

HUGGINS AND WITTEN, LLC

156 Duck Hill Road
Duxbury, Massachusetts 02332 and
132 Adams Street, Suite 7
Newton, Massachusetts 02458
781-934-0084
781-934-2666 (facsimile)

BY FEDEX 8755 7179 2430

September 18, 2014

Ms. Lorraine Nessar,
Clerk
Housing Appeals Committee
Department of Housing and Community Development
100 Cambridge Street
3rd Floor
Boston, MA 02114

RE: In the Matter of Stoneham Board of Appeals and Weiss Farm Apartments, LLC

Dear Ms. Nessar:

On behalf of the Stoneham Board of Appeals and in the above noted matter, please find enclosed the Board's interlocutory appeal.

Please contact me at the Duxbury address noted above with any questions or if you require any additional information.

Thank you.

Respectfully submitted on behalf of the Stoneham Board of Appeals as special counsel,

HUGGINS AND WITTEN, LLC



Jonathan D. Witten

cc: Richard Gallogly, Esq.
Department of Housing and Community Development, Associate Director of Community Services
Stoneham Board of Appeals
William Solomon, Esq., Stoneham Town Counsel

COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

**IN THE MATTER OF STONEHAM BOARD OF APPEALS AND
WEISS FARM APARTMENTS, LLC¹**

INTERLOCUTORY APPEAL OF THE STONEHAM BOARD OF APPEALS

INTRODUCTION

Pursuant to the provisions of 760 CMR 56.03(8)(a), by letter dated July 24, 2014, the Stoneham Board of Appeals (“Board”) informed the Department of Housing and Community Development (“DHCD”), with a copy of the same to counsel for Weiss Farm Apartments, LLC, that it believed the Town of Stoneham consistent with local needs, as that term is found at G.L. c.40B, s.20 and 760 CMR 56.00 et al, as the Town of Stoneham met the statute’s “1.5% General Land Area Minimum” and the regulation’s “related application” provision.

By letter dated September 2, 2014 (distributed to the parties by electronic mail on September 5, 2014 and received by undersigned counsel on September 8, 2014), DHCD “[A]fter careful analysis”, informed the Town of Stoneham that “the Board has not met the burden of proof in its assertion that a denial with conditions [sic] would be consistent with local needs. DHCD’s September 2, 2014 letter is attached as Exhibit 1.²

¹Housing Appeals Committee “Standing Order” 10-01 states, in relevant part, “DHCD shall not be named a party to the appeal”. Notwithstanding the caption of the current appeal—prepared so as to comply with “Standing Order” 10-01—the Board reserves all rights to call as a witness any DHCD employee who participated in above noted September 2, 2014 decision and subpoena any relevant document in this matter.

²The requirements purportedly imposed by 760 CMR 56.03(8)(a)—shifting the burden of proof of determination of consistency with local needs onto the municipality—are invalid. The Board reserves the right to challenge the imposition of the requirements of 760 CMR 56.03(8), inclusive.

As grounds therefore, the Board states that DHCD wrongly concluded that the Town of Stoneham is not "consistent with local needs" with regard to the application for a comprehensive permit filed by Weiss Farm Apartments, LLC.

FACTS AND PRESUMPTIONS

1. On or about June 30, 2014, Weiss Farm Apartments, LLC filed a comprehensive permit application with the Town of Stoneham for the development of 264 rental dwelling units on a 25.657 acre parcel of land with an address of 170 Franklin Street, Stoneham, Massachusetts.
2. The total land area of the Town of Stoneham is 4,252.35 acres.
3. Excluded land from the total land area, according to the formula found at G.L. c.40B, s.20 is 2,110.4 acres.
4. Developable land in the Town of Stoneham—the total land area less excluded land area—is 2,141.95 acres.
5. 1.5% of the developable land area is 32.1 acres.³
6. The Department of Housing and Community Development (DHCD) includes ten housing developments in the Town of Stoneham on DHCD's January 28, 2014 Subsidized Housing Inventory (SHI), each identified by a DHCD identification number.
7. The identification number and acreage of the parcel on which DHCD has identified existing qualified subsidized housing developments are as follows:

³ DHCD appears to state that the 1.5% General Land Area Minimum for the Town of Stoneham is 28.74 acres. See DHCD decision at page 2. The Board accepts the calculation of 28.74 acres made by DHCD, the agency entrusted to make these determinations (see 760 CMR 56.03(8)(a)).

