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Board of Appeals

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DECISION

#19-01

Comprehensive Permit

Avalon Phase II

1000 Avalon Drive

AMENDMENT #1

of

DECISION

#04-13

(Previously known as Woodlands at Laurel Hill)

April 8, 2019

GRANTED with Conditions

This is a Decision (the "Decision") of the Acton Zoning Board of Appeals (hereinafter the "Board") on the request for a Comprehensive Permit amendment under Massachusetts General Laws ("M.G.L.") Chapter 40B, §20-23 (the "Act"), made by the Applicant, Aria at Laurel Hill LLC, 600 Atlantic Avenue, Floor 20, Boston, MA 02210 (hereinafter the "Applicant") for the property located at 1000 Avalon Drive in Acton, Massachusetts (the "Site"). This Decision amends Comprehensive Permit Decision #04-13 issued to Woodlands at Laurel Hill, LLC dated December 20, 2005, as affected by an Addendum to Comprehensive Permit filed with the Acton Town Clerk on January 31, 2006, both of which are recorded with the Middlesex (South) Registry of Deeds at Book 47074, Page 265, and as further affected by a Second Addendum to Comprehensive Permit filed with the Acton Town Clerk on December 7, 2006, which are recorded with the Middlesex (South) Registry of Deeds at Book 48626, Page 570 (the "Original Decision"). The Site is identified on the Acton Town Atlas map as parcel B5-9.

This Decision is in response to an application for a comprehensive permit amendment for a rental housing development. The proposed project consists of 13 buildings with 86 direct-entry and townhouse style units and additional resident amenities including outdoor amenities (the "Phase II Project"). The comprehensive permit amendment application was submitted to the Board of Appeals on January 18, 2019. The Board opened a duly noticed public hearing on February 21, 2019. The hearing was continued

on March 20, 2019, April 8, 2019 and closed on April 8, 2019. Throughout the duration of the hearing sessions, the Board heard testimony from the Applicant, Town staff, and abutters to the Phase II Project and Acton residents. Board members Kenneth Kozik (Chair), Adam Hoffman (Member), and Emilie Ying (Associate Member) were present throughout the hearings. The minutes of the hearings and submissions on which this Decision is based may be referred to in the Town Clerk's office or the office of the Board at Acton Town Hall.

1 EXHIBITS

Submitted for the Board's deliberation were the following exhibits:

1.1 The application for a Comprehensive Permit entitled "AVALON ACTON PHASE II" was filed with the Town Clerk on January 18, 2019. The drawings and documents submitted as part of the application and as revised throughout the course of the hearings are as follows:

- Cover Letter addressed to Mr. Bartl & Comprehensive Permit Fee;
- Introduction Letter;
- Table of Contents;
- Application for Comprehensive Permit Amendment;
- Incumbency Certificate
- Certified List of Parties in Interest;
- Trip Generation Comparison Memorandum, dated December 6, 2018;
- Application for Project Eligibility & Project Eligibility Letter;
- List of Requested Exceptions to Local Requirements and Regulations;
- Development Impact Report;
- Tabulation of Buildings and Unit Composition;
- Use Description;
- Development Schedule;
- Records Plans and Deeds;
- Letter Authorizing Completion of Improvements;
- Legal Documents;
- Drainage Calculations;
- Water Balance Calculations;
- Operation and Maintenance Plan;
- Stormwater Report;
- Earth Removal Calculations;
- Traffic Study;
- Site Plan;
- Affordable Dwelling Units;
- Development Pro Forma;
- Market Study;
- Draft Regulatory Agreement;
- Development Pro Forma and Market Study;
- Site Plan, last updated March 29, 2019;
- Comprehensive Permit Plan;
- Landscape Plans;
- Architectural Plans, dated January 18, 2019;
- Floor Plans, dated January 18, 2019.

1.2 Additional, supplemental, revised, and corrected plans and documentation submitted as part of the application included in the following:

- Response to Comments on Comprehensive Permit Modification Application, dated February 20, 2019;
 - Avalon Presentation to the Zoning Board of Appeals, February 21, 2019;
 - Acton II Emergency Egress Sketch Plan March 8, 2019;
 - Response to Comments on Comprehensive Permit Modification Application March 19, 2019;
 - Avalon Presentation to the Zoning Board of Appeals, March 20, 2019;
 - Response to Comments on Comprehensive Permit Modification Application April 1, 2019.
 - Final Approval Application to the Department of Housing and Community Development, received March 20, 2019.
- 1.3 Interdepartmental communications were received from:
- Design Review Board memo, dated November 7, 2018;
 - Natural Resources Comments, dated January 28, 2019 and updated March 28, 2019;
 - Acton Community Housing Corporation comments, dated January 29, 2019;
 - RHSD comments, dated January 29, 2019 and March 12, 2019;
 - Doug Halley (CrossTown Connect), received February 7, 2019 & March 7, 2019;
 - BOS memo, dated February 8, 2019;
 - Acton Water District memo, dated February 14, 2019 and updated March 28, 2019;
 - Engineering Department memo, dated February 14, 2019, updated March 20, 2019;
 - Planning Division memo, dated February 19, 2019, updated March 19, 2019;
 - Police comments, dated March 29, 2019.
 - Fire Chief comments, dated April 2 and April 5, 2019.
- 1.4 Sixth Amendment to Memorandum of Agreement between Avalon Acton Inc., Aria at Laurel Hill, LLC; Avalon Bay Communities, Inc., and the Town of Acton, dated January 28, 2019.
- 1.5 Extension Agreements:
- Consent and Agreement to Extension of Hearing to February 21, 2019;
 - Consent and Agreement to Extension of Hearing to March 20, 2019;
 - Consent and Agreement to Extension of Hearing to April 8, 2019.

