



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

Charles D. Baker, Governor ♦ Karyn E. Polito, Lt. Governor ♦ Chrystal Komegay, Undersecretary

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Comprehensive Permit Application – River Stone LLC, Hingham, MA.

Dear Mr. Ryan:

The Department of Housing and Community Development (DHCD) is in receipt of the Town of Hingham's May 12, 2016, letter to River Stone LLC., (Applicant), regarding its application for a Comprehensive Permit. The May 12, 2016, letter seeks to provide notice pursuant to 760 CMR 56.03(8) that the Town of Hingham Zoning Board of Appeals (Board) considers the denial of the Applicant's application for a Comprehensive Permit to be consistent with local needs. DHCD is also in receipt of the Applicant's May 20, 2016, letter challenging the Board's denials of the Comprehensive Permit. Specifically, the Board claims a "safe harbor," having satisfied the statutory minima as defined at 760 CMR 56.03(1).

Background

The Town's assertion of the safe harbor is based on the Town's claim that all of the units at the Erickson Retirement Community's "Linden Ponds" project, a Continuing Care Retirement Community (CCR) that currently consists of 986 units (with a planned build out of 1,750 units), should be included on the Subsidized Housing Inventory (SHI). The Town has made the same claim on numerous prior occasions, including an assertion of the safe harbor that was the subject of a determination by the Housing Appeals Committee in the *Matter of Hingham Zoning Board of Appeals and Avalon Bay Communities, Inc.*, Housing Appeals Committee Docket No 12-03, Interlocutory Decision Regarding Safe Harbor dated January 14, 2013 and in the *Matter of Hingham Zoning Board of Appeals and SEB/Hingham, LLC*, Housing Appeals Committee Docket No 13-02, Interlocutory Decision Regarding Safe Harbor dated November 7, 2013.

Both the Applicant and the Board have submitted extensive documentation to support their respective arguments. DHCD has carefully analyzed the documentation submitted, and has made its findings based

on that documentation in light of DHCD's published regulations and guidelines, the Housing Appeals Committee decision noted above, and prior DHCD determinations as set forth below.

Continuing Care Retirement Communities

Unlike an ordinary rental housing community, a CCR such as Linden Ponds imposes substantial economic burdens on residents, including entry fees that, as of the issuance of the original comprehensive permit in 2001, ranged between \$142,000 and \$326,000, and were subject to increase over time based on inflation and other economic factors such as mandatory monthly fees covering costs beyond simply "rent" for a unit.¹ With respect to affordability thresholds, CCRs are more akin to a homeownership model than a rental tenure. Additionally, residents of a CCR do not sign a lease, further differentiating CCR units from rental housing units.

At the time that the Linden Ponds project was permitted, DHCD had not yet adopted regulations or guidelines specific to CCRs. However, DHCD consistently stated (and has maintained since that time) that Linden Ponds was not a rental project, and that accordingly DHCD guidelines detailing how rental units count on the SHI would not apply to Linden Ponds.

In light of the ongoing dispute regarding whether and how the units were to be counted in the SHI, 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 then-Director Gumble dated November 16, 2005.

In the November 16, 2005 letter, former DHCD Director Jane Gumble reiterated a methodology under which DHCD agreed to count up to 25% of the units subject to two conditions: the units must be occupied by income-eligible households, and entrance deposit subsidy funds must remain available to assist income eligible households in accessing units at Linden Ponds. Several additional conditions applied, as detailed in the letter, which is included as Exhibit L to the Town's May 12, 2016 letter. Given the "less rigorous standard of affordability" at Linden Ponds, DHCD described this methodology as more than reasonable and providing the greatest benefit to the town and the developer."

On February 22, 2008, DHCD published Chapter 40B guidelines which distinguished CCRs from rental units, recognizing that the up-front entry fee poses a barrier to affordability not generally present in rental housing. DHCD's 2008 and current (December 2014) Chapter 40B guidelines also establish standards for inclusion of CCRs on the SHI, including:

- A requirement that a CCRs entrance fee policy must be reasonable, taking into account that many otherwise eligible households may not have owned a home previously, and therefore the value of their household assets may be limited. A policy that sets a minimum entry fee for such households that is equivalent to a 10% down payment on a homeownership unit for which a household at 80% of area median income, adjusted for household size, would be eligible, shall be deemed to be reasonable.
- A general limit on monthly fees, capping such fees at 35% of household income plus an allowance for meals, if provided, and

¹ According to Linden Ponds' website, entry fees as of January 1, 2016 started at \$168,000 for a studio and went up to \$626,000 for a "luxury two bedroom, two bath" unit.

- A requirement that any health care reserve fund must be reasonable, must be held for the benefit of the household for the exclusive purpose of paying for acute and skilled nursing care, and must be funded prior to determining whether a household has sufficient resources for the entrance deposit and excluded from the calculation of assets for the purposes of determining asset eligibility.

Based on the standards generally applicable to CCRs, none of the units at Linden Ponds would qualify for inclusion on the SHI.

Previous Rulings

It is important to note that DHCD has issued previous decisions specifically addressing the Town's assertion of the 10% safe harbor based on the status of units at Linden Ponds. On August 17, 2012, DHCD issued a ruling regarding the application for a Comprehensive Permit filed by Avalon Bay Hingham, Inc., Proposal for Recreation Park Drive, Hingham, MA. On May 20, 2013, DHCD issued a ruling regarding the application for a Comprehensive Permit filed by SEB/ Hingham LLC Villages on Main at 895/901 Main Street, Hingham (SEB/ Hingham LLC). In both these matters DHCD found that Hingham had not satisfied the statutory minima as defined at 760 CMR 56.03(1).

Most notably, the Housing Appeal Committee ruled on 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.*, Housing Appeals Committee Docket No 12-03, Interlocutory Decision Regarding Safe Harbor dated January 14, 2013, the Housing Appeals Committee 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 the Board 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 Avalon Bay 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 Housing Appeals Committee similarly concluded that Hingham had not achieved the 10% housing unit minimum in its Interlocutory Decision Regarding Safe Harbor in the *Matter of Hingham Zoning Board of Appeals and SEB/Hingham, LLC*.

The key issue in the determination of whether the Town has achieved the statutory minima is still the eligibility of Linden Ponds units for inclusion in the SHI. As Linden Ponds, at the time of its initial permitting, represented a new form of housing tenure, with unique barriers to affordability, the threshold question was whether *any* units should be included on the SHI. DHCD as a state agency clearly has the rights and responsibilities to make decisions and set policy for instances where no clear guidelines and regulations exist. This is what occurred in the context of DHCD's November 16, 2005, letter. Since that

time, DHCD has adopted Guidelines to specifically address the eligibility of CCR units for inclusion on the SHI; under those duly adopted Guidelines, none of the units at Linden Ponds would be eligible for inclusion. While DHCD acknowledges its obligation to honor the terms of the November 16, 2005 letter, inclusion of any additional units at Linden Ponds would violate clearly established DHCD policy regarding the treatment of CCRs.

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).

DHCD was hopeful that the Interlocutory Decision (*Matter of Hingham Zoning Board of Appeals and Avalon Bay Communities, Inc.*, Housing Appeals Committee 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 Housing Appeals Committee 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 Housing Appeals Committee’s ruling shall not be taken until after the Board has completed its hearing and the Housing Appeals Committee 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.

Sincerely,



Louis Martin
Associate Director
Department of Housing and Community Development

cc: Ted C. Alexiades, Town Administrator, Hingham
Joseph M. Fisher, Chairman, Hingham Zoning Board of Appeals
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