which requires and the Committee (but not the local board) to scrutinize the economic viability of the project. G.L. c. 40B, § 23; 760 CMR 31.05(3)(a). The second exception is a legal question such as the question of profit discussed above at page 7, above. If the profit guidelines for an entire program were such that it appeared that the program was not the sort which the legislature intended to be eligible to benefit from the statute, clearly the Committee would interpret the statute prior to the question being appealed to the courts. *See, e.g.*, Cedar Street Assoc. v. Wellesley, No. 79-05, slip op. at 21-23 (Mass. Housing Appeals Committee Mar. 4, 1981)(in which the Committee declared invalid a provision in its own regulations which it deemed inconsistent with the statutory intent), *aff'd,* 385 Mass. 651, 433 N.E.2d 873 (1982). This must be distinguished, however, from the factual determination of whether the profits from a particular project are likely to be within the guidelines. The latter is neither a local concern nor a matter of law under c. 40B, §§ 20-23, and should therefore be left to the subsidizing agency.

op. 11-38, generally, for an excellent review of the history and precedents in this area.)

The wisdom of this approach is quite apparent since it prevents the local board from becoming unnecessarily involved in issues which are not among the health, safety, and planning concerns enumerated in the statute, and yet provides additional protection to the local community which is unavailable when non-subsidized housing is built. That is, private housing may be constructed under existing zoning with no inquiry at all into the financing or the builder's qualifications or the resulting marketability or profit, whereas for subsidized housing, without impinging upon the prerogatives of the funding agency, the board is entitled to see proof that the funding program requirements have been and will be met.

The preceding discussion has focused on the preliminary review traditionally provided by MHFA. In the 1980s, a number of new subsidy programs were created in which the preliminary determination of fundability is established differently. This case involves such a program. Under the TELLER program there are joint subsidizing agencies--the local housing authority and the TELLER program within the Bureau of Private Housing Programs of the Executive Office of Communities and Development (EOCD). *See* 760 CMR 35.00. Preliminary approval is granted by the local housing authority in the form of an Official Action Status determination

based upon a rather extensive "Initial Application" and review. 760 CMR 35.03(1), 35.03(2). Final approval of the project must be given by both of these agencies. On their face, the regulations require little more for final approval than a finding that the "Final Application for the Project is complete." 760 CMR 35.03(5)(a), 35.03(6)(a). However, since § 35.03(4) requires that the final application include, among other things, complete descriptions of the project itself and the project's financing, it is clear that the intent is that both the local housing authority and EOCD perform comprehensive reviews of the design, financing, and other aspects of the project prior to construction.[5] (The regulations, in § 35.04, provide for substantial fees, which are presumably intended to offset the costs of such review, at least in part.)

In this case fundability was argued at length. In addition to the original Official Action Status determination that permitted the developer to proceed before the Board, during the hearing, on April 29, 1991, the Westborough Housing Authority reaffirmed its support for the project. Exh. 16. Though action by the state TELLER program is technically unnecessary to show fundability, that agency also indicated that the project "will be eligible to apply to EOCD for [final] state approval...." Exh. 17. We

[5] As is our normal practice, we have included a condition in our decision formally requiring such reviews prior to construction. See § V-3, below.

hold that the Official Action Status determination here was sufficient to create a presumption of fundability, and that that presumption has not been rebutted. Crossroads Housing Partnership v. Barnstable, No. 86-12, slip op. at 8-11 (Mass. Housing Appeals Committee March 25, 1987).

We note in passing that the developer presented considerable evidence from an investment banker involved with the project concerning pro forma financial statements and internal rates of return. See Exh. 1, 1-A, 1-B, 1-C, 5, 6, 23, 24. The Board, for its part, presented testimony from a development consultant concerning these financial statements. Tr. X, 7-127. As discussed in detail above, such issues are primarily the concern of the subsidizing agency.[6] Though this evidence would have been relevant (indeed, crucial) in determining whether the project is economically feasible if it had been approved with conditions, we need not review it here since the permit was denied.

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[6] Exhibit 17, a letter from the TELLER program, indicates that in fact a comprehensive final review of this project will be performed before it is funded. In addition, interestingly, the clear implication of paragraph four of the letter is that if there is a problem with this project financially, it is not that it is too profitable, as the Board argues, but that it may not be profitable enough to be feasible. That is, the letter points out that certain revenues may have been overestimated. This, as well as common sense, casts grave doubt upon the Board's analysis in its brief (p. 10) and testimony (Tr. X, 30) that the developer will realize a 600 per cent profit.

B. Adequacy of Plans

The Westborough Board has maintained both in its decision and on this appeal that CMA, Inc. failed to submit a complete description of the project, as required as part of the so-called local action prerequisite found in 760 CMR 31.02. That section of our regulations lists a number of items which normally constitute a complete description of the project. Clearly, the list is not intended to create mandatory, technical requirements, since "[f]ailure to submit a particular item shall not necessarily invalidate an application." 760 CMR 31.02(2).[7] Rather,

> those items provide guidance to both the developer and the Board as to what information is necessary for the Board to make an informed decision on the comprehensive permit application. Clearly, that information must be detailed enough so that the Board can reasonably judge the likely impact of the proposal on local concerns,... [but] the regulation is not to be read by the Board in an overly restrictive manner...

Tetiquet River Village, Inc. v. Raynham, No. 88-31, slip op.

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[7] On January 4, 1991, while this matter was pending, the Committee amended its regulations. The current version of § 31.02(2) is a clarification and simplification of the earlier version, and reflects the Committee's long standing interpretation of this provision. This change is consistent with the approach taken generally in the 1991 amendments, which, as the administrative history makes clear, were designed primarily to clarify ambiguities in the Committee's practice, rather than to change either that practice or substantive rights. *See* Public Hearing on Amendments to 760 CMR 30.00 and 31.00, H.A.C., Dec. 3, 1990, p. 39. In any case, on a purely procedural matter such as this, the Committee will apply its current regulations. *See* News Group Boston, Inc. v. Commonwealth, 409 Mass. 627, 568 N.E.2d 600, 602 (1991); Goodwin Bros. Leasing, Inc. v. Nousis, 373 Mass. 169, 366 N.E.2d 38, 41 (1977).

at 4-5 (Mass. Housing Appeals Committee March 20, 1991). Further, as we elaborated in Oxford H.A. v. Oxford, No. 90-12, slip op. at 4-5 (Mass. Housing Appeals Committee Nov. 18, 1991),

> [b]eginning with its earliest cases, the Committee has made it clear that plans submitted for comprehensive permit approval are preliminary and need not be as detailed as final construction drawings. The rationale for this rule is that the comprehensive permit itself is preliminary in the sense that no construction can proceed until a building permit has been issued. The building permit is not issued until the appropriate officials have reviewed final construction drawings and insured that the project will comply with various state codes and all local requirements not waived by the comprehensive permit. Since design work involves substantial costs for the developer, it is unreasonable to require completed plans before the comprehensive permit is issued. Country Village Corp. v. Hanover, No. 70-03, slip op. at 10-15 (Mass. Housing Appeals Committee Sep. 13, 1971), *aff'd*, 363 Mass. 339, 294 N.E.2d 393 (1973); Dartmouth West Housing Assoc. v. Dartmouth, No. 71-04, slip op. at 7-10 (Mass. Housing Appeals Committee Aug. 27, 1973); Woodcrest Village Assoc. v. Maynard, No. 72-13, slip op. at 5-6 (Mass. Housing Appeals Committee memorandum Feb. 13, 1974, decision Apr. 22, 1974), *aff'd*, 370 Mass. 64, 345 N.E.2d 382 (1976). If the application is before the Board, under the provision in 760 CMR 31.02(2) which describes what plans must be submitted with an application or appeal, the plans must be sufficiently detailed so that the Board can reasonably judge the impact of the proposal on local concerns. Tetiquet River Village, Inc. v. Raynham, No. 88-31, slip op. at 4-7 (Housing Appeals Committee Mar. 20, 1991) (finding compliance with § 31.02(2), though ultimately upholding the Board's denial of a comprehensive permit).... Finally, the requirements of § 31.02(2) are to be applied in a common sense, rather than an overly technical manner. Watertown Housing Authority v. Watertown, No. 83-8, slip op. at 5, 10-12 (Mass. Housing Appeals Committee June 5, 1984).

In this case, the best indication of whether there was

sufficient information before the Board is the Board's decision itself, Exhibit 13. First, Attachment A to the decision lists eleven categories of documents submitted by the developer, including six separate architectural or engineering plans or sets of plans, three bound volumes, and a Draft Environmental Impact Report (E.I.R.). Second, Attachment C to the decision (a checklist prepared by the Board) shows graphically that the submission, even as seen in the critical eyes of the Board, was substantially complete. Twenty-four items are marked as submitted, and only seven are marked not submitted. Six bear an indication that the developer submitted additional information. Third, it is clear from the long list of reasons for the denial that the Board was able to review the proposal in considerable detail. For instance, the Board objects in ¶ 6(a) of the decision that it has insufficient information about streets and parking areas, and yet makes extensive adverse findings about these issues in ¶ 2(c), 2(e), 3(a)-3(c), 3(e), and 5(a)-5(k).

Finally, most of the Board's individual claims that additional information is needed are either quibbles or simply incorrect. For example (looking at issues in the order they appear in the decision), decision ¶ 6(a)(2) and Attachment C, ¶ 8(d) would require plans showing the location of electric power lines and television cables. These are not among the utilities enumerated in 760 CMR

31.02(2)(f), which mentions only sewer, drainage, and water. Attachment C, ¶ 8 indicates that these last three items were submitted. We speculate that the parties may have disagreed as to whether wiring should be above or below ground (though that issue was not raised on appeal). But there would have been no need of detailed plans to resolve that question. In fact, it is difficult to imagine any situation where the exact location of such lines would be important. Clearly, the Board was in error to claim that the utility plans submitted were inadequate in this respect.

Decision ¶ 6(a)(4) would require "justification of waiver requests." Section 31.02(2)(h) of the regulations requires only a list of such requests. It does not require the developer in its application to justify every deviation from town requirements. As with decision ¶ 9, where the Board would require that the developer provide financial justification for the number of units proposed, the Board fundamentally misunderstands the comprehensive permit process. The developer is not required to justify each and every aspect of its proposal and build a project that comes as close to compliance with all town requirements as possible. Rather, just as a non-subsidized builder is given wide latitude to design within local restrictions without providing justifications, the subsidized developer may submit whatever proposal it chooses, subject of course to preliminary design approval by the subsidizing agency pursuant to

760 CMR 31.01(1)(b). It is the responsibility of the Board to review all such proposals fairly; to approve those in which local health, safety, and planning concerns have been met or are outweighed by the regional need for housing; to impose reasonable conditions when such conditions are necessary to meet local concerns; and to deny comprehensive permits only if it is not possible to fashion conditions to address the local concerns. *See* G.L. c. 40B, §§ 20, 21; *also see* Model Local Rules, Housing Appeals Committee, 1991, § 5.03, n.7.

Decision ¶ 6(b)(2) objects to a lack of clarity as to whether the developer's intent was to include in Building D four units, a convenience store, and an office or four units, a store, and a day care center. If the town had a strong preference for one option, or believed that the impact on local concerns would be very different depending on the use, it could easily have formalized its preference in a condition included in the comprehensive permit.

Without discussing them in detail, we note that the following claims by the Board that information in the application was insufficient are without merit:[8] decision ¶ 6(c)(1), list of abutters from the town of Shrewsbury omitted (easily corrected, if necessary); ¶ 6(c)(2), drainage

[8] This list should not be read to imply that we believe that objections we do not list have merit. It is simply the case that there are a number of claims that do not present issues which, in our opinion, justify extended discussion.

plans (objection appears to be substantive[9]); ¶ 6(c)(4), details of maintenance garage omitted (unnecessary); ¶ 6(c)(8), traffic increase due to reopening of factory (objection is substantive); ¶ 6(c)(9), flawed Draft E.I.R. (misunderstands purpose of Draft E.I.R. and relationship to comprehensive permit process); ¶ 8(c), Wetlands Protection Act process not completed (misunderstands relationship to comprehensive permit process).

Based upon all of the above, we find that the developer's submission to the Board was adequate to satisfy the requirements of 760 CMR 31.02(2).

Finally, we must note that even if we had reached the opposite conclusion on this issue, we would not simply have upheld the Board's denial of the comprehensive permit. A significant purpose of the comprehensive permit statute is to reduce delays faced by the developer. Report of the Committee on Urban Affairs, June, 1969, quoted in 760 CMR 30.01(2)(para. 2). Disagreements over whether the application to the board is sufficiently detailed are common and frequently result in delays. Because local hearings are open, non-adversarial public inquiries, the best practice in case of disagreement (and apparently the one followed here) is normally for the board to begin the hearing and enter into a dialogue with the developer as to what information is

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[9] The substantive aspects of these questions, as opposed to whether the submission was significantly detailed with regard to them, are discussed later in this decision.

really necessary.[10]

When the board chooses this approach, however, and conducts a full hearing on the substance of the proposal, the Committee will not usually remand the case if it finds that the application was incomplete.[11] To do so would not only subject the developer to unnecessary delay, but more important, would create the risk that as a matter of tactics, a board, instead of doing everything possible to develop a full record, might purposely permit gaps in the submission to go uncorrected, and then use the incompleteness as an alternative grounds for denial, hoping for a remand and further delays. From the point of view of the

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[10] Nevertheless, in the unusual case where the board is certain at the outset that it does not have and will not receive sufficient information on which to base a decision, it may refuse to review the application, and render a decision denying the permit for that reason. This decision, in turn, is appealable to the Housing Appeals Committee. If the denial is upheld by the Committee, the developer could, of course, resubmit a more complete application to the board. If the Committee finds that the board was in error (and assuming that the board had been prompt in rendering its decision and there were no exceptional circumstances), the Committee would remand the case to the board for consideration on the merits. Such action is required by another aspect of the Committee's mandate, which is to interfere as little as possible with local prerogatives. 760 CMR 30.01(2)(para. 3).

[11] After conducting a hearing, the board cannot avoid this result simply by basing its decision on the incompleteness of the application and refusing to address the merits. In fact, the Committee might well refuse to remand a case even if the board had not considered the merits if it appeared that a dispute over the adequacy of an application had been protracted simply for purposes of delay.

Of course, if the proposal had changed substantially, the Committee would normally remand, once again out of respect for local prerogatives. *See* 760 CMR 31.03.

Board, on the other hand, because the hearing before the Committee is de novo (Hanover v. Housing Appeals Committee, supra, at 414-416), there is no significant disadvantage when we decline to remand. It is for these reasons that § 31.02(2) of the regulations makes no mention of remand, but rather provides that "...during an appeal, the Committee may determine whether [any] item... should be submitted to the Committee."

Thus, in the case at hand, even if we had found that the original application was defective, because the Board delved into the merits, our remedy would not have been to uphold the denial and require the developer to submit an entirely new application. Rather, we would simply have required submission of the missing information during our own de novo hearing.

C. Changes in the Proposal

Finally, the Board argues that the Committee should remand this case for further review due to changes that have been made in the proposal.

Section 31.03(1) of our regulations makes it clear that a case should be remanded only when the changes are substantial. Section 31.03(2) clarifies the previous provision with examples. For instance, a reduction in the number of housing units will ordinarily be insubstantial. 760 CMR 31.03(2)(b)(1). In large measure, the reason for this is that even an improvement in design is not likely to result

in the board's altering of its decision when that decision rests on a number of independent grounds. Planning Office for Urban Affairs, Inc. v. North Andover, No. 74-03, slip op. at 6 (Mass. Housing Appeals Committee May 5, 1975), *aff'd,* 4 Mass. App. Ct. 676, 357 N.E.2d 936 (1976). Further, we recognize that designing, financing, and getting state approvals for a housing project, particularly when the appeal process becomes protracted, as in this case, is "a dynamic, constantly evolving process." Crossroads Housing Partnership v. Barnstable, No. 86-12, slip op. at 17 (Mass. Housing Appeals Committee March 25, 1987)(changes presented during the Committee hearing, including reduction in number of units, deemed not substantial). If the changes are not so great as to represent a totally new or different proposal, and if it seems unlikely that the local board will reverse its previous decision, remand would only result in delay, and merits are best resolved in the do novo proceedings before this Committee. Sherwood Estates v. Peabody, No. 80-11, slip op. at 3-4 (Mass. Housing Appeals Committee Apr. 30, 1982), *aff'd,* No. 82-1114 (Essex Super. Ct. Dec. 3, 1984). Thus, "[t]he absence of a remand procedure comports with the time limit fixed for each stage of the hearing process which together indicate the Legislature's intent to speed up the permit procedure...." Hanover v. Housing Appeals Committee, supra, at 416 (holding that when the board decision is overruled, no remand is necessary).

In this case, the changes in the proposal are not substantial, and particularly since many of the Board's concerns (traffic, for instance) are not significantly affected by the changes, we will decide the case on its merits rather than remand it for further proceedings before the Board.

IV. SUBSTANTIVE ISSUES

Where the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's procedures, in this case the developer established a prima facie case by showing that its proposal complies generally with state and federal requirements and other generally recognized design standards. Tr. I, 26-74; III, 6-88; IV, 11-51; Exh. 7-A, 15, 19; *see* 760 CMR 31.06(2). Therefore, to prevail, the Board must prove first, that there is a valid health, safety, environmental, or other local concern which supports the denial, and second, that such concern outweighs the regional need for housing. 760 CMR 31.06(6); *also see* Hanover v. H.A.C., 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); Hamilton Housing Authority v. Hamilton, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

To meet its burden, the Board has raised issues concerning density and intensity of the use, traffic, and storm

water drainage.[12]

A. The Proposed Development Must be Reduced in Size to Satisfy Local Concerns with Regard to its Density in Relation to the Surrounding Area and the Intensity of Uses on the Site Itself.

The related issues of density of the proposed development in relation to the surrounding area and the intensity of uses on the site itself are the grounds that are the first to appear in the Board's decision and were pursued most assiduously during the hearing. There are at least two possible justifications for denying a comprehensive permit to this development on these grounds.

The first and more difficult argument for the Board to prevail upon is that as a matter of planning and aesthetics no large, multi-family, rental development would be acceptable in this particular neighborhood. This is certainly not the case here. The parcel itself is zoned industrial. Tr. VII-A, 144; VII, 110, 112. To the east are retail and industrial uses as one approaches the center of Westborough; to the west are suburban, single family homes. Tr. XI, 197;

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[12] A technical issue under the state Building Code regarding egress and the number of stories in the building was also raised. Tr. IX, 22, 25. Clearly, under all circumstances the Project must comply with the Building Code. *See* 760 CMR 31.09(3) and § V(4)(f), below. Matters solely within the code are not within our jurisdiction, but rather that of the building inspector and the State Building Code Appeals Board. *See* G.L. c. 143, § 100.

The Board also alluded to other environmental concerns, e.g., damage to wetlands and wildlife habitat, but did not pursue them with evidence or argument.

VIII, 77-79; Exh. 7-A, page following fig. 1. The site itself is inside of a "Y" formed by the intersection of Fisher and Gleason Streets, minimizing the number of direct abutters. In the immediate vicinity to the south and east of the site are various uses--residential, vacant lots, a farmhouse being used for commercial purposes, and a manufacturing concern. Tr. VII, 99; VII-A, 51; VIII, 77, 110; IX, 84. Immediately to the west in Shrewsbury are several vacant lots and then single family houses. Exh. 25. Thus, what is described by Mr. Abend, the Board's traffic expert, as the "transitional" nature of the area makes it ideal for multi-family, rental housing. *See* Tr. XI, 197. Therefore, to the extent that the Board's decision stands for the proposition that housing of the sort proposed is inappropriate for this site, the decision is not consistent with local needs, and must be overruled, permitting housing to be built.

The Board's second argument is that it is not the use itself that creates a problem, but rather the scale of the proposal. This requires more intricate analysis. Though ultimately we agree with the Board on this issue, before we address it in detail, it is important to clarify differences between the role of the Housing Appeals Committee and that of the Board in reviewing the proposal.

The essence of c. 40B, §§ 20-23 is the recognition that most major developments and particularly developments of

subsidized housing engender substantial local opposition. Even where the local zoning board of appeals is not actively hostile to a proposal, it views it from a distinctly local perspective. Thus, though the statute offers the local board the first opportunity to review a proposal, there must be constraints upon that review. Most important, the board must review the proposal submitted to it, and may not redesign the project from scratch. Sheridan Development Co. v. Tewksbury, No. 89-46, slip op. at 3 n.3 (Mass. Housing Appeals Committee January 16, 1991). With regard to the proposed number of units in particular, the board should usually simply grant or deny the permit. It is particularly inappropriate for it to evaluate the financial feasibility of a project in order to redesign and reduce it so that it will be exactly at the financial feasibility threshold.[13]

This Committee, on the other hand, operates with fewer constraints. It was created so that there would be a body with greater distance from the dispute and greater objectivity. As a result, its charge under the statute differs from that given to the local board. For instance, while financial feasibility is not an issue before the local board, in the case of an appeal of a permit granted with conditions, the Committee is obligated under the statute to hear evi-

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[13] This is not to say that a condition limiting the size of a development is never proper. It certainly may be appropriate when necessitated by particular conditions on the site. In addition, the parties may negotiate a reduction, and formalize their agreement in a condition.

dence on financial feasibility. G.L. c. 40B, § 23. Similarly, even though we are generally very reluctant to modify a developer's proposal, in appropriate cases, we believe we must do so to further the intent of the statute. That is, in balancing local needs and the need for housing, we must be permitted to reduce the size of a proposal where the alternative is that no affordable housing would be built. *See* Silver Tree Ltd. Partnership v. Taunton, No. 86-19, slip op. 43-45 (Mass. Housing Appeals Committee Oct. 19, 1988), *aff'd*, No. 88-6435E (Suffolk Super. Ct. May 10, 1989).

In doing this, our overriding concern is consistency with local needs (just as that is to be the overriding concern of the ZBA in local hearings). And, just as it is improper for the ZBA to tailor its decision to financial feasibility, it would be improper for us to be influenced by financial feasibility in determining what housing can be built without impinging upon local health, safety, and other interests. Thus, the reasoning and conclusion which follow are an inquiry into what maximum density is consistent with local needs, without regard to financial feasibility. It is up to the developer and the subsidizing agency to determine if the project is feasible at the scale we approve. If it is not, the only options available to the developer are to apply to the Board to change the proposal or to abandon it.

As elaborated below, we find that the concerns raised by the Board with regard to density and intensity of the

project as proposed are legitimate, but that the Board's denial of a comprehensive permit is not consistent with local needs since the local concern is adequately addressed by reducing the size of the project from 180 units in three buildings to 120 units in two buildings.

The project, with its three large buildings and their surrounding parking (282 spaces), occupies nearly all of the site. *See* Exh. 15. Though the developer maintains that 56 percent of the site is recreational or open space (Tr. VIII, 38), the area actually available for use by tenants is far less than that. Specifically, the space between the buildings is filled by parking lots, and with the exception of one corner of the site which is wetlands, the parking lots and driveways nearly touch all of the boundaries of the parcel.[14] Exh. 15. In addition to three "tot lots," there are a basketball court and a swimming pool sandwiched in between a public road, the development entrance, and the end of one of the buildings. Exh. 15. The Board's planning consultant, Carol Thomas, testified that this amounts to approximately one half acre of recreational space. Tr. IX, 138. She also indicated that the rule of thumb based upon National Recreational Association standards would require two acres of on-site recreational space for the development as proposed. Tr. IX, 136. We find that the intensity of

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[14] The proximity of the buildings to the local roads and to each other may well raise aesthetic concerns as well, though no evidence was presented on this issue.

the uses on the site (residential, parking, recreational, open space, and so on) is unacceptably great. Tr. IX, 80, 131-136.

Similarly, the project as proposed is very dense, with approximately 18 units per acre. Density, however, is a difficult concept with which to work. It is seductively easy to quantify, and yet quantification does not provide an objective answer to the question of what density is appropriate.

The Board's planning consultant, Carol Thomas, recommended development on this site at a density of four units per acre, but conceded that a density twice as great, eight units per acre, was acceptable. Tr. VII-A, 131, 132, 154. She relied greatly on the "Baltimore study," an "environmental characteristic planning study" from the 1970s. Tr. VII-A, 68-70. The portions of that study which were introduced into evidence as Exhibit 14 are more descriptive than prescriptive, but we agree with Ms. Thomas' conclusion that density of greater than sixteen units per acre (Type V, in the study's terms) is too great for this suburban setting. *See* Exh. 14, fig. 6; Tr. VII-A, 73. But it appears that her recommendation of a four or eight unit per acre density (Types III and IV) is unnecessarily restrictive. The pictorial renderings of these densities in Exhibit 14 seem more suited for single family and condominium developments, respectively, than for multi-family rental housing. We

believe that it is fair to hold Ms. Thomas to the negative inference of her testimony--that a density below sixteen units per acre can be appropriate in a suburban setting such as the one in this case.

