

8/28/03

MOTION:

Moved that the Board of Selectmen:

- appoint the Acton Community Housing Corporation ("ACHC") as the Town of Acton's monitoring agent under a proposed Monitoring Services Agreement (substantially in the form attached) with Crossroads Development, LLC, to be executed under the comprehensive permit issued by the Acton Board of Appeals pursuant to Chapter 40B of the Massachusetts General Laws for the development of mixed-income housing on a 2.23 acre site on Main Street in Acton, and
- pursuant to Chapter 143 of the Acts and Resolves of 1996, authorize the ACHC to: (a) acquire and hold interests in real and personal property, including affordable housing restrictions, and to sell, lease, convey, mortgage, or encumber the same; (b) enter into contracts with consultants, accountants, and any other agents, employees and contractors; and (c) receive and hold such funds as may be appropriated from time-to-time by the Town of Acton and other funds from any source, and to expend or utilize the same, all as may be necessary and appropriate to carry out its functions and perform its obligations as Monitoring Agent under said Agreement.



C H A P A

Citizens' Housing and Planning Association

Monitoring Agent
Cost review
New Eng. Fund

President
Eleanor White

President-Elect
Robert Kuehn, Jr.

Vice Presidents
Jack Cooper
Ann Houston
Vincent O'Donnell
Jeanne Pinedo

Treasurer
Matthew Hobbs

Clerk
Sharon Anderson

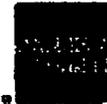
Executive Director
Aaron Gornstein

Fax Transmittal Sheet

Date: 5/17/04
To: Betty McManus
Organization: 978-Hob-L408
Fax No.: _____
Phone No.: _____
No. of Pages Inc. Cover: 6

From: Janner
Fax No.: (617) 742-3953
Phone No.: (617) 742-0820

Comments: per Nancy's request - some
info on cost certification



Tax & Business Services

American Express
Tax and Business Services in
Suite 300
2300 Crown Colony Drive
Quincy, MA 02189
Bus: 617.542.2880
Fax: 617.472.0526

24 Federal Street, 9th Floor
Boston, MA 02110
Bus: 617.542.8886
Fax: 617.558.2889

MEMORANDUM

TO: AARON GORNSTEIN
CC: ROBERT LANGLEY
FROM: ALBERT A. RODIGER 
DATE: SEPTEMBER 23, 2002
RE: NEF COST CERTIFICATION PROCEDURES

Per your request, we have analyzed the statutory and regulatory requirements for M.G.L. 40B with respect to certifying limited dividend compliance for Federal Home Loan Bank New England Fund projects. Based on our analysis we have developed a cost certification process to establish compliance with these requirements. We have developed a cost certification template for addressing these issues with homeownership projects and rental projects.

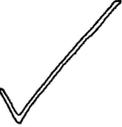
→ For both rental and homeownership projects we have developed a two tiered system of cost certification procedures based on project size. For smaller projects, of 25 or fewer units we are recommending an accountant's review engagement. For larger projects of 26 or more units, we are recommending an audit engagement. This tiered approach was intended to provide an appropriate level of financial oversight for all projects, while minimizing the cost of the financial oversight for smaller projects.

In addition to these accounting procedures, we are recommending that some additional review procedures take place. These additional non-accounting procedures would include at a minimum review of the land acquisition cost relative to appraised value. If the funding agency or member bank was unable or unwilling to do so, these additional procedures should review of key programmatic issues such as number of affordable and total units, and sales or rental prices of those units.

Larger Project Procedures

For larger projects we feel that a full audit of project sources and uses, similar to that conducted for Section 42 tax credit projects is appropriate. Given the greater costs and land values involved with projects in excess of 25 units, we feel that the added level of is both warranted and affordable relative to total project development costs.

Smaller Project Procedures



For smaller projects of 25 or fewer units, we felt that the cost of a full audit could be less affordable relative to total project development costs. In an effort to provide responsible oversight, while not imposing an unreasonable cost burden on the project we are proposing that an accountant's review procedure be conducted instead of an audit. This review should include analysis of a key area of concern for limited dividend projects, related party development expenditures. Although a lesser level of overall review appears to be warranted for these smaller projects, we feel that this issue still needs close attention. In cases where the local zoning board of appeals has specified a full audit or where some other oversight entity has determined it necessary, then a full audit could be conducted in place of an accountant's review engagement.

Homeownership Project Procedures



The homeownership procedures focus on analysis of total gross proceeds from sales relative to total project costs including land, sales commissions and all direct documented developer expenses. Developer profit is considered to be the difference between gross sales proceeds and total costs exclusive of developer's fee. Developer profit is measured as percentage of total costs. For the purposes of creating a master cost certification document, it is our recommendation that profit be capped at 20% to reflect similar limitations in other homeownership programs. Local zoning boards of appeal may impose lower profit restrictions in specific cases.

Rental Project Procedures

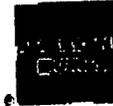
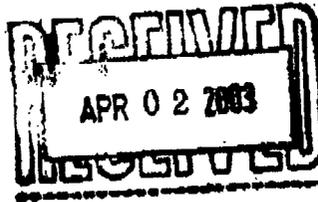
The rental procedures focus on analysis of total sources and uses. Developer overhead and profit are considered to be part of total development costs regardless of the availability of cash sources to pay the fee at permanent loan closing. The difference between total development fee and cash development fee is considered a deferred development fee note. For the purposes of creating a master cost certification document it is our recommendation that total developer overhead and profit be capped at 20% to reflect similar to reflect general limitation of program. (Other rental programs have lower limits, and specific documentation for the NEF program was unavailable. This figure may need to be adjusted downward if this was not the intent of the program.) Local zoning boards of appeal may also impose lower profit restrictions in specific cases.

Additional Review Procedures

In addition to the cost certification procedure described above, we feel that it is important the land acquisition cost be examined to ensure compliance with the limited dividend intent of the statute. Specifically, we feel that the land appraisal indicating highest and best use without a comprehensive permit be examined along with and the actual purchase documentation and ancillary land related agreements. Frequently, land acquisition prices exceed un-permitted appraised values and are based upon the number of units approved. Identifying inflated land acquisition costs is an important aspect of maintaining the integrity of the limited dividend

status of the permitting process. This review would most likely take place separately from that of the cost certification process since it is not part of a traditional audit/review engagement.

If the funding agency or member bank is unable or unwilling to do so, review of other fundamental programmatic components is also warranted. This review should include at a minimum, review of the pre-construction application documentation and the comprehensive permit. These documents should be reviewed for consistency with the as built development with respect to the total number of units, the number of affordable units, and the sales or rental rates of the affordable units. This review would also take place separately from that of cost certification process since it is not part of a traditional audit/review engagement.



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Fax: 617.542.2889

MEMORANDUM

TO: AARON GORNSTEIN
CC:
FROM: ALBERT A. RODIGER 
DATE: 04/01/2003
RE: NEF/CHAPTER 40B LIMITED DIVIDEND COMPLIANCE REVIEWS

Per our discussion on January 27, 2003, I have reviewed the Federal Home Loan Bank of Boston (FHLBB) documentation with regard to compliance with the limited dividend requirements for New England Fund projects which were issued Chapter 40B site eligibility letters prior to August, 2002. Review of those documents indicates no specific guidelines for implementation of the limited dividend requirements for those projects. In an effort to minimize confusion and provide fair implementation of the limited dividend requirements of the program and statute, it is our recommendation that the new NEF guidelines issued in February of 2003 be used as reference until more specific guidelines for these older NEF projects are established by either the FHLBB or the Department of Housing and Community Development (DHCD).

Establishing land values for the purpose of determining cost basis for profit limitations is likely to be one of the greatest points of contention with project sponsors. The new NEF guidelines specify limitations very similar to those used by both DHCD and MassHousing for both rental and homeownership developments. In many cases, it appears that NEF developer/sponsors have not been made aware of the importance of land value in assessing dividend limitations. Therefore, guidance to developer/sponsors on these requirements and additional review of land value assessment and methodology may be necessary for these projects.

For rental projects the new NEF guidelines vary significantly from MassHousing programs in the manner in which both capital and operating dividend restrictions apply. The new rules are more restrictive on the capital side and may work out to be similar or more generous on the operating side. Since most of the NEF projects will not involve any capital subsidy, we do not feel that this more restrictive capital calculation will result in any significant impact to most project sponsors. On the operating side, we feel that the NEF calculation will likely produce a comparable or more favorable return to project sponsors than the current MassHousing approach. Therefore, overall we believe that project sponsors are likely to be supportive of using these guidelines.

For homeownership projects, it is also recommended that the new NEF guidelines be used. These guidelines closely resemble existing DHCD and MassHousing programs. Therefore, we feel that developer/sponsors will be supportive of using these guidelines.

For both rental and ownership projects it is anticipated that certain cost review decisions not specifically addressed in the program guidelines will need to be handled on a case by case basis. Specifically, undefined aspects of the attached guidelines will need interpretation by the CHAPA compliance contractor. On these issues the CHAPA compliance contractor will need to negotiate a satisfactory resolution with project developer/sponsor's auditor. We feel that the CHAPA compliance contractor cannot also represent project sponsors as auditors. In cases where American Express TBS and/or its affiliate Ziner, Kennedy and Lehen, LLP are representing the developer/sponsor as consultant or auditor, an alternate entity will need to be identified by CHAPA to serve as its compliance contractor.



C H A P A

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Planning Association**

President

Eleanor White

President-Elect

Robert Kuehn, Jr.

Vice Presidents

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Ann Houston

Vincent O'Donnell

Jeanne Pinado

Treasurer

Matthew Hobbs

Clerk

Sharon Anderson

Executive Director

Aaron Gornstein

Checklist of Things to Send CHAPA

- Copy of Comprehensive Permit
- Copy of site plan (condensed version if possible)
- Signed Monitoring Services Agreement
- Copy of Regulatory Agreement
- Copy of Deed Rider
- Sales or rental price methodology
- Marketing and Outreach Plan, application, ads and flyers for approval, prior to commencing the marketing period
- Complete Income Certifications packages for all the lottery winners, including back-up income documentation such as W-2s, tax returns, asset information, such as checking and savings account statements and any evidence of alimony or child support.
- Copy of signed Deed Riders for each buyer post-closing
- Copy of Audit for Cost Certification



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CHAPA's Role as the Monitoring Agent

1. Review and approve sales or rental prices of affordable units
2. Review and approve Marketing and Outreach plan (including all applicable attachments, such as the application, informational packet, ads, flyers, etc.)
Marketing should not begin until CHAPA has given final approval to the plan and sales/rental price.
3. Keep in contact with the developer and/or marketing agent throughout the marketing period.
4. Oversee the lottery and monitor the lottery process.
5. Income-certify all lottery winners prior to lease-up or closing. The developer or marketing agent should pre-screen all applicants prior to entering them into the lottery for income eligibility, appropriate household size and first-time homebuyer status.