2 FINDINGS AND CONCLUSIONS

Based upon its review of exhibits, and the record of the proceedings, the Board finds and concludes that:

- 2.1 The submitted application substantially complies with the Board's comprehensive permit application requirements as stated in the Town of Acton's "Rules and Regulations for Comprehensive Permits" adopted August 22, 2017, and the governing regulations of the Department of Housing and Community Development's ("DHCD") Housing Appeals Committee entitled "Comprehensive Permit; Low or Moderate Income Housing" 760 CMR 56.00 (the "Regulations").
- 2.2 According to DHCD's Chapter 40B Subsidized Housing Inventory (SHI) as of June 2017, Acton's SHI percentage is 6.71%. As a result Acton does not presently have sufficient low or moderate income housing to meet Chapter 40B's minimum 10% criterion.
- 2.3 The Site is located within the R-10/8 (Residence 10/8) Zoning District, Affordable Housing Sub-District A, and the Ground Water Protection District Zone 4.
- 2.4 The proposed roadway is a loop design extending off Avalon Drive with an emergency access drive on the southeasterly side of the proposed roadway. Avalon Drive is a private street owned by the Applicant.

- 2.5 The Applicant provided a comparison of what was approved in Phase I for traffic analysis. The Engineering Department does not see a need for a new traffic study as the peak hour traffic is decreased and the average weekday traffic increases by only 26 trips.
- 2.6 The Site totals approximately 16.47 acres in area.
- 2.7 The Phase II Project consists of 13 buildings containing 86 direct-entry and townhouse style units with a mixture of 1, 2, 3 bedrooms.
- 2.8 The Phase II Project includes a three-season porch area with lounge seating, a barbeque and dining area, fire pit, lawn game area and passive green space.
- 2.9 The Engineering Department finds that complying with MassDEP Stormwater Quality Standards satisfies the water balance, treatment of renovation of runoff, watershed recharge, pollution safeguards and location of stormwater requirements; therefore these waiver requests are unnecessary.
- 2.10 The original project received Eligibility in 2005 from MassDevelopment. The Applicant now proposes to proceed under the Local Initiative Program with the amended proposal. The Applicant submitted an Application for Project Eligibility to DHCD with a copy made to the Town on March 20, 2019.
- 2.11 The Applicant requested waivers from the following Town of Acton Bylaws and Rules and Regulations:

Zoning Board of Appeals 40B Rules and Regulations:

- Section 2.1.2 and 3.3 –Project Eligibility. To allow for final approval from DHCD to be obtained prior to the issuance of a building permit rather than issuance of the Decision.
- Section 3.9 – Letter Authorizing Completion of Improvements. To allow the Applicant to omit such a letter from its comprehensive permit amendment application.
- Section 3.15 – Traffic Study. To allow the Applicant to omit a Traffic Study from its comprehensive permit amendment application, due to the de minimis change in what was approved as part of the Phase I Project.

Zoning Bylaw provisions:

- Section 3.1 & 3.2 – Provisions for Table of Principal Uses and Principal Use Definitions; and General Uses. To allow multifamily dwelling use in the Residence 10/8 District.
- Section 3.3 - Residential Uses. To allow more than one multifamily residential building per lot.
- Section 3.8.1.5 - Common Drives for Vehicular Access. To allow access to the lot over Avalon Drive. The proposed Phase II Project extends Avalon Drive into the proposed development.
- Section 4.4 - Affordable Housing Incentives and Overlay District. To allow for a greater number of dwelling units than would otherwise be allowed.
- Section 5.1 - Table of Standard Dimensional Regulations. To allow construction of the proposed Phase II Project notwithstanding the Bylaw's provisions requiring:
 - 45-foot minimum front yard setback (the proposed Phase II Project will have an approximately 17-foot front yard setback); and
 - 36-foot maximum height (the proposed Phase II Project will have an approximately 42-foot maximum height).

- Section 5.3.1 - Location of Structures. To allow construction of the Phase II Project notwithstanding the location of certain structures in the required yard offset areas, including Buildings A and M and the existing recycle and trash building in the front yard area.
- Section 6.7.1 - Parking Cells. To allow parking lot cells separated by a distance of less than 30 feet.
- Section 6.7.2 - Set-Backs. To allow a parking lot less than 30 feet from the front lot line.
- Section 6.7.3 – Access Driveways. To allow a looped driveway on the Site.