We have considered the proposal before us in relation to both density and intensity of use, and find that we are led to the same answer. That is, with regard to density, this development should be roughly between the figure of eight units per acre which the Board's expert testified was acceptable and the figure of sixteen which she conceded was the limit for a suburban area. With regard to intensity, Ms. Thomas testified that two acres of on-site recreational space instead of the currently available one half acre would be adequate for the development as designed at 180 units. Removal of one of the buildings[15] will make at least two acres of land available for use as recreational and open space. Exh. 15. Therefore, we find that the proposed development is consistent with local needs if it is reduced to 120 units in two buildings (for a density of twelve units per acre), and if two children's play area, a basketball court, and a swimming pool are provided as proposed.

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[15] Though our decision to remove one building is based upon density and intensity, we note that the aesthetics will also be improved considerably. The same effect would not be achieved by reducing the number of units in each of the three buildings.

B. Traffic Hazards Related to the Proposed Development Can be Mitigated.

Each party presented testimony from a traffic engineer. A thorough traffic study was undertaken by John Gillon, the developer's expert. His calculations (but not raw data), diagrams, and most of his conclusions are contained in a lengthy document--Exhibit 7-A. His methodology, based primarily on traffic counts, is standard (*also see* Exhibit 9), and was accepted by the Board's expert, Norman Abend, with one notable exception, discussed below.

Before we consider traffic hazards, we must note that both experts in this case were liberal in interpretations upon which they based their conclusions. For instance, Mr. Abend's most important criticism of the study was to challenge one of its assumptions. That is, Mr. Gillon's projected distribution of traffic leaving the site showed 40% going West ~~toward~~ Worcester and ~~60%~~ going East. Exh. 7-A, fig. 9. Mr. Abend believed that "probably half, would go east and half would go west." Tr. XI, 186; *also see* Tr. XI, 184. But Mr. Abend conceded that he did not base his assumption on reliable, hard data examined in connection with this particular proposal. Rather, it is "based on our own experience in dealing with other projects; ...based on traffic counts we've done in this area, and on other sites we've done." Tr. XI, 184. The data he did cite is open to wide interpretation. Much of his experience appears to be

with large employment sites, such as a Digital Equipment Corp. site nearby. Tr. XI, 212. But since we are most concerned about where people may go to work during peak morning hours from a residential development (or vice versa in the evening), this is of almost no relevance. After Mr. Abend completed his direct testimony, a short recess was taken, at which he had an opportunity to consult with counsel. He then added a second justification to his assumption. That is, he noted that the count of existing turning movements shows more going to the west. While these counts are certainly relevant (Mr. Gillon's assumption was based in part on them as well), this later testimony was very brief, and Mr. Abend did not develop the theory behind his assertion. Without elaboration, these counts by no means inevitably lead to his result. At a minimum, he failed to show a sound scientific basis for the proposition that the current directional flow from an undefined, broad area south of the highways will predict the flow from the planned concentrated residential site.

Mr. Abend, however, by no means had a corner on subjective interpretation of the data. Mr. Gillon, for his part, prepared a letter to the developer's counsel for use in this hearing (Exhibit 7-B) which minimizes the impact of traffic from the site. The figures show that less than 1% of total traffic at several intersections is from the site, but we note that this is misleading. That is, the vast majority of

traffic at these intersections is through traffic on the major highways. Thus, site traffic represents a much higher percentage of local traffic than it does of total traffic. (*See* Tables I and II and discussion below.)

For these reasons, we cannot unquestioningly accept the opinions of either expert, but rather must draw our own conclusions.[16]

We first turn to the already discussed assumption of a 40/60 split in the distribution of site-generated traffic.[17] Despite every effort to make traffic analysis as scientific as possible, ultimately we are dealing with complex variables in an unknown future. In the end, it is inevitable that not only the conclusions, but also some of the assumptions are "educated guesses." *See* Tr. V, 86. After evaluating the demeanor of the witnesses (particularly Mr. Gillon on cross examination) and the data contained in Exhibit 7-A, we accept Mr. Gillon's assumption.

On other issues there was less divergence between the experts. They agreed that the three intersections which

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[16] Technically, we could perhaps accept many of the developer's conclusions by noting that it is the Board that has the burden of proving unacceptable safety concerns, and that its expert presented little affirmative evidence. We prefer, however, to analyze these issues as thoroughly as possible.

[17] This may or may not be a significant difference in the sense that intersections both to the east and west are already heavily burdened, but it must be addressed since it is an assumption that underlies most of the other figures we will discuss.

will be used most frequently by residents of the site are heavily burdened, and will become more so. The intersections of Route 9 and Otis Street, Route 20 and Walnut Street, and Route 20 and South Street are hazardous, high accident locations and deserve our particular attention. Tr. VI, 52, 103.

For most planning purposes, traffic analysts project not only traffic added by the proposed project,[18] but also general increases in traffic in the area. The traffic study predicted unacceptable levels of service (LOS) in the future for all three intersections. (*See* Exhibit 7-A, fig. 15; for the "Build" option for 1994, this indicates the number of seconds of delay for Route 9 and Otis Street, where there is a traffic signal, and the number of gaps in traffic per hour for the two Route 20 intersections, which are unsignalized.)

We accept the LOS figures in the traffic study to show that there is a legitimate local concern. But they are not appropriate for determining what, if any, action is required under the comprehensive permit process.[19] We will not per-

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[18] The figures in the traffic study, Exhibit 7-A, are based on a development of 274 units. While some of the figures cannot be proportionately reduced to account for the reduction in the project, others can. For simplicity, we will consider the approved site of the project to be half that proposed, i.e., 137 units.

[19] This is particularly true since there is a possibility that the growth factor was inflated. Under the Mass. Environmental Policy Act (MEPA), Mr. Gillon was administratively required to use a seven percent per year factor in his study, though a more appropriate figure (as recommended by the Central Mass. Regional Planning Commission in 1990)

mit an analysis which could result in affordable housing going unbuilt when that analysis is based upon other growth that may occur during the next five years. We will base our decision on the effect the proposal has on current conditions. If the town can sustain the proposed project, but not all of the other growth that is projected, it should be the other growth, not the affordable housing that is curtailed.

Traffic counts show that the vast majority of traffic at the three intersections is through traffic on the major highways. Exhibit 7-A, fig. 3, 4.[20] The exact figures are shown in Table I:

TABLE I

(from Exh. 7-A, fig. 3)

A.M. Peak Hour

	Existing Total Traffic	Existing Thru Traffic	Percentage Thru Traffic
Rte.9/Otis	3780	2954	78%
Rte.20/Walnut	1477	1389	87%
Rte.20/South	1475	1425	97%

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may well have been two to three percent. Tr. VII, 11-15.

[20] Since morning and evening peak hour volumes are similar, though by no means identical, for purposes of illustration we will use only the morning figures.

In these circumstances, we believe it is appropriate to examine the effect of the proposed housing on the "local" traffic (which we define for these purposes as all traffic at each intersection which is not through traffic on the main highway).

Exhibit 7-A, fig. 10 shows the traffic which will be generated by the site. By comparing these numbers to existing traffic volumes (fig. 3), the increase in local traffic can be calculated. *See* Table II, below. At thirteen percent and twenty-two percent, respectively, the total increases in local traffic at the Walnut Street and South Street intersections are clearly significant. The increase at Route 9 and Otis Street is much less. Further, Exhibit 7-A, fig. 15 indicates that for at least some turning movements at Walnut Street and at South Street, the LOS currently is "E," that is, there are "very long traffic delays." The LOS at Route 9 and Otis Street is "C," which is described as "fair." (*Also see* explanations of LOS on pages following fig. 15.) We conclude that there is a significant local concern which must be addressed at the intersections of Route 20 and Walnut Street and Route 20 and South Street, but not at Route 9 and Otis Street.

TABLE II

(from Exh. 7-A, fig. 3 & 10)

A.M. Peak Hour

	Existing Local Traffic	Add'l Traffic (274 U.)	Add'l Traffic (137 U.)	Percentage Increase (137 U.)
RTE.9/OTIS STREET				
Total Local	826	67	33.5	4%
Turns (or thru):				
fr. Otis NB rt.	102	43	21.5	21%
fr. Otis NB thru	29	4	2	7%
fr. Otis NB lft.	133	2	1	1%
fr. Otis SB thru	27	1	0.5	2%
fr. Rte.9 WB lft.	73	10	5	7%
fr. Rte.9 EB rt.	157	7	3.5	2%
other directions	305	-	-	-
RTE.20/WALNUT STREET				
Total Local	88	22	11	13%
Turns (or thru):				
fr. Walnut WB thru	1	6	3	300%
fr. Walnut WB rt.	22	12	6	27%
fr. Walnut EB thru	2	1	0.5	25%
fr. Rte.20 SB lft.	4	3	1.5	38%
other directions	59	-	-	-
RTE.20/SOUTH STREET				
Total Local	50	22	11	22%
Turns (or thru):				
fr. South WB lft.	27	18	9	33%
fr. Rte.20 NB rt.	15	4	2	13%
other directions	8	-	-	-

Although our analysis of the local traffic shows that the proposed development contributes significantly to a serious traffic problem, there is a strong argument under our regulations that as with other municipal services, costs of improving the infrastructure should not be borne by the developer. Clearly, inadequate streets cannot be grounds for denial of a comprehensive permit when it is technically and financially feasible, as here, to improve them. 760 CMR 31.06(8). It is less clear whether the developer can be required to contribute to the cost. Though our early cases point to an answer in the negative, the fiscal climate in the state and local communities has changed in recent years. We hold that because it is now a common practice to require large residential developments to contribute to infrastructure costs, and since here other developments (albeit commercial projects, see Tr. XI, 215, 221-223) have done so in this immediate area, the developer must contribute to the cost of improving the intersections of Route 20 with Walnut and South Streets.

Calculating the amount of that contribution is not simple. First, we must determine what improvements should be considered. Clearly there must be time limits. The developer, in fairness, should not pay for improvements finalized before the comprehensive permit is issued.[21]

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[21] Though there is a certain arbitrariness to any rule concering time limits that may be established, we believe that our obligation is to establish parameters that are as

Similarly, it is impractical and unfair to obligate it to pay for improvements far in the future. We hold that the developer must contribute to street improvements necessitated by increased traffic volumes if the final Massachusetts Highway Department approval for those improvements is received after the comprehensive permit is issued, and before the first occupancy permit for the project is issued.[22]

Second, we believe that in this case, at least, the developer should contribute in proportion to its contribution to total local traffic volume as we defined it above.[23] Thus, the developer should pay for thirteen percent of any improvements to the Route 20 and Walnut Street intersection and twenty-two percent of any improvements to the Route 20 and South Street intersection.

Turning to other concerns raised by the Board, the

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consistent as possible with the purposes of the comprehensive permit statute both in this case and for future cases. For instance, one might argue for a beginning cut-off date of the date of the application for the permit. This, however, would create an incentive for the town to delay issuance of the permit, and we therefore believe that a more appropriate cut-off date is that on which the permit is issued.

[22] In many cases, the period during which street improvements are studied and designed prior to full approval will coincide with the period during which the developer negotiates a comprehensive permit and gets final subsidy approval prior to construction. Thus, we believe that the "window" of obligation we have created will mesh nicely with negotiations over the details of comprehensive permit.

[23] In different factual circumstances the Committee might alter this formula. In future cases it might, for instance, consider the history of negotiated contributions in the town or recommendations of other state agencies which have an interest in the improvements.

C. The Board Has Not Proven that Storm Water Drainage for the Project Is Inadequate.

In the cases that appear before us, environmental issues are often among the most critical. Here, however, they were addressed by both parties in a rather summary fashion. Nevertheless, we have no trouble in reaching several conclusions. First, the scale of the work related to storm water drainage is small. The only significant change is the construction of a storm water detention area under one of the site parking lots. Tr. VIII, 83. In addition, the developer will replace an existing 18 inch drainage pipe that runs under Fisher Street (which the site abuts) with a large, 27 inch by 53 inch arch pipe. Tr. I, 28. This, however, simply represents an improvement to a currently inadequate system. That is, the existing pipe is too small, and after the proposed development is completed, the rate of runoff will not increase. Tr. I, 28. The entire system directs storm water to a nearby flood control reservoir, which is not used for potable water supply. Tr. VIII, 86-87, 100, 106. Thus, it is clear that drainage is not a major problem. In any case, the Board failed to sustain its burden of proving that there is any valid environmental concern. In the absence of a legitimate local concern, it is unnecessary for the Committee to determine whether the concern outweighs the need for housing.

V. CONCLUSION AND ORDER

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Westborough Zoning Board of Appeals is not consistent with local needs.

1. A comprehensive permit will be issued which shall conform to the evidence introduced before the Committee and to this decision. That is, the permit shall permit construction of the proposed project as follows:

a. There shall be no more than 120 units of housing in two buildings substantially similar to Exhibits 15 and 19.

b. The site shall consist of 10.3 acres, that is, the site shown in exhibit 15 with the 0.8 acre lot previously owned by RAM Development Corp. eliminated.

c. There shall be a basketball court, a swimming pool, and two children's play areas.

d. All roads, driveways, and parking areas shall have a sidewalk on at least one side so that sidewalks connect one building to the other and each to other facilities on the site and to the local roads. In consultation with the Board or local school officials, the developer shall construct at one of the entrances or within the development a school bus waiting area with curbs.

e. There shall be a 50 foot long leveling area at each entrance to the site of a maximum grade of two percent.

f. The developer shall pay for thirteen percent of any improvements to the Route 20 and Walnut Street intersection and twenty-two percent of any improvements to the Route 20 and South Street intersection if such street improvements are necessitated by increased traffic volumes and if the final Massachusetts Highway Department approval for those improvements is received after the comprehensive permit is issued, and before the first occupancy permit for the project is issued.

g. Assuming that construction permits and easements are arranged for by the Board, the developer shall pay for reconstruction of a 550 foot segment of Gleason Street as per Exh &-A, fig. 19 and page preceding; Exh. 18, ¶ 4; and Tr. VIII, 95, 100.

2. The comprehensive permit shall not be issued until CMA, Inc. has filed with the Committee and the Committee has approved by Final Order the following plans and drawings signed by a registered architect:

a. Existing Site Conditions Plan,

b. Site Plan showing building locations, parking, walks, and street dimensions and cross sections,

c. Drainage Plan,

d. Utilities Plan,

e. Landscape Plan, showing existing vegetation, wetlands, grading, street trees,

f. Scaled architectural plans and elevations of all buildings.

Either party or amicus curiae may, within ten days of the filing of the above plans, request in writing a hearing to determine whether such plans conform to the evidence presented in this case. The Committee hereby authorizes the Chairman to issue a Final Order thereafter without further consultation with the Committee as a whole.

3. The design of the development is subject to such changes in site and building design as are required or recommended by the subsidizing agencies. No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agencies, that is, both the local housing authority and the TELLER program within the Executive Office of Communities and Development, and until subsidy funding for the project has been committed.

4. The comprehensive permit shall be subject to the following further conditions:

(a) No construction shall commence until the Housing Appeals Committee has fully complied with the Massachusetts Environmental Policy Act (MEPA), M.G.L. c. 30, §§ 61-62H. Upon issuance of the Certificate of the Secre-

tary of Environmental Affairs on the Final Environmental Impact Report (FEIR) with regard to this project, the applicant shall file that certificate and the FEIR with the Committee. The Committee shall retain authority to modify this decision based upon the FEIR, other reports prepared in connection with MEPA, or other information, all in accordance with the Committee's regulations under MEPA, 760 CMR 31.08(3).

(b) Construction in all particulars shall be in accordance with all presently applicable zoning and other by-laws except those which are not consistent with this decision. The subsidizing agencies may impose requirements for compliance with any other recognized building codes or portions of such codes, and, in the event of conflict, the requirements of the subsidizing agencies shall control.

(e) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agencies, the standards of such agencies shall control.

(f) When a Final Order is issued in this case, the Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant without undue delay, upon presentation of construction plans which conform to the comprehensive permit and the

Massachusetts Uniform Building Code. It shall also insure town cooperation with other aspects of the project, such as replacement of the drain pipe under Fisher Road.

This decision shall not be final nor appealable until a Final Order is issued by the Chairman.

Housing Appeals Committee

Date: June 25 1992

Maurice Corman
Maurice Corman, Chairman

Grace A. Abruzzio
Grace A. Abruzzio

Joseph P. Henefield
Joseph P. Henefield

Jacquelyn R. Smith
Jacquelyn R. Smith

Werner A. Lohe Jr.
Counsel

LPclw.f

Certificate of Service

I, Werner A. Lohe Jr., Counsel of the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid a copy of the within Decision in the case of CMA, Inc. v. Westborough, No. 89-25 dated June 25, 1992, to:

John J.L. Matson, Esq.
19 West Main Street
Westborough, MA 01581

Alan F. Dodd, Esq.
14 South Street
Westborough, MA 01581

Burton Chandler, Esq.
Seder & Chandler
399 Main Street
Worcester, MA 01608

T. Phillip Leader, Esq.
Dunn, Leader, & Allen
446 Main Street
Worcester, MA 01608-2300

7/1/92
(date)

Werner A. Lohe Jr.
Counsel, H.A.C.

WAL\s
LPclw.crt

Avalon Properties
d/b/a Avalon Residential

Bryce Blair
Senior Vice President
Development/Acquisitions

100 Grandview Road ▲ Suite 305 ▲ Braintree, MA 02184-2686 ▲ (617) 848-8869 ▲ Fax (617) 849-0708

March 15, 1994

Mr. Donald M. Gillis, Chairman
Zoning Board of Appeals
Town of Westborough
Town Hall
Westborough, MA 01581

Re: M.G.L Chapter 40B Permit Granted to CMA, Inc. for the Charlestown Meadows Development

Dear Mr. Gillis:

Subject to the necessary approval, we have an agreement to purchase the interest of CMA, Inc. ("CMA") in the comprehensive permit granted pursuant to M.G.L. chapter 40B (the "Permit") for the development of the Charlestown Meadows development (the "Development") by the decision of the Housing Appeals Committee ("HAC") dated June 25, 1992.

Under the terms of paragraph 2 of the Conclusion and Order of the HAC decision (page 42-43), a Final Order will not be issued until certain plans and drawings are submitted to the HAC.

In order for us to proceed, certain changes to and/or clarifications of the Permit are necessary. Under the terms of the HAC decision and the Comprehensive Permit regulations, we are uncertain whether these changes/clarifications should be sought from the HAC or ZBA. We do not believe that any of these changes are substantial.

In any event, we would like an opportunity to review with you these proposed changes/clarifications.

To the extent this notice is filed with the ZBA pursuant to C.M.R. 31.08(5) and 31.03(3).

Request for Transfer of Permit

C.M.R. 31.08(5) requires the written approval of the Board of the Housing Appeals Committee to transfer a comprehensive permit.

We are requesting approval of the transfer of the permit to Avalon Properties, Inc. ("Avalon") or a wholly owned subsidiary of Avalon Properties, Inc.

Avalon is the successor entity to Trammell Crow Residential. Avalon specializes in the ownership and management of apartment developments and owns 7,044 apartments located in 22 developments. Avalon is an experienced developer of mixed income housing developments. Two such developments are located in Massachusetts: Town Arbor (302 apartments) in Shrewsbury and Lexington Ridge (198 apartments) in Lexington.

Additional information on Avalon and the proposed project is attached.

Avalon will establish a limited dividend entity to own the Development in accordance with the requirements of M.G. L. chapter 40B.

Request for Approval of Insubstantial Changes

C.M.R. 31.03 requires ZBA approval of all changes in proposals.

Avalon is requesting approval of the following four changes in the proposal. Avalon believes that all four changes are insubstantial and, in fact, that two of the changes are merely clarifications of the existing Permit.

1. Authority to utilize either TELLER, MHFA or MIFA financing. The initial application for the Development proposed the use of tax-exempt bonds to be issued by the local housing authority under the TELLER Program. Tax-exempt financing is available also through the Massachusetts Housing Finance Agency ("MHFA") or the Massachusetts Industrial Finance Authority ("MIFA"). Avalon requests the authorization to utilize either the TELLER Program, MHFA or MIFA for financing.

MHFA and MIFA are extremely experienced issuers of tax-exempt financing. MHFA has financed over 60,000 units of multifamily housing, including Avalon's Lexington Ridge development. MIFA has financed over a $5 billion of facilities including residential, industrial, manufacturing and health care facilities.

The option to utilize MHFA or MIFA financing will not affect any other aspect of the proposal.

2. Change in building type. The current permit authorizes the development of 120 units in two mid-rise structures. (Condition 1 of the Conclusion and Order, page 41.) Avalon does not believe mid-rise structures are the most appropriate building type for the site or for the Town. Avalon is proposing to change the building type to eight low-rise buildings. Since we believe this is a less burdensome building type and represents an improvement in the Development, we do not believe this change is substantial. The revised site plan incorporating this change has been included as part of this submittal.

3. Water and sewer connection fees. Under existing town guidelines, water and sewer charges of $332,750 would be assessed for the Development. These fees were not included in the development pro forma submitted by CMA pursuant to which the Permit was granted. Under the comprehensive permit statute, the ZBA makes all necessary determinations with respect to all local permits including water and sewer hook-ups.

We seek clarification as to the amount, if any, of water and sewer hook-up charges due under the Permit. We understand that pursuant to local practice these fees are typically reduced by the amount of other public improvements made by a developer. Further, in the context of comprehensive permits it is typical that these types of charges not be assessed upon the low-income units and thus, by way of clarification, we would propose that these fees should not be imposed upon the low-income units in the Development. These adjustments are set forth in Exhibit 1. Based upon these adjustments we would seek clarification that the amount due for water and sewer hook-up under the Permit be established as $139,100.02.

4. Deletion of Permit Condition 1(f). Paragraph 1(f) of the Permit requires the developer to pay "13% of any improvements to the Route 20 and Walnut Street intersection . . . if the final Massachusetts Highway Department approval for those improvements is received after the comprehensive permit is issued, and before the first occupancy permit for the project is issued." Avalon anticipates that the lack of certainty imposed by this condition will be a problem for any proposed debt or equity financing sources. After discussions with the Highway Department, Avalon believes that no such improvements are contemplated. Avalon therefore is requesting that this condition be deleted from the Permit.

We understand that we will have the opportunity to meet with the ZBA on March 21, 1994. We look forward to discussing these issues with you at that time.

Sincerely yours,

Avalon Properties, Inc.
d/b/a Avalon Residential

By: Bryce Blair, Senior Vice President

BB:tlc

Exhibit 1

*Sewer and Water Connection Fee

Water :	$151,250.00	
Sewer :	$181,500.00	
TOTAL :	$332,750.00	$332,750.00

**Minus Affordable Units

Water :	$30,000.00	
Sewer :	$36,000.00	
TOTAL :	$66,000.00	
SUBTOTAL :		$266,750.00

Minus		
Gleason Street Improvements :	$107,296.00	
SUBTOTAL :		$159,454.00

***Minus		
Otis Street Pump Station Payment :	$20,353..98	
SUBTOTAL :		$139.100 02
TOTAL :		$ 139,100.02

Calculations :

* Water - (119 units x $1250) + $2500 = $151,250.00 (per Town regulations)
Sewer - (119 units x $1500) + $3000 = $181,500.00

** 120 units x Affordable Units (20%) = 24 units
Water - (24 units x $1250.00) = $30,000.00
Sewer - (24 units x $1500.00) = $36,000.00

*** Payment made by CMA, Inc. on 11/22/88 to Otis Street Pump Station Partners.

Town Clerk

TOWN OF WESTBOROUGH
MASSACHUSETTS

BOARD OF APPEALS

TOWN HALL, WEST MAIN STREET
WESTBOROUGH, MA 01581

April 5, 1994

TOWN CLERK'S OFFICE

APR - 5 1994

TOWN OF WESTBOROUGH

Mr. Bryce Blair
Senior Vice President
Avalon Properties, Inc.
100 Grandview Road - Suite 305
Braintree, MA 02184-2686

RE: COMPREHENSIVE PERMIT - CMA, INC.
CHARLESTOWN MEADOWS DEVELOPMENT

Dear Mr. Blair:

I am writing to you on behalf of the Town of Westborough Board of Appeals with reference to proposed changes/clarifications to the proposal originally submitted to this Board by CMA, Inc. As you are aware, the Board has reviewed your correspondence and revised plans submitted and, at a meeting held on March 28, 1994, determined that C.M.R. 31.03(1) is applicable and that your proposed request relating to requested changes/clarifications should be submitted to the Housing Appeals Committee. The Board made this determination as a result of the fact that a Comprehensive Permit has not yet been issued by the Appeals Committee and that the Committee's decision of June 25, 1992 contained language indicating that the Committee has retained jurisdiction in this matter. The Board understands that you concur with its decision in that your correspondence of March 15, 1994, states that you are "uncertain whether these changes/clarifications should be sought from the Housing Appeals Committee or the Board of Appeals". Since the Board has determined that C.M.R. 31.03(1) governs rather than C.M.R. 31.03(3), it makes no representation as to whether the proposed changes are substantial and reserves the right to comment upon the proposed changes at a hearing to be held before the Appeals Committee.

