Town of Lexington
Town Clerk's Office

$103

2009 00084494
Bk: 52763 Pg: 187 Doc: DECIS
Page: 1 of 103 05/13/2009 12:31 PM

Donna M. Hooper, Town Clerk
Tel: (781) 862-0500 x270
Fax: (781) 861-2754

DATE: April 17, 2009
TO: Board of Appeals
RE: 536-540 Lowell St., Lexington, MA

I hereby certify the Board of Appeals Decision: Map 61, Lots 69A, 69B Lowell Street Application for Comprehensive Permit pursuant to M.G.L. 40B issued pursuant to the application of RTD Greenhouse LLC and Rising Tide Development, LLC was filed with the Town Clerk on February 7, 2003 (the "ZBA Decision") and that as of this date no amended comprehensive permit issued by the Board of Appeals has been filed with the Town Clerk.

I hereby certify that the Commonwealth of Massachusetts, Housing Appeals Committee Decision for Case No. 03-05 (Rising Tide Development, LLC v. Lexington Board of Appeals) dated June 14, 2005 was received April 6, 2009 by the Town Clerk.

In accordance with the Housing Appeals Committee decision on file with the Town Clerk *"the Housing Appeals Committee affirms the granting of a comprehensive permit, but concludes that certain of the conditions imposed in the Board's decision render the project uneconomic and are not consistent with local needs. The Board is directed to issue an amended comprehensive permit as provided in the text of this decision and the conditions below."* AND

"Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, §23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board."

I hereby certify that notice of an appeal of the Decision of the Lexington Board of Appeals dated February 7, 2003 (William Taylor et als v. Town of Lexington Board of Appeals - #MICV2003-00746) was made to the Town Clerk on February 25, 2003. I hereby certify that a Judgment After Rescript, re: Civil Docket # MICV2003-00746 (William Taylor et als v. Town of Lexington Board of Appeals), dated May 29, 2008, was received April 6, 2009 by the Town Clerk. In accordance with the Superior Court Judgment After Rescript re: Civil Docket # MICV2003-00746, "*It is Ordered and Adjudged: That the Complaint be and hereby is Ordered Dismissed.*"

I hereby certify that a Judgment After Rescript, re: Case No. 2005-2910 (William Taylor et als v. Housing Appeals Committee, et al), dated May 13, 2008, was received April 6, 2009 by the Town Clerk. In accordance with the Supreme Judicial Court Judgment After Rescript re: Case No. 2005-2910, dated May 13, 2008, *"it is ordered and adjudged: Plaintiff's motions to dismiss for lack of subject jurisdiction and for judgment on the pleadings are denied. Judgment shall enter affirming the decision of the Housing Appeals Committee ordering the Board of Appeals for the Town of Lexington to issue an amended Comprehensive Permit.*"

I hereby certify that no other appeal with regard to the ZBA Decision has been filed with the Town Clerk.

Attest:
Donna M. Hooper

5-1119-121

Donna M. Hooper
Town Clerk

Town of Lexington
Board of Appeals

Tel: (781) 862-0500 x207
Fax: (781) 861-2780

February 7, 2003

Ms. Donna M. Hooper
Town Clerk
Lexington MA 02420

Re: 536-540 Lowell Street
Rising Tide Development, LLC

Dear Ms. Hooper:

Attached please find the decision of the Board of Appeals made after a public hearing on December 12, 2002.

The Board of Appeals, by unanimous vote, hereby grants a Comprehensive Permit pursuant to M.G.L. c. 40B, §20-23, as amended, for the construction of multi-family condominium units in multiple buildings at 536-540 Lowell Street, with conditions attached and with exceptions from the Lexington local bylaws and regulations allowed.

Very truly yours,

Sheila M. Marian

Sheila M. Marian
Administrative Clerk

Enc.

CC: Rising Tide Development
William L. Lahey, Esq.
Building Commissioner
Board of Selectmen
Planning Board
Town Manager

TRUE COPY ATTEST
Donna M. Hooper
TOWN CLERK
LEXINGTON, MA

21-day - 2/28/03

TOWN OF LEXINGTON ZONING BOARD OF APPEALS
DECISION:

MAP 61, LOTS 69A, 69B LOWELL STREET
APPLICATION FOR COMPREHENSIVE PERMIT PURSUANT TO M.G.L. 40B

RECORD AND DECISION

A. BACKGROUND

1. The Application and Proposed Project

On January 31, 2002, RTD Greenhouse LLC for Rising Tide Development, LLC, ("Rising Tide" or "Applicant") filed an application for a Comprehensive Permit (the "Original Application") pursuant to M.G.L. c. 40B, § 20 through 23, as amended ("Chapter 40B" or "the statute") for the construction of 48 residential housing units at 536-540 Lowell Street, Lexington (the "Project") with the Lexington Board of Appeals ("the Board"). The Original Application requested permission to construct a residential development of 48 multi-family condominium units in 17 buildings at 536-540 Lowell Street, Lexington (the "Site") known as Greenhouse Condominiums. The Applicant included evidence that the Project would be funded pursuant to the New England Fund housing program. The Board sent notice of the application to other local boards for their recommendations and input.

On July 31, 2002, the Applicant submitted a revised application for a Comprehensive Permit for 36 condominium units in 9 buildings pursuant to the Housing Starts Program of MassHousing Starts Program, as an amendment to the original application (the "Revised Application", the Original Application and Revised Application collectively referred to as the "Applications"). The Board sent notice of the Revised Application to other local boards for their recommendations and input. Consistent with Chapter 40B and the requirements of the MassHousing program, the Applicant proposes to sell 25% of the units to households with incomes at or below 80% of median income, as established by the U.S. Department of Housing and Urban Development ("HUD"). Proposed sale prices for the affordable units are approximately $139,000 for a 2-bedroom unit and $159,000 for a 3-bedroom unit, based on current guidelines. The proposed townhouse units will be of very high quality, with all units having ground floor access, patios or decks, and many having ground floor bedrooms. Site planning includes a looped access road and a central "common" area. All units will have one- or two-car attached garages, plus additional parking on site. The Project will be connected to municipal water and sewer systems

The filing of the Revised Application effectively withdrew the Original Application from consideration.

536-540 Lowell Street
RT Greenhouse LLC

2. The Site

The Site is approximately 3.6 acres or 159,533 sq. ft. and bordered by Lowell Street in the RO District. The Site currently consists of a working commercial greenhouse operation with several greenhouses, a heating plant and workshop, plus a single-family dwelling. The Site is accessed by two drives along Lowell Street and there is also a parking area for the greenhouses along Lowell Street. The Site is generally flat; portions of the Site near the perimeter are lightly wooded and other areas are fenced. The Site is fully served by public water, sewer, gas, and electric utilities. The surrounding area is primarily residential.

3. The Board's Personnel

The members of the Board hearing and acting on the Revised Application were: Chairman Robert F. Sacco, Vice Chairman Judith J. Uhrig, Francis W.K. Smith, Arthur C. Smith, and Nyles N. Barnert. The Board had the assistance of Edward Marchant, a consultant hired by the Town to advise the Board on Chapter 40B and procedural questions during its review and consideration of the Applications.

4. The Hearings

Notice of the Public Hearing on the Application was duly posted at the Town Hall and sent by mail, postage prepaid, to all parties in interest, and owners of land within 600 feet of the property lines of the subject property, the Lexington Planning Board and other Town Agencies, and was published in the *Lexington Minuteman* newspaper.

The Public Hearing on the Application was first held in the Selectmen's Meeting Room, Town Office Building at 7:45 PM on March 14, 2002. With the consent of the Applicant, continued hearings were subsequently held on April 25, 2002, June 13, 2002, July 11, 2002, September 12, 2002, October 24, 2002, November 14, 2002, November 21, 2002, and December 12, 2002. During these hearings, the Board, other Town boards and officials, the Applicant, abutters, and other concerned parties discussed the issues raised by the Application. The Board closed the hearing on December 12, 2002.

The Board deliberated on the Application in public sessions on December 19, 2002, January 2, 2003, and January 23, 2003. On January 23, 2003, the Board voted to approve the Revised Application with conditions. The Applicant granted the Board an extension of time to January 31, 2003, for the Board to issue its final written decision on the Revised Application. The applicant granted a further extension of time to February 7, 2003 for the Board to issue its final written decision.

Rules applicable to this application are the Board of Appeals' Regulations governing Application[s] for a Comprehensive Permit Under MGL c. 40B (Subsidized Housing) (Article V, §138 of the Code of the Town of Lexington) and the Model Rules prepared by the Commonwealth of Massachusetts, Department of Housing and Community Development

5. The Record

The Record of this decision includes, but is not limited to, the Applications, correspondence from the Applicant, reports, plans, specifications, and supplemental materials listed in Exhibit A; recordings and draft minutes of the public hearings and meetings held by the Board to deliberate on this decision; agency and peer review reports listed in Exhibit B; written testimony and comments received during the public process as contained in Exhibit C; and such other exhibits as listed herein or appended hereto.

B. BACKGROUND OF CHAPTER 40B

Chapter 40B creates certain minimum thresholds for low- or moderate-income housing in municipalities. If a municipality meets any of these thresholds, it is essentially exempted from the requirements of Chapter 40B. Otherwise, Chapter 40B creates a mandate, subject to the local needs provision described below, to local cities and towns to allow the construction of low- and moderate-income housing that requires relief from otherwise applicable local requirements and regulations, including but not limited to zoning bylaws, subdivision rules and regulations, and local Board of Health and Conservation Commission regulations, when there is a substantial need for low and moderate housing. Rather than having to apply to various local boards and departments for the otherwise multiple applicable permits, an applicant has to apply only to the Zoning Board of Appeals for a "Comprehensive Permit". A Zoning Board of Appeals can insist on full compliance with all local requirements and regulations only if they are, in the words of the statute, "consistent with local needs". Relief, or exceptions, from local requirements and regulations will be considered "consistent with local needs" if they are reasonable, taking into account "the regional need for low and moderate housing considered with the number of low income persons in the city or towns affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces...." *See* M.G.L. c. 40B, § 20.

536-540 Lowell Street
RT Greenhouse LLC

C. JURISDICTIONAL REQUIREMENTS

The Town of Lexington does not meet any of the minimum thresholds for affordable housing established in Chapter 40B. According to the Department of Housing and Community Development's Chapter 40B Subsidized Housing Inventory (Revised as of April 24, 2002, the Town of Lexington has 796 units of affordable housing. According to the Inventory, 7.06% of its housing stock is affordable, which fails to meet the 10% threshold established in Chapter 40B. Because the Town of Lexington has not met this or the other statutory minima set forth in Chapter 40B or 760 CMR 31, it is subject to the requirements of Chapter 40B and the mandate to create affordable housing in the Town of Lexington.

Pursuant to the regulations enforcing Chapter 40B, the Applicant must fulfill three jurisdictional requirements: (1) the Applicant must be a public agency, non-profit organization, or a limited dividend organization; (2) the Project must be fundable by a subsidizing agency under a low and moderate income housing subsidy program; and (3) the Applicant must control the Site. *See* 760 CMR 31.01(1).

1. Applicant's Status

The Applicant has standing to seek a Comprehensive Permit. The Applicant qualifies as a limited dividend organization in that he has agreed to the restrictions set forth in the proposed Regulatory and Monitoring Service Agreements submitted with the Applications.

2. Fundable Project

The Board received written communications from MassHousing, the subsidizing agency, indicating that the Project is acceptable. The Board finds that pursuant to 760 CMR 31.01(2), the Project is fundable by a subsidizing agency.

3. Applicant's Control of the Site

The Board received evidence that the Applicant has purchased the Site. The Board finds that pursuant to 760 CMR 31.01(3), the Applicant has sufficient control of the Site.

D. AFFORDABILITY

The affordable units will be sold at prices to be determined according to MassHousing guidelines which are estimated to be $139,000 - $159,000 for 2- and 3-bedroom condominiums. The eligible affordable home owners will have household

incomes no greater than 80% of the annual median income for the Boston Metropolitan Statistical Area as defined by HUD, and they will be paying no more than 30% of their annual income for their interest and principal mortgage payments, real estate taxes, insurance, and any homeowners' association fees. The affordable units will be substantially similar to the market-rate units and will be randomly distributed throughout the entire development.

E. PUBLIC COMMENT

At each of the evenings of the Public Hearing, the Board asked for public comment. Many residents from the surrounding area spoke at various times. They expressed concerns about density, traffic, storm drainage, site plan design, noise, and "quality of life" issues. They expressed a great deal of concern about the Applicant's *pro forma* and, in particular, about the price paid by the Applicant for the property and the impact of that on the density of the project.

The following Town boards, commissions, and departments submitted comments concerning the Project during the public comments period:

1. The Town of Lexington Design Advisory Board
2. The Town of Lexington Conservation Commission
3. The Town of Lexington Engineering Department
4. The Town of Lexington Planning Board
5. The Lexington Housing Assistance Board, Inc. ("LexHab")
6. The Town of Lexington Fair Housing and Human Relations Committee.
7. The Lexington Enablement Committee.
8. The Town of Lexington Fire Department
9. The Town of Lexington Tree Committee
10. The Town of Lexington Board of Selectmen
11. The Town of Lexington Housing Authority

12. The Town of Lexington Board of Health

In addition to the noted input from Town departments, boards, and commissions, the Board retained at the Applicant's expense: (a) a consultant, Ed Marchant, to, among other things, conduct a peer review of the Applicant's *pro forma;* and (b) an engineering firm, Rizzo and Associates, to conduct a peer review of the Applicant's Traffic Study.

The Board also retained a real estate appraisal firm, Avery Associates, to perform an independent appraisal of the market value of the fee simple interest in the property. The appraisal submitted stated that in the opinion of Avery Associates, the market value of the fee simple interest in the subject property, is One Million Seven Hundred Thousand ($1,700,000) Dollars.

F. DENSITY

The Applicant's Original Application proposed the development of 48 units of residential housing in 17 townhouse buildings on the 3.6-acre site. As a result of input from the Board and the public, the Applicant presented the Revised Application, which proposed the construction of 36 units in nine buildings. It is the role of the Board to determine whether the proposed housing is "consistent with local needs," that is, whether the housing can be built without impinging unduly on local planning and environmental concerns. In particular, the Board considered design, surrounding land uses, traffic, safety, and other local concerns and balanced them against the regional need for affordable housing. The Board's review of the density of the Project is driven by these local concerns and not by the economics of the Project, as was argued at a number of the hearings. Indeed, this Project is governed by policies and requirements of MassHousing and a detailed evaluation and determination of its compliance with the MassHousing and Chapter 40B requirements for profitability will be performed by that funding agency. It is the province of MassHousing to monitor the Applicant's compliance with its economic program requirements and to make any necessary adjustments to the Project to address excess profit. It is the Board's job to determine the appropriate density for this site based on the local concerns it is permitted to consider under Chapter 40B.

The Board considered both the number of units as well as the number of buildings in its evaluation of density of the Project. In its deliberations, the Board considered a variety of options: a 24-unit development with 6 affordable units (24/6), 26 units with 7 affordable (26/7), 28 units with 7 affordable (28/7), 28 units with 8 affordable (28/8), and 32 units with 8 affordable (32/8). A 28-unit design, rather than a larger number, permits the removal of 4-plexes from the plan thereby reducing both the visual impact and the site coverage. The lower number of units also allowed the

developer to achieve compliance with the storm water management regulations. Based on the evidence presented, the Board has determined that 28 units of housing in 11 buildings is the appropriate density for this development. At this density, the developer can maintain appropriate setbacks from adjoining properties. Proposed developments at higher densities intruded on these setback areas. While the property does not abut any commercial properties, the general area of this proposed development includes a number of commercial operations. In addition, Lowell Street is a well-traveled road. While not technically zoned as a transitional area, the increased density of this development compared to the single-family zoning on the surrounding lots, provides some transition from the busier and more commercial Lowell Street. The 28-unit design provides less visual impact than either the 32- or 48-unit designs that were considered.

The Board then considered the appropriate number of affordable units. Chapter 40B and MassHousing require that at least 25 percent of the units be available to low- or moderate-income individuals. The Board balanced the local concerns against the need for affordable housing in the region and Town. In its judgment, after careful consideration of the entire record, the Board determined that eight (8) of the units should be designated as low- or moderate-income housing. This 28/8 configuration maximized the number of affordable units within the acceptable density. In the event the funding agency determines that the Project violates its policies governing profitability, the Board recommends an increase in the number of affordable units rather than a decrease in the total number of units at the Site or having the excess profit returned to the Town in cash to address this issue.

G. DETERMINATION

Following the public hearings and based upon the evidence and recommendations submitted to the Board, the Board makes the following determinations:

(1) The Applicant has standing to seek a Comprehensive Permit. The Applicant has submitted a Site Approval Letter from MassHousing Housing Starts. The Applicant shall execute and deliver a Regulatory Agreement with the approved lender which Agreement shall limit the Applicant's profit on the proposed project as required by Chapter 40B, its regulations, and the requirements of the funding authority.

(2) The Applicant has demonstrated that it has control of the property by providing the Board with a copy of the Purchase and Sale Agreement, dated February 11, 2002.

(3) The Town of Lexington does not meet any of the minimum thresholds for affordable housing established in Chapter 40B.

(4) The Applicant has filed a complete and satisfactory Comprehensive Permit Application with the Board including a complete description of the proposed project, documentation of its satisfaction of the jurisdictional requirements of the statute and various letters, engineering reports, studies and plans which have all been made a part of the record of this hearing and are contained in the Board's files.

(5) The health, safety, environmental, design, open space or other concerns identified in the record do not support denial of the project or outweigh the regional housing need.

(6) There is a substantial regional housing need, as determined under Chapter 40B and the regulations promulgated in connection therewith, 310 CMR 30.00, et seq.

(7) After considering the testimony and reports of the Town's Engineering Department, the Conservation Commission, and Meridien Engineering, the engineering firm retained by the Applicant, the Board finds that the project will have no adverse impact on storm drainage or on properties abutting the project.

(8) After considering the testimony and reports of the Board's traffic engineering firm and of the Applicant's traffic engineering firm, the Board finds that any potential negative impacts on traffic will be minimal and are outweighed by the regional housing need.

(9) The neighborhood in which the project is proposed is in the RO District and contains primarily residential uses.

(10) The Board carefully considered the potential impact of a range of land planning concerns, including:

a) Health and safety of the occupants of the development

b) Health and safety of other residents

c) Site and building design

d) Preservation of open space

(11) Relaxation of local zoning restrictions and their local requirements and regulations are necessary to ensure affordability and economic viability of the project, but that the conditions and restrictions set out below are necessary to protect the public interest and make the project consistent with local needs.

CONDITIONS

(1) This Comprehensive Permit is granted for the Revised Application submitted to the Board on July 31, 2002, as an amendment to the Original Application, using MassHousing Housing Starts Program funding for construction of the development known as Greenhouse Condominiums.

(2) The Applicant shall provide the Board with a letter formally withdrawing the Original Application for construction of 48 multi-family condominium units using New England Fund funding.

(3) Greenhouse Condominiums shall consist of no more than 28 townhouse-style condominium units, of which at most 20 units may be market-rate and at least 8 units (29% of 28 units) shall be affordable. The location of the affordable units shall be substantially similar to the layout plan submitted November 19, 2002 with one additional unit.

(4) The interior and exterior of the buildings shall conform essentially to the architectural renderings submitted by the Applicant and be located as indicated in its November 19, 2002 submission (which included site design and architectural plans on [a] 28-unit plan), except that the number of units in the structures shall be modified so that there shall be at most 20 market-rate units and at least 8 affordable units, for a total of 28 units.

(5) The roadway and parking areas shall be consistent with the site plan submitted in the November 19, 2002 submission (Layout and Materials Plan, Greenhouse Condominiums, Sheet 1 of 1, 1/18/02).

(6) The drainage system shall be consistent with the site plan submitted in the May 29, 2002 submission for 32 units, suitably modified for the November 19, 2002 layout.

(7) Utilities shall be placed underground as indicated in the May 29, 2002 submission (and referenced in the November 19, 2002 submission; Site Utility Plan, Sheet No. 5 of 8).

(8) Sidewalks, hydrants, lighting and other site details shall be consistent with the May 29, 2002 submission, suitably modified for the November 19, 2002 layout. The lighting plan will ensure that light trespass onto any street or abutting lot will not occur.

(9) The Stormwater Management Report dated July 3, 2002, including provisions as modified to meet Conservation Commission concerns, and as agreed to by the Applicant at the December 12, 2002 hearing (withdrawing a request for an exception and accepting that it will meet the 100-Year Peak Flow Standard as to stormwater management), shall be implemented. Prior to commencement of construction, the Applicant shall submit to the Department of Public Works, a revised Stormwater Management Report prepared by the project engineer which shall demonstrate that the final plans meet the same performance standards as the Stormwater Management Report dated July 3, 2002 prepared by Meridian Engineering except that, in addition, the final Stormwater Management Report shall demonstrate that the total peak flow across all property boundaries in the 100 year storm event shall be no greater than the current conditions.

(10) The Applicant will provide an Operating and Maintenance Plan for the stormwater management system conforming with standard requirements of such systems to the satisfaction of the DPW.

(11) Patios shall be restricted in size to no larger than 10' x 12' and shall not extend more than 10 feet from the rear of the structures. There will be no decks.

(12) Landscaping shall be in accordance with the November 19, 2002 submission and the December 6, 2002 letter to the Lexington Tree Committee.

(13) Fencing shall be installed in accordance with and as shown on the plan included with the November 19, 2002 submission.

(14) A condominium agreement, master deed and rider, with a regulatory agreement, shall be prepared and recorded. The regulatory agreement and deed rider shall be consistent with those used by the MHFA, as modified by further conditions listed below. One of the purposes of the deed rider is to ensure that the affordable units remain affordable in perpetuity or the maximum term allowed by law, but in no case less than ninety-nine (99) years.

(15) The Monitoring Agent for the project shall be the Citizens Housing and Planning Association.

(16) The initial sales price for the Affordable Units shall be based on the number of bedrooms in each unit, with the 2-bedroom unit sales price to be an affordable price for a 3-person household, and the 3-bedroom unit price to be an affordable price for the average of a 4-person and a 5-person household.

(17) The initial sales price for each Affordable Unit shall be based on the standard methodology used by MassHousing and Citizens Housing and Planning Association for determining the Affordable Unit sales price and shall be approved by the Monitoring Agent. The initial sales prices for each Affordable Unit shall be set prior to the advertisement for eligible applicants and shall be approved by the Monitoring Agent.

(18) The Applicant shall prepare a homebuyer selection plan (the "Selection Plan") which identifies the basic qualifications for all eligible applicants and provides for a local preference arrangement for up to seventy percent (70%) of the affordable units. The Selection Plan shall define those eligible for local preference in consultation with a committee of representatives from relevant town boards and committees to be appointed by the Board of Selectmen. The Selection Plan shall also describe the manner in which the selection process shall be implemented. The Selection Plan shall also include an affirmative fair marketing plan and may include preference for minority applicants. The Selection Plan shall include language that would require the Monitoring Agent to exclude from eligibility those applicants whose eligibility is only temporary in nature.

(19) After approval by the Monitoring Agent, the Applicant shall forward the completed Selection Plan to the Board for approval, which approval shall be based on reasonable consistency with the terms of this decision.

(20) The Applicant shall make at least one affordable unit handicapped accessible in accordance with the requirements of the Massachusetts Architectural Access Board. Accordingly, the Selection Plan shall establish a preference for an eligible household in need of such an accessible unit, and the Applicant shall make reasonable efforts to adapt the accessible unit to the selected household.

(21) To the extent allowed by the requirements of the laws governing condominiums, the percentage interest in the condominium association

shall be assigned to each unit based primarily on the relative square footage of the unit, with a reasonable adjustment for interior finishes, location and amenities which may differ between market-rate and affordable units.

(22) The Condominium By-laws shall require the Condominium Board of Trustees to include one member selected from among the owners of affordable units.

(23) If approved by MassHousing, the Applicant shall amend the attached Regulatory Agreement and Deed Rider such that the Maximum Resale Price is determined by the increase in median income from the initial sale of the unit, rather than or in addition to a multiplied factor based on fair market value of the unit.

(24) The Town of Lexington shall be allowed to assign its option to purchase, established in the Deed Rider, up to three of the Affordable Units upon resale to the Lexington Housing Assistance Board (Lexhab) for subsequent purchase by Lexhab and rental to low-income households. The condominium documents shall not have a prohibition on the purchase and subsequent rental of up to three units by Lexhab.

(25) The Deed Rider shall state that no affordable unit, except those owned by the Town or its assignee, shall be rented, and those owned by the Town must be rented only to eligible families (as defined in the Deed Rider, meaning "an individual or family earning no more than eighty percent (80%) of median income for the Area as published from time to time by the United States Department of Housing and Urban Development").

(26) The Deed Rider shall be amended to provide the Town of Lexington (the Municipality) forty-five (45) days after notification by the Grantee to accept or waive its right of first refusal, and one hundred twenty (120) days after notification to locate the purchaser if the right of first refusal is accepted. In addition, if the right of first refusal is waived, the Deed Rider shall be amended to require one hundred twenty (120) days following notification before the Grantee may convey the property to an ineligible buyer. The forty-five (45) days shall also apply to the notification period from a lending institution intending to foreclose on an affordable unit.

