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January 14, 2015

Massachusetts Department of Housing and Community Development
100 Cambridge Street, Suite 300
Boston, MA 02114
Attn: Phil DeMartino

Re: Dinosaur Rowe LLC project at 70 Rowe St., Newton MA

Dear Mr. DeMartino:

The City of Newton ("City") hereby corrects the record and responds to assertions made by Dinosaur Rowe LLC ("Applicant") in its submissions to the Department on January 8 and January 12, 2015.

The City Timely Submitted Proper Documentation

First, the City did not "retroactively supplement" its documentation. Backup documents provided by the City were pursuant to a public records request made by the Applicant and its counsel. The regulations require written notice of reaching the statutory minima, the grounds that have been met, the factual basis for that position, and any necessary supportive documentation. 760 CMR 56.03(8). The City of Newton provided this information when it timely notified the Applicant that it reached 1.5% land area for affordable housing, and therefore could require the project to be consistent with local needs. The City initially provided both a detailed chart showing the statutory grounds, factual descriptions and comprehensive calculations concerning how the 1.5% land area was reached. The City also provided a process summary describing what happens when a community has satisfied the 1.5% land area minimum. Nothing in the applicable regulations specifies the level of detail that must be provided. The City submits that this level of detail met the regulatory requirements.

There is No Legal Basis for Splitting Lots to Exclude SHI Land Area for Certain Projects

Second, Applicant protests a handful of affordable housing projects that it claims should

be reduced or discounted altogether from the numerator calculation. This position would ignore land area on which affordable housing has been constructed and currently exists. The position has no support in the regulations.

For example, the 180 units of rental housing on 6.88 acres in ArborPoint at Woodland Station count because they are "occupied, available for occupancy, or under permit as of the date of Applicant's initial submission to the Board," which is the standard required under the regulations. 760 CMR 56.03(3)(b). All of those units are on the Subsidized Housing Inventory ("SHI"), which means they have been certified by the Department and are presumed to be accurate. Id. at 56.03(2)(e) & (3)(a). Applicant claims that the Department should disregard its certification and abandon the presumption because the same land – if vacant without any affordable housing on it – could be excludable from the denominator's total land area because it is owned by the MBTA. Even though the regulations would allow MBTA owned land to be excluded from the denominator because it's unlikely that affordable housing would be built there, they do not require the Department to ignore the reality that in this instance affordable housing was actually built and currently exists on this land. Applicant's read of the regulations would ignore reality, undermine the Department's certification and the presumption of accuracy accorded to the SHI.

Similarly, the Applicant would split the West Suburban YMCA lot on which 28 units of SRO housing sits on 6.02 acres to address steep slopes. But those 28 units are all on the SHI, and there is no basis in the regulations for excluding a portion of the land area because the site has steep slopes that may be unbuildable. As with ArborPoint, the entire lot is used accessory to the principal residential use.

The Applicant's argument to exclude wetlands on the Winchester Street project is similar to the argument to exclude steep slopes on the YMCA parcel. Though certain protected wetlands are excludable from the denominator because they are unlikely to be built on, the Winchester Street wetland area is on a parcel that actually contains SHI Eligible Housing and therefore cannot simply be ignored without arbitrarily splitting the lot.

Nothing in the regulations or statutory scheme would allow for Applicant's arbitrary bifurcation of sites where SHI Eligible Housing Units are located, as suggested by the Applicant for the ArborPoint, YMCA and Winchester Street sites. Doing so would undermine the integrity of the calculation because none of the lots are split in the denominator. In order to be a true ratio, the numerator and denominator must be calculated the same way. In fact, the one authority on point determined that in calculating the general land area minimum under c. 40B, "sites are to be counted in the most natural, straightforward way, that is, that the entire sites should be counted. This is also consistent with DHCD guidance on the matter." Arbor Hill Holdings LP v. Weymouth Bd. Of Appeals, No. 02-09, at 4 (Housing Appeals Committee Sept. 24, 2003).

There Is No Legal Basis To Exclude Certain Other SHI Eligible Housing Projects

Third, the Applicant mistakenly seeks to exclude two other SHI Eligible Housing projects from the numerator calculation. The Applicant claims that one project, Weeks House, no longer counts even though it remains on the SHI because the restriction expired. The Applicant also claims that Riverside Station does not count because the permit has lapsed. The Applicant is wrong on both counts.

Weeks House has 75 rental units on the SHI, so all 3.69 acres of land area should count. Contrary to Applicant's assertion that the restriction has expired, the affordability restriction is

valid until November 2037 (see enclosed deed restriction from Middlesex County (South) Registry of Deeds, Book 27849, Page 365). In any event, the restrictions are perpetual as a matter of law so long as the project does not comply with zoning, as the Weeks House does not. Zoning Bd. Of Appeals of Wellesley v. Ardemore Apt. LP, 436 Mass. 811 (2002).

Riverside Station's 294 units and 25.97 acres remain SHI Eligible Housing because the special permit granted in October 2013 did not become final until February 2014 when appeals related to that permit were resolved. 760 CMR 56.03(2)&(8)(b).

The Boston Globe Article Submitted By Applicant Should Be Excluded

Fourth, in recent correspondence, the Applicant cites to an article printed in the Boston Globe on January 11, 2015. Media articles are not properly considered as part of the administrative record, and should not be admitted as such. In any event, a full reading of the article shows that the quote at issue referred to past calculations and is a disingenuous attempt to challenge the City's calculations.

Finally, the City is willing to meet with the Department to further explain its calculation methodology of the 1.5% land area and respond to any questions the Department may have.

Very truly yours,

Dennis A. Murphy

cc: Alan Schlesinger, Esq.
Dinosaur Rowe LLC

Encl.