



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

Charles D. Baker, Governor ◆ Karyn E. Polito, Lt. Governor

January 23, 2015

Ms. Brooke K. Lipsitt
Chairman, Newton Zoning Board of Appeals
City Hall-1000 Commonwealth Ave
Newton, MA 02459

Decision on Grounds for Denial of Comprehensive Permit Application – Dinosaur Rowe LLC, 70 Rowe St., Newton.

Dear Ms. Lipsitt:

The Department of Housing and Community Development (DHCD) is in receipt of the City of Newton's December 18, 2014, letter to Dinosaur Rowe LLC., (Applicant), regarding its application for a Comprehensive Permit for 70 Rowe Street, Newton. The December 18, 2014, letter seeks to provide notice pursuant to 760 CMR 56.03(8) that the City of Newton Zoning Board of Appeals (Board) considers the denial of the Applicant's application for a Comprehensive Permit to be consistent with local needs. Specifically, the Board claims that the City of Newton's denial is consistent with local needs based on the following assertion: Subsidized Housing Inventory (SHI) Eligible Housing units occupy sites in Newton comprising more than 1.5% of the total land area as defined under 760 CMR 56.03(3)(b).

DHCD is also in receipt of a December 29, 2014 letter from the Applicant that challenges the Board's assertion that the City of Newton's denial is consistent with local needs. The Applicant asserts the Board has not met the General Land Area Minimum, because the Board did not include necessary supporting documentation at the time of notice.

Background

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 in accordance with 760 CMR 56.03(1); furthermore, the Board is to provide any necessary supportive documentation regarding the grounds it believes it has met within 15 days of the opening of the local hearing for the Comprehensive Permit.

DHCD notes that this decision is solely based on what the Board officially submitted to the Applicant with a copy to DHCD, and the Applicant submitted to the Board with a copy to DHCD, under the 760 CMR 56.03(8) procedure/timelines. DHCD did not consider any documentation submitted by the Board or

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Applicant past the deadlines detailed in 760 CMR 56.03(8) for consistency with the regulations and in fairness to all parties.

Notice Requirements under 760 CMR 56.03(8):

The Applicant claims that the Board did not provide necessary supportive documentation as required under 760 CMR 56.03(8) procedure.

General Land Area Minimum as Defined under 760 CMR 56.03(3)(b):

The Board and the Applicant have submitted conflicting documentation/arguments, notably:

- The Board claims that the City of Newton has met the 1.5% General Land Area Minimum based on 135.21 acres of what the Board refers to as “developable land area,” divided by 7,208.08 acres of what the Board refers to as “total SHI land area” resulting in a calculation of 1.88%.
- The Applicant claims the Town has not met the General Land Area Minimum because the Board did not include necessary supporting documentation at the time of notice and the Board’s land area assertions are not beyond reasonable dispute and cannot otherwise be presumed accurate for purposes of 760 CMR 56.03(8).
- The Applicant provides two purported memoranda and an email from the City of Newton that appear to acknowledge that Newton had not achieved the 1.5% General Land Area Minimum prior to the December 18, 2014, letter.

DHCD’s Chapter 40B Regulations detail the calculation method for 1.5% Land Area as defined under 760 CMR 56.03(3)(b) as follows:

General Land Area Minimum. For the purposes of calculating whether SHI Eligible Housing exists in the city or town on sites comprising more than 1½% of the total land area zoned for residential, commercial, or industrial use, pursuant to M.G.L. c. 40B, § 20:

- 1. Total land area shall include all districts in which any residential, commercial, or industrial use is permitted, regardless of how such district is designated by name in the city or town’s zoning by law;*
- 2. Total land area shall include all un-zoned land in which any residential, commercial, or industrial use is permitted;*
- 3. Total land area shall exclude land owned by the United States, the Commonwealth or any political subdivision thereof, the Department of Conservation and Recreation or any state public authority, but it shall include any land owned by a housing authority and containing SHI Eligible Housing;*
- 4. Total land area shall exclude any land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the Department of Environmental Protection pursuant to M.G.L. c. 131, § 40A. No other swamps, marshes, or other wetlands shall be excluded;*

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5. *Total land area shall exclude any water bodies;*

6. *Total land area shall exclude any flood plain, conservation or open space zone if said zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial or industrial use are completely prohibited.*

7. *No excluded land area shall be counted more than once under the above criteria.*

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 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).

Discussion and Findings

After careful analysis of all documentation submitted by both the Board and Applicant, DHCD makes the following observations:

Notice Requirements under 760 CMR 56.03(8)

DHCD finds the Board submitted notice to the Applicant and DHCD within 15 days of opening up the local hearing (December 18, 2014), and the documentation (although minimal) was also submitted by the Board. DHCD notes that the December 18, 2014 letter was signed by the Board Chairman Brooke K. Lipsitt. DHCD also finds that the Applicant challenge to the Board's assertion was submitted in the proper timeframe.

General Land Area Minimum under 760 CMR 56.03(3)(b)

DHCD finds that the Board has not met its burden of proof in establishing that it has met the criteria of 760 CMR 56.03(3)(b). DHCD agrees with the Applicant that the Board did not include necessary supporting documentation at the time of notice and that the Board's land area assertions are not beyond reasonable dispute and cannot otherwise be presumed accurate for purposes of 760 CMR 56.03(8). The Board did not include land acreage for individual sites in its December 18, 2014 letter. The Board did not submit a detailed analysis that identifies the parcels that it included and excluded from the total "developable land area" in its December 18, 2014 letter. The Board also did not identify the sites that it included in the "SHI land area," and more specifically, the proportion of those sites that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units), in accordance with 760 CMR 56.03(3)(b). The Board provided only a one page summary and a cover letter. Lastly, the appearance that the City may have believed it had not achieved the General Land Area Minimum under 760 CMR 56.03(3)(b), prior to its December 18, 2014 notice to the Applicant, is not dispositive. However, as the Board did not provide sufficient facts and documentation as to the land that merits inclusion and exclusion from its calculations for purposes of 760 CMR

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56.03(3)(b), DHCD does not have adequate information to determine that the regulatory requirements were satisfied.

Conclusion

DHCD again notes that the Applicant and the 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)(c)(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

Department of Housing and Community Development

cc: Scott I Oran, Manger, Dinosaur Rowe, LLC
Mark T. Dutton, Manager, Dinosaur Rowe, LLC
Donnalyn B. Lynch Kahn, Esq., City Solicitor, Newton
Alan Schlesinger, Esq.