DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT

Charles D. Baker, Governor
Karyn E. Polito, Lt. Governor
Jennifer D. Maddox, Undersecretary

HOUSING APPEALS COMMITTEE

Shelagh A. Ellman-Pearl, Chair
Caitlin E. Loftus, Counsel
Lisa V. Whelan, Counsel
Veronica G. Barros, Clerk

December 23, 2021

VIA ELECTRONIC MAIL ONLY
Christian Klein, Chair (cklein@town.arlington.ma.us)
Town of Arlington
Zoning Board of Appeals
23 Maple Street
Arlington, MA 02476

RE: *Arlington Land Realty, LLC v. Arlington Zoning Board of Appeals*
HAC No. 2016-08

Dear Chair:

Pursuant to 760 CMR 56.06(4)(b), *Arlington Land Realty, LLC,* is appealing the decision of your Board. I am enclosing a copy of the following for your records:

1. Initial Pleading Cover Sheet;
2. Initial Pleading filed with attachment(s);
3. Notice of Receipt of Appeal & Conference of Counsel; and
4. Notice of Mediation Screening with Info Sheet.

It appears that Jonathan Witten, Esq., represented the Board in the interlocutory appeal for this matter. In addition to the counsel identified on the Initial Pleading Cover sheet. He will receive a copy of this letter and its attachments. Nevertheless, the attorney who shall represent you in this current appeal must provide us with a Notice of Appearance pursuant to 760 CMR 56.06(6)(b) and (c).

The initial Conference of Counsel will be conducted virtually, via Microsoft Teams. Please submit a letter to DHCDHousingAppealsCommittee@mass.gov providing the email addresses of all individuals you wish to have attend the conference of counsel. *See* 760 CMR 56.06(7)(d)(4), linked at https://www.mass.gov/service-details/dhcd-regulations-current-regulations-and-proposed-amendments .

All submissions to the Committee shall be made electronically pursuant to Standing Order 2021-01, linked at https://www.mass.gov/doc/standing-order-2021-01-filing-and-service-of-papers-in-cases-before-the-committee/download and the Committee's Rules of Electronic filing, linked at https://www.mass.gov/doc/housing-appeals-committee-rules-of-electronic-filing-e-filing-rules/download .

Sincerely,

Veronica G. Barros,
Clerk

Enclosures
cc: Stephanie Kiefer, Esq. (SKiefer@smolakvaughan.com)
Doug Heim, Esq. (dheim@town.arlington.ma.us)
Jonathan Witten, Esq. (JWitten@k-plaw.com)

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Docket No.: 2016-08

Date: December 23, 2021

NOTICE OF

X Receipt of Appeal under G.L. c. 40B, §§ 20-23

X Conference of Counsel

Pre-Hearing Conference

Site Visit

Hearing Session

Motion Session

Mediation Session

Arlington Land Realty, LLC

v.

Arlington Zoning Board of Appeals

The above matter has been scheduled as follows:

Thursday, January 6, 2022
10:00 AM

This conference of counsel will be conducted virtually through Microsoft Teams. To request an invitation to the Teams Meeting, for guidance on the Teams App, or if you wish to participate via audio, please email DHCDHousingAppealsCommittee@mass.gov , or call 617-573-1527.

Presiding Officer: Shelagh A. Ellman-Pearl

For procedures governing hearings before the Housing Appeals Committee, please refer to 760 CMR 56.06. Pursuant to 760 CMR 56.06(6), all documents filed with the Committee must be served simultaneously on all parties, interveners, and interested persons. Additional information, including Housing Appeals Committee Practice Guidelines, may be found on the Committee's website at "https://www.mass.gov/service-details/housing-appeals-committee-hac"

100 Cambridge Street, Suite 300
Boston, Massachusetts 02114
Phone: 617-573-1520; Fax: 617-573-1515
www.mass.gov/dhcd/hac

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Docket No.: 2016-08

Date: December 23, 2021

NOTICE OF MEDIATION SCREENING

Arlington Land Realty, LLC

v.

Arlington Zoning Board of Appeals

The parties are required to participate in a Mediation Screening with the Massachusetts Office of Public Collaboration (MOPC) on the day of your Conference of Counsel. You will meet with the MOPC Mediation Screener immediately following your scheduled Conference of Counsel.