- a. ID# 3041, 4.95 acres
 - b. ID# 3042, 8.77 acres
 - c. ID# 3043, 8.77 acres
 - d. ID# 3044, 8.77 acres
 - e. ID# 3045, 8.77 acres
 - f. ID# 3046, 2.83 acres
 - g. ID# 3049, 8.17 acres
 - h. ID# 4469, 7.0 acres
 - i. ID# 9094, 1.01 acres
 - j. ID# 9648, 4.95 acres
8. The total land area of the developments identified by DHCD in DHCD's SHI and enumerated in ¶ 7 above, is 63.99 acres.
 9. SHI housing exists in Stoneham on sites comprising more than 1.5% of the total land area zoned for residential, commercial and industrial use in the Town of Stoneham pursuant to G.L. c.40B, s.20.
 10. In its opposition to the Board's assertion that the Town is consistent with local needs, counsel for the applicant, at Table 1, stated that the "SHI Eligible Land Area" in the Town of Stoneham is 28.74 acres.
 11. On or about December 4, 2013, at the request of Weiss Farm, Inc., the Stoneham Planning Board voted to approve the endorsement of a plan dividing a 26.834-acre parcel into two lots.
 12. On December 24, 2014, the plan approving the above noted land division was recorded at the Middlesex Registry of Deeds at Plan Book 1031 of 2013.
 13. One of the two lots created following the above noted land division is the parcel of land identified in ¶ 1, above. Said lot consists of 25.657 acres.
 14. Less than 12 months elapsed between the filing of the plan dividing the above noted 26.834-acre parcel and the comprehensive permit application of Weiss Farm Apartments, LLC.

15. The above noted filing is an “other approval related to the construction on the same land” as that clause is found at 760 CMR 56.03(7).
16. The above noted plan filing did not include at least 10% SHI dwelling units, as that clause is found at 760 CMR 56.03(7).

CLAIMS OF ERROR

Count I : The Town is Consistent with Local Needs Pursuant to the “1.5% General Land Area Minimum” of G.L. c.40B, s.20

17. The Board repeats, re-alleges, and incorporates fully herein the allegations contained in paragraphs 1-16, above.
18. DHCD erroneously concluded that the Town of Stoneham is not consistent with local needs pursuant to the “1.5% General Land Area Minimum”.
19. In reaching its erroneous conclusion, DHCD wrongly states that “the asserted land is not beyond reasonable dispute or otherwise presumed to be accurate”.
20. As the Commonwealth’s agency responsible for compiling critical statistics pertaining to the state’s cities and towns, DHCD well knows the accuracy of the asserted land area identified by the Town of Stoneham.
21. DHCD erroneously accuses the Board of “artificially boosting the total count” of the Town’s qualifying land area but in fact, each of the qualifying developments identified by the Board and identified in ¶ 7 above, are included on the applicable DHCD Subsidized Housing Inventory (SHI).
22. DHCD’s decision wrongly concludes that “...even assuming the Board’s assertion that 28.74 acres of land constituting total land area under 760 CMR 56.03(b) is correct and that the method of calculating area occupied by SHI Eligible Housing units meets the regulatory requirement, the Board has failed to establish that it has met the 1.5% threshold” where the applicant has stated that SHI Eligible Land Area in Stoneham is 28.74 acres.

23. With respect to the Town of Stoneham's status pursuant to the General Land Area Minimum of G.L. c.40B, s.20, DHCD's September 2, 2014 decision is arbitrary, capricious, whimsical, unsupported by evidence and based on errors of law.

Count II: The December 2, 2014 Plan Filing and Planning Board Endorsement Triggers the "Related Application" Provision of 760 CMR 56.03(7)

24. The Board repeats, re-alleges, and incorporates fully herein the allegations contained in paragraphs 1-23, above.
25. DHCD erroneously concluded that the filing of an approval not required plan for the locus from which the applicant's comprehensive permit project land derives "was not an approval" and therefore the Town of Stoneham is not consistent with local needs pursuant to 760 CMR 56.03(7).
26. DHCD's erroneous conclusion that the Town of Stoneham is not consistent with local needs pursuant to 760 CMR 56.03(7) is based on the agency's patently wrong statement that "[T]here was also no application for approval as the filing was for an Approval Not Required" [sic]. The application that DHCD claims does not exist is found at Exhibit 2.
27. DHCD's erroneous conclusion the Town of Stoneham is not consistent with local needs pursuant to 760 CMR 56.03(7) is further based on the agency's nonsensical statement that "...the ANR plan filing related to the lack of a subdivision for purposes of M.G.L. c.41 §81-P and did not relate to construction on the land".
28. DHCD's erroneous conclusion that the Town of Stoneham is not consistent with local needs pursuant to 760 CMR 56.03(7) is further based on DHCD's totally irrelevant reference to its own "Approval Not Required" handbook and its tortured and incorrect conclusion that "Although it [the approval not required division that the applicant sought and obtained] may essentially create a lot(s) by allowing the plan to be recorded, it does not meet the Related Application provision since it does not involve construction on the proposed Comprehensive Permit site".