The developer or marketing agent should send CHAPA copies of the complete files for the lottery winners, including the Income Certification Cover Sheet (provided by CHAPA) and all necessary income documentation, such as pay stubs, tax returns and all asset information such as checking and savings account statements).

CHAPA will provide the developer with a notarized certification of eligibility that should be recorded with the deed rider at the buyers' closings.

For projects with 10 or less units, income certification documentation should be sent to CHAPA immediately following the lottery, prior to winners signing a Purchase and Sale agreement.

For projects with 10 or more units, income certification documentation should be sent to CHAPA for review after the buyers have signed Purchase and Sale agreement, but well in advance of a scheduled closing date.

The timing of these submissions should be worked with CHAPA prior to sending the income certifications, to ensure that they are returned to the developer in a timely manner.

6. When the project is complete, do a cost-certification of the developer's financial audit.
7. Send a report to the Town on the project when the final cost-certification is completed.

To: "Janna Peckham" <jpeckham@chapa.org>
From: Tavernier <ntavern@comcast.net>
Subject: RE: Monitoring Agent
Cc:
Bcc:
Attached:

Hi Janna,

I would ask you to fax it to the Acton Housing Authority since I do not think my fax is operating at the moment. Please address it to the attention of: Betty McManus, her fax number is 978-266-1408. She is the Clerk of our housing committee, ACHC.

Thanks so much for your help.

Nancy

At 02:38 PM 5/17/2004, you wrote:

Nancy,

Aaron just gave me a couple of memos from Bert Rodiger at American Express, who does the cost certifications for CHAPA (formerly Ziner and Lehan). I can fax them to you. I'm not sure how helpful they will be, but it's all we have.

Aaron said we've estimated each certification will cost about \$2,000, though we haven't finished one entirely yet.

What is your fax number?

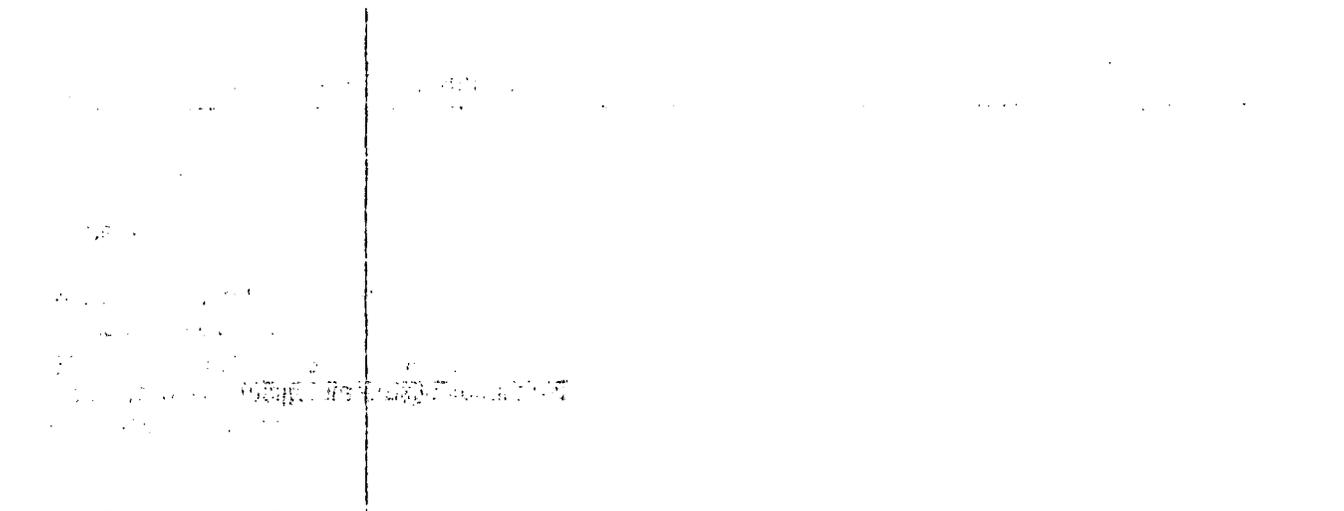
—Janna

Janna Peckham
CHAPA
18 Tremont Street, Suite 401
Boston, MA 02108
V/TTY 617-742-0820
Fax 617-742-3953

—Original Message—

From: Tavernier [<mailto:ntavern@comcast.net>]
Sent: Friday, May 14, 2004 2:58 PM
To: Janna Peckham
Subject: RE: Monitoring Agent

Janna,



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I got the attachments. I think that must be the checklist that our town counsel referenced, thank you. All but the last item is in our possession, it is the audit for cost certification that we have never seen. At least we know what to ask the developer for now. Looking forward to anything else that CHAPA can offer in the way of advice.

Thanks again.

Nancy

At 02:56 PM 5/14/2004, you wrote:

>Nancy,

>

>I'm sorry. I need to talk to Aaron about it, and he's been really busy the
>last few days. I forwarded him your email today and I'm hoping I'll have a
>response back on Monday.

>

>in terms of a checklist, I'm not really sure what you are referring to.

I've

>attached a one-page description of CHAPA's role as a monitoring agent, and
>the checklist of items that we ask the developer to send this. Let me know
>if this is not what you are looking for.

>

>--Janna

>

>

>_____
>Janna Peckham

>CHAPA

>18 Tremont Street, Suite 401

>Boston, MA 02108

>V/TTY 617-742-0820

>Fax 617-742-3953

>

>

>-----Original Message-----

>From: Tavernier [<mailto:ntavern@comcast.net>]

>Sent: Friday, May 14, 2004 1:12 PM

>To: Janna Peckham

>Subject: RE: Monitoring Agent

>

>Hi Janna,

>

>I am hoping to hear from you soon, we need to get the financial review
>underway. I understand you have a checklist for monitoring projects, that
>would be helpful for us. Thanks.

>

>Nancy

>

>At 08:35 AM 5/11/2004, you wrote:

> >Hi Nancy,

> >
> >CHAPA has been subcontracting out the review of the audit to Ziner and
> >Lehan, an accounting firm. Let me check with Aaron when he gets back to
the
> >office on Wednesday to see if we have something from Ziner that might be
> >helpful for you.
> >
> >I'll get back to you by the end of the week.
> >
> >—Janna
> >
> >
> >Janna Peckham
> >CHAPA
> >18 Tremont Street, Suite 401
> >Boston, MA 02108
> >V/TTY 617-742-0820
> >Fax 617-742-3953
> >
> >—Original Message—
> >From: Tavernier [<mailto:ntavern@comcast.net>]
> >Sent: Monday, May 10, 2004 11:26 AM
> >To: jpeckham@chapa.org
> >Subject: Monitoring Agent
> >
> >Dear Ms. Peckham,
> >
> >I am the chairman of the Acton Community Housing Corporation, the town
> >board charged with facilitating affordable housing. We were appointed by
> >the Board of Selectmen in Sept. 2003 to be the Monitoring Agent for the
> >Crossroads Condominium development which is a New England Fund Program
> >property, approved in Nov. 2002. We were uneasy at the time because this
> >was our first experience with a New England Fund program and we had never
> >performed these duties before in the town. We were assured by the
> >consultant for the developer that this was not a big deal so we agreed to
> >the assignment. Now the development is 99% sold out and it is time for
> >the monitoring of the Financials to begin. We have been involved to date
> >in the affordability items such as the lottery, income qualification,
> >appraisals, and the discount rate calculation but not in the financials.
> >
> >I am seeking help from CHAPA. I am aware that CHAPA usually performs
these
> >functions for towns but that is not the case here. Do you have a succinct
> >description of the duties of the Monitoring Agent in regard to the
> >financials? We need to have a step by step approach given to us since we
> >may be assigned these duties for a second development, Franklin Place, in
> >the near future also.
> >
> >I look forward to your attention on this matter.
> >

> > Thank you.
> >
> > Nancy Tavernier, Chair
> > Acton Community Housing Corporation
> > 978-263-9611
>

X-Originating-IP: [207.180.7.26]
From: "Janna Peckham" <jpeckham@chapa.org>
To: "Tavernier" <ntavern@comcast.net>
Subject: RE: Monitoring Agent
Date: Tue, 11 May 2004 08:35:43 -0400
X-Mailer: Microsoft Office Outlook, Build 11.0.5510
Thread-Index: AcQ2q5f1nTwYdGq+SRCymWOWzu7ZCQAqJi5g

Hi Nancy,

CHAPA has been subcontracting out the review of the audit to Ziner and Lehan, an accounting firm. Let me check with Aaron when he gets back to the office on Wednesday to see if we have something from Ziner that might be helpful for you.

I'll get back to you by the end of the week.

--Janna

Janna Peckham
CHAPA
18 Tremont Street, Suite 401
Boston, MA 02108
V/TTY 617-742-0820
Fax 617-742-3953

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From: Tavernier [<mailto:ntavern@comcast.net>]
Sent: Monday, May 10, 2004 11:26 AM
To: jpeckham@chapa.org
Subject: Monitoring Agent

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I am seeking help from CHAPA. I am aware that CHAPA usually performs these functions for towns but that is not the case here. Do you have a succinct description of the duties of the Monitoring Agent in regard to the financials? We need to have a step by step approach given to us since we may be assigned these duties for a second development, Franklin Place, in the near future also.

I look forward to your attention on this matter.

Thank you.

Nancy Tavernier, Chair

Printed for Tavernier <ntavern@comcast.net>

5/11/2004

X-Originating-IP: [65.209.101.19]
Subject: Acton - Franklin Place 40B
Date: Thu, 19 Aug 2004 17:06:22 -0400
X-MS-Has-Attach:
X-MS-TNEF-Correlator:
Thread-Topic: Acton - Franklin Place 40B
Thread-Index: AcSGMGGHzs1PcWWxQQ+LAT+mSdExhA==
From: "Daniel C. Hill" <dhill@AndersonKreiger.com>
To: "Tavernier" <ntavern@comcast.net>
Cc: "Stephen D. Anderson" <SAnderson@AndersonKreiger.com>

Hi Nancy,

We are in the process of creating the Monitoring Services Agreement for this project, and we need to set a monitoring fee. CHAPA, who does most of the monitoring of 40B projects statewide, charges \$7,500. This includes: reviewing sales price, overseeing lottery, certifying incomes of initial occupants; and conducting an audit review. Under the terms of the ZBA's Franklin Place comprehensive permit decision, the "audit review" must be performed by a CPA who is retained by the Monitoring Agent. Its possible that the ACHC's monitoring costs might exceed \$7500 if the CPA is more costly than CHAPA's auditing services. Under the comprehensive permit, the monitoring fee can be as high as \$10,000. Therefore, I recommend that we set the fee at \$10,000. If the ACHC's total monitoring costs end up to be lower than \$10,000, then the difference could be returned to the developer. I have a feeling that your costs will not be significantly lower than \$10,000. Please let me know if you agree with setting the fee at \$10,000.