General Bylaw provisions:

- Section D.10 – Sewer Assessment. The Project will not be subject to any assessments or fees under the Sewer Assessment Bylaw.
- 2.12 Given the regional need for affordable housing the Board finds that the requested waivers, including for increased density and reduced setbacks, are reasonable in relation to the size of the Site, its location, and the specifics of the proposed development and its proposed use. Therefore, the Board grants all of the waivers as requested and necessary as enumerated above, subject to the conditions of this Decision.
- 2.13 Pursuant to the Act and the Regulations at 760 CMR 56.04, an applicant for a comprehensive permit must fulfill three jurisdictional requirements. The board finds that the Applicant has provided sufficient information to meet them:
- a. The Applicant has site control; Aria at Laurel Hill, LLC holds a deed to the property.
 - b. The Applicant represents that it will meet DHCD’s criteria of a limited dividend organization¹. Based on this representation MassDevelopment issued its Determination of Project Eligibility, dated July 14, 2005.
 - c. The Applicant and the Town are in receipt of MassDevelopment’s July 14, 2005 “Determination of Project Eligibility under the Local Initiative Program (LIP)”. Although the Applicant seeks to proceed through the DHCD, the 2005 approval indicates that MassDevelopment has determined that the project is fundable by a subsidizing agency under a low or moderate income housing subsidy program (a “Subsidizing Agency”).
- 2.14 The Applicant and the Town of Acton through its Board of Selectmen executed the “Sixth Amendment to Memorandum of Agreement” dated January 28, 2019, which sets forth:
- a. Mitigation payment of \$10,500 per market rate unit, or \$672,000 in total for the 64 market rate units approved hereunder, due prior to the issuance of any Certificate of Use and Occupancy; and
 - b. Reimbursements to the Town of Acton for out-of-pocket costs, up to a maximum amount of \$100,000, incurred in connection with additional building and other inspectors necessitated by and during the construction of the Phase II Project (the “Inspection Cost Reimbursement”).

¹ Only public agencies, non-profit organization, or limited dividend organizations may apply for Comprehensive Permits under M.G.L. Ch.40B.

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

- 2.15 As set forth in, and pursuant to the terms of, Section 4.4.4(i) below, the Applicant has agreed to pay to the Town of Acton an annual \$2,100.00 monitoring services fee for monitoring and the existence and retention of the Affordable Units (to be defined hereinafter) in the Phase II Project.
- 2.16 The proposed Phase II Project, when conforming to the conditions set forth in this Decision, will adequately provide for storm water drainage and sewage, will not be detrimental or injurious to the surrounding neighborhood, will provide for convenient and safe vehicular and pedestrian movement within and through the site, all without an undue burden on the occupants of the Phase II Project or on the surrounding neighborhood or the Town.
- 2.17 The proposed Phase II Project will, when conforming to the conditions in this Decision, not be a threat to the public health and safety of the occupants of the Phase II Project, the neighborhood, or the Town.
- 2.18 The proposed Phase II Project as supported by the evidence, and as conditioned below, (i) would not be rendered uneconomic by the terms and conditions of this Decision, and (ii) would represent a reasonable accommodation of the need for low and moderate income housing.
- 2.19 The Board received comments from various Town departments, which are listed in exhibit 1.3 above. These comments were considered by the Board in its deliberations, were made available to the Applicant, and are incorporated into this Decision as deemed appropriate by the Board.
- 2.20 This Decision has been issued and filed with the Town Clerk within the time frame specified in the Act and as agreed upon by the Applicant.

3. GOVERNING LAW & JURISDICTIONAL ELEMENTS

- 3.1 The law governing this Phase II Project is the Act, the Regulations, and the Board's Rules & Regulations for Comprehensive Permits.
- 3.2 The Act prevents the possible use by cities and towns of exclusionary local bylaws to shut out needed low and moderate income housing. The purposes of the Act are satisfied if (a) a town has low or moderate income housing in excess of 10% of the housing units reported in the latest decennial census or which is on sites comprising 1.5% or more of the town's total area zoned for residential, commercial, or industrial use, or (b) if the application results in the commencement of low and moderate income housing construction on sites comprising more than 0.3% of such total area or 10 acres, whichever is larger, in one year. Acton does not currently meet these criteria.

4 BOARD ACTION

Therefore, the Board voted unanimously on April 8, 2019 to GRANT the requested Comprehensive Permit Amendment for the Phase II Project as described herein and as presented in the application, subject to and with the benefit of the following Plan modifications, conditions, and limitations.

4.1 PLAN MODIFICATIONS

The Building Commissioner shall not issue a building permit, until and unless the Zoning Enforcement Officer confirms that any proposed building permit plans are substantially in compliance with information submitted, reviewed and approved as part of this Comprehensive Permit Amendment. Except where otherwise provided, all such information shall be subject to the approval of the Zoning Enforcement Officer. Where approvals are required from persons or agencies other than the Zoning Enforcement Officer, the Applicant shall be responsible for providing evidence of such approvals to the Zoning Enforcement Officer.

- 4.1.1 The Plan shall show street names and street address for approval by the Acton Engineering Department.

