



Dennis A. Murphy, Esq.
dgusmurphy@gmail.com
781-588-7881

October 8, 2021

BY EMAIL: Pdeschenes@walpole-ma.gov

Walpole Zoning Board of Appeals
135 School Street
Walpole, MA 02081

Re: Darwin Commons comprehensive permit application, 32 Darwin Ln, Walpole MA

Dear Members of the Board:

This office represents several abutters (whose names and addresses are copied below) to the project proposed by Wall Street Development Corp. (“Developer”) for the Residence at Darwin Commons (“Project”) located at 32 Darwin Lane in Walpole (“Site”). Please consider these initial comments on the application at your first public hearing scheduled for Wednesday October 13, 2021.

First, the Board should vote to invoke safe harbor at the outset of the public hearing process. Last month before this application was filed, the Massachusetts Department of Housing and Community Development (“DHCD”) certified the Town’s compliance with its Housing Production Plan (“HPP”), which entitles the Town to a two year safe harbor under DHCD’s regulations. 760 CMR 56.03(1)(b) & (4)(f) But that two year safe harbor is not self-executing, it must be expressly reserved by the Board in a written notice to Developer within fifteen days of opening the public hearing. Id. at 56.03(8). Since the Board is unlikely to meet on this matter again within that time, it should make this the first order of business upon opening the public hearing. A copy of DHCD’s September 10, 2021 HPP Certification Approval letter is attached.

Invoking the HPP safe harbor is not a debatable proposition. The Town has expended considerable resources to implement its plan and fulfill its housing production goals. This Developer has three other pending c. 40B applications before this Board, so is well aware of the Town’s housing production status. Should Developer wish to proceed despite the safe harbor, and waive any interlocutory appeal, the Board can give them the opportunity to present the Project on its merits, without any threat of appeal to the Housing Appeals Committee (“HAC”).

Second, in addition to the HPP safe harbor, the Board should also reserve its rights under the ten percent statutory minimum safe harbor as well. According to DHCD’s Subsidized Housing Inventory (“SHI”), as of a month ago the Town has at least 877 subsidized units of housing, which represents 9.76% of its year round housing stock. (9/7/2021 Walpole SHI,

attached) That means the Town is within a quarter percent – just 21 units – of c. 40B’s holy grail of reaching ten percent subsidized units. I have been involved in nearly every safe harbor challenge at HAC over the past six years and can attest from personal experience representing boards like yours that the actual number of SHI units never match the number on DHCD’s SHI list. The units on that list are presumptively valid, and also include any units that are eligible to be listed but for one reason or another have not been. For this reason, DHCD puts a disclaimer on the SHI list itself: “This data is derived from information provided to . . . (DHCD) by individual communities and is subject to change as new information is obtained”. (Id.)

The disclaimer also finds support in DHCD’s own regulations, which define “SHI Eligible Housing” to include not just the units on the list, but also:

- (a) any unit of Low or Moderate Income Housing;
- (b) such other housing units in a Project as may be so defined under the Department's guidelines;
- (c) any other housing unit as may be allowed under the Department’s guidelines, provided that such housing unit is subject to a Use Restriction and Affirmative Fair Marketing Plan, and regardless of whether or not such unit received a Subsidy. 760 CMR 56.02

The regulations also include among SHI Eligible Housing, units that are under legal appeal and have not yet been added to the SHI list. 760 CMR 56.03(8)(b) (“the total number of SHI Eligible Housing Units in a municipality as of the date of a Project’s application shall be deemed to include those in any prior Project . . . subject to legal appeal by a party other than the Board.”).

Under these complex regulations, not expressly reserving the ten percent safe harbor would amount to waiving the Town’s ten percent statutory minima under c. 40B. Given how close the Town is to reaching that statutory minima based on just the SHI list, without adding other SHI Eligible Units, it would be an abdication of your duty as members of the ZBA not to reserve the Town’s rights by invoking the ten percent safe harbor. I urge you to do so, lest this Board end up like the ZBA in Salisbury, which recently learned it was over ten percent after it was too late to invoke safe harbor under the regulations.

Third, the application submitted is not complete and fails to comply with the Board’s own rules. Notably, no pro forma or environmental impact analysis has been submitted with the application, contrary to the local rules adopted just two years ago by this Board. Developer seeks waivers from your rules, claiming they conflict with those of DHCD. But unless and until a such a waiver has been granted, the application before you remains incomplete.

There are good reasons not to waive omissions from the application. The pro forma submitted to MassHousing with the Project Eligibility application showed anticipated profit of 26.6%, which exceeds the profit limitation of twenty percent under the c. 40B regulations. Moreover, Developer Wall Street Development Corp. is incorporated as domestic profit corporation whose articles contain nothing about limiting profits or dividends. The application claims that an entity called “Darwin Development LLC” will abide by profit limitations, but that entity does not exist and is not registered with the Secretary of State. A future promise by a non-existent entity is purely illusory. Without an existing limited dividend organization, and a compliant pro forma that shows an allowable profit margin, the application is incomplete.

Finally, these are just the threshold issues regarding this application, which also suffers from numerous substantive deficiencies as well as these procedural ones. For example, the Project Eligibility letter states “The Site is generally level,” but the site plan shows a gradient of 34 feet that funnels toward the Town’s Zone I public water supply. This kind of misinformation, coupled with the lack of the required Impact Analysis of Natural and Built Environment, hampers the Board’s ability to review the Project on its merits. If and when we get there, I’ll be commenting further on those substantive issues.

Very truly yours,

/s/ Dennis A. Murphy

Dennis A. Murphy

cc: Jay Talerman, Esq.

David & Jo-Anne Vlacich - 31 Darwin Lane, Walpole MA 02081
Joe & Bernadette Moriarty - 28 Darwin Lane, Walpole MA 02081
Jim & Yasemin Herlihy - 3 Darwin Lane, Walpole MA 02081
Michael & Laurie Moore - 4 Darwin Lane, Walpole MA 02081
Michael & Caroline Farley - 15 Darwin Lane, Walpole MA 02081
Mike & Marianne Stanton - 19 Darwin Lane, Walpole MA 02081
Mario & Susan Corso - 24 Darwin Lane, Walpole MA 02081
Corey Greenburg & Kathryn Fisher - 27 Darwin Lane, Walpole MA 02081
Denna Horne & Jim Howley - 23 Darwin Lane, Walpole MA 02081
Sean & Amy Radley - 12 Darwin Lane, Walpole MA 02081
Mark & Jacqueline Mannion - 8 Darwin Lane, Walpole MA 02081
Paul & Caroline Truland, 15 Queens Court, Walpole MA 02081
Tom & Peg White, 20 Darwin Lane, Walpole MA 02081