Before the Conference of Counsel/Mediation Screening, **all counsel must**:

- **Discuss mediation with their clients**
- **Notify them that of the availability of subsidized initial mediation (see enclosed MOPC Mediation Information Sheet)**

Most cases have some potential for negotiated settlement, particularly with the assistance of a neutral mediator. Mediation Screening is an opportunity for counsel, and principals, if they choose to attend, to meet with each other and to discuss with the MOPC Screener the needs of their case, the benefits of participating in mediation, and the Housing Appeals Mediation Program.

The Mediation Screening is a separate event. It does not affect any scheduled Housing Appeals Committee events or constitute grounds for the rescheduling of such events. There is no charge for the screening. For additional information about the Mediation Program, see the enclosed information sheet.

If you have any questions about mediation or if you and opposing counsel are ready to schedule a mediation session at this time, please contact MOPC at (617) 287-4040.

100 Cambridge Street, Suite 300
Boston, Massachusetts 02114
Phone: 617-573-1520; Fax: 617-573-1515
www.mass.gov/dhcd/hac

INITIAL PLEADING COVER SHEET — HOUSING APPEALS COMMITTEE

(PER 760 CMR 56.00)

Developer/Applicant (Name/Address):	Chairman/Zoning Board (Name/Address):
Arlington Land Realty, LLC c/o Oaktree Development 84 Sherman Street, 2nd Fl Cambridge, MA 02140	Christian Klein, Chairman Arlington Zoning Board of Appeals 23 Maple Street Arlington, MA 02476
Developer/Applicant's Attorney (Name/Address/Phone/Fax/Email):	**Zoning Board's Attorney (Name/Address/Phone/Fax/Email):**
Stephanie A. Kiefer, Esq. Smolak & Vaughan LLP 21 High Street, Suite 301 North Andover, MA 01845 Email: skiefer@smolakvaughan.com Ph: 978-682-5220 Fax: 978-327-5219	Doug Heim, Town Counsel Town of Arlington 50 Pleasant Street Arlington, MA 02476 dheim@town.arlington.ma.us Ph: 781-316-3150

Project Name: Thorndike Place

Address: 0 Dorothy Road
Arlington, MA

Type of Development: Rental ____ Ownership ____ Mixed X

Funding Agency/Program: New England Fund

Site Approval/Project Eligibility: Yes X No ____ Date: 12/4/2015

Total No. Units Appealed to H.A.C.: 136 No. Affordable (subsidized) Units: 34

ZBA Decision: Denial ____ Grant ____ Grant With Conditions X Constructive Grant ____
Constructive Denial ____ Other ____

Date ZBA Decision Filed With Municipal Clerk: 12/1/2021

Comments: Appeal from Grant of Conditions filed together with Motion to Reduce Filing Fee.

/s/ Stephanie A. Kiefer 12/21/21
Developer's Attorney's Signature and Date

FOR DOCKET CLERK USE ONLY

Standard Fee Amount: $_____

Full Standard Fee enclosed with Initial Pleading? ___ Yes ___ No

Motion on Fee enclosed with Initial Pleading? ___ Yes ___ No

Minimum Fee of $1,500 enclosed with Initial Pleading? ___ Yes ___ No

Motion on Fee: ___ Granted ___ Denied

on (date) _____

Additional Fee beyond $1,500 Minimum Fee paid as per Ruling on Motion on Fee:

amount: $_____

on (date): _____

Docket #: _____ Case #: _____ HAC Appeal Date: _____

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

HOUSING APPEALS COMMITTEE

DOCKET NO. 2021-

In the matter of:	)
	)
ARLINGTON ZONING BOARD OF APPEALS	)
	)
and	)
	)
ARLINGTON LAND REALTY, LLC	)

APPLICANT ARLINGTON LAND REALTY, LLC'S APPEAL OF DECISION BY ARLINGTON ZONING BOARD OF APPEALS GRANTING COMPREHENSIVE PERMIT WITH CONDITIONS

I. Parties

1. The Appellant is Arlington Land Realty, LLC ("Applicant" or "ALR"), a Massachusetts limited liability company, which will conform to the limited dividend requirements of M.G.L. c.40B, 20-23, with an address of 222 Berkeley Street, Boston, MA 02116.

2. The Appellee is the Town of Arlington Zoning Board of Appeals, ("the Board") with an address of 23 Maple Street, Arlington, MA 02476.

