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November 23, 2021

BY ELECTRONIC AND US MAIL

Phillip DeMartino
Department of Housing and Community Development
100 Cambridge Street, Suite 300
Boston, MA 02114

Re: Response to Safe Harbor Notice
Town of Manchester-By-The-Sea

Dear Mr. DeMartino:

Please be advised that this office serves as counsel to SLV School Street, LLC, which is the Applicant for a Comprehensive Permit under G.L. c. 40B, §§20-23 in the Town of Manchester-By-The-Sea (the "Town"). In our capacity as counsel to the Applicant, please consider this letter as an official response, pursuant to 760 CMR 56.03(8)(a) to the Town's so-called Notice of Safe Harbor, dated November 8, 2021 (the "Notice"). For the reasons stated herein, the Applicant asserts that the Town's Notice is fatally deficient and, accordingly, the Applicant requests that the Department summarily reject the same so that a public hearing on this important affordable housing project may resume in earnest.

Based upon the 2010 census, at the time of the Applicant's submittal of its 40B application, the Town had only 115 affordable units on its Subsidized Housing Inventory ("SHI"), a mere 5.1% of its total year-round housing stock. That percentage will decrease upon final determination of the number of year-round housing units in the 2020 census. Furthermore, at the time of submittal of the Application there were no pending certifications, by the Department, of new affordable units that met the requirements for inclusion on the Town's. The Town's Notice does not and cannot refute these facts.

Pursuant to 760 CMR 56.02:

SHI Eligible Housing – means, solely for the purposes of 760 CMR 56.03:

- (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; and*
- (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.*

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In relevant part, 760 CMR 56.02 defines “Low or Moderate Income Housing” as “units of housing whose occupancy is restricted to an Income Eligible Household.” *Emphasis supplied.* Units not approved pursuant to a c. 40B project may be eligible for inclusion on a town’s SHI when a complying restriction and Affirmative Fair Marketing Plan is in place and the unit in question is occupied by a qualified Income Eligible Household. 760 CMR 56.03(2). Complying affordable housing restrictions must be in a form prescribed and approved by the Department in order to qualify a unit for inclusion on the SHI.

To the extent that a town has an effective Housing Production Plan (“HPP”) and seeks to establish certification of progress in the creation of new qualifying affordable units, the units must be eligible in accordance with the above criteria, including, without limitation, the requirement that they be subject to a complying affordable housing restriction. The certification shall be effective as of the date that the units in question satisfied the criteria cited herein.

For the purposes of determining the availability of a so-called “safe harbor”, the criteria in question must have been satisfied on the date the underlying 40B application was submitted to the town. Here, that date was September 27, 2021.

In its Notice, and the attachments thereto, the Town asserts that it is entitled to the safe harbor due to compliance with its HPP by virtue of recent agreements for management of certain units in a project known as Powder House Lane (“PHL”). That the Town has, acting by and through its Affordable Housing Trust is seeking to subsidize and preserve the units in PHL is laudable. However, the facts clearly demonstrate that at all times relevant to this matter, there are no units in PHL that are eligible for inclusion in the Town’s SHI. Nor has the Department certified said units for compliance with numerical targets under its HPP. More concerning is the fact that the Town’s Notice includes facts, assertions and representations that the Town knows are not true. To wit:

- The Town’s Notice expressly states (in the first sentence of its of its 4th paragraph) that the 29 units in the PHL project are “deed-restricted”. However this statement is patently false. The Town has not and cannot produce a restriction. Indeed, we have conducted a thorough search of the Registry of Deeds, which, as of November 18th, has not revealed the existence of a comply restriction. That there is an aspiration that said units be bound by an affordable housing restriction does not make them restricted.
- The Town’s Notice and supporting information state that over 60% (18 of 29) of the units in PHL are currently occupied by “income qualified” households. However, there is absolutely no proof provided for this proposition except for an informal “survey” of existing tenants and, in fact, we believe this representation as well as other representations in the Notice may be inaccurate. . While the Town’s Notice cites to a prospective tenant Selection Plan and Affirmative Fair Housing Marketing Plan, the Town implicitly concedes that such measures are not yet in place.

Based upon the foregoing facts, there can be no dispute that, despite the Town’s efforts to bring PHL’s units into the Town’s SHI, such units were not eligible for inclusion in the Town’s SHI at

the time the Applicant's 40B application was submitted to the Town's ZBA and are still not eligible today. Similarly, there can be no dispute that said units were not certifiable under the Town's HPP at the time of the Application and are still not certifiable today. Accordingly, on behalf of the Applicant, I hereby respectfully request that the Department reject the Town's Notice in accordance with applicable regulations.

My client is long-time developer of affordable housing and has assisted many communities in reaching their affordable housing goals. The currently proposed project is thoughtfully designed, has no residential abutters, will not tax municipal resources, is proximate to major transportation routes and, when constructed, will likely put the Town's SHI over 10%. It is perhaps for this reason that the Town's Select Board had strongly considered the proposal as a Local Initiative Project, so much so that a draft Development Agreement was prepared for execution between the Developer and the Board of Selectmen. While it is disappointing that the Town's ZBA would pose artificial barriers to the project by submitting a false, deficient safe harbor notice, my client remains undeterred and will work closely with the Town to bring this important project to fruition.

Please do not hesitate to contact me with any questions that you may have.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Talerman', with a long, horizontal, wavy flourish extending to the right.

Jason R. Talerman

Enc.

Cc: Manchester-By-The-Sea ZBA (by email)
Town Counsel (by email)