(27) The revised Deed Rider shall be submitted to the Board for approval before any affordable unit is sold. Such approval shall be based on consistency with the terms of this decision.

TRUE COPY ATTEST
Donna M. Hooper
TOWN CLERK
LEXINGTON, MA

(28) The Deed Rider shall state that even under the conditions whereby an affordable unit may be purchased by an ineligible buyer, that buyer shall still be subject to the same Deed Rider restrictions as an eligible buyer.

(29) Signage shall be allowed during construction per Chapter 135, Article III, of the Code of the Town of Lexington (Zoning; Signs).

(30) Noise during construction shall be controlled per Chapter 80 of the Code of the Town of Lexington (Noise Control).

(31) Prior to any building permit being issued, the Applicant shall submit to the Board of Appeals for approval a set of final plans for the development of the approved 28 units that shall include the following: locus context map; record conditions plan of land; revised site details; layout and materials plan; grading and drainage plan (and stormwater management report); landscape and lighting plan; schematic landscape plan; snow storage plan; open space exhibit. These final plans must be consistent with these conditions, the terms of the Comprehensive Permit, and be substantially similar to the plans submitted during the hearings.

(32) Any plan[s] submitted to the Building Commissioner with the Applicant's application for necessary building permits must be consistent with these conditions.

EXCEPTIONS AND/OR WAIVERS

Greenhouse Condominiums
List of Zoning Exceptions

Zoning Bylaw:

(1) Section 3.5.1.1; Information Required, waiver from the specific submission information required for a Special Permit with Site Plan Review (SPSPR), except that any building permit application submissions must support the conditions attached to the Comprehensive Permit.

(2) Section 4.2 Table 1 Part A (1.18); Permitted Uses: exception to allow more than three dwelling units without SPSPR.

(3) Section 4.2 Table 1 Part A (1.1840); Permitted Uses: exception to develop three-family dwellings within the RO Zoning District.

(4) Section 7.1.1 Table 2; Maximum % Site Coverage: exception to exceed

this percentage of 15%.

(5) Section 7.1.4; One Dwelling Per Lot: exception in order to develop multifamily housing within the RO District.

(6) Section 9.1.3; Residential Development Types: exception to allow this type of multifamily development within the RO Zoning District.

(7) Section 9.2.2; Types of Buildings Permitted: exception in order to allow the proposed multifamily use for mixed-income housing.

(8) Section 9.2.4; Minimum Perimeter Setback: exception to the extent that this section is applicable to the proposed development. Dwelling unit setbacks will be a minimum of 25'.

(9) Section 9.2.5; Maximum Impervious Surface Ratio: exception to the extent that this section is applicable to the proposed development. Impervious surface will exceed the 15% described in this section.

(10) Section 9.2.6; Minimum Common Open Space: exception to the extent that this section is applicable to the proposed development. Common open space includes approximately 11,400 s.f. of the project site.

(11) Section 9.2.7; Minimum Usable Open Space: exception to the extent that this section is applicable to the proposed development. Usable open space averages approximately 1785 s.f. per dwelling unit.

(12) Section 9.4.4; Additional standards: exception from the requirement that dwelling units larger than 2,500 s.f. have a minimum setback of 25', to the extent that such a requirement would be applied to this project. The proposed development will have a minimum setback of 25' to the face of the dwelling structure. Incidental structures, such as eaves may be less than the 25' setback requirement.

(13) Section 9.5.3; Maximum Development Based on Impact: exception to the extent that this section is applicable to the proposed development. The Applicant maintains that the proposed project likely exceeds the maximum development allowed on the site as calculated under this Section, and that the impacts associated with the project are being mitigated in accordance with sound land planning principles and standard site engineering practices and design strategies.

(14) Section 10.0; Landscaping, Transition and Screening: exception in that

approval by the Board of a schematic landscape plan will substitute for approval under this section, including final landscape design and material selection.

(15) Section 11.0; Off-Street Parking and Loading: exception in that approval by the Board of a schematic landscape plan will substitute for approval under this section, including final landscape design and material selection.

(16) Section 12.0; Traffic: exception from this section. A traffic study has been provided to the Town and reviewed by both the Town's Engineer and by an independent traffic engineering firm, Rizzo Associates. No significant impacts associated with the development have been cited by either.

(17) Section 14.0; Outdoor Lighting: exception where the general lighting plan and typical fixtures are consistent with the intent of this section, but are not sufficiently detailed to comply with the specific requirements of this Section. However, there shall be no spillage of ambient light from the property, as per Section 14.4.2 of the Zoning Bylaw.

Development Regulations Including Subdivision Regulations:

(18) The proposed development is not a subdivision, and therefore is not subject to these regulations.

General Bylaw for Wetland Protection (Article XXXII):

(19) Section 5(2); Performance Standards (Increase in Runoff): The Applicant agreed at the Board's 12/12/02 hearing to comply with this bylaw, so the requested exception is not necessary.

Lexington Code of Regulations, Article V, Application for a Comprehensive Permit:

(20) Section 138-21; Submission Procedure: exceptions are required in that some of the plans required for submission are beyond the level of detail in this application. The Applicant will be required to submit plans as detailed in the Comprehensive Permit as filed.

(21) Section 138-24; Planning, Design and Construction Standards: conformance with this Section shall be superseded by the Board's decision. With respect to specific standards in subsection "c", the proposed development is generally in conformance with all aspects with the exception of item 5, minimum distance between buildings, (as the minimum distance between buildings will be 30 feet) and item 8,

conformance with subdivision standards (the proposed development is not a subdivision and is not conforming with all design and construction aspects of the subdivision rules and regulations).

H. DECISION

Prior to its deliberations, the Board considered all of the written and oral testimony submitted by the Applicant and its representatives, the public (and their representatives), and other Town boards, departments, consultants, and experts. Based on the above determinations, the Board finds that the proposed development meets the requirements for a Comprehensive Permit under Chapter 40B. After discussion at its meeting held on January 23, 2003, a Motion was made by Nyles N. Barnert, seconded by Judith J. Uhrig, to GRANT a Comprehensive Permit to Rising Tide Development LLC, and to allow those waivers or exceptions from the Lexington local bylaws and regulations, as detailed above and incorporated herein by reference, and to incorporate the preceding CONDITIONS into the Comprehensive Permit:

The vote on the application[s] concerning the property located at 536-540 Lowell Street, Map 61, Lots 69A and 69B, with conditions and exceptions as noted herein, was:

Robert F. Sacco, Chair – YES
Judith J. Uhrig, Vice Chair – YES
Francis W.K. Smith, Regular Member – YES
Arthur C. Smith, Regular Member – YES
Nyles N. Barnert, Regular Member – YES

Index of Exhibits

A: Application Materials, Supplemental Information, and Applicant Correspondence
B: Town Reports, Peer Review Reports, and Correspondence
C: Public Testimony and Exhibits
D: Deed Rider
E: Regulatory Agreement
F: Monitoring Services Agreement

LEXINGTON BOARD OF APPEALS' DECISION: Hearing: March 14, 2002 - December 12, 2002

This constitutes the record of the decision of the Board of Appeals relative to:

Subject Property: 536-540 LOWELL STREET

Petitioner/s: RISING TIDE DEVELOPMENT, LLC

BOARD OF APPEALS OF LEXINGTON (acting under the Lexington Zoning Bylaw, Lexington General Town Bylaws, and Massachusetts General Laws, Chapter 40A)

Francis W. Smith

Chairman

I, Sheila M. Marian, administrative clerk of the Board of Appeals, certify that copies of this decision have been filed with the Lexington Town Clerk and the Planning Board.

Sheila M. Marian

In accordance with Mass. G.L., Ch. 40A, SS11, "No variance or special permit, or any extension, modification of renewal thereof, shall take effect until a copy of the decision bearing the certification of the town or city clerk that twenty days have elapsed after the decision has been filed in the office the city or town clerk and no appeal has been filed or that if such appeal has been filed, that it has been dismissed or denied, is recorded in the registry of deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The fee for recording or registering shall be paid by the owner or applicant." Prior to the issuance of a building permit, the applicant shall present to the building commissioner evidence of such recording.

In accordance with Mass. G.L., Ch. 40A, SS9, "Zoning ordinances or bylaws shall provide that a special permit shall lapse within two years unless substantial use or construction has commenced..."

TRUE COPY ATTEST

Donna M. Hooper

TOWN CLERK
LEXINGTON, MA

Exhibit A
Rising Tide Development
Greenhouse Condominiums
Application Materials, Supplemental Information and Applicant Correspondence

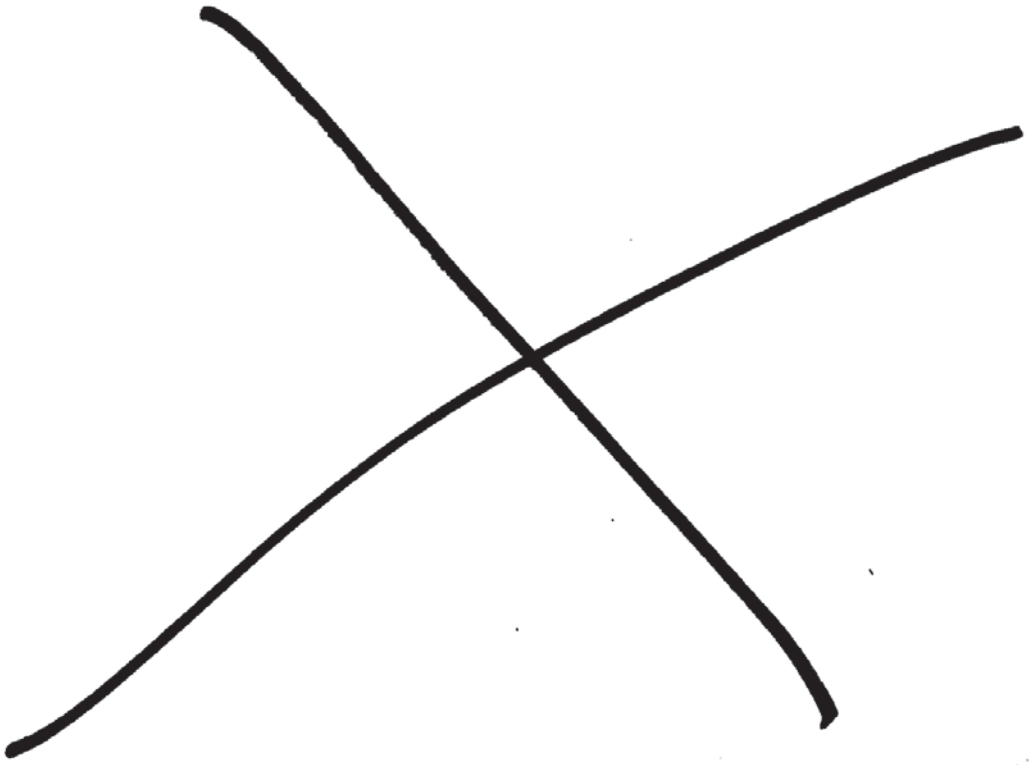
1. Undated, Rising Tide Company Overview.
2. December 26, 2001 Site Approval Letter.
3. December 28, 2001, Abend Associates Technical Memorandum, "Traffic Impact Assessment 536-540 Lowell Street, Lexington, Massachusetts".
4. January 3, 2002 Pro forma (48 units).
5. January 22, 2002 Application for a Comprehensive Permit according to the requirements of Chapter 40B and the New England Fund (48 units).
6. February 11, 2002 Purchase and Sale Agreement.
7. April 23, 2002 Letter from Rising Tide to ZBA.
8. April 25, 2002 Lowell Street Development Proposal Comparison with Lexington Cluster Developments.
9. May 29, 2002 Cover letter from Rising Tide to ZBA with revised architectural, site and landscape plans for 32 units.
10. June 3, 2002 Letter from Rising Tide to ZBA.
11. June 4, 2002, Abend Associates' Memorandum, "Response to Peer Review Comments".
12. June 5, 2002 Letter from Banknorth to ZBA
13. June 10, 2002 Letter from Rising Tide to ZBA.
14. June 11, 2002 Memorandum from Rising Tide to ZBA.
15. June 13, 2002, Conceptual Plans submitted at Hearing.
16. June 25, 2002 First and Second Amendments to Purchase and Sale Agreement with cover letter from Rising Tide to ZBA.
17. June 28, 2002 Memorandum accepting pro forma analysis cost estimate, from Rising Tide to ZBA.
18. July 8, 2002 Letter from Rising Tide to ZBA.
19. July 8, 2002 Letter from Meridien Engineering to Town Engineering Department with supplemental documents: July 3, 2002 Stormwater Management Report; July 8, 2002 Revised Grading and Drainage Plan, Sheet 4 of 8; July 8, 2002 Revised Site Details, Sheet 7 of 8; July 3, 2002 Snow Storage Exhibit; undated "Colonial Series" Lighting Information.
20. July 10, 2002 List of Anticipated Exceptions, Memorandum from Meridien Engineering to Rising Tide, with July 11, 2002 Cover letter from Rising Tide to ZBA.
21. July 17, 2002 *Scippa v. Wayland Board of Appeals* excerpts submitted by Rising Tide on September 12, 2002.

TRUE COPY ATTEST

Donna M. Hooper

TOWN CLERK
LEXINGTON, MA

22. July 30, 2002 Amendment to Application for a Comprehensive Permit according to the requirements of Chapter 40B and MassHousing (36 units).
23. August 16, 2002 Cover letter from Rising Tide to ZBA with revised proposal for 36 units.
24. September 23, 2002 Project Eligibility Letter from Mass Housing.
25. October 15, 2002 Letter from Rising Tide to ZBA with 28-unit sketch.
26. October 24, 2002 Letter from Meridien Engineering to Town Department of Public Works.
27. November 19, 2002 Cover letter from Rising Tide to ZBA with attached documents, including: site design and architectural information for 28 units; copy of previously supplied information for 32 units; revised list of exceptions for 28 units; documentation of continued fundability through the NEF; resident selection and affordability program.
28. December 6, 2002 Letter from Rising Tide to ZBA in response to Lexington Tree Committee memorandum dated November 13, 2002.
29. December 6, 2002 Letter from Rising Tide to ZBA in response to Lexington Conservation Commission memorandum dated November 21, 2002.
30. December 12, 2002 Letter from Rising Tide to ZBA in response to letter from Patrick Mehr dated November 25, 2002.
31. December 12, 2002 Letter from Rising Tide to ZBA agreeing to extension of 40-day period for deliberation to January 31, 2003.



TRUE COPY ATTEST

Donna M. Hooper

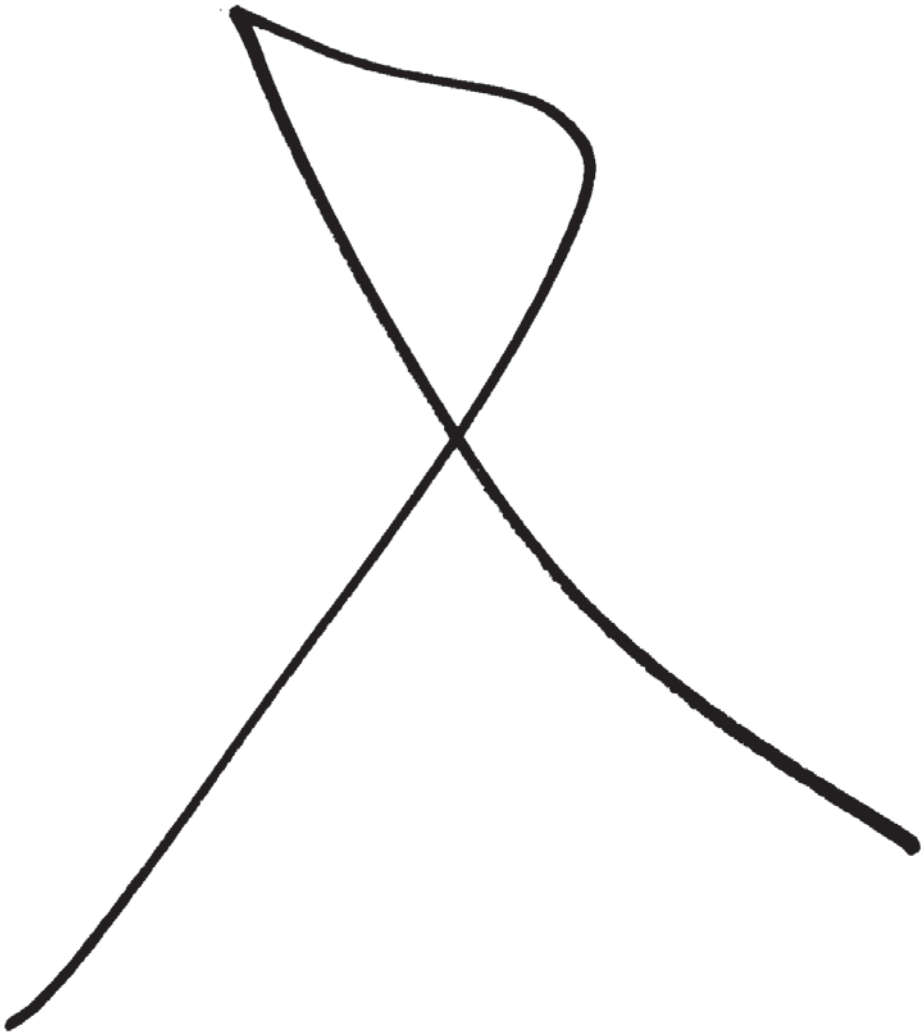
TOWN CLERK
LEXINGTON, MA

Exhibit B
Rising Tide Development
Greenhouse Condominiums
Town Reports, Peer Review Reports, and Correspondence

1. October 18, 2001 Memorandum from Lexington Housing Assistance Board ("LexHAB").
2. February 15, 2002 Memorandum from LexHAB.
3. February 22, 2002 Comment from the Conservation Administrator.
4. February 22, 2002 Comment from the Health Director.
5. February 22, 2002 Interdepartmental Recommendations.
6. February 27, 2002 Memorandum from the Engineering Department.
7. March 12, 2002 Letter from the Design Advisory Committee.
8. March 14, 2002 Letter from the Planning Board.
9. April 2, 2002 Letter from the Planning Board.
10. April 23, 2002, Rizzo Associates' Peer Review of Abend Associates' Traffic Impact Assessment.
11. April 25, 2002 Memorandum from LexHAB.
12. June 3, 2002 Memorandum from the Assistant Fire Chief.
13. June 4, 2002 Comment from the Conservation Administrator.
14. June 5, 2002 Memorandum from the Engineering Department.
15. June 6, 2002 Letter from the Design Advisory Committee.
16. June 10, 2002 Letter from the Fair Housing and Human Relations Committee.
17. June 11, 2002 Memorandum from the Engineering Department.
18. June 12, 2002, Rizzo Associates' Review of Abend Associates Responses to Peer Review Coments.
19. June 13, 2002 Memorandum from Rizzo Associates, Supplemental information to June 12, 2002 Peer Review Letter.
20. June 13, 2002 Letter from the Lexington Tree Committee.
21. June 13, 2002 Memorandum from the Enablement Committee.
22. June 13, 2002 Interdepartmental Recommendations
23. July 5, 2002 Memorandum from the Engineering Department.
24. July 10, 2002 Memorandum from the Engineering Department.
25. July 11, 2002 Memorandum from Edward H. Marchant, "Financial Review of Proposed 536-540 Lowell Street Chapter 40B Development".
26. September 11, 2002 Memorandum from the Design Advisory Committee.
27. August 16, 2002 Memorandum from the Fire Department.
28. August 26, 2002 Memorandum from the Engineering Department.
29. August 29, 2002 Letter from the Board of Selectmen to MassHousing Finance Agency.
30. September 5, 2002 "Summary Appraisal Report and Valuation Analysis of 536-540 Lowell Street", by Avery Associates.
31. September 11, 2002 Letter from the Design Advisory Committee.

TRUE COPY ATTEST
Donna M. Hooper
TOWN CLERK
LEXINGTON, MA

32. September 12, 2002 Comment from the Fire Department.
33. November 13, 2002 Letter from the Lexington Tree Commmittee.
34. November 14, 2002 Letter from the Lexington Housing Authority.
35. November 17, 2002 Submission from the Lowell Street Affordability Working Group.
36. November 21, 2002 Memorandum from the Conservation Commission.
37. November 21, 2002 Letter from the Board of Selectmen.
38. November 25, 2002 Memorandum from the Board of Health.
39. December 12, 2002 Letter from the Planning Board.
40. December 12, 2002 Memorandum from the Conservation Commission.
41. December 12, 2002 Memorandum from the Enablement Committee.



TRUE COPY ATTEST

Donna M. Hooper

TOWN CLERK
LEXINGTON, MA

Exhibit C
Rising Tide Development
Greenhouse Condominiums
Public Testimony and Exhibits

1. January 8, 2002 letter from Andrew J. Friedlich to Peter D. Fenn, First Massachusetts Bank, N.A.
2. March 12, 2002 letter from Michael Schroeder to ZBA.
3. March 13, 2002 letter from Tom & Carla Fortmann to ZBA.
4. March 13, 2002 letter from Ephraim Weiss to ZBA.
5. March 14, 2002 e-mail memorandum from David G. Kanter to ZBA.
6. March 14, 2002 e-mail memorandum from Arthur Meyers to ZBA.
7. March 14, 2002 letter from Elaine Dratch to ZBA.
8. Petition of concerns from Lexington residents to ZBA, received March 14, 2002.
9. March 14, 2002 abutter presentation, "Preliminary Neighborhood Statement on Proposed Rising Tides Development at ZBA".
10. April 3, 2002, "Questions for the Lexington ZBA" from Bill Passman.
11. April 12, 2002 letter from Diane B. Carr to ZBA.
12. April 22, 2002 bound memorandum, "Proposed comprehensive permit development for Plant Action parcel", from Bill Taylor and Abutters of Plant Action to ZBA.
13. April 25, 2002 e-mail memorandum from David G. Kanter to ZBA.
14. April 25, 2002 letter from Thomas E. Montanari to ZBA.
15. April 25, 2002 letter from The Reverend Diane Teichert to ZBA.
16. April 25, 2002 letter from Attorney Jonathan D. Witten to ZBA.
17. April 25, 2002 Bill Taylor presentation to the ZBA, "Neighborhood Comments on Proposed Lowell St 40B Project".
18. June 1, 2002 bound memorandum, "Estimation of 'As Zoned' Value of the 536-540 Lowell St parcel from the Lexington Assessor's VISION database", from Phillip Fischer and Bill Taylor to ZBA.
19. June 13, 2002 letter from Mark L. DiNapoli to ZBA.
20. June 13, 2002 abutter presentation, "Comparables from Rising Tides".
21. June 15, 2002 letter from Elaine Dratch to ZBA.
22. July 1, 2002 *Boston Globe* article "Rulings cloud housing battle" submitted to ZBA by Phillip Fischer.
23. July 5, 2002 letter from Bill Passman to ZBA.
24. July 9, 2002 letter from Bill Taylor to ZBA, with attachments
25. [2nd] July 5, 2002 letter from Bill Passman to ZBA, with attachments.
26. July 2002 bound document, "Comprehensive Determination of the Fair Market Value of the 536-540 Lowell Street Parcel Lexington, MA", submitted by Andrew Friedlich and William Taylor to ZBA.
27. Memorandum re "Application for Project Eligibility for Greenhouse Condominiums, Lexington" from Bill Passman to ZBA and Selectmen, received August 8, 2002.