In light of the foregoing, the Board would request that the changes/clarifications requested in your letter be submitted directly to the Housing Appeals Committee and that you request the

Committee to schedule a hearing with reference to those changes/clarifications. As the Board may wish to comment on the changes/clarifications and participate in such hearing, the Board would request that they be notified of the scheduled hearing date.

Further, the Board would request that an authorized representative of Avalon Properties sign the enclosed copy of this letter acknowledging its assent to the submittal of your proposed changes/clarifications to the Housing Appeals Committee and your assent that the Board not be bound to the provisions of C.M.R. 31.03(3) with reference to the time requirements of determining whether the changes are substantial or insubstantial.

Sincerely,

Donald M. Gills

Donald M. Gills, Chairman
Westborough Board of Appeals

AFD/pbt
Enclosure

cc: Westborough Board of Selectmen
Westborough Town Clerk
Werner Lohe, Chairman, Housing Appeals Committee
Alan F. Dodd, Town Counsel
John J.L. Matson, Esq.

ACKNOWLEDGING ITS ASSENT,
AVALON PROPERTIES BY

_____

Bryce Blair, Senior Vice President date

COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

CMA, INC., Appellant	)	
v.	)	No. 89-25
WESTBOROUGH BOARD OF APPEALS, Appellee	)	July 20, 1994

ORDER TO TRANSFER OF PERMIT

The Housing Appeals Committee rendered a decision in this case on June 25, 1992 ordering the Westborough Board of Appeals to issue a comprehensive permit to CMA, Inc. pursuant to G.L. c. 40B, §§ 20-23. Since then, Avalon Properties, Inc. has entered into an agreement with CMA, Inc. to purchase the site of the proposed housing. In April, 1994, Avalon requested that the Committee transfer the permit to it, and that certain other post decision issues be disposed of. The Westborough Board of Appeals has joined Avalon in requesting that these matters be heard before the Housing Appeals Committee.

The Committee held a conference of counsel, and then, on June 7, 1994, conducted an evidentiary hearing, with witnesses sworn and a verbatim transcript. At that hearing the parties filed a Joint Status Report and Recommendation (the Joint Recommendation). Because Avalon still intends to develop the site as affordable housing pursuant to the

comprehensive permit, and because there is general agreement that the changes represent improvements in the design, most of the outstanding issues have been resolved by the Joint Recommendation. The major issue left unresolved is that of water and sewer fees imposed by the town.

This order is issued by the presiding officer pursuant to the authority of 760 CMR 30.09(5)(c). *See* Wilmington Arboretum Apts. Assoc. Ltd. Partnership v. Wilmington, No. 87-17, slip op. 3, (Mass. Housing Appeals Committee Sep. 28, 1992), *aff'd*, C.A. No. 92-6822 (Middlesex Superior Court Dec. 7, 1993).

Approval of Plans

In its June 25, 1992 Decision, § V-2, the Committee took the unusual step of requiring the developer to submit final plans to the Committee for approval. Based upon the parties' joint recommendation, the Committee finds that the plans submitted (Exhibits A-E) are adequate and comply substantively with the comprehensive permit. Joint Recommendation, § I.

Changes in Plans

The new plans submitted to the Committee change the type of buildings in the development from two mid-rise, sixty-unit apartment buildings to eight low-rise structures. We need not decide whether this is a substantial change under our regulations since the Board has no objection to the change. Joint Recommendation, § II. Therefore, we

hereby approve the change.

Similarly, the source of subsidy has changed from the Tax Exempt Local Loans to Encourage Rental Housing (TELLER) program to a Massachusetts Housing Finance Agency (MHFA) program using federal tax credits. Exh. G.[1] Based upon the parties joint recommendation, we approve this change. Joint Recommendation, § V.

Water and Sewer Fees

The Town of Westborough has assessed sewer connection fees of $3,000 for the first unit of this development and $1,500 for each of the 119 units thereafter. It has assessed water connection fees of $2,500 for the first unit and $1,250 for the remainder. The total of these fees is $332,750. The developer has requested five waivers or offsets against these fees.

The developer previously paid $20,254 toward the Otis Street pump station. The Board of Selectmen approved this amount as an offset against the total amount of fees assessed. Exh. Q. We approve that action.

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[1] Exhibit G is a March 21, 1994 letter from the MHFA confirming its interest in financing the proposal. This letter would not be sufficient to constitute a determination of project eligibility under 76 CMR 31.01(2) at the beginning of the comprehensive permit process. But at this point, since project eligibility was previously established and fundability is not contested by the Board, the letter is acceptable. We are confident that the MHFA will ensure that twenty percent of the units are set aside for tenants with incomes no higher than fifty percent of median income, that long-term affordability will be assured, and that the other normal requirements for subsidized housing are met.

The developer proposed to extend a water main along Gleason Street for the benefit of the town at an additional cost to itself of $40,000. The Board of Selectmen would not approve an offset for this. The developer, however, is under no obligation to construct the extension or spend the $40,000 (Tr. XIII, 109), so this question is moot.

The developer previously committed itself to roadway improvements on Gleason Street costing $107,296. These have now been agreed upon in revised form as shown on Exhibit R. (The water main extension also shown on the plan is not part of the proposal as approved.) In addition, the developer agreed to improvements to a culvert on Fisher Street costing $5,000. The Board of Selectmen did not approve an offset for any of this work. We will not disturb that judgment.

Twenty-four of the proposed units will be affordable, subsidized housing. The developer requested waiver of all fees for these units, that is, of $66,000. In light of the Board of Appeals' power pursuant to G.L. c. 40B, §21 and 760 CMR 31.08(2)(e) to waive fees for all 120 units in order to facilitate the construction of this sort of housing, this request is by no means exorbitant. The Board of Selectmen accepted this request in principle, but added the condition that each unit "actually [be] rented to a Westborough resident." Exh. Q. We doubt there is any legal basis for such a distinction between units rented to current town residents and those rented to people who will move into town, and in any case, such matters are to be decided by the subsidizing agency. 760 CMR 31.07(4)(e). We therefore approve the waiver, but remove the condition.

Transfer of Permit

The parties have jointly requested that the comprehensive permit be transferred to Avalon Properties, Inc. or Avalon Town Meadows, Inc., a corporation wholly owned by Avalon Properties, Inc. Joint Recommendation, § IV. Pursuant to 760 CMR 31.08(5), the permit is so transferred. All conditions contained in the Committee's June 25, 1992 decision, except those modified in this order, will apply to the transferees, and in particular the transfer is subject to the final approval of Avalon Properties, Inc. or Avalon Town Meadows, Inc. as a limited dividend organization acceptable in all respects to the subsidizing agency.

MEPA

On July 1, 1993, a Certificate of the Secretary of Environmental Affairs on the Notice of Project Change was issued. In the first sentence, the certificate states that preparation of an Environmental Impact Report (EIR) under the Massachusetts Environmental Policy Act (MEPA) is no longer required. Under these circumstances, the Committee is not required to make a finding under G.L. c. 30, § 61. 760 CMR 31.08(3)(a)(1). Since the certificate was issued, however, further changes have been made in the proposal. Therefore, construction under this order may not commence until ten days after filing with the Committee of a certificate stating that an EIR is still not required.

It is hereby ORDERED that the comprehensive permit be transferred and modified as set out above.

Housing Appeals Committee

Werner A. Lohe Jr.
Acting Chairman
Presiding Officer

Date: 7/20/94

LPelw.o

Certificate of Service

I, Werner A. Lohe Jr., Acting Chairman of the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid a copy of the within Order on Transfer in the case of CMA, Inc. v. Westborough, No. 89-25 dated July 20, 1994, to:

John J.L. Matson, Esq.
19 West Main St
Westborough MA 01581

Howard E. Cohen, Esq.
Paul D. Wilson, Esq.
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
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339 Main Street
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T. Philip Leader, Esq.
Dunn, Leader & Allen
446 Main St, 18th fl
Worcester MA 01608

7/20/94
(date)

Werner A. Lohe Jr.
Acting Chairman, H.A.C.

WAL\s
LP2c-s

136508

Name: Avalon West Apartments
MHFA No. 94-010-N

HUD Project #023-98003

REGULATORY AGREEMENT

Date: December 10, 1996

Owner's Name and Address: Avalon Town Meadows, Inc.
Suite 210, 15 River Road
Wilton, CT 06897 (the "Owner")

Name and Location of Project: Avalon West Apartments
Gleason and Fisher Streets
Westborough, MA (the "Project")

Number of Units: 120

Initial Replacement Reserve Requirement: $2,750 per month
$33,000 per year

Owner's Equity: $4,083,611

RECORDED 9 AM DEC 12 1996

REGULATORY AGREEMENT between Owner and Massachusetts Housing Finance Agency (the "Agency"), a body politic and corporate, organized and operated under the provisions of Chapter 708 of the Acts of 1966 of the Commonwealth of Massachusetts as amended (the "Act").

IN CONSIDERATION of the first mortgage loan which the Agency has agreed to advance the Owner for the permanent financing of a residential housing project which is more fully described in the Mortgage of even date herewith, the Owner covenants and agrees that in connection with ownership and operation of the Project it will comply, and will require any purchaser of the Property to comply, with the following:

1. Low income and market rate rents in the Project shall be set in accordance with the Rental Schedule previously approved by the Agency, which is attached hereto as Appendix A and is hereby made a part hereof. Any change in said schedule relative to the low income rentals shall be reviewed by the Agency at its annual Property Management Review (PMR). Market rate rentals shall be reviewed at least once every two years. The Agency reserves the right to require the Owner to increase the market rate rents if the Agency determines that the market rate rents are not sufficiently high, as defined by Agency policy. Notwithstanding any rental increases pursuant to the preceding sentences, not less than 20% of the units shall be rented at all times to low income persons, as defined herein, at or below the rents required under the U. S. Department of Housing and Urban Development (HUD) Housing Finance Agency Risk-Sharing Pilot Program. The gross allowable rents permitted for low income

Cypress Street
Mintz Levin
One Financial Center
Boston, MA 02110

units under such Program shall be calculated at 30% of 50% of the median income levels established and updated by HUD, and shall not be adjusted based on the actual income of individuals or families occupying such units. If general market conditions are such that there is no significant difference between market rate rents and the allowable low income rent, as set forth above, the Agency may require that the low income rents be reduced to ensure the affordability of the low income units.

In fulfilling the low-income requirement, the Owner will accept referrals of tenants from the Public Housing Authority in the city or town in which the Project is located, and will not unreasonably refuse occupancy to any prospective tenants so referred. As used in this Agreement, the term "low-income persons" shall mean persons or families eligible at any given time for occupancy in public housing in the city or town in which the Project is located, but in no event shall such term include persons or families who do not qualify as families with incomes of 50% or less of the area median income determined by HUD under the HUD Risk-Sharing Program.

2. Any and all other definitions of "rents" or "rentals" that may be applicable because of Federal or state subsidy programs shall be determined by the rules and regulations of such subsidy programs. The term "below market rental" shall have the meaning set forth in Section 6(a) of the MHFA Enabling Act.

3. This Agreement, the Mortgage Note, the Mortgage, Security Agreement and Assignment of Leases and Rents (the "Mortgage"), the Land Use Restriction Agreement and the Development Fund Agreement executed by the parties, all of even date and relating to the Project, and all agreements between the Owner and the Agency, or either of them, and the United States Department of Housing and Urban Development and/or the Commonwealth of Massachusetts relating to the provision of mortgage or rental subsidies for the project (the "Subsidy Documents") shall be construed as a single agreement, and default by the Owner under the provisions of any one shall be deemed a default under each of the others. Said documents collectively shall be known as the "Contract Documents." The terms "Property" and "Project" are defined in the Mortgage.

4. The Resident Selection Plan which has been approved by the Agency will be complied with. Said plan is hereby made a part of this Agreement, and is attached hereto as Appendix B. As between applicants equally in need and eligible for occupancy, preference shall be given in the leasing of units, in accordance with statutory requirements, to persons displaced by public action or natural disaster. There shall be no discrimination on the selection of tenants by reason of the fact that there are children in the family of the applicant. The Agency agrees that applicants may be denied occupancy due to inability to pay the tax credit rent, based upon consistently applied standards of eligibility, which shall be reviewed from time to time by Owner and the Agency.

5. There shall be no discrimination upon the basis of race, creed, color, sex, handicap, or national origin in the lease, use, or occupancy of the Project or in connection with the employment or application for employment of persons for the operation and management of the Project. An Affirmative Action Plan with regard to advertising for, hiring and promoting employees of the Owner or of the management company hired by the Owner must be approved by the Agency. Contracts for services and goods will be subject to such Affirmative Action Plan.

6. All records, accounts, books, tenant lists, applications, waiting lists, documents, and contracts relating to the Project shall at all times be kept separate and identifiable from any other business of the Owner which is unrelated to the Project, and shall be maintained, as required by regulations issued by the Agency from time to time, in a reasonable condition for proper audit and subject to examination during business hours by representatives of the Agency. Failure to keep such books and accounts and/or make them available to the Agency will be a default pursuant to section 2.1(f) of the Mortgage.

7. Commencing on the first day of the month following the first anniversary of the closing of the permanent mortgage loan, Owner shall establish and maintain a reserve fund for replacements in an escrow account controlled by the Agency in an amount per month specified above. It is agreed by the Owner that the replacement reserve amount specified above shall be adjusted each year by the amount of an adjustment reasonably required by the Agency, which adjustment shall be indexed to the Agency's underwriting or based upon capital needs assessments (provided that in no event shall such adjustment exceed 5% of the prior year's replacement reserve). The interest earned on the account shall remain in the Replacement Reserve for the benefit of the Project. Disbursements from such fund, whether for the purpose of effecting replacement of structural elements or mechanical equipment, may be made only after receiving the prior consent in writing of the Agency, which consent will not be withheld unreasonably. In the event of a default in the terms of the Mortgage whereby repayment of the loan is accelerated, the Agency may apply or authorize the application of the balance in such fund to the amount due on the Mortgage Debt as accelerated. The Agency agrees that, at such time as the Mortgage has been paid in full, all Project reserves, escrows and accounts will be returned to the Owner, but until such time, all reserves, escrows and accounts shall be subject to Agency rules, regulations, controls and escrow arrangements. In the event of prepayment of the loan pursuant to the provisions of the Mortgage, all Agency controls on the fund shall terminate and the balance in such fund shall belong to the Owner.

8. Owner shall establish a Distribution Account, in accordance with the following requirements:

   (a) Only such Project income from rents or other sources may be allocated to the Distribution Account as may remain after, and any amounts in the Distribution Account shall always be available for, in the following order of priority: (i) payment of or adequate reserve for all sums due or currently required to be paid under the terms of the Mortgage and the Mortgage Note; and (ii) payment of or adequate

reserve for all current obligations of the Project other than the mortgage loan, including escrows for real estate taxes and insurance; and (iii) deposit of all amounts required to be deposited in the reserve fund for replacements; and (iv) payments of expense loans from the Distribution Account by principals of the Owner for Project expenses, provided that the Owner shall have obtained prior Agency approval for such loans and shall have supplied the Agency with such evidence as the Agency may reasonably request as to the application of the proceeds of such operating expense loans to Project expenses. Distribution may be made from the Distribution Account only when all currently payable obligations of the Owner as identified in paragraphs (i), (ii), (iii) and (iv) above are paid as evidenced by a certificate provided by an independent accountant indicating that no such obligations are more than thirty days past due.

(b) No additional amount shall be allocated to the Distribution Account, and no amount shall be paid out of said Account when a default for which notice has been issued exists under the Contract Documents, or when there has been failure to comply with the Agency's notice of any reasonable requirement for proper maintenance of the Project, or when there is outstanding against all or any part of the Project any lien or security interest on the Project assets other than the Mortgage unless provided for to the Agency's reasonable satisfaction by a bond, insurance, reserve, or in a similar manner. No amount shall be allocated to the Distribution Account or distributed to the Owner which constitutes or is derived from the borrowed funds or from the sale of capital assets, except with the prior written authorization of the Agency and except as otherwise approved in the Development Fund Agreement.

(c) Distributions to the Owner may be made from the Distribution Account, provided that no distribution for any fiscal year may exceed that percentage of the Owner's Equity in the Project which from time to time is permitted under the Act, and which, at the time of execution hereof, is ten percent (10%). The ten percent (10%) standard shall apply throughout the term of the mortgage loan, except that if the Agency establishes a higher rate at a later date, the Agency will consider the Owner's request for a higher distribution. Distributions shall be permitted with respect to each fiscal year of the Project commencing on the date of commencement of construction, but not before all current and owed-to-date project expenses have been paid and reserves, then due or owing, have been funded. In the event cash is available, all allowable distributions shall be made in the year in which they are earned or as soon as possible thereafter. In the event that distributions are not made in any year to the maximum percentage permitted by law at the time with respect to such year, then in that event, but subject to the provisions of subsections (a) through (c), such deficiency shall accrue with interest at a rate of ten percent (10%) simple interest per annum and the cumulative deficiencies may be made up out of amounts in the Distribution Account which have been accumulated or which will accumulate in succeeding years. Distributions may in no case be made from the Excess Rental Account. All distributions shall apply first

to the principal amount of unpaid distributions and then to accrued and unpaid interest. Distributions may be made only after all deposits required pursuant to Paragraph 8(a) have been made.

(d) The Owner's Equity shall be adjusted only upon the Owner's request as set forth in this subsection. The Agency agrees to re-evaluate at the Owner's written request the Owner's Equity in the Project every five years (or at such shorter interval as may be permitted under the Act). The first five-year period shall commence on the date of commencement of construction. The revalued Owner's Equity will be established by Agency staff or an outside appraiser selected or approved by the Agency. In the event the Owner disputes the Agency's appraisal, (i) the Owner shall have the right to withdraw the re-evaluation of equity request, or (ii) the Owner may contract a second appraisal. If the initial appraisals are less than ten percent (10%) apart on Project value (i.e., the higher appraisal is less than 110% of the lower appraisal), the value shall be the average of the two appraisals. In the event the appraisals are ten percent (10%) or more apart and the parties are not able to reconcile the differences and agree upon a value, the initial appraisers shall select a third appraiser whose value determination shall be binding. The appraisers shall follow the Agency's standard appraisal policies and shall be instructed to take into account (x) the Project's favorable financing rate and (y) the low income use restrictions pursuant to the MHFA financing and the Town of Westborough's zoning restrictions on the Project. All costs for appraisals shall be borne by the Owner as a capital expense (which shall not be funded from the reserve fund for replacements).

9. All rentals, if any, received by the Owner in excess of the below-market rentals established for each unit and not necessary for Project operations shall be applied pursuant to Agency direction to reduce rentals so as to make more units available to low income persons and families.

10. Occupancy shall be permitted only upon execution of a lease in form satisfactory to the Agency. All leases shall be expressly subordinated to the Mortgage, and shall contain clauses, among others (though in the event such clauses are inconsistent with the Subsidy Documents, the Subsidy Documents will apply to those units for which there is a subsidy) wherein each individual Lessee:

(a) certifies the accuracy of the statements made in the application and income survey;

(b) agrees that the tenant income and other eligibility requirements, shall be deemed substantial and material obligations of his tenancy; that he will comply promptly with all requests for information with respect thereto from the Owner or the Agency, and that his failure or refusal to comply with a request for information with respect thereto shall be deemed a violation of a substantial obligation of his tenancy;

(c) agrees that at such time as the Owner or Agency may direct, he will furnish to the Owner certification of then current tenant income, with such documentation as the Agency shall require;

(d) agrees to such charges as the Agency has previously approved for any facilities and/or services which may be furnished by the Owner or others to such tenant upon his request, in addition to the facilities and services included in the approved Rental Schedule.

11. Owner shall not, without the prior written approval of the Agency, which approval will not unreasonably be withheld, and any other governmental authority whose jurisdiction includes regulation of Owner, nor contrary to Agency law effective at the time in question:

(a) convey, transfer, or encumber any of the mortgaged property including the grant of commercial leases, or permit the conveyance, transfer or encumbrance of such property (except for apartment leases);

(b) assign, transfer, dispose of, or encumber any personal property of the Property, including rents, or pay out any funds other than: distributions with respect to equity expressly permitted hereunder, reasonable operating expenses and necessary repairs, proceeds of the sale of ownership shares of the Owner, subject to the terms of the Development Fund Agreement, and repayment of loans which the Owner makes to the Project at such rates and upon such conditions as the Agency reasonably agrees are fair and reasonable to the Project, provided, however, that Owner is expressly permitted to assign, transfer, dispose of or encumber any tangible personal property to be replaced by or with other items of personal property of like quality and value, and free of superior title, liens and claims;

(c) convey, assign, transfer, or permit the transfer, conveyance or assignment of greater than twenty-five percent (25%) of the corporate stock of the Owner, all of which is currently held by Avalon Properties, Inc., or any right to manage or receive the rents and profits of the Project, except with the Agency's prior written approval, which approval shall not be unreasonably withheld or delayed, and unless the transferees or assignees of the general partners assume the obligations of the Contract Documents by an instrument in writing satisfactory to the Agency;

(d) substantially remodel, add to, reconstruct, or demolish any part of the mortgaged property or substantially subtract from any real or personal property of the Project;

(e) permit the use of the dwelling accommodations of the Project for any purpose except residences or permit commercial use greater than that originally approved by the Agency, if any;

(f) incur any liability, direct or contingent, out of the ordinary course of business in developing and operating a low, middle income and market rate residential housing Project;

(g) except as stated expressly in the Contract Documents or otherwise approved by the Agency in writing, pay any compensation or make any distribution of income or other assets to any of the owners of shares of stock or of beneficial interest;

(h) enter into any management contract;

(i) modify or amend the Owner's charter, by-laws, Articles of Organization, or other governing instrument or instruments, except as permitted by the Contract Documents.

12. Owner shall provide for the management of the Project in a manner reasonably satisfactory to the Agency. Any management contract entered into by Owner shall contain a provision that it shall be subject to termination, without penalty and with or without cause, upon thirty days notice by the Owner if such termination is requested by the Agency and be terminable immediately by the Agency if Owner fails to implement such request by the Agency. Upon receipt of such request or notice of termination, Owner shall immediately make arrangements reasonably satisfactory to the Agency for continuing proper management of the Project. Any event of default under the Contract Documents shall be cause for termination of the management contract by the Agency. Owner, with the approval of the Agency, may retain the terminated management company for up to thirty days while a replacement management company is being selected. In the event that, subsequent to thirty days after the termination of the management contract by the Owner (whether or not such termination is pursuant to the provisions of this section), Owner has not made arrangements reasonably satisfactory to the Agency for continuing proper management of the Project, the Agency shall have the right to designate a management agent for the Project.

13. Payment for services, supplies, or materials shall not exceed the amount ordinarily and reasonably paid for such services, supplies, or materials in the area where the services are rendered or the supplies or materials furnished.

14. Within the ninety (90) days following the end of each fiscal year of the Project, the Agency shall be furnished with a complete annual financial report for the Project based upon an examination of the books and records of the Owner containing a detailed, itemized statement of all income and expenditures, prepared and certified by a Certified Public Accountant in accordance with the reasonable requirements of the Agency which include (i) the income statement submitted on an Agency format, and (ii) the financial report on an accrual basis and in conformity with generally accepted accounting principles applied on a consistent basis. A duly authorized agent of the Owner must approve in writing such submission.

15. At the request of the Agency, the Owner shall furnish quarterly financial statements and occupancy reports and shall give specific answers to questions upon which information is reasonably desired from time to time relative to the ownership and operation of the Project.

16. All rents and other receipts of the Project shall be deposited in the name of the Owner or a nominee for the Owner in a bank or banks, whose deposits are insured by the F.D.I.C. The Agency shall at all times be advised of the names of the accounts and names of the banks. Such funds shall be withdrawn only in accordance with the provisions of this Agreement. Any person receiving funds of the Project other than as permitted by the Contract Documents shall immediately deposit such funds in a Project bank account, and failing to do so in violation of this Agreement, shall hold such funds in trust for the Project.

Any such letters of credit, cash accounts or investments provided to the Agency as security shall be monitored by the Agency and if, in the sole discretion of the Agency, the financial institution issuing or holding such letters of credit, cash accounts or investments should be in danger of insolvency, bankruptcy or takeover by a financial institution unacceptable to the Agency, the Agency will give the Owner fifteen (15) days' notice in which to transfer such letters of credit, cash accounts or investments to a financial institution acceptable to the Agency (provided that, in the case of time deposit instruments, the Owner need not transfer the same until maturity if a penalty would result from transfer within such 15-day period), or the Agency will have the right, pursuant to this Regulatory Agreement, to call, in part or in full, such letters of credit, cash accounts or investments and invest the proceeds, on the terms and conditions herein set forth, in any investment allowed by the Banking Commissioner of the Commonwealth of Massachusetts for investments by public agencies.