29. With respect to the Town of Stoneham's status pursuant to the related application provisions of 760 CMR 56.00 et al., DHCD's September 2, 2014 decision is arbitrary, capricious, whimsical, unsupported by evidence and based on errors of law.

Wherefore, the Stoneham Board of Appeals requests that the Housing Appeals Committee reverse the decision of DHCD in this matter and conclude that the Town of Stoneham is "consistent with local needs" based on satisfaction of the 1.5% General Land Area Minimum, and based on the pre-existence of a Related Application pursuant to G.L. c.40B, s.20 and 760 CMR 56.00 et seq.

Respectfully submitted on behalf of the Stoneham Board of Appeals as special counsel,

HUGGINS AND WITTEN, LLC

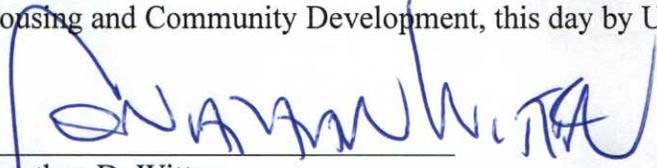


Jonathan D. Witten, BBO 636337
Barbara Huggins, BBO 562535
156 Duck Hill Road
Duxbury, MA 02332
781-934-0084
jon@hugginsandwitten.com

September 18, 2014

CERTIFICATE OF SERVICE

I certify that I sent a true copy of the above noted Interlocutory Appeal, to counsel for Weiss Farm Apartments, LLC and the Associate Director of Community Services at the Department of Housing and Community Development, this day by US Mail, postage prepaid.



Jonathan D. Witten

September 18, 2014

EXHIBIT 1



Commonwealth of Massachusetts
**DEPARTMENT OF HOUSING &
COMMUNITY DEVELOPMENT**

Deval L. Patrick, Governor ♦ Aaron Gornstein, Undersecretary

September 2, 2014

Mr. Jonathon Whitten, Esq.,
Huggins and Witten, LLC
156 Duck Mill Rd
Duxbury, MA 02332 and
1172 Beacon Street, Suite 202
Newton, MA 02461

Decision on Grounds for Denial of Comprehensive Permit Application – Weiss Farm Apartments, LLC, Stoneham

Dear Mr. Witten:

The Department of Housing and Community Development (DHCD) is in receipt of the Town of Stoneham's July 24, 2014, letter to Weiss Farm Apartments, LLC, (Applicant), regarding its application for a Comprehensive Permit. The July 24, 2014, letter seeks to provide notice pursuant to 760 CMR 56.03(8) that the Town of Stoneham Zoning Board of Appeals (Board) considers the denial of Applicant's application for a Comprehensive Permit to be consistent with local needs. DHCD is also in receipt of an August 7, 2014 letter from the Applicant that challenges the Board's assertion that the Town of Stoneham denial is consistent with local needs.

Specifically, the Board claims that the Town of Stoneham is consistent with local needs based on the following assertions: 1) Subsidized Housing Inventory (SHI) Eligible Housing units occupy sites in Stoneham comprising more than 1.5% of the total land area as defined under 760 CMR 56.03(3) (b); and 2) the Related Application provision at 760 CMR 56.03(7) has been met. Pursuant to 760 CMR 56.03(8), DHCD addresses both assertions below.

General Land Area Minimum as Defined in 760 CMR 56.03(3) (b):

The Board claims that Subsidized Housing Inventory (SHI) Eligible Housing units occupy sites in Stoneham comprising more than 1.5% of the total land area as defined under 760 CMR 56.03 (3) (b). DHCD notes that the Board via its July 24, 2014 letter claims that the Town has 2,141.95 acres of developable land based on exclusions from total land area as defined under 760 CMR 56.03(3)(b).

The July 24, 2014 letter also notes that the 1.5% of the total land area land is 32.1 acres. Finally, the July 24, 2014 letter claims that the total qualifying land area (with respect to SHI units) is 50.85 acres, therefore meeting and exceeding the 32.1 acres, to support the Board's assertion that Town is "consistent with local needs" pursuant to Chapter 40B.