II. Statement of Prior Proceedings

3. On or about September 1, 2016, the Applicant applied to the Board for a Comprehensive Permit to create a 219-unit project consisting of twelve (12) for-sale townhouse condominium units, including three (3) low or moderate income units and 207 rental units in a multi-family structure, of

which fifty-two (52) rental units would be available to low or moderate income families, under the New England Fund Program of the Federal Home Loan Bank of Boston as administered by MassHousing. The project locus is a 17+ acre site on Dorothy Road, at the intersection of Littlejohn Street, in Arlington, Massachusetts.

4. The public hearing was opened on September 27, 2016.

5. At the September 27, 2016 public hearing, the Board voted to give notice to the Applicant that the Town of Arlington has satisfied the statutory 1.5% General Land Area Minimum (the "Safe Harbor Claim").

6. By letter dated October 6, 2016 and received by the Applicant on October 7, 2016, the Board notified the applicant in writing of its Safe Harbor Claim.

7. By letter dated October 21, 2016, the Applicant appealed the Safe Harbor Claim to the Massachusetts Department of Housing and Community Development ("DHCD").

8. By letter dated November 17, 2016, DHCD sustained the Applicant's challenge to the Safe Harbor Claim.

9. The Board filed an Interlocutory Appeal on the Safe Harbor Claim with the Committee on or about December 6, 2016.

10. The Committee, on October 15, 2019, issued its Interlocutory Decision Regarding Safe Harbor which denied the Board's appeal and upheld DHCD's denial of the Safe Harbor Claim.

11. On or about December 10, 2019, the Board reconvened the public hearing on the merits of the comprehensive permit application.

12. The public hearing was continued until the Board's April 14, 2020 public hearing. However, due to the onset of the COVID-19 pandemic, the Board did not resume the public hearing until August 25, 2020, at which time all further sessions of the public hearing were conducted remotely, consistent with Governor Baker's March 12, 2020 *Order Suspending Certain Provisions of the Open Meeting Law, G.L. c30A, §18*, and thereafter the legislation titled *An Act Extending Certain COVID-19 Measures Adopted During the State of Emergency*, extending the same provisions of the Governor's Order until April 1, 2022.

13. Subsequent sessions of the public hearing were held on the following dates: October 13, 2020, November 2, 2020, December 8, 2020, January 26, 2021, February 16, 2021, March 11, 2021, April 8, 2021, May 13, 2021, June 10, 2021, June 29, 2021, August 3, 2021, September 9, 2021, October 5, 2021 and October 20, 2021. The public hearing closed on October 21, 2021.

14. During the course of the public hearings, the Applicant provided alternative design schemes of the Project, including a) a 176 unit multifamily rental structure; and b) 12 ownership duplex units (6 buildings) and a 124-unit senior living rental building.

15. By a 74-page written decision filed with the Town Clerk on December 1, 2021, the Board granted a comprehensive permit, with 123 numbered

conditions, exclusive of subparts, approving a total of 136 dwelling units consisting of: twelve (12) ownership units, three (3) of which are to be low or moderate income units under Chapter 40B; and one-hundred twenty-four (124) age-restricted rental units, of which thirty-one (31) are to be low or moderate income units under Chapter 40B. See copy of Decision attached hereto as Exhibit A (the "Decision").

III. Applicant's Objections to the Findings

16. Statutory Minima. Applicant continues to dispute the Town's Safe Harbor Claim and Applicant objects to the Board's determination on Safe Harbor and asserts all of Applicant's claims in the proceeding before the Committee on the Safe Harbor issue.

17. Applicant objects to the characterization of "local needs" as described in the Decision and that the Decision is not consistent with local needs under the Chapter 40B and its regulations.

18. Applicant objects to the Decision because certain of the conditions imposed cumulatively render the project uneconomic, in violation of G.L. c. 40B, s. 20 and 22, and the regulations promulgated pursuant thereto.

19. Applicant further objects to the Decision because it fails to apply local requirements and regulations as equally as possible to Subsidized and Unsubsidized Housing.

20. Without waiving the generality of the foregoing, Applicant objects to the denial of certain requested waivers from local bylaws, rules and regulations.

21. Without waiving the generality of the foregoing, Applicant further objects because the Decision imposes certain post-permit approvals by Town officials.