- 4.1.2 The Plan shall clearly identify snow storage areas for approval by the Acton Engineering Department.
- 4.1.3 The plan shall demonstrate that all outdoor lighting installations will comply with the standards of Section 10.6 of the Acton Zoning Bylaw.

4.2 CONDITIONS

The following conditions shall be binding on the Applicant and its successors and assigns in Perpetuity. The Town of Acton may elect to enforce compliance with this Decision using any and all powers available to it under the law.

- 4.2.1 The Applicant shall submit a membership application and \$1,100 fee to CrossTownConnect prior to issuance of any occupancy permit.
- 4.2.2 The Affirmative Fair Housing Marketing Plan shall be approved by the Board or its designee and the monitoring agent before the issuance of a building permit.
- 4.2.3 The Applicant shall comply with the Acton Water District memo dated February 14, 2019.
- 4.2.4 The Applicant shall make commercially reasonable efforts to work with the abutting property owner to connect a path from their property easterly to the town forest property, provided, however, that this will not be a precondition to the issuance of a building permit or certificate of occupancy if (i) the abutting property owner is not willing to do so; or (ii) such connection will require the issuance of a Conservation & Management Permit or an amendment or major modification to the existing Conservation & Management Permit affecting the Site.
- 4.2.5 The buildings shall be tested for Radon prior to the issuance of any certificate of occupancy; if Radon is detected above an acceptable level for residential dwellings, an appropriate Radon mitigation system shall be installed prior to occupancy.
- 4.2.6 All taxes, penalties and back charges resulting from the non-payment of taxes, if any, shall be paid in full prior to the issuance of the 1st the building permit
- 4.2.7 The Applicant shall not be required or obligated to make any off-site improvements except for those shown on the Approved Plan (hereinafter defined).
- 4.2.8 Final architectural plans submitted for building permit shall be substantially in accordance with the Approved Plan and the renderings presented at the public hearing and approved hereunder.
- 4.2.9 Prior to the issuance of any certificate of occupancy, the Applicant shall submit, to the satisfaction of the Zoning Enforcement Officer, an adequate plan for the operation and maintenance of the storm water management system.
- 4.2.10 The Phase II Project shall be constructed in compliance with any and all applicable requirements promulgated by the Acton Board of Health, the Acton Water District, and the Acton Fire Department, except as waived herein.
- 4.2.11 All utilities, including but not necessarily limited to electric, cable and telephone shall be located underground.
- 4.2.12 The Applicant shall be diligent to ensure that no construction debris or material from the site enter any of the abutting properties.
- 4.2.13 The Applicant shall make every attempt to minimize any adverse or nuisance construction conditions (such as, but not limited to dust, noise, vibrations, etc.) from existing in and around the Site and affecting neighboring and abutting properties during construction. The Applicant shall at all times use all reasonable means, including where necessary temporary construction fencing or screening, to minimize inconvenience to residents in the general area.

- 4.2.14 All construction activity on the property relating to this Decision shall be limited to the hours of: Monday – Friday: 7:00am – 6:00pm; Saturday 8:00am – 5:00pm; Sundays & Holidays as recognized by the Commonwealth of Massachusetts: no work permitted.
- 4.2.15 In the event that blasting should be required for the Phase II Project, the Applicant shall develop, agree upon and execute a mutually satisfactory safety and public notice protocol with the building commissioner and fire department prior to the first blast.
- 4.2.16 All work on the Site shall be conducted in accordance with the terms of this Decision and shall conform with and be limited to the improvements shown on the Approved Plan and as modified herein.
- 4.2.17 Prior to commencement of any construction, not including demolition, land clearing or grading, the Applicant shall submit to the Zoning Enforcement Officer for review and approval a final electronic set of engineering drawings, landscape plans, and architectural plans for the Phase II Project which shall be substantially in conformance with those cited in Section 1 – Exhibits (above) of this Decision except that they shall be updated in accordance with the requirements of this Decision. Each plan sheet shall be signed by and show the appropriate registered professional seal of the individual(s) drawing the plan sheet as appropriate to the data on the sheet. The submission shall in addition include a list of the specific changes made to conform to the requirements of this Decision; this list and the final set of Engineering Drawings and Landscape Plans shall be signed and stamped by the Design Engineer. Upon the Zoning Enforcement Officer's finding that the Engineering Drawings and Landscape Plans conform to this Decision, he shall mark electronically "Approved" on the final set of Engineering Drawings and Landscape Plans which shall thereupon constitute the final "Approved Plan" under this Decision and shall be filed with the records of the Board (the "Approved Plan"). If the Zoning Enforcement Officer fails to take action within 30 days after receipt of such drawings and plans, they shall be deemed "Approved".
- 4.2.18 In the event the Zoning Enforcement Officer determines that the Applicant's construction drawings submitted with its building permit application(s) materially deviate from the final Approved Plan in such a manner that, in his professional opinion, they do not conform to the requirements and conditions imposed by this Decision, the Zoning Enforcement Officer shall notify the Applicant of the specific deviations, and the Applicant shall either bring the construction drawings into conformity with this Decision or seek modification of this Decision in accordance with 760 CMR 56.05(11). In the event of a disagreement between the Zoning Enforcement Officer and the Applicant with respect thereto, they shall notify the Board which shall thereupon determine whether the building permit construction drawings (with any necessary revisions) do conform to this Decision. The Board shall endorse those construction drawings if so requested by the Applicant. Any change or modification to the Approved Plan, which in the opinion of the Zoning Enforcement Officer are deemed to be de minimis in nature, shall be deemed to be within the scope of this Decision.
- 4.2.19 By granting waivers from the local bylaws and regulations identified herein, it is the intention of this Decision to permit construction of the Phase II Project as shown on the final Approved Plan. If, in reviewing the Applicant's building permit application(s), the Zoning Enforcement Officer determines that any additional waiver from local zoning, wetlands, health, or subdivision regulations is necessary to permit construction to proceed as shown on the final Approved Plan, the Zoning Enforcement Officer shall proceed as follows: (a) any matter of de minimis nature shall be deemed within the scope of the waivers granted by this Decision; and (b) any matter of a substantive nature, including those having a potential adverse impact on public health, safety, welfare or the environment shall be reported back to the Board for expeditious disposition of the Applicant's request for a waiver therefrom. Once the Phase II Project has been constructed in accordance with the Approved Plan, neither this Decision nor the Waivers set forth herein shall