TRUE COPY ATTEST

Donna M. Hooper

TOWN CLERK
LEXINGTON, MA

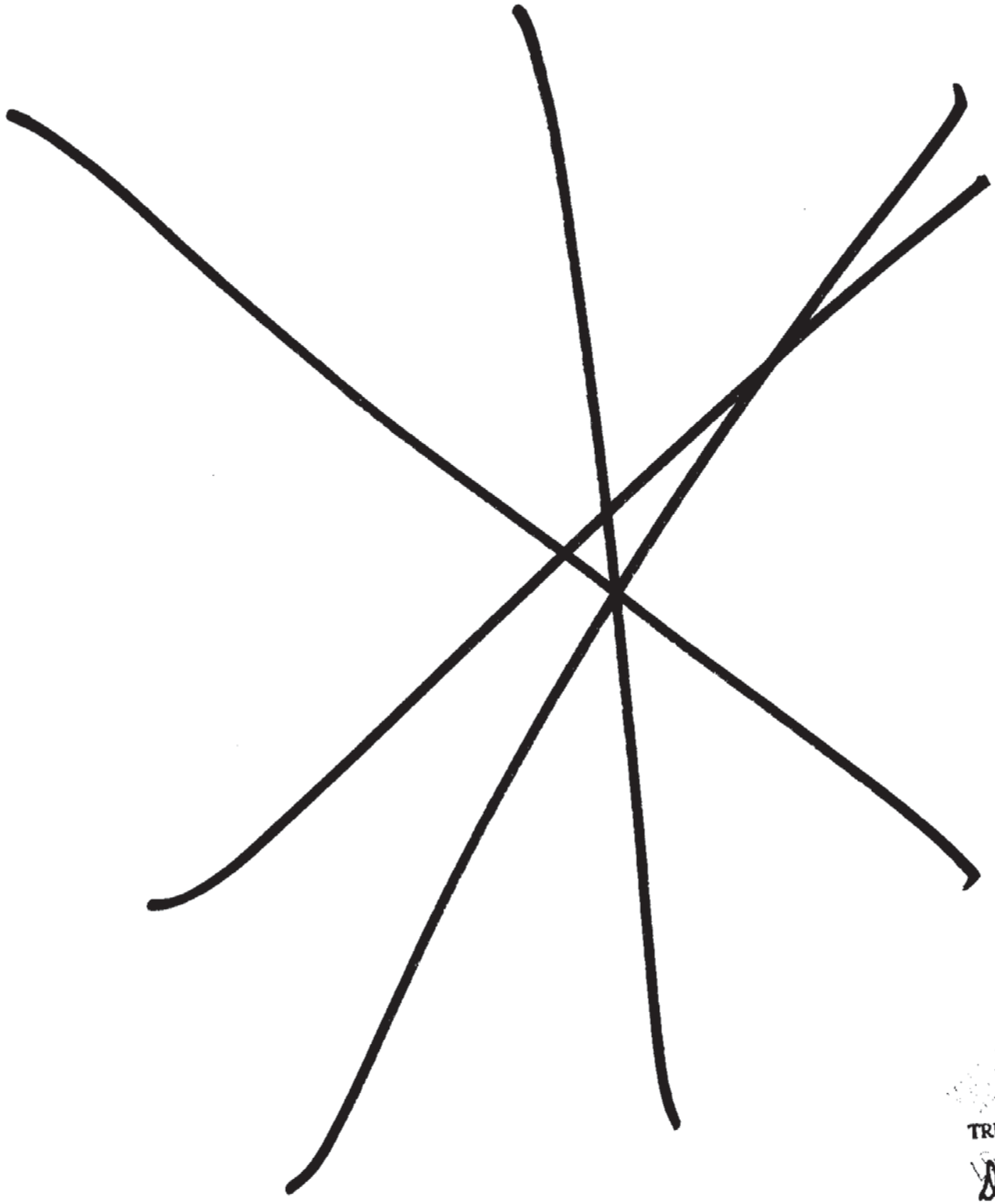
28. Copy of August 21, 2002 letter from Anthony G. Galaitsis to Richard Herlihy, MassHousing.
29. Copy of August 28, 2002 letter from Andrew J. Friedlich to Richard Herlihy, MassHousing.
30. September 6, 2002 letter from Elaine Dratch to ZBA.
31. September 12, 2002 e-mail memorandum from Kenneth Elmore to ZBA.
32. Copy of proposed Article for the 2003 Warrant, from Andrew Friedlich, received September 12, 2002.
33. September 12, 2002, abutter presentation, "Design Considerations", prepared by Marge Daggett, Phil Fischer, Bill Taylor.
34. September 12, 2002, "Preliminary Analysis of the Rising Tide LLC ProForma", submitted by Anthony G. Galaitsis to the ZBA.
35. October 17, 2002 letter from Stanley Abkowitz to the ZBA.
36. October 2002 bound document, "Comprehensive Analysis of Rising Tide's ProForma for the 536-540 Lowell Street Parcel Lexington, MA", prepared by Anthony G. Galaitsis.
37. November 18, 2002 memorandum from Andy Friedlich to Lexington Selectmen.
38. November 20, 2002 memorandum from Bill Passman to ZBA.
39. November 21, 2002 e-mail memorandum from Paul Sodano to ZBA.
40. November 21, 2002 presentation, "The ZBA process so far is flawed", by Patrick Mehr.
41. November 25, 2002 letter from Patrick Mehr to ZBA.
42. Letter from William T. Taylor received November 29, 2002 by ZBA.
43. November 2002 bound document, "Correction of Inconsistencies Found in 6/3/02 ProForma Submitted by Rising Tide for a 24-Unit Plan (536-540 Lowell Street Parcel Lexington, MA", prepared by Anthony G. Galaitsis.
44. December 6, 2002 letter from Stanley Abkowitz to ZBA.
45. December 9, 2002 letter from abutters to ZBA.
46. Copy of proposed Town Meeting Warrant Article with signatures, received December 11, 2002 by the ZBA.
47. December 12, 2002 Bill Taylor presentation to the ZBA, "Comparables".
48. December 12, 2002 Bill Passman presentation to the ZBA, "Ed Marchant's Review".
49. December 12, 2002 Anthony G. Galaitsis presentation to the ZBA, "Design Deficiencies of Proposed 40B Development 536-540 Lowell Street, Lexington, MA".
50. December 12, 2002 Testimony of Andy Friedlich to the ZBA.

TRUE COPY ATTEST

Donna M. Hooper

TOWN CLERK
LEXINGTON, MA

Exhibit D
Rising Tide Development
Greenhouse Condominiums
Deed Rider



I/HousingStarts/deedrider
Rev. 3/02

MASSACHUSETTS HOUSING FINANCE AGENCY
Housing Starts Program

DEED RIDER

annexed to and made part of that certain deed (the "Deed") from _____ ("Grantor") to _____ ("Grantee") dated _____, 200_

RECITALS

WHEREAS, the Grantor is conveying that certain real property more particularly described in the attached Deed ("Property") to the Grantee at a consideration which is less than the appraised value of the Property; and

WHEREAS, the Property is part of a project which was originally financed under a construction loan program of the Massachusetts Housing Finance Agency ("MassHousing") known as the Housing Starts Program (the "Program") and was granted a Comprehensive Permit under Massachusetts General Laws Chapter 40B from the city/town of _____ (the "Municipality"); and

WHEREAS, pursuant to the Program, eligible purchasers such as the Grantee are given the opportunity to purchase certain property at a discount of the property's appraised fair market value if the purchaser agrees to certain use and transfer restrictions, including the agreement to convey the property on resale to an income-eligible purchaser located by the Municipality, or to the Municipality, for an amount not greater than a maximum resale price, all as more fully provided herein.

NOW, THEREFORE, as further consideration for the conveyance of the Property at a discount in accordance with the Program, the Grantee, his/her/their heirs, successors and assigns, hereby agrees that the Property shall be subject to the following rights and restrictions which are hereby imposed for the benefit of, and shall be enforceable by, the Grantor's assignees and designees, and the Municipality.

1. Definitions. In this Deed Rider, the following words and phrases shall have the following meanings:

Area means the Primary Metropolitan Statistical Area which includes the Municipality.

Chief Elected Official means, with respect to a city, the Mayor of such city, and with respect to a town, the Board of Selectmen of such town.

Compliance Certificate shall have the meaning set forth in Section 4(b) hereof.

Comprehensive Permit means the comprehensive permit issued by the Zoning Board of Appeals of the Municipality with respect to the Project, recorded in the Registry in Book ___, Page

TRUE COPY ATTEST
Donna M. Hooper
TOWN CLERK
LEXINGTON, MA

Developer means _____, the developer of the Project pursuant to the Program and the Comprehensive Permit.

Discount Rate means the percentage of the appraised fair market value of the Property which the Grantee is paying as consideration for the Property, and which will be applied to the appraised fair market value of the Property at the time of sale or other transfer of the Property by the Grantee to determine the Maximum Resale Price, and which in this case is ____ %.

Eligible Purchaser means an individual or family earning no more than eighty percent (80%) of median income for the Area as published from time to time by the United States Department of Housing and Urban Development ("HUD"). If HUD discontinues publication of median income statistics, then the Municipality shall designate another measure of eligible income. To be considered an Eligible Purchaser, an individual or family must intend to occupy the Property as his, her or their principal residence and must provide to the Municipality and to the Monitoring Agent such income certifications as the Municipality and the Monitoring Agent may require to justify designation as an Eligible Purchaser.

Eligible Purchaser Certificate shall have the meaning set forth in Section 5(a) hereof.

Maximum Resale Price means (i) the appraised fair market value of the Property determined without regard to any restrictions contained in this Deed Rider and prepared by a real estate appraiser acceptable to the Municipality and qualified to appraise property for secondary mortgage markets and recognized as utilizing acceptable professional appraisal standards in Massachusetts, multiplied by (ii) the Discount Rate.

Monitoring Agent means Citizens' Housing and Planning Association, Inc., as monitoring agent under the Monitoring Services Agreement.

Monitoring Services Agreement means the Monitoring Services Agreement dated _____ between the Developer and the Monitoring Agent.

Municipal Compliance Certificate shall have the meaning set forth in Section 5(a) hereof.

Project means the ___-unit development located at _____, which, pursuant to the terms of the Comprehensive Permit and the Program, includes ___ units/detached dwellings of affordable housing.

Registry means the appropriate registry of deeds or registry district of the Land Court for the county in which the Property is located.

Regulatory Agreement means the Regulatory Agreement among MassHousing, the Municipality and the Developer dated _____ and recorded with the Registry in Book _____, Page _____.

Term means, unless terminated earlier according to Section 7 hereof, the period from the date hereof until the earliest to occur of (i) ___ years from the recording of the Regulatory Agreement, (ii) the recording of a Compliance Certificate, (iii) the recording of an Eligible Purchaser Certificate and a new Deed Rider executed by the Eligible Purchaser referenced in the Eligible Purchaser Certificate, which new Deed Rider the Eligible Purchaser Certificate certifies

is in form and substance satisfactory to the Municipality, or (iv) the conveyance of the Property to the Municipality and the recording of a Municipal Purchaser Certificate as set forth herein (the "Term"). Pursuant to Section 32 of Chapter 184 of the Massachusetts General Laws and as set forth in the Regulatory Agreement, the Director of the Department of Housing and Community Development has determined that the rights and restrictions set forth herein, including the Term, are in the public interest.

2. Owner-Occupancy/Principal Residence. The Property shall be occupied and used by the Grantee as his, her or their principal residence. Any use of the Property or activity thereon which is inconsistent with the purpose of this Deed Rider is expressly prohibited.

3. Restrictions Against Leasing and Junior Encumbrances. The Property shall not be leased, refinanced, encumbered (voluntarily or otherwise) or mortgaged without the prior written consent of the Monitoring Agent; provided, however, that this provision shall not apply to a first mortgage granted in connection with this conveyance. Any rents, profits, or proceeds from any transaction described in the last preceding sentence which transaction has not received the prior written consent of the Monitoring Agent shall be paid to and be the property of the Municipality. In the event that the Monitoring Agent in the exercise of its absolute discretion consents to any such lease, refinancing, encumbrance or mortgage, it shall be a condition to such consent that all rents, profits or proceeds from such transaction which exceed the carrying costs of the Property as determined by the Monitoring Agent in its sole discretion shall be paid to and be the property of the Municipality.

4. Right of First Refusal. (a) When the Grantee or any successor in title to the Grantee shall desire to sell, dispose of or otherwise convey the Property, or any portion thereof, the Grantee shall notify the Municipality in writing of the Grantee's intention to so convey the property (the "Notice"). The Notice shall contain an appraisal of the fair market value of the Property (assuming the Property is free of all restrictions set forth herein) acceptable to the Municipality prepared by a real estate appraiser acceptable to the Municipality and qualified to appraise property for secondary mortgage markets and recognized as utilizing acceptable professional appraisal standards in Massachusetts, and the Notice shall set forth the Discount Rate and the Maximum Resale Price of the Property. Within thirty (30) days of the Municipality's receipt of the Notice, the Municipality shall notify the Grantee whether (i) the Municipality is proceeding to locate an Eligible Purchaser of the Property, (ii) the Municipality intends to exercise its right of first refusal to purchase the Property, or (iii) the Municipality waives its right of first refusal (the "Municipality's Notice"). The Eligible Purchaser, if located by the Municipality, must be ready and willing to purchase the Property within ninety (90) days after the Municipality receives the Notice.

(b) In the event that (i) the Municipality's Notice states that the Municipality does not intend to proceed to locate an Eligible Purchaser and that the Municipality does not intend to exercise its right of first refusal to purchase the Property, or the Municipality fails to give the Municipality's Notice within the thirty (30) day time period specified above, the Grantee must use diligent efforts to find an Eligible Purchaser within a one hundred twenty (120) day period from the date the Property is put on the market, as determined by the date of the first advertisement for sale, as set forth below. the term "diligent efforts" shall mean (A) the placement of an advertisement in the real estate section of at least one newspaper of general circulation for a period of three consecutive weeks which sets forth a customary description of the unit for sale, a single price which is not in excess of the Maximum Resale Price, Grantee's

(or Grantee's real estate broker) telephone number and the phrase *"Sale of unit subject to certain guidelines and restrictions with respect to the maintenance and retention of affordable housing for households of low and moderate income"* and (B) the receipt of satisfactory evidence that the new purchaser qualifies as an Eligible Purchaser. If the Grantee is unable to locate an Eligible Purchaser within sixty (60) days from the date the Property is put on the market, the Grantee may convey the Property to any third party at fair market value, free of all restrictions set forth herein; provided, however, all consideration and payments of any kind received by the Grantee for the conveyance of the Property to the third party which exceeds the Maximum Resale Price shall be immediately and directly paid to the Municipality. Upon receipt of this excess amount, if any, the Municipality, acting by and through its Chief Elected Official, shall issue to the third party and the Monitoring Agent a certificate in recordable form (the "Compliance Certificate") indicating the Municipality's receipt of the excess amount, if applicable, or indicating that no excess amount is payable, and stating that the Municipality has elected not to exercise its right of first refusal hereunder and that all rights, restrictions, agreements and covenants set forth in this Deed Rider shall be henceforth null and void. This Compliance Certificate is to be recorded in the Registry and such Compliance Certificate may be relied upon by the then owner of the Property and by third parties as constituting conclusive evidence that such excess amount, if any, has been paid to the Municipality, or that no excess amount is payable, and that the rights, restrictions, agreements and covenants set forth herein are null and void. The sale price to a third party shall be subject to the Monitoring Agent's approval, with due consideration given to the value set forth in the appraisal accompanying the Notice, and the Monitoring Agent may withhold its approval if in its sole judgment the purchase price is not consistent with the requirements of this Deed Rider and the Regulatory Agreement. The Monitoring Agent's approval of the sale price shall be evidenced by its issuance of this Compliance Certificate.

(c) In the event the Municipality, within said thirty (30) day period, notifies the Grantee that the Municipality is proceeding to locate an Eligible Purchaser or that the Municipality shall exercise the Municipality's right of first refusal to purchase the Property, the Municipality may locate an Eligible Purchaser, who shall purchase the Property at the Maximum Resale Price, within ninety (90) days of the date that the Municipality receives the Notice or the Municipality may purchase the Property itself at the Maximum Resale Price within ninety (90) days of the date that the Municipality receives the Notice. If more than one Eligible Purchaser is located by the Municipality, the Municipality shall conduct a lottery or other like procedure to determine which Eligible Purchaser shall be entitled to the conveyance of the Property. The procedure for selecting an Eligible Purchaser shall be approved by MassHousing as provided in the Regulatory Agreement.

(d) If an Eligible Purchaser is selected to purchase the Property, or if the Municipality elects to purchase the Property, the Property shall be conveyed by the Grantee to such Eligible Purchaser or to the Municipality as the case may be, by a good and sufficient quitclaim deed conveying a good and clear record and marketable title to the Property free from all encumbrances except (i) such taxes for the then current year as are not due and payable on the date of delivery of the deed, (ii) any lien for municipal betterments assessed after the date of the Notice, (iii) provisions of local building and zoning laws, (iv) all easements, restrictions, covenants and agreements of record specified in the Deed from the Grantor to Grantee, (v) the Regulatory Agreement or any successor regulatory agreement entered into between MassHousing and the Municipality pursuant to the provisions of Section 16 of the Regulatory Agreement, (vi) such additional easements, restrictions, covenants and agreements of record as the Municipality consents to, such consent not to be unreasonably withheld or delayed, and (vi

in the event that the Property is conveyed to an Eligible Purchaser, a Deed Rider satisfactory in form and substance to the Monitoring Agent which the Grantee hereby agrees to annex to said deed.

(e) Said deed shall be delivered and the purchase price paid (the "Closing") at the Registry, or at the option of the Eligible Purchaser (or the Municipality, if the Municipality is purchasing the Property), exercised by written notice to the Grantee at least five (5) days prior to the delivery of the deed, at such other place as the Eligible Purchaser (or the Municipality, if the Municipality is purchasing the Property) may designate in said notice. The Closing shall occur at such time and on such date as shall be specified in a written notice from the Eligible Purchaser (or the Municipality if the Municipality is purchasing the Property) to the Grantee, which date shall be at least five (5) days after the date on which such notice is given, and if the Eligible Purchaser is located by the Municipality, or if the Municipality is purchasing the Property no later than ninety (90) days after the Municipality receives the Notice from the Grantee.

(f) To enable Grantee to make conveyance as herein provided, Grantee may, if so desired at the time of delivery of the deed, use the purchase money or any portion thereof to clear the title of any or all encumbrances or interests; all instruments so procured to be recorded simultaneously with the delivery of said deed. Nothing contained herein as to the Grantee's obligation to remove defects in title or to make conveyance or to deliver possession of the Property in accordance with the terms hereof, as to use of proceeds to clear title or as to the election of the Eligible Purchaser or the Municipality to take title, nor anything else in this Deed Rider shall be deemed to waive, impair or otherwise affect the priority of the Municipality's rights herein over matters appearing of record, or occurring, at any time after the recording of this Deed Rider, all such matters so appearing or occurring being subject and subordinate in all events to the Municipality's rights herein.

(g) Water and sewer charges and taxes for the then current tax period shall be apportioned and fuel value shall be adjusted as of the date of Closing and the net amount thereof shall be added to or deducted from, as the case may be, the purchase price payable by the Eligible Purchaser or by the Municipality.

(h) Full possession of the Property free from all occupants is to be delivered at the time of the Closing, the Property to be then in the same condition as it is in on the date hereof, reasonable wear and tear only excepted.

(i) If Grantee shall be unable to give title or to make conveyance as above stipulated, or if any change of condition in the Property not included in the above exception shall occur, then Grantee shall be given a reasonable time not to exceed thirty (30) days after the date on which the Closing was to have occurred in which to remove any defect in title or to restore the Property to the condition hereby provided for. The Grantee shall use best efforts to remove any such defects in the title whether voluntary or involuntary and to restore the Property to the extent permitted by insurance proceeds or condemnation award. The Closing shall occur fifteen (15) days after notice by Grantee that such defect has been cured or that the Property has been so restored. The Eligible Purchaser (or the Municipality, if the Municipality is purchasing the Property) shall have the election, at either the original or any extended time for performance, to accept such title as the Grantee can deliver to the Property in its then condition and to pay therefore the purchase price without deduction, in which case the Grantee shall convey such title, except that in the event of such conveyance in accordance with the provisions of this clause, if

the Property shall have been damaged by fire or casualty insured against or if a portion of the Property shall have been taken by a public authority, then the Grantee shall, unless the Grantee has previously restored the Property to its former condition, either:

(i) pay over or assign to the Eligible Purchaser or the Municipality, on delivery of the deed, all amounts recovered or recoverable on account of such insurance or condemnation award less any amounts reasonable expended by the Grantee for the partial restoration, or

(ii) if a holder of a mortgage on the Property shall not permit the insurance proceeds or the condemnation award or part thereof to be used to restore the Property to its former condition or to be so paid over or assigned, give to the Eligible Purchaser or to the Municipality a credit against the purchase price, on delivery of the deed, equal to said amounts so retained by the holder of the said mortgage less any amounts reasonably expended by the Grantee for any partial restoration.

(j) If the Municipality fails to locate an Eligible Purchaser who purchases the Property within ninety (90) days after the Notice is received by the Municipality, and the Municipality does not purchase the Property during said period, then following expiration of ninety (90) days after the Municipality receives the Notice from the Grantee, the Grantee may convey the Property to any third party at fair market value, free and clear of all rights and restrictions contained herein, including, but not limited to the Maximum Resale Price, provided, however, all consideration and payments of any kind received by the Grantee for the conveyance of the Property to the third party which exceeds the Maximum Resale Price shall be immediately and directly paid to the Municipality. Upon receipt of this excess amount, if any, the Municipality shall issue to the third party and to the Monitoring Agent a Compliance Certificate in recordable form indicating the Municipality's receipt of the excess amount, if any, and indicating that the Municipality has elected not to exercise its right to locate an Eligible Purchaser and its right of first refusal hereunder and that all rights, restrictions, agreements and covenants contained herein are henceforth null and void. This Compliance Certificate is to be recorded in the Registry and such Compliance Certificate may be relied upon by the then owner of the Property and by third parties as constituting conclusive evidence that such excess amount, if any, has been paid to the Municipality and that the rights, restrictions, agreements and covenants set forth herein are null and void. The sale price to a third party shall be subject to the Monitoring Agent's approval, with due consideration given to the value set forth in the appraisal accompanying the Notice, and the Monitoring Agent may withhold its approval if in its sole judgment the purchase price is not consistent with the requirements o this Deed Rider and the Regulatory Agreement.. The Monitoring Agent's approval of the sale price shall be evidenced by its issuance of its acceptance of the Municipality's Compliance Certificate.

(k) The Grantee understands and agrees that nothing in this Deed Rider or the Regulatory Agreement in any way constitutes a promise or guarantee by MassHousing or the Municipality that the Grantee shall actually receive the Maximum Resale Price for the Property or any other price for the Property.

(l) In the event that the Grantee receives notice that the Municipality does not intend to locate an Eligible Purchaser or to exercise its right of first refusal to purchase the Property or in the event the Municipality fails to give the Municipality's Notice within the thirty(30) day time

period specified in Section 4(b) above, should the Grantee be unable to sell the Property at the Maximum Resale Price as presented in its Notice to the Municipality, and the Grantee desires to sell the Property at less than the Maximum Resale Price (except for a proposed sale to an Eligible Purchaser), the right of first refusal and the procedures therefor set forth in Section 4 above shall continue to apply, so that the Municipality has the right to purchase the Property, or to locate an Eligible Purchaser to purchase the Property, at the lesser resale price identified in the new Notice from the Grantee. In no event shall the purchase price paid by the Municipality, or by an Eligible Purchaser located by the Municipality, be less than the Permitted Indebtedness.

5. Resale and Transfer Restrictions. Except as otherwise stated herein, the Property or any interest therein shall not at any time be sold by the Grantee, the Grantee's successors and assigns, and no attempted sale shall be valid, unless:

(a) the aggregate value of all consideration and payments of every kind given or paid by the Eligible Purchaser (as located and defined in accordance with Section 4 above) or the Municipality, to the then owner of the Property for and in connection with the transfer of such Property, is equal to or less than the Maximum Resale Price for the Property, and (i) if the Property is conveyed to an Eligible Purchaser, unless a certificate (the "Eligible Purchaser Certificate") is obtained and recorded, signed and acknowledged by the Monitoring Agent which Eligible Purchaser Certificate refers to the Property, the Grantee, the Eligible Purchaser thereof, and the Maximum Resale Price therefor, and states that the proposed conveyance, sale or transfer of the Property to the Eligible Purchaser is in compliance with the rights, restrictions, covenants and agreements contained in this Deed Rider and the Regulatory Agreement, and unless there is also recorded a new Deed Rider executed by the Eligible Purchaser, which new Deed Rider the Eligible Purchaser Certificate certifies is satisfactory in form and substance to the Monitoring Agent; or (ii) if the Property is conveyed to the Municipality unless a Certificate (the "Municipal Purchaser Certificate") is obtained and recorded, signed and acknowledged by the Monitoring Agent, which Municipal Purchaser Certificate refers to the Property, the Grantee, the Municipality, and the Maximum Resale Price for the Property and states that the proposed conveyance, sale or transfer of the Property to the Municipality is in compliance with the rights, restrictions, covenants and agreements contained in this Deed Rider and the Regulatory Agreement; or

(b) pursuant to Sections 4(b) or 4(j), any amount in excess of the Maximum Resale Price which is paid to the Grantee by a purchaser who is permitted to buy the Property pursuant to Sections 4(b) or 4(j), is paid by the Grantee to the Municipality, and the Monitoring Agent executes and delivers a Compliance Certificate as described in Sections 4(b) or 4(j) for recording with the Registry.

(c) Any good faith purchaser of the Property, any lender or other party taking a security interest in such Property and any other third party may rely upon a Compliance Certificate, an Eligible Purchaser Certificate or a Municipal Purchaser Certificate referring to the Property as conclusive evidence of the matters stated therein and may record such Certificate in connection with conveyance of the Property, provided, in the case of an Eligible Purchaser Certificate and a Municipal Purchaser Certificate the consideration recited in the deed or other instrument conveying the Property upon such resale shall not be greater than the consideration stated in the Eligible Purchaser Certificate or the Municipal Purchaser Certificate as the case may be. If the Property is conveyed to the Municipality, any future sale of the Property by the Municipality shall be subject to the provisions of Section 4 of the Regulatory Agreement.

(d) Within ten (10) days of the closing of the conveyance of the Property from Grantor to Grantee, the Grantee shall deliver to the Monitoring Agent and to the Municipality a true and certified copy of the Deed of the Property, together with information as to the place of recording thereof in the public records. Failure of the Grantee, or Grantee's successors or assigns to comply with the preceding sentence shall not affect the validity of such conveyance.

