

MEMORANDUM

---

To: Arlington Zoning Board of Appeals  
Fr: Stephanie Kiefer, Esq.  
Re: Supplemental Response to Completeness Review Memo, Thorndike Place  
Date: September 25, 2020

---

This Supplemental Response clarifies and further supplements Applicant's Completeness Review Memorandum submitted to the Board on or about March 19, 2020.

**Completeness Review Summary and Supplemental Responses**

The Applicant submits its responses to the Completeness Review memorandum, as revised by Attorney Witten on July 7, 2020. As reference, the Applicant has previously responded to the completeness of its Comprehensive Permit Application in March 2020. To the extent that the local regulations requested additional information that was not included within the original application submittal, the Applicant had the same within its waiver list, either seeking a full waiver or referencing that the information would be provided during the public hearing process.<sup>1</sup> The below supplemental response further clarifies and, where applicable, proposes submittal timeframes responsive to the Board's request.

**Project Eligibility Documentation – Section 3.2.1-3.3.4<sup>2</sup>**

The local regulations at Section 3.2.1 to 3.2.4 mirror the project eligibility requirements of the 40B regulations, as contained at 760 CMR 56.04(1). The Completeness Review memo (as updated July 7, 2020) asserted that the Board may question the Subsidizing Agency's findings of eligibility, specifically whether the Applicant was a limited dividend entity<sup>3</sup>, as such finding was made within the MassHousing December 5, 2015 Project Eligibility letter.

*Response: 760 CMR 56.04(6) (Conclusive Nature of Determination)* provides that a Subsidizing Agency's issuance of a Project Eligibility letter is "conclusive" as to whether the project and applicant have satisfied the project eligibility requirements; it states in relevant part: "[i]ssuance of a determination of Project Eligibility shall be considered by the Board... to be conclusive evidence that the Project and the Applicant have satisfied the project eligibility requirements of 760 CMR 56.04(1)"

---

<sup>1</sup> As referenced in the Comprehensive Permit Application, Tab 5, Applicant sought waivers from certain provisions contained in Sections 3.1, 3.2, 3.2.5, 3.2.7, 3.2., 3.2.11, 3.2.13, 3.2.14 and 3.2.15 of the local 40B regulations.

<sup>2</sup> The Section references in Applicant's response correspond to those references of the local 40B regulations referenced in the Completeness Review memo.

<sup>3</sup> One of the project eligibility requirements is that the 40B applicant is either a public agency, a non-profit or a limited dividend entity. See 760 CMR 56.04(1)(a).

As previously submitted within the Comprehensive Permit Application (Tab 4), MassHousing issued its Project Eligibility Letter on December 5, 2015, confirming that the Applicant met the general eligibility standards under the New England Fund (“NEF”) housing subsidy program and that Applicant had entered into an “Acknowledgement of Obligations” to restrict its profits. In Finding F of the Project Eligibility letter, MassHousing confirmed that Applicant will satisfy limited dividend entity.

Preliminary Site Plans – Section 3.2.5

Under the Arlington Comprehensive Permit regulations, information to be shown on Preliminary Site Plans. The supplemental Completeness Review memorandum commented on the following subparts of Section 3.2.5:

- a) Subpart 3.2.5.1 – references that Preliminary Site Plans include existing wetland resource areas protected under the State Act and the Arlington Wetlands Protection Regulations, including floodplains. Within the supplemental Completeness Review memorandum, a comment stated “it is unclear” whether the Existing Conditions Plan (Sheet C-100 of the March 13, 2020 plan set) satisfied the condition. The brief comment did not further detail what was unclear (e.g., whether the comment questioned the delineations or whether suggested that input from the Conservation Commission was sought).
- b) Subpart 3.2.5.4 – references that significant environmental features be included on Preliminary Site Plans. The supplemental Completeness Review memorandum suggested that significant environmental features were not shown on the updated, March 13 Preliminary Site Plan.
- c) Subpart 3.2.5.5 – references that Preliminary Site Plans include proposed stormwater management. The supplemental Completeness Review memorandum commented that proposed stormwater management was not shown. on the updated, March 13 Preliminary Site Plan.
- d) Subpart 3.2.5.7 – references that proposed lighting and photometric analysis be shown on Preliminary Site plans and otherwise included. The supplemental Completeness Review memorandum commented that lighting and photometric analysis were not included.