Discussion and Findings

Pursuant to 760 CMR 56.03(8), the Board shall have the burden of proving satisfaction of the grounds for asserting that a denial of a permit would be consistent with local needs; furthermore, the Board is to provide any necessary supportive documentation regarding the grounds it believes it has met. DHCD finds that the Board's letter and its accompanying table with asserted acreage did not provide necessary supportive documentation as it does not show that the land area used in its calculations is accurate and satisfies 760 CMR 56.03(3)(b)). The asserted land area is not beyond reasonable dispute or otherwise presumed to be accurate by DHCD for purposes of 760 CMR 56.03(8). Even assuming the Board could meet its burden of proof without other documentation, the documentation provided by the Applicant sufficiently rebuts the Board's assertion that it has met the 1.5% threshold. After careful analysis of the Town of Stoneham's Appraisal Summary Forms provided by the Applicant, which include land area for units qualifying under 760 CMR 56.03(3)(b), DHCD makes the following observations:

DHCD notes that the Board's letter counted the same land parcel several times, which undermines its argument that the Town is "consistent with local needs" pursuant to Chapter 40B. The Applicant points out, and provides Town of Stoneham Appraisal Summary Forms as supportive documentation, that four SHI projects (SHI ID #'s 3042, 3043, 3044 and 3045) are all located on the same parcel of land (8.77 acres in total) owned by the Stoneham Housing Authority (SHA). In addition, the Applicant notes that SHI #'s 3041 and 9648 are located on the same parcel of land (4.85 acres) and owned by the SHA. The Board appears to have counted various SHI projects as separate parcels artificially boosting the total count to 50.85 acres.

After reviewing all documentation, DHCD is in agreement with the Applicant that, even assuming the Board's assertion that 28.74 acres of land constituting total land area as defined under 760 CMR 56.03(3)(b) is correct and that the method of calculating area occupied by SHI Eligible Housing units meets the regulatory requirement,¹ the Board has failed to establish that it has met the 1.5% threshold.

Related Application as Defined in 760 CMR 56.03(7):

The Board also asserts consistency with local needs based on the Related Application provision as defined in 760 CMR 56.03(7). The regulation states:

¹ "Only sites of SHI Eligible Housing units inventoried by the Department or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, shall be included in toward the 1½ minimum. For such sites, that proportion of the site area shall count that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units." 760 CMR 56.03(3)(b).

Related Applications.

For the purposes of this subsection, a related application shall mean that less than 12 months has elapsed between the date of an application for a Comprehensive Permit and any of the following:

(a) the date of filing of a prior application for a variance, special permit, subdivision, or other approval related to construction on the same land, if that application was for a prior project that was principally non-residential in use, or if the prior project was principally residential in use, if it did not include at least 10% SHI Eligible Housing units;

(b) any date during which such an application was pending before a local permit granting authority;

(c) the date of final disposition of such an application (including all appeals); or

(d) the date of withdrawal of such an application. An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.

DHCD notes that the Board's letter states that the Applicant filed an Approval Not Required (ANR) plan with the Stoneham Planning Board to divide the land into two lots in November 2013. The ANR Plan was later endorsed by the Stoneham Planning Board (December 4, 2013). One of the two lots is the land comprising the proposed Comprehensive Permit.

Discussion and Findings

DHCD agrees with the Applicant that the Town's endorsement of the ANR plan was not an approval. Approval was not required on its face ("Approval Not Required") and the Town found approval was not required when it endorsed the ANR filing. There was also no application for approval as the filing was for an Approval Not Required. Even assuming there was such an application and approval, the ANR plan filing related to the lack of a subdivision for purposes of M.G.L. c. 41, §81P and did not relate to construction on the land.

DHCD notes that according to the DHCD Approval Not Required (ANR) Handbook, the court(s) has interpreted the Subdivision Control Law (M.G.L. c. 41, §§ 81K-81GG) to impose three standards that must be met in order for lots shown on a plan to be entitled to an endorsement by the Planning Board that "approval under the Subdivision Control Law is not required."

1. The lots shown on such plan must front on one of the three types of ways specified in Chapter 41, Section 81L, MGL;
2. The lots shown on such plan must meet the minimum frontage requirements as specified in Chapter 41, Section 81L, MGL; and,
3. A Planning Board's determination that the vital access to such lots as contemplated by Chapter 41, Section 81M, MGL, otherwise exists.

The endorsement of the ANR lots does not constitute approval for construction and/or a permit. Although it may essentially create a lot(s) by allowing the plan to be recorded, it does not meet the Related Application provision since it does not involve construction on the proposed Comprehensive Permit site.