The Owner and the Managing Agent shall be responsible and account for any and all disbursements made from rents and receipts from the operation of the Project, and failure to account for any cash disbursements used for any purpose not permitted by the Contract Documents shall make the Owner and the Managing Agent personally liable to the extent of such unaccounted for disbursements. Project income may be used only for the purposes specified in Section 8(a)(i)-(iv) and 8(c).

17. There shall be full compliance with the provisions of all state or local laws prohibiting discrimination in housing on the basis of race, sex, handicap, religion, color, national origin, age, marital status or ancestry, and providing for nondiscrimination and equal opportunity in housing. Failure or refusal to comply with any such provisions shall be a proper basis for the Agency to take any corrective action it may deem necessary including, but not limited to, the rejection of future applications for mortgage loans and the refusal to enter into future contracts of any kind with which the Owner or its shareholders, trustees, or beneficiaries are identified.

18. (a) This Agreement shall bind, and the benefits shall inure to, respectively, the Owner and its successors and assigns, and the Agency and its successors and assigns, so long as

the Mortgage continues in effect, whether or not the Agency shall continue to be the Owner of the Mortgage, provided, however, that this Agreement shall become a nullity upon payment and discharge of the Mortgage.

(b) The Mortgage is insured by the U.S. Department of Housing and Urban Development (HUD) under the Housing Finance Agency Risk-Sharing Program for Insured Affordable Multifamily Project Loans, and the Owner shall comply with all regulations and requirements thereunder, as found at 24 C.F.R. Part 266, for as long as the Mortgage is insured by HUD.

19. Owner warrants that it has not, and will not, execute any other agreement with provisions contradictory to, or in opposition to, the provisions hereof, and that, in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations set forth and supersede any other requirements in conflict therewith.

20. The invalidity of any clause, part or provision of this Agreement shall not affect the validity of the remaining portions thereof.

21. Notices shall be deemed delivered when mailed registered mail, return receipt requested, to the Owner at the above referred-to address and to the Agency at One Beacon Street, Boston, Massachusetts 02108, with copies sent to Stephen T. Langer, Esquire, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., One Financial Center, Boston, MA 02111 or to such other place as a party may designate in writing. Notice will be deemed legally sufficient when given only to the Owner.

22. In accordance with Section 542(c) of the Housing and Community Development Act of 1992, and the implementing regulations (24 C.F.R. Part 266), the Owner shall be a sole asset mortgagor.

IN WITNESS WHEREOF, the parties have caused this Regulatory Agreement to be signed and sealed by their respective, duly authorized representatives, as of the day and year first written above.

MASSACHUSETTS HOUSING FINANCE AGENCY

By: _____
Wendy E. Warring, General Counsel

OWNER:

AVALON TOWN MEADOWS, INC.

By: _____
Bryce Blair, Senior Vice President

Attachments:
Appendix A - Rent Schedule
Appendix B - Resident Selection

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. December 10, 1996

Then personally appeared the above-named Wendy E. Warring, General Counsel of Massachusetts Housing Finance Agency, and she acknowledged the foregoing instrument to be her free act and deed and the free act and deed of said Agency.

Before me,

Deanna Ramsden

Notary Public Deanna Ramsden
My Commission Expires: 2/26/99

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. December 10, 1996

Then personally appeared before me the above-named Bryce Blair, Senior Vice President of Avalon Town Meadows, Inc. and acknowledged the foregoing to be his free act and deed and the free act and deed of Avalon Town Meadows, Inc.

Before me,

Laurie A. Rizzelli

Notary Public
My Commission Expires: 12/23/99

511750.1

LAURIE A. RIZZELLI
Notary Public
My Commission Expires December 23, 1999

APPENDIX A

RENT SCHEDULE

	LOW INCOME				MARKET					
	Certificates		Unassisted							
NO. OF BEDROOMS	2	3	1	2	1	1L	2G	2L	3	3G
NO. OF UNITS (120 TOTAL)	6	5	8	5	16	16	22	22	10	10
NET SF/UNIT	1297	1438	776	1279	776	901	1279	1387	1348	1454
ELEV/NONELEV	N	N	N	N	N	N	N	N	N	N
MARKET RATE RENT 8.75%RATE 30yr TERM	$650	$811	$382	$445	$838	$898	$1153	$1238	$1188	$1268
MHFA BELOW MKT RENT (Cost Based Rent)	612	773	344	407	800	860	1115	1200	1150	1230
MHFA RENT ADJUSTED					25-30% OF INCOME					
ATTAINABLE RENT-LOW	612	773	344	407						
ATTAINABLE RENT-MKT					800	860	1115	1200	1150	1230
UTILITY ESTIMATE	92	107	71	92						

Appendix B

MHFA Resident Selection Plan

There shall be no discrimination in the selection of residents by reason of race, creed, color, sex, handicap, national origin, or the fact that there are children in the family.

Affirmative Marketing The owner/agent shall follow an MHFA - approved Affirmative Marketing Plan for the development which shall, with specificity, state company policy and commitment to an affirmative marketing program, describe systems to involve management staff at all levels in carrying out an effective program, and assert an aggressive recruitment, advertising and outreach plan designed to accomplish affirmative marketing objectives. Affirmative marketing and outreach, including contacting relevant community groups, shall commence at least 30 days prior to other marketing efforts.

Physically Disabled Outreach Generally, 5% of the units in the development are specially designed to meet the needs of handicapped individuals who require physical adaptations to the unit. The owner/agent shall notify appropriate handicap resource groups of the availability of accessible units and engage in an outreach program to ensure maximum utilization of adapted units by persons who require accessible features. Such persons will at all times have priority for units specially designed for their use and occupancy.

Mentally Disabled Requirements Generally, 3% of the units in the development distributed proportionately among the market and low income units are committed by the owner/agent for participation in the MHFA Department of Mental Health (DMH) and Department of Mental Retardation program. The owner/agent will develop a DMH/DMR program participation agreement with DMH/DMR or its local service provider in order to establish the guidelines for the individual program at the development.

Low Income Units Low income units shall be marketed and residents selected in accordance with the Marketing and Selection Procedures for Low Income Units.

Moderate Units Preference will be given on a site specific basis. The owner/agent should refer to the regulatory agreement and legal closing documents to determine if moderate units will be available.

Reference Checks In performing investigations of a low or moderate applicant's history, the following information may be considered. Third party written verification will be obtained whenever feasible.

1. Landlords within the past five years may be contacted to determine the applicant's record of rental payments, as well as whether the applicant conducted themselves in a manner so as not to intentionally damage property, cause disturbances to neighbors and/or otherwise jeopardize the health, security, and welfare of neighbors or himself.

2. Credit references furnished by the applicant or obtained through a credit bureau may be used to evaluate the credit history of the applicant. Information to be considered will be limited to the applicant's credit record established within the five years prior to the date of application. If management rejects an application based upon the credit report, the notice of rejection given to the applicant will include the name of the credit bureau which performed the credit check. Applicants will also be given the opportunity to have corrections made to the credit report.

3. Personal references furnished on the application may be contacted.

4. Management may check court for other information generally available to the public. Management shall have the obligation to ensure that none of the information is collected in violation of the law.

5. Home visits may be made when requested by an applicant as part of his/her rebuttal of a rejection, or to verify a need priority reported by the applicant when such verification may not be obtained through outside sources in a timely fashion, or at the request of the applicant due to a physical impairment or illness which prevents the applicant from meeting with the agent in the rental office.

Standards for Rejection A low and moderate income applicant is deemed acceptable for occupancy unless specific information or facts show one or more of the following:

1. Reasonable risk that the applicant may be unable or willing to pay the rent as agreed.

2. Reasonable risk that the applicant or those under the applicant's control may interfere with the health, safety, security, or right to peaceful enjoyment of the resident community.

3. Reasonable risk of intentional damage or destruction to the apartment unit and surrounding premises by the applicant or those under the applicant's control.

4. Intentional, material falsification of information supplied on the application.

In determining whether or not an applicant is to be rejected under one or more of the above standards, the following points are to be considered.

1. In the evaluation of the information that is gathered from the permitted sources, The possible biases, attitudes, and motives of the sources must be considered.

2. Information relating to behavior not relevant to the rejection standards listed above must not be considered.

3. In evaluating information, the currentness of the information and the possibility of mitigating factors should be considered.

4. In judging an applicant's rental payment record or credit history, consideration shall be given to the applicant's present shelter cost/income ratio and whether the rent level for the unit for which the applicant applies would help eliminate a present inancial hardship.

Eligibility Criteria

Eligibility includes meeting the criteria specified under the applicable federal or state subsidy program and the MHFA statue with regard to income and household characteristics as well as suitability of the applicant's family composition for the size units available and capability of the applicant to live independently given the level of supportive services provided at the development or arranged by the applicant.

Appeal Procedures for Low and Moderate Income Tenants

Following verification of information on the application and reference checks, applicants who are rejected or determined to be ineligible are to be notified promptly in writing with the reason stated. They must also be informed of the right to appeal the owner/agent's decision to MHFA and the procedure for such an appeal (see attached Applicant Conference Procedure). The MHFA conference officer will render a decision on the applicant's appeal within the prescribed time frame. The decision of the MHFA conference officer may be appealed to the MHFA General Counsel in writing within five days of receipt by the applicant or the owner or agent. The decision may be reversed after review by the General Counsel if he or she reaches another conclusion based on the facts presented at the original conference. Units will be held open in a number equal to the number of pending appeals until all conferences have been held. The owner or agent must ensure sufficient time to complete processing and to allow applicants to avail themselves of appeal procedure rights while avoiding project vacancy loss.

Attachments: Marketing and Selection Procedures
Applicant's Conference Procedure

MARKETING AND SELECTION PROCEDURES

LOW-INCOME UNITS

PURPOSE OF MARKETING AND SELECTION PROCEDURES

MHFA's primary purpose is to expand the supply of affordable housing in the Commonwealth. Therefore, twenty percent (20%) of the units within each property must be occupied by persons and families who are, at the time of initial occupancy, of low income. Throughout these Procedures, these set-aside units will be referred to as the "Low Income Units".

Developers will required to follow these Procedures in order to rent the Low Income Units. The following objectives should govern the developer's marketing process:

1. Low Income Units will first be offered to current holders of rental housing certificates under the Federal Section 8 and the State MRVP programs. Many of these certificate holders are currently unable to find suitable apartments due to the rental housing shortage. A key objective of these procedures is to provide additional housing opportunities for these certificate holders.

2. The marketing process will be repeated whenever Low Income Units turn over. Whenever the current residents of Low Income Units moves, the developer will be required once again to market to current certificate holders. If certificate/voucher holders are not available, then the owner is obligated to occupy the unit with an eligible low income applicant in accordance with the restrictions established in the developments regulatory agreement and legal closing documents.

The Massachusetts Housing Finance Agency (MHFA) is committed to implementing these Procedures in a manner which will safeguard the financial viability of the development.

RENT UP PROCEDURES FOR LOW INCOME UNITS

A. MARKETING TO CERTIFICATE HOLDERS

Developers will begin to market to certificate holders no later than one hundred twenty (120) days prior to anticipated occupancy, and continue this effort until thirty (30) days prior to anticipated occupancy.

1. Local Housing Agency. For purposes of these Procedures, the term "Local Housing Agency" shall mean the local housing authority, regional housing authority, and regional non-profit organization which manages the rental assistance programs for the community in which the property is located.

As part of the developer's marketing to certificate holders, the developer will contact the Local Housing Agency (or Agencies) administering rental assistance programs in the property's community and provide the Agencies with a complete description of the property, including a general site description, the rents to be charged in the Low Income Units (no higher than rent allowable under the Section 8 Existing Housing Program), number of units and bedroom sizes available, anticipated date of occupancy, a description of how a certificate holder may apply, and the name of a contact person at the development.

The Local Housing Agencies will inform the developer of the current number of Section 8 and MRVP certificate holders who have not located units. The developer will supply the Agencies with a mailing advising certificate holders of the availability of Low Income Units at the development, the anticipated date of occupancy, bedroom sizes available, and the manner in which to make application. In order to protect the certificate holders' right to privacy, the Local Housing Agencies may not provide the developer with the names of certificate holders. The Local Housing Agencies will address and mail project information to certificate holders and current program participants who have indicated a desire to move. This process shall continue until such time as the low income portion of the development is occupied. The Agencies may bill, and the developer shall pay, actual costs incurred by the Agencies for completing the mailing.

In addition, the Local Housing Agencies will post the availability of these units, and follow all other procedures normally followed to advise certificate holders of available units.

B. GENERAL OUTREACH

The developer will advertise the availability of units for certificate holders in local newspapers and minority newspapers. Local community resource contacts will also be notified of the availability of units for certificate holders. Promotional materials and newspaper ads are subject to MHFA approval and will include Equal Opportunity and Handicapped logos, state that units are available on an open occupancy basis and that the development is financed by MHFA. If human models are used, they will depict a racial mix. The marketing program will, in all other ways, comply with pertinent MHFA guidelines regarding the marketing of Low Income Units.

ATTACHMENT 1

APPLICANT CONFERENCE PROCEDURE

What follows outlines, step by step, the conference procedure which is to be made available to applicants of MHFA-financed developments who are rejected, determined to be ineligible, or reclassified in a lower tenant-selection priority category.

1. **THE TIME FOR REQUESTING A CONFERENCE:**

   Where Management has given Applicant a written notice of rejection, ineligibility, or reclassification to a lower tenant selection priority category, Applicant must request a conference within two (2) working days from the Applicant's receipt of the notice.

2. **THE APPLICANT'S REQUEST:**

   The Applicant's written request must be mailed or personally presented to Management. Management must immediately notify MHFA's Senior Management Officer by telephone and mail the request to MHFA.

3. **MHFA APPOINTMENT OF CONFERENCE OFFICER AFTER RECEIVING APPLICANT'S REQUEST:**

   Within two (2) working days, MHFA will appoint an impartial conference officer and notify Management.

4. **SETTING UP THE CONFERENCE:**

   Management must contact Applicant and establish, with a view to the availability of the conference officer, a mutually convenient date and place to hold the conference; but in no event shall the conference be held later than fifteen (15) days from the date of Management's written notice.

5. **THE CONFERENCE ITSELF:**

   At the conference, Management must present evidence in support of its reasons for rejection, ineligibility, or reclassification in selection priority. The evidence must be limited to those issues or that conduct specified in Management's written notice. The burden is on Management to justify its action. No evidence may be used against an Applicant or in any way affect the decision of the conference officer unless the evidence has been introduced at the conference. The Applicant or his/her authorized representative shall have the opportunity to present his/her case, and to question or refute any testimony or evidence. Rules of evidence applicable in a court of law shall not be applicable to the conference.

ATTACHMENT 1

6. **THE DECISION OF THE CONFERENCE OFFICER:**

The conference officer listens to the presentations by Applicant and Management. The conference officer's decision must be based solely and exclusively upon the evidence presented at the conference and upon applicable laws and regulations. All decisions must be in writing, must be dated, and must state the finding of fact and the specific reasons for the results. A copy of the conference officer's decision shall be forwarded within five (5) days of the conference to Management and the Applicant.

7. **APPEAL OF CONFERENCE OFFICER'S DECISION:**

The decision of the conference officer may be appealed to the MHFA Senior Management Officer by the Applicant or Management within two (2) days of the receipt of the decision The decision may be reversed if he/she reaches a different conclusion based on the facts presented. The Senior Management Officer shall consider only: the conference officer's written decision and written arguments submitted by either party during the original conference. An appeal to the Senior Management Officer by either party must be copied to the other party at the time it is submitted to MHFA. The decision of the Senior Management Officer will be in writing and will state the specific reasons for the decision. A copy shall be forwarded to both Management and Applicant within five (5) days of the request for an appeal.

ATTEST: WORC. Anthony J. Vigliotti, Register

136509

Name: Avalon West Apartments
MHFA No.: 94-010-N

HUD Project #023-98003

MASSACHUSETTS HOUSING FINANCE AGENCY
LAND USE RESTRICTION AGREEMENT

DATE: December 10, 1996

OWNER:	Avalon Town Meadows, Inc.
ADDRESS:	c/o Avalon Properties, Inc. Suite 210, 15 River Road Wilton, CT 06897
PROJECT NAME:	Avalon West Apartments
PROJECT ADDRESS:	Gleason and Fisher Streets Westborough, MA
REGISTRY of DEEDS:	Worcester Registry of Deeds

NUMBER OF UNITS OCCUPIED BY FAMILIES OR INDIVIDUALS OF LOW OR MODERATE INCOME: 24

APPLICABLE PERCENTAGE: 20%

RECORDED 9 AM DEC 12 1996

This Land Use Restriction Agreement (this **"Agreement"**) is entered into as of the date first above written, by and between Owner and MASSACHUSETTS HOUSING FINANCE AGENCY (**"Issuer"**), a corporate governmental agency, constituting a public benefit corporation organized and operated under the provisions of Chapter 708 of the Acts of 1966 of the Commonwealth of Massachusetts, as amended, found in Massachusetts General Laws Annotated, Chapter 23A Appendix (West Ed.), (the **"Enabling Act"**).

WITNESSETH:

WHEREAS, Owner holds or will hold legal title to certain real property upon which is to be developed or rehabilitated (the **"Project"**), located at Project Address above, more fully described in Exhibit **"A"** attached hereto and made a part hereof; and

WHEREAS, the Project will be financed by a mortgage of even date herewith (the **"Mortgage"**), to be recorded in the land records of the Worcester County Registry of Deeds; and

Lynne Sweet
Mintz Levin
One Financial Center
Boston, Ma 02110

WHEREAS, Issuer, pursuant to the Enabling Act, is authorized both to issue notes and renewals thereof for periods not to exceed six (6) years from the date of original issuance, and to issue bonds for periods not longer than fifty (50) years from the date of original issuance; and

WHEREAS, Issuer, without regard to the term of the Obligations anticipated to be issued to finance the Mortgage, is unwilling to finance the Mortgage unless Owner, by agreeing to the restrictions running with the land set forth in this Agreement, consents to be regulated by Issuer to preserve the exclusion from gross income under Sections 103 and 142 of the Internal Revenue Code of 1986 (the **"Code"**) of interest on the obligations issued to finance the Project (the **"Obligations"**).

NOW, THEREFORE, the parties, with intent to be legally bound, do hereby agree as follows:

1. Subordination and Termination of Agreement - In the event of foreclosure of the Mortgage or deed-in-lieu of foreclosure, this Agreement and the restrictions hereunder may be terminated at the election of the Issuer, upon a determination by the Issuer that such termination will be in the interest of furthering the purposes of the Enabling Act, provided, however, that if the obligor on the Mortgage or a related person obtains, during the Qualified Project Period (as hereinafter defined) an ownership interest in the Project for federal income tax purposes, this Agreement and the restrictions hereunder shall be revived in full force and effect. In addition, this Agreement and the restrictions hereunder may cease to apply in the event of an involuntary loss or a substantial destruction of the Project as a result of unforeseen events such as fire, seizure, requisition or condemnation, upon a determination of the Issuer that such cessation will be in the interest of furthering the purposes of the Enabling Act, provided (a) the Obligations are retired at the first available call date with respect to the Obligations; or (b) any insurance proceeds or condemnation awards received as a result of such loss or destruction are used to provide a project which meets the requirements of Section 142(d) of the Code.

2. Term of Restrictions - Pursuant to the requirements of the Code, the term of the Occupancy Restrictions set forth in Section 4 of this Agreement (the "Qualified Project Period") shall commence on the later of the first day of which 10 percent of the units in the Project are first occupied or the date of issue of the Obligations and shall end on the latest of the following (a) the date which is fifteen years after the date on which 50 percent of the units in the Project are first occupied; (b) the first day on which no Obligation issued with respect to the Project is outstanding; (c) the termination date of the Housing Assistance Payments Contract, including the initial term and any renewal thereof, if the Project is funded under Section 8, or (d) the date which is fifteen years from the date hereof.

3. Project and Rental Restrictions - The Project will be constructed or rehabilitated for the purposes of providing multifamily residential rental property and will be used for such purposes during the Qualified Project Period unless terminated earlier pursuant to Section 1 hereof. The Project will consist of a building or structure or several proximate buildings or structures which are

located on a single tract of land or contiguous tracts of land with or without facilities functionally related and subordinate thereto. If the Project is on scattered, non-contiguous tracts of land, the following Occupancy Restrictions will be followed as if each tract is a separate Project. All of the units in the Project will be similarly constructed. Owner shall not occupy a unit in a building or structure unless such building or structure contains more than four units. All of the units in the Project will contain complete living, sleeping, eating, cooking and sanitation facilities for a single person or family. None of the units in the Project will at any time be utilized on a transient basis, or used as hotel, motel, dormitory, fraternity house, sorority house, rooming house, hospital, sanitarium or rest home. Once available for occupancy, each unit must be rented or available for rental on a continuous basis to members of the general public. If the Project is receiving Section 8 assistance, Owner will comply with all Section 8 requirements in administering these restrictions.

4. Occupancy Restrictions - In accordance with the election made by the Issuer on the date of issue of the Obligations, at least the percentage set forth on the first page of this Agreement of the units in the Project shall be occupied by individuals or families of low or moderate income, at rental levels consistent with the terms of the Enabling Act, the Issuer's regulations, and the Regulatory Agreement, if any, by and between the Issuer and the Owner. Individuals or families of low or moderate income are defined in final Treasury regulations Section 1.103-8 in a manner consistent with Section 8 of the United States Housing Act of 1937 (or if such program terminated, under such program as was in effect immediately before such termination), except that (i) the percentage of median gross income which qualifies as low or moderate income shall not exceed fifty percent (50%), if the Issuer has elected that twenty percent (20%) of the units in the Project shall be occupied by individuals or families of low or moderate income or sixty percent (60%), if the Issuer has elected that forty percent (40%) of the units in the Project shall be occupied by individuals or families of low or moderate income, in either case, with adjustment for family size; and (ii) the occupants of a unit shall not be considered to be of low or moderate income if all the occupants are students (as defined in Section 1.103-8(b)(8) of the Treasury Regulations, no one of whom is entitled to file a joint return under Section 6013 of the Code). The method of determining low or moderate income in effect on the date of issue of the Obligations will be determinative even if such method is subsequently changed.

The determination of whether the income of a resident of a unit exceeds the applicable income limit shall be made at least annually on the basis of the current income of the resident. A unit occupied by an individual or family who at the commencement of the occupancy was of low or moderate income shall be treated as occupied by such individual or family during their tenancy in such unit, even though they subsequently cease to be of low or moderate income unless the income of this individual or family, after adjustment for family size, exceeds 140 percent of the applicable income limit, if after such determination, but before the next determination, any residential unit of comparable size or smaller size in the Project is occupied by a new resident whose income does not exceed the applicable income limit. A unit formerly occupied by an individual or family of low or moderate income which has become vacant shall be treated as occupied by an individual or family of low or moderate income until occupied, other than for a temporary period not to exceed thirty-one (31) days, by another occupant, at which time the character of the unit shall be redetermined.

The lease shall provide for termination and eviction if a tenant has certified that he or she is an individual or family of low and moderate income, and has failed to so qualify, at the time of commencement of the occupancy. The form of lease to be utilized by Owner in renting all dwelling units in the Project shall be subject to Issuer's approval. The lease must comply with all applicable Section 8 requirements if the Project is receiving Subsidy pursuant to Section 8 of the United States Housing Act of 1937. The Owner agrees that there will be no displacement of any existing low-income tenant involuntarily upon the expiration of the term of this Land Use Restriction Agreement, and that as to any existing low-income tenant as of the date of such expiration, the restrictions set forth in this Section 4 shall continue in effect as if such term had not expired.

5. General Covenant - Owner covenants that it will not take any action or fail to take any action or make any use of the Project or the proceeds of the Mortgage, which would adversely affect the exclusion from gross income under Section 103 of the Code of the interest on the Obligations.

6. Transfer Restrictions - Prior to any transfer of the Project, Owner agrees to secure from transferee a written agreement stating that transferee will assume in full Owner's obligations and duties under this Agreement. This limited transfer restriction shall not affect the rights of the U.S. Department of Housing and Urban Development ("HUD"), and/or the Issuer, to approve the proposed transferee as required under the HUD, and/or the Issuer's, Regulatory Agreement.

7. Information - Owner covenants and agrees to secure and maintain on file for inspection and copying by Issuer such information, reports and certifications as Issuer may require in writing. Owner further covenants and agrees to submit to Issuer annually, or more frequently if required in writing by Issuer, reports detailing such facts as Issuer determines are sufficient to establish compliance with the restrictions contained hereunder. Owner further covenants and agrees promptly to notify Issuer if Owner discovers noncompliance with any restriction hereunder.

8. Annual Certification - Owner covenants to certify annually to the Secretary of the Treasury whether or not the Project continues to satisfy the requirements imposed by Sections 3, 4, 5, and 16 of this Agreement.

9. Interpretations - Except where the context otherwise requires, terms used in this Agreement shall have the same meanings given to such terms in final Treasury regulations Section 1.103-8 published on October 15, 1982, as modified by Section 142(d) of the Code and any proposed temporary or final regulations thereunder. In the event of a transfer of the Project the term "Owner" shall be construed to include any transferee.