Thanks, Dan

Daniel C. Hill, Esq.
Anderson & Kreiger LLP
43 Thorndike Street
Cambridge MA 02141
dhill@andersonkreiger.com
T: 617-252-6575 FAX: 617-252-6899
<http://www.andersonkreiger.com>

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MassHsg

Contact Rick Herlihy

rherlihy@masshousing.com

617-854-1335

I:\Housing Starts Docs\MonAgmt
10/03

**MASSACHUSETTS HOUSING FINANCE AGENCY
Housing Starts Program**

MONITORING SERVICES AGREEMENT

This Monitoring Services Agreement (this "Agreement") is made as of the _____ day of _____, 200_, by and between _____, a Massachusetts (corporation/limited partnership/limited liability company) having an address at _____ ("Developer"), Citizens' Housing Planning Association, Inc., having an address at 18 Tremont Street, Boston, Massachusetts 02108 ("Monitoring Agent"), Massachusetts Housing Finance Agency, having an address at One Beacon Street, Boston, Massachusetts 02108 ("MassHousing"), and _____ ("Municipality").

RECITALS

WHEREAS, the Developer intends to construct a housing development known as _____ at a _____-acre site located at _____ in the Municipality, more particularly described in Exhibit A attached hereto and made a part hereof (the "Project"); and

WHEREAS, the Project is being financed with a \$ _____ construction loan (the "MassHousing Loan") under the affordable housing program of MassHousing known as the Housing Starts Program and the guidelines adopted by MassHousing's Homeownership Division in connection therewith (the "Program Guidelines"); and

WHEREAS, the Developer has received a comprehensive permit (the "Comprehensive Permit") from the Zoning Board of Appeals of the Municipality under Chapter 40B, Sections 20-23, of the Massachusetts General Laws (the "Act"), which permit is recorded at the _____ County Registry of Deeds ("Registry") in Book _____, Page _____; and

WHEREAS, pursuant to the Comprehensive Permit, the Program Guidelines and the Regulatory Agreement among MassHousing, the Municipality and the Developer of even date herewith (the "Regulatory Agreement"), the Project is to consist of a total of _____ condominium units/detached dwellings, of which _____ percent (_____ units) (the "Affordable Units") will be sold at prices specified in the Regulatory Agreement to Eligible Purchasers (as defined herein); and

WHEREAS, the Affordable Units will be subject to deed riders governing resale (the "Affordability Requirement") for a period of at least thirty (30) years, except as provided therein; and

WHEREAS, pursuant to the Comprehensive Permit, the Program Guidelines and the Regulatory Agreement, the Developer may not receive profit in excess of twenty percent (20%) of total development costs of the Project (the "Limited Dividend Requirement"); and

WHEREAS, pursuant to requirements of the Regulatory Agreement and the Comprehensive Permit, the Developer has agreed to retain the Monitoring Agent to perform monitoring and enforcement services regarding compliance of the Project with the Affordability Requirement and compliance of the Developer with the Limited Dividend Requirement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound hereby, agree as follows:

1. Monitoring Services. Monitoring Agent shall monitor the compliance of the Project with the Affordability Requirement and the compliance of the Developer with the Limited Dividend Requirement, as more fully described herein.

(a) Limited Dividend Requirement. In accordance with Section 6 of the Regulatory Agreement, the Developer agrees to deliver to the Monitoring Agent the Certified Cost and Income Statements, as defined in the Regulatory Agreement, at the times required thereunder. The Monitoring Agent agrees to review the adequacy and completeness of the Certified Cost and Income Statements and determine the Developer's substantive compliance with the Limited Dividend Requirement. Upon completion of its review of the Certified Cost and Income Statement, the Monitoring Agent will deliver to MassHousing and the Municipality a copy of such statement together with the Monitoring Agent's determination of whether the Limited Dividend Requirement has been met. If all of the units in the Project have not been sold at the time the Developer is required to deliver the initial Certified Cost and Income Statement to the Monitoring Agent, the Monitoring Agent will continue to review the subsequent Certified Cost and Income Statements delivered pursuant to the Regulatory Agreement and notify MassHousing and the Municipality until all of the units are sold and compliance with the Limited Dividend Requirement can be determined. If units are sold prior to approval of the initial Certified Cost and Income Statement, the provisions of Section 6(c) of the Regulatory Agreement shall apply.

(b) Affordability Requirement. (i) Initial Sales. The Developer agrees to deliver to the Monitoring Agent the income and asset certifications, deeds and deed riders with respect to initial sales of Affordable Units as required under the Regulatory Agreement (the "Initial Sales Data"). The Monitoring Agent agrees to review the Initial Sales Data and determine the substantive compliance of the Project with the Affordability Requirement. The Monitoring Agent shall also ensure substantive compliance with the approved Marketing Plan and lottery process. Upon completion of its review of Initial Sales Data, the Monitoring Agent will deliver to MassHousing and the Municipality a copy of such data together with the Monitoring Agent's determination of whether the Affordability Requirement has been met. MassHousing shall make the final determination of whether the Affordability Requirement has been met.

(ii) Resales. The Monitoring Agent also agrees to monitor resales of Affordable Units (including review of income and asset certifications, deeds and deed riders) for compliance with

the terms of the Deed Rider, and issuance of certifications, as appropriate, approval of resales and the payment of recapture amounts to the Municipality. The Monitoring Agent shall also locate and select, or provide assistance to the Municipality in locating and selecting, Eligible Purchasers, including without limitation, ensuring compliance with the approved Marketing Plan and lottery process.

(c) Annual Reports. Until the Limited Dividend Requirement and the Affordability Requirement have been met, the Monitoring Agent agrees to prepare and deliver annually a report (the "Annual Compliance Report") to the Zoning Enforcement Officer of the Municipality on (x) the compliance of the Developer with reporting requirements required under the Regulatory Agreement and with the Limited Dividend Requirement, and (y) compliance of the Project with the Affordability Requirement. The Annual Compliance Report shall indicate the extent of noncompliance with the relevant reporting and/or substantive requirements, describe efforts being made by the Developer to remedy such noncompliance and, if appropriate, recommend possible enforcement action by the Monitoring Agent and/or Municipality against the Developer. The Monitoring Agent shall deliver the Annual Compliance Report within one hundred twenty (120) days of the end of each calendar year during the term of this Agreement. For so long as the MassHousing Loan is outstanding, the Monitoring Agent shall deliver a copy of the Annual Compliance Report to MassHousing simultaneously with delivery thereof to the Municipality.

(d) Supplemental Monitoring Services. The Monitoring Agent shall provide reasonable supplemental monitoring on its own initiative in order to ensure to the extent practicable (i) the compliance by the Developer with the Affordability Requirement and the Limited Dividend Requirement, and (ii) the compliance by the owners of the Affordable Units with the requirements of the Deed Rider, including without limitation the owner-occupancy requirement and the Resale Restrictions (including recalculating the Resale Price Multiplier, if necessary). The services hereunder shall not include any construction monitoring. The services hereunder shall include follow-up discussions with the Developer and/or owners of the Affordable Units, if appropriate, after an event of noncompliance.

2. Monitoring Services Fee. (a) The Monitoring Agent shall receive a fee of \$ _____ from the Developer at the time of execution of this Agreement. Such fee shall constitute payment for the services of the Monitoring Agent with respect to compliance by the Developer with the Limited Dividend Requirement and with respect to the initial sales of the Affordable Units with the Affordability Requirement. As provided in the Deed Rider with each Affordable Unit, the Monitoring Agent shall receive a Resale Fee of two and one-half percent (2.5%) of the product of the Base Income Number (at the time of resale) multiplied by the Resale Price Multiplier, to be paid by the seller of the Affordable Unit at each closing as a condition precedent to closing, for the services with respect to monitoring each subsequent sales transaction for compliance with the Resale Restrictions and the other terms of the Deed Rider. Such fee shall be payable for all transfers of Affordable Units, including those to an Eligible Purchaser or any other purchaser. If the Monitoring Agent's fee is not paid at the time of closing, the Monitoring Agent shall be entitled to payment from the purchaser of the Affordable Unit and to bring an action and seek an attachment of the interest of the purchaser in the

Affordable Unit. Neither MassHousing nor the Municipality shall have any responsibility for payment of any fee to Monitoring Agent hereunder.

(b) The Municipality may enter into a separate contract with the Monitoring Agent and MassHousing to provide a portion of the services required to be performed by the Monitoring Agent under this Agreement, except for services with respect to compliance by the Developer with the Limited Dividend Requirement. The Municipality shall be entitled to receive from the Monitoring Agent a reasonable portion of the Monitoring Services Fee and/or the Resale Fee, as applicable, for performance of such services. MassHousing shall not have any responsibility for payment of any such fee to the Municipality.

3. Enforcement Services. In the event of serious or repeated violations of the substantive or reporting requirements of the Regulatory Agreement or a failure by the Developer to take appropriate actions to cure a default under the Regulatory Agreement, the Monitoring Agent shall have the right, with the prior consent of the Municipality (and, until the mortgage securing the MassHousing Loan is discharged, with the prior consent of MassHousing), to take appropriate enforcement action against the Developer, including, without limitation, legal action to compel the Developer to comply with the requirements of the Regulatory Agreement. The Regulatory Agreement provides for payment by the Developer of fees and expenses (including legal fees) of the Monitoring Agent in the event enforcement action is taken against the Developer thereunder and grants to the Monitoring Agent a lien on the Project, junior to the lien securing the MassHousing Loan, to secure payment of such fees and expenses. The Monitoring Agent shall be entitled to seek recovery of its fees and expenses incurred in enforcing the Regulatory Agreement against the Developer and to assert a lien on the Project to secure payment by the Developer of such fees and expenses.

In the event of a violation of the provisions of a Deed Rider, the Monitoring Agent shall have the right, with the prior consent of the Municipality, to take appropriate enforcement action against the unit owner or the unit owner's successors in title, including, without limitation, legal action to compel the unit owner to comply with the requirements of the relevant deed rider. The form of Deed Rider will provide for payment by the unit owner of fees and expenses (including legal fees) of the Monitoring Agent in the event enforcement action is taken against the unit owner thereunder and will grant to the Monitoring Agent a lien on the unit, junior to the lien of any institutional holder of a first mortgage on the unit to secure payment of such fees and expenses. The Monitoring Agent shall be entitled to seek recovery of its fees and expenses incurred in enforcing a deed rider against the unit owner and to assert a lien on the relevant unit to secure payment by the unit owner of such fees and expenses.

The Monitoring Agent shall not be entitled to seek any compensation or reimbursement from MassHousing or the Municipality in connection with the enforcement services under this Section, it being understood that the Monitoring Agent shall look solely to the reimbursement rights described above for payment of the Monitoring Agent's costs and expenses. Nothing in this Agreement shall be construed to require the Monitoring Agent to expend more than \$20,000 in enforcing the provisions of the Regulatory Agreement or to take any particular enforcement action against the Developer.