6. Option. In addition to the foregoing rights of first refusal granted to the Municipality, the Grantee grants to the Municipality the right and option to purchase the Property upon one or more of the following events:

(a) Any legal or beneficial interest in the Property is conveyed without notice to the Municipality as provided above, unless the Municipality shall have waived its option to purchase with respect to a particular sale; or

(b) Any legal or beneficial interest in the Property is conveyed for consideration less than the Maximum Resale Price or the lesser resale price identified in a new Notice from the Grantee (except as allowed under Section 4(l) above); or

(c) Receipt by the Municipality of notice in any form (including notice by newspaper publication) of an impending foreclosure against the Property; or

(d) Receipt by the Municipality of notice in any form (including notice by newspaper publication) of the taking of the Property for unpaid taxes.

7. Rights of Mortgagees. (a) Notwithstanding anything herein to the contrary, but subject to the next succeeding paragraph hereof, if the holder of record (other than the Grantor or any person related to the Grantor by blood, adoption, or marriage, or any entity in which the Grantor has a financial interest (any of the foregoing, a "Related Party")) of a first mortgage granted to a state or national bank, state or federal savings and loan association, cooperative bank, mortgage company, trust company, insurance company or other institutional lender or its successors or assigns (other than a Related Party) shall acquire the Property by reason of foreclosure or similar remedial action under the provisions of such mortgage or upon conveyance of the Property in lieu of foreclosure, provided that the holder of such mortgage has given the Municipality not less than thirty (30) days prior written notice of its intention to foreclose upon its mortgage or to accept a conveyance of the Property in lieu of foreclosure, and provided further that the principal amount secured by such mortgage did not exceed ninety-seven percent (97%) of the Maximum Resale Price calculated at the time of the granting of the mortgage (the "Permitted Indebtedness"), then the rights and restrictions contained herein shall not apply to such holder upon such acquisition of the Property, any purchaser (other than a Related Party) of the Property at a foreclosure sale conducted by such holder, or any purchaser (other than a Related Party) of the Property from such holder, and such Property shall thereupon and thereafter be free from all such rights and restrictions.

(b) In the event such holder conducts a foreclosure or other proceeding enforcing its rights under such mortgage and the Property is sold for a price in excess of the greater of (i) the sum of the outstanding principal balance of the note secured by such mortgage plus all future advances, accrued interest and all reasonable costs and expenses which the holder is entitled to recover pursuant to the terms of the mortgage and (ii) the Maximum Resale Price applicable on the date of the sale, such excess shall be paid to the Municipality in consideration of the loss of

the value and benefit of the rights and restrictions herein contained held by the Municipality and released by the Municipality pursuant to this section in connection with such proceeding (provided, that in the event that such excess shall be so paid to the Municipality by such holder, the Municipality shall thereafter indemnify such holder against loss or damage to such holder resulting from any claim made by the mortgagor of such mortgage to the extent that such claim is based upon payment of such excess by such holder to the Municipality in accordance herewith, provided that such holder shall give the Monitoring Agent and the Municipality prompt notice of any such claim and shall not object to intervention by the Municipality in any proceeding relating thereto.) In order to determine the Maximum Resale Price of the Property at the time of foreclosure or other proceeding, the Municipality may, at its own expense, obtain an appraisal of the fair market value of the Property satisfactory to such holder. The Maximum Resale Price shall be equal to the appraised fair market value so obtained, multiplied by the Discount Rate assigned to the Property. If the holder disagrees with such appraised value, the holder may obtain a second appraisal, at the holder's expense and the Maximum Resale Price shall be equal to the average of the two appraisal amounts multiplied by the Discount Rate. To the extent the Grantee possesses any interest in any amount which would otherwise be payable to the Municipality under this paragraph, to the fullest extent permissible by law, the Grantee hereby assigns its interest in such amount to said holder for payment to the Municipality.

(c) A holder of a mortgage shall notify the Municipality in the event of any default for which the lender intends to commence foreclosure proceedings but no failure to notify the Municipality shall impair the validity of a foreclosure. Said notice shall be sent to the Municipality as set forth in this Deed Rider.

(d) If any person who was a Related Party prior to any foreclosure acquires an interest in the Property after foreclosure, then all covenants and options contained herein shall apply to all subsequent occupancy and sale of the Property.

(e) A certificate signed under penalties of perjury by a purchaser at a foreclosure sale certifying that such purchaser is not a Related Party shall, if recorded with the Registry, be conclusive evidence that such purchaser is not a Related Party.

8. Covenants to Run With the Property. (a) It is intended and agreed that all of the agreements, covenants, rights and restrictions set forth herein shall be deemed to be covenants running with the Property and shall be binding upon and enforceable against the Grantee, the Grantee's successors and assigns and any party holding title to the Property, for the benefit of and enforceable by the Municipality, the Municipality's agents, successors, designees and assigns during the Term of this Deed Rider.

(b) This Deed Rider and all of the agreements, restrictions, rights and covenants contained herein shall be deemed to be an affordable housing restriction as that term is defined in Section 31 of Chapter 184 of the Massachusetts General Laws which has the benefit of Section 32 of said Chapter 184, such that the restrictions contained herein shall not be limited in duration by any rule or operation of law.

(c) The Grantee intends, declares and covenants on behalf of itself and its successors and assigns (i) that this Deed Rider and the covenants, agreements, rights and restrictions contained herein shall be and are covenants running with the land, encumbering the Property for the Term, and are binding upon the Grantee's successors in title, (ii) are not merely personal covenants of

the Grantee, and (iii) shall bind the Grantee, its successors and assigns and enure to the benefit of the Municipality and their successors and assigns for the Term. Grantee hereby agrees that any and all requirements of the laws of the Commonwealth of Massachusetts to be satisfied in order for the provisions of this Deed Rider to constitute restrictions and covenants running with the land shall be deemed to be satisfied in full and that any requirements of privity of estate are also deemed to be satisfied in full.

(d) Without limitation on any other rights or remedies of the Grantor, the Municipality, their agents, successors, designees and assigns, any sale or other transfer or conveyance of the Property in violation of the provisions of this Deed Rider, shall, to the maximum extent permitted by law, be voidable by the Municipality, the Municipality's agents, successors, designees and assigns by suit in equity to enforce such rights, restrictions, covenants, and agreements.

9. Notice. Any notices, demands or requests that may be given under this Deed Rider shall be sufficiently served if given in writing and delivered by hand or mailed by certified or registered mail, postage prepaid, return receipt requested, to the parties hereto at the addresses set forth below, or such other addresses as may be specified by any party by such notice.

Municipality:

MassHousing: Massachusetts Housing Finance Agency
One Beacon Street
Boston, MA 02108
Attention: General Counsel

Grantor:

Grantee:

Monitoring Agent: Citizens Housing and Planning Association, Inc.
18 Tremont Street
Boston, MA 02108
Attentiion: Aaron Gornstein
Executive Director

Any such notice, demand or request shall be deemed to have been given on the day it is hand delivered or mailed.

10. Further Assurances. The Grantee agrees from time to time, as may be reasonably required by the Municipality or the Monitoring Agent, to furnish the Municipality or the Monitoring Agent with a written statement, signed and, if requested, acknowledged, setting forth the condition and occupancy of the Property, information concerning the resale of the

Property and all other information pertaining to the Property or the Grantee's eligibility for and conformance with the requirements of the Comprehensive Permit and the Program.

11. Enforcement. (a) The rights hereby granted shall include the right of the Municipality to enforce this Deed Rider independently by appropriate legal proceedings and to obtain injunctive and other equitable relief against any violations including without limitation relief requiring restoration of the Property to its condition prior to any such violation (it being agreed that the Municipality will have no adequate remedy at law), and shall be in addition to, and not in limitation of, any other rights and remedies available to the Municipality.

(b) Without limitation of any other rights or remedies of the Municipality or its successors and assigns, in the event of any sale, conveyance or other transfer or occupancy of the Property in violation of the provisions of this Deed Rider, the Municipality shall be entitled to the following remedies, which shall be cumulative and not mutually exclusive:

(i) specific performance of the provisions of this Deed Rider;

(ii) money damages for charges in excess of the Maximum Resale Price, if applicable;

(iii) if the violation is a sale of the Property at a price greater than the Maximum Resale Price as provided herein, the Municipality shall have the option to purchase the Property on the same terms and conditions as provided herein for the exercise of its option to purchase, except that the purchase price shall be the price paid in a conveyance that would have complied with the provisions of this Deed Rider;

(iv) the right to void any contract for sale or any sale, conveyance or other transfer of the Property in violation of the provisions of this Deed Rider in the absence of a Certificate of Compliance, by an action in equity to enforce this Deed Rider; and

(v) money damages for the cost of creating or obtaining other comparable dwelling units to fulfill the need for affordable housing by Eligible Purchasers.

(c) If any suit or action is brought by the Municipality to enforce this Deed Rider, the prevailing party shall be entitled to actual and reasonable attorneys' fees and other costs of bringing the suit or action, in addition to any other relief or remedy to which such party may be entitled.

(d) In addition to the foregoing, in the event of a violation of the provisions of this Deed Rider, the Monitoring Agent shall have the right, with the prior consent of the Municipality (and, for so long as the MassHousing Loan is outstanding, with the consent of MassHousing), to take appropriate enforcement action against the Grantee or the Grantee's successors in title, including, without limitation, legal action to compel the Grantee to comply with the requirements of this Deed Rider. The Grantee hereby agrees to pay all fees and expenses (including legal fees) of the Monitoring Agent in the event enforcement action is taken against the Grantee hereunder and hereby grants to the Monitoring Agent a lien on the Property, junior to the lien of any institutional holder of a first mortgage on the Property, 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 this Deed Rider against the Grantee and to assert a lien on the Property to secure payment by the Grantee of such fees and expenses.

(e) The Grantee for himself, herself or themselves and his, her or their successors and assigns, hereby grants to the Municipality and the Monitoring Agent the right to enter upon the Property for the purpose of enforcing the restrictions herein contained, or of taking all actions with respect to the Property which the Municipality or the Monitoring Agent may determine to be necessary or appropriate pursuant to court order, or with the consent of the Grantee to prevent, remedy or abate any violation of this Deed Rider.

12. Monitoring Agent Services; Fees. As provided in the Monitoring Services Agreement, the Developer has engaged the Monitoring Agent to monitor compliance of the Project with ongoing requirements of the Comprehensive Permit, including the requirement that the Affordable Units be sold to Eligible Purchasers (or to the Municipality) as provided herein. As partial compensation for providing services under the Monitoring Services Agreement, the Monitoring Agent shall receive a fee of one-half of one percent of the Maximum Resale Price (or the lesser sale price actually received by the Grantee, as provided in Section 4(l) above) on the sale of the Property to the Municipality, an Eligible Purchaser or any other purchaser in accordance with the terms of this Deed Rider and the Regulatory Agreement. This fee shall be paid by the Grantee as a closing cost at the time of Closing, and payment of the fee of the Monitoring Agent shall be a condition to deliver and recording of its certificate, failing which the Monitoring Agent shall have a claim against the Grantee and persons claiming under the Grantee for which the Monitoring Agent may seek an attachment against the Property..

13. Third-Party Beneficiaries. The covenant as to Maximum Resale Price for the Property may be enforced by the Municipality, the Grantee and/or prospective purchaser of the Property.

14. Severability. If any provisions hereof or the application thereof to any person or circumstance shall come, to any extent, to be invalid or unenforceable, the remainder hereof, or the application of such provision to the persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each provision hereof shall be valid and enforced to the fullest extent permitted by law.

Executed as a sealed instrument this _____ day of _____, 200_.

Grantor:

By _____

Grantee:

By _____

COMMONWEALTH OF MASSACHUSETTS

County of _____, ss

_____, 200 ___

TRUE COPY ATTEST

Donna M. Hooper

TOWN CLERK
LEXINGTON, MA

Then personally appeared the above-named _____, Grantor, and acknowledged the foregoing instrument to be his/her free act and deed, before me.

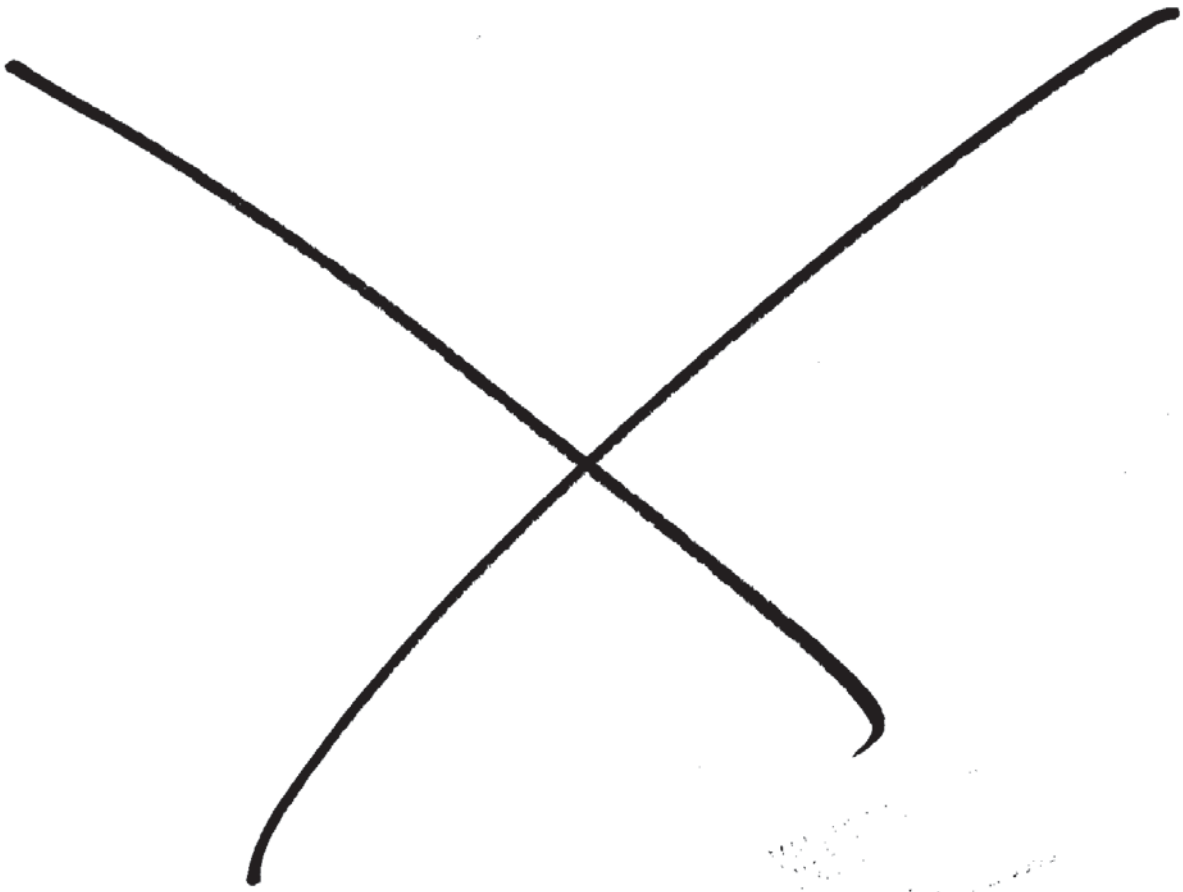
Notary Public
My commission expires:

COMMONWEALTH OF MASSACHUSETTS

County of _____, ss _____, 200___

Then personally appeared the above-named _____, Grantee(s), and acknowledged the foregoing instrument to be his/her/their free act and deed, before me.

Notary Public
My commission expires:

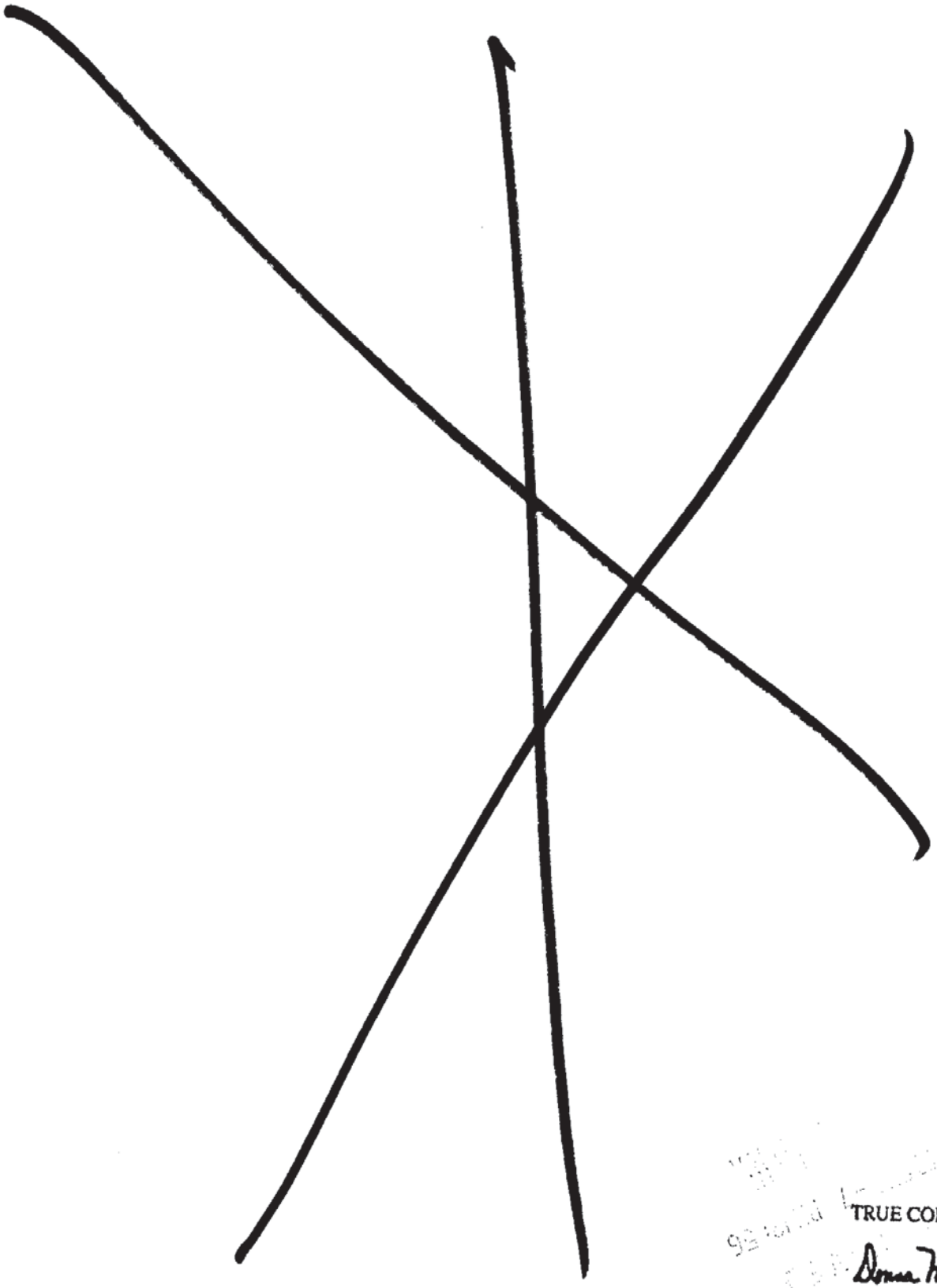


TRUE COPY ATTEST

Donna M. Hooper

TOWN CLERK
LEXINGTON, MA

Exhibit E
Rising Tide Development
Greenhouse Condominiums
Regulatory Agreement



I/HousingStarts/regagmt
Rev. 3/02

MASSACHUSETTS HOUSING FINANCE AGENCY
Housing Starts Program

REGULATORY AGREEMENT

This Regulatory Agreement (this "Agreement") is made this ___ day of _____ 200_, by and among the Massachusetts Housing Finance Agency ("MassHousing"), the City/Town of _____ ("the Municipality"), and _____, a Massachusetts corporation/limited partnership, having an address at _____, and its successors and assigns ("Developer").

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 MassHousing's affordable housing program 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 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 Construction Loan Agreement between MassHousing and the Developer of even date herewith relating to the MassHousing Loan (the "Loan 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 this Agreement to Eligible Purchasers (as defined herein) and will be subject to this Agreement; and

WHEREAS, the Developer has agreed to retain Citizens' Housing and Planning Association, Inc. (the "Monitoring Agent") to perform monitoring and enforcement services regarding compliance of the Project with the Comprehensive Permit, the Program Guidelines and the Loan Agreement.

NOW, THEREFORE, in consideration of the agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, MassHousing, the Municipality, and the Developer hereby agree as follows:

1. Definitions. The following terms shall have the meanings set forth below:

Area means the Primary Metropolitan Statistical Area which includes the Municipality.

Chief Elected Official means in the case of a city, the Mayor of such city, and in the case of a town, the Board of Selectmen of such town.

Deed Rider means the deed rider in the form attached hereto as Exhibit C and fully incorporated herein by reference to be attached to each deed of each Affordable Unit as provided in Section 5 hereof.

Discount Rate means the percentage of the appraised fair market value of the Affordable Unit which the Eligible Purchaser is paying as consideration for the Affordable Unit, and which will be applied to the appraised fair market value of the Affordable Unit at the time of resale or other transfer of the Affordable Unit by the Eligible Purchaser to determine the Maximum Resale Price.

Discount Rate Certificate means the certificate in recordable form issued by MassHousing which sets forth the Discount Rate to be applied on the sale, resale or other transfer of each Affordable Unit, according to the terms of the Deed Rider for such unit, for so long as the restrictions set forth in this Agreement continue.

Eligible Purchaser means an individual or family earning no more than eighty percent (80%) of median income for the Area as published from time to time by the United States Department of Housing and Urban Development ("HUD"). If HUD discontinues publication of median income statistics, then the Municipality shall designate another measure of eligible income. To be considered an Eligible Purchaser, an individual or family must intend to occupy the Property as his, her or their principal residence and must provide to the Municipality and to the Monitoring Agent such income certifications as the Municipality and the Monitoring Agent may require to justify designation as an Eligible Purchaser.

Eligible Purchaser Certificate shall have the meaning set forth in Section 5(a) hereof.

Maximum Resale Price means the (i) the appraised fair market value of the Property determined without regard to any restrictions contained in this Deed Rider and prepared by a real estate appraiser acceptable to the Municipality and qualified to appraise property for secondary mortgage markets and recognized as utilizing acceptable professional appraisal standards in Massachusetts, multiplied by (ii) the Discount Rate.

Monitoring Agent means Citizens' Housing Planning Association, Inc., as monitoring agent under the Monitoring Services Agreement.

Monitoring Services Agreement means the Monitoring Services Agreement dated _____ between the Developer and the Monitoring Agent.

Municipal Compliance Certificate shall have the meaning set forth in Section 5(a) hereof.

Project means the ___-unit development located at _____, which, pursuant to the terms of the Comprehensive Permit and the Program, includes ___ units/detached dwellings of affordable housing.

Registry means the appropriate registry of deeds or registry district of the Land Court for the county in which the Property is located.

2. Construction Obligations. The Developer agrees to construct the Project in accordance with plans and specifications approved by MassHousing (the "Plans and Specifications") and in accordance with all terms and conditions of the Comprehensive Permit and the Loan Agreement. All Affordable Units to be constructed as part of the Project must be similar in exterior appearance to other units in the Project and shall be evenly dispersed throughout the Project. In addition, all Affordable Units must contain complete living facilities including but not limited to a stove, kitchen cabinets, plumbing fixtures, and washer/dryer hookup, all as more fully shown in the Plans and Specifications. The Project must fully comply with the State Building Code and with all applicable state and federal building, environmental, health, safety and other laws, rules, and regulations, including without limitation all applicable federal and state laws, rules and regulations relating to the operation of adaptable and accessible housing for the handicapped. Except to the extent that the Project is exempted from such compliance by the Comprehensive Permit, the Project must also comply with all applicable local codes, ordinances and by-laws.

3. Maximum Sales Price. Each Affordable Unit will be sold by the Developer for no more than the Maximum Sales Price set forth in Exhibit B attached hereto and incorporated herein by reference to an Eligible Purchaser. MassHousing shall determine the appropriate Discount Rate for each Affordable Unit and shall issue the Discount Rate Certificate to the Developer. The Developer shall record the Discount Rate Certificate with the first deed of each Affordable Unit.

4. Subsidized Housing Inventory. The units in the Project designated on the Plans and Specifications and the Comprehensive Permit as Affordable Units shall be included in the Subsidized Housing Inventory as that term is described in 760 CMR 31.04(1) when the Comprehensive Permit becomes final, provided that any housing units for which building permits have not been issued within one (1) year of the date when the Comprehensive Permit becomes final shall no longer be counted until building permits have been issued. No unit shall be counted more than once for any reason. Only Affordable Units will be counted as Subsidized Housing Units for the purposes of the Act.

5. Deed Riders; Affordability Requirement. (a) At the time of sale of each Affordable Unit by the Developer, the Developer shall execute and shall as a condition of the sale cause the purchaser of the Affordable Unit to execute a Deed Rider in the form of

Exhibit C attached hereto and fully incorporated herein. Such Deed Rider shall be attached to and made a part of the deed from the Developer to the initial purchaser of the Affordable Unit (the "Unit Purchaser"). Each such Deed Rider shall require the Unit Purchaser at the time he desires to sell the Affordable Unit to offer the Affordable Unit to the Municipality at a discounted purchase price more particularly described therein. The Municipality shall have the option upon terms more particularly described in the Deed Rider to either purchase the Affordable Unit or to find an Eligible Purchaser.