authorize any further waiver of the Town of Acton Zoning Bylaw or other local by-laws, rules and regulations.

- 4.2.20 Except as waived herein or otherwise waived by the Board of Selectmen, the Applicant shall pay all fees of the Town of Acton generally imposed with respect to construction projects.
- 4.2.21 The Applicant shall copy the Zoning Enforcement Officer on all correspondence between the Applicant and any federal, state, or Town official, board or commission that concerns the conditions set forth in this Decision, including but not limited to all testing results, official filings and other permits issued for the Phase II Project.
- 4.2.22 Prior to any building permit being issued, this Decision shall be recorded at the Middlesex South District Registry of Deeds or the Middlesex Registry District of the Land Court. Proof of recording shall be forwarded to the Zoning Enforcement Officer prior to the issuance of any building permit.
- 4.2.23 The Applicant shall comply with the State Building Code.
- 4.2.24 The Applicant shall maintain a copy of the endorsed Approved Plan and this Decision at the Site during construction.
- 4.2.25 Prior to issuance of the certificate of occupancy for the last building on the Site or for any dwelling unit within that building, the Applicant shall submit to the Board an "As-Built Plan" showing all drainage structures and sewer facilities as they exist on the site, including appropriate grades and elevation. The Applicant shall also submit proof that an As-Built Plan has been prepared for all utilities including water, gas, electric, and cable, acceptable to the utility company. Each plan sheet shall be signed and show the seal of a Registered Professional Engineer, or Registered Land Surveyor certifying that the Phase II Project, as built, conforms with the Approved Plan.
- 4.2.26 Prior to issuance of the certificate of occupancy for the last building on the Site or for any dwelling unit within that building, the Applicant shall have fully completed the infrastructure improvements and plantings shown on the approved Landscaping Plan. Notwithstanding the foregoing, if in the judgment of the Zoning Enforcement Officer landscaping cannot reasonably be completed because the time of year is inhospitable thereto, landscaping may be treated separately from infrastructure such that the Applicant may post a bond or other performance guarantee securing the completion of the landscaping; provided that the Applicant shall complete the landscaping no later than the next growing season or the bond or other performance guarantee shall be forfeited.
- 4.2.27 The Applicant shall ensure safe and convenient vehicular access into and around the Site during the entire duration of the Phase II Project construction. Any traffic problems that occur as a result of construction shall be mitigated as soon as reasonably practical, at the expense of the Applicant. Additional traffic enforcement or management measures may be required as reasonably necessary, or as reasonably directed by the Zoning Enforcement Officer or Building Commissioner upon consultation with the Applicant. The Board's representatives shall be permitted access to the Site, subject to conformance with applicable safety standards, to observe and inspect the Site and construction progress until such time as the Phase II Project has been completed.
- 4.2.28 All construction vehicles shall be parked on the Site at all times.
- 4.2.29 The Phase II Project shall be limited to the 86 units in 13 apartment buildings and the improvements shown and labeled on the Approved Plan.
- 4.2.30 The landscaping shall be maintained in Perpetuity by the Applicant or its successor. Dead or diseased plantings shall be replaced as soon as possible in accordance with growing and weather conditions. As used in this Decision, the term "Perpetuity" shall mean for so long as the Phase II

Project and the use of the Site do not strictly and fully conform to the requirements of the Town of Acton Zoning Bylaw.

- 4.2.31 The Applicant shall adhere to the DEP Stormwater Management Policy and Guidelines.
- 4.2.32 Each condition in this Decision shall run with the land and shall, in accordance with its terms, be applicable to and binding on the Applicant and the Applicant's successors and assigns in Perpetuity.
- 4.2.33 At least seven days prior to the start of construction, the Applicant shall provide written notice to the Zoning Enforcement Officer of the anticipated construction start date.
- 4.2.34 The "Sixth Amendment to Memorandum of Agreement" dated January 28, 2019 in its entirety is hereby made part of this Decision, and the Applicant shall comply with the term of said Agreement like with any other condition set forth herein.

