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Town of Southborough
BOARD OF APPEALS
SOUTHBOROUGH, MASSACHUSETTS 01772

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SOUTHBOROUGH, MASSACHUSETTS 01772-1662
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James F. Hegarty
Town Clerk
Town House
17 Common Street
Southborough, Massachusetts 01772

DECISION ON APPLICATION FOR
COMPREHENSIVE PERMIT APPLICATION
M.G.L. C.40B, §§20-23

APPLICANT: The Residences at Park Central LLC (the "Applicant")

PROPERTY: 0 Turnpike Road, 0 Flagg Road, Off Route 495, also identified on Assessor's Map 33-4, 25-5, 41-4A, and 24-3 (the "Property" or "Site")

DATE: September 20, 2024

I. PROCEDURAL HISTORY AND JURISDICTIONAL FINDINGS

1. An original application for a Comprehensive Permit (the "Application") was received by the Zoning Board of Appeals (the "Board") on or about September 18, 2023. The Application is for two hundred (200) ownership units on the Property, twenty-five percent (25%) of which would be affordable, in four buildings on the Site which consists of approximately 19.7 +/- acres of a 100 +/- acre parcel in the Town's Industrial & Industrial Park Zoning Districts (the "Project").
2. The Property is located at 0 Turnpike Road, 0 Flagg Road, and Off Route 495 and shown on the Assessors' Maps as Parcels 33-4, 25-5, 41-4A, and 24-3 and is the location of an undeveloped parcel.
3. The Applicant proposes to be a limited dividend entity that will limit its profits for the entire project in accordance with legal requirements. The Application also provided an "eligibility/site approval letter," dated February 8, 2023, issued by MassHousing (the "Subsidizing Agency") under the New England Fund Program ("the Program"). The approval contained in the eligibility letter is expressly limited to the development of not more than two hundred (200) ownership units under the terms of the program, of which not less than twenty-five percent (25%) of such units shall be restricted as affordable for low or moderate-income persons or families as required under the terms of the

Comprehensive Permit Guidelines issued by the Department of Housing and Community Development.

4. The Applicant is related to the corporate entity that owns the property and has entered into an agreement under which the Applicant will purchase the Property upon the issuance of a Comprehensive Permit. Accordingly, nominally, the Applicant would appear to have control over the site, as required under 760 CMR 56.04(1)(c). However, by virtue of the terms of a certain Declaration of Restrictive Covenants (the "Declaration"), the Applicant (and the owner of the property) are temporally prohibited from seeking approvals for the Project that is the subject of the application. The Declaration was entered into with neighboring property owners in order to bind the Applicant to certain mitigation relating to a similar large multi-family development on the same Property. The Applicant has endeavored to terminate the Declaration but there is a two year waiting period before a succeeding project may be pursued. That two year period has not elapsed. Accordingly, the Applicant lacks the requisite site control to apply for and complete the project that is contemplated under the application. Accordingly, the Board finds that the Applicant does not have requisite site control under 760 CMR 56.04(1)(c). At the very least, the Board finds that existence of the covenants in the Declaration function as a legal and practical barrier to providing relief on the Application. Additionally, it is notable that MassHousing's approval was contingent upon the consideration of the practical effect of the Declaration.
5. A duly advertised public hearing was timely commenced on October 11, 2023, and was continued, with good cause and at the request of the Applicant (copies of which were duly filed with the Town Clerk), to the following dates: November 29, 2023, January 10, 2024, April 3, 2024, July 17, 2024, July 31, 2024, and September 4, 2024, on which date the hearing was closed. The reason for each of the requests for continuance was because of the ongoing issues over the enforceability of the Declaration, which is the subject of litigation in the Land Court. The Applicant granted extensions of the hearing through April 16, 2025. This Decision was then prepared and reviewed and adopted by the Board at a duly posted meeting held September 20, 2024.
6. The Applicant was primarily assisted by Jason Panos, Esq, The Panos Law Group, as well as members and managers of the Applicant.
7. The Board utilized the services of Town Counsel, Jason Talerman and Stephen Chaplin of Mead, Talerman & Costa, LLC. No peer review of the application took place during the public hearing because a substantive review never commenced due to issues relating to the Declaration.
8. The Board notified all applicable local boards and commissions of the filing of the Application by sending a copy thereof to such local boards and commissions for their recommendations, all of which have been made a part of the record of these proceedings and have been taken into consideration by the Board in rendering its Decision.

9. During the course of the public hearing, Town staff, boards and commissions submitted oral and written testimony with respect to the Application.
10. The Applicant provided the initial application materials upon filing. No additional plans, revisions, or other material was provided during the course of the public hearing. At the first session of the public hearing, the impact of the Declaration was discussed and the Applicant thereafter requested multiple continuances while the Declaration was being litigated. Despite the Board's suggestion, the Applicant never expressed any interest in pursuing a project that complied with the Declaration.
11. Several abutters and other interested members of the public attended the public hearing and offered commentary. These individuals asked a variety of questions, which the Board and the Applicant's representatives responded to. Principal among the commentary from the public was the impact of the Declaration and the litigation thereof.