(b) The Deed Rider shall require the seller and the Eligible Purchaser to execute at the time of resale a similar Deed Rider which will be attached and made a part of the deed to the Eligible Purchaser, so that the affordability of the Affordable Unit will be preserved each time that subsequent resales of the Affordable Unit occur. (The various requirements and restrictions regarding resale of an Affordable Unit contained in the Deed Rider are hereinafter referred to as the "Resale Restrictions").

(c) If, upon the initial resale or any subsequent resale of an Affordable Unit, the Municipality is unable to find an Eligible Purchaser for the Affordable Unit and the Municipality elects not to exercise its right to purchase the Affordable Unit, the then-current owner of the Affordable Unit shall have the right to sell the Affordable Unit to any person, regardless of his income and at any price, free of any future Resale Restrictions, provided that the difference between the actual resale price and the discounted purchase price for which the Municipality or an Eligible Purchaser could have purchased the Affordable Unit (the "Windfall Amount") shall be paid by the then-current owner of the Affordable Unit to the Municipality. The Municipality agrees that all sums constituting Windfall Amounts from the sale of Affordable Units shall be deposited in the Municipality's Affordable Housing Fund (as that term is hereinafter defined).

(d) The Municipality agrees that, in the event the Municipality purchases an Affordable Unit pursuant to its right to do so contained in the Deed Rider then in effect with respect to such Affordable Unit, the Municipality shall within six (6) months of its acceptance of a deed of such Affordable Unit, either (i) sell the Affordable Unit to an Eligible Purchaser at the same price for which it purchased the Affordable Unit plus any expenses incurred by the Municipality during its period of ownership, subject to the Deed Rider, and the recording of an Eligible Purchaser Certificate satisfactory in form and substance to the Monitoring Agent, or (ii) rent the Affordable Unit to a person who qualifies as an Eligible Purchaser upon terms and conditions applicable to low-income rental units under the MassHousing Enabling Act. If the Municipality fails to sell or rent the Affordable Unit as provided herein within said six (6) month period, or if at any time after the initial rental of the Affordable Unit by the Municipality as provided herein the Affordable Unit becomes vacant and remains vacant for more than ninety (90) days, then such Affordable Unit shall cease to be counted as a Subsidized Housing Unit, and shall no longer be included in the Subsidized Housing Inventory.

(e) Each Affordable Unit will remain a Subsidized Housing Unit and continue to be included in the Subsidized Housing Inventory for as long as the following three conditions are met: (1) this Agreement remains in full force and effect and neither the

Municipality nor the Developer is in default hereunder; (2) the Project and the Affordable Unit each continues to comply with the Comprehensive Permit; and (3) either (i) a Deed Rider binding the then-current owner of the Affordable Unit to comply with the Resale Restrictions is in full force and effect and the then-current owner of the Affordable Unit is either in compliance with the terms of the Deed Rider, or the Municipality is in the process of taking such steps as may be recommended by the Monitoring Agent to enforce the then-current owner's compliance with the terms of the Deed Rider, or (ii) the Affordable Unit is owned by the Municipality and the Municipality is in compliance with the terms and conditions of subsections 5(b) through 5(d) above.

6. Limited Dividend Requirement. Developer agrees that the aggregate profit from the Project which shall be payable to Developer or to the partners, shareholders or other owners of Developer or the Project shall not exceed twenty percent (20%) of total development costs of the project (the "Allowable Profit"), which development costs have been approved by the Monitoring Agent on behalf of MassHousing pursuant to the Monitoring Services Agreement. 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 Developer shall deliver to the Monitoring Agent an itemized statement of total development costs together with a statement of gross income from the Project received by the Developer to date in form satisfactory to the Monitoring Agent (the "Certified Cost and Income Statement") prepared and certified by a certified public accountant satisfactory to the Monitoring Agent. If all units at the Project have not been sold as of the date the Certified Cost and Income Statement is delivered to the Monitoring Agent, the Developer shall at least once every ninety (90) days thereafter until such time as all of the Units are sold, deliver to the Monitoring Agent an updated Certified Cost and Income Statement. All profits from the Project in excess of the Allowable Profit (the "Excess Profit") shall be paid by the Developer to the Municipality. The Municipality agrees that all amounts constituting Excess Profit shall be deposited in the Affordable Housing Fund (as hereinafter defined). For so long as the Developer complies with the requirements of this Section 6, the Developer shall be deemed to be a limited dividend organization within the meaning of the Act.

7. Affordable Housing Fund. The Municipality agrees that upon the receipt by the Municipality of any Windfall Amount, Excess Profit, or any amount paid to the Municipality pursuant to the provisions of Sections 3, 4 and 7 of the Deed Rider (the "Additional Windfall Amounts"), the Municipality shall deposit any and all such Windfall Amounts, Excess Profit, or Additional Windfall Amounts into an interest bearing account established with an institutional lender (the "Affordable Housing Fund"). Sums from the Affordable Housing Fund shall be expended from time to time by the Municipality for the purpose of reducing the cost of Affordable Units to Eligible Purchasers upon resale or for the purpose of encouraging, creating, or subsidizing the construction or rehabilitation of housing for persons and families who qualify as Eligible Purchasers elsewhere in the Municipality.

8. Marketing Plan. Prior to marketing or otherwise making available for sale any of the Units, the Developer must obtain MassHousing's approval of a marketing plan

(the "Marketing Plan") for the Affordable Units. Such Marketing Plan must describe the buyer selection process for the Affordable Units, including any lottery or similar procedure for choosing among Eligible Purchasers, and must comply with the Memorandum of Understanding executed by the Developer in connection with the application for the Loan regarding affirmative marketing of Affordable Units to minority households. At the option of the Municipality, the Marketing Plan may also include a preference for local residents for up to seventy percent (70%) of the Affordable Units. When submitted to MassHousing for approval, the Marketing Plan should be accompanied by a letter from the Chief Elected Official of the Municipality which states that the buyer selection and local preference (if any) aspects of the Marketing Plan have been approved by the Municipality and which states that the Municipality will perform any aspects of the Marketing Plan which are set forth as responsibilities of the Municipality in the Marketing Plan. All costs of carrying out the Marketing Plan shall be paid by the Developer. A failure to comply with the Marketing Plan by the Developer or by the Municipality shall be deemed to be a default of this Agreement. The Developer agrees to maintain for at least five years following the sale of the last Affordable Unit, a record of all newspaper ads, outreach letters, translations, leaflets, and any other outreach efforts (collectively "Marketing Documentation") as described in the Marketing Plan as approved by MassHousing which may be inspected at any time by MassHousing. The Developer and the Municipality agree that if at any time prior to or during the process of marketing the Affordable Units, MassHousing determines that the Developer, or the Municipality with respect to aspects of the Marketing Plan that the Municipality has agreed to be responsible for, has not adequately complied with the approved Marketing Plan, the Developer or Municipality as the case may be, shall conduct such additional outreach or marketing efforts as shall be determined by MassHousing.

9. No Discrimination. Neither the Developer nor the Municipality shall 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 buyers for the Units; and the Developer shall not so discriminate in connection with the employment or application for employment of persons for the construction, operation or management of the Project.

10. Monitoring Agent. The Developer shall retain the Monitoring Agent for purposes of monitoring the Developer's performance under this Agreement pursuant to an agreement acceptable to the Monitoring Agent and MassHousing. All notices and reports required to be submitted under this Agreement shall be submitted simultaneously to the party specified to receive the notices and reports hereunder and to the Monitoring Agent.

11. Compliance; Certifications. (a) The Developer agrees to comply and to cause the Project to comply with all requirements of the Comprehensive Permit and all other applicable laws, rules, regulations, and executive orders. MassHousing (for so long as the MassHousing Loan is outstanding), the Monitoring Agent and the Chief Elected Official of the Municipality (from the date hereof through the date which is five (5) years after the Developer has sold the last unit in the Project) shall have access during normal

business hours to all books and records of the Developer and the Project in order to monitor the Developer's compliance with the terms of this Agreement.

(b) Throughout the term of this Agreement, the Chief Elected Official shall annually certify in writing to the Monitoring Agent that each of the Affordable Units continues to be occupied by a person who was an Eligible Purchaser at the time of purchase; that any Affordable Units which have been resold during the year have been resold in compliance with all of the terms and provisions of the Deed Rider then in effect with respect to each such Affordable Unit, the Program Guidelines and this Agreement; and that the Project and the Affordable Units have otherwise been maintained in a manner consistent with the Program Guidelines, this Agreement, and the Deed Rider then in effect with respect to each Affordable Unit.

12. Recording. Upon execution, the Developer shall immediately cause this Agreement and any amendments hereto to be recorded with the Registry of Deeds for the County where the Project is located or, if the Project consists in whole or in part of registered land, file this Agreement and any amendments hereto with the Registry District of the Land Court for the County where the Project is located (collectively hereinafter the "Registry of Deeds"), and the Developer shall pay all fees and charges incurred in connection therewith. Upon recording or filing, as applicable, the Developer shall immediately transmit to MassHousing and the Municipality evidence of such recording or filing including the date and instrument, book and page or registration number of the Agreement.

13. Developer's Representations, Covenants and Warranties. The Developer hereby represents, covenants and warrants as follows:

(a) The Developer (i) is a _____ duly organized under the laws of the Commonwealth of Massachusetts, and is qualified to transact business under the laws of this State, (ii) has the power and authority to own its properties and assets and to carry on its business as now being conducted, and (iii) has the full legal right, power and authority to execute and deliver this Agreement.

(b) The execution and performance of this Agreement by the Developer (i) will not violate or, as applicable, has not violated any provision of law, rule or regulation, or any order of any court or other agency or governmental body, and (ii) will not violate or, as applicable, has not violated any provision of any indenture, agreement, mortgage, mortgage note, or other instrument to which the Developer is a party or by which it or the Project is bound, and (iii) will not result in the creation or imposition of any prohibited encumbrance of any nature.

(c) The Developer will, at the time of execution and delivery of this Agreement, have good and marketable title to the premises constituting the Project free and clear of any lien or encumbrance (subject to encum-

brances created pursuant to this Agreement, the Loan Agreement and any other documents executed in connection with the MassHousing Loan, or other encumbrances permitted by MassHousing).

(d) There is no action, suit or proceeding at law or in equity or by or before any governmental instrumentality or other agency now pending, or, to the knowledge of the Developer, threatened against or affecting it, or any of its properties or rights, which, if adversely determined, would materially impair its right to carry on business substantially as now conducted (and as now contemplated by this Agreement) or would materially adversely affect its financial condition.

14. Restrictions on Transfers and Junior Encumbrances. Except for sales of Units to homebuyers as permitted by the terms of this Agreement, Developer will not sell, transfer, lease, exchange or mortgage the Project without the prior written consent of the Municipality and (for so long as the MassHousing Loan is outstanding) MassHousing.

15. Casualty. Until such time as decisions regarding repair of damage due to fire or other casualty, or restoration after taking by eminent domain, shall be made by a condominium association or trust not controlled by the Developer (or if the Project consists of detached dwellings, by homebuyers), Developer agrees that if the Project, or any part thereof, shall be damaged or destroyed or shall be condemned or acquired for public use, the Developer will use its best efforts to repair and restore the Project to substantially the same condition as existed prior to the event causing such damage or destruction, or to relieve the condemnation, and thereafter to operate the Project in accordance with the terms of this Agreement, subject to the approval of MassHousing (for so long as the MassHousing Loan is outstanding).

16. Governing Law. This Agreement shall be governed by the laws of the Commonwealth of Massachusetts. Any amendments to this Agreement must be in writing and executed by all of the parties hereto. The invalidity of any clause, part, or provision of this Agreement shall not affect the validity of the remaining portions hereof.

17. Notices. All notices to be given pursuant to this Agreement shall be in writing and shall be deemed given when delivered by hand or when mailed by certified or registered mail, postage prepaid, return receipt requested, to the parties hereto at the addresses set forth below, or to such other place as a party may from time to time designate by written notice:

MassHousing:

Massachusetts Housing Finance Agency
One Beacon Street
Boston, MA 02108
Attention: General Counsel

Municipality:

Developer:

Monitoring Agent:

Citizens Housing and Planning Association, Inc.
18 Tremont Street
Boston, Massachusetts 02108
Attention: Aaron Gornstein
Executive Director

18. Term. (a) This Agreement and all of the covenants, agreements and restrictions contained herein shall be deemed to be an affordable housing restriction as that term is defined in Section 31 of Chapter 184 of the Massachusetts General Laws which has the benefit of Section 32 of said Chapter 184 such that the restrictions contained herein shall not be limited in duration by any rule or operation of law. This Agreement is made for the benefit of MassHousing and the Municipality, and MassHousing and the Municipality shall be deemed to be the holders of the affordable housing restriction created by this Agreement. MassHousing and the Municipality have determined that the acquiring of such affordable housing restriction is in the public interest. The term of this Agreement shall be for ___ years after the date of recording this Agreement with the Registry, provided however, that this Agreement shall terminate if (a) at any time hereafter there is no Affordable Unit at the Project which is then subject to a Deed Rider containing the Resale Restrictions, and there is no Affordable Unit at the Project which is owned by the Municipality as provided in Section 4 hereof, or (b) the Project is acquired by foreclosure of a first priority mortgage on the Project or by instrument in lieu of foreclosure, provided that the holder of the first priority mortgage gives the Municipality not less then sixty (60) days prior written notice of such mortgagee's intention to foreclose upon the Project or to accept an instrument in lieu of foreclosure, or (c) if at any time the Comprehensive Permit is revoked and all applicable appeal periods with respect to such revocation have expired. If this Agreement terminates because of a foreclosure or the acceptance of an instrument in lieu of foreclosure as set forth in clause (b) of this Section, the Municipality agrees that if at the time of such termination there are one or more Affordable Units at the Project which are then subject to a Deed Rider containing the Resale Restrictions or there are one or more Affordable Units at the Project which are owned by the Municipality as provided in Section 4 hereof, the Municipality shall enter into a new Regulatory Agreement with

MassHousing with respect to such Affordable Units which shall be satisfactory in form and substance to MassHousing.

(b) The Developer intends, declares and covenants on behalf of itself and its successors and assigns that this Agreement and the covenants, agreements and restrictions contained herein (i) shall be and are covenants running with the land, encumbering the Project for the term of this Agreement, and are binding upon the Developer's successors in title, (ii) are not merely personal covenants of the Developer, and (iii) shall bind the Developer, its successors and assigns and enure to the benefit of MassHousing and its successors and assigns for the term of the Agreement. Developer hereby agrees that any and all requirements of the laws of the Commonwealth of Massachusetts to be satisfied in order for the provisions of this Agreement to constitute restrictions and covenants running with the land shall be deemed to be satisfied in full and that any requirements of privity of estate are also deemed to be satisfied in full.

(c) The Resale Restrictions contained in each of the Deed Riders which are to encumber each of the Affordable Units at the Project pursuant to the requirements of this Agreement shall also constitute an affordable housing restriction as that term is defined in Section 31 of Chapter 184 of the Massachusetts General Laws which has the benefit of Section 32 of said Chapter 184 such that the restrictions contained herein shall not be limited in duration by any rule or operation of law. Such Resale Restrictions shall be for the benefit of both MassHousing and the Municipality and both MassHousing and the Municipality shall be deemed to be the holder of the affordable housing restriction created by the Resale Restrictions in each of the Deed Riders. MassHousing has determined that the acquiring of such affordable housing restriction is in the public interest. To the extent that MassHousing and the Municipality are the holders of the Resale Restrictions to be contained in each of the Deed Riders, the Director of the Department of Housing and Community Development by the execution of this Agreement hereby approves such Resale Restrictions in each of the Deed Riders for the Affordable Units of the Project as required by the provisions of Section 32 of said Chapter 184.

19. Further Information. The Developer and the Municipality each agree to submit any information, documents or certifications requested by the Monitoring Agent which the Monitoring Agent shall deem necessary or appropriate to evidence the continuing compliance of the Developer and the Municipality with the terms of this Agreement.

20. Defaults; Remedies. (a) The Developer and the Municipality each covenant and agree to give MassHousing written notice of any default, violation or breach of the obligations of the Developer or the Municipality hereunder (with a copy to the other party to this Agreement) within seven (7) days of first discovering such default, violation or breach (a "Default Notice"). If MassHousing becomes aware of a default, violation, or breach of obligations of the Developer or the Municipality hereunder without receiving a Default Notice from Developer or the Municipality, MassHousing shall give a notice of such default, breach or violation to the offending party (with a copy to the other party to this Agreement) (the "MassHousing Default Notice"). If any such

default, violation, or breach is not cured to the satisfaction of MassHousing within thirty (30) days after the giving of the Default notice by the Developer or the Municipality, or if no Default Notice is given, then within thirty (30) days after the giving of the MassHousing Default Notice, then at MassHousing's option, and without further notice, MassHousing may either terminate this Agreement, or MassHousing may apply to any state or federal court for specific performance of this Agreement, or MassHousing may exercise any other remedy at law or in equity or take any other action as may be necessary or desirable to correct non-compliance with this Agreement.

(b) If MassHousing elects to terminate this Agreement as the result of a breach, violation, or default hereof, which breach, violation, or default continues beyond the cure period set forth in this Section 19, then the Affordable Units and any other Units at the Project which have been included in the Subsidized Housing Inventory shall from the date of such termination no longer be deemed Affordable Housing for the purposes of the Act and shall be deleted from the Subsidized Housing Inventory.

20. Enforcement Services. In the event of serious or repeated violations of the substantive or reporting requirements of this Agreement or a failure by the Developer to take appropriate actions to cure a default under this Agreement, the Monitoring Agent shall have the right, with the prior consent of the Municipality (and, for so long as the MassHousing Loan is outstanding, 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 this Agreement. The Developer shall pay all fees and expenses (including legal fees) of the Monitoring Agent in the event enforcement action is taken against the Developer hereunder. The Developer hereby 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 this Agreement against the Developer and to assert a lien on the Project to secure payment by the Developer of such fees and expenses. The Monitoring Agent may perfect a lien on the Project by recording/filing one or more certificates setting forth the amount of the costs and expenses due and owing in the Registry. A purchaser of the Project or any portion of the Project shall be liable for the payment of any unpaid costs and expenses which were the subject of a recorded/filed certificate prior to the purchaser's acquisition of the Project or any portion thereof.

21. Intent and Effect. The terms and conditions of this Agreement have been freely accepted by the parties. The provisions and restrictions contained therein exist to further the mutual purposes and goals of MassHousing, the Municipality and the Developer set forth herein to create and preserve access to land and to decent and affordable homeownership opportunities for eligible families who are often denied such opportunities for lack of financial resources.

Executed as a sealed instrument as of the date first above written.

Developer

By: _____
its

Massachusetts Housing Finance Agency

By: _____
Laurie R. Wallach, General Counsel

Municipality

By: _____

its
(Chief Elected Official)

TRUE COPY ATTEST

Donna M. Hooper

TOWN CLERK
LEXINGTON, MA

COMMONWEALTH OF MASSACHUSETTS

_____, ss. _____, 200__

Then personally appeared before me the above-named _____ as of the _____ [Developer] and acknowledged the foregoing instrument to be his/her free act and deed and the free act and deed of _____.

_____
Notary Public
My Commission Expires:

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. _____, 200__

Then personally appeared before me the above-named Laurie R. Wallach, General Counsel of Massachusetts Housing Finance Agency and acknowledged the foregoing instrument to be her free act and deed and the free act and deed said entity.

_____
Notary public
My Commission Expires:

COMMONWEALTH OF MASSACHUSETTS

_____,ss. _____, 200__

Then personally appeared before me the above-named _____ as _____ of the City/Town of _____ and acknowledged the foregoing instrument to be his/her free act and deed and the free act and deed of said City/Town of _____.

_____
Notary Public
My Commission Expires:

Exhibit A - Legal Description
Exhibit B - Prices & Location of Affordable Units
Exhibit C - Form of Deed Rider

TRUE COPY ATTEST
Donna M. Hooper
TOWN CLERK
LEXINGTON, MA

ACKNOWLEDGMENT BY DHCD

The Commonwealth of Massachusetts, acting by and through the Department of Housing and Community Development, hereby acknowledges the foregoing Regulatory Agreement and agrees that the rights and affordable housing restrictions referred to therein, including the term thereof, are in the public interest.

The Commonwealth of Massachusetts,

acting by and through the Department of Housing and Community Development

By: _____

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. _____, 200__

Then personally appeared before me the above-named _____ as _____ of the Commonwealth of Massachusetts, acting by and through the Department of Housing and Community Development and acknowledged the foregoing instrument to be his/her free act and deed and the free act and deed of said entity.

_____
Notary Public
My Commission Expires:

EXHIBIT A

Legal Description

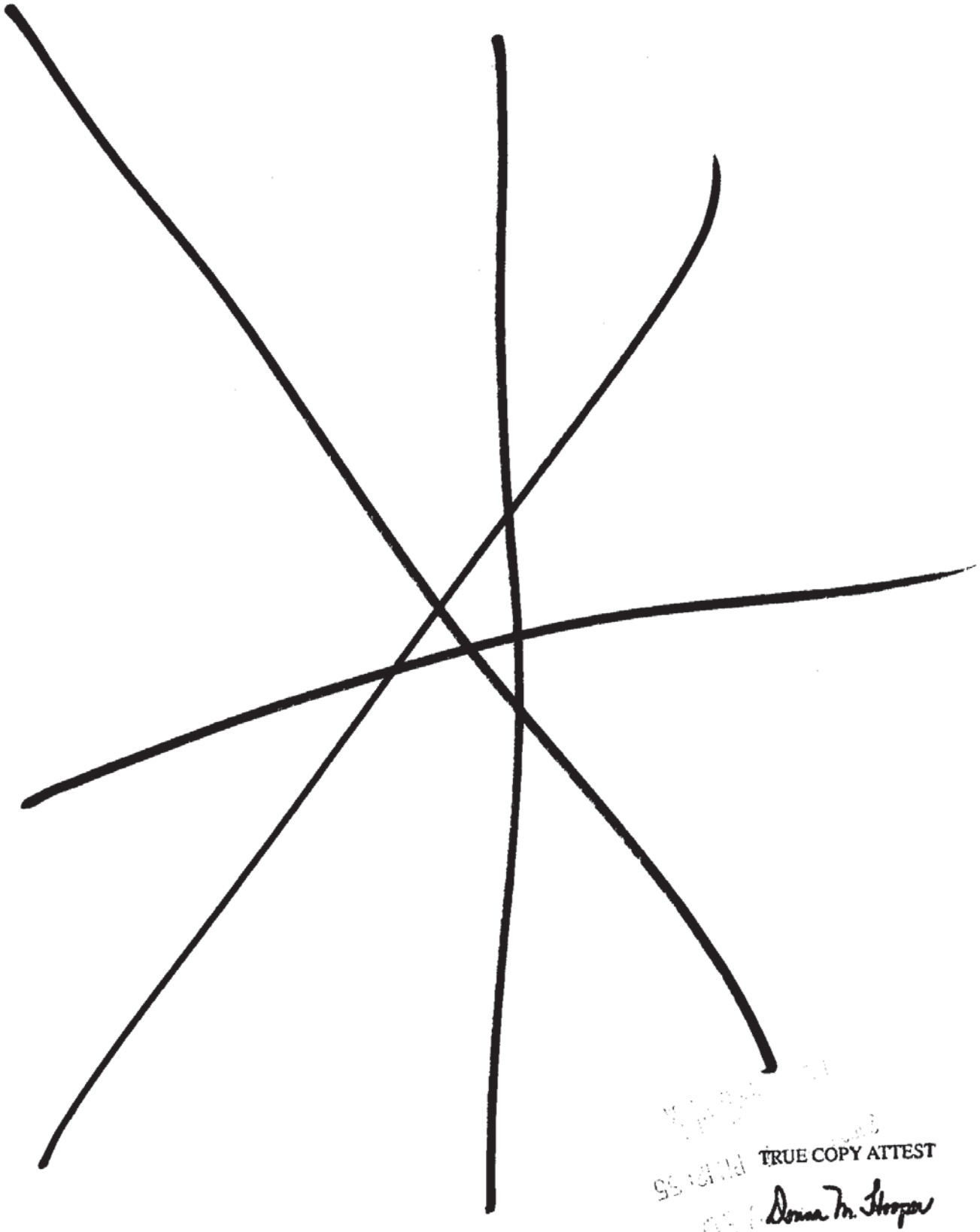


EXHIBIT B

Re:

(Project Name)

(City/Town)

(Developer)

Maximum Sales Prices for Affordable Units

One bedroom units	$
Two bedroom units	$
Three bedroom units	$
Four bedroom units	$

Location of Affordable Units

The housing units which are Affordable Units are those designated as lot/unit numbers on:

☐ a plan of land entitled

recorded with the _____ Registry of Deeds in Book ____, Page ____.

☐ floor plans recorded with the Master Deed of the

Condominium recorded with the _____ Registry of Deeds in Book

, Page ____.