4.3 CONDITIONS - LEGAL REQUIREMENTS

- 4.3.1 In Perpetuity, any sale or transfer of rights or interests in all or any part of the Site (excluding residential leases and any mortgages) shall include a condition that successors are bound by the terms and conditions of this Decision.
- 4.3.2 The Applicant shall provide notice of any transfer prior to substantial completion of the Phase II Project as set forth in 760 CMR 56.05(12)(b).
- 4.3.3 Transfer of Permits. Prior to substantial completion of a Project or a phase thereof, a comprehensive permit may be transferred to a person or entity other than the Applicant, upon written confirmation from the applicable Subsidizing Agency that the transferee meets the requirements of 760 CMR 56.04(1) (a) and (b), and upon written notice to the Board and the Committee (in the case of a Project granted a comprehensive permit under 760 CMR 56.07). Transfer of a permit shall not, by itself, constitute a substantial change pursuant to 760 CMR 56.07(4). After substantial completion, a comprehensive permit shall be deemed to run with the land.
- 4.3.4 The Applicant and/or subsequent Owner(s) shall be bound by all conditions and requirements set forth in this Decision.
- 4.3.5 The, driveway, parking lot, utilities, drainage systems, and all other infrastructure shown in the Approved Plan shall remain privately owned. The Town of Acton shall not have, now or ever, responsibility for the operation or maintenance of this infrastructure, including but not limited to snow removal and trash collection.

4.4 CONDITIONS - AFFORDABILITY REQUIREMENTS

To the extent permitted by the Department of Housing and Community Development ("DHCD"), the following conditions shall apply. Without limiting the generality of the foregoing, in the event DHCD or other Subsidizing Agency determines that it cannot accept or otherwise accommodate any of the conditions in this Decision since they are inconsistent with the holding of the Supreme Judicial Court in *Zoning Board of Appeals of Amesbury v. H.A.C.*, 457 Mass 748 (2010), such conditions shall be null and void. In addition, to the extent that there exists any inconsistency or conflict between this Decision and the terms of the Act, the Regulations or any regulatory agreement entered into between the Applicant and the Subsidizing Agency (the "Regulatory Agreement"), the terms of the Act, Regulations or Regulatory Agreement, as applicable, shall govern. The Applicant shall support the Town in obtaining the DHCD's approval of the following conditions:

- 4.4.1 Affordable Units: 22 of the units (approximately 25%) (the "Affordable Units") shall be made available for rental by households whose aggregate income is no greater than 80% of the area

median income (the “Area Median Income”) as published by the Department of Housing and Urban Development (HUD) for the Boston Metropolitan Primary Statistical Area (BMPSA).

- 4.4.2 Accessible Affordable Units: The percentage of accessible units within the Phase II Project shall be split as follows: approximately 75% market rate units and approximately 25% Affordable Units.
- 4.4.3 Rental Price: The Affordable Units shall be rented to qualified households at prices deemed affordable utilizing cost assumptions developed under the DHCD Comprehensive Permit Program and subject to condition 4.4.1 above. The applicable household sizes shall be determined in accordance with DHCD regulations. The maximum rental prices for the Affordable Units shall be reviewed and approved by the Monitoring Agent.
- 4.4.4 Monitoring: Pursuant to 760 CMR 56.04(8)(a), the Town shall be responsible for the monitoring and enforcement of these Use Restrictions, subject to the Subsidizing Agency's right to delegate such functions as set forth in 760 CMR 56.02 (the Subsidizing Agency or its delegee of such functions is referred to herein as the “Monitoring Agent”). Any modification or deviation from the designation of Affordable Units as set forth herein shall be subject to approval of the Monitoring Agent and the Board. In addition, the Applicant shall provide the Town of Acton with all DHCD required annual compliance reports with tenant certifications, and certify that the Phase II Project and units are in compliance with all regulatory terms and conditions.
- i. The Applicant shall execute a Monitoring Agreement with the Town prior to issuance of the first building permit.
 - ii. The Applicant shall pay \$2,100 to the Town of Acton for the monitoring of the Affordable Units prior to the 1st Affordable Dwelling Occupancy Permit. Afterward, the Applicant shall pay the town \$2,100 each year for monitoring on July 1st, starting July 1, 2020.
- 4.4.5 Selection of tenants for Affordable Units: The Applicant shall obtain the Monitoring Agent’s approval of the tenant selection plan for the rental of the Affordable Units prior to conducting the tenant selection process for the Affordable Units. Tenants shall be selected through a fair lottery process (the “Lottery”), administered by the Applicant or a consultant retained and funded by the Applicant, in accordance with the Regulations.
- 4.4.5.1 70% of the Units in the initial lease-up of the Project shall be given to households that meet one or more of the following “Acton Connection” preference criteria, it being understood that the Town of Acton shall have the burden to demonstrate to the Subsidizing Agency the need for “local preference” and failure to demonstrate such a need in a timely manner shall not preclude the rental of any of the units in the Phase II Project:
- (i) Currently a resident of the Town of Acton. For purposes of the Lottery, a person shall be deemed a resident if that person has been registered as an Acton resident with the Acton Town Clerk pursuant to M.G.L. Ch. 51, §4 and would be considered a resident under the United States Census Bureau’s residency guidelines. “Usual residence” has been defined as the place where the person lives and sleeps most of the time. Also, non-citizens who are living in the United States are included, regardless of their immigration status.
 - (ii) Currently an employee of the Town of Acton, the Acton-Boxborough Regional School District, or the Acton Water District, including those with a bona fide offer of employment by one of those entities.
 - (iii) A person who is currently an employee of a business located within the Town of Acton, including those with a bona fide offer of employment by such a business.