22. Without waiving the generality of the foregoing, the Applicant objects to the following conditions (the numbers below correspond to the Condition numbers in the Decision), inclusive of conditions contained in Section A of the Decision as to the number of approved units in light of the extensive conditioning of the Project and:

Condition C.1.a requires that prior to construction or any site development, whether or not the work requires a building permit, that Applicant to deliver a "reasonable amount" as determined by the Director of Planning and Community Development. While the initial amount is to be no greater than $6,500, the Director of Planning and Community Development at any time may require additional funds without limitation on amount. The use of such funds is stated to hire civil engineers, traffic engineers and/or other professionals beyond municipal staff. The condition is not consistent with any municipal fee schedule established by bylaw or regulation; and allow for fees to be set on an *ad hoc* basis by the Director of Planning and Community Development.

Condition C.1.d requires the Applicant to submit a landscaping plan for all non-wetland/non-buffer areas, which prohibits the use of non-cultivar plantings. There is no local regulation or bylaw that restricts the use of cultivars and it is not believed that such restriction has been imposed on other residential projects. Condition C.1.d also seeks to impose requirements within Applicant's contract with a management company.

Condition C.1.e as written references post-40B permit written approval by the Conservation Commission prior to pruning or removing revegetation

in a resource area protected under the local wetlands bylaw as well as in-kind replacement and requires the information to be submitted as would be required under a notice of intent for wetland vegetation work under the local wetlands bylaw, and contradicts the one-stop permitting under Chapter 40B.

Condition C.1.f requires submission of a Compensatory Flood Storage Mitigation Plan for the Board's review and approval, with requirements that the plan include a 3 year monitoring schedule, annual submission of monitoring reports to the Board and, if plant survivorship is less than 80% at the third year, the Applicant is required to annually monitor and replant without limitation in time.

Condition C.1.g requires Applicant to prepare an Invasive Species Management Plan for work in wetland areas or the 100 foot buffer and requires monitoring reports to be submitted to the Board, unlimited in terms of frequency or time.

Condition C.1.h requires the applicant to be responsible for all applicable sewer permit, capacity permit and privilege fees, but does not limit such sewer permit, capacity permit and/or privilege fees to be those fees that were established by a duly enacted bylaw or regulation as of the date of the Comprehensive Permit application.

Condition C.1.i requires the applicant to be responsible for all applicable water and sewer system fees as per officially promulgated fee schedules. This condition, however, does not clarify that the water or sewer system fees are those set forth in an officially promulgated fee schedule as of the date of the Comprehensive Permit application.

Condition C.1.k requires that if the Applicant and the Town do not enter into a Memorandum of Understanding with respect to the 12 acres of the property that is not to be developed, that the Applicant submit a report

regarding site clean up operations together with a reporting of the costs incurred by the Applicant.

Condition C.1.l requires that if the Applicant and the Town do not enter into a Memorandum of Understanding with respect to the 12 acres of the property that is not to be developed, that the Applicant must have a Phase I site assessment performed, provide the Board and the Director of Community Development with a copy of the same and escrow $100,000 with the Director of Planning and Community Development.

Condition C.1.m requires that if the Applicant and the Town do not enter into a Memorandum of Understanding, the Applicant is required to file a Phase II Environmental Investigation upon the full site if the possible presence of oil or hazardous materials is indicated within the Phase I and that the costs of the investigation and any cleanup are solely borne by Applicant.

Condition D.1 requires that prior to commencement of any work, and in addition to a town staff pre-construction meeting, the Applicant and the general contractor also host a public meeting to review construction hours, schedules and "other neighborhood impacts" at least 14 days prior to start of construction and that the meeting is to be noticed as if under M.G.L. c.40A, Section 11.

Condition D.10 requires that lighting installed on site conform to the Zoning Bylaw and Town Bylaw, but it fails to clarify that such requirements are those bylaw provisions as in place at the time of the Comprehensive Permit application.

Condition D.23 requires that Applicant comply with DPW requirements regarding curb cuts, but fails to clarify that the requirement must be established by bylaw or regulation in effect at the time of the permit application.

Condition D.28 recognizes that the Comprehensive Permit is a master permit; it requires Applicant to pay "all local fees for such permits or approvals as published in the Town regulations or bylaws applicable to the Project, but does not clarify that such published permit fees are those that there in effect as of the date of the Comprehensive Permit application.