10. Amendment - Amendment of this Agreement is conditioned upon the prior written approval of HUD for so long as the HUD Regulatory Agreement, if any, remains in effect. This Agreement may not be amended without first obtaining an opinion of an attorney or firm of attorneys of nationally-recognized standing in the field of municipal finance that such amendment will not adversely affect the exclusion from gross income under Section 103 of the Code of interest on the Obligations.

11. Enforcement - Upon violation of any of the provisions of this Agreement by Owner, Issuer, at its option, may apply to any court, State or Federal, for specific performance of this Agreement or an injunction against any violation of this Agreement, or for such other relief as may be appropriate, since the injury to Issuer arising from the default under any of the terms of this Agreement would be irreparable and the amount of damage would be difficult to ascertain and may not be compensable by money alone. However, enforcement of this covenant shall not, if the Project is insured by the Secretary of HUD pursuant to the National Housing Act, as amended, except with the prior written approval of HUD, result in any claim against the mortgaged property, the mortgage proceeds, any reserve or deposit made with the mortgagee or another person or entity required by HUD in connection with the mortgage transaction, or against the rents or other income from the mortgage property for payment hereunder, as long as the HUD Regulatory Agreement and/or Housing Assistance Payments Contract remain in effect, except that such claim may be paid out of Surplus Cash (as defined in the HUD Regulatory Agreement). No waiver by Issuer of any breach of this Agreement shall be deemed a waiver of any other or subsequent breach. No act or omission by Issuer other than a writing signed by it waiving a breach by Owner, shall constitute a waiver thereof.

12. Notices - All notices to be given pursuant to this Agreement shall be in writing and shall be deemed given when mailed by certified or registered mail, return receipt requested, to the parties hereto at the addresses first set forth, or to such other place as Issuer or Owner from time to time designate in writing. Copies of such notices to the Owner also shall be sent to: Stephen T. Langer, Esquire, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., One Financial Center, Boston, MA 02111; provided, however, notice shall be deemed given if sent only to the Owner.

13. Severability - All rights, powers and remedies provided herein may be exercised only to the extent that exercise thereof does not violate any applicable law, and are intended to be limited to the extent necessary so that they will not render this Agreement invalid, unenforceable or not entitled to be recorded, registered, or filed under applicable law. If any provision or part thereof shall be affected by such holding, the validity of other provisions of this Agreement and of the balance of any provision held to be invalid, illegal or unenforceable in part only, shall in no way be affected thereby, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision or part thereof has not been contained therein.

14. Governing Law - This Agreement shall be governed by the laws of The Commonwealth of Massachusetts.

15. Recording - The benefits and burdens of this Agreement shall run with and bind the land upon which the Project is constructed. Owner, at its cost and expense, shall cause this Agreement to be duly recorded or filed and re-recorded or refiled in such places, and shall pay or cause to be paid all recording, filing, or other taxes, fees and charges, and shall comply with all such statutes and regulations as may be required by law in order to establish, preserve and protect the ability of the Issuer to enforce this Agreement.

16. Tax and Miscellaneous Covenants - A. Owner covenants and agrees that, in order to preserve the exclusion from gross income under section 103 of the Code, of interest on Bonds issued to fund the Mortgage Loan, Owner shall not, without the written consent of the Issuer, request any advance thereof to pay costs of issuance or to pay for costs which are not "qualified costs." For purposes of the preceding sentence, the term "qualifying costs" includes only costs that (i) are chargeable to the capital account of a "residential rental project" for Federal income tax purposes or would be so chargeable either with a proper election or but for a proper election to deduct such amounts (including fees or other costs relating to the financing of such project and interest on indebtedness eligible for capitalization under sections 266 or 263A of the Code, but only to the extent that such fees, costs, and interest are properly allocable to the financing of "qualified costs"); and (ii) were not paid or incurred by Owner or a "related person" (within the meaning of section 1.103-11 of the Treasury regulations) prior to the date the Issuer took "official action" toward the issuance of the Bonds to finance the Project (within the meaning of section 1.103-8(a) (5) of the Treasury regulations). For purposes of the preceding sentence, the term "residential rental project" has the meaning given to such term in section 1.103-8(b) (4) (i) of the Treasury regulations (determined without regard to compliance in the future with the occupancy and rental requirements contained in section 1.103-8(b) (4) of such regulations and incorporated herein). In the case of a "mixed-use" project wherein part of the building or structure, together with any facilities functionally related and subordinate thereto, contains one or more similarly constructed residential rental units that, in the aggregate, meet the low or moderate income occupancy requirements of paragraph 5 of this Agreement (the "residential rental units") and the rest of the building is devoted to use unrelated to such units (the "nonqualifying property"), the term "residential rental project" shall mean only to the residential rental units and the other portions of the project allocable to such units, including the allocable portion of property benefitting both the residential rental units and the nonqualifying property (e.g., the common elements), and all property benefitting only the residential rental units. The allocation of the costs of the common elements shall be made according to a method that properly reflects the proportionate benefit derived, directly or indirectly, by the residential rental units and the nonqualifying property.

B. Owner further covenants and agrees that, in order to preserve the exclusion from gross income under section 103 of the Code of interest on the Bonds, Owner shall not use any portion of any advance to finance the acquisition of any property (or an interest therein) unless "first use" of such property is pursuant to such acquisition (within the meaning of Section 147(d)(1) of the Code); provided, however, that advances may be used to finance the acquisition of property (or interest therein) where the "first use" of such property is not pursuant to such acquisition if rehabilitation expenditures with respect to such building equal or exceed fifteen percent (15%) of the portion of the cost of acquiring such building (and equipment) financed with advances. For purposes of this paragraph, the term "rehabilitation expenditures" has the same meaning given such term in Section 147(d)(3) of the Code and, thus, does not include, among other things, any expenditures incurred more than two years after the later of the date the Bonds were issued, or the date on which the property was acquired, or any expenditures attributable to the enlargement of an existing building nor any expenditures described within Section 48(g)(2)(B) of the Code. Expenditures to rehabilitate a building include expenditures to rehabilitate equipment or to replace equipment having substantially

the same function, but only if the equipment was part of an integrated operation contained in the building prior to its acquisition by the Owner. References to equipment in parenthesis refer only to equipment which is functionally related and subordinate to and is purchased with an existing building.

C. Owner further covenants to avoid any violation of Section 147(e) of the Code, including but not limited to the charging of any fee to any person for the use of such facilities as are itemized in Section 147(e), built with the proceeds of the Bonds.

17. Not applicable.

18. Non-Recourse. If the Owner is a corporation, no stockholder, officer or director shall have any personal liability for the payment or performance of all or any part of the Owner's obligations hereunder, and the Issuer shall look only to the Owner's assets for such payment or performance.

19. Extended Low-Income Housing Commitment

A. Pursuant to Section 42(h)(6) of the Code, the following requirements shall apply: (i) the Applicable Percentage of units, as set forth on the first page of this Agreement (the "Applicable Percentage"), shall be occupied by individuals or families of low or moderate income, as defined in Section 4 of this Agreement, commencing on the date the Project is placed in service, or the next succeeding taxable year at the election of the Owner pursuant to Section 42(f)(1) of the Code, and ending thirty years after the taxable year in which the Project is placed in service or deemed placed in service (the "Extended Use Period"); (ii) during the Extended Use Period the Owner or successors will not, other than for good cause, evict an existing tenant or terminate the tenancy of an existing tenant of any low income unit, or increase the gross rent with respect to such low income unit in a manner inconsistent with Section 42 of the Code; (iii) individuals of low or moderate income, whether prospective, present, or former occupants of the Project, shall have standing to enforce the Applicable Percentage requirement and the requirements contained in Section 18(A)(ii) hereof in the state courts of the Commonwealth of Massachusetts; and (iv) the Owner or successors shall not dispose of less than 100% of their interest in any building to which this Extended Low-Income Commitment applies.

B. Notwithstanding the preceding paragraph, the Extended Use Period shall generally terminate (i) on the date the Project is acquired by foreclosure, or an instrument in lieu of foreclosure, unless the Secretary of the Treasury determines that such acquisition is part of an arrangement with the Owner or successors, a purpose of which is to terminate the Extended Use Period, or (ii) fifteen years after the taxable year in which the Project is placed in service or deemed placed in service if the Issuer is unable to present a qualified contract as defined and described in Sections 42(h)(6)(F) and (I) of the Code.

IN WITNESS WHEREOF, the parties have caused this **Land Use Restriction Agreement** to be signed and sealed by their respective, duly authorized representatives, as of the day and year first written above.

OWNER:

AVALON TOWN MEADOWS, INC.

By: _____
Bryce Blair, Senior Vice President

ISSUER:

MASSACHUSETTS HOUSING FINANCE AGENCY

By: _____
Wendy E. Warring, General Counsel

Attachment: Exhibit A-Description of Property

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. December 10, 1996

Then personally appeared before me the above-named Wendy E. Warring, General Counsel of the Massachusetts Housing Finance Agency, and acknowledged the foregoing instrument to be her free act and deed and the free act and deed of said Agency.

Deanna Ramsden
Notary Public Deanna Ramsden
My Commission Expires: 2/26/99

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. December 10, 1996

Then personally appeared before me the above-named Bryce Blair, Senior Vice President of Avalon Town Meadows, Inc., and acknowledged the foregoing to be his free act and deed.

Lynne D. Sweet
Notary Public
My Commission expires:

LYNNE D. SWEET
NOTARY PUBLIC
My Commission Expires November 10, 1998

T3/511875.1

EXHIBIT A

All that certain parcel of land with the buildings thereon situated at Gleason and Fisher Streets, in Westborough, Worcester County, Massachusetts, all more particularly described as follows:

The land in Westborough, Worcester County, Massachusetts on Gleason and Fisher Streets being shown as Parcel "A-1" on a plan entitled: "Plan of Land in Westborough, Mass.", dated January 11, 1989, prepared by Guerard Survey Co. & Assoc., recorded December 19, 1994 with the Worcester District Registry of Deeds in Plan Book 688, Page 110.

ATTEST: WORC. Anthony J. Vigliotti, Register

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Page: 1 of 5 09/25/2007 01:35 PM

AMENDMENT TO REGULATORY AGREEMENT

This Amendment to Amended and Restated Regulatory Agreement (this "**Amendment**") is made and entered into this 25th day of September, 2007, by and between Northland TPLP LLC, a Delaware limited liability company ("**Owner**") and Massachusetts Housing Finance Agency ("**Agency**").

RECITALS

WHEREAS, Owner and Agency entered into that certain Regulatory Agreement dated December 10, 1996* (the "**Regulatory Agreement**"); and

* and recorded in Book 18464, Page 115

WHEREAS, simultaneously with the execution and delivery of this Amendment, Avalon Town Meadows Inc., ("Assignor"), Owner, and the Agency have entered into a certain Assignment, Assumption, Consent and Release Agreement whereby Assignor assigned to Owner and Owner assumed the obligations contained in the Assumed Documents (as defined therein); and

WHEREAS, the Regulatory Agreement was one of the Assumed Documents; and

WHEREAS, the Owner and the Agency now desire to amend the Regulatory Agreement as described below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. **Extension of Affordability Restrictions**. The Owner covenants and agrees for itself and any successors and assigns that the provisions contained in Sections 1 and 2 of the Regulatory Agreement (the "Affordability Restrictions") shall continue in effect for a period of fifteen years from the date of this Amendment. The covenant contained in the preceding sentence shall run with the land, be binding upon the Owner and any successors and assigns to the fullest extent permitted by law, be for the exclusive benefit of MassHousing, be enforceable solely by MassHousing, its successors and assigns and shall survive the foreclosure of the Mortgage and be binding upon and enforceable against any purchaser at a foreclosure sale. MassHousing and its successors and assigns, as sole beneficiary of the covenants provided by the Owner herein, may release the Owner from its obligations herein if MassHousing determines that such release will preserve affordable housing that would otherwise be converted to market rate housing, or if MassHousing otherwise finds that such release will further the specific purposes of the Enabling Act.

2. **Owner's Equity**. MassHousing hereby confirms that the "Owner's Equity" under the Regulatory Agreement is currently $8,606,936.00, and that such amount may next be adjusted pursuant to the terms of the Regulatory Agreement on January 1, 2011. As of the date hereof, the aggregate amount accrued under Section 8(c) of the Regulatory Agreement is 1,156,949.00.

3. **Transfer**. Notwithstanding any provision in the Regulatory Agreement to the contrary, Owner shall have the right to effect transfers of the mortgaged property and interests therein in accordance with the Agency's Transfer of Ownership Policy dated August 14, 2007.

Gleason and Fisher Straits
Westborough, MA

4. **Comprehensive Permit.** Owner hereby acknowledges that the Project is subject to that certain decision of the Housing Appeals Committee ("HAC") in the case of CMA, Inc. v. Westborough Aoning Board of Appeals, No. 89-25 dated June 25, 1992, as affected by an Order to Transfer [Of] Permit issued by the HAC in the case of CMA, Inc. v. Westborough Zoning Board of Appeals, No. 89-25 dated July 24, 1994.

5. **Conflicts; Full Force and Effect**. Except to the extent otherwise expressly set forth in this Amendment, all of the terms and conditions set forth in the Regulatory Agreement shall remain in full force and effect.

6. **Counterparts**. This Amendment may be executed in any number of identical counterparts, any or all of which may contain the signatures of less than all of the parties, and all of which shall be construed together as a single instrument.

IN WITNESS WHEREOF, the parties have executed this Amendment the day and year first above written.

MASSACHUSETTS HOUSING FINANCE AGENCY

By: _____
Name: Laurie R. Wallach
Title: General Counsel

NORTHLAND TPLP LLC

By: _____
Name: Mark P. Consoli
Title: Treasurer and Authorized Signatory

4. **Comprehensive Permit.** Owner hereby acknowledges that the Project is subject to that certain decision of the Housing Appeals Committee ("HAC") in the case of CMA, Inc. v. Westborough Aoning Board of Appeals, No. 89-25 dated June 25, 1992, as affected by an Order to Transfer [Of] Permit issued by the HAC in the case of CMA, Inc. v. Westborough Zoning Board of Appeals, No. 89-25 dated July 24, 1994.

5. **Conflicts; Full Force and Effect**. Except to the extent otherwise expressly set forth in this Amendment, all of the terms and conditions set forth in the Regulatory Agreement shall remain in full force and effect.

6. **Counterparts**. This Amendment may be executed in any number of identical counterparts, any or all of which may contain the signatures of less than all of the parties, and all of which shall be construed together as a single instrument.

IN WITNESS WHEREOF, the parties have executed this Amendment the day and year first above written.

MASSACHUSETTS HOUSING FINANCE AGENCY

By: _____
Name:
Title:

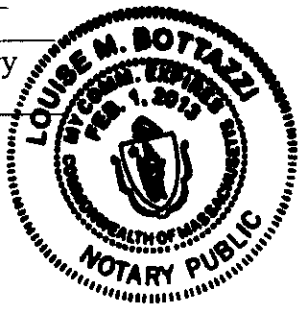
NORTHLAND TPLP LLC

By: _____
Name: Mark P. Consoli
Title: Treasurer and Authorized Signatory

COMMONWEALTH OF MASSACHUSETTS)
)
COUNTY OF SUFFOLK)

On this 20 day of September, 2007, before me, the undersigned notary public, personally appeared Laurie R. Wallach, proved to me through satisfactory evidence of identification which was personal knowledge of identity, to be the person whose name is signed on the preceding document and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose as General Counsel of Massachusetts Housing Finance Agency.

Louise M. Bottazzi
Official Signature and seal of Notary
My commission expires: 2/1/2013



COMMONWEALTH OF MASSACHUSETTS)
) ss.
COUNTY OF)

On _____, 2007, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Mark P. Consoli, Treasurer and Authorized Signatory of Northland TPLP LLC, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the within instrument.

WITNESS my hand and official seal.

_____
Notary Public

COMMONWEALTH OF MASSACHUSETTS)
)
COUNTY OF SUFFOLK)

On this ____ day of November, 2006, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification which was (personal knowledge of identity, Massachusetts license, etc.), to be the person whose name is signed on the (preceding) (attached) document and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose as _____ of Massachusetts Housing Finance Agency.

_____
Official Signature and seal of Notary
My commission expires: _____

COMMONWEALTH OF MASSACHUSETTS)
) ss.
COUNTY OF Middlesex)

On September 21, 2007, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Mark P. Consoli, Treasurer and Authorized Signatory of Northland TPLP LLC, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the within instrument.

WITNESS my hand and official seal.

Carol DiNardi
Notary Public

CAROL DiNARDI
Notary Public
Commonwealth of Massachusetts
My Commission Expires December 28, 2012

Development: Residences at Westborough
MassHousing No. 94-010

---------- Above Space is Reserved for Recording Information ----------

Gleason and Fisher Street, Westborough, Massachusetts

SECOND AMENDMENT TO REGULATORY AGREEMENT

This Second Amendment to Regulatory Agreement is executed as of the 18th day of October, 2018, by and between the MASSACHUSETTS HOUSING FINANCE AGENCY, a body politic and corporate, organized and operated under the provisions of Chapter 708 of the Acts of 1966 of the Commonwealth of Massachusetts, as amended ("MassHousing"), and NORTHLAND TPLP LLC, a Delaware limited liability company (the "Owner").

RECITALS

Whereas, Avalon Town Meadows, Inc. and MassHousing entered into a Regulatory Agreement dated December 10, 1996, and recorded with the Worcester South County Registry of Deeds (the "Registry") on December 12, 1996 in Book 18464, Page 115 (the "Original Regulatory Agreement") with respect to the property known as Residences at Westborough located at Gleason and Fisher Street, Westborough, Massachusetts as more particularly described in the Original Regulatory Agreement (the "Development");

Whereas, the Original Regulatory Agreement was assigned by Avalon Town Meadows, Inc. to Owner pursuant to an Assignment, Assumption, Consent and Release Agreement dated September 25, 2007 and recorded with the Registry on September 25, 2007 in Book 41842, Page 122 (the "Assignment");

Whereas, the Original Regulatory Agreement, as assigned by the Assignment, was amended by an Amendment to Regulatory Agreement, dated September 25, 2007 and recorded with the Registry on September 25, 2007 in Book 41842, Page 143 (the "First Amendment" and together with the Original Regulatory Agreement, the "Regulatory Agreement").

Whereas, MassHousing is hereby defining the remaining obligations of Owner pursuant to the Regulatory Agreement and Owner is hereby agreeing to such obligations.

AGREEMENT

Now, therefore, for good and valuable consideration, the receipt and sufficiency of

Please Return To:
MassHousing
One Beacon Street
Boston, MA 02108
Attn: Legal Dept.

which is hereby acknowledged, the parties hereto agree as follows:

1. The provisions of Sections 1 and 2 of the Original Regulatory Agreement, as affected by Section 1 of the First Amendment, are hereby replaced with the following:

Owner covenants and agrees, for itself and any successors and assigns, that it shall provide that not less than twenty percent (20%) of the total rental units within the Development be rented at all times to Low-Income Persons or Families at rentals, including the provision of heat, electricity and hot water, set on the basis of the use by Low-Income Persons or Families of not more than thirty percent (30%) of the Annual Income Limit for the unit rents by Low-Income Persons or Families or such greater portion of such persons' or families' Annual Income as required by laws, regulations, or guidelines applicable to any affordable housing program of an agency of the United States government, or the Commonwealth or any agency thereof, used or to be used in connection with the Development.

For purposes hereof, the terms set forth in the paragraph above are defined as follows:

(a) "Annual Income" - a family's or person's gross annual income less such reasonable allowances for dependents (other than spouse) and for medical expenses.

(b) "Annual Income Limit" –Fifty percent (50%) of the Median Gross Income for the Area.

(d) "Family" - two or more persons who occupy the same dwelling or unit.

(e) "Low-Income Persons or Families" - those persons and families whose Annual Income is equal to or less than the Annual Income Limit.

(f) "Median Gross Income for the Area" – the median income for any household of a given size, in the Primary Metropolitan Statistical Area in which the Development is located, as most recently determined by the United States Department of Housing and Urban Development ("HUD") under Section 8 of the United States Housing Act of 1937, as amended ("Section 8"), or, if programs under Section 8 are terminated, the median income determined under the method used by HUD prior to the termination of such programs.

2. The requirements set forth in Section 1 above are the only surviving obligations of the Owner with respect to the Regulatory Agreement. Notwithstanding the foregoing, the Owner hereby acknowledges that the Project is subject to that certain decision of the Housing Appeals Committee ("HAC") in the case of CMA, Inc. v. Westborough Zoning Board of Appeals, No. 89-25 dated June 25, 1992, as affected by an Order to Transfer [Of] Permit issued by the HAC in the

case of CMA, Inc. v. Westborough Zoning Board of Appeals, no. 89-25 dated July 24, 1994.

3. The Owner's obligations pursuant to Section 1 above shall continue until September 25, 2022. Thereafter, the Regulatory shall be considered released by its own terms and no further discharge of the Regulatory Agreement shall be required.

[The remainder of this page is intentionally blank. Signature page follows.

[Signature page of MassHousing]

In witness whereof, the parties have executed this Second Amendment as of the date written above.

MASSACHUSETTS HOUSING FINANCE AGENCY

By: _____
Name: Beth M. Elliott
Title: General Counsel

COMMONWEALTH OF MASSACHUSETTS

County of Suffolk, ss.

On this 18th day of October, 2018, before me, the undersigned notary public, Beth M. Elliott personally appeared, proved to me through satisfactory evidence of identification, which was: [ ] at least one current document issued by a federal or state government agency bearing the photographic image of the signatory's face and signature, [ ] the oath or affirmation of a credible witness unaffected by the document or transaction who is personally known to me and who personally knows the signatory, or [X] identification of the signatory based on my personal knowledge of the identity of the signatory, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that she signed it voluntarily for its stated purpose, as General Counsel of the Massachusetts Housing Finance Agency, a body politic and corporate organized and operated under the provisions of Chapter 708 of the Acts of 1966 of the Commonwealth of Massachusetts, as amended, as the voluntary act of the Massachusetts Housing Finance Agency.

_____
Notary Public
My Commission Expires:
December 25, 2020

MAUREEN A. BURKE
Notary Public
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires
December 25, 2020

[Signature page of Owner]

NORTHLAND TPLP LLC

By: _____
Name: Beth Kinsley
Title: Assistant Secretary

COMMONWEALTH OF MASSACHUSETTS

County of Middlesex, ss.

On this 24th day of October, 2018, before me, the undersigned Notary Public, personally appeared the above-named Beth Kinsley, proved to me by satisfactory evidence of identification, being (check whichever applies): ☐ driver's license or other state or federal governmental document bearing a photographic image, ☐ oath or affirmation of a credible witness known to me who knows the above signatory, or ☑ my own personal knowledge of the identity of the signatory, to be the person whose name is signed above, and acknowledged the foregoing to be signed by her voluntarily for its stated purpose.

_____
Notary Public
My Commission Expires: 8/31/2023

MARSHA A. TREACY
Notary Public
Commonwealth of Massachusetts
My Commission Expires August 31, 2023

SUMMARY OF THE "TELLER" PROGRAM

Chapter 233 of the Acts of 1984 created the TELLER program to encourage the development of mixed-income rental housing in the Commonwealth. Under this program, local housing authorities may issue tax-exempt bonds to finance new construction or rehabilitation of rental housing, with at least 20% of the units set aside for low-income households. The following is an outline of the major points of this program.

Rental Nature of Projects. Projects to be funded under this program must be rental housing developments, of which a portion of the units (see below) have rents affordable for low-income tenants.

Low-Income Units. At least 20% of the units must be set aside for households earning less that 50% of the area-wide median income (or 40% of the units must be set aside for households earning less than 60% of the area-wide median income.)* The rents in these units, including the provision of heat, electricity, and hot water, must not exceed 30% of 50% of the area-wide median income (or 30% of 60% of the area-wide median income). These restrictions remain in effect for as long as the bonds are outstanding, but in no event for less than 15 years.**

Other Units in the Development. The remaining 80% (or 60%) of the units are subject to very few restrictions under this program, and they may be marketed at prevailing rents for similar units in the vicinity of the project.

Issuance of Securities. Housing authorities will issue tax-exempt bonds to finance TELLER developments. These bonds will be purchased by individuals or corporations, and bond proceeds will be disbursed to the project through a bond trustee. These bonds will not be backed by any pledge of credit on the part of the housing authority, but are backed instead by a mortgage on the project.

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*Although state law and regulations specify low-income limits of 80% of the area median, Federal tax law requires more stringent standards. Since compliance with Federal tax law is necessary to receive tax-exemption on the TELLER bonds, it is necessary for developers using the TELLER program to set aside either 20% of the units in a development for households with incomes below 50% of the area median or 40% of the units in a development for households with incomes below 60% of the area median.

**Although state law requires only a 10 year minimum lock-in period, since Federal tax law requires a longer lock-in period of 15 years, the Federal law must be complied with.