(iv) A family with a child who attends a school within the Acton Boxborough Regional School District.

4.4.5.2 Renters whose selection is based on any of the above “Acton Connection” preference criteria shall continually meet at least one of these criteria from the time of selection until the time of the lease commencement including at the time of commencement of any extensions of said lease. Such a renter’s failure to meet at least one of these criteria during this time period shall be a cause for that renter’s disqualification and selection of a new renter in accordance with the procedures of the Lottery.

4.4.5.3 The selection of renters for the Affordable Units, including the administration of the Lottery, shall be administered by the Applicant or a consultant retained and funded by the Applicant. The Lottery shall be implemented pursuant to a Lottery Plan developed by the Applicant or the Lottery consultant, as applicable, and approved by the DHCD. The Town of Acton or its designee, as permitted by the DHCD, shall oversee the Lottery. The Applicant shall fund the expenses of the Lottery.

4.4.5.4 Income eligibility shall be governed by the rules and regulations of DHCD, or in default, the rules and standards employed by HUD in the selection of income-eligible households for publicly subsidized housing. The prime objective is that the units must count on the Acton Subsidized Housing Inventory.

4.4.5.5 The provisions of this section are intended to complement and not to override or supersede any rules, regulations, or requirements of DHCD, the Massachusetts Commission Against Discrimination, or any authority with jurisdiction and like purpose, to provide low and/or moderate income housing.

4.4.5.6 In the event that the aforesaid paragraphs for the selection of renters for the units are inconsistent with DHCD requirements, including any requirements set forth by the Town of Acton in its approval of the buyer selection plan, DHCD requirements shall prevail.

4.4.6 Perpetual Affordability Restriction: As a “limited dividend organization” at the time of financing and construction, the Applicant’s profit shall not exceed more than 10% of the owner’s equity in the Development. Any profit in excess of that amount shall be paid to the Town, in a form that will allow the Town to use said funds to facilitate the development of affordable housing. Review of the Applicant’s limited dividend obligations shall be done in accordance with the Regulatory Agreement. The Applicant shall provide to the Development’s subsidizing agency a full certification of total development costs and total revenues, prepared and certified by a certified public accountant, in a form and upon a schedule determined by the Guidelines. All cost certification and other reporting requirements shall be prepared in accordance with the limited dividend guidelines and reporting requirements of G.L. c. 40B, §§20-23, 750 CMR 56.04(8) and the Guidelines. Notwithstanding the forgoing, in no event shall anything in this Decision be construed to require that the Applicant, its successors and assigns, remain a “limited dividend organization” beyond the duration required by the Regulatory Agreement.

Prior to the issuance of any building permit in the Development, the Applicant shall prepare the final draft of a Regulatory Agreement and submit the same to the Town official(s) responsible for affordable housing, the same to be reviewed pursuant to procedures established by the Development’s subsidizing agency. The form of agreement to be used shall be designed to preserve the affordability restriction in the event of foreclosure by a lender. The Agreement shall contain, at a minimum, the requirement that the Affordable Units shall be reserved in perpetuity for rent to eligible applicants as set forth in Condition 4.4.1.

In any event, as this Decision grants permission to build the Phase II Project under the Act, and as the Applicant has obtained the benefits of a comprehensive permit, the Phase II Project shall remain subject to the restrictions imposed by the Act so long as the Phase II Project is not in

compliance with the Town of Acton's zoning requirements which otherwise would be applicable to the Site and the Phase II Project but for the comprehensive permit's override of local bylaws to promote affordable housing. Accordingly, this Decision shall restrict such Affordable Units in Perpetuity, so that the units continue to serve the public interest for which the Phase II Project was authorized. It is the express intention of this Decision that the period of affordability shall be the longest period allowed by law.