Condition D.29 requires that construction staging occur off-site and grants the Director of Inspectional Services post-permit approval authority as to the location of the off-site staging.

Condition E.1.f; E.1.g; E.1/h – requires that in the absence of an Memorandum of Understanding entered into between Applicant and the Town, the Applicant enter into a Conservation Restriction for conservation and public passive recreation, which Conservation Restriction is to be reviewed by the Board. Condition E.1.h further requires an escrow be held by the Director of Planning and Community Development to be funded $25,000 annually for ten years. While the Applicant offered to establish an annual account to be used for maintenance of the area, the Comprehensive Permit requires the money to be escrowed within the Department of Planning and Community Development, without assurance as to how said monies may be withdrawn and gives the town department unfettered discretion.

Condition E.3 imposes an additional post-development monitoring study to be performed by Applicant regarding traffic on local streets, and that the study be submitted to the Transportation Advisory Committee ("TAC"), and thereafter to be reviewed and approved by the TAC and the Select Board. The condition also requires the Applicant to cooperate with the Town to implement post-comprehensive permit traffic calming measures approved by the TAC and Select Board.

Condition F.9 requires the Applicant to charge a monthly fee, at market

rates, for parking within the garage or upon the surface parking areas associated with the senior rental building, regardless of whether the tenant is a market rate tenant or a qualifying low or moderate income tenant.

Condition F.11 requires the Applicant's property manager to review, on a quarterly basis, parking requirements and to adjust parking designations/ allocations as between tenants, guests and staff.

Condition I.25 requires that all plant species planted and/or invasive species removed must be monitored for three years and that if the survival rate is less than 80%, Applicant must submit for Board review and approval a replacement plan.

Condition I.28 permits only "limited activity" between 50 and 75 feet from a wetland resource area, potentially in contravention of the approved plans and also requires "mitigation" for any work from 50 to 100 feet, imposing post-permit conditions and presumably approvals.

Waiver Denial 6 rejected to waive a bond under Article 8, Section 11 (Bond to Secure Corrections of Flooding Conditions) and imposed a bond of $173,900.00, which is not in accordance with any published fee schedule in effect at the time of the application.

IV. Prayers for Relief

WHEREFORE, the Applicant prays that the Housing Appeals Committee issue the following relief:

1. Make final the "Interlocutory Decision Regarding Safe Harbor" dated October 15, 2019.

2. Order that the Comprehensive Permit be modified by eliminating the conditions objected to by the Applicant and by granting the waivers as requested by the Applicant.

Such other relief as this Committee deems just and equitable.

Dated: December 21, 2021

Respectfully submitted,
Arlington Land Realty, LLC
By its attorney,

/s/ *Stephanie A. Kiefer*

Stephanie A. Kiefer (BBO #567341)
Smolak & Vaughan LLP
21 High Street, Suite 301
North Andover, MA 01845
Tel: 978-682-5220
skiefer@smolakvaughan.com

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

HOUSING APPEALS COMMITTEE

DOCKET NO. 2021-

In The Matter Of:	)
	)
ARLINGTON ZONING BOARD OF APPEALS	)
	)
and	)
	)
ARLINGTON LAND REALTY, LLC	)
	)

Now comes the Appellant, Arlington Land Realty LLC, and moves pursuant to 760 CMR 56.06(4)(f) that the full filing fee in this matter be reduced to the minimum $1,500.00. In support of this motion, Appellant states as follows:

1. Under Standing Order 08-01, the full filing fee would be $9,330.00, for a 136-unit project.

2. The Appellant submits that there are special circumstances applicable to support a reduction of this amount to the minimum filing fee of $1,500.

3. The Appellant is hopeful that a resolution of this matter can be reached without the need for the Committee to conduct a full hearing on the merits and that the Applicant and the Board participate in a mediated resolution without the necessity of substantial time or resources of the Committee.

4. The granting of the Motion would therefore be in the public interest and result inmore money being available to advance the approved project.

Respectfully submitted,
Arlington Land Realty, LLC
By its attorney,

/s/ *Stephanie A. Kiefer*

_____

Stephanie A. Kiefer (BBO #567341)
Smolak & Vaughan LLP
21 High Street, Suite 301
North Andover, MA 01845
Tel: 978-682-5220
skiefer@smolakvaughan.com

Dated: December 21, 2021