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0115472-00002

Joseph Freeman, Chairman
Hingham Zoning Board of Appeals
210 Central Street
Hingham, MA 02043

Re: Response to Comments
Broadstone Bar Cove Alliance, Beal Street, Hingham, Massachusetts

Dear Chairman Freeman and Members of the Board:

On behalf of Broadstone Bare Cove Alliance, LLC (the "Applicant"), the developer of a proposed M.G.L. c. 40B development at Beal Street, Hingham, Massachusetts (the "Project") presently before the Hingham Board of Appeals (the "Board"), this letter responds to the November 28, 2016 comment letter submitted to the Board by the Back River Condominium Trust (the "Trust") and comments made by the Trust's counsel at the Board's November 30, 2016 hearing in this matter. Although the Trust's letter and comments provide no support for any actual concerns with the Project, a response is required as the letter and comments disingenuously argue that the Board should merely deny the Project as the Town has achieved "consistent with local needs" status.

As the Board is likely aware, there is no "consistent with local needs" status under M.G.L. c. 40B, §§ 20-23 as argued by the Trust's counsel. Per c. 40B and its regulations, the Board is tasked with weighing whether an application is "consistent with local needs." Counsel to the Trust repeatedly confuses this fundamental principal in his argument. Here, the Town asserts, and the Applicant does not contest for the purposes of the present Application before the Board, that the Town meets the "10%" statutory minimum Safe Harbor and the so-called "Recent Progress Safe Harbor" pursuant to 760 CMR 56.03(1)(c) and 760 CMR 56.03(5). The Trust suggests incorrectly that the Board should deny the Project with no further review or comment, an action which the Trust implies will just make this Project "go away". However, such an outcome is not required as a matter of law, and is certainly not warranted here, where the Project is consistent with local needs as it will ultimately benefit the Town in reaching the so-called "10%" statutory minimum pursuant to M.G.L. c. 40B, §§ 20-23.

Although, in regard solely to the present Application and Project before the Board, the Applicant is no longer contesting the Town's assertion that it meets "10%" statutory minimum and the so-called "Recent Progress Safe Harbor" pursuant to 760 CMR 56.03(1)(c) and 760 CMR 56.03(5), the Trust's statement that "it cannot be disputed" that the Project is not consistent with local needs is wrong. Rather, the Board is the proper entity to review the Project and

determine if it is consistent with local needs. The fact that the Applicant has not elected to contest the safe harbors alone does not require the Board to deny the Project.

The Supreme Judicial Court (“SJC”) has held that “[n]othing in the definition of ‘consistent with local needs’ . . . , or in other provisions of [c. 40B], divests a local board of appeals of its authority to grant a comprehensive permit once a municipality satisfies its minimum affordable housing obligation. *Boothroyd v. Zoning Bd. of Appeals of Amherst*, 449 Mass. 333, 340 (2007). In fact, in *Amherst*, the SJC determined that a “municipality’s attainment of its minimum affordable housing obligation in many cases does not eliminate the need for affordable housing within its borders.” *Id.* at 341.

Here, the 220 units proposed for the Project provide significant benefit to the Town. All parties are well aware that the Board has asserted the “10%” statutory minimum on a number of occasions; however, the Department of Housing and Community Development (“DHCD”) continues to dispute the assertion and the Housing Appeals Committee (the “Committee”) has repeatedly ruled against the Town’s assertion. Approval of the Project, after a comprehensive review by the Board, will provide the requisite number of units for the Town to assert the “10%” statutory minimum regardless of the previous rulings of the DHCD or Committee. Further, approval of the Project will provide additional security against the 10%” statutory minimum after the next census in 2020. Also, as stated by the Trust’s counsel at the Board’s November 30, 2016 hearing, “the inoculation status that the Town has [because of the Recent Progress Safe Harbor] does not last forever.” The Recent Progress Safe Harbor is not only short-lived, until May 2016, but a cursory denial of the Project would not preclude the Applicant re-filing the same or larger project. Additionally, other applications could be filed on far less appropriate sites within the Town. Therefore, nothing is gained by any party in merely denying the Project as suggested by the Trust.