4. Term. The monitoring services are to be provided for so long as there is any Affordable Unit subject to a Deed Rider containing the Resale Restrictions, or there is any Affordable Unit which is owned by the Municipality. The term of this Agreement shall end on the date six (6) months after the later to occur of the latest expiration date of the term of the Deed Rider attached to any of the Affordable Units or the date the Municipality no longer owns any Affordable Unit.

5. Responsibility of Monitoring Agent. The Monitoring Agent shall not be held liable for any action taken or omitted under this Agreement so long as it shall have acted in good faith and without gross negligence.

6. Successor Monitoring Agent. Should the Monitoring Agent be dissolved or become incapable of fulfilling its obligations during the term of this Agreement, or if the Monitoring Agent consistently fails to exercise reasonable care and diligence in carrying out its responsibilities under this Agreement (any of the foregoing a "Termination Event"), the Municipality (with the consent of MassHousing) shall have the right to appoint a successor to serve as Monitoring Agent for the remaining term of this Agreement. If, within ninety (90) days after MassHousing receives notice of the occurrence of a Termination Event, the Municipality fails to appoint a successor monitoring agent, MassHousing shall promptly appoint a successor monitoring agent to serve as Monitoring Agent for the remaining term of this Agreement.

7. Indemnity. The Developer agrees to indemnify and hold harmless the Monitoring Agent, MassHousing and the Municipality against all damages, costs and liabilities, including reasonable attorney's fees, asserted against the Monitoring Agent, MassHousing or the Municipality by reason of its relationship with the Project under this Agreement and not involving the Monitoring Agent, MassHousing or the Municipality acting in bad faith and with gross negligence.

8. Applicable Law. This Agreement, and the application or interpretation hereof, shall be governed by the laws of The Commonwealth of Massachusetts.

9. Binding Agreement. This Agreement shall be binding on the parties hereto, their heirs, executors, personal representatives, successors and assigns.

10. Headings. All paragraph headings in this Agreement are for the convenience of reference only and are not intended to qualify the meaning of the paragraph.

11. Third-Party Beneficiaries. MassHousing (for so long as the MassHousing Loan is outstanding) and the Municipality shall be entitled to enforce this Agreement and may rely on the benefits of this Agreement.

12. Entire Agreement. This Agreement supersedes all prior agreements between the parties with respect to the Project, whether oral or written, including without limitation, all correspondence between the parties and between counsel for their respective parties. This Agreement constitutes the sole and entire agreement between the parties hereto with respect to the subject transaction, and the rights, duties, and obligations of the parties with respect thereto.

In executing this Agreement, the Monitoring Agent acknowledges that the Monitoring Agent is not relying on any statement, representation, warranty, covenant or agreement of any kind made by the Developer, MassHousing or the Municipality or any employee or agent of any of the foregoing, except for the agreements set forth herein.

13. Definitions. Any capitalized term used and not defined herein shall have the same meaning as set forth in the Regulatory Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first written above.

[DEVELOPER]

By: _____
Title: _____

CITIZENS HOUSING AND PLANNING
ASSOCIATION, INC.

By: _____
Title: _____

[MUNICIPALITY]

Town [City] of _____

By:

Massachusetts Housing Finance Agency

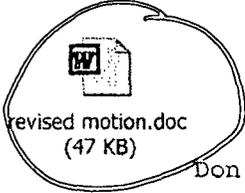
By: _____
Laurie R. Wallach, General Counsel

Christine Joyce

From: Daniel C. Hill [dhill@AndersonKreiger.com]
Sent: Friday, February 25, 2005 4:44 PM
To: Don Johnson; Christine Joyce
Cc: Stephen Anderson
Subject: Acton/Fort Pond Brook LIP Project



Contreas (from Hunter).doc (38...



revised motion.doc (47 KB)

Don:

Very Important!

Per our discussion, please find attached a revised motion for the Board of Selectmen meeting Monday night.

Also attached is a letter that the developer has requested Dore' to sign, to be sent to DHCD signifying the Town's approval of the Project's marketing plan. I have reviewed the same and advise Dore' to sign it. Perhaps Christine can put this letter on Town letterhead?

Let me know if you have any questions!

-Dan <<Contreas (from Hunter).doc>> <<revised motion.doc>>

Daniel C. Hill, Esq.
Anderson & Kreiger LLP
43 Thorndike Street
Cambridge MA 02141
dhill@andersonkreiger.com
T: 617-252-6575 FAX: 617-252-6899
<http://www.andersonkreiger.com>

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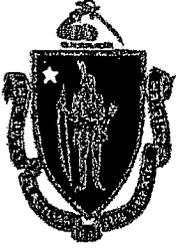
2/25/05

Mr. Don Johnson
2/25/2005
Page 1

MOTION:

Moved that the Board of Selectmen:

- (1) appoint the Acton Community Housing Corporation (AACHC@) as the Town of Acton's monitoring agent under a proposed Monitoring Services Agreement (substantially in the form attached) with 68 River Street, LLC, to be executed under the comprehensive permit issued by the Acton Board of Appeals pursuant to Chapter 40B of the Massachusetts General Laws for the development of mixed-income housing at 68 River Street in Acton;
- (2) pursuant to Chapter 143 of the Acts and Resolves of 1996, authorize the ACHC to: (a) acquire and hold interests in real and personal property, including affordable housing restrictions, and to sell, lease, convey, mortgage, or encumber the same; (b) enter into contracts with consultants, accountants, and any other agents, employees and contractors; and (c) receive and hold such funds as may be appropriated from time-to-time by the Town of Acton and other funds from any source, and to expend or utilize the same, all as may be necessary and appropriate to carry out its functions and perform its obligations as Monitoring Agent under said Agreement; and
- (3) authorize the Chairman of the Board of Selectmen, or the Acting Chairman of the Board of Selectmen, to execute the Regulatory Agreement and Monitoring Services Agreement for the Chapter 40B development at 68 River Street in Acton, in the forms approved by Town Counsel on February 14, 2005.



The Commonwealth of Massachusetts
Office of the Inspector General

GREGORY W. SULLIVAN
INSPECTOR GENERAL

cc: BOS

JOHN W. MCCORMACK
STATE OFFICE BUILDING
ONE ASHBURTON PLACE
ROOM 1311
BOSTON, MA 02108
TEL: (617) 727-9140
FAX: (617) 723-2334

July 13, 2005

Mr. Peter Ashton
Chairman, Board of Selectmen

Mr. Don P. Johnson
Town Manager

Town of Acton
472 Main Street
Acton, MA 01720

Re: Preliminary Findings Pertaining to Crossroad Development, LLC's Cost & Income Statement.

Dear Chairman Dore'Hunter and Mr. Johnson:

The purpose of this letter is to provide you with a brief update regarding this office's preliminary review of the housing development implemented under M.G.L. c.40B by Crossroads Development, LLC at 244 Main Street, Acton, MA. I understand that the town of Acton, through the "Acton Community Housing Corporation" (the monitoring agent for this development) has commissioned an audit of Crossroads in order to independently ascertain the profits for this project. I hope that these findings will be useful in your audit efforts.

This office reviewed the documentation regarding the Crossroads development which was provided through the town based on this office's document request dated December 21, 2004. Officials from this office also met with the executive director of Citizens Housing and Planning Association (CHAPA), a non-profit monitoring agent for several Chapter 40B projects, to discuss auditing and cost certification. The preliminary review of these documents indicates that the "Developer Certification of Cost and Income Statement," dated January 13, 2005 and submitted by Crossroads to the town may understate the development's profits, which in turn, may also result in a loss of

funds to the town. Below are some of the issues we identified. As part of the next phase of our review, this office will examine detailed cost data (invoices, cancelled checks, etc.) directly from the developer.

PRELIMINARY FINDINGS:

1. Sale of Housing Unit to Related Party and Subsequent Resale to Third Party.

On December 15, 2004, the final unit at Crossroads (Unit 4 at 248 Main Street) was sold. The "buyer" of this unit was "Stow Street Realty, Inc." The principals of Stow Street Realty, Inc. are James Fenton (President) and Michael Jeanson (Treasurer/Secretary), who are also the developers of Crossroads. It should be noted that the other eight market rate units of this development sold for an average of \$312,000 (sales price range for these units was between \$299,000 and \$335,000). The \$250,000 purchase price for this last unit was reflected in the certified Cost and Income Statement submitted to the town by the developers in determining the allowable profit of the project. Note the net profit reported to the town was \$525,431.89 or 19.44 percent of the total expenses. The reported profit is just under (less than \$15,000) the maximum allowable profit of 20 percent.

On January 13, 2005, the developer submitted the cost and income certification to the town. On February 10, 2005, Stow Street Realty, Inc. sold the unit to a third party for \$300,000. The net result is that \$50,000 of additional profit may not have been reported to the town. Based on the regulatory agreement and assuming the rest of the data on the certified cost and income statement is correct; approximately \$35,000 of this profit should have been paid to the town (see attached deeds).

2. Unallowable Costs Appear to be Included in the Profit Calculations.

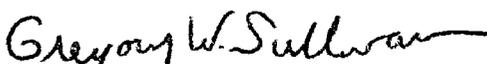
In reviewing the certified Cost and Income Statement submitted by the developer, there appears to be costs included (based on the expense descriptions) which may be unallowable. These costs include \$36,000 in "Development Fees" and \$84,600 in "Admin, Construction Mgmt". The Regulatory Agreement (see attached) between Crossroads Development, LLC, Middlesex Savings Bank and the town; specifically excludes development fees in the calculation of the allowable profits.

3. Reasonableness of Broker Commission Fees.

Based on the certified Cost and Income Statement – a 6 percent broker's commission was paid by the developer on the sale of the market units. According to CHAPA, 6 percent is high for this type of development and a 4 to 5 percent commission would be more reasonable. Each percentage point reduction equates to \$25,000 for the town.

Our office will contact you in order to discuss this review in more detail. Should you have any questions pertaining to these findings or if we can be of other assistance, please do not hesitate to contact George Xenakis or Dan O'Neil of my staff.

Sincerely,


Gregory W. Sullivan
Inspector General *by: [Signature]*

encl.

fund to be used by the Municipality to support other affordable housing within the Municipality.

The Deed Rider requires the Affordable Unit owner and any purchaser to execute at the time of resale a similar Deed Rider which shall be attached to and made a part of the deed from the owner to the purchaser, so that the affordability of each Affordable Unit will be preserved each time that subsequent resale of the Affordable Unit occurs during the period of affordability specified in this Agreement.

5. Dividend Limitation. Developer agrees that the profit to the Developer or to the partners, shareholders, or other owners of Developer or of the Project shall not exceed twenty percent (20%) of total development costs of the Project, exclusive of development fees (the "Allowable Profit"). After all Units in the Project that are offered for sale have been sold, the Developer shall deliver to the Monitoring Agent or its designated agent a final Certified Cost and Income Statement. All profits from the Project in excess of the Allowable Profit shall be paid by the Developer to the Municipality for deposit in an affordable housing fund to be used by the Municipality for the purposes of encouraging, creating or subsidizing the construction or rehabilitation of affordable housing elsewhere in the Municipality.

