



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

Deval L. Patrick, Governor ♦ Timothy P. Murray, Lt. Governor ♦ Aaron Gornstein, Undersecretary

May 20, 2013

Kerry T. Ryan, Esq.,
Special Counsel to the Town of Hingham
c/o Morrissey, Wilson & Zafiropoulos, LLP
35 Braintree Hill Office Parks, Suite 404
Braintree, MA 02184

Comprehensive Permit Application – SEB/ Hingham LLC Villages on Main at 895/901 Main Street, Hingham

Dear Mr. Ryan:

The Department of Housing and Community Development (DHCD) is in receipt of your April 12, 2013 letter to Mr. Robert Engler (the Applicant) regarding the application for a Comprehensive Permit filed by SEB/ Hingham LLC Villages on Main at 895/901 Main Street, Hingham (SEB/ Hingham LLC). Your letter seeks to provide notice pursuant to 760 CMR 56.03(8), that the Town of Hingham Zoning Board of Appeals (the Board) considers the denial of the Comprehensive Permit filed by SEB/ Hingham to be consistent with local needs.

Specifically, the Board claims a “safe harbor,” having satisfied the statutory minima as defined at 760 CMR 56.03(1). This same claim was made by the Town in the Matter of Hingham Zoning Board of Appeals and Avalon Bay Communities, Inc., Housing Appeal Communities Docket No 12-03, Interlocutory Decision Regarding Safe Harbor dated January 14, 2013. This safe harbor would be triggered by counting all units at the Erickson Retirement Community’s “Linden Ponds” project. Linden Ponds is a Continuing Care Retirement Community (CCRC) with a planned build out of 1,750 units that currently consists of 986 units.

Background

DHCD has consistently stated that only 25% or 216 units at Linden Ponds (SHI# ID 5711) would count for the SHI statistics. Both the Applicant and the Board have submitted extensive documentation to bolster their respective arguments. After careful analysis, DHCD makes the following observations:

- DHCD has consistently stated that Linden Ponds was not a rental project and the Guidelines that detail how rental units’ count on the SHI is not applicable to CCRC.
- At the time of permitting the Linden Ponds project DHCD had no regulations or guidelines specific to CCRC.

- Because the issue of how the units were to be counted in the SHI had not been resolved to the satisfaction of all parties, former DHCD Director Jane Gumble met with Erikson Retirement Communities on September 20, 2005, and DHCD staff met with town officials on October 14, 2005. These discussions were confirmed in a letter from the Director dated November 16, 2005.
- In the November 16, 2005 letter, former DHCD Director Jane Gumble described Linden Ponds as a “unique model” under 40B. In this same letter, DHCD developed a methodology and agreed to count up to 25% of the units as long as the occupants were income eligible and the entrance deposits were subsidized. DHCD described this approach as “more than reasonable and provides the greatest benefit to the town and the developer” and “this methodology was developed specifically for Linden Ponds as it was a unique model in the 40B context.”

Most notably, the Housing Appeal Committee (HAC) recently ruled on the same safe harbor claim. Specifically, Hingham’s claim that the statutory minima as defined at 760 CMR 56.03(1) had been achieved. In the Matter of Hingham Zoning Board of Appeals and Avalon Bay Communities, Inc., HAC Docket No 12-03, Interlocutory Decision Regarding Safe Harbor dated January 14, 2013, HAC made the following key findings:

- Under current policy, Hingham has not achieved the 10% housing unit minimum.
- Principles of retroactivity do not bar application of current policy.
- The Board’s argument that all of the Linden Ponds units should count because it relied upon actions of DHCD lacks merit.

The Conclusion in the Decision states:

“For the reasons stated above, we conclude that Hingham had not achieved the 10% housing unit minimum at the time of AvalonBay Communities’ application, and we affirm DHCD’s August 17, 2012 finding that “the Board has not met the burden of proof... that Hingham has achieved a ‘safe harbor.’”

The key issue is still the determination of the nature of the tenure of Linden Ponds units. As a new form of tenure, and with unique barriers to affordability, the question was never how many units to count; it was if any units should be included on the SHI. However, DHCD as a state agency clearly has the rights and responsibilities as an administrative agency to make decisions and set policy for instances where no clear guidelines and regulations exist. This is exactly what occurred in the context of DHCD’s November 16, 2005 letter.

Finding

Once again, DHCD finds that the Board has not met the burden of proof in its assertion that a denial or approval with conditions would be consistent with local needs on the grounds that Hingham has achieved a “safe harbor” pursuant to the statutory minima provisions as set forth at 760 CMR 56.03(1).

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DHCD was hopeful that the recent Interlocutory Decision (Matter of Hingham Zoning Board of Appeals and Avalon Bay Communities, Inc., HAC Docket No 12-03, Interlocutory Decision Regarding Safe Harbor dated January 14, 2013) had settled this issue.

If either the Board or the Applicant wishes to appeal this pursuant to 760 CMR 56.03(8)(a), 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: Ted C. Alexiades, Town Administrator, Hingham
W. Tod McGrath, Chairman, Hingham Zoning Board of Appeals
Miryam Bobadilla, Senior Technical Assistance Coordinator, DHCD
Margaux LeClair, Senior Policy Analyst/Fair Housing Specialist, DHCD
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