Minimum Rehabilitation. This program may not be used solely to refinance an existing rental building. The minimum rehabilitation requirement will be at least one major structural element or at least one major system (such as plumbing, electricity, or heating).

Ancillary Commercial Facilities. Commercial space must not exceed 20% of the rentable space of the project.

Fees. Housing authorities will be allowed to recover reasonable costs associated with processing applications and issuing bonds; in addition, technical assistance will be provided through EOCD to all housing authorities considering TELLER projects.

Application Process. EOCD regulations require that the application filing and review process should be open to the general public for comment. Copies of each application should be forwarded to other local officials and to EOCD. Further details on the application process are included in regulations issued by EOCD. For more information on this program, please contact the Director of the TELLER Program at (617) 727-7130.

EXECUTIVE OFFICE OF COMMUNITIES AND DEVELOPMENT
DEPARTMENT OF COMMUNITY AFFAIRS

TAX EXEMPT LOCAL LOANS TO ENCOURAGE RENTAL HOUSING

TELLER PROGRAM

EFFECTIVE AUGUST, 1985

760 CMR: DEPARTMENT OF COMMUNITY AFFAIRS

760 CMR 35.00: TAX EXEMPT LOCAL LOANS TO ENCOURAGE RENTAL HOUSING - TELLER PROGRAM

Section
35.01 Purpose and Effective Date
35.02 Definitions
35.03 Approval Process
35.04 Fees
35.05 Regulatory Agreement

35.01: PURPOSE AND EFFECTIVE DATE

(1) In August, 1984, Sections 35 and 36 of Chapter 233 of the Acts of 1984 amended Chapter 121B, Sections 25 and 26(m) of the General Laws to permit local housing authorities to issue bonds to finance mixed-income housing. Prior to this amendment, Section 26(m) permitted such bonds to be issued solely for projects that were to be occupied exclusively by low and moderate income tenants. This amendment indicates legislative intent to make tax-exempt financing widely available at the local level for housing production and rehabilitation. In light of the substantial cutbacks in federal aid for housing production and limitations on state assistance, this amendment provides an important tool to communities to increase and maintain their housing stock.

Section 103(b)(4)(A) of the Internal Revenue Code establishes the federal standards for the issuance of tax-exempt bonds for housing projects. The low and moderate income housing requirements of Section 26(m) and these Regulations are similar to, but not identical with, the requirements of Section 103(b)(4)(A). It is the responsibility of the sponsor of the project and the lender to assure compliance with Section 103(b)(4)(A) of the Code and the Treasury regulations promulgated thereunder. Particular attention should be given to Section 1.103-8(b) of the Treasury regulations.

Under the Massachusetts Constitution and Section 26(m), the provision of financing for housing which serves market income persons and families is permissible only if: (1) the housing project is located in a decadent, substandard, or blighted open area; or (2) the project is mixed income and the benefits to tenants, other than the low and moderate income tenants, is at most incidental to, and no greater than is necessary for, achieving proper housing in appropriate surroundings for the low income tenants.

These alternative tests are met, respectively, by the findings either that the project is located in a decadent, substandard, or blighted open area or that the market income tenants will be paying a rental comparable to those being charged in the market area for similar non-assisted housing.

(2) These regulations shall take effect upon promulgation. Bonds authorized by these Regulations may not be issued prior to that date. However, procedural requirements of these Regulations may be completed prior to that date, so long as such actions are not inconsistent with the requirements of these Regulations.

(3) These requirements shall apply to any project the construction, Rehabilitation, or acquisition and Rehabilitation of which is financed in whole or in part by a loan of the proceeds of the sale of bonds issued by local housing authorities pursuant to Section 26(m) of Chapter 121B of the General Laws, as amended by Section 36 of Chapter 233 of the Acts of 1984. The program utilizing the issuance of such bonds is referred to herein as the TELLER program, for "Tax Exempt Local Loans to Encourage Rental Housing".

(4) The Secretary may waive any provision of these Regulations (760 CMR 35) when, in her opinion, compliance with such provision would result in undue hardship, and a waiver would serve the public interest and not be inconsistent with the purposes or requirements of Chapter 121B, Sections 25 and 26(m) of the General Laws.

(5) At its discretion a Local Housing Authority may impose additional requirements upon Owners and Projects other than those contained in 760 CMR 35.00 provided that these additional requirements are consistent with the housing needs of its community and with relevant state and federal statutes, regulations, and guidelines adopted by the Department as then in effect.

35.02 DEFINITIONS

Ancillary Commercial Facilities means commercial facilities included in a Project which in the aggregate do not exceed thirty-five percent of the total rentable area of the Project.

Blighted Open Area shall have the meaning set forth in section 1 of chapter 121B of the General Laws.

Bonds shall mean any bonds, notes, or other obligations of a Local Housing Authority (LHA) issued pursuant to the Enabling Act, substantially all of the proceeds of which are used to make a Loan for the purpose of financing or refinancing all or any part of the cost of the construction, Rehabilitation, or acquisition and Rehabilitation of one or more projects.

Code shall mean the Internal Revenue Code of 1954, as amended, and all regulations promulgated, temporary or proposed thereunder.

Decadent Area shall have the meaning set forth in section 1 of chapter 121B of the General Laws.

Department means the Department of Community Affairs of the Executive Office of Communities and Development.

Enabling Act means section 26(m) of chapter 121B of the General Laws as amended.

Housing Development Area means a Decadent, Substandard, or Blighted Open Area.

Income means income from all sources of each member of the household determined in a manner consistent with Section 103(b)(4)(A) and Section 103(b)(12) of the Code.

Limited Dividend Organization means a corporation, partnership, or other organization, other than a public agency, which by its governing articles of organization or partnership agreement prohibits distribution with respect to any one year of operation of more than ten percent (10%) of owner's equity in the Project; equity in the Project shall be the difference between the amount of the Loan to provide the Project and the total cost of the Project, which may include any in-kind contribution as determined pursuant to guidelines issued from time to time by the Department.

Local Housing Authority (LHA) means any housing authority created pursuant to Section 3 or Section 3A of Chapter 121B of the General Laws or by other special act.

Lock-In Period means the longer of (a) the remaining term of the Bonds or (b) the period of time beginning on the later of the first day on which at least ten percent (10%) of the Units in a Project are first occupied or the date of issue of the Bonds to provide the Project, and ending on the later of the date (i) which is 10 years after the date on which at least fifty percent (50%) of the Units in the Project are first occupied or (ii) which is a "qualified number of days" after the date on which any of the Units in the Project is first occupied; for purposes of the foregoing, the term "qualified number of days" means fifty percent (50%) of the total number of days comprising the term of the Bond with the longest maturity in the Bond issue.

Low or Moderate Income Person or Family means an individual or family whose adjusted Income (computed in the manner prescribed by Section 1.167(k)-3(b)(3) of the regulations under the Code) is less than 80% of Median Income; the determination of Low or Moderate Income Persons or Families shall be made in a manner consistent with determinations of lower income families under Section 8 of the United States Housing Act of 1937, as amended, except that the percentage of Median Income which qualifies as low or moderate income shall be less than eighty percent (80%). For all purposes of these Regulations, whether a person or family is a Low or Moderate Income Person or Family shall be determined at the time of initial occupancy.

Low or Moderate Income Unit means a Unit which is occupied by, or which is designated from time to time by the Owner as one which is available for occupancy by, a Low or Moderate Income Person or Family.

Loan means a loan made to or on behalf of an Owner to finance or refinance all or any part of the costs of construction, Rehabilitation, or acquisition and Rehabilitation of one or more Projects.

Loan Security means a mortgage secured by a lien on the real property and a security interest in the personal property included in a Project and any other property, note, bond, letter of credit, guarantee, agreement, covenant, or other obligation or credit facility given, pledged, granted or made by or on behalf of an Owner to secure the repayment of a Loan.

Market Area Rental means the maximum annual rental which could be obtained for a Unit in light of the rentals charged for comparable units within the same market area, which amount shall be no less than that determined by the Unit Appraisal.

Median Income means the median gross income for the area in which the Project is located as determined from time to time by the United States Department of Housing and Urban Development pursuant to Section 8 of the United States Housing Act of 1937, as amended.

Owner means any partnership, profit or non-profit corporation, Limited Dividend Organization, trust, public agency, individual or any other person or entity which is the Owner of a Project for Federal income tax purposes.

Project means a building or structure, together with any functionally related and subordinate facilities, containing one or more Similarly Constructed Units (but excluding any building or structure which contains fewer than five Units one of which is occupied by an Owner of the Units) which are used on other than a transient basis and which are rented or are available for rental on a continuous basis during the Lock-In Period. A Project may consist of more than one building or structure if they are located on a single tract of land, they are owned for Federal tax purposes by the same person, and they are financed pursuant to a common plan of financing. Facilities that are functionally related and subordinate to a Project include facilities for use by the tenants including, without limit, swimming pools, other recreational facilities, parking areas, Units for resident managers or maintenance personnel, and other facilities which are reasonably required for the Project. A Project may also include Ancillary Commercial Facilities.

Regulatory Agreement means the agreement between a LHA and the Owner containing the terms and conditions set forth in Section 35.05 hereof.

Rehabilitation means the replacement or substantial restoration of at least one major structural element or system in a Project.

Similarly Constructed Units means Units within a Project that are of similar quality and type of construction, without regard to the number of rooms, the amount of floor space, or the location within the Project.

Substandard Area shall have the meaning set forth in section 1 of chapter 121B of the General Laws.

TELLER Program means the "Tax-Exempt Local Loans to Encourage Rental Housing" program authorized pursuant to the Enabling Act and these Regulations.

Unit means any accommodation containing separate and complete facilities for living, sleeping, eating, cooking, and sanitation.

Unit Appraisal means an appraisal of the maximum rental value of a Unit in the Project (other than Low or Moderate Income Units) as determined by a study of current rents in the same market area for Similarly Constructed Units in comparable residential facilities by a qualified professional

appraiser, and updated on at least a triennial basis by a study conducted by or on behalf of the Owner, pursuant to standard appraisal methods and procedures prescribed by the Department.

35.03 APPROVAL PROCESS

The following procedures shall be followed in the issuance of Bonds under the TELLER Program. Basically, the process will consist of six steps: (1) filing of an Initial Application; (2) the granting of Official Action Status; (3) public hearing, review and comment; (4) filing of a Final Application; (5) findings and determinations by the LHA; and (6) state approval. Prior to the issuance of Bonds, each of the following steps must be completed:

(1) Initial Application. The Owner shall apply to the LHA by filing an Initial Application, which shall include a request for the LHA to grant Official Action Status to the Project.

It should be noted that the term "Official Action Status" is used herein to denote the status which regulations under the Code provide for a Project with respect to which a resolution has been adopted by a LHA indicating its present intent, subject to subsequent review of the Project, to issue Bonds to finance the Project. Under the Treasury regulations, only those costs (with some exceptions) incurred after the granting of Official Action Status may be financed from the proceeds of the Bonds.

The Initial Application shall be submitted on forms provided by the Department. The Initial Application shall include at least the following information: (a) a description of the proposed Project, including the number of Units, the estimated total development cost for the Project, the proposed Loan amount to be supported by Bonds issued under the TELLER Program, and the proposed Loan Security to be provided for the Loan; (b) a description of the Owner of the proposed Project and the other development and financing team for the Project; (c) a description of the site for the Project, including the status of control of the site by the Owner and the status of all permits for construction or rehabilitation of the Project; (d) estimated operating expenses, including Loan amortization expenses, and anticipated rents for all Units in the Project; (e) a request, if so desired, that the site be declared a Housing Development Area and (f) other relevant Project information as required by the Department.

A LHA may request additional information from the Owner as part of the submission of the Initial Application. If the Owner has requested the designation of the site of the Project as a Housing Development Area, the Initial Application must include the submission of such information as the Department or the LHA shall specify as necessary to substantiate such designation. Upon designation of the site as a Housing Development Area by the LHA (which designation may occur at any time prior to the final approval of the Bonds), the LHA shall submit the substantiating information and evidence of the designation to the Department.

The Project may be subject to review by the Massachusetts Historic Commission pursuant to Chapter 9 of the General Laws or by the Executive Office of Environmental Affairs pursuant to Chapter 30 of the General Laws,

the Massachusetts Environmental Policy Act (MEPA). (For further information, the Owner should consult 950 CMR 71.00 and 301 CMR 10.00.) If the Owner is required to submit an Environmental Notification Form (ENF) to the Executive Office of Environmental Affairs, it should be submitted at the time of the Initial Application and included within such submission.

(2) Official Action Status. Upon receipt of an Initial Application, the LHA shall promptly review the Application and the accompanying information to determine if the Application is complete. The LHA shall act on the request for Official Action Status for the Project within 30 days of receipt of the Initial Application, if the Application is found by the LHA to be complete upon filing, or within 30 days of receipt of any additional information required by the LHA to complete the Application. The LHA may grant Official Action Status to a Project if it finds that: (a) it appears that the Project will serve to meet the housing needs of the community; (b) it is reasonable to expect that the Project will be able to comply with the requirements of the TELLER Program; and (c) the Owner and the development/financing team appear to be capable of carrying out the construction, Rehabilitation, or acquisition and Rehabilitation, and operation and management of the Project. The resolution of the LHA granting Official Action Status shall contain such terms, conditions, and findings as may be prescribed by the Department. While the granting of Official Action Status to a Project evidences the present intent of the LHA to issue Bonds for the Project, it does not constitute a binding commitment by the LHA to issue such Bonds; such commitment is conditional upon a full review of the Final Application and after all of the procedures contained in these Regulations and the Enabling Act have been completed.

Within five days after granting Official Action Status to a Project, the LHA (or the Owner on behalf of the LHA) shall submit a copy of the Initial Application, along with all accompanying information and a certified copy of the Official Action resolution, to the Department.

Only if a Project has been granted Official Action Status may it be considered for further action.

(3) Public Hearing, Review and Comment on Proposed Projects.
The Department shall maintain a register of all Projects which have been granted Official Action Status. Information on a proposed Project, as contained in the Initial Application, shall be available at the Department for review for a period of 30 days following receipt of the Initial Application by the Department (the "Review Period"). Interested parties may submit written comments on the proposed Project to the Department. The Department shall maintain a file of comments received on each proposed Project and, after the completion of the Review Period, the Department shall forward to the LHA a copy of all comments so received.

At any time after granting Official Action Status to a Project and prior to the final approval by the LHA of the issuance of Bonds therefor, the LHA shall hold a public hearing on the Project and the issue of Bonds to finance the Project. Notice of the public hearing shall be given in such manner, and the hearing shall be held at such place and in such manner, and shall be attended by such members or employees of the LHA, as shall be necessary to comply with applicable state and local laws and ordinances and

with the provisions of Section 103(k) of the Code and the Treasury regulations thereunder. Notice of the public hearing shall also be given to the Department. The Initial Application, along with accompanying documents, shall be available for review by the public prior to the hearing. The LHA shall maintain a record of all comments received prior to or at the hearing.

(4) Final Application. At any time after the granting of Official Action Status to a Project the Owner may submit a Final Application to the LHA. The Final Application shall be on a form prescribed by the Department and shall include, without limitation, the following: (a) a complete description of the proposed Project; (b) a complete description of the proposed financing for the Project; (c) the rent structure for the Project; (d) the status of necessary permits; (e) the status of site control; (f) all proposed documents to be used as part of the Bond financing or to provide Loan Security; (g) a Relocation Plan if any existing occupants or tenants at the site of the Project will be displaced by construction or Rehabilitation of the Project; and (h) such other relevant information as may be required by the Department. The LHA may require the submission of such additional information as part of the Final Application as it shall deem relevant to the Project.

(5) Approval of Bonds; Findings and Determination. At any time following the public hearing and expiration of the Review Period, and upon receipt of the Final Application, the LHA may approve, as the issuing agency, the issuance of Bonds to finance the construction, Rehabilitation, or acquisition and Rehabilitation of a Project. Issuance of the Bonds must also be approved by the "Applicable Elected Representative" for the LHA within the meaning of Section 103(k) of the Code and the Treasury regulations thereunder. (Generally, the Applicable Elected Representative for a LHA in a town will be the board of the LHA, whose approval of the Bonds may be combined with the approvals otherwise provided in this paragraph, and the Applicable Elected Representative for a LHA in a city will be the mayor of the city.)

The bond or other authorizing resolution of the LHA for any Bonds shall contain such terms and conditions as the Department and LHA shall require and shall make the following findings:

(a) that the Final Application for the Project is complete;

(b) that the Project documents, including the Regulatory Agreement, provide that until the expiration of the Lock-In Period not less than twenty percent (20%), or such higher percentage as may be required by the LHA, of the total number of Units in the Project will be Low or Moderate Units;

(c) that Low or Moderate Income Persons or Families can afford the rentals, including the provision of heat, electricity and hot water, established by the Owner of the Project for the Low or Moderate Income Units in the Project on the basis of the use of not more than thirty percent (30%) of their annual income, or such lower percentage as the LHA may required; (a LHA may find this determination satisfied if it determines that the annual rentals

established for the Low or Moderate Income Units in the Project, including provision for heat, electricity, and hot water, will be less than twenty-four percent (24%) of Median Income);

(d) that either:

1. the Project is located in a Housing Development Area; or

2. the Project documents, including the Regulatory Agreement, provide that so long as the Bonds are outstanding, each Unit in the Project, other than the Low or Moderate Income Units, will be occupied or be available for occupancy by persons and families who shall pay a rental not less than one-seventh of their annual Income but in no event greater than the Market Area Rental; (a LHA may find this determination satisfied if it determines that the annual rental established for each Unit in the Project, other than the Low or Moderate Income Units, will be set at a level equal to, but not in excess of, the Market Area Rental as determined by the Unit Appraisal);

(e) that the issuance of the Bonds will not involve a pledge of the faith and credit of the LHA, the Commonwealth, or any political subdivision thereof, and that such issuance appears to be fiscally prudent for the LHA;

(f) that the Relocation Plan, if any, for the Project adequately addresses the relocation of any tenants or other occupants of the Project site to be displaced by construction or Rehabilitation of the Project;

(g) that the Project will serve to meet the housing needs of the community and will serve to foster the balanced growth and development of the community; and

(h) that the qualifications and experience of the Owner and development/financing team indicate that they will be able to fulfill the commitments contained in the Final Application and the Regulatory Agreement.

If it is determined that delaying final approval of a Project for the full Review Period prescribed above is not in the public interest, then the LHA may request, and the Department may grant, a waiver of all or a portion of the Review Period.

In order to make the findings required by this section, the LHA shall enter into a Regulatory Agreement, as specified in Section 35.05, with the Owner prior to the delivery of the Bonds.

The approval of a LHA for any Project may contain such conditions as the LHA may deem appropriate to ensure compliance with the provisions of the TELLER Program. The final approval may delegate to the Chairman, any other member of the LHA, or any employee thereof, the determination of the final terms and conditions of the Bonds, upon receipt of state approval of the issue, including without limitation the interest rate or rates for the Bonds

(subject to such maximum rate and other terms as may be specified in the bond or other authorizing resolution) and the maturity, redemption, or other amortization schedule for the Bonds.

If a LHA decides not to approve a Project it shall inform the Owner in writing of such action, citing the findings and determinations which could not be made.

(6) State Approval. Following final approval by the LHA and the Applicable Elected Representative, the LHA (or the Owner on behalf of the LHA) shall submit to the Department the Final Application, together with all supporting documentation including the financing documents and the proposed Regulatory Agreement, along with the record from the public hearing, a certified copy of the bond or other authorizing resolution of the LHA granting final approval to the Bonds, and evidence of the approval of the Applicable Elected Representative.

Following a review of the Final Application, comments received, and the hearing record, the Department shall approve the issuance of the Bonds under the TELLER Program if the Department determines:

(a) that the Final Application for the Project is complete;

(b) that the findings of the LHA contained in its final approval have been properly made and appear to be supported by the information on file;

(c) that the issuance of the Bonds will not involve a pledge of the faith and credit of the LHA, the Commonwealth or any political subdivision thereof and that such issuance appears to be fiscally prudent for the LHA;

(d) that the Project will serve to meet the housing needs of the Commonwealth and will serve to foster the balanced growth and development of the Commonwealth; and

(e) that the procedures prescribed by the Enabling Act and these Regulations have been substantially complied with.

Upon receipt of the Final Application and all supporting information, the Department shall promptly review the Application and shall within fourteen days of receipt of the Application, if the Department shall find the Application to be complete, or within fourteen days of receipt of any information otherwise required to complete the Application, either approve or reject the Project. If the Department decides not to approve a Project, it shall inform the Owner and the LHA in writing of such action, citing the findings and determinations which could not be made.

35.04 FEES

In conjunction with the approval of a Project and issuance of Bonds therefor, a fee shall be paid by the Owner to the Department and the LHA in an aggregate amount equal to one-half of one percent of the principal amount of the Bonds issued or $5,000 whichever is greater; provided that, if the

Owner is a non-profit corporation, the fee shall be set at an amount equal to one-quarter of one percent of the principal amount of the Bonds or $2,500 whichever is greater.

The fee provided in this paragraph shall be payable as follows:

(a) to the LHA upon submission of the Initial Application, an amount equal to $2,000 ($1,000 if the owner is a non-profit corporation);

(b) to the Department upon submission to it of the Initial Application, an amount equal to $500 ($250 if the Owner is a non-profit corporation);

(c) to the LHA upon submission to it of the Final Application, an amount, after credit for the fees paid pursuant to paragraphs (a) and (b) of this section, equal to fifty percent to the total fee payable upon issuance of the Bonds (based on the proposed principal amount of the Bonds), provided that in no event shall the aggregate amount payable pursuant to paragraphs (a), (b), and (c) exceed $12,500;

(d) to the Department upon submission of the Final Application, an amount equal to $500 ($250 if the Owner is a non-profit corporation);

(e) to the LHA upon delivery of the Bonds, an amount equal to the balance of the fee, provided that in no event shall the aggregate amount payable pursuant to paragraphs (a), (c), and (e) of this section exceed $20,000; and

(f) to the Department upon delivery of the Bonds, the balance, if any, of the fee.

The Department shall provide the LHA with funds to cover all necessary and reasonable expenses, upon granting Official Action Status to a Project, or earlier if determined by the LHA, as approved by the Department, incurred by the LHA in connection with the issuance of the Bonds and the approval of the Project, and not otherwise reimbursed by the fee provided herein. Such expenses may include attorney fees, other fees, and expenses approved by the Department. The LHA with the approval of the Department, may also agree with the Owner of the Project for the payment, prior to, upon or after the issuance of the Bonds, of additional fees to the LHA relating to its approval and supervision of the Project.

In addition to counsel retained by a LHA to provide advice with respect to its approval of a Project, upon granting Official Action Status to a Project, or earlier if determined by the LHA, each LHA shall retain special counsel, selected from a list maintained by the Department, to represent and provide advice to the LHA with respect to the issuance of the Bonds. With the approval of the Owner, such special counsel may also act as bond counsel for the Bonds but shall not otherwise represent the Owner. All fees payable to such special counsel shall be reimbursed from the proceeds of the Bonds or as otherwise agreed to by the LHA and the Owner. The Department shall also provide technical assistance and make available technical and legal consultants on a statewide basis to each LHA involved in reviewing a Project under the TELLER program.