6. Affirmative Marketing. The Developer shall not discriminate on the basis of race, creed, color, sex, age, handicap, marital status, national origin or any other basis prohibited by law in the selection of the buyers for the Affordable Units. The Developer shall affirmatively market the Affordable Units to minority households through direct outreach efforts to local churches, social service and civic organizations as well as local and area-wide newsprint media where minority households are most likely to be contacted. This outreach effort must continue for a period of at least 60 days prior to the selection of buyers for the Affordable Units. The Developer agrees to maintain for at least three (3) years following the sale of the Affordable Units, a record of all newspaper ads, outreach letters translations, leaflets and any other outreach efforts that may be inspected by the Monitoring Agent or the Municipality.

7. Recording. Upon execution hereof, the Developer shall immediately cause this

Acton Community Housing Corporation

Nancy Tavernier, Chairman

TOWN OF ACTON

Acton Town Hall

472 Main Street

Acton, Massachusetts, 01720

Telephone (978) 263-9611

TO: Board of Selectmen
FROM: Nancy Tavernier, Chair
SUBJECT: 40B Monitoring Agent – request for change
DATE: March 9, 2006
cc Don Johnson, John Murray

The ACHC has voted to ask the Board of Selectmen to re-define its designation of us as the Monitoring Services Agent for current and future 40B developments and to take whatever action is required to relieve us of this assignment. ACHC began to be the Monitoring Agent in 2002 for the Crossroads Condominium, and since then, the Board has designated us for Fort Pond Brook Place, Franklin Place, and anticipates doing so for The Woodlands. This was a new official term for the work we normally did, or so we thought. It was done in each case with our consent and as a condition to each Comprehensive Permit but we have now reconsidered that agreement.

Monitoring 40B's involves two areas of focus, 1) monitoring the compliance of the Project with the Affordability Requirements and 2) monitoring the compliance of the Developer with the Limited Dividend Requirement. The ACHC has always done the monitoring of the affordability requirements for housing developments. This is what we do best due to our knowledgeable and experienced members. We want to continue to monitor this aspect of development but not the post-development financial aspect.

The Limited Dividend Requirement review is not an area that we have any expertise in and we feel this is the time to terminate that activity. Since we have never actually completed this requirement, we cannot even say what the duties are but they primarily relate to the post-development financial reports from the developer for the purpose of verifying whether or not the limited profit has been met or exceeded. The post-development audit for Crossroads was ready to begin in January 2005 and to date has not been completed nor have we had any recent updates on its progress. Dan Hill has been supervising the contract for the Town, we have not. The Franklin Place audit is due to be underway but has not yet begun and it could be quite complicated. We wish to be relieved of the financial responsibility for Crossroads and Franklin Place and the same going forward with The Woodlands and other 40B's to be approved by the ZBA. We

are holding \$10,000 in escrow for the Franklin Place audit, it should be in the Town's hands and we shall return it as soon as this is ironed out.

Listed below are the Monitoring Agent functions that ACHC would like to continue to be responsible for, the compliance of each project with the Affordability Requirements.

Before the lottery process commences, the developer must submit a lottery and affirmative marketing plan to the monitoring agent (ACHC) for approval, which must include a mechanism for selecting affordable households from among the set of affordable applicants where the number of affordable applicants exceeds the number of available affordable units in development.

The monitoring agent (ACHC) will review the plan to ensure that it meets basic threshold requirements of Chapter 40B guidelines and regulations, provisions of the comprehensive permit for the development, and conforms to best practices. Once ACHC approves the lottery and marketing plan, a letter of approval will be sent to the developer and the subsidizing agency.

The monitoring agent will review:

- Sales price of the affordable units
- Maximum income and asset eligibility and size of households applying for the affordable units
- Marketing and outreach plan to ensure affirmative fair marketing is being undertaken
- Deed riders used to ensure continued affordability
- Sample advertisements to be used and list of publications where ads will be placed

We ask that the BOS take whatever votes are required to rescind the assignment of ACHC as the Monitoring Agent responsible for the Limited Dividend Requirements of Crossroads, Franklin Place, The Woodlands, and any future 40B's. We are aware that this could be a tangled web since ACHC is listed as the Monitoring Agent in all of these Permits and Nancy has signed several documents on ACHC's behalf. If we need to make the Town the designee in our place, we are prepared to vote to do that but again only for the Limited Dividend Requirements of 40B's.

Thank you for your attention to this matter.



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

Mitt Romney, Governor ♦ Kerry Healey, Lt. Governor ♦ Jane Wallis Gumble, Director

Memorandum

To: Local Officials and Housing Colleagues
From: Jane Wallis Gumble, Director
Subject: Monitoring of Chapter 40B Developments
Date: April 27, 2006

On behalf of the Department of Housing and Community Development I would like to clarify some questions that have arisen about the role that local boards and organizations may undertake in monitoring approved Chapter 40B developments.

The Comprehensive Permit Law (M.G.L. Chapter 40B) provides for the issuance of comprehensive permits by zoning boards of appeal (ZBAs) to public agencies, nonprofit organizations and limited dividend organizations for the purpose of developing low- and moderate-income housing. In granting a permit, the ZBA may impose reasonable conditions that address planning and land use concerns (such as building height, number of units, site layout, environmental mitigation, etc.) Further guidance on ZBA decisions is available on DHCD's web site (www.mass.gov/dhcd/components/hac) and in the Massachusetts Housing Partnership's Local 40B Review and Decision Guidelines (www.mhp.net/40B).

The rules that allow a developer to qualify for a comprehensive permit are established and regulated by the applicable federal or state "subsidizing agency." For most 40B developments that subsidizing agency will be MassHousing, DHCD, the Massachusetts Housing Partnership, or MassDevelopment. (In the case of projects subsidized by the New England Fund of the Federal Home Loan Bank of Boston, MassHousing acts as project administrator under the Guidelines for Housing Programs in which Funding is Provided Through a Non-Governmental Entity (NEF Guidelines) (<http://www.mass.gov/dhcd/Toolkit/default.htm>) and effectively undertakes the same role as a subsidizing agency.)

In order to comply with regulations, the subsidizing agency must ensure that the developer will be a limited dividend organization through execution of a regulatory agreement. In addition, the subsidizing agency must be satisfied that development costs and fees are reasonable and within program limits (which is verified through a cost certification upon the development's completion), that housing is sold or rented to income and asset-qualified households in compliance with fair housing laws, that sales prices for homeownership units or monthly rental

costs are within program limits, and, in the case of rental housing, that annual dividends from the operations are within program limits.

It is the responsibility of the subsidizing agency to monitor and enforce the aforementioned requirements that are imposed on the development. Monitoring of 40B projects is performed either by the subsidizing agency or by an organization under contract to the subsidizing agency called a monitoring agent.* If local organizations are willing and able to perform some or all of those monitoring functions they may submit their qualifications to the subsidizing agency for approval. A subsidizing agency may establish minimum qualifications and performance standards for local monitoring agents, and it is within the subsidizing agency's discretion whether to utilize local monitoring agents. Indeed, because the subsidizing agency is accountable for adhering to Chapter 40B statutory, regulatory, and program requirements, it must ensure that the monitoring agent has the capacity to perform those tasks well with no conflicts of interest.

Zoning boards of appeal may not under any circumstance impose conditions in a comprehensive permit that impinge on the regulatory responsibilities of the subsidizing agency. Accordingly, ZBAs should not impose any conditions that specify how cost certification, project monitoring, or the sale or rental of affordable units is to be performed, or by whom those tasks will be performed during the period the subsidizing agency retains regulatory oversight. If local officials have specific concerns about state oversight of 40B developments, we are fully prepared to address them directly.

Municipalities have the right to be informed that the subsidizing agencies are fulfilling their 40B monitoring and enforcement responsibilities. ZBAs may obtain such documentation from the subsidizing agencies (e.g., copies of cost certifications and annual monitoring reports as approved by the subsidizing agency in accordance with program requirements) and the state subsidizing agencies will be responsive to all such inquiries from municipalities. Moreover, with regard to rental developments, given that many comprehensive permits impose affordability requirements in perpetuity, municipalities should appropriately document the affordability requirements that extend beyond the term of the subsidizing agency's regulatory agreement. A municipality may want to hire a monitoring agent to monitor affordability during this time period with the cost of such agent to be paid by the owner of the 40B rental development. If you have further questions about the role of communities or local organizations in regulating or monitoring 40B developments I encourage you to consult your own local counsel, to contact the appropriate subsidizing agency, and to utilize free consulting services available through the Massachusetts Housing Partnership for the review of any pending applications for comprehensive permits.

* Monitoring agents were designated as part of the local review and approval process for New England Fund projects initiated prior to August 2002. For New England Fund projects initiated thereafter, the NEF Guidelines allow, but do not require, the Project Administrator to use a Monitoring Agent.



Commonwealth of Massachusetts
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
Mitt Romney, Governor ♦ Kerry Healey, Lt. Governor ♦

To: ZBA 6/5/06
From Nancy Tavernier
Letter requested by ZBA as follow-up to DHCD letter on monitoring agents

May 10, 2006

Mr. Thomas Connelly, Executive Director
MassNAHRO
11 Beacon Street, Suite 722
Boston, MA 02108

Dear Tom,

I am writing to reiterate my interest in collaborating with Mass NAHRO and local housing authorities that are interested in having a role in the local lotteries and the monitoring for 40B developments. It is absolutely appropriate that local housing authorities have an interest in insuring that affordable housing opportunities are made available to qualified households and that the use restrictions for affordable units are enforced over time. It is also reasonable and understandable for local officials and boards of zoning appeals to seek out the housing authorities as experts on issues related to affordable housing, including housing permitted pursuant to c. 40B.

As you know, it is the responsibility of the subsidizing agency to monitor and enforce the subsidy program requirements and the terms of the regulatory agreement. For most 40B developments that subsidizing agency will be MassHousing, DHCD, the Massachusetts Housing Partnership, or MassDevelopment. The subsidizing agency may contract with another entity to perform some or all of those monitoring functions. If local housing authorities are interested in this role, they may submit their qualifications to the subsidizing agency for approval. I have attached a copy of the memo that I have sent to local officials, local housing authorities, developers and others involved in c. 40B development to clarify any confusion on this matter.

In reviewing an earlier version of the manual, I was troubled that it contained elements that were misleading and/or did not contain complete information regarding various aspects of the c. 40B process. I am confident that you would like LHAs that are interested in taking a role in this process to have the most accurate and complete information to enable them to perform skillfully. I was pleased to receive a copy of the 4/21/06 version of the manual and your request for comments from DHCD, MassHousing and MHP. We will endeavor to get you our feedback within 30 days.

It is my hope that we can work together with MassNAHRO and local housing authorities to maintain the integrity of c. 40B and achieve the shared goals of creating more affordable housing opportunities in cities and towns across the state.