At the most recent hearing, the Board raised the issue of whether the denial sought by the Trust in its November 28, 2016 letter would preclude the Applicant from re-filing a comprehensive permit application. Although such a denial is unwarranted for the reasons discussed above, the denial would not preclude the Applicant from re-filing for the same or a larger project. The regulations expressly state that a Board’s decision to deny a project based upon attainment of one or more of the Statutory Minima “shall be without prejudice, and it shall not preclude re-filing of the Comprehensive Permit application at a later date.” *See* 760 CMR 56.03(1).

Additionally, Alliance’s withdrawal of its opposition to the Town’s assertion of Safe Harbor would not be deemed “res judicata” or otherwise preclude the Applicant from re-applying or challenging the assertion as part of a new application, as the withdrawal specifically

relates to only the present Application and Project before the Board. The withdrawal specifically references only the present Application before the Board being subject to the Safe Harbors and the withdrawal in no way limits future applications for a different project. As a result, the DHCD found that it did not have a “regulatory basis for making a determination” on the Town’s Safe Harbor assertions and stated that DHCD’s “inaction shall not be deemed to be a determination in favor of either party.” As (i) Alliance never took the position that the Town had attained Safe Harbor status; (ii) DHCD did not make a determination in favor the Town or Alliance; and (iii) the Memorandum of Agreement specifically contemplates that should Alliance be denied by the Board, the Agreement would be null, the withdrawal does not preclude a future application by the Applicant or an opposition to any future assertion of the Safe Harbors by the Board in regard to such future application.

We note that the Applicant has responded in a separate letter to the Trust’s comments on the scale and character of the Project in the context of the immediate and surrounding neighborhood. As the statements provided by the Trust on these issues are unsupported in the Trust’s letter and unsupported in fact, we provide no further comment at this time.

As the Board has the discretion to review and approve the Project under c. 40B regardless of its current Safe Harbor status, and because the Trust’s letter fails to provide any substantive reasons for denying the Project, the letter should be disregarded and the full review of the Project by the Board should continue. The Applicant is confident that upon review of all of the issues, the Board will find that the Project is thoughtfully designed to fit in with both the Town and neighborhood, and will have minimal impacts when compared to the benefits to the Town. We note that during the November 30, 2016 hearing the Trust’s counsel listed a number of concerns previously raised by the Board of Selectmen in regard to the initial filing for the Project. Those items of concern have been addressed following repeated meetings with representatives of abutting uses, department representatives and peer reviewers, and the plan revisions and modifications are currently under review by the Board.

We note that counsel for the Trust also made a separate request to the Board in an email dated December 2, 2016 seeking a copy of the Applicant’s purchase and sale agreement as evidence of site control. The Applicant has supplied sufficient evidence of site control and is not required to provide the purchase and sale agreement. As noted in counsel’s email, the Applicant has provided a copy of the notice of the purchase and sale agreement. In addition, the Applicant provided in its application to the Board a copy of the Project Eligibility Letter issued by MassHousing, which documents MassHousing’s finding pursuant to 760 CMR 56.04(1) that the Applicant controlled the property.

We are at a loss as to why the Trust's counsel would request that the Board seek production of the purchase and sale agreement at this juncture. Further evidence of site control is not an application requirement pursuant to 760 CMR 56.05. As the Board is aware, 760 CMR 56.05(4)(1) requires that the "Board shall not address matters in the hearing that are beyond its jurisdiction under M.G.L. c. 40B, §§ 20 through 23 and 760 CMR 56.00 and that lie solely within the authority of the Subsidizing Agency." In addition, the Housing Appeals Committee holds that a determination of Project Eligibility, which includes site control, shall be an irrebuttable presumption. *See* 760 CMR 56.07(3)(a); *see also Zoning Bd. of Appeals of Holliston v. Housing Appeals Committee*, No. 393326 (KCL), at 5 (Mass. Land Ct. June 24, 2010) ("HAC's position that the PEL establishes sufficient site control for purposes of the comprehensive permit process is reasonable.").

The Applicant looks forward to completing a full presentation and review of the Project. Thank you for your time and consideration. Please do not hesitate to contact me to discuss the above, or any other aspect of the Project.

Very truly yours,

James G. Ward

Cc: Susan Murphy, Esq.
Broadstone Bare Cove Alliance, LLC
Jeffery A. Tocchio, Esq.