EXHIBIT C

[DEED RIDER]

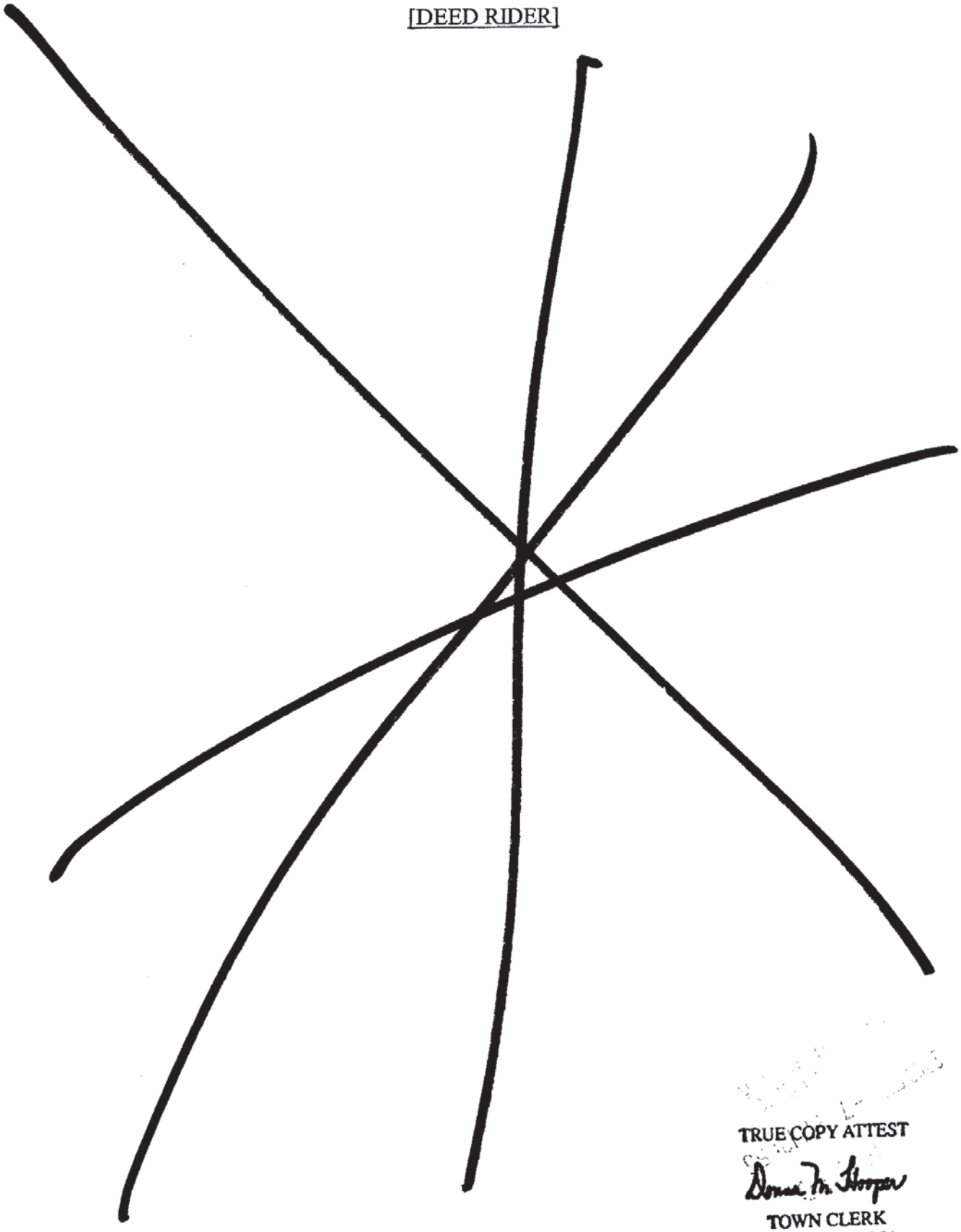
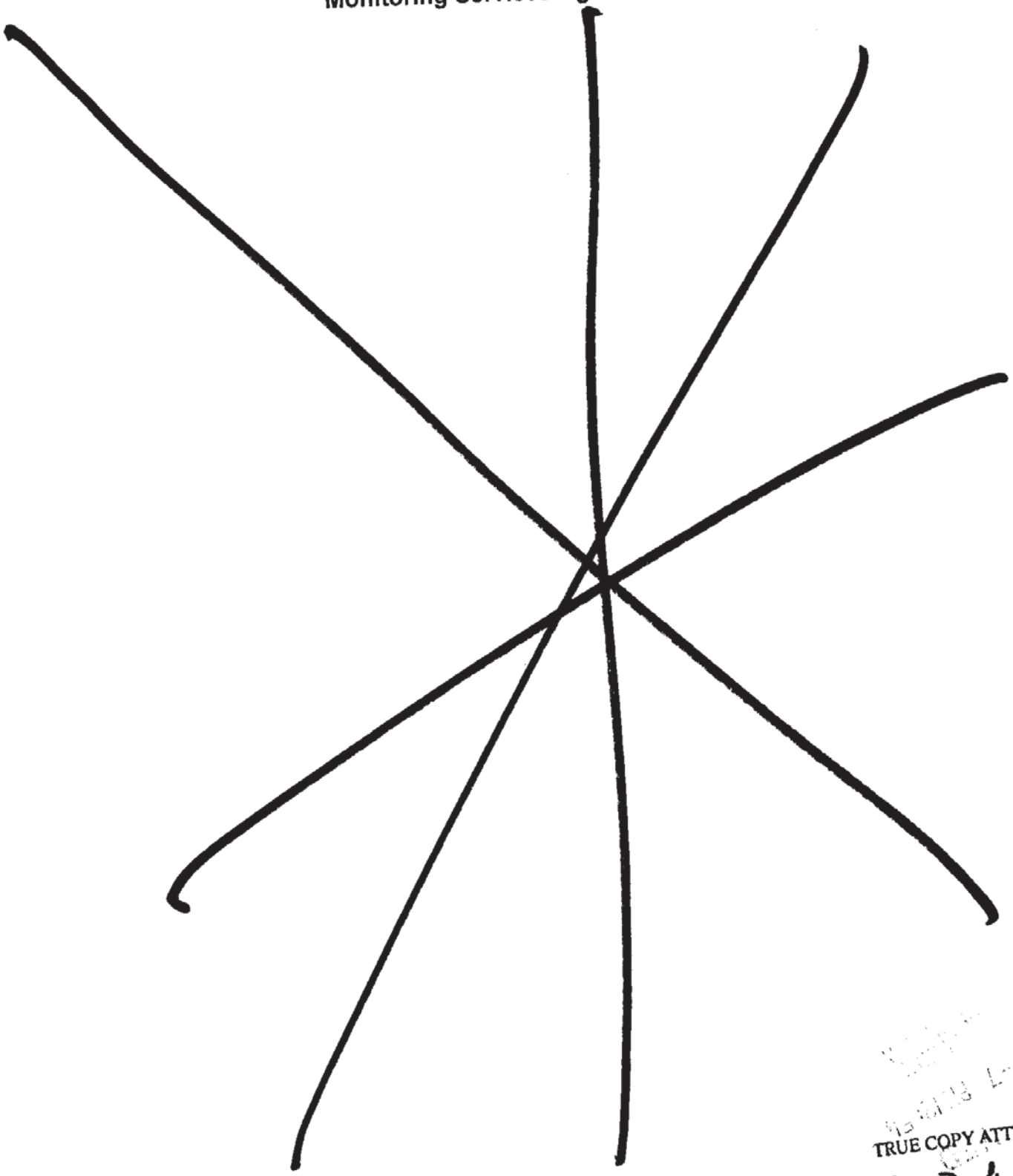


Exhibit F
Rising Tide Development
Greenhouse Condominiums
Monitoring Services Agreement



I:\Housing Starts\Monitoring.doc\
Rev. 3/02

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") and Citizens' Housing Planning Association, Inc., having an address at 18 Tremont Street, Boston, Massachusetts 02108 ("Monitoring Agent").

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 the Massachusetts Housing Finance Agency ("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 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 between 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 ___ years; and

WHEREAS, pursuant to the Comprehensive Permit, the Program Guidelines and the Regulatory Agreement, the Developer may not receive profit in excess of 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 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 until all of the units are sold and compliance with the Limited Dividend Requirement can be determined.

B. Affordability Requirement. The Developer agrees to deliver to the Monitoring Agent the income 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. Upon completion of its review of Initial Sales Data, the Monitoring Agent will deliver to MassHousing a copy of such data together with the Monitoring Agent's determination of whether the Affordability Requirement has been met. The Monitoring Agent also agrees to monitor resales of Affordable Units (including review of income certifications, deeds and deed riders) for compliance with the terms of the Regulatory Agreement and consistency with the form of deed rider attached thereto, and issuance of certifications, as appropriate, approval of resales and the payment of recapture amounts to the Municipality.

C. Annual Reports. 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 Municipality against the Developer. The Monitoring Agent shall deliver the Annual Compliance Report within 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 the compliance of the Project and the Developer with the Affordability Requirement and the Limited Dividend Requirement. The services hereunder shall not include any construction period monitoring. The services hereunder shall include follow-up discussions with the Developer, if appropriate, after an event of noncompliance.

2. Monitoring Services Fee. 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 of 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 fee of one-half of one percent of the Maximum Sales Price (or the lesser sale price actually received by the owner), 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 Affordability Requirement as set forth in this Agreement. Such fee shall be payable for all transfers of Affordable Units, including those to the Municipality, an Eligible Purchaser on 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.

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, for so long as the MassHousing Loan is outstanding, with a 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 (and, for so long as the MassHousing Loan is outstanding, with the consent of MassHousing), 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 the full term of the Regulatory Agreement which is ____ years after the date of recording of the Regulatory Agreement by the Developer in the Registry. The term of this Agreement shall end on the date six months after the end of the __ full year after the date of such recording.

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, the Municipality shall have the right to appoint a successor 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 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.

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
ASSOCATION, INC.

By:_____
Title:_____

ACKNOWLEDGMENT BY MUNICIPALITY

The undersigned, on behalf of the Town [City] of _____, Massachusetts, hereby acknowledges the foregoing Monitoring Agreement between the Developer stated therein and Citizens Housing and Planning Association, Inc., as Monitoring Agent, for the development known as _____, located at _____.

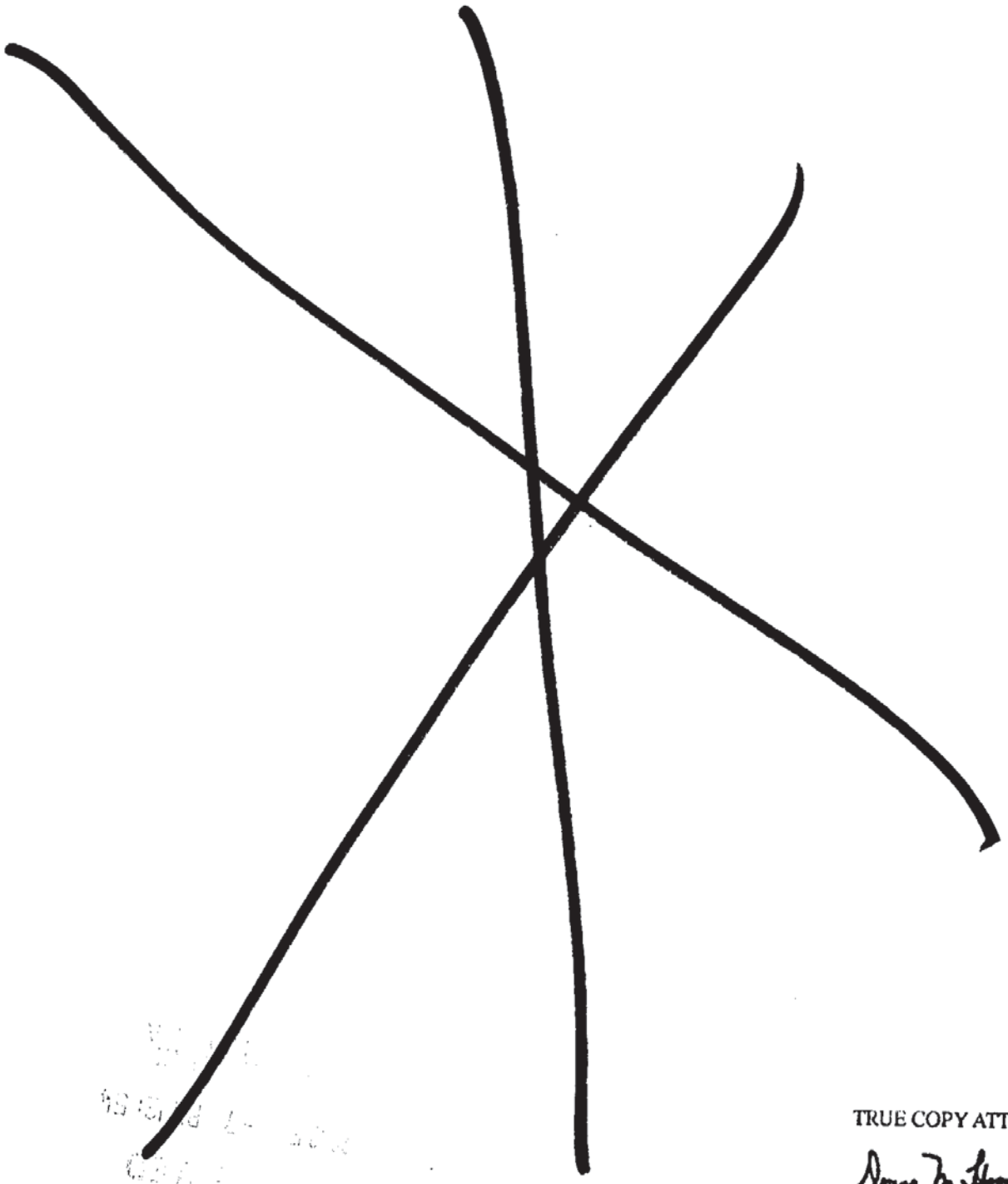
TRUE COPY ATTEST

Donna M. Harper

TOWN CLERK
LEXINGTON, MA

Date: _____ Town [City] of _____

By:



TRUE COPY ATTEST

Donna M. Hooper

TOWN CLERK
LEXINGTON, MA

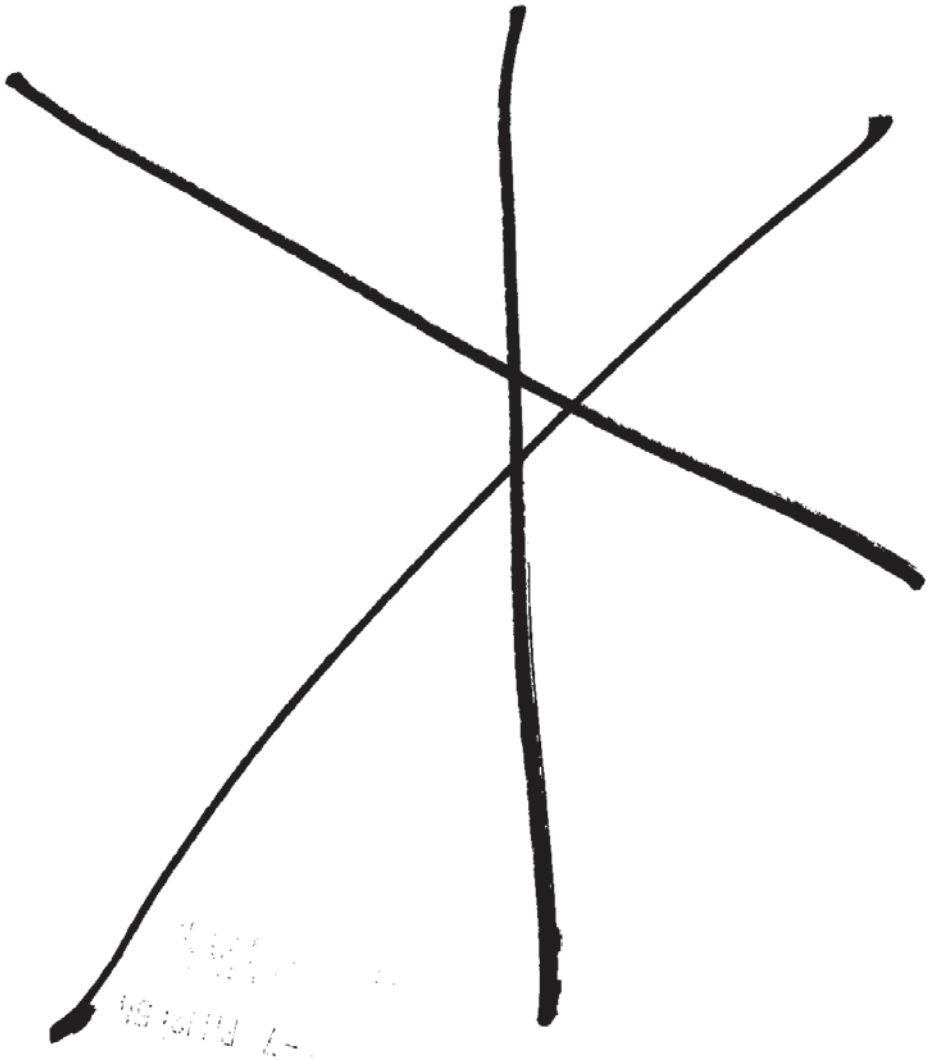
ACKNOWLEDGMENT BY MASSACHUSETTS HOUSING FINANCE AGENCY

The undersigned Massachusetts Housing Finance Agency hereby acknowledges the foregoing Monitoring Agreement between the Developer stated therein and Citizens Housing and Planning Association, Inc., as Monitoring Agent, for the development known as _____, located at _____.

Date: _____

Massachusetts Housing Finance Agency

By: _____
Laurie R. Wallach, General Counsel



TRUE COPY ATTEST

Donna M. Hooper

TOWN CLERK
LEXINGTON, MA

DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT

Deval L. Patrick, Governor
Timothy P. Murray, Lt. Governor
Tina Brooks, Undersecretary

HOUSING APPEALS COMMITTEE

Werner Lohe, Chairman
Shelagh A. Ellman-Pearl, Hearing Officer
Keeana Saxon, Counsel
Lorraine Nessar, Clerk
617-573-1520

Gina Donahue, Paralegal
Klein Hornig LLP
145 Tremont Street, Suite 400
Boston, MA 02111

CERTIFICATE OF THE PUBLIC RECORD

I certify and attest that the attached decision in the case of Rising Tide Development, LLC v. Lexington Board of Appeals, No. 03-05, which I have initialed and dated, is a true copy from the records of the Housing Appeals Committee.

In WITNESS WHEREOF I have hereunto set my hand and seal.

03/16/09
(Date)

Lorraine Nessar, Clerk
Keeper of the Records
Housing Appeals Committee

100 Cambridge Street, 3rd Floor
Boston, Massachusetts 02114
Phone: 617-573-1520 Fax: 617-573-1515
www.mass.gov/dhcd/components/hac

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

RISING TIDE DEVELOPMENT, LLC

v.

LEXINGTON BOARD OF APPEALS

No. 03-05

DECISION

June 14, 2005

03/16/04

TABLE OF CONTENTS

JM 12/16/09

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

RISING TIDE DEVELOPMENT, LLC, Appellant	)	
v.	)	No. 03-05
LEXINGTON BOARD OF APPEALS, Appellee	)	

DECISION

I. PROCEDURAL HISTORY

In January 2002, Rising Tide Development, LLC, submitted an application to the Lexington Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build 48 condominium units of mixed-income affordable housing at 536-540 Lowell Street in Lexington. Exh. 1. The housing is to be financed under the Housing Starts program of the Massachusetts Housing Finance Agency (MassHousing) or the New England Fund (NEF) of the Federal Home Loan Bank of Boston. Exh. 5, 6, 56. During the yearlong local review process, several alternative sizes and configurations for the development were considered, and ultimately, the developer proceeded with a 36-unit proposal. Tr. I, 98-99. The Board unanimously granted the permit, filing its decision with the Lexington Town Clerk on February 7, 2003. But the permit imposed a number of conditions, most significantly a reduction in the number of housing units to 28 units (of which 8 were to be affordable).

Exh. 1, pp. 6-7. From this decision the developer appealed to the Housing Appeals Committee. The Committee conducted a site visit, and held nine days of *de novo* evidentiary hearing, with witnesses sworn, full rights of cross-examination, and a verbatim transcript.[1] Following the presentation of evidence, counsel submitted post-hearing briefs.

II. FACTUAL OVERVIEW

The developer proposes to construct 36 condominium units in nine four-unit buildings on a 3.6-acre site. Tr. I, 28, 72, 104; Exh. 4, 8. The site is located on Lowell Street, one of the Lexington's main thoroughfares; the street is residential in the immediate vicinity of the site, but in the general area, it also has commercial and institutional uses. Tr. I, 79-80, 92; VI, 159-160; VII, 50. The site is shaped roughly like an equilateral triangle, with its base along the west side of Lowell Street and its apex to the rear, away from the street. See Exh. 9. The south side of the site abuts the rear yards of six houses on East Street. Exh. 9. These houses are on lots ranging in size from 12,000 to 15,000 square feet. Tr. I, 71. On the northwest side of the triangular site, it abuts the backyards of four houses on

---

1. The Committee issued a joint Pre-Hearing Order, agreed to by the parties. In it, the parties stipulated that the developer satisfies the three jurisdictional requirements found in 760 CMR 31.01(1). The interveners objected to these stipulations. However, such objections, including a question raised during the seventh session of the hearing concerning the expiration of the project eligibility determination issued by the Massachusetts Housing Finance Agency, are beyond the scope of their interest. See § III, infra; also see Tr. VII, 6-7; Exh. 56.

The Board also stipulated that Lexington had not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock be subsidized housing; see 760 CMR 31.04), thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order (Jun. 5, 2003), §§ I-2, I-4, I-5, I-6. In footnote 4 of its brief the Board "notes that it expects by the time of the Committee's decision in this matter that the Town will have achieved compliance with the 10 percent threshold...," and then after the filing of briefs, notified the Committee that the town had in fact passed the 10% threshold. This is of no consequence, however, since the time at which compliance is measured is the time of the Board's decision. *Casaletto Estates, LLC v. Georgetown*, No. 01-12, slip op. at 18 (Mass. Housing Appeals Committee May 19, 2003).

Burroughs Street, which are on lots one acre in size or larger. Tr. I, 71; VII, 133-135.

The site is currently occupied by a large, commercial greenhouse and a single-family home, both of which are to be demolished. The neighborhood is zoned for single-family homes on lots with a minimum area of 30,000 square feet. Exh. 55, p. 13665; Tr. VI, 177.

III. MOTION TO INTERVENE

On March 19, 2003, thirteen abutters, residents of Burroughs Road, East Street, and Lowell Street moved to intervene pursuant to our regulations, 760 CMR 30.04(2), "in order to assert matters set forth in the accompanying Memorandum of Law in Support..." Motion to Intervene, p 1. (filed Mar. 19, 2003).[2] The memorandum alleges that the proposed project "has the potential to dramatically impact [their] real property, including threats to health and safety from flooding, fire, stormwater runoff, noise, dust and vibration."[3] Memorandum, p. 1 (filed Mar. 19, 2003). On June 5, 2003, an almost identical group of fourteen abutters, citing G.L. c. 30A, § 10A and alleging concerns for ground water resources, pesticide pollution, and excessive noise, filed a second motion to intervene to address possible "damage to the environment" (as that term is defined in G.L. c. 214, 214, § 7A). During the hearing before the Committee, rulings on these motions were deferred, and the proposed interveners, through counsel, were permitted to participate fully in the proceedings as *amici*.

---

2. Several other motions were filed, including a Motion to Quash a Subpoena issued to an employee of MHFA (filed September 21, 2004), a related Motion in Limine (filed September 23, 2004), and a motion by the interveners to "cure jurisdictional defect" (filed September 28, 2004).

3. Concerns about noise, like concerns about light trespass, might well be dismissed as aesthetic sensitivity insufficient to support intervention in the absence of an allegation that such matters are regulated under the Lexington zoning bylaw. See *Monks v. Zoning Board of Appeals of Plymouth*, 37 Mass. App. Ct. 685, 688, 642 N.E.2d 314, 315 (1994). We need not reach this question since it was not pursued during the hearing.

2/11/09

We turn first to the motion made pursuant to our regulations. An administrative agency has broad discretion to grant or deny intervention. *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 346, 757 N.E.2d 1104, 1109 (2001). It is not required to allow intervention by petitioners who have not demonstrated a sufficient interest in the proceedings. See *Newton v. Department of Public Utilities,* 339 Mass. 535, 543 n.6, 160 N.E.2d 108, 113 (1959). Conversely, it may allow people who are not substantially and specifically affected to participate in proceedings for limited purposes, and such participation may even be extensive if there are special circumstances to provide justification. See *Boston Edison Co. v. Dept. of Public Utilities*, 375 Mass. 1, 45-46, 375 N.E.2d 305, 332, cert. den. 439 U.S. 921 (1978).

Our standards for intervention set out in 760 CMR 30.04, and require a "showing that [the intervener] may be substantially and specifically affected by the proceedings...."[4] As is clear from the commentary in the regulation, this means showing "that their harm would be related to the granting of relief from local regulation as requested by the developer in this

4. Our standards are similar to and reflect the requirements of the state Administrative Procedures Act, c. 30A, § 10. They are also very similar to the standing requirements applied by the courts. Although as an administrative agency, our discretion is presumably sufficiently wide so that we could apply our intervention standards more liberally than the courts do the standing requirements, we have always—largely for the sake of consistency and clarity—attempted to apply our standards so as to be identical to the courts' standing requirements. (The same standing requirements apply to both zoning appeals under G.L. c. 40A and comprehensive permit appeals under G.L. c. 40B. *Bell v. Zoning Board of Appeals of Gloucester*, 429 Mass. 551, 553, 709 N.E.2d 815, 817 (1999).) Of course, procedurally, in the courts abutters have the benefit of the rebuttable presumption established under G.L. c. 40A, § 11; this is not available to them under our regulations.