- 4.4.7 Substitute for Regulatory Agreement with Subsidizing Agency: If and when the Regulatory Agreement is terminated, expires or is otherwise no longer in effect and is not replaced with another regulatory agreement with another subsidizing agency, the Applicant or his/her legal successor(s) shall enter into a permanent regulatory agreement with the Town, in a form and substance reasonably acceptable to the Board and Town Counsel (the "Town Regulatory Agreement"), which shall be signed by all necessary parties, including all mortgagees and lien holders of record, and recorded with the Middlesex South District Registry of Deeds or the Land Court. The Town Regulatory Agreement, at a minimum: (i) shall require that twenty-five percent of the dwellings in the Phase II Project shall remain be affordable to low and moderate income households in Perpetuity as set forth in this Decision; and (iii) shall restrict the number of allowed dwelling units to not more than 86 units. The Town Regulatory Agreement shall constitute a restrictive covenant and shall be recorded against the Property. It shall be enforceable by the Town and shall require that the Units shall remain affordable in Perpetuity.
- 4.4.8 DHCD and Financial Information: In addition to the Applicant's obligations to DHCD to provide financial information and documentation, promptly following the issuance of a final certificate of occupancy for all of the Units (but not as a condition thereto), the Applicant shall provide a copy of all such DHCD submittals. The Applicant shall provide any back-up and supporting documentation reasonably requested by the Town for all Phase II Project costs and income sources.

4.5 LIMITATIONS

The authority granted to the Applicant under this Decision is limited as follows:

- 4.5.1 The foregoing required conditions, legal requirements and affordability requirements have been stated for the purpose of emphasizing their importance, but are not intended to be all inclusive or to negate the remainder of the Bylaw and the Rules.
- 4.5.2 If, between the date this Decision is filed in the office of the Acton Town Clerk and the completion of the Phase II Project, the Applicant desires to change in a material way and/or to a significant degree the proposed Phase II Project as reflected in and approved by this Decision, such changes shall be governed by 760 CMR 56.05(11). In no case shall the Applicant be allowed to implement a project change that increases the number of units in a manner, which constitutes a "substantial change" under 760 CMR 56.05(11) and 760 CMR 56.07(4), without submitting a new application and undergoing a new public hearing and Decision process. Without limitation, in the event any subsequent permitting process results in a change to the Approved Plan that triggers the need for further waivers from local bylaws, rules, or regulations, any such matter shall be treated as a project change and the procedures in 760 CMR 56.05(11) shall be followed, subject to the provisions of Condition 4.2.19 above.
- 4.5.3 This Decision applies only to the Site identified in this Decision and to the proposed development as shown on the Approved Plan.
- 4.5.4 Except as set forth herein, other approvals or permits required by the Bylaw, other governmental boards, agencies or bodies having jurisdiction shall not be assumed or implied by this Decision.
- 4.5.5 This Decision permits the construction, use, and occupancy of a 86 units on the Site. The construction and use of the Site shall be in conformity with the Approved Plan, and there shall be

no further subdivision of the Site, or the creation of additional Dwelling Units or any other structures or Infrastructure except that which is shown on the Approved Plan, without further approval by the Board in the form of an amendment to this Decision, subject to the provisions of Paragraph 4.5.2 above.

- 4.5.6 If construction authorized by this Decision has not commenced within five (5) years of the date on which the permit becomes final, the permit shall lapse. The permit shall become final on the date that the written Decision is filed in the office of the town clerk if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of. The Board may grant an extension of the five year lapse date for good cause shown, which shall include without limitation delay (notwithstanding the Applicant's diligent efforts) in the issuance of a governmental permit or approval or delay occasioned by a third party appeal of a governmental permit or approval required for the Phase II Project. Any request for extensions shall be made at least thirty (30) days prior to expiration. A request to extend said time limits must be made in writing to the Board at least 30 days prior to said expiration dates, and the Board herewith reserves its rights and powers to grant or deny such extension.
- 4.5.7 In the event a typographical error renders this Decision and the final Approved Plan inconsistent as to the number of units, number of bedrooms, or similar objective characteristic of the Phase II Project, the provisions of the final Approved Plan shall control on the point of inconsistency. Otherwise this Decision shall be given full force and effect on its terms, unless amended by the Board in writing.
- 4.5.8 The Board hereby reserves its right and power to modify or amend the Approved Plan and the terms and conditions of this Decision with or without a public hearing upon the request of the Applicant, his designees or assigns, pursuant to 760 CMR 56.05 (11).


5 EFFECT AND SCOPE OF THIS AMEDEMMENT DECISION

This Amendment Decision only responds and decides on the limited matters before the Board as outlined herein. Except as herein specified, the Original Decision shall remain in full force and effect.

6 APPEALS

- 6.1 Any person aggrieved by the issuance of this Decision has the right to appeal pursuant to M.G.L. Ch. 40A, § 17 and shall file such appeal within 20 days after the date of filing this Decision with the Town Clerk.
- 6.2 The Applicant shall have the right to appeal the issuance of this Decision to the Housing Appeals Committee pursuant to M.G.L. Ch. 40B, § 22 and shall file such appeal within 20 days after the date of filing this Decision with the Town Clerk.

The Town of Acton Zoning Board of Appeals


Kenneth F. Kozik, Chairman


Adam Hoffman, Member


Emilie Ying, Associate Member

This is to certify that the 20-day appeal period on this decision has passed and there have been no appeals made to this office.

Eva K. Szkaradek, Town Clerk

Date

Copies furnished:

Applicant -

certified mail #

Town Clerk

Fire Chief

Acton Water District

GIS

Land Use Department

Engineering Department

Town Manager

Police Chief

Board of Selectmen

RHSO

Assessor's Office

Design Review Board

Owner

ACHC