Sincerely,

Jane Wallis Gumble, Director

Cc: Thomas R. Gleason, MassHousing
Clark L. Ziegler, MHP





National Association of Housing & Redevelopment Officials

To: Local Officials and Housing Authorities
From: Massachusetts Chapter of NAHRO
Subject: Our Response to the DHCD Memo of April 27 on the
Monitoring of Chapter 40B Developments
Date: May 17, 2006

The Massachusetts Chapter of the National Association of Housing and Redevelopment Officials, MassNAHRO, is a 501c(3) professional association representing 267 local housing authorities and municipal development agencies across the state. Our members are familiar with the development of public and private affordable housing in their communities. Housing authorities are the local officials specifically obligated under state law to serve the housing needs of their low and moderate residents.

The Director of DHCD sent you a memo recently relative to the monitoring conditions Zoning Boards of Appeal (ZBAs) may place on comprehensive permits and the powers of the subsidizing agency to review and possibly reject those conditions. The impetus for this DHCD memo is the 40B training and reference materials MassNAHRO is providing our members for guidance at their request. We are providing this assistance as numerous local ZBAs have reached out to their local housing authorities to protect and monitor specific functions related to but not limited to lottery oversight, limited dividend monitoring, and ongoing affordability monitoring.

MassNAHRO believes strongly that local housing officials can play a significant role in the 40B process and may choose to offer their services to the community to audit the comprehensive permit and to ensure compliance with the decision of the local Zoning Board of Appeals. A local housing authority is an entity that has a long standing place within the community, is accountable to a number of federal and state entities, is transparent in their business practices, has conducted lotteries and is familiar with local housing needs. The local housing authority should be the one-stop shop for all activities related to the development, oversight and management of affordable housing within a local community.

MassNAHRO will continue to provide our members with the information and education they have requested in order for them to continue to be effective managers of affordable housing and an active player in the local 40B process. MassNAHRO will serve the informational needs of local officials so they may better serve their community.

MassNAHRO will continue to work cooperatively with DHCD and all 40B players on addressing any issues they may have. Also, we will further review our excellent training program based upon comments from DHCD, MHP and MassHousing. Lastly, we will continue to meet with the state in an effort to promote the increased involvement of municipal housing officials in local 40B activities.

Development of truly affordable housing must continue in the State of Massachusetts and we believe that the local housing authorities across the state should play a key role.



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

Mitt Romney, Governor ♦ Kerry Healey, Lt. Governor ♦ Jane Wallis Gumble, Director

Memorandum

To: Local Officials and Housing Colleagues
From: Jane Wallis Gumble, Director 
Subject: Monitoring of Chapter 40B Developments
Date: April 27, 2006

On behalf of the Department of Housing and Community Development I would like to clarify some questions that have arisen about the role that local boards and organizations may undertake in monitoring approved Chapter 40B developments.

The Comprehensive Permit Law (M.G.L. Chapter 40B) provides for the issuance of comprehensive permits by zoning boards of appeal (ZBAs) to public agencies, nonprofit organizations and limited dividend organizations for the purpose of developing low- and moderate-income housing. In granting a permit, the ZBA may impose reasonable conditions that address planning and land use concerns (such as building height, number of units, site layout, environmental mitigation, etc.). Further guidance on ZBA decisions is available on DHCD's web site (www.mass.gov/dhcd/components/hac) and in the Massachusetts Housing Partnership's Local 40B Review and Decision Guidelines (www.mhp.net/40B).

The rules that allow a developer to qualify for a comprehensive permit are established and regulated by the applicable federal or state "subsidizing agency." For most 40B developments that subsidizing agency will be MassHousing, DHCD, the Massachusetts Housing Partnership, or MassDevelopment. (In the case of projects subsidized by the New England Fund of the Federal Home Loan Bank of Boston, MassHousing acts as project administrator under the Guidelines for Housing Programs in which Funding is Provided Through a Non-Governmental Entity (NEF Guidelines) (<http://www.mass.gov/dhcd/Toolkit/default.htm>) and effectively undertakes the same role as a subsidizing agency.)

In order to comply with regulations, the subsidizing agency must ensure that the developer will be a limited dividend organization through execution of a regulatory agreement. In addition, the subsidizing agency must be satisfied that development costs and fees are reasonable and within program limits (which is verified through a cost certification upon the development's completion), that housing is sold or rented to income and asset-qualified households in compliance with fair housing laws, that sales prices for homeownership units or monthly rental

costs are within program limits, and, in the case of rental housing, that annual dividends from the operations are within program limits.

It is the responsibility of the subsidizing agency to monitor and enforce the aforementioned requirements that are imposed on the development. Monitoring of 40B projects is performed either by the subsidizing agency or by an organization under contract to the subsidizing agency called a monitoring agent.* If local organizations are willing and able to perform some or all of those monitoring functions they may submit their qualifications to the subsidizing agency for approval. A subsidizing agency may establish minimum qualifications and performance standards for local monitoring agents, and it is within the subsidizing agency's discretion whether to utilize local monitoring agents. Indeed, because the subsidizing agency is accountable for adhering to Chapter 40B statutory, regulatory, and program requirements, it must ensure that the monitoring agent has the capacity to perform those tasks well with no conflicts of interest.

Zoning boards of appeal may not under any circumstance impose conditions in a comprehensive permit that impinge on the regulatory responsibilities of the subsidizing agency. Accordingly, ZBAs should not impose any conditions that specify how cost certification, project monitoring, or the sale or rental of affordable units is to be performed, or by whom those tasks will be performed during the period the subsidizing agency retains regulatory oversight. If local officials have specific concerns about state oversight of 40B developments, we are fully prepared to address them directly.

Municipalities have the right to be informed that the subsidizing agencies are fulfilling their 40B monitoring and enforcement responsibilities. ZBAs may obtain such documentation from the subsidizing agencies (e.g., copies of cost certifications and annual monitoring reports as approved by the subsidizing agency in accordance with program requirements) and the state subsidizing agencies will be responsive to all such inquiries from municipalities. Moreover, with regard to rental developments, given that many comprehensive permits impose affordability requirements in perpetuity, municipalities should appropriately document the affordability requirements that extend beyond the term of the subsidizing agency's regulatory agreement. A municipality may want to hire a monitoring agent to monitor affordability during this time period with the cost of such agent to be paid by the owner of the 40B rental development. If you have further questions about the role of communities or local organizations in regulating or monitoring 40B developments I encourage you to consult your own local counsel, to contact the appropriate subsidizing agency, and to utilize free consulting services available through the Massachusetts Housing Partnership for the review of any pending applications for comprehensive permits.

* Monitoring agents were designated as part of the local review and approval process for New England Fund projects initiated prior to August 2002. For New England Fund projects initiated thereafter, the NEF Guidelines allow, but do not require, the Project Administrator to use a Monitoring Agent.



National Association of Housing & Redevelopment Officials

To: Local Officials and Housing Authorities
From: Massachusetts Chapter of NAHRO
Subject: Our Response to the DHCD Memo of April 27 on the
Monitoring of Chapter 40B Developments
Date: May 17, 2006

The Massachusetts Chapter of the National Association of Housing and Redevelopment Officials, MassNAHRO, is a 501c(3) professional association representing 267 local housing authorities and municipal development agencies across the state. Our members are familiar with the development of public and private affordable housing in their communities. Housing authorities are the local officials specifically obligated under state law to serve the housing needs of their low and moderate residents.

The Director of DHCD sent you a memo recently relative to the monitoring conditions Zoning Boards of Appeal (ZBAs) may place on comprehensive permits and the powers of the subsidizing agency to review and possibly reject those conditions. The impetus for this DHCD memo is the 40B training and reference materials MassNAHRO is providing our members for guidance at their request. We are providing this assistance as numerous local ZBAs have reached out to their local housing authorities to protect and monitor specific functions related to but not limited to lottery oversight, limited dividend monitoring, and ongoing affordability monitoring.

MassNAHRO believes strongly that local housing officials can play a significant role in the 40B process and may choose to offer their services to the community to audit the comprehensive permit and to ensure compliance with the decision of the local Zoning Board of Appeals. A local housing authority is an entity that has a long standing place within the community, is accountable to a number of federal and state entities, is transparent in their business practices, has conducted lotteries and is familiar with local housing needs. The local housing authority should be the one-stop shop for all activities related to the development, oversight and management of affordable housing within a local community.

MassNAHRO will continue to provide our members with the information and education they have requested in order for them to continue to be effective managers of affordable housing and an active player in the local 40B process. MassNAHRO will serve the informational needs of local officials so they may better serve their community.

MassNAHRO will continue to work cooperatively with DHCD and all 40B players on addressing any issues they may have. Also, we will further review our excellent training program based upon comments from DHCD, MHP and MassHousing. Lastly, we will continue to meet with the state in an effort to promote the increased involvement of municipal housing officials in local 40B activities.

Development of truly affordable housing must continue in the State of Massachusetts and we believe that the local housing authorities across the state should play a key role.

ANDERSON & KREIGER LLP

DANIEL C. HILL
dhill@andersonkreiger.com

May 31, 2006

BY FACSIMILE: 978-749-0006 and Mail

Melanson Heath & Company, PC
10 New England Center Drive
Suite 112
Andover, MA 01810-1096

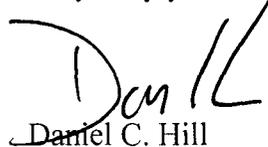
Dear Sir or Madam:

This firm is Town Counsel for the Town of Acton. The Town is currently seeking a qualified Certified Public Accountant to perform a financial audit of a 12-unit residential housing development permitted under the so-called "comprehensive permit statute," General Laws Chapter 40B. The purpose of the audit is to determine whether the project complies with the profit limitation ("limited dividend") provisions under the Zoning Board of Appeals' comprehensive permit decision, and under Chapter 40B generally.

The Board of Appeals designated the Acton Community Housing Corporation as the monitoring agent for this project. The ACHC is a quasi-public board and an entity of the Town. As monitoring agent, the ACHC is responsible for reviewing the project's financial statements and to determine whether the project complies with the limited dividend provisions. The ACHC requires the professional expertise of an accountant with specific experience in residential construction, as well as a basic understanding of the legal framework of Chapter 40B and the role of the monitoring agent in reviewing a project's financials.

If you are interested in applying for this contract with the ACHC, please submit a proposal, with your estimated costs and fees, relevant experience, and timetable for completion to my attention by June 14, 2006. If you have any questions, please call me.