*Response:* Without commenting upon the accuracy or inaccuracy of the July 7, 2020 supplemental Completeness Review’s assessment of the information contained within the revised Preliminary Site Plans (dated March 13, 2020), these comments are noted.

As informally conveyed to the Town, the Applicant will be presenting a revised project design to be presented in preliminary concept plan to the Board, BETA Group and the Conservation Commission. This revised design concept responds to comments made within the August 5 Civil/Site Peer Review comments prepared by BETA Group together with comments of the Conservation Commission, in writing and verbally by the Commission’s Chairwoman at the August 25, 2020 Board hearing. The Applicant will be submitting a revised design in its updated concept plan to the Board, the Department of Planning and Community Development, the Conservation Commission and BETA on or about August 28, 2020. The Applicant and its engineers will participate in a work session with the Conservation Commission and BETA

Group in early October (October 1) and present the modified concept plan/comparison plan document at the October 13, 2020 Board hearing. With feedback received during the Commission work session and Board hearing, Applicant will proceed to prepare detailed drawings, to include the information set out in Section 3.2.5 of the local regulations, by November 3, 2020, excepting full compliance with subpart 3.2.5.4 (significant environmental features such as ledge outcrops, scenic views and trees greater than 24" dbh). Such waiver request remains given the size of the project locus (of which only a small portion is proposed for development) and the difficulty to otherwise depict all such features over the entire undeveloped locus.

Report on Existing Site Condition – Section 3.2.6

The supplemental Completeness Review memo states generally that the site conditions report is incomplete and/or inconsistent with Section 3.2.6 requirements.

*Response:* As reflected by 760 CMR 56.05(2)(b) of the State 40B regulations, and/or Section 3.2.6 of the local 40B regulation, to the extent not waived, information on existing site conditions may be combined with the preliminary site plans. The submitted March 13, 2020 updated site plans included such information as to the surrounding areas, location/nature of existing buildings, wetlands, street elevations, etc. The original application also included a narrative on existing site conditions, at pp. 14-15 of the 40B Application and photographs accompanying the same.

As addressed above, revised project design plans/engineered drawings will be submitted to the Board, DPCD, Conservation Commission and BETA Group on November 3; at that time, an updated report on existing site conditions will also be submitted.

Preliminary Scaled Architectural Drawings – Section 3.2.7

The review memo generally states preliminary architectural plans are not complete and/or not consistent with local requirements, but without specificity of alleged incompleteness. The supplemental Completeness Review memorandum states that the March 2020 updated architectural drawings fail to identify construction type and exterior finish.

*Response:* As referenced above, upon receiving feedback informed during the upcoming October 13 public hearing on the revised project design, Applicant will submit its updated scaled architectural plans on November 3, 2020, including typical floor plans, typical elevations and sections, construction type and proposed exterior finish and such additional information as set out in Section 3.2.7, if relevant based on setbacks and building heights

Utility Plans – Section 3.2.9

The supplemental Completeness Review memo commented that utility plan information provided within the March 13, 2020 plan set was “incomplete” and/or “inconsistent,” No further information was provided as to what information was deemed incomplete and/or inconsistent.

*Response:* As addressed above, revised project design plans/engineered drawings will be submitted to the Board and BETA Group on November 3; an updated utility plan will be included in the November 3 submission. Applicant will review with the Project Engineer should there be any associated waiver sought under the local stormwater bylaw, low impact development guidelines or best management practices and will include the same within the updated waiver list, as may be applicable.

*Recreation and Open Space Amenities – Section 3.2.10*

The supplemental Completeness Review memo commented that recreational and open space amenities information provided within the March 13, 2020 plan set was “incomplete” and/or “inconsistent,” No further information was provided as to what information was deemed incomplete and/or inconsistent.

