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March 21, 2022
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Via E-Mail

Jane Fisher Carlson, Chair
Weston Zoning Board of Appeals
11 Town House Road
P.O. Box 378
Weston, MA 02493

Re: Comprehensive Permit Application- 518 South Avenue
Timing of Pro Forma Review

Dear Zoning Board Members:

At the Board's hearing on March 8, 2022, Attorney Witten advised the Board that simply suggesting a reduction in the scale of the Applicant's proposed 180 unit development is sufficient to request that the Applicant determine whether the request is uneconomic and produce a *pro forma*. To clarify for the Board, the regulations at 760 CMR 56.05(6) are clear as to the preconditions the Board must meet before the Board may request a *pro forma*:

- "1. other consultant review has been completed;
2. the Applicant has had an opportunity to modify its original proposal to address issues raised;
3. the Board has had an opportunity to propose conditions to mitigate the Project's impacts and to consider requested Waivers;
and
4. the Applicant has indicated that it does not agree to the proposed condition(s) or Waiver denial(s) because they would render the Project uneconomic. A Board may not conduct review of a pro forma in order to see whether a Project would still be economic if the number of dwelling units were reduced, unless such reduction is justified by a valid health, safety, environmental, design, open space, planning, or other local concern that directly results from

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the size of a project on a particular site, consistent with 760 CMR 56.07(3).”

The Housing Appeals Committee has affirmed that a Board may request to review the pro forma “only after the occurrence of certain preconditions, including the Applicant’s indication that the Board’s proposed conditions would render the project uneconomic.” *Matter of White Barn Lane, LLC v. Norwell Zoning Bd. Of Appeals*, No. 2008-05, slip op. at 6 (Decision July 18, 2011). Accordingly, as stated at the hearing, a request to review the Applicant’s pro forma is premature until other consultant review has been completed and the Board has proposed the conditions it believes necessary to mitigate the Project’s impacts and has considered the requested waivers. It is only following all those steps that the Applicant is required to make a determination as to whether the proposed conditions render the Project uneconomic and the Board may then request to review the Applicant’s pro forma.

At this stage, consultant review is not yet complete with respect to stormwater and groundwater mounding. Accordingly, the Board has not yet met the preconditions for requesting to review the Applicant’s pro forma. Further, although Attorney Witten suggested that the Board could take a piecemeal approach to conditions and that this would be sufficient to shift the burden to the Applicant to assess whether the project is uneconomic, again, the regulations are clear that it is “whether the conditions and/or requirements considered in the **aggregate** make the building or operation of such Project Uneconomic.” 760 CMR 56.05(4)(d). The regulations only require the Applicant to determine whether the Project is Uneconomic once the Board has provided a list of all conditions it intends to impose. While the regulations allow the Board to make modifications following a review of the pro forma, they do not contemplate an iterative process whereby the Applicant must determine whether singular conditions in a vacuum might render the Project Uneconomic. Accordingly, we expect that when consultant review is complete, the Board will review the waiver requests and prepare a list of conditions which the Applicant may respond to comprehensively. If the Board considers consultant review to be complete at this time, please advise and provide all proposed conditions and determinations on waivers so that we may determine if in the aggregate they render the project uneconomic.

We look forward to completing consultant review and proceeding to discuss conditions and waivers with the Board.

Very truly yours,



James G. Ward

JGW:vam
None



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cc: John Field
Valerie Geary
Dennis Murphy, Esq.
Luke Legere, Esq.
Jonathan Witten, Esq.