Very truly yours,



Daniel C. Hill

DCH/sm

Encl.

cc: Don P. Johnson, Town Manager
Nancy Tavernier, ACHC

g:\docs\act\40b-mainstreet\melansonheath001.doc



The Commonwealth of Massachusetts
Office of the Inspector General

GREGORY W. SULLIVAN
INSPECTOR GENERAL

JOHN W. MCCORMACK
STATE OFFICE BUILDING
ONE ASHBURTON PLACE
ROOM 1311
BOSTON, MA 02108
TEL: (617) 727-9140
FAX: (617) 727-2334

May 26, 2006

Mr. Peter Ashton
Chairman, Board of Selectmen
Town of Acton
472 Main Street
Acton, MA 01720

Mr. Don P. Johnson
Town Manager
Town Of Acton
472 Main Street
Acton, MA 01720

Subject: Developer Profits – Crossroads Development, LLC

Dear Chairman Ashton and Manager Johnson;

In July, 2005 the Office of the Inspector General provided the town of Acton with preliminary cost recovery findings (letter attached) related to the housing development implemented under M.G.L. c. 40B by Crossroads Development, LLC (Crossroads) at 244 Main Street. Since then this Office has initiated a detailed and comprehensive review of 40B projects primarily focused on the determination and reporting of the associated developer profits. The Crossroads project was one of several projects selected for this detailed review. Highlighted below are our findings based on this review. We hope this information is useful to the town of Acton in arriving at an appropriate financial settlement with the developer. We plan to use the results of all the individual development audits (including Crossroads) in order to identify and implement improvements to the 40B process.

In order to facilitate our review of 40B developer profits, this Office has contracted with the certified public accounting firm of Melanson Heath & Company, PC (Melanson) to perform the necessary agreed upon audit procedures. A copy of the Melanson report is enclosed for your review and use. A draft of this report was reviewed with Crossroads through their attorney, Mr. Brian Hurley, Esq. of Rackemann, Sawyer, & Brewster. Also, enclosed for your review is all correspondence between this Office and Attorney Hurley throughout this process.

The Crossroads development was built under the New England Fund (NEF) subsidy program which allowed a developer profit of up to 20% of the total development costs of the project. The cost certification provided by the developer to the town reflected total development costs of \$2,702,069 and an associated profit of \$525,431 or 19.45% of total development costs. The developer did not make any excess profit payment to the town since the reported profit was less than the designated 20% allowed under the NEF subsidy program.

Our investigation has highlighted a significantly different profit scenario for Crossroads. We found that the cost certification provided by the developer understated sales by \$50,000 and overstated expenses by approximately \$600,000. The net effect of these proposed adjustments is a revised profit percentage of 57% which in turn results in an excess profit payable to the town of Acton of approximately \$763,000. Based on the regulatory agreement these monies can be used by the town to promote additional affordable housing opportunities.

The \$50,000 sales adjustment relates to the sale of housing unit 4 to a related party and the subsequent resale of the property to a third party at a profit. As was communicated back in our April 2005 letter to the town, unit 4 at 248 Main Street was sold in December 2004 to Stow Street Realty, Inc. The principals of Stow Street Realty, Inc. are James Fenton and Michael Jeanson who are also the developers of Crossroads. The other 8 market units sold for an average of \$312,000 and the sales price range for these units was between \$299,000 and \$335,000. As was reflected in the cost certification unit 4 was sold to Stow Street Realty, Inc for \$250,000. Less than one month after the cost certification was submitted to the town, Stow Street Realty, Inc resold the unit to a third party for \$300,000. In our opinion the arms length transaction of \$300,000 should be reflected in the profit calculation and not the related party transaction amount of \$250,000.

As was previously noted, we found that the cost certification overstated development costs by approximately \$600,000. The largest proposed adjustment (\$396,334) relates to a related party transaction for site development work. Although requested on multiple occasions, the developer has not provided any back-up expense invoices for this billing. It should be noted that separate payments were also made to other vendors for paving, landscaping materials and foundation installation. In comparing Crossroads to another similar development in scope but one which used a third party contractor to do the site development work we noted these third party site development costs to be in the neighborhood of \$40,000 or an order of magnitude cost difference from the related party costs claimed by Crossroads. Other proposed related party adjustments include \$43,373 for administration/construction management costs and \$24,975 for real estate sales commission costs.

A construction management fee of \$84,600 was paid to Distinctive Acton Homes, a related party to the developer. The amount was determined by taking 3% of the expected sales revenue of \$2,820,000. This fee was not disclosed by the developer in pro forma financial information submitted by the developer in the comprehensive permit application. In our opinion, a strong case could be made to disallow the entire \$84,600 construction management fee since this was not previously disclosed to the town and since the regulatory agreement specifically states that development costs for calculating the 20% profit are exclusive of development fees. The proposed adjustment of \$43,373 reduces the construction management fee to 2% of construction costs or \$41,227 which is more in line with recent Department of Housing and Community Development (DHCD) guidance.

Another related party, Colonial Homes Real Estate, Inc., was the broker for the market units sold. Colonial Homes Real Estate, Inc. was paid a 6% commission rate on the sale of eight market rate units. Using the guidance recently published by DHCD that if there is an identity of interest between the development entity and the brokerage agency, the fee on the sale of the market units should not exceed 5%. Adjusting this related party commission rate to 5%, results in a \$24,975 reduction in allowable development costs which should be used in the developer profit calculation. Our preliminary work with other projects where the real estate broker is not related to the developer indicates commission rates even lower than the 5% related party rate advocated in the recent DHCD guidelines.

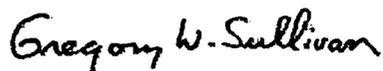
Other significant proposed cost adjustments include a refund of \$56,733 which was received by the developer from the town of Acton for excess sewer connection fees paid. This refund was received by the developer after the cost certification was submitted and therefore was not considered in either the sewer connection costs or the profit calculations. Approximately \$35,000 of costs were adjusted down since the developer was unable to provide adequate support backup. Insurance premiums for multiple entities totaling \$46,251 were charged to the Crossroads project. The developer was not able to provide the backup showing the portion related to Crossroads directly, and therefore these costs have also been excluded from the allowable development costs. It should be noted that the pro forma financials only reflected a \$15,000 insurance related cost. We are also of the opinion that since a 2% management fee was allowed, this would cover these types of expenses.

Proposed cost adjustments also include among other things a \$3,251 charge for carpeting which was not installed in the project, an adjustment of \$9,974 for early payment discounts and credit memos received by the developer on payments but not reflected in costs charged to jobs in the general ledger; and, a duplicate invoice charge of \$7,729.

Acton – Crossroads
May 26, 2006
Page 4 of 4

We would be happy to arrange a meeting with you in order to discuss these findings in more detail. If you have any questions or concerns, or if we can be of other assistance, please do not hesitate to call me.

Sincerely,



Gregory W. Sullivan
Inspector General

Enclosures

Cc: Mr. Dan Hill Esq.
Mr. Brian Hurley, Esq.

Acton Community Housing Corporation

Nancy Tavernier, Chairman

TOWN OF ACTON

Acton Town Hall

472 Main Street

Acton, Massachusetts, 01720

Telephone (978) 263-9611

achc@acton-ma.gov

TO: Board of Selectmen
FROM: Nancy Tavernier, Chair
SUBJECT: Renew ACHC request on Monitoring Agent role
DATE: June 20, 2006

In March 2006, ACHC transmitted the attached memo to the Selectmen requesting a bifurcation of our Monitoring Agent duties. There are two distinct functions required of Monitoring Agents of 40B projects, the oversight of the Affordability Requirements and the review of the Limited Dividend Requirement

On March 6, ACHC stated our intention to cease the monitoring of the Limited Dividend Requirement but retain the oversight for the Affordability Requirements. We asked at that time for the Board to rescind the votes that assigned the financial oversight role to ACHC for Crossroads, Franklin Place and any future 40B's going forward including The Woodlands. The March 6 memo was briefly discussed at the Board's March 13 meeting and was reported in the minutes:

ACHC MONITORING AGREEMENT DISCUSSION - Peter asked if Nancy and Don could sit down and continue their discussion. ACHC got this new task assigned to them several years ago. It has proven to be a very large task. They are not covered by Liability insurance and Nancy asked that we come to an agreement. Don said that he agreed with Nancy, Don asked that we explore it before we just stop. Dore' felt that we might want to buy some counsel in this issue. Dore' suggested we need to supply some additional help outside the town. Peter felt we will continue this discussion at a later date.

Subsequent to the Board's discussion, Don and I did sit down to discuss various related issues including the lack of insurance coverage for ACHC. To date, we do not have that issue fully resolved. We are covered by the Town's umbrella policy when we are doing work on behalf of the Town but not when we are working independently as we are with Willow-Central. Since we are not covered for that activity it makes us hesitate to file for the Comprehensive Permit until such time as we are. This is very disconcerting to say the least.

A more pressing issue at the moment is the Crossroads post-development audit or lack of to be more specific. As the Town's officially designated Monitoring Agent, we expected that a professional, independent, and timely review of the whole project would be performed by a professional auditor contracted by the Monitoring Agent, since that is our understanding of the role. Due to several false starts and interruptions, this task has yet to be done.

Therefore, the ACHC wishes to renew its request to remove us from the Limited Dividend Requirement responsibilities for Crossroads, Franklin Place, The Woodlands, and all other 40B's going forward. We reiterate our desire to continue with the monitoring of the Affordability Requirements of both 40B's and Local Action Units.

draft

CONSENT AGENDA

PETER ASHTON - Moved to accept the Consent Agenda as presented with an Extra Consent for use of the Faulkner Room. DORE' HUNTER - Second. UNANIMOUS VOTE Dore' abstained from the vote for the Extra Consent Item.

"This Consent Agenda includes approval of Blanchard Place regulatory agreement and designation of ACHC as Monitoring agent for affordability and resales for both Blanchard and Davis Place." Copy of Agenda for March 12, 2007 Attached.

TOWN MANAGER'S REPORT

EXECUTIVE SESSION

LAUREN ROSENZWEIG -Moved to go into Executive Session for the purpose of discussing Litigation. All AYES. UNANIMOUS and Land acquisition All Ayes

Recording Secty

Clerk, Board of Selectmen

Date

John Murray

3/12/07 (18)

From: Nancy Tavernier
Sent: Friday, March 09, 2007 12:45 PM
To: John Murray
Cc: Don Johnson; Daniel C. Hill
Subject: Davis Place too

HI John,

Come to think of it, the BOS has not voted ACHC the lottery monitoring agent for Davis Place either. I have spent the past month working with Davis Place on the lottery materials which have now been approved by DHCD and the marketing has begun. I will collect the \$500 fee once we are officially designated.

So I would like to have the BOS designate ACHC for both Davis and Blanchard as the Monitoring Agent for the Lottery Administration and for future resales of the affordable units in both developments.

Thanks.

Nancy

Approved 3/12/07

draft

Nancy-T
FYI

Mary Michaelman- Thanked the Board for their support of Bruce Freeman Rail Trail and asked that appropriate money gets put towards the BFRT.

Mike Cappolinio representing the Regional School District discussed the notice they have received from their Counsel that CPC monies for lighting at the Jr. and Senior High's could be qualified to receive CPC money.

