

MEMORANDUM

TO: Roland Bartl, Planning Director

FROM: Christine M. Griffin, Anderson & Kreiger LLP

CC: Stephen D. Anderson, Town Counsel

DATE: February 3, 2014

RE: Application for a Comprehensive Permit
6 Post Office Square

You have asked for a brief review of the Application for a Comprehensive Permit for a project to be located at 6 Post Office Square to see if the application meets the jurisdictional requirements for such a permit.

There are three basic jurisdictional requirements for an applicant to be eligible to submit an application to the Board of Appeals for a Comprehensive Permit:

- (a) The Applicant shall be a public agency, a non profit organization, or a Limited Dividend Organization;
- (b) The Project shall be fundable by a Subsidizing Agency under a Low or Moderate Income Housing subsidy program; and
- (c) The Applicant shall control the site.

To satisfy the jurisdictional pre-requisites, the Applicant has offered the following information:

1. A Certificate of Organization for Post Office Square Acton LLC from the Massachusetts Secretary of State's Office;
2. An Amendment and Restatement of Purchase and Sale Agreement from Seller, Mark Brooks, Trustee of Post Office Square Realty Trust to Buyer Philip S. Singleton with a proposed closing date of September 30, 2013, but permitting extensions of that deadline until March 31, 2014;
3. A Project Eligibility Letter dated August 16, 2013 from the Commonwealth's Department of Housing and Community Development to Philip Singleton, Post Office Square Acton, LLC and Janet K. Adachi, Chair of the Board of Selectmen.

Jurisdictional Pre-requisite (a)

Under the 40B Regulations, 760 CMR 56.02, a “Limited Dividend Organization” is “any entity which proposes to sponsor a Project under the M.G.L. c.40B, §§20 through 23; and is not a public agency or a nonprofit; and is eligible to receive a Subsidy from a Subsidizing Agency after a Comprehensive Permit has been issued and which, unless otherwise governed by a federal act or regulation, agrees to comply with the requirements of the Subsidizing Agency relative to a reasonable return for building and operating the Project.”

Accordingly, to the extent that Post Office Square Acton LLC is such an entity which has proposed such a project subject to such an agreement, Post Office Square Acton LLC is a Limited Dividend Organization. However, it would be helpful to clarify with the applicant what its position is on why or whether it is a “Limited Dividend Organization.”

Jurisdictional Pre-requisite (b)

According to the letter from DHCD, the applicant’s “application for project eligibility under the Local Initiative Program (LIP) for the proposed Post Office Crossing project has been approved.”

Accordingly, the Project is fundable by a Subsidizing Agency under a Low or Moderate Income Housing subsidy program.

Jurisdictional Pre-requisite (c)

The Amendment and Restatement of Purchase and Sale Agreement from Seller, Mark Brooks, Trustee of Post Office Square Realty Trust to Buyer Philip S. Singleton has a proposed closing date of September 30, 2013, but permits extensions of that deadline until March 31, 2014. Although this P&S has a conditional extension to March 31, 2014, there is no evidence one way or the other to show whether the applicant has exercised that extension, whether the applicant is in compliance with the listed conditions for an extension and whether the closing date has, in fact, been extended. The applicant is the LLC; John Singleton is the Manager of the LLC and the person authorized to execute, acknowledge, deliver and record any recordable instrument purporting to affect an interest in real property (see attached Certificate of Organization of the LLC). However, the Buyer under the P&S is John Singleton, individually, not as Manager of the LLC. The Board should require the applicant to clarify the status of the P&S, any extensions thereto, its current terms, and the applicant’s rights, if any, under the P&S. Otherwise the Board has insufficient evidence to conclude that the applicant currently controls the site sufficient to meet this jurisdictional prerequisite.