35.05 REGULATORY AGREEMENT

Prior to issuing Bonds to finance a Project, the LHA and the Owner shall enter into a Regulatory Agreement in a form consistent with guidelines adopted from time to time by the Department which shall contain:

(1) provisions requiring that:

(a) until the expiration of the Lock-In Period, not less than twenty percent (20%) of the total number of Units in the Project shall be Low or Moderate Income Units;

(b) until the expiration of the Lock-In Period, the annual rentals, including provision for heat, electricity and hot water, established by the Owner for the Low and Moderate Income Units shall not exceed twenty-four percent (24%) of Medium Income;

(c) unless the Project is located in a Housing Development Area, for so long as the Bonds are outstanding, the annual rental for each Unit in the Project, other than the Low or Moderate Income Units, shall be established at initial occupancy and upon renewal of any lease term at a level so that the tenants of such Units shall pay a rental not less than one-seventh of their annual Income, but in no event greater than the Market Area Rental; (in the alternative, the Regulatory Agreement may provide that rentals for such Units shall be established, at initial occupancy and upon any renewal of a lease, at a level equal to but not in excess of the Market Area Rental as determined by the most recently prepared Unit Appraisal);

(d) prior to the initial occupancy of any Units in the Project or the issuance of the Bonds, whichever is later, the Owner shall adopt and implement both: (i) a Plan for Selecting Tenants for Low or Moderate Income Units; and (ii) an Affirmative Fair Marketing Plan for all Units; in both cases consistent with standards and guidelines as then in effect and adopted from time to time by the Department;

(e) except at turnover in tenancy, the Owner shall not increase the rent to be charged for any Low or Moderate Income Unit in the Project more frequently than once per year, and except at turnover in tenancy, the Owner shall give no notice of a change in rent to be charged for a Low or Moderate Income Unit prior to providing the affected tenant with a thirty-day opportunity to comment on the proposed change;

(f) the Owner shall enter into a lease in a form approved by the Department with each Tenant of a Low or Moderate Income Unit which shall be for a minimum period of one (1) year, and which shall provide that no tenant of a Low or Moderate Income Unit shall be evicted during the Lock-In Period or Notice Period (as hereinafter defined) for any reason other than a substantial breach of a material provision of the lease;

(g) the Owner shall not discriminate against any applicant for housing or employment or against any tenant or employee on the basis of age, race, creed, color, sex, handicap, religion, national origin, or any other basis prohibited by law;

(h) during the Lock-In Period, no Unit in the Project shall be converted to condominium or cooperative form of ownership;

(i) no Tenant in the Project shall be evicted due to conversion to condominium or cooperative form of ownership unless and until said Tenant has received the rights and benefits as set forth in Chapter 527 of the Acts of 1983, as then currently in effect (hereinafter, the "Conversion Act"), notwithstanding any exemption provided in the third paragraph of Section 2 of the Conversion Act to the city or town in which the Project is located, and any applicable local laws and ordinances;

(j) no Tenant of a Low or Moderate Income Unit shall be evicted due to conversion to condominium or cooperative form of ownership nor shall such Low or Moderate Income Unit be converted to conventional rental housing (which shall mean housing having an annual rental greater than twenty-four percent (24%) of Median Income) unless and until the following restrictions have been met and completed with respect to such Unit:

(i) the LHA and any tenant of a Low or Moderate Income Unit so affected shall be given prior written notice of intent to convert to condominium or cooperative form of ownership or to convert to conventional rental housing (hereinafter referred to as a "Notice Period") of at least four years (beginning on a date no sooner than the date such Notice is first given with respect to such Low or Moderate Income Unit). The Notice Period may not commence prior to the expiration of the Lock-In Period, unless the LHA shall prescribe upon Final Approval of the Project an earlier commencement of the Notice Period based on a finding that such earlier commencement is necessary for the feasibility of the Project; in no event shall the Notice Period commence at a date more than four years prior to the expiration of the Lock-In-Period. The Notice of Intent shall include notice of the Tenant's rights and notice of the right of first refusal provided in paragraph (iii) of this Section 35.05(1)(j). Only tenants occupying Low or Moderate Income Units within the Project shall be entitled to receive the additional rights enumerated in this paragraph (j), and subsequent to the expiration of the Lock-In-Period any Low or Moderate Income Unit vacated after a Notice of Intent shall have been given with respect to such Unit shall no longer be considered a Low or Moderate Income Unit for purposes of this paragraph (j) regardless of the income of the Tenant who thereafter occupies such Unit;

(ii) all tenants of Low or Moderate Income Units given, or entitled to be given the Notice of Intent shall receive an extension of their lease or rental agreement, with substantially the same terms, subject to permissible rental increases, during the Notice Period;

(iii) not later than two (2) years prior to the expiration of the Notice Period, the Tenant of an affected Low or Moderate Income Unit shall receive a right of first refusal for purchase of the Unit, which right shall last for a period, of not less than six (6) months; during this period, the Unit shall be offered to the Tenant at a discount of at least ten percent (10%) from the

offering price for the Unit; these terms shall not apply to Tenants who move into a Low or Moderate Income Unit after a Notice of Intent has been given with respect to such Unit; if the Tenant of an affected Unit chooses not to purchase the Unit, the Unit shall be offered for purchase to the LHA for an additional period of at least ninety (90) days at the same price the Unit was offered to the Tenant;

(iv) all Tenants given, or entitled to be given the Notice of Intent, who are unable or choose not to exercise their right to purchase or to remain and to pay the conventional rental shall be entitled to relocation benefits in accordance with the Conversion Act.

(k) the Regulatory Agreement shall be recorded in place and manner appropriate for recording of a mortgage and, until the end of the Lock-In Period or so long as the Bonds are outstanding, whichever is longer, the Regulatory Agreement and the covenants contained therein shall run with the land and shall bind, and the benefits shall inure to, the LHA, its successors and assigns;

(l) any failure by the Owner to perform or comply with any obligation, covenant, or warranty under the Regulatory Agreemement shall constitute a "Default" and, upon Owner's Default, the LHA, its successors or assigns, may take any action permitted by law or in equity or under the Loan Security for the Bonds, including the right to specific performance, foreclosure of any mortgage, acceleration of the Bonds, or otherwise as appropriate and provided in the Regulatory Agreement and the Loan Security documents, to remedy such default;

(m) the Owner (a) provide a Unit Appraisal not less often than every third anniversary of the Regulatory Agreement to the LHA and the Department and (b) provide an annual report to the LHA, or its designee, and to the Department on the status of the Project certifying that the terms of the Regulatory Agreement are being complied with;

(n) the Owner provides any and all pertinent information with respect to the Project as requested by the LHA or by the Department, provided that the LHA or the Department shall request personal data only when essential to performance of statutory or other lawful obligations; and

(o) that the Owner shall provide, on a form and in a manner prescribed by the Department, a notification to each tenant of a Low or Moderate Income Unit indicating the manner in which the maximum rentals for such Units are determined.

(2) additional provisions imposed by the LHA pursuant to 35.01(5).

REGULATORY AUTHORITY

760 CMR 35.00: M.G.L. c.23B Sec. 6; M.G.L. c.121B Sec. 25, 26(m) and Sec. 29.

Benjamin Tymann

From: Kinsley, Beth <bkinsley@Northland.com>
Sent: Friday, July 22, 2022 10:17 AM
To: Benjamin Tymann
Subject: FW: Prepayment Language in Avalon West's Mortgage

Beth Kinsley
General Counsel

Phone 617-630-7254
Email bkinsley@northland.com Web www.northland.com
2150 Washington Street, Newton, MA 02462

-----Original Message-----
From: Abair, Suzanne
Sent: Wednesday, August 31, 2011 3:31 PM
To: Abair, Suzanne <sabair@Northland.com>; Kinsley, Beth H. <bkinsley@Northland.com>
Subject: FW: Prepayment Language in Avalon West's Mortgage

_____
Suzanne Abair
Senior Vice President & General Counsel Northland Investment Corporation
2150 Washington Street
Newton, MA 02462
P: 617.630.7275
F: 617.965.7101
sabair@northland.com
www.northland.com

-----Original Message-----
From: Moore, Mary Lee [mailto:MLMoore@mintz.com]
Sent: Thursday, August 09, 2007 10:18 AM
To: Abair, Suzanne; Frieze, David
Subject: FW: Prepayment Language in Avalon West's Mortgage

Please see below.

Mary Lee Moore, Esq.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

One Financial Center | Boston, MA 02111

Phone: 617.348.1697 | Fax: 617.542.2241

E-mail: mlmoore@mintz.com

-----Original Message-----
From: John McGinty [mailto:JMcGinty@masshousing.com]
Sent: Thursday, August 09, 2007 10:15 AM
To: Francisco Stork
Cc: David Keene; Paul Scola; Moore, Mary Lee
Subject: RE: Prepayment Language in Avalon West's Mortgage

Francisco, the 15 year prepayment lockout expires on December 10, 2011
(15 years from the December 10, 1996 date of the note). Please note that as a condition of our approval, the current affordability restrictions will be extended for 15 years from the date of property transfer.

Jack

-----Original Message-----
From: Francisco Stork
Sent: Wednesday, August 08, 2007 4:24 PM
To: 'Moore, Mary Lee'
Cc: David Keene; Paul Scola; John McGinty; Francisco Stork
Subject: RE: Prepayment Language in Avalon West's Mortgage

Mary Lee,
This is to confirm that if Northland otherwise qualifies as a transferee of the Avalon West Project, then in connection with its consent to the transfer MassHousing will substitute its standard prepayment provision contained in our standard note for the outdated provision currently found in Section 3 the Avalon West mortgage. John Mcginty (the Loan Officer in charge of this transaction, plan to go over the Avalon West Note tomorrow and confirm for you the first date upon which prepayment can be made. Paul Scola of our Legal Department will be overseeing this in my absence. We should continue with the application process as set forth in the Transfer of Ownership Policy (to be adopted by the Board tomorrow). There have been some revisions (not substantial) to the version that was previously sent to you. I am sending the last and final version to you now. Paul can tell you if the Policy was adopted or if there were revisions to this draft. Time permitting, maybe we can go over the requirements in Exhibit A-1 by phone tomorrow AM and determine which are applicable to this transaction. I'll be in from 8:00 until about Noon.
Regards,
Francisco

-----Original Message-----
From: Moore, Mary Lee [mailto:MLMoore@mintz.com]
Sent: Wednesday, August 08, 2007 3:09 PM
To: Moore, Mary Lee; Francisco Stork
Subject: RE: Prepayment Language in Avalon West's Mortgage
Importance: High

Francisco - CORRECTION. We believe the first date on which the loan
can be prepaid is December 10,
2011, not 2015 (i.e., fifteen years from December 10, 1996). Sorry about that!

Mary Lee

Mary Lee Moore, Esq.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

One Financial Center | Boston, MA 02111

Phone: 617.348.1697 | Fax: 617.542.2241

E-mail: mlmoore@mintz.com

-----Original Message-----
From: Moore, Mary Lee
Sent: Wednesday, August 08, 2007 3:03 PM
To: 'Francisco Stork'
Subject: RE: Prepayment Language in Avalon West's Mortgage

Francisco - Before you get away on your vacation, would you please send me an email confirming that if Northland otherwise qualifies as a transferee of the Avalon West project, then in connection with its consent to the transfer, MHFA will agree to substitute its current standard prepayment provision for the outdated one that is in the existing mortgage? I understand that MHFA will also confirm the first date on which prepayment will be permitted under the loan, which we believe to be December 10, 2015. If you could check that internally and let me know if you agree, I would appreciate it.

Lastly, would you kindly let me know who our contact person should be at MHFA while you are out of the office? Thank you. And if I don't speak with you, have a great vacation.

Mary Lee

Mary Lee Moore, Esq.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

One Financial Center | Boston, MA 02111

Phone: 617.348.1697 | Fax: 617.542.2241

E-mail: mlmoore@mintz.com

-----Original Message-----
From: Francisco Stork [mailto:FStork@masshousing.com]
Sent: Monday, August 06, 2007 11:31 AM
To: Moore, Mary Lee
Subject: FW: Prepayment Language in Avalon West's Mortgage

Mary Lee,
Please don't disseminate this e-mail further. I'll send you an e-mail later confirming MassHousing's willingness to amend the current language in the Avalon West Mortgage with the standard prepayment language. I'm sending you this to give you comfort that the issue was discussed internally and approved by Legal, Rental Management and Tim Sullivan, the Director of Finance.
Regards,
Francisco.

> -----Original Message-----
> From: Timothy Sullivan
> Sent: Tuesday, July 31, 2007 2:46 PM
> To: Francisco Stork; Laurie Wallach; George E. Curtis; Daniel C.
Staring; David Keene
> Subject: RE: Prepayment Language in Avalon West's Mortgage
>
> We are fine with this.
>
> -----Original Message-----
> From: Francisco Stork
> Sent: Tuesday, July 31, 2007 2:39 PM
> To: Laurie Wallach; Timothy Sullivan; George E. Curtis; Daniel C.
Staring; David Keene
> Cc: Francisco Stork
> Subject: Prepayment Language in Avalon West's Mortgage
>
>
> I'm following up on previous e-mails regarding the concern that
Northland is having with language in the current Avalon West Mortgage that limits the right to prepay (afte the 15 year lock-out period) to situations where the Bonds allow for redemption. Northland's attorney's are asking for assurances regarding future bond issues that we can't make.
>
> One possible solution (suggested by George) to this issue is to amend
the troublesome language in the current language with Avalon West and insert the standard pre-payment language that we have in our Notes.

Since as Dan's research shows, the Borrower would be apble to prepay after the 15 year lock out period, I think this makes sense. I also think that we can modify the mortgage under the existing delegated authority but ask George and Laurie's advice on this. Below is a) Dan's e-mail regarding the 2005 Bonds b) standard prepayment language and c) in the pdf file (the current language in Avalon West's mortgage).
>
> Let me know right away if anyone has any problems with this and I'll
call Northland's attorney to see if this will work for them.
>
> Dan's Research:
>
> Hi Joanne:
>
> Please see attached the first 9 pages of the Housing Bonds 2005 Series
E (AMT) Official Statement "Refunding Bonds" This is the bond issue that Avalon West is currently financed under. To confirm this please turn to page 4 where at the top of the page it identified the bonds to be refunded and lists "Rental Housing Mortgage Revenue Bonds 1995 Series B"
(original bonds that funded Avalon West) and identifies the corresponding "Principal to be Redeemed" that ties to the then outstanding Avalon West transaction.
>
> On page 8 under Special Redemption it identifies a redemption
provision and pursuant to item (vi) allows redemption upon prepayment of the Mortgage Loans.
>
> I think this closes the loop as the Mortgage Note states that you can
prepay if the Agency Bonds are redeemable and the underlying Bond allows for redemption if the Mortgage Loan is prepaid.
>
>
>
> Standard language:
>
>
> 3. Prepayment.
>
> (a) Borrower may not prepay this Note at any time, either in whole
or in part, except as expressly provided in this Paragraph 3.
>
> (b) Borrower may not prepay this Note, either in whole or in part,
during the first fifteen (15) years of the Loan Term, except with the prior consent of the Agency. During the balance of the Loan Term, Borrower may prepay this Note, either in whole or in part.
>
> (c) > In the event prepayment of the principal amount of this Note
is permitted in accordance with subparagraph 3(b), above, Borrower may prepay in whole or in part (provided, that no partial prepayment shall be in an amount less than $100,000, and provided, further, that no partial prepayment shall postpone, reduce or in any way affect any other principal payment due under this Note) the outstanding principal balance hereof, upon giving at least thirty (30) days' prior written notice to Holder (which notice, to be effective, shall state the amount to be
prepaid) and upon the payment of the Prepayment> Fee described in subparagraph (d), below, constituting bargained-for consideration for Holder's agreement to permit prepayment as herein provided. Holder shall have no obligation to accept any prepayment which is not made in immediately available federal funds or the equivalent and which is not accompanied by all accrued but unpaid interest on the Note and any and all other sums then owing to Holder hereunder or under any of the Contract Documents. If Borrower gives Holder notice of its intention to so prepay, then the amount designated for its prepayment in Borrower's notice of prepayment, together with accrued but unpaid interest (and, in

the event of payment in full of this Note, together with all other sums owing to Holder hereunder or under any Contract Document), shall be due and payable on the later of the date specified in Borrower's notice, or the first (1st) day of the first (1st) month which occurs at least thirty (30) days after Holder receives such notice.
>
> (d) Borrower shall pay to the Holder in connection with any payment
or prepayment, under any circumstances whatsoever, whether voluntary or involuntary, of all or any portion of the Loan Amount other than in accordance with scheduled payments to be made in accordance with subparagraph 1(b) above, an amount equal to one percent (1%) of such payment or prepayment plus such other reasonable amounts to cover costs incurred in connection with such prepayment ("Prepayment Fee") to cover the losses, costs or expenses of the Holder which may be incurred as a result of such payment or prepayment.
>
> << File: LE_FXS - 07-31-07 - BHTPYP7.pdf >>

IRS CIRCULAR 230 NOTICE

In compliance with IRS requirements, we inform you that any U.S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of avoiding tax penalties or in connection with marketing or promotional materials.

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From:	Edward Behn
Sent:	Wednesday, February 16, 2022 5:13 PM EST
To:	Arce, Stacy
CC:	Allen Edinberg; Kristi Williams; Mark Silverberg; Jim Robbins; Fred Lonardo
Subject:	Maintaining Affordable Housing at the Residences at Westborough Station
Attachments:	Memo to NorthLand - Residences at Westborough Station.pdf

Ms. Arce,

Please see the attached memo regrading the Residences at Westborough Station.
As you are aware the Town of Westborough would like to maintain 24 units at this location as affordable housing. The memo outlines what we believe are appropriate discussion points and action items related to that end.

After you have had an opportunity to review the memo we would like to meet in person to discuss the details contained in the memo.

As we move forward the Westborough Affordable Housing Trust will be taking the lead on these discussions.

I am confident that the town and Northland can find a way to maintain the affordability of the units located at the Residences at Westborough Station.

Looking forward to hearing from you,
Ed

Edward F. Behn
Chair – Westborough Affordable Housing Trust
5 Thomas Rice Drive
Westborough, MA 01581
Tel : 508-366-2516
Cell: 617-515-5432
Web: *http://westboroughhousingtrust.org*

Westborough Affordable Housing Trust
34 West Main Street
Westborough, MA 01581

DATE: February 15, 2022

TO: Stacy Arce, Regional Property Manager
Northland Investment Corporation

FROM: Edward F. Behn, Chair, Westborough Affordable Housing Trust
Allen Edinberg, Trustee, Westborough Affordable Housing Trust and Chair, Select Board

CC: Jim Robbins, Westborough Town Planner
Mark Silverberg, Chair, Westborough Planning Board
Kristi Williams, Westborough Town Manager

SUBJ: **Maintaining Affordable Housing Inventory at the Residences at Westborough Station**

Ms Arce:

As a follow up to your email communications with Westborough Town Planner Jim Robbins, we are writing to understand the current and planned status of the 24 affordable units and solicit your support for finding a workable program that would allow the units to remain as affordable. The Westborough Affordable Housing Trust ("Trust") will lead the effort, engaging Town departments, committees, and boards as necessary to move the process forward.

Current Status

Our understanding of the affordability provisions for the 24 units is as follows. Please correct or refine the information as appropriate.

- Northland acquired the property in 2007, paying of the MassHousing Financing Authority note.
- Northland agreed to maintain the 24 affordable, SHI compliant units, for fifteen (15) years.
- The 15-year period expires in September 2022.
- Northland plans to move these units to market-rate rents.
- Northland provided tenants in the affordable units with initial notice in September 2021, one (1) year prior the transition to market rates.
- Northland is willing to explore options for continuing these units as affordable provided the program meets Northland's current and anticipated needs. Specifically, net rental payments for the affordable units (tenant + subsidy) need to be at market rates

Affordability Options

In your email to Jim Robbins, you asked for information about how we would like to proceed. The Department of Housing and Community Development (DHCD) has multiple subsidy programs that might work for Northland and the Town. We will need to gather more information to understand which program(s) best meet our mutual objectives.

In general, programs either offer tenant subsidies or project-based subsidies. Tenant subsidies are awarded to, and move, with the tenant. Project-based programs link the subsidies to the specific units, enabling the units to be rented to any qualified household.

Our expectation is that Northland would prefer a project-based subsidy program.

With increased budgetary funding for Affordable Housing and over $100 million in ARPA funding at the state level directed to Affordable Housing, we believe the timing is good to find a workable solution.

The Trust is exploring hiring a consultant to assist us in working with DHCD. The Trust wants this effort to move forward smoothly and expeditiously for all involved.

Immediate Next Steps

To determine which affordability program(s) may apply, we are asking for your cooperation and support. Specifically, we are asking Northland to:

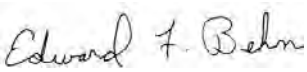
- Share the information necessary for the Trust, working with the Town and DHCD, to determine which programs and options will best meet Northland's needs and those of the tenants, the Town, and DHCD regulations.
- Assist with applications and other administrative tasks, should we identify a viable program.
- Cooperate in publicizing a successful program as a win for our community and a demonstration of Northland's Residents First philosophy and its strong commitment to building community.

Information Gathering

The initial information we need as follows:

- Inventory of the affordable units, including for each unit:
  - Number of bedrooms
  - Number of occupants over 18
  - Number of total occupants
  - Current rent received
- Planned market-rate rent expected for each unit as of 10/1/22
- Projected market-rate rents (pro-forma)
  - Either projected increases or plans to tie increases to economic indicators, such as CPI.

As mentioned in the memo we would appreciate the opportunity to meet in person to discuss the above.



Edward F. Behn – ed@edbehn.com
Chair – Westborough Affordable Housing Trust
Tel : 508-366-2516
Cell: 617-515-5432

From:	Allen Edinberg
To:	Bill Brauner
Cc:	Edward Behn; Kristi Williams; Mark Silverberg; Jim Robbins; Fred Lonardo; Jon Steinberg
Subject:	Re: Update on Charlestown Meadows - Call with Bill Brauner of CEDAC
Date:	Thursday, January 13, 2022 4:44:14 PM

Bill

Thank you for the clarifications. We have confirmed that the affordability provisions are not in perpetuity and are set to expire.

Thank you,
Allen

Sent from my iPhone

> On Jan 13, 2022, at 4:05 PM, Bill Brauner <bbrauner@cedac.org> wrote:
>
> Hi all,
>
> Please see some minor edits to Ed's email below.
>
> Best,
>
> Bill Brauner
> Director of Housing Preservation and Policy
> CEDAC
> 18 Tremont Street
> Boston, MA 02108
> Of. 617-727-5944
>
> ---
>
> **From:** Edward Behn <ed@edbehn.com>
> **Sent:** Thursday, January 13, 2022 2:06 PM
> **To:** Kristi Williams <kwilliams@town.westborough.ma.us>; Allen Edinberg <selectman@allenedinberg.com>; Mark Silverberg <msilverberg@beaconappraisals.com>; Jim Robbins <jrobbins@town.westborough.ma.us>; Fred Lonardo <flonardo@town.westborough.ma.us>; Jon Steinberg <jsteinberg@town.westborough.ma.us>
> **Cc:** Bill Brauner <bbrauner@cedac.org>
> **Subject:** Update on Charlestown Meadows - Call with Bill Brauner of CEDAC
>
> EXTERNAL EMAIL

Team,

I had a very productive call with **Bill Brauner** from **CEDAC** (Community Economic Development Assistance Corporation) this morning regarding Charlestown Meadows. Here are the key takeaways:

1. In order to begin the process of looking for resources to help us maintain affordability at Charlestown Meadows we should reach out to Northland and ask what it would take for them to keep the 24 units affordable.

2. He suggested that we get a copy of the original 40B decision to ensure that the units are not affordable in perpetuity or have an additional term of affordability; ~~as would be the default~~.

3. If we can keep all 24 units affordable at a 50% AMI then we should be able to claim all 120 units in our SHI.

4. The State sees preservation of affordable housing ~~at the top of its housing priorities~~ that is imminently at risk of conversion to market as a very high priority.

5. DHCD received $600MM in ARPA funding for housing affordability. Of that $115MM has been specifically earmarked for affordable housing production and preservation. That bodes well for us. This is in addition to the monies that DHCD normally receives for these purposes.

6. There are two approaches we can take including a blend of the two.
   - Capital Projects in which the developer/landlord receives an amount of money up front to offsets rent differentials between affordable units and market rate units going forward.
   - Ongoing ~~supplement programs~~ operating subsidy programs such as project-based Section 8 that would assist renters meet market rate costs.

7. Bill did not believe that Ch. 40T applied to this situation since 40T is only relevant to specific funding programs.

I suggest that we meet via a video call next week to discuss the above.
Ed

Edward F. Behn
Chair – Westborough Affordable Housing Trust
5 Thomas Rice Drive
Westborough, MA 01581
Tel : 508-366-2516
Cell: 617-515-5432
Web: *http://westboroughhousingtrust.org*

EXH #23

Adams, Harkness & Hill, inc.
MEMBER: NEW YORK STOCK EXCHANGE
ONE LIBERTY SQUARE
BOSTON, MASSACHUSETTS 02109

(617) 423-6688
TELECOPIER (617) 423-3856

November 1, 1989

Mr. Murray Corman
Housing Appeals Committee
Executive Office of Communities
and Development
100 Cambridge Street - 18th Floor
Boston, MA 02202

Re: Charlestown Meadows, Westborough, Massachusetts

Dear Murray:

On October 26, 1989 I testified before the Housing Appeals Committee concerning the economic feasibility of the Charlestown Meadows project in Westborough. I had prepared three proformas for the project at three sizes and had calculated the internal rate of return ("IRR") for each over the 15 year lock-in period for the affordable units. This was an analysis I had performed several times before for developers, although all were for smaller projects that the Westborough one.

The intensity of the questioning at the hearing piqued my curiosity about exactly how the computer had made the final IRR calculations. I returned to my office and began to examine the calculations step by step.

What I have discovered is that all numbers on the proformas were accurate (based upon the assumptions used) except for the final IRR calculations. What had happened, much to my surprise, was that because of the larger magnitude of the cash-flow numbers for Westborough, my administrative assistant had to use two columns of the space allotted in the Lotus 123 program. The result was that the program was reading the 15 net cash flow figures as 30 separate column entries, i.e. as amounts being received over 30 instead of 15 years. The effect was to calculate IRRs approximately one-half of the actual.

The new results are as follows:

	274 Units	206 Units	137 Units
IRR	21.50%	17.85%	13.10%

As I indicated in my prior analysis, most developers would consider an IRR below approximately 15% to be marginal and perhaps not worth the substantial risks inherent in a complex development of this type. A return of over 20% would, however, be considered attractive.