40B ISSUES, CROSSROADS DEVELOPMENT AND FORT POND BROOK PLACE

Letter from Crossroads Development – Requested production of financial items. The developer is requesting to extend the deadline from Oct 27 to November 17th.

DORE' HUNTER – Moved to approve to send a letter to developer of Crossroads requesting he provide financial information not provided to IG. The motion was amended to include and voted to remove ACHC as the auditor at their request, and to hire a professional. The developer asked to extend the deadline to November 17th. PETER ASHTON –second.

Fort Pond Brook Place - There is a 2 phase approach, CPA will check if the monies are right, but not what is a reasonable cost for the market place. The developer questioned the cost and has submitted his pro forma. The developer is agreeable to have a cost estimator review his submission. Walter wanted a policy in place for this and future projects.

PETER ASHTON - Move to remove ACHC and monitoring agent for Franklin Place and Fort Pond Brook Place and to have ACHC return \$10,000 to the Town. DORE' HUNTER – second. UNANIMOUS VOTE

MAPC STUDY, HYDROLOGIC MODELING FOR THE ASSABET RIVER

Lauren outlined the modeling project and she feels water is a limited resource and how we maintain a clean water source. Peter was concerned that they are confident that they are on the right track with this proposal.

COMMUTER PARKING RESTRICTIONS, JONES FIELD

At the Sept. 11 meeting it was extended to November and asked if the Board will continue to June, 2007. This is 28 spaces. Maple Street unintended consequence of taking away free spots and them migrating back to the Maple Street roadway.

Clair Sisco asked that the pilot to gather any data and what will happen in June. Lauren noted that people were parking at Jones Field. Currently there are reserved and after 10:00 am any one can park there if not occupied already. They intend to keep monitoring this issue and what can be do behind the South Acton Fire Station.

Christine Hanley asked that the neighborhood be included in the review. Walter said that we will notify the neighborhood.

ANDREW MAGEE - Moved to extend the pilot parking at Jones Field to June 30th 2007. DORE' HUNTER – second UNANIMOUS VOTE

X-Originating-IP: [206.46.252.48]
Date: Wed, 25 Oct 2006 09:48:54 -0400
From: "Paul Gaboury" <paul.gaboury@verizon.net>
Subject: Audit of Books & Records
To: "John Murray" <jmurray@acton-ma.gov>
Cc: "Marilyn Contreas" <Marilyn.Contreas@state.ma.us>,
"Nancy Tavernier" <ntavern@comcast.net>,
"Board of Selectmen" <BOS@acton-ma.gov>,
"Cheryl Frazier" <cfrazier@acton-ma.gov>,
"Glen Kaufmann" <gkmeridian@verizon.net>,
"Daniel C. Hill" <dhill@AndersonKreiger.com>
X-Mailer: Microsoft Outlook Express 6.00.2900.2869

Thank you for the direction. This confirms that we will have an audit of our books & records performed. Our CPA does not perform audits. Therefore, we have engaged the firm Robert C. Alario CPA, PC, Leominster, MA to perform an audit of our books and records and to issue an opinion and address the scope of work to be provided.

We would like to confirm the scope of work we/you are expecting of them. We propose to satisfy the Zoning Board of Appeals Decision requirements as it appears to be most encompassing and indicates the following deliverables: (quoted from Paragraph F.6. of the decision).

1. The Applicant shall cause a certified public accountant (" CPA") to review the financial records of the Project to determine whether the Applicant has conformed to the Profit Cap requirements of this Comprehensive Permit Decision.
2. The CPA shall submit to the Board, DHCD, and the Monitoring Agent a CPA certification that either the Applicant has conformed to the Profit Cap, or certifying the actual profit from the development. (The audit opinion will satisfy the latter alternative.)
3. The CPA shall be required to certify that
 - (a) the total profit to the Applicant does not exceed twenty percent (20%) of total development costs of the Project, exclusive of development fees;
 - (b) the Applicant has not made unreasonable or excessive payments (i.e. payments in excess of reasonable industry standards applicable to an arm's length transaction) to the Applicant or to its parents, subsidiaries, affiliates, successors, and assigns, or to their respective partners, limited partners, shareholders, managers, or other owners, or to the relatives of the same in connection with work performed on the Project in order to artificially inflate the costs of development of the Project;
 - (c) there have been no commissions charged on the affordable units which are required to be sold pursuant to a lottery selection process as provided by this Comprehensive Permit; and
 - (d) the CPA has been provided access by the Applicant to any reasonable financial information necessary to make these determinations
 - (e) and to verify whether the income and expenses of the Project, including without limitation land acquisition costs, construction costs, landscaping costs, and other expenses, represent fair market value for such items, with particular attention to those arrangements between parties with overlapping ownership to owners of the Applicant

With respect to item (b) and (e) above requires the CPA to verify the amounts expended represents fair market value for the services provided.

May we assume that this relates to transactions that are NOT arms length transactions and that involve, as the ZBA says "arrangements between parties with overlapping ownership to owners of the Applicant"?

Thank you for your direction. We look forward to your confirmation of our proposed audit scope and an answer to our question as it related to item b & e. Once we have that we can advise the audit firm. With respect to the audit firm, neither applicant nor any of their business interests have made use of the audit firm in any way whatsoever in the past.

Regards,

Paul Gaboury (primary contact 978-618-1729)
Glen Kaufmann

----- Original Message -----

From: John Murray

To: Paul Gaboury ; Board of Selectmen

Cc: Marilyn Contreas ; Nancy Tavernier ; Board of Selectmen ; Cheryl Frazier ; Glen Kaufmann ; Daniel C. Hill

Sent: Monday, October 23, 2006 11:24 AM

Subject: RE: UPDATE: Re: Fort Pond Brook Place final accounting

Staff and Town Counsel do not see an inconsistency between the Town of Acton requirements -- all refer to the same requirement of needing an audit by an independent CPA.

John

From: Paul Gaboury

Sent: Monday, October 23, 2006 8:49 AM

To: Board of Selectmen

Cc: Marilyn Contreas; Nancy Tavernier; Board of Selectmen; Cheryl Frazier; Glen Kaufmann; Daniel C. Hill

Subject: UPDATE: Re: Fort Pond Brook Place final accounting

As per my earlier email (below) the requirements for a final accounting vary between the various authorities - DHCD, Zoning Board of Appeals and the Regulatory Agreement. We have had no response to that earlier email from either the Acton Zoning Board of Appeals or DHCD. We should have copied Town Counsel on that email (below) because of the reporting requirements in the Regulatory Agreement. We have copied Dan Hill on this email to remedy that oversight.

Our Accountants have made many inquiries with DHCD and I am told DHCD cannot provide any direction to our accountants on what they expect of them beyond the format of the Profit and Loss statement (Called the End of Project Accounting by DHCD). They have been unable to provide any rules or regulations as regards preparation of it nor a description of expenses to be assigned to which account listed in the statement.

Further, our accountant has advised that there is no such thing as a "certified" statement issued by a certified public accountant. All a CPA can do is a) prepare the cost and income statement from records submitted b) review the information provided by the developer or c) audit the books and records issue an opinion as to whether they are in accordance with generally accepted accounting principles

In the absence of further direction our accounting firm, John T. Bresnahan, Jr. P.C. of Shirley MA is preparing a review. We will attach our commentary summarizing the results as well as the DHCD End of Project Accounting, Analysis of Total Sales Revenue (DHCD report), Variance from Project Feasibility tabulation which, unlike the DHCD End of Project Accounting details Residential Construction expenses.

On release of these reports, we will request the opportunity to present them to the Board of Selectmen and answer any questions they may have. In addition we are prepared and look forward to doing the same for any other entity including Town Counsel, the Acton Zoning Board of Appeals, Acton Community Housing Corporation (Monitoring Agent), Massachusetts Inspector General and DHCD. Further, our records will be available for review by whomever any one of these groups may designate.

Sincerely,

Paul Gaboury (Primary Contact), 978-618-1729

Glen Kaufmann
Fort Pond Brook Place Developers

----- Original Message -----

From: Paul Gaboury
To: [Nancy Tavernier](mailto:Nancy.Tavernier@bos@acton-ma.gov) ; bos@acton-ma.gov ; Cheryl Frazier
Cc: nwashington@jtbresnahan.com ; Glen Kaufmann ; Marilyn Contreas
Sent: Friday, September 29, 2006 12:33 PM
Subject: Fort Pond Brook Place final accounting

As you know the final unit closed Sept. 5th and we have 90 days to submit the DHCD "End of Project Accounting Form. We completed this September 20th and submitted it to our CPA for review. In addition to the End of Project Accounting Form we prepared a project review commentary and will be submitting a variance analysis of Actual costs vs. the Project Feasibility (Budget) submitted with the final DHCD application as well as a more detailed version of the End of Project Accounting Form breaking down construction costs.

With regard to the required CPA review we find the **instructions from DHCD** to be a bit vague and imprecise. In their letter to us regarding the reporting it provides two descriptions:

1. "Certified Cost and Income Statement" to include #2 immediately following.
2. "Independent Accountant's Report narrative from a certified public accountant"

To a CPA these are very different things. The first appears to be a report title (which doesn't appear in and standard DHCD report heading), but if not, the use of the word "Certified" to a CPA requires a formal audit of the books & records and the other (#2) a "narrative" which is also vague.

Our accountants have discussed the issue with Marilyn Contreas at DHCD who spoke to Elsa Campbell who is responsible for the reporting. As of today they are unsure if the reporting requires a formal independent audit. Elsa will be back Wednesday so we should hear late next week. Marilyn indicated that because they are holding us up (we had hoped to provide the report less than 30 days from close) the 90 day requirement would be extended.

There is another issue as it relates to the final accounting - the **ZBA Decision** wording. It says

"The Applicant shall cause a certified public accountant (" CPA ") to review the financial records of the Project to determine whether the Applicant has conformed to the Profit Cap requirements of this Comprehensive Permit Decision. The CPA shall submit to the Board, DHCD, and the Monitoring Agent a CPA certification that either the Applicant has conformed to the Profit Cap, or certifying the actual profit from the development. "

The wording first requires a CPA "review" followed by a "CPA Certification".

Finally, the **Regulatory Agreement** weighs in with its own version, as follows:

(Paragraph 4) "Upon issuance of a final Certificate of Occupancy for the Project or upon the issuance of final Certificates of Occupancy for all of the units, the Project Sponsor shall deliver to the Municipality, the Monitoring Agent, and to DHCD an itemized statement of total development costs together with a statement of gross income from the Project received by the Project Sponsor to date in form satisfactory to the Municipality and DHCD ("the Certified Cost and Income Statement") prepared and certified by a certified public accountant satisfactory to the Municipality and to DHCD."

In this case it raises a new issue - vetting/approving which CPA is used.

As a solution may I suggest that all parties agree to accept the instructions to be issued to us by DHCD in the coming week?

[Cheryl: Please forward to the members of the ZBA. Thank You]

Regards,

Paul Gaboury
Fort Pond Brook Place
978-618-1729