*Response:* As addressed above, revised project design plans/engineered drawings will be submitted to the Board and BETA Group on November 3; the submission will include the recreation and open space amenities/areas to be set aside within the locus per Section 3.2.10.

*List of Exemptions – Section 3.2.11*

The supplemental Completeness Review memorandum stated the updated (March 19, 2020) List of Requested Waivers did not comply with Section 3.2.11, stating that certain requests were “blanket” requests.

*Response:* As addressed to the Board within the public hearings on this project, a 40B project list of requested waivers is not static; instead, it becomes revised, further defined and modified based on the public hearing process and changes to the project design as may arise within such project.

760 CMR 56.05(7), states: “the Applicant may request Waivers, as listed in the application *or as may subsequently arise during the hearing*, and the Board shall grant such Waivers as are Consistent with Local Needs and are required to permit the construction and operation of the Project.” (Emphasis supplied).

The Applicant will submit a revised waiver list together with its submittal of revised project design plans/engineered drawings with the November 3, 2020 submittal. Consistent with 760 CMR 56.05(7), it should be noted that within the ongoing public hearing process, the waiver list is expected to be further revised/refined<sup>4</sup>.

---

<sup>4</sup> The Applicant notes that Section 3.2.11 of the local 40B regulations is inconsistent with Chapter 40B and its regulations, as it relates to waiver requests. 760 CMR 56.05(2)(h) provides only that a list of requested waivers accompany the Comprehensive Permit Application. A Chapter 40B waiver list is not required to include a detailed analysis of each requirements, the location on the plan for which it is sought and a “complete explanation of why the exception is required to keep the project from becoming uneconomic,” as stated under Section 3.2.11 of the local

Pro Forma – Section 3.2.12

The supplemental completeness memo commented that the pro forma provided did not comply with Section 3.2.12.

*Response:* Under 760 CMR 56.05(2) (Elements of Submission, Filing Fees), the state regulations contain no requirement for an application to include a pro forma<sup>5</sup>. As a courtesy, the Applicant has previously provided the Board with a copy of the Pro Forma that accompanied its Project Eligibility application to MassHousing.

As previously addressed at the public hearings, the Board is not permitted to review a *pro forma* until much later in the public hearing process, and *only* if certain preconditions have been met. *See* 760 CMR 56.06(a) and (b), excerpted below. The Board cannot otherwise undertake review of financials. *See White Barn Lane, LLC v. Norwell Zoning Board of Appeals*, Decision, HAC Docket No. 08-05 (Decision dated July 18, 2011).

760 CMR 56.05(6) Review of Financial Statements.

- (a) A Board may request to review the *pro forma* or other financial statements for a Project *only after* the following preconditions have been met:
1. other consultant review has been completed.
  2. the Applicant has had an opportunity to modify its original proposal to address issues raised;
  3. the Board has had an opportunity to propose conditions to mitigate the Project’s impacts and to consider requested Waivers; and
  4. the Applicant has indicated that it does not agree to the proposed condition(s) or Waiver denial(s) because they would render the project uneconomic. A Board may not conduct review of a *pro forma* in order to see whether a Project would still be economic if the number of dwelling units were reduced, unless such reduction is justified by a valid health, safety, environmental, design, open space, planning or other local concern that

---

regulation. Chapter 40B and its regulations instead provide that unless the municipality has achieved the statutory minimum (or otherwise satisfied one of the stated grounds under Section 56.03(1), in accordance with Section 56.03(8), there is a presumption that the need for Affordable Housing outweighs Local Concerns. It is noted that Arlington has not met the statutory minimum; likewise, in the appeal brought by the Board, the Housing Appeals Committee issued its Final Decision after an evidentiary hearing, holding that the Town had not satisfied the GLAM threshold. To the extent that Section 3.2.11 is not otherwise inconsistent with Chapter 40B (and therefore unavailing), Applicant will include such a waiver request with in its revised waiver list to be submitted on November 3.