I might further point out that these IRRs are calculated based only on the cash equity scheduled to be invested to meet project costs. If we include the 10% non-cash developer's fee, as would certainly be done in a calculation of the owner's equity and as is listed in the sources and uses of funds statement, the IRRs can be recomputed as follows:

	274 Units	206 Units	137 Units
IRR	15.53%	13.44%	10.28%

I had not done this in my earlier analysis because the IRRs with only the cash equity were already so low.

I am sorry for any inconvenience these changes may cause. I can assure you that we have re-formatted our program to prevent it from happening again.

Should you have any further questions of me regarding this issue, I will be pleased to respond.

Sincerely,

Matthew H. Hobbs
Vice President

MHH:llp
cc: Brian Pehl
Frank Stehlmach
Richard Wood, Esquire

Charlestown Meadows, Westborough

Sources and Uses of Funds

	274 Units	206 Units	137 Units
Sources of Funds:			
Bond Proceeds	$19,300,000	$14,500,000	$ 9,600,000
Equity*	4,097,000	3,785,000	3,562,000
	$23,397,000	$18,285,000	$13,162,000
Uses of Funds:			
Residential construction ($55,000/unit)	$15,070,000	$11,330,000	$ 7,535,000
Site work	2,000,000	1,900,000	1,800,000
Land cost	800,000	800,000	800,000
Surveys, permits	100,000	90,000	80,000
Architect/engineer	500,000	450,000	400,000
Construction interest (24/22/20 months on 1/2 at 7.5%)	1,448,000	997,000	600,000
Taxes and insurance	100,000	90,000	80,000
Legal and accounting	75,000	75,000	75,000
Title and recording	75,000	60,000	45,000
Issuance costs (4%)	772,000	580,000	384,000
LOC fee (2 years)	600,000	450,000	300,000
Rent up and marketing	150,000	140,000	130,000
Developer's fee and overhead (10% of construction)	1,707,000	1,323,000	933,000
	$23,397,000	$18,285,000	$13,162,000
*Sources of Equity			
Developer's fee	$ 1,707,000	$ 1,323,000	$ 933,000
Cash	2,390,000	2,462,000	2,629,000
	$ 4,097,000	$ 3,785,000	$ 3,562,000
Internal Rate of Return			
Using cash equity only	21.50%	17.85%	13.10%
Using cash and non-cash equity	15.53%	13.44%	10.28%

MHH:llp
November 1, 1989

Charlestown Meadows, Westborough, Massachusetts
Letter of Credit Enhanced TELLER Bond Issue

Unit Type	# Units	Rent/Mo.	Annual Income
1 BR Market	48	825	$475,200
2 BR Market	151	980	$1,775,760
2 BR Below Market	49	550*	$323,400
3 BR Market	20	1,100	$264,000
3 BR Below Market	6	695	$50,040
	274		$2,888,400

1.04 = Rental Income Inflator
0 = Monthly Income from Commercial
1.05 = Commercial Income Inflator
$0 = Monthly Income from Laundry
1.05 = Laundry Income Inflator
0.05 = Vacancy Factor for Market Units
0.03 = Vacancy Factor for Below-Market Units
$739,800 = Operating and Maintenance Expenses (@ $2,700/unit)
1.05 = Expenses Inflation Factor
$19,300,000 = Amount of Bond Issue
0.075 = Interest Rate (10 year maturity)
0.0846712 = Debt Service Constant on Bonds (30 year amortization)
$20,065,000 = Letter of Credit Amount
0.015 = Letter of Credit fee

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11	Year 12	Year 13	Year 14	Year 15	
Gross Rental Income	$2,888,400.00	$3,003,936.00	$3,124,093.44	$3,249,057.18	$3,379,019.46	$3,514,180.24	$3,654,747.45	$3,800,937.35	$3,952,974.85	$4,111,093.84	$4,275,537.59	$4,446,559.10	$4,624,421.46	$4,809,398.32	$5,001,774.25	
Commercial Income	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
Laundry Income	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
Gross Income	2,888,400.00	3,003,936.00	3,124,093.44	3,249,057.18	3,379,019.46	3,514,180.24	3,654,747.45	3,800,937.35	3,952,974.85	4,111,093.84	4,275,537.59	4,446,559.10	4,624,421.46	4,809,398.32	5,001,774.25	
Vacancy for Market Units	125,748.00	130,777.92	136,009.04	141,449.40	147,107.37	152,991.67	159,111.34	165,475.79	172,094.82	178,978.61	186,137.76	193,583.27	201,326.60	209,379.66	217,754.85	
Vacancy for Below-Market Units	11,203.20	11,651.33	12,117.38	12,602.08	13,106.16	13,630.41	14,175.62	14,742.65	15,332.35	15,945.65	16,583.47	17,246.81	17,936.68	18,654.15	19,400.32	
Effective Gross Income	2,751,448.80	2,861,506.75	2,975,967.02	3,095,005.70	3,218,805.93	3,347,558.17	3,481,460.50	3,620,718.91	3,765,547.67	3,916,169.58	4,072,816.36	4,235,729.02	4,405,158.18	4,581,364.50	4,764,619.08	
Expenses	739,800.00	776,790.00	815,629.50	856,410.98	899,231.52	944,193.10	991,402.75	1,040,972.89	1,093,021.54	1,147,672.61	1,205,056.24	1,265,309.06	1,328,574.51	1,395,003.24	1,464,753.40	
Net Operating Income	2,011,648.80	2,084,716.75	2,160,337.52	2,238,594.73	2,319,574.41	2,403,365.07	2,490,057.74	2,579,746.02	2,672,526.13	2,768,496.96	2,867,760.12	2,970,419.96	3,076,583.67	3,186,361.27	3,299,865.69	
Debt Service	1,634,154.16	1,634,154.16	1,634,154.16	1,634,154.16	1,634,154.16	1,634,154.16	1,634,154.16	1,634,154.16	1,634,154.16	1,634,154.16	1,634,154.16	1,634,154.16	1,634,154.16	1,634,154.16	1,634,154.16	
Net Cash Flow	377,494.64	450,562.59	526,183.36	604,440.57	685,420.25	769,210.91	855,903.58	945,591.86	1,038,371.97	1,134,342.80	1,233,605.96	1,336,265.80	1,442,429.51	1,552,207.11	1,665,711.53	
Debt Service Coverage	1.23	1.28	1.32	1.37	1.42	1.47	1.52	1.58	1.64	1.69	1.75	1.82	1.88	1.95	2.02	
Letter of Credit Fee	300,675.00	300,675.00	300,675.00	300,675.00	300,675.00	300,675.00	300,675.00	300,675.00	300,675.00	300,675.00	300,675.00	300,675.00	300,675.00	300,675.00	300,675.00	
Debt Service Coverage after LOC	1.05	1.09	1.14	1.19	1.24	1.29	1.34	1.39	1.45	1.51	1.57	1.63	1.70	1.77	1.84	
Net Cash Flow after LOC **($2,390,000)	76,819.64	149,887.59	225,508.36	303,765.57	384,745.25	468,535.91	555,228.58	644,916.86	737,696.97	833,667.80	932,930.96	1,035,590.80	1,141,754.51	1,251,532.11	1,365,036.53	15,523,778.97 ***
Internal Rate of Return																21.50%

*Below market rents: 1988 Section 8 rents ($553 and $694) trended at 5% for 2 years
Rents reduced by utility allowance: $60 for 2 BR, $70 for 3 BR
**Owner's equity contribution
***Residual value: 90% of Year 15 NOI capitalized at 10% less outstanding mortgage balance.

Charlestown Meadows, Westborough, Massachusetts
Letter of Credit Enhanced TELLER Bond Issue

Unit Type	# Units	Rent/Mo.	Annual Income
1 BR Market	36	$825	$356,400
2 BR Market	113	980	$1,328,880
2 BR Below Market	37	550 *	$244,200
3 BR Market	15	1,100	$198,000
3 BR Below Market	5	695 *	$41,700
	206		$2,169,180

1.04 = Rental Income Inflator
0 = Monthly Income from Commercial
1.05 = Commercial Income Inflator
$0 = Monthly Income from Laundry
1.05 = Laundry Income Inflator
0.05 = Vacancy Factor for Market Units
0.03 = Vacancy Factor for Below-Market Units
$556,200 = Operating and Maintenance Expenses (@ $2,700/unit)
1.05 = Expenses Inflation Factor
$14,500,000 = Amount of Bond Issue
0.075 = Interest Rate (10 year maturity)
0.0846712 = Debt Service Constant on Bonds (30 year amortization)
$15,060,000 = Letter of Credit Amount
0.015 = Letter of Credit Fee

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		Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11	Year 12	Year 13	Year 14	Year 15	
Gross Rental Income		$2,169,180.00	$2,255,947.20	$2,346,185.09	$2,440,032.49	$2,537,633.79	$2,639,139.14	$2,744,704.71	$2,854,492.90	$2,968,672.61	$3,087,419.52	$3,210,916.30	$3,339,352.95	$3,472,927.07	$3,611,844.15	$3,756,317.92	
Commercial Income		0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
Laundry Income		0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
Gross Income		2,169,180.00	2,255,947.20	2,346,185.09	2,440,032.49	2,537,633.79	2,639,139.14	2,744,704.71	2,854,492.90	2,968,672.61	3,087,419.52	3,210,916.30	3,339,352.95	3,472,927.07	3,611,844.15	3,756,317.92	
Vacancy for Market Units		94,164.00	97,930.56	101,847.78	105,921.69	110,158.56	114,564.90	119,147.50	123,913.40	128,869.94	134,024.73	139,385.72	144,961.15	150,759.60	156,789.98	163,061.58	
Vacancy for Below-Market Units		8,577.00	8,920.08	9,276.88	9,647.96	10,031.88	10,435.23	10,852.64	11,286.75	11,738.22	12,207.75	12,696.06	13,203.90	13,732.05	14,281.34	14,852.59	
Effective Gross Income		2,066,439.00	2,149,096.56	2,255,060.42	2,324,462.84	2,417,441.35	2,514,139.01	2,614,704.57	2,719,292.75	2,828,064.46	2,941,187.04	3,058,834.52	3,181,187.90	3,308,435.42	3,440,772.83	3,578,403.75	
Expenses		556,200.00	584,010.00	613,210.50	643,871.03	676,064.58	709,867.81	745,361.20	782,629.26	821,760.72	862,848.75	905,991.19	951,290.75	998,855.29	1,048,798.05	1,101,237.96	
Net Operating Income		1,510,239.00	1,565,086.56	1,621,849.92	1,680,591.81	1,741,376.78	1,804,271.20	1,869,343.37	1,936,663.49	2,006,303.74	2,078,338.28	2,152,843.33	2,229,897.15	2,309,580.13	2,391,974.78	2,477,165.79	
Debt Service		1,227,732.40	1,227,732.40	1,227,732.40	1,227,732.40	1,227,732.40	1,227,732.40	1,227,732.40	1,227,732.40	1,227,732.40	1,227,732.40	1,227,732.40	1,227,732.40	1,227,732.40	1,227,732.40	1,227,732.40	
Net Cash Flow		282,506.60	337,354.16	394,117.52	452,859.41	513,644.38	576,538.80	641,610.97	708,931.09	778,571.34	850,605.88	925,110.93	1,002,164.75	1,081,847.73	1,164,242.38	1,249,433.39	
Debt Service Coverage		1.23	1.27	1.32	1.37	1.42	1.47	1.52	1.58	1.63	1.69	1.75	1.82	1.88	1.95	2.02	
Letter of Credit Fee		225,900.00	225,900.00	225,900.00	225,900.00	225,900.00	225,900.00	225,900.00	225,900.00	225,900.00	225,900.00	225,900.00	225,900.00	225,900.00	225,900.00	225,900.00	
Debt Service Coverage after LOC		1.05	1.09	1.14	1.18	1.23	1.29	1.34	1.39	1.45	1.51	1.57	1.63	1.70	1.76	1.83	
Net Cash Flow after LOC	**($2,462,000)	56,606.60	111,454.16	168,217.52	226,959.41	287,744.38	350,638.80	415,710.97	483,031.09	552,671.34	624,705.88	699,210.93	776,264.75	855,947.73	938,342.38	1,023,533.39	11,644,689.01 ***
Internal Rate of Return																	17.85%

*Below market rents: 1988 Section 8 rents ($553 and $694) trended at 5% for 2 years
Rents reduced by utility allowance: $60 for 2 BR, $70 for 3 BR
**Owner's equity contribution
***Residual value: 90% of Year 15 NOI capitalized at 10% less outstanding mortgage balance.

Charlestown Meadows, Westborough, Massachusetts
Letter of Credit Enhanced TELLER Bond Issue

Unit Type	# Units	Rent/Mo.	Annual Income
1 BR Market	24	$825	$237,600
2 BR Market	75	980	$882,000
2 BR Below Market	25	550 *	$165,000
3 BR Market	10	1,100	$132,000
3 BR Below Market	3	695 *	$25,020
	137		$1,441,620

1.04 = Rental Income Inflator
0 = Monthly Income from Commercial
1.05 = Commercial Income Inflator
$0 = Monthly Income from Laundry
1.05 = Laundry Income Inflator
0.05 = Vacancy Factor for Market Units
0.03 = Vacancy Factor for Below-Market Units
$369,900 = Operating and Maintenance Expenses (@ $2,700/unit)
1.05 = Expenses Inflation Factor
$9,600,000 = Amount of Bond Issue
0.075 = Interest Rate (10 year maturity)
0.0846712 = Debt Service Constant on Bonds (30 year amortization)
$9,970,000 = Letter of Credit Amount
0.015 = Letter of Credit fee

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11	Year 12	Year 13	Year 14	Year 15	
Gross Rental Income	$1,441,620.00	$1,499,284.80	$1,559,256.19	$1,621,626.44	$1,686,491.50	$1,753,951.16	$1,824,109.20	$1,897,073.57	$1,972,956.51	$2,051,874.78	$2,133,949.77	$2,219,307.76	$2,308,080.07	$2,400,403.27	$2,496,419.40	
Commercial Income	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
Laundry Income	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
Gross Income	1,441,620.00	1,499,284.80	1,559,256.19	1,621,626.44	1,686,491.50	1,753,951.16	1,824,109.20	1,897,073.57	1,972,956.51	2,051,874.78	2,133,949.77	2,219,307.76	2,308,080.07	2,400,403.27	2,496,419.40	
Vacancy for Market Units	62,580.00	65,083.20	67,686.53	70,393.99	73,209.75	76,138.14	79,183.66	82,351.01	85,645.05	89,070.85	92,633.69	96,339.03	100,192.60	104,200.30	108,368.31	
Vacancy for Below-Market Units	5,700.60	5,928.62	6,165.77	6,412.40	6,668.90	6,935.65	7,213.08	7,501.60	7,801.66	8,113.73	8,438.28	8,775.81	9,126.84	9,491.92	9,871.59	
Effective Gross Income	1,373,339.40	1,428,272.98	1,485,403.90	1,544,820.05	1,606,612.85	1,670,877.37	1,737,712.46	1,807,220.96	1,879,509.80	1,954,690.19	2,032,877.80	2,114,192.91	2,198,760.63	2,286,711.05	2,378,179.49	
Expenses	369,900.00	388,395.00	407,814.75	428,205.49	449,615.76	472,096.55	495,701.38	520,486.45	546,510.77	573,836.31	602,528.12	632,654.53	664,287.25	697,501.62	732,376.70	
Net Operating Income	1,003,439.40	1,039,877.98	1,077,589.15	1,116,614.56	1,156,997.09	1,198,780.82	1,242,011.08	1,286,734.51	1,332,999.03	1,380,853.88	1,430,349.68	1,481,538.38	1,534,473.37	1,589,209.43	1,645,802.79	
Debt Service	812,843.52	812,843.52	812,843.52	812,843.52	812,843.52	812,843.52	812,843.52	812,843.52	812,843.52	812,843.52	812,843.52	812,843.52	812,843.52	812,843.52	812,843.52	
Net Cash Flow	190,595.88	227,034.46	264,745.63	303,771.04	344,153.57	385,937.30	429,167.56	473,890.99	520,155.51	568,010.36	617,506.16	668,694.86	721,629.85	776,365.91	832,959.27	
Debt Service Coverage	1.23	1.28	1.33	1.37	1.42	1.47	1.53	1.58	1.64	1.70	1.76	1.82	1.89	1.96	2.02	
Letter of Credit Fee	149,550.00	149,550.00	149,550.00	149,550.00	149,550.00	149,550.00	149,550.00	149,550.00	149,550.00	149,550.00	149,550.00	149,550.00	149,550.00	149,550.00	149,550.00	
Debt Service Coverage after LOC	1.05	1.10	1.14	1.19	1.24	1.29	1.34	1.40	1.46	1.51	1.58	1.64	1.70	1.77	1.84	
Net Cash Flow after LOC **($2,629,000)	41,045.88	77,484.46	115,195.63	154,221.04	194,603.57	236,387.30	279,617.56	324,340.99	370,605.51	418,460.36	467,956.16	519,144.86	572,079.85	626,815.91	683,409.27	7,761,843.59 ***
Internal Rate of Return																13.10%

*Below market rents: 1988 Section 8 rents ($553 and $694) trended at 5% for 2 years
Rents reduced by utility allowance: $60 for 2 BR, $70 for 3 BR
**Owner's equity contribution
***Residual value: 90% of Year 15 NOI capitalized at 10% less outstanding mortgage balance.

COPY

Adams, Harkness & Hill, Inc.

Ex B #24

Charlestown Meadows, Westborough
Sources and Uses of Funds

	180 Units
Sources of Funds:	
Bond Proceeds	$12,500,000
Equity*	3,147,000
	$15,647,000
Uses of Funds:	
Residential construction ($49,500/unit)	$ 8,910,000
Site work and sewer connection	1,750,000
Land cost and carry	1,000,000
Surveys, permits	180,000
Architect/engineer	475,000
Construction interest (24 months on 1/2 at 6.75%)**	844,000
Taxes and insurance	92,000
Legal and accounting	200,000
Title and recording	62,000
Issuance costs (4%)	500,000
LOC fee (2 years)	388,000
Rent up and marketing ($1,000/unit)	180,000
Developer's fee (10% of construction costs)	1,066,000
	$15,647,000

10% of construction cost

*Sources of Equity

Developer's fee	$ 1,066,000
Cash (from syndication proceeds)	2,081,000
	$ 3,147,000

not syndication proceeds in entirety

**Anticipates three phases of construction, 60 units each over three 8-month periods.

Internal Rate of Return 14.88%

MHH:llp
September 6, 1991

Charlestown Meadows, Westborough, Massachusetts
Letter of Credit Enhanced TELLER Bond Issue

Unit Type	# Units	Rent/Mo.	Annual Income
1 BR Market	9	$725	$78,300
2 BR Market	126	$850	$1,285,200
2 BR Below–Mkt*	33	$576	$228,096
3 BR Market	9	$1,000	$108,000
3 BR Below–Mkt*	3	$649	$23,364
	180		$1,722,960

Assumptions

1.04 = Market Rental Income Inflator
1.04 = Below–Market Rental Income Inflator
0 = Monthly Income from Commercial
$1,440 = Monthly Income from Laundry @ $8.00 /unit
1.04 = Laundry Income Inflator
0.05 = Vacancy Factor for Market Units
0.03 = Vacancy Factor for Below–Market Units
$504,000 = Operating and Maintenance Expenses @ $2,800 /unit
1.05 = Expenses Inflation Factor
6.750% = Interest Rate (7 – 10 years)
7.857% = Debt Service Constant on Bonds (30 year amortization)
1.500% = Letter of Credit Fee

Bond and LOC Amount

$12,500,000 = Bond Amount
$12,933,594 = Letter of Credit Amount

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11	Year 12	Year 13	Year 14	Year 15	
Market Rental Income	$1,471,500.00	$1,530,360.00	$1,591,574.40	$1,655,237.38	$1,721,446.87	$1,790,304.75	$1,861,916.94	$1,936,393.61	$2,013,849.36	$2,094,403.33	$2,178,179.47	$2,265,306.64	$2,355,918.91	$2,450,155.67	$2,548,161.89	
Below–Market Rental Income	251,460.00	261,518.40	271,979.14	282,858.30	294,172.63	305,939.54	318,177.12	330,904.21	344,140.37	357,905.99	372,222.23	387,111.12	402,595.56	418,699.38	435,447.36	
Commercial Income	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
Laundry Income	17,280.00	17,971.20	18,690.05	19,437.65	20,215.16	21,023.76	21,864.71	22,739.30	23,648.87	24,594.83	25,578.62	26,601.77	27,665.84	28,772.47	29,923.37	
GROSS INCOME	1,740,240.00	1,809,849.60	1,882,243.58	1,957,533.33	2,035,834.66	2,117,268.05	2,201,958.77	2,290,037.12	2,381,638.60	2,476,904.15	2,575,980.31	2,679,019.53	2,786,180.31	2,897,627.52	3,013,532.62	
Vacancy for Market Units	73,575.00	76,518.00	79,578.72	82,761.87	86,072.34	89,515.24	93,095.85	96,819.68	100,692.47	104,720.17	108,908.97	113,265.33	117,795.95	122,507.78	127,408.09	
Vacancy for Below–Market Units	7,543.80	7,845.55	8,159.37	8,485.75	8,825.18	9,178.19	9,545.31	9,927.13	10,324.21	10,737.18	11,166.67	11,613.33	12,077.87	12,560.98	13,063.42	
EFFECTIVE GROSS INCOME	1,659,121.20	1,725,486.05	1,794,505.49	1,866,285.71	1,940,937.14	2,018,574.62	2,099,317.61	2,183,290.31	2,270,621.93	2,361,446.80	2,455,904.67	2,554,140.86	2,656,306.50	2,762,558.76	2,873,061.11	
Expenses	504,000.00	529,200.00	555,660.00	583,443.00	612,615.15	643,245.91	675,408.20	709,178.61	744,637.54	781,869.42	820,962.89	862,011.04	905,111.59	950,367.17	997,885.53	
NET OPERATING INCOME	1,155,121.20	1,196,286.05	1,238,845.49	1,282,842.71	1,328,321.99	1,375,328.72	1,423,909.41	1,474,111.70	1,525,984.38	1,579,577.38	1,634,941.78	1,692,129.82	1,751,194.91	1,812,191.59	1,875,175.58	
Debt Service**	843,750.00	982,150.00	982,150.00	982,150.00	982,150.00	982,150.00	982,150.00	982,150.00	982,150.00	982,150.00	982,150.00	982,150.00	982,150.00	982,150.00	982,150.00	
Net Cash Flow	311,371.20	214,136.05	256,695.49	300,692.71	346,171.99	393,178.72	441,759.41	491,961.70	543,834.38	597,427.38	652,791.78	709,979.82	769,044.91	830,041.59	893,025.58	
Debt Service Coverage	1.37	1.22	1.26	1.31	1.35	1.40	1.45	1.50	1.55	1.61	1.66	1.72	1.78	1.85	1.91	
Letter of Credit Fee	194,003.91	194,003.91	194,003.91	194,003.91	194,003.91	194,003.91	194,003.91	194,003.91	194,003.91	194,003.91	194,003.91	194,003.91	194,003.91	194,003.91	194,003.91	
Debt Service Coverage after LOC	1.14	1.02	1.06	1.11	1.15	1.20	1.25	1.30	1.36	1.41	1.47	1.53	1.59	1.65	1.71	
Net Cash Flow after LOC *** (2,061,000)	117,367.29	20,132.14	62,691.58	106,688.80	152,168.08	199,174.81	247,755.50	297,957.79	349,830.48	403,423.48	458,787.88	515,975.92	575,041.00	636,037.68	699,021.67	7,672,050.72 ****
Internal Rate of Return	14.88%															

*Below Market rents: 1991 Section 707 rent ($554 and $624) trended at 4% for one year
**Interest only in Year 1.
***Owner's equity contribution
****Residual value: 90% of Year 15 NOI capitalized at 10% less outstanding mortgage balance.

06–Sep–91

Adams, Harkness & Hill, inc.

MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K) CERTIFICATION

I hereby certify that, to the best of my knowledge, the foregoing application complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including but not limited to:

Rule 11(b) (applications for direct appellate review);

Rule 16(a)(13) (addendum);

Rule 16(e) (references to the record);

Rule 18 (appendix to the briefs);

Rule 20 (form and length of briefs, appendices, and other documents)

Rule 21 (redaction)

The brief is in the Courier New, 12-point font, and was composed on Microsoft Word (Version 2504 Build 16.0.18730.20220). The number of non-excludable words contained in this application for direct appellate review is 1213 words.

CERTIFICATE OF SERVICE

I, Benjamin B. Tymann, hereby certify, under the penalties of perjury that on June 27, 2025, I caused a true and accurate copy of the foregoing to be served upon counsel of record via this Court's e-filing system and electronic mail:

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/s/ Benjamin B. Tymann
_____
Benjamin B. Tymann