

# State, Newton at odds on affordable housing tally

By **Ellen Ishkanian** | GLOBE CORRESPONDENT FEBRUARY 01, 2015

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Newton will appeal a decision by the state rejecting the city's assertion that it has met a threshold that would put it outside the parameters of the state's Chapter 40B affordable-housing law.

The state Department of Housing and Community Development issued a decision Jan. 23 that the city "has not met its burden of proof" when it submitted figures showing that more than 1.5 percent of the city's developable land is used for affordable-housing developments.

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In issuing its ruling, the state sided with Dinosaur Rowe LLC, the developers proposing to build a 135-unit apartment complex on Rowe Street in Auburndale and West Newton.

"We applaud the DHCD's speedy decision," the developers said in a prepared statement e-mailed to the Globe. "This is a victory for affordable housing in Newton."

The statement went on to say the developers look forward to working cooperatively with the city and neighborhood residents "to permit our proposed housing community."

But city solicitor Donnalyn B. Lynch Kahn said the city will appeal the decision through the state, and is ready to take the issue to court if necessary.

She continues to stand by the figures prepared over the past several months by people in various city departments, and said the vague language in the Chapter 40B regulations left her guessing at what was expected.

“There are no rules or regulations to specify the amount of information municipalities would need to reveal to demonstrate they have met the 1.5 percent,” she said. “What we gave them was sufficient mathematical calculations and a chart showing how we met the 1.5 percent number. We feel it was sufficient within the meaning of the law.”

Chapter 40B law, enacted in 1969, mandates zoning appeals boards to approve housing developments under flexible rules if 20 to 25 percent of the units are set aside as affordable.

Exemptions are allowed for communities where at least 10 percent of the housing stock is determined to be affordable, or where 1.5 percent of land is being used for affordable housing.

Towns that meet the criteria for exceptions can still approve affordable-housing projects, but the need for affordable housing would no longer trump local concerns, as is the case for communities falling under the parameters of the law, according to Kahn.

In practice, that means a Zoning Board of Appeals in a town that has met the 40B threshold could deny a project and impose conditions even if it means the developer would not make a profit. And instead of appealing directly to the state Housing Appeals Committee, the developer’s only remedy would be to take the municipality to court.

About 50 communities across the state have met the 10 percent threshold as of December, but none have successfully been granted the land use exception since the regulations were updated in 2008, according to Juli Hanscom of the state Office of Community Development.

Stoneham, like Newton, is currently appealing a ruling by the state that it did not qualify for the 1.5 percent land use exemption. At issue there is a 264-unit development proposed at Weiss Farm on Franklin Street by John M. Corcoran & Companies.

In ruling against Stoneham’s assertion that it met the 1.5 percent threshold, the state questioned the method used to determine it had met the threshold.

In its decision against Newton, there was no mention or specific issue with how the figure was determined, but instead the issue centered on the city’s lack of documentation proving its assertion.

In its decision, the state says the city failed to “provide sufficient facts and documentation as to the land that merits inclusion and exclusion from its calculations.”

In addition, the state agreed with the developers that the city failed to include “necessary supporting documentation” that the figures were not “beyond reasonable dispute” when they were notified of the city’s decision to use the 1.5 percent threshold on this project.

The decision goes on to say the city failed to provide “detailed analysis that identifies parcels that it included and excluded from the total of developable land area,” and questions whether it had proven it is now at the threshold when it asserted just prior to the Dec. 18 meeting with the Rowe Street developers that it had not reached the 1.5 percent mark.

Kahn has said the 1.5 percent threshold was not cited when the city was deciding the 36-unit condominium complex on Court Street behind Cabot’s just prior to the Rowe Street decision, because at that point the city had not yet exactly pinpointed the precise figure, and was using estimates that she did not think would survive a challenge.

It could take several months for a decision to be made by the state Housing Appeal Committee, and then even longer if that decision is again appealed to land court, according to Kahn.

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