In cases in which the abutters do not satisfy our standards for intervention, we will typically permit them to participate in our hearings on a limited basis as "interested persons." See 760 CMR 30.04(4). Although participation by interested persons has been permitted by our regulations for many years, in the past abutters were often permitted to participate fully as "amici" with only the most cursory review of their actual interests in the controversy. We amended § 30.04 and other procedural portions of our regulations effective July 2, 2004. Our intention is to be clearer and more precise during the early stages of the hearing process in delineating the rights of interveners and

appeal, that their harm is not a common harm which is shared by the all the residents of the Town, and that the Board will not diligently represent those interests." *Weston Development Group v. Hopkinton*, No. 00-05, slip op. at 6-7 (Mass. Housing Appeals Committee May 26, 2004). In addition, the harm stated must not be speculative. See *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 348, 757 N.E.2d 1104, 1110 (2001).

Many of the allegations and arguments in the abutters' motion and the accompanying eight-page memorandum misunderstand the respective roles of the Board and the interveners. Much of the eight-page memorandum asserts four esoteric arguments dealing primarily with the procedures or standards under which the Board considered the application. These, however, are not matters that specifically affect the abutters.

First, they question the developer's status as a limited dividend organization as established by a project eligibility letter issued by the Massachusetts Housing Finance Agency (MassHousing). See 760 CMR 31.01(1)(a), 31.01(2)(a)(5). We have held repeatedly, however, that it is primarily the role of the subsidizing agency to ensure that the developer is a proper limited dividend organization at the time the project receives final subsidy approval. *Mallow Realty Trust v. Gloucester*, No. 02-13, slip op. at 3 (Mass. Housing Appeals Committee May 26, 2004); *Crossroads Housing Partnership v. Barnstable*, No. 86-12, slip op. at 10-11 (Mass. Housing Appeals Committee Mar. 25, 1987). The courts have concurred in our interpretation. *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 378-380, 294 N.E.2d 393, 421 (1973); *Maynard v. Housing Appeals Committee*, 370 Mass. 64, at 67, 345 N.E.2d 382 (1976). It is perfectly proper, in fact routine, that the Board

---

interested persons. Interveners will be permitted to participate fully, but their participation will be limited to those issues that affect them specifically; interested persons will be limited further.

accepted the MassHousing determination in this regard, and this is not a matter that is of any specific concern to the abutters.

Second, the abutters make a nearly indistinguishable argument "challeng[ing] the Board's acceptance of the project eligibility letter… pursuant to 760 CMR 31.01(1)." This, too, is a jurisdictional matter clearly not of specific concern to individual residents of the town.[5] Third, they argue that Board failed to examine the project's finances and establish an acceptable profit limitation. The Board's consideration of these matters should be very limited since they are primarily within the province of the subsidizing agency. *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7 (Mass. Housing Appeals Committee Jun. 25, 1992); also see *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass 339, 379, 294 N.E.2d 393, 420-421 (1973). But in any case, they are not of specific concern to the abutters. Finally, they argue that the Board "failed to require the Applicant to provide proof of regional need, if any, for low and moderate-income housing." This, too, is not a specific concern of the abutter, and in fact in most cases it is not necessary for the Board to make a specific finding with regard to regional housing need since "the municipality's failure to meet its minimum housing obligations, as defined in §20, will provided compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal." *Id.*, at 366, 413.

The abutters' motion to intervene is denied with regard to the above jurisdictional matters raised in their original motion to intervene.

---

5. The abutters also subpoenaed an official from MassHousing in order delve into the process and facts behind that agency's issuance of the project eligibility letter. Tr. VI, 11. MassHousing moved to quash the subpoena, and the presiding officer granted that motion for reasons discussed in detail in *Farmview Affordable Homes, LLC v. Sandwich*, No. 02-32, slip op. at 2-5 (Mass. Housing Appeals Committee Ruling May 21, 2004). Tr. VI, 22, 25-27.

2/16/09

With regard to matters that are of legitimate concern to abutters, the motion provides little or no factual specificity.[6] But, since they were permitted to participate as *amici*, their interests did become clear during the hearing. Their backyards abut the development site, and they raise concerns about density and stormwater management. Under the proper circumstances, these are exactly the sort of specific concerns that would lead us to grant the motion to intervene.

With regard to stormwater management, as will be seen when we address this issue in detail in Section VI-C, below, while specific, factually the concern is not substantial. We therefore deny the abutters' motion with regard to this issue.

Density, however, which is addressed in Section VI-A, below, is a concern substantial enough in this case to support intervention by the abutters. The neighborhood is zoned for single-family houses. If the housing proposal were simply for single-family houses on smaller lots than permitted under existing zoning, it is unlikely that the abutters' concerns would rise to a level that would support intervention. But here, larger multi-family buildings are proposed. If the proposal complied with the setbacks required in the Lexington Zoning Bylaw for multi-family districts, and if there were no other unusually obtrusive features, then we would be unlikely to grant intervention. But the proposal does not meet the 40-foot setback requirement for multi-family districts, and the abutters' concerns about whether the bulk and proximity of these buildings will impact their properties aesthetically or otherwise is a legitimate and substantial one. We therefore grant their motion with regard to the issue of density only.

---

6. The Committee will normally rule upon a motion to intervene before the evidentiary portion of the hearing commences. It is therefore incumbent upon proposed interveners to plead their interests with specificity in their motion.

Finally, we turn to the later motion, which asserts a right to intervene pursuant to G.L. c. 30A, § 10A. That section of the Administrative Procedures Act permits not less than ten persons to intervene in an adjudicatory proceeding in which damage to the environment, as defined in G.L. c. 214, § 7A, might be at issue. We are not convinced that an appeal before the Housing Appeals Committee—where intervention rights are already established by 760 CMR 30.04—is the sort of proceeding for which nearly automatic intervention contemplated by G.L. c. 30A, § 10A is appropriate.[7] And in any case, the purpose of such intervention is "in order that any decision… shall include the disposition of [the] issue [of damage to the environment and the elimination or reduction thereof]." G.L. c. 30A, § 10A. Full intervention by these persons is unnecessary for two reasons.

First, in appeals under the Comprehensive Permit Law, some of the issues typically joined between the parties—the developer and the Board—are environmental issues. Thus, the purpose of § 10A is served in that our hearing process includes the disposition of issues of damage to the environment. In this case, because of the nature of the motion to intervene and it generality (see below) it is difficult to ascertain exactly what damage to the

7. There appear to be no reported precedents interpreting G.L. c. 30A, § 10A that can be of assistance. It is fair to assume, however, that the policy considerations underlying the similar provisions of G.L. c. 214, § 7A are instructive. Initially, the Supreme Judicial Court interpreted that statute broadly. See *Boston v. Massachusetts Port Auth.*, 364 Mass. 639, 646, 308 N.E.2d 488, 494 (1974). But the Court's more recent interpretation of the law has been increasingly narrow. See *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 466 N.E.2d 102 (1984); *Cummings v. Secretary of the Executive office of Environmental Affairs*, 402 Mass. 611; 524 N.E.2d 836 (1988); *Town of Wellfleet v. Glaze*, 403 Mass. 79, 525 N.E.2d 1298 (1988); *Town of Walpole v. Secretary of the Executive Office of Environmental Affairs*, 405 Mass. 67, 537 N.E.2d 1244 (1989); also see *Enos v. Secretary of the Executive Office of Environmental Affairs*, 48 Mass.App.Ct. 239, 247 n.13, 719 N.E.2d 874, 880 n.13 (1999), aff'd 432 Mass. 132, 731 N.E.2d 525; also see *Enos v. Secretary of the Executive Office of Environmental Affairs*, 432 Mass. 132, 141-142, 731 N.E.2d 525, 532-533 (2000). This ruling is consistent with these precedents.

environment is feared, but there is no reason to believe that the Board will not adequately protect these environmental issues as it presents its case to us.

Second, in their motion, the interveners assert that "a ruling by the Housing Appeals Committee favorable to the Applicant would adversely effect environmental resources, including but not limited to ground water resources, result in pesticide pollution, and generate excessive noise," and further argue that "the Town of Lexington will not adequately represent *their* interests" (emphasis added). Nowhere do they allege environmental damage with further specificity. The statutory provision under which they would proceed provides that "damage to the environment shall not include any insignificant… impairment…." G.L. c. 214A, § 7A, para. 1. Here, instead, the record shows that many, if not all, of the individuals named have requested to participate largely to protect their own, individual property interests. But they have been granted the status of interveners under 760 CMR 30.04 on an appropriately limited basis, and to grant them broader intervention in derogation of the requirements of that section of our regulations by asserting that they are really interested in protecting the environment in general would be a misuse of G.L. c. 30A, § 10A.

Within the context of the Comprehensive Permit Law, the proposed interveners have not alleged environmental damage sufficient to support their motion, and it is therefore denied.

IV. REQUEST TO DEEM THE GRANT OF A PERMIT A DENIAL

After the briefs were filed in this matter, the Bristol Superior Court ruled in the case of *9 North Walker Street Development, Inc. v. Commonwealth and Rehoboth Zoning Board of Appeals*, No. BRCV 2003-00767 (Dec. 28, 2004) that while the decision of the local board

was couched as an approval with conditions, it should in fact have been considered a denial. The developer brought this to our attention by letter filed on January 21, 2005, and requested that the decision in this case be treated as a denial.

There are a number of questions with regard to the precedential effect of the Superior Court decision, and, in addition, the Housing Appeals Committee filed a Motion for Reconsideration with the Court, and the matter has now been remanded to the Committee for further consideration. We need not consider the questions raised by the Court's ruling, however, since we find below that the developer has met its burden of proving that conditions imposed by the Board rendered the housing proposal uneconomic. The effect of that finding is to shift the burden to the Board to prove local concerns that outweigh the regional need for affordable housing, which is the same burden that would be imposed if we ruled that the Board's decision was in fact a denial.

V. ECONOMIC EFFECT OF THE CONDITIONS

When the Board has granted a comprehensive permit with conditions, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The Appellant must first prove that the conditions in aggregate make construction of the housing uneconomic. See 760 CMR 31.06(3); *Walega v. Acushnet*, No. 89-17, slip op. at 8, (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that "the conditions imposed… make it impossible to proceed… and still realize a reasonable return [or profit] as defined b the applicable subsidizing agency…." 760 CMR 31.06(3)(b); also see G. L. c. 40B, § 20.

The first step in the analysis of reasonable return is to determine whether the proposed housing is rental housing or homeownership housing, since the analysis for these types of housing is slightly different. Then for homeownership housing, such as that under consideration here, an analysis of the Return on Total Costs (ROTC) is conducted.[8]

Once the Return on Total Costs is established for a particular proposed development, we must determine whether it is reasonable, that is, whether it is sufficient in the marketplace to induce the developer to invest its resources in pursuing the proposal. Although our regulation refers to a reasonable return "as defined by the applicable subsidizing agency," currently, subsidizing agencies have not defined such a return quantitatively. See Tr. IV, 18; VI, 15-17. This is due, in part, to the fact that what level of return is reasonable varies over time depending on changes in interest rates in the financial markets. Thus, in the absence of policy direction, we will determine what level of return constitutes a reasonable return from the evidence as a factual matter.

The crux of the dispute between the developer and the Board is the number of housing units that should be permitted on the site. Thus, with regard to economics, what are primarily at issue are a number of conditions that either explicitly limit the development to 28 units (with 8 affordable units) or impose design constraints that have the same effect, and therefore the developer prepared *pro forma* financial statements reflecting the two different size developments. See Pre-Hearing Order, § II-B(1).

The developer presented these *pro formas* and other evidence on the economics of its

---

8. The requirement that a developer be a limited dividend organization appears in G.L. c. 40 B § 21 and 760 CMR 31.01(1)(a). This is further defined in 760 CMR 30.02, which indicates that the developer must agree "to limit the dividend on invested equity." This regulatory definition was added in 1986, prior to the advent of ownership affordable housing programs. Since ownership

proposal through its development manager, who is also a principal in the enterprise. Having worked in the development of affordable housing for many years, he is highly qualified to testify with regard to the economics of this proposal. See Tr. III, 128-142. He used a standard analysis based upon a *pro forma* financial statement that he prepared for a 28-unit proposal, and testified that the return or profit would be 5.2% of total costs ($734,000) if the land acquisition cost was carried at $3,000,000 or 7.5% ($1,033,000) if the land acquisition cost was assumed to be $2,700,000.[9] Exh. 37; Tr. III, 156, 180. He offered credible testimony that this profit is "woefully inadequate," and that he would have built the 28-unit development as approved, rather than face the time and expense of appeal, if it would result in a reasonable return. Tr. IV, 13, 15, 151.

The Board challenges that analysis on several grounds.[10] First, it argues that the land acquisition cost used in the analysis is inflated. See Board's Brief, pp. 4-6. Next, it argues that revenue from the sale of market-rate housing units is underestimated. See Board's Brief, pp. 7. Third it argues that there is $310,000 in "redundant" project overhead and administration. See Tr. VIII, 63-67. When these inaccuracies are taken into account, the

---

housing is not held for investment, the specific terms used in the regulation are not meaningful in that context. Therefore, a different analysis must be undertaken—the Return on Total Costs analysis.

9. Both at the local hearing and before us, a confusing array of *pro formas* was presented. They were prepared at different times, and the assumptions contained in them vary in a number of different ways. For instance, an abbreviated *pro forma* from 2002 for a 28-unit development was introduced during cross-examination of the developer's principal. Exh. 46, p. 7; Tr. IV, 34, 142. Though it showed a profit of 11.96%, the developer argued from the time when it was created that it showed that a reduction in the proposal to 28 units "would likely render the project uneconomic." Exh. 46, p.1. Thus, despite various differences, it is consistent, in its broad outlines, with the later 28-unit *pro forma* relied on during the hearing before this Committee.

10. Subsumed within the various analyses is the effect of a condition requiring that 8 units, not the typical 7 (or 25%) units be sold as affordable units. Similarly, during the course of this lengthy hearing, other details were raised that would have some impact on the financial projections. Some of these, as the Board points out with regard to decks and patios, for instance, have virtually no impact.

Board argues, the projected profit is actually $2,800,000 or 21.3% of total costs.

A. Land Acquisition Cost

The developer's principal testified that a base price of $2,700,000 was negotiated for purchase of the site. Tr. III, 149. This appears to have been an arms-length transaction, based in part on the land's value if it were developed under the town's cluster zoning bylaw, which would permit between 15 and 18 houses to be built. Tr. III, 151; Exh. 42, p. 1. It is also consistent with an agreement in 1995, which was never consummated, to sell the land to a different purchaser for $2,100,000.[11] Tr. III, 152; IV, 50; V, 38-40. Nevertheless, we must consider whether the $2,700,000 valuation is consistent with the appraised market value of the land under the existing zoning.

The Board commissioned an appraisal that showed the value as $1,700,000. Exh. 50; Exh VI, 58. Their financial witness[12] testified that a figure of about $2,000,000 would be more accurate due to appreciation.[13] Tr. VIII, 60-63. The appraisal, however, was flawed because of the build-out assumptions upon which it was based. That is, the appraisal was

---

See Board's Brief, p. 12. Others are sufficiently minor that they were not briefed by the Board, and are thus waived. See *Cameron v. Carelli,* 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995).

11. The developer's principal was credible in defending the sales price on cross-examination. His testimony was not weakened by the indication in the MassHousing project eligibility letter that there may have been a conflict between figures in the *pro forma* submitted to it and its land acquisition policy. See Exh. 6, p. 3. The reference in Exhibit 6 is ambiguous, and he explained on redirect examination that the concern raised involved a bonus provision in the agreement for the purchase of the land, which has no impact on the $2,700,000 as we are considering it. See Tr. III, 149, 154; IV, 35, 146.

12. This witness, Richard Heaton, was actually presented on direct examination by the abutters' counsel. Counsel for the Board and the abutters worked together throughout the hearing, however, and it is of little consequence that this witness was examined by the abutters' lawyer. It should be noted again, however, that financial aspects of the proposal are part of the Board's case, but are not within the more limited interests of the abutters.

13. Though the issue of land value is beyond the scope of the abutters' intervention, they had also commissioned an appraisal (showing the value of the land as only $1,330,000). Exh. 49;Tr. IV, 55. The author did not testify, and there was testimony that its analysis was flawed. Tr. V, 41-43.

based on two different assumptions—that the highest and best use of the land would either be for four single-family homes or for a cluster development under existing zoning of only ten units. Tr. VI, 58; Exh. 50, p. 20. The appraiser testified that he settled on the figure of ten units for a cluster development after discussions with representatives of the Lexington Planning Board and the Board of Appeals, but, in fact, the Planning Board twice indicated in writing that the actual development capacity of the parcel was 15 to 18 units. Tr. VI, 66; Exh. 41, 42.

The developer rebutted the Board's appraisal by engaging a second expert, who testified that the value of the property is between $2,500,000 and $3,000,000. Tr. V, 30-37.

We find that $2,700,000 is a fair value to carry in the *pro forma* financial statement for land acquisition.

B. Revenue from Market-Rate Sales

The developer's principal testified that projected sales prices of affordable units were established based upon standard procedures. Tr. III, 171. Market-rate units were priced based on his own study over two and one half years and on the advice of a local real estate broker. Tr. III, 172, 177-179; Exh. 39, 39-A. In particular, he described in detail how he compared the housing he is proposing to similar market-rate developments called Roosevelt Circle, Coppersmith Way, Old Smith Farm, and Johnson Farm. Tr. III, 177-179. His judgment in this regard is highly credible, and was not undercut by cross-examination or the testimony of other witnesses. Cf. Tr. VIII, 115-137. We find that the revenues shown in the *pro forma* are accurate projections.

C. Project Overhead and Administration

The *pro forma* financial statement for the proposed development shows three separate

cost items: "general contractor fee (at 5% of building costs)," "construction management and oversight," and "project overhead and administration." Exh. 37. The Board's expert argues that these are duplicative.[14] Tr. VIII, 63-67. He acknowledges, however, that the general contractor fee is legitimate. Tr. VIII, 63. And certainly, though the parties introduced little evidence on this point, it is appropriate for the developer to hire a construction manager to over see the work of the independent contractor, whether an individual or organization, who is doing the actual work. As the Board's expert acknowledged on cross-examination, a construction manager "would manage the project for the… the owner, manage the work that's done on site…." Tr. VIII, 106. Thus, construction management and oversight is a proper cost line item. Also see Tr. III, 164. Whether another cost item for project overhead and administration is proper is not as clear. The most unambiguous evidence we have on this point is testimony from the developer's principal that "every affordable housing program I have worked with allows an overhead expense." Tr. III, 168. We find this credible and persuasive, particularly since it appears to be confirmed by the MassHousing documents that were admitted into evidence. That is, the MassHousing "Project Feasibility" *pro forma* explicitly lists "developer overhead" as the second to last soft cost item. Exh. 58. And, a model "Preliminary Construction Budget" that is part of MassHousing's official guidelines for the Housing Starts program has identical hard and soft cost line items except that the overhead item is labeled "consultant." Exh. 57. We find it appropriate to carry a general contractor fee, a construction manager cost, and developer overhead as separate costs.

---

14. Only the appropriateness of this cost, not its amount, is in issue. The developer's principal testified that the typical allowable expense for project administration and overhead is 5% of total costs, and that he carried a figure of $250,000, which is slightly less than 2%. Exh. 37; Tr. III, 168; IV, 144.

D. Summary and Reasonableness of the Return

Before stating our conclusion on the issue of reasonable return, it is useful to describe the context in which profit projections are prepared. First, it must be pointed out that not only is the ultimate projection of total profit merely an estimate, but in addition, nearly all of the factors on which the calculations are based are themselves estimates. That is, even if only one factor were an estimate—the final sales prices, for instance—and the others were know quantities, there would be an element of speculation in the ultimate conclusion. But not only the sales prices, but also nearly all of the costs are also unknown to one degree or another. Even the land acquisition cost—which one might think is the clearest of these figures—cannot, as has been seen, be specified with absolute certainty.

Second, different experts approach the nuances of profit analysis in slightly different ways, and the discrepancies can be magnified by the adversary process. Though we believe that all of the witnesses who appeared before us are professionals who testified truthfully, their approaches are subtly influenced by their positions in this litigation. That is, their choice of methodologies and assumptions cannot help but be influenced by the outcome they or their clients favor.

In this complicated and sometimes confusing context, we attempt to both analyze the different methodologies used and evaluate the credibility of the experts. From our experience, we believe that in this case the approach taken by the developer was proper. Based on all of the evidence and the credibility of the witnesses, but in particular on the *pro forma* financial statement introduced by the developer, Exhibit 37,[15] we conclude that the

15. We have also examined Exhibit 58 with great interest. This is apparently an internal, working document prepared in 2002 by MassHousing when they issued a project eligibility determination. We do not necessarily expect it to conform in every way with the figures in the developer's *pro*

JM 3/16/09

Return on Total Costs for this proposal when reduced to 28 units is 7.5%.

Determining what is a reasonable return in the abstract in this case is not possible. The developer's second expert, who specializes in market analysis and financial feasibility of development, testified that a reasonable return is 15%. Tr. V, 27-28. The Board's financial expert testified that it is 12%. Tr. VIII, 29, 51. From this evidence it is not possible to determine what a minimum reasonable return is in the abstract, but since the projected profit for the 28-unit development is only 7.5%—well less that the figures set by opposing witnesses—the developer has sustained its burden of proving that the conditions imposed by the Board make construction of the housing uneconomic.[16]

VI. ISSUES

Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for low or moderate income housing.[17] 760 CMR 31.06(7).

---

forma, Exhibit 37, which was prepared a year later, but nevertheless, in its broadest outlines, it is consistent with the developer's projections. With regard to cost, it shows the developer's projections to be conservative, that is, to be less favorable to its own position in this litigation than to the Board's position. For instance, Exhibit 58 shows higher land acquisition costs than the developer does. Similarly, it shows higher total hard costs. Total soft costs are nearly identical. Where it diverges from the developer's estimates is in projected revenues, showing $4,000,000. This discrepancy was not addressed by the parties, but we are confident of the accuracy of the developer's figures, as addressed in detail in § V-A, above.

16. This is consistent with the opinion of the bank which would fund the development under the NEF, which reviewed the *pro formas* for the two different sized proposals and concluded that it "would not recommend approval of the twenty-eight unit project...." Exh. 43.

17. The standard that must be met by the Board is not simply that there be a "rational basis" for each condition, as was implied by some of the testimony. See e.g., Tr. VII, 20, 21-22, 28, 29, 47.

JM 3/16/09

In this case, the issues raised relate to the Board's "firm belief that 36 units was over-utilization of the property and created intractable health and safety problems."[18] Board's Brief, p. 13. The Board and the abutters joined in making four specific arguments in this regard: 1) that the proposal is too dense in relationship to the surrounding neighborhood, 2) that there are parking and internal traffic safety issues, 3) that stormwater issues are not properly addressed, and 4) that there is insufficient open space.[19] Board's Brief, 13-18.

A. Density

The Board and the abutters argue that because of its density, the proposed housing will be out of character with the neighborhood and "immensely visually intrusive." Board's

18. The Pre-Hearing Order lists many conditions as being in issue. Several of these are primarily legal issues concerning which no evidence was introduced. These issues were not briefed, and thus are waived. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995). Though that alone is reason enough to strike them, they are not defensible for other reasons as well. The requirement that the final development use funding only the Housing Starts program, and not NEF funds is not an issue of local concern. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7 (Mass. Housing Appeals Committee Jun. 25, 1992). That final plans be submitted to the Board for approval offends our long-standing rule against "conditions subsequent." See *Hastings Village, Inc. v. Wellesley,* No. 95-05, slip op. at 33-34 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 00-P-245 (Mass.App.Ct. Apr. 25, 2002); Owens v. Belmont, No. 89-21, slip op. at 13-14 (Mass. Housing Appeals Committee Jun. 25, 1992); also see 760 CMR 31.09(3). And a condition providing that the permit lapse if construction does not begin within two years is permissible on its face, but by regulation must permit limited extensions. See 760 CMR 31.08(4).

Other conditions described in the Pre-Hearing Order are incorporated within larger issues. That is, as will be seen, the conditions described in §§ II-B(1)(c)(ii), II-B(1)(c)(iv), and II-B(1)(c)(v) of the Pre-Hearing Order—setbacks, distance between buildings, and restrictions on decks and patios—relate primarily to density. The condition described in § II-B(1)(c)(iii)—involving the local wetland bylaw—is Condition 9 of the Comprehensive Permit (Exh. 1, p. 10), and mentions "Conservation Commission concerns," which in fact are concerns about 100-year storm calculations for storm water system design. Condition 12, described in Pre-Hearing Order § II-B(1)(c)(vi), apparently concerns to protection and replacement of trees under the Lexington Tree Bylaw, and could relate to visual screening and density, but this issue was not briefed and is therefore waived. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995).