Conclusion

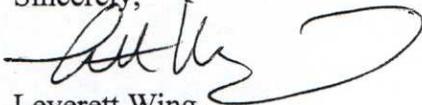
DHCD notes that the Applicant and Board have met the regulatory timeline(s) pursuant to 760 CMR 56.03(8) based on the information provided. After careful analysis of the documentation submitted and a review of the applicable regulations and guidelines, DHCD is in agreement with the Applicant, the Board has not met the burden of proof in its assertion that a denial with conditions would be consistent with local needs.

If either the Board or the Applicant wishes to appeal this decision pursuant to 760 CMR 56.03(8), that party shall file an interlocutory appeal with the HAC on an expedited basis, pursuant to 760 CMR 56.05(9) (c) and 56.06(7) (e) (11), within 20 days of its receipt of the decision, with a copy to the other party and to the Department.

The Board's hearing of the Project shall thereupon be stayed until the conclusion of the appeal, at which time the Board's hearing shall proceed in accordance with 760 CMR 56.05. Any appeal to the Courts of the HAC's ruling shall not be taken until after the Board has completed its hearing and the HAC has rendered a decision on any subsequent appeal.

If you have further questions, please contact Phillip DeMartino, Technical Assistance Program Coordinator, at (617) 573-1357 or Phillip.DeMartino@state.ma.us.

Sincerely,



Leverett Wing
Associate Director
Division of Community Services

cc: David Ragucci, Town Administrator, Stoneham
Thomas Boussy, Chairman, Stoneham, Board of Selectman
William Solomon Esq., Town Counsel, Stoneham
Robert Saltzman Esq., Chairperson, Stoneham Zoning Board of Appeals
Steven L. Cikatelli, Esq.
Miryam Bobadilla, Senior Technical Assistance Coordinator, DHCD
Margaux LeClair, Counsel/Fair Housing Specialist, DHCD
Greg Watson, Director of Comprehensive Permits, MassHousing

EXHIBIT 2

LAW OFFICES
CICATELLI & CICATELLI
266 MAIN STREET
STONEHAM, MASSACHUSETTS 02180-3502
AREA CODE 781 438-4060
TELECOPIER 781 438-9674

December 2, 2013

Stoneham Planning Board
Stoneham Town Hall
35 Central Street
Stoneham, Massachusetts 02180

Attn: Catherine Rooney

RE: 170 Franklin Street
Stoneham, MA
My file #13106-S

2013 DEC - 3 A 10:32

GENERAL
TOWN CLERK
REGISTRARS

Dear Mr. Chairman and Members:

Enclosed please find the following documents to be filed in connection with the above referenced application for endorsement of an ANR Plan in accordance with M.G.L. Ch. 41, Section 81P: Application for Endorsement Of Plan Believed Not To Require Approval(3 copies), seven copies of the proposed ANR Plan and Filing Fee check in the sum of \$100.00.

Kindly place this matter on your agenda for the Wednesday, December 4, 2013 meeting of the Board.

Thank you for you anticipated cooperation.

Respectfully submitted,

Steven L. Cicatelli

SLC/dml

Enclosures

cc John M. Corcoran and Company
cc Town Clerk
cc Harry R. Feldman, Inc.

HAND DELIVERED

Town of Stoneham

Form A

Application for Endorsement of Planning Board Believed not to require approval

December 2, 2013

Date

Stoneham Planning Board
Stoneham, MA

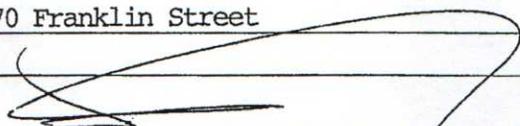
Gentleman:

The undersigned, believing that the accompanying plan of his property in the Town of Stoneham does not constitute a subdivision within the meaning of the subdivision Control Law, herewith submits said plan for a determination and endorsement that Planning Board approval under the Subdivision Control law is not required.

The undersigned believes that the division of land shown on this plan is not a subdivision for the following reasons:

Both Lots 1 & 2 shown on said plan have adequate frontage on Franklin
Street, a public way.

1. Applicant: John M. Corcoran and Company
Address: 100 Grandview Road, Suite 203, Braintree, MA 02184
2. Surveyor/Engineer: Harry R. Feldman, Inc.
Address: 112 Shawmut Avenue, Boston, MA 02118
3. Deed of property recorded in Middlesex South Registry of deeds:
Book 8474 Page 460
4. Location and description of property: 170 Franklin Street

Signature of owner: 
Address: 266 Main Street, Stoneham, MA 02180
Steven L. Cikatelli, Attorney for Applicant

NOTE: Evidence if necessary to show that the plan does not require approval must be filed with this application.

This form is to be made out in duplicate