<sup>5</sup> This local submission requirement, requesting a *pro forma* to be submitted with a Comprehensive Permit Application, contradicts and is inconsistent with Chapter 40B and its regulations. Per 760 CMR 56.05, a Board may only adopt rules, “not inconsistent with” Chapter 40B. Section 3.2.12 is inconsistent with Chapter 40B’s implementing regulations at 760 CMR 56.06(a) and 56.06(b), which regulations detail the preconditions that must be met before the Board can request the Applicant to submit a *pro forma*.

directly results from the size of a project on a particular site, consistent with 760 CMR 56.07(3)<sup>6</sup>.

(b) If the Applicant does not agree to some or all of the proposed permit conditions or Waiver denials because they would render the Project Uneconomic, [then] the Board may ask that the Applicant submit its *pro forma*, in form satisfactory to the Subsidizing Agency, and revised as necessary to reflect the additional cost of meeting those conditions and/or denials...

Notwithstanding this objection to the conflict between Chapter 40B regulations and cases decided thereunder, and without waiving any rights to object thereto, the updated waiver list will continue to include a waiver of the submittal of a pro forma prior to the satisfaction of the preconditions under 760 CMR 56.06(a) and (b). as part of the application.

*Impact Analysis (Environmental and Municipal Facilities)– Section 3.2.13 and 3.2.15*

The supplemental Completeness Review memo asserts that the impact analysis is incomplete.

*Response:* An impact analysis as described in Section 3.2.13 and 3.2.15 of the local 40B regulations are not otherwise required as part of a Comprehensive Permit regulations at 760 CMR 56.05. The Applicant specifically requested a waiver of the timing of such analysis. In light of the updated schedule contemplated with a revised project design, the submission of an environmental and municipal facilities analysis will be better informed as to project revisions (and related impact on the natural and built environment) subsequent to the November 24, public hearing. The Applicant suggests providing its impact analysis reports<sup>7</sup> within 45 days after the November 24, 2020 hearing for the Board and BETA Group peer review.

*Traffic Impact Analysis – Section 3.2.14*

The supplemental Completeness Review memo notes the date of the Traffic Impact Access Study (April 2014) has not been updated.

*Response:* Applicant will work with BETA Group as to acceptable parameters on the updated traffic study. Once the traffic professionals have reached agreement on methodology/scope of review, an updated traffic impact analysis will be submitted within 30 days thereafter to the Board and BETA Group for peer review. The timing of the submittal of the traffic study is expected to be clarified on or before the next Board hearing, on October 13.

---

<sup>6</sup> 760 CMR 56.07(3)(a) provides that within an appeal, where a municipality has failed to satisfy the grounds of 56.03(1), there is a rebuttable presumption that the need for affordable housing outweighs Local Concerns. As stated in 760 CMR 56.05(4) (Scope of Board Hearing), “in the conduct of a [board] hearing, the Board should make itself aware of the detailed provisions for burden of proof and evidence” as set forth in 760 CMR 5.07(2) and (3), that the Committee would apply to the appeal of a Board decision.

<sup>7</sup> Applicant’s updated waiver list to be submitted in November likewise may include waiver of certain details described in 3.2.13 and 3.2.15; in such event, the updated waiver list will reflect such waiver request.

Statement of Demonstration of Compliance with Master Plan/Open Space Plan – Section 3.2.16

The supplemental Completeness Review memo states that such statement is incomplete.

*Response:* As noted previously, the application included a statement as to consistency with sustainable development principles as found at Pages 23-25 of the Comprehensive Permit Application. Together with the revised design engineered drawings, to be submitted on November 3, 2020, Applicant will also file a statement of compliance with Master Plan/Open Space plan.

Roster of Development Team Members – Section 3.2.17

The supplemental completeness memo recognized that the March 19, 2020 submittal updated the development team members.

List of Abutters/Copies of Application – Section 3.2.18

The supplemental completeness comments that compliance with Section 3.2.18 was “incomplete” but does not detail what is incomplete.

*Response:* The Applicant submitted the requisite copies (including both sizes of plans and form of media) of the Comprehensive Permit Application to the Town Clerk on September 1, 2016. Further, the certified abutters list is contained at Tab 11 of the Comprehensive Permit Application. Applicant will submit revised engineered plans by November 24, and will include the number of sets (full sized, reduced, digital) as may be requested by the Board.