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).

Office of the General Counsel
100 Cambridge St., Suite 300
Boston, Massachusetts 02114
(617) 53-1500

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. Cicatelli, Esq.
Miryam Bobadilla, Senior Technical Assistance Coordinator, DHCD
Margaux LeClair, Counsel/Fair Housing Specialist, DHCD
Greg Watson, Director of Comprehensive Permits, MassHousing