19. As noted in Section III, above, and also in note 14, above, the scope of the abutters' interests are limited to matters that affect them directly, that is, only to density and possibly stormwater runoff. But the Board and the abutters worked together closely in presenting throughout the hearing, and the Board has adopted arguments and testimony raised by the abutters. See Tr. VII, 104; Board's Brief, p. 1 n.1. To simplify discussion, we will, for the most part, refer to experts and evidence as presented by the Board and abutters together.

2/16/09

Brief, p. 14; Tr. VII, 50-51, 57, 85. The civil engineer and land use planner who testified for the Board and abutters summarized his opinion most clearly saying that if the proposal is built "there clearly would be a different character to the neighborhood in a sense that now the neighbors overlook a somewhat passive, non-intrusive use. Under the future scenario there will be tall and relatively intensely developed residential structures." Tr. VII, 67; also see Tr. VI, 153. The developer's architect, on the other hand, testified that he tried in his design "to make this look as if it were part of the community in size and character of the architecture." Tr. III 27. In choosing between these differing opinions, we must consider a number of facts.

First is the matter of the character of the neighborhood. There is no allegation that the architectural style of the proposed housing clashes with the neighborhood. In fact, the architect carefully considered similar multi-family developments in this part of Lexington. Tr. III, 18-25. Nor, obviously, can there be any claim that multi-family housing is an uncharacteristic use in this area. Not only is there other multi-family housing in the area, but in approving this proposal as a 28-unit development, the Board has clearly indicated that such a use is appropriate.[20] And while the Board's and abutters' expert is certainly correct that the existing greenhouses and accessory power plant currently on the site are fairly unobtrusive in relation to surrounding houses, he overstates the case in suggesting that if the proposed housing is built, "little of the natural or scenic characteristics of the site" will remain. See Tr. VII, 85-86. Any such characteristics of the site have already been altered. Considering all of these factors, we find that the proposal is in character with the neighborhood.

20. The abutters' interest is not in the use *per se*, but rather only in aspects that affect them directly, such as the greater bulk of multi-family units, which is discussed below.

Second, the Board and abutters raise a more serious concern in arguing that the new buildings will be unduly intrusive due to their bulk and setbacks from adjoining yards. We will examine this in terms of several different factors.

As a preliminary matter, much was made of some imprecision in the preliminary architectural plans that were introduced into evidence. See Tr. VII, 145; Interveners' Brief, pp. 13-21. As is common in cases before us, the architectural plans have been revised several times. The developer's current proposal is shown in Exhibits 4 and 8. This is a revision of earlier plans shown in Exhibit 2. The primary difference is that Exhibits 4 and 8 include changes in the site layout of four buildings at the front of the site to address concerns raised by the Board. Certain aspects of the design are not shown in as much detail on Exhibits 4 and 8 as they were on Exhibit 2. For instance, Exhibit 2 has detailed landscaping plans that will be incorporated into the Exhibit 4 plans. In addition, there was a drafting error in Exhibit 4 in the architect's rendering of the open space—a three-story (or two-and-one-half-story) building was shown in the background, even though the actual design provides for all two-story buildings. Exh. 4, sheet 2; Tr. III, 106-108. This rendering apparently still reflected the "rejected" or superceded plans shown in Exhibit 2, which showed seven end condominium units as having a third-floor bedroom. Tr. III, 64-65. In any case, it is clear from Exhibit 4, that all of the buildings as finally proposed will be only two stories.

Similarly, there was confusion about the final design of the buildings in terms of the elevation of the first floors of the buildings above existing grade. This is important since it obviously affects the overall height of the buildings and their appearance from the abutters' yards. The developer committed to constructing the buildings so that their first floor elevations would be within 12 inches of the elevations shown on Exhibit 2, sheet 4. Tr. IX,

JM 3/16/09

103, 108. Thus, as shown clearly on Exhibit 4, sheet 8, the maximum height of the buildings to the peak of the roof will be 34 feet above the first floor elevation and 36 feet above final grade. Exh. 4, sheet 8; also see Exh. 8 ("Abbreviated Schedule of Dimensional Controls"); Tr. III, 31. This is well within the dimensional requirements of the Lexington Zoning Bylaw which are 40 feet in both single-family and multi-family residential districts. Exh. 55, p. 13665.

Though the proposed buildings will be within the height requirements of the zoning bylaw, they are, as the Board's and abutters' expert points out, tall in relation to neighboring houses. See Tr. VII, 67. The highest building, one on the southern border of the site, will have a first floor elevation is shown as 216 feet. Exh. 2, sheet 4. Based on the developer's commitment, above, it could be twelve inches higher than that, or 217 feet. The existing elevation in its location is 212 feet. Exh. 2, sheet 2. Since by design the peak of the roof will be 34 feet above the first floor elevation, simple calculation shows that the elevation of the peak may be as much as 39 feet above the existing grade.[21]

In terms of bulk, the buildings are also larger than most of the houses in the neighborhood, particularly those on East Street whose backyards they abut. But they are roughly the same size as some of the houses currently being built in the neighborhood. Two houses on Boroughs Street have been torn down recently and replaced with much larger houses—houses with footprints greater than 3,000 square feet and total usable space,

---

21. A technical concern related to building height must be addressed. There was disagreement about whether the estimated level of groundwater is above or below the grade of the proposed basements. Since an increase in height would likely make the buildings more visible to the abutters, if, before or during construction, it is determined that actual groundwater levels are higher than expected, the buildings may not be raised. Other engineering solutions, such as the foundation drainage system described by the Board's and abutters' expert, must be implemented. See Tr. VII, 158.

including garages and basements, approaching 10,000 square feet. Exh. 9, 10; Tr. I, 69, 75-76; III, 32.

Another factor that affects how the proposed buildings will be perceived by the abutters is the separation between them. The Board and abutters also argue that lack of building separation results in a "wall" effect. Both the chairman of the Board and the Board's and abutters' expert expressed a preference for 30 feet of space between buildings. Tr. VI, 155, 157; VII, 42-43. Under the circumstances here, however, where we do not have the flat exterior of an apartment building, but rather, a varied, two-story façade with broken rooflines, gables, and dormers, and where all buildings are separated by at least 25 feet and some by more than that, this characterization hardly seems accurate. See Exh. 4, sheet 6; Exh. 8; Tr. III, 31.

More important than any of the above factors is the distance from which the buildings are set back from adjacent properties. The Lexington Zoning Bylaw would permit individual houses to be built in this single-family residential district within 15 feet of the property line or 25 feet if they were large, "jumbo-size" houses. Tr. I, 85; II, 132-134. Setbacks in multi-family districts are 40 feet. Exh. 55, p. 13665. Currently, at the front of the property, to the south on Lowell Street, the greenhouse to be demolished as part of the proposal is only 10 to 15 feet from an existing house; the new buildings will be set back 20 feet from the property line and 40 to 50 feet from the next house on Lowell Street. Tr. I, 68, 73, 128; Exh. 10, 8. To the north on Lowell Street, the existing power plant for the greenhouses, which has a 25-foot smoke stack, is only 5 feet from the property line of the existing abutting house; the proposed buildings will be set back 20 feet from the property line and 40 to 50 feet away the existing house. Tr. I, 68, 73, 128; Exh. 10, 8. On the other two sides of this triangular site—

that is, to the rear, abutting the backyards of the East Street and Boroughs Street houses—the setbacks of the existing greenhouses, which are quite low buildings, vary from as little as 5 feet to 30 feet or more from the property lines. See Exh. 2, sheet 2; Exh. 10. Exh. 10. In those locations, the proposed buildings will be 25 feet from the site's southern boundary, making them 100 to 120 feet distant from the houses on East Street.[22] Tr. I, 73; Exh. 8. The new buildings will also be 25 feet from the site's northwest boundary, that is, about 170 feet from the houses on Boroughs Street.[23] Tr. I, 73; Exh. 8.

The final factor relating to the impact of the proposed buildings on the abutters is to what extent they will be screened by vegetation. There is currently a good deal of vegetation along the property line. Tr. I, 92, 95; III, 30; Exh. 10. In addition, new plantings will be provided along the perimeter of the site. Tr. III, 27; Exh. 2, sheet 6.

Considering all of these factors, we are not persuaded that given their bulk and setback the proposed housing will have a great impact on the abutters.

Third, the Board and abutters allege that the new buildings will cast shadows on adjoining properties. Tr. VII, 90. The abutters' expert did not prepare a shadow study or other evaluation, however. Tr. VII, 145-146. The facts show that the new buildings will comply with the height requirements in the zoning bylaw, that they will be set back from the

---

22. A garage is proposed in the southwest corner of the property. Though it might provide something of a buffer and backs up to a barn, it is only 10 feet from the property line. Tr. IV, 128-129, 164-165. It is unclear to what extent this is objectionable to the abutters. Though the garage appears to be a better design than open parking spaces, neither is critical to the overall housing design. For that reason, if the interveners desire that the garage be removed and replaced with parking spaces in that area—also set back from the property line at least 10 feet—we will order that change if the request is made in writing to the developer and the Board within 30 days after this decision becomes final. See Tr. IV, 164-165; Section VII-2(d), below.

23. There was also a great deal of rather opaque testimony from both sides concerning decks and patios and their relation to setbacks and stormwater runoff. See e.g., Tr. I, 128-130; VII, 37-38, 124-

3/16/09

property line, and that at the northern boundary where winter shadows could be the greatest problem, the abutters' houses are at the greatest distance from the development. We find no evidence that shadows are a legitimate concern in this case.

In summary, though some of the concerns raised about density in this case are clearly legitimate, the Board and the intervening abutters have not proved that there will be a significant impact on the surrounding neighborhood, and certainly have not proved that any such impact outweighs the regional need for affordable housing.

B. Parking and Traffic

The Board and abutters argue that because parking is provided for the housing units in the form of garages with tandem parking outside of them, it is inadequate and unsafe. Interveners' Brief, pp. 6-7; Board's Brief, pp. 14-15. But the Board's argument is undercut by the fact that the 28-unit development that it approved also included tandem parking.[24]

Three experts testified on behalf of the developer concerning parking. One professional engineer testified on direct testimony, and another engineer and the developer's architect testified on cross-examination. They were clearly of the opinion that overall parking was adequate, that tandem parking was appropriate, and that 24-foot-wide areas for side-by-side parking were satisfactory. Tr. IX, 16-20; also see Tr. II, 44-50; Tr.III, 94-96; IX, 43-46.

The Board's and abutters' expert testified that there were not adequate parking spaces since he believed that tandem spaces should not be included. Tr. VII, 68-69. He testified

---

126; Interveners' Brief, pp. 50-52. This is not a significant issue, and we conclude that the condition imposed by the Board was appropriate.

24. Once again, this is not an issue within the scope of the abutters' intervention since no argument has been made that the onsite parking configuration affects them in any specific and substantial way.

further that "in this particular instance, I think [tandem spaces] are highly undesirable and unsafe because access to the individual dwellings is provided by a common driveway which is only 18 feet in width." Tr. VII, 70. As was pointed out in rebuttal testimony, and is clearly discernible on the plans, this is in error—single driveways are 18 feet wide, but shared driveways are 24 feet wide.[25] Tr. IX, 18-19, Exh. 8.

The burden with regard to the matter of tandem spaces, as with the other local concerns, is on the Board, and it has not proven a substantial concern that outweighs the need for housing.

A second issue is raised by the configuration of the driveway. The driveway is a simple, 18-foot-wide, one-way loop that allows drivers to turn off Lowell Street, drive through the interior of the site, and exit again onto Lowell Street. Tr. I, 100; Exh. 8. It was modified slightly from the original design, removing an awkward internal "alley" and increasing the width from 16 feet, at the request of municipal officials. Tr. I, 66, 101, 103; IX, 20. No parking is permitted on it. Tr. III, 30.

Once again the developer's three experts, though they did not provide detailed testimony, were clearly of the opinion that that this was safe and adequate. See Tr. II, 45, 48; Tr. III, 95, 96; IX 19-20, 46-47. The Board's and abutters' expert disagreed, suggesting that the driveway is too narrow, particularly for delivery vehicles, and that "with a one-way street pattern that empties onto a public way, …[traffic is] going to be circulating in and out of Lowell Street and back into the site, which is a highly undesirable circulation pattern." Tr. VII, 70, 105-106, 108. He did not elaborate on this testimony or refer to technical standards

25. Though the testimony on this point was clear, we have included a condition that all areas in which two cars may be parked side-by-side shall be 24 feet wide. See Section VII-2(e), below.

to substantiate his opinion. We find that though the driveway may raise issues of inconvenience, the Board has not met its burden of establishing the existence of a substantial safety concern that outweighs the regional need for affordable housing.[26]

C. Stormwater

The site of the proposed housing is one on which stormwater can be managed easily—it is quite flat and even though 47% of it is impervious surface, there is currently no stormwater mitigation of any kind. Tr. II, 131; see Exh. 2, sheet 2. In the summer of 2002, the Lexington Engineering Department commented on the developer's site plans, which included plans for stormwater management, and the developer submitted revised plans in response. Exh. 13. Upon further review, the Engineering Department concluded that "[t]he increase of units from 32 to 36 still results in a net decrease in storm water runoff from the site versus existing conditions." Exh. 14; also see Tr. I, 110-121. Nevertheless, the Board and abutters remained concerned that the drainage system was not designed to accommodate a 100-year storm. Tr. VII, 32, 109. In response, although there is apparently no legal requirement that it do so,[27] the developer determined that it is possible to comply with the state Department of Environmental Protection Stormwater Management Policy, and committed to doing the additional work necessary to comply. Tr. III, 5; IX, 8; also see Section VII-2(B), below.

---

26. An even less fully developed issue is that the driveway location is "a classically undesirable situation… just over the crest of a vertical curve [which results in] limited sight distance." Tr. VII, 105. The Board's and abutters' expert acknowledged that he did not take any of the measurements required to analyze sight distance. Tr. VII, 105; also see Tr. IX, 23. Similarly, there was a great deal of ultimately inconclusive testimony concerning storage of snow that will be plowed from the driveway, a matter that in these circumstances at most raises another issue of inconvenience, not safety. See e.g., Tr. VII, 71; IX, 20-21.

27. The record is unclear, but this may be required by Lexington's local wetlands bylaw.

3/16/09

A specific concern raised about the stormwater management system is whether detention basins have been designed properly. It is certainly not of concern, as the abutters seem to imply, that the basins will contain as much as four feet of water immediately after a large storm. See Interveners' Brief, p. 10; Tr. II, 104-105; IX, 88. That is what they are designed to do.[28] But the Board's and abutters' expert testified that because "[ground] water is only 5 feet down, … there would be a possibility" of standing water in one of the detention basins, and thus it would not function properly. Tr. VII, 110-112. His testimony was far from conclusive, as was shown on cross-examination. Tr. VII, 117-118. The developer's expert indicated that there would not actually be standing water, but that there might be water in the dry-well portion of the catch basin that is below a ground-level catch basin. Tr. IX, 84, 86. The confusion with regard to this issue is not atypical since the developer is permitted to proceed under the Comprehensive Permit Law with preliminary designs. 760 CMR 31.02(2)(a); Tr. IX, 76. But the exact design of the detention basins must be addressed in detail before and during construction. This will be assured by the developer's commitment to comply with the state's Stormwater Management Policy, which will be enforced by our condition in Section VII-2(b), below.

Finally, the record is unclear as to what, if any, specific concerns abutters may have about stormwater runoff onto their individual properties. Though the site is very flat, there is currently a very shallow slope off the site at some locations on the southern boundary. Exh. 2, sheet 2. There is some indication that more water might flow onto the abutters' land at that point, though probably only if the drainage system were not designed to accommodate

28. The question of fencing the detention basins was not raised. Though not usually necessary, fences can be added for safety if the slopes in a basin are particularly steep.

the 100-year storm. Tr. II, 108-109; VII, 32. Presumably, the redesign to state standards will address this concern. There was also a minimal amount of testimony indicating that runoff from patios in the same area may flow across the backyards of several condominium units into the neighbors' backyards. See Tr. VII, 34, 115-116. This evidence, however, does not even begin to approach the level of proof that would be required to sustain the burden of proving a local concern that outweighs the regional need for housing.

D. Open Space

The Board also argues that insufficient open space is provided on the site.[29] It points out correctly that there is only a "single, central common area," and then argues that the developer "counts as open space the land areas within the separators of parking stalls, separators between the roadway and the dwelling units, areas designated for snow storage, and land areas adjacent to the proposed stormwater detention basins."[30] Board's Brief, p. 17; also see Tr. III, 110; Exh. 3.

---

29. With reference to concerns about intensity (which are similar to concerns about open space), the Board refers to a MassHousing guideline for the Housing Starts program that limits the density of developments to "the greater of 8 units per acre or 4 times the surrounding density." Board's Brief, p. 13; also see Exh. 57, p. 4. This may well be a useful guide to MassHousing in conducting preliminary reviews of proposals, but as we have said repeatedly, the obligation of both the local Board and this Committee within the comprehensive permit process is to review proposals not on the basis of some abstract density/intensity standard, but rather on the particular facts presented by the housing development, the site, and the neighborhood. See *CMA, Inc. v. Westborough,* No. 89-25, slip op. at 27 (Mass. Housing Appeals Committee June 25, 1992); *Hastings Village, Inc. v. Wellesley,* slip op. at 21-22, No. 95-05 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 98-235 (Norfolk Super. Ct. Nov. 12, 1999). That being said, we note that the proposal in this case, at 10 units per acre, is little in excess of the MassHousing standard. Further, the guideline is apparently intended to be applied flexibly since MassHousing originally issued a project eligibility determination for 48 units. Exh. 5.

30. The interveners have argued that there is not enough space dedicated to snow storage. This issue, like concerns about the roadway, seems at worst to be a matter of inconvenience. It does not specifically affect the interveners, and it was not presented in sufficient depth to meet the Board's burden of proof.

Two separate issues are raised here. First, we are not concerned that there is a single area designated as common open space. This is approximately a quarter acre of land in the center of the site where there is a small, fenced children's play area next to a larger, open lawn area to be surrounded by trees. Exh. 8, Exh. 2, Exh 3; Tr. II, 81. (These areas are shown clearly on Exhibit 8, though they appear in more detail on the landscape plan in Exhibit 2, sheet 6, and on Exhibit 3, which are "very similar." Tr. II, 79. In fact, providing such an area is exactly the approach that should be taken in designing affordable housing. Cf., *Dennis Housing Corp. v. Dennis*, No. 01-02, slip op. at 8-12 (Mass. Housing Appeals Committee May 7, 2002)(upholding denial of comprehensive permit on grounds that no space had been provided for recreation); also see *Hastings Village, Inc. v. Wellesley,* slip op. at 29, No. 95-05 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 98-235 (Norfolk Super. Ct. Nov. 12, 1999)(permit granted where adjoining public areas compensated for lack of usable open space on site). In addition, each condominium unit has a small, private backyard area. No evidence was presented that the common recreation area or the backyards are not large enough; rather, the backyards appear to be typical and the common area appropriate. A legitimate local concern with regard to usable open space has not been proven.

Second, is the more technical and ultimately less important question of how *total* open space compares to formal requirements. The Lexington Zoning Bylaw itself might provide a framework for such an analysis, even though the Comprehensive Permit Law permits the waiver of any requirements it contains. In their briefs, however, the parties did

not analyze how those standards might apply to the facts before us.[31] The Zoning Bylaw provisions relating to open space, lot coverage, and related issues are very complex, and where they have not been presented carefully to us by the parties, we are not prepared to rely on them. See e.g., Exh. 55, pp. 13592-13593, 13603, 13605-13606, 13619-13622, 13665. The bare facts are clear enough, however. The total area of the site is 159,500 square feet, and the amount of impervious surface is 82,940 square feet. Exh. 8 (Abbreviated Schedule of Dimensional Controls). Thus, by calculation, 52% of the site is impervious surface or 48% total open space. This is not atypical for this sort of dense suburban development. See, e.g., *Hastings Village, Inc. v. Wellesley, supra* (43% open space). But such general comparisons have little value since our mandate is to review each case on its merits. Here, the burden of proof is on the Board, and in order to prove that the proposed development impinges upon local concerns sufficiently to outweigh the need for housing—particularly in order to prove that by relying on numerical, percentage guidelines—it would need to present substantial evidence and analysis. It has not done so.

VII. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit, but concludes that certain of the conditions imposed in the Board's decision render the project uneconomic and are not consistent with local needs. The Board is directed to issue an amended comprehensive permit as provided in the text of this decision and the conditions below.

---

31. This is perhaps because, as appears from the testimony of the chairman of the Board, the Board's primary concern was usable open space. Tr. VI, 154.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development, consisting of 36 total units, including 9 affordable units, shall be constructed as shown on drawings by Bruner/Cott and Associates, Inc. (Greenhouse Condominiums Schematic Plans), rev. May 2003 (Exh. 4, 8), and shall be generally consistent with utility and landscaping details shown on Preliminary Site Development Plans prepared by Meridian Engineering, Inc., Aug. 16, 2002 (Exh. 2).

(b) Prior to commencement of construction, the applicant shall submit to the Lexington Department of Public Works a revised stormwater management report prepared by the project engineer that demonstrates that the final plans meet the DEP Stormwater Management Policy.

(c) Finished first floor elevations for the perimeter buildings shall be within twelve inches of the elevations shown on Exhibit 2, sheet 4, and the interior buildings at the front of the site shall have first floor elevations no higher than the highest perimeter building (see Tr. IX, 108).

(d) If the interveners make a written request to the developer and the Board within 30 days after this decision becomes final, the garage shown on the plans in the southwest corner of the site shall be removed from the design and replaced with parking spaces, which shall be set back at least 10 feet from the property line, i

(e) All areas in which two cars may be parked side-by-side shall be 24 feet wide.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: June 14, 2005

Werner Lohe, Chairman

Joseph P. Henefield

Christine Snow Samuelson

James G. Stockard, Jr.

LPcW

Commonwealth of Massachusetts
County of Middlesex
The Superior Court

19 CIVIL DOCKET# **MICV2003-00746**

Willaim Taylor, et als

vs

Town Of Lexington Board Of Appeals, et als

JUDGMENT AFTER RESCRIPT

This action was appealed to the Supreme Judicial Court for the Commonwealth, the issues having been duly heard and the Supreme Judicial Court having duly issued a rescript affirming the Judgment of the Superior Court,

It is **ORDERED and ADJUDGED:**

That the Complaint be and hereby is Ordered Dismissed.

Dated at Woburn, Massachusetts this 29th day of May, 2008.

Michael A. Sullivan,
Clerk of the Courts

By: Catherine Clancy
Assistant Clerk

Copies mailed 05/29/2008

MIDDLESEX, SS. *Commonwealth of Massachusetts*
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

In testimony that the foregoing is a true copy on file and of record made by photographic process, I hereunto set my hand and affix the seal of said Superior Court this Twenty-Sixth day of March, 2009.

Robert E. Tuo
Deputy Assistant Clerk

N.B. FOR CLERK'S USE ONLY
JUDGMENT ENTERED ON DOCKET 5/15 ~~X~~ 2008
PURSUANT TO MASS.R.CIV.P.58(b) AND NOTICE SENT
TO PARTIES PURSUANT TO MASS.R.CIV.P.77(d) AS FOLLOWS:

20

Commonwealth of Massachusetts

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION

No. 2005-2910

WILLIAM TAYLOR, ET AL, Plaintiff(s)

v.

HOUSING APPEALS COMMITTEE, ET AL, Defendant(s)

JUDGMENT ~~FOR PLAINTIFF(S)~~ AFTER RESCRIPT
(PURSUANT TO MASS.R.A.P.28)

This action was appealed to the - *~~Appeals Court~~ - Supreme Judicial Court - the issues having been duly heard and the SUPREME JUDICIAL Court having duly issued a rescript, it is ordered and adjudged:

PLAINTIFFS MOTIONS TO DISMISS FOR LACK OF SUBJECT JURISDICTION AND FOR JUDGMENT ON THE PLEADINGS ARE DENIED. JUDGMENT SHALL ENTER AFFIRMING THE DECISION OF THE HOUSING APPEALS COMMITTEE ORDERING THE BOARD OF APPEALS FOR THE TOWN OF LEXINGTON TO ISSUE AN AMENDED COMPREHENSIVE PERMIT

I HEREBY ATTEST AND CERTIFY ON 3/20/09 THAT THE FOREGOING DOCUMENT IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE, AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY: _____

notice sent 5/15/08
JDN DSW MSR
BH BOVG
JG. LJL
DAG. PDW
NCS

2008 MAY -5 A 11:00
CLERK
BOSTON, MASS.

Dated at Boston, Massachusetts, this 13TH day of MAY, 2008 ~~19~~.

MICHAEL JOSEPH DONOVAN, Clerk/Magistrate

By: _____, Asst. Clerk

NOTICE TO PARTIES: PURSUANT TO MASS.R.A.P.26(c) A PARTY DESIRING COSTS SHALL STATE THEM IN AN ITEMIZED AND VERIFIED BILL OF COSTS, WHICH SHALL BE FILED WITH THE CLERK OF THIS COURT, WITH PROOF OF SERVICE, WITHIN FOURTEEN (14) DAYS AFTER ENTRY OF THIS JUGMENT.

*Strike inapplicable words.

Form Mass.R.A.P. 6-5-81-1,000