II. PROJECT AND PROPERTY DESCRIPTION

1. The Project, as revised, is described and shown on plans entitled "Proposed Preliminary Site Plan Documents" dated September 18, 2023, prepared by Bohler Engineering, "Proposed Preliminary Subdivision Plan" dated September 18, 2023, prepared by Bohler Engineering, and preliminary architectural plans entitled "The Residences at Park Central, LLC" dated July 1, 2022, with a most recent revision date of September 14, 2023, prepared by Rankin Associates, LLC, hereinafter collectively referred to as the "Plans".
2. The Property is located in the Town's Industrial Park and Industrial Districts. The Site and surrounding properties are located on Turnpike Road, Flagg Road, and off Route 495, and include a mix of residential and commercial uses.
3. The Project is not located within the NHESP estimated habitats of rare wildlife or rare species, or a FEMA mapped flood zone. The site is within the Town's Outstanding Resource Water Overlay District, and has several wetland systems and streams, two existing ponds, and three existing man-made stormwater management basins. The applicant has not filed an application with the Southborough Conservation Commission.
4. Access to the Site is proposed via three (3) proposed driveway connections: Park Central Drive, as a one-way ingress from Turnpike Road (Route 9); John Boland Road, as a one-way egress onto Turnpike Road (Route 9); and Blackthorn Drive Extension as a two-way, gated access onto Blackthorn Drive.

5. The Applicant proposes to construct two hundred (200) ownership units within four (4) buildings of four (4) stories each. The units will be a mix of two-bedroom (138 proposed) and three-bedroom (62 proposed) layouts.
6. The Applicant proposes that twenty five percent (25%) of the units, being fifty units (50), be sold to individuals/families whose total household income does not exceed 80% of area median income (AMI) as determined by the U.S. Department of Housing and Urban Development.
7. The Applicant proposes four hundred and twenty (420) parking space, two hundred (200) of under a covered garage, and two hundred twenty (220) as exterior parking spaces.
8. The Project will be serviced by a proposed private on-site wastewater treatment plant and four (4) above-ground basins for the attenuation and treatment of stormwater.
9. Notwithstanding some differences, the Project is substantially similar to the prior project that is contemplated under the Declaration. Both projects are large multi-family developments on the same parcel, utilizing the same roadway network and having the same impacts on local concerns.

III. FINDINGS


1. The Board finds that the Applicant has failed to diligently and adequately pursue and prosecute the application. The Applicant applied notwithstanding clear knowledge of the Declaration and the legal impact thereof. The Applicant chose not to comply with the Declaration but, rather elected to apply for the Project and then seek to terminate the Declaration by notice to, and litigation with, the other parties thereto. That litigation has months, if not years to go before it is completed and the termination notice will not be effective for nearly another year. It is the Applicant's duty to diligently pursue an application. The Board has numerous complex and active cases before it and the continued pendency of this matter on its agenda precludes the Board from working effectively on such projects.
2. The Board finds that the Applicant lacks site control due to the provisions of the Declaration that preclude the present application. Without adequate site control, as required under 760 CMR 56.04(1)(c), the Board finds that the Application must be denied.

3. Even if issues arising under the Declaration do not arise to site control, they present a practical and legal barrier to filing an application for a comprehensive permit.
4. The Applicant has shown bad faith in breaching the terms of the Declaration then failing to negotiate with the other parties thereto, all of whom will be adversely impacted by the project.
5. The Board finds that the denial of the project should be without prejudice to a future application for the Project. The Applicant has not presented the merits of the project, has not offered any substantive presentation of issues relating to traffic, engineering, architecture or other matters of local concern. The Board remains willing and ready to expeditiously review a new application for the project if and when the issues regarding the Declaration are resolved.

IV. DECISION

Based upon the foregoing findings and pursuant to Chapter 40B, the Board, upon motion by Michael Robbins, and seconded by Doris Cahill, the Board unanimously voted (4 to 0), to deny a Comprehensive Permit to the Applicant for the Development.

SOUTHBOROUGH ZONING BOARD OF APPEALS:


David Williams, Chair

**** NOT VALID FOR RECORDING UNTIL CERTIFIED BY THE TOWN CLERK OF SOUTHBOROUGH****

In accordance with Sec. 11 of Ch. 40A of Massachusetts General Law, I hereby certify that twenty (20) days have elapsed after the within decision was filed in the office of the Southborough Town Clerk, and that no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied.

Attest: _____

Date: _____

James F. Hegarty, Town Clerk
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