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M E M O R A N D U M

TO: **The Honorable South Kingstown Planning Board**
James Rabbitt, Director of Planning
Jason Parker, Principal Planner

FROM: **Peter F. Skwirz, Special Legal Counsel**

DATE: **December 3, 2020**

SUBJECT: **Integration and compatibility of LMI Units, Village at Curtis Corner**

I. Introduction –

During the December 1, 2020, consideration of the Village at Curtis Corner preliminary plan application, two questions arose regarding the integration and compatibility of Low to Moderate Income (LMI) Units in the development. Both questions centered on the fact that the development would consist of both duplexes and single-family homes, and all of the proposed LMI units would be placed in one half of a duplex, while all of the single-family homes would be market rate. First, the Board inquired into whether it could require the applicant to designate some of the single-family homes as part of the 25% LMI, as a condition on the preliminary plan approval, or whether the Board was required to allow all of the LMI units to be placed in duplexes, based on the master plan approval. Second, the question arose as to whether, under the LMI Housing Act, the individual LMI units must be compatible in scale and architecture to other market rate duplex units, or whether the duplexes as a whole must be compatible in scale and architecture to the single-

family homes, or whether the LMI units must be compatible in scale and architecture to the single-family homes. This memorandum is addressed to both of those questions. The short answer to the first question is that the Board cannot alter the placement of LMI units in the duplexes at this stage of review. The short answer to the second question is that the LMI units must be compatible with both the market-rate duplex units and the single-family homes.

II. Based upon the master plan decision, the Board cannot require the applicant to restrict a portion of the single-family homes as LMI units in order to achieve integration.

As the Board is aware, the Rhode Island Land Development and Subdivision Review Enabling Act divides the review of major subdivisions and land developments into multiple stages. The first stage where Planning Board approval is required is master plan review. RIGL 45-23-32(23) defines the master plan as "[a]n overall plan for a proposed project site outlining general, rather than detailed, development intentions. It describes the basic parameters of a major development proposal, rather than giving full engineering details." The second approval stage is preliminary plan review. RIGL 45-23-32(35) defines the preliminary plan as "[t]he required stage of land development and subdivision review which requires detailed engineered drawings."

The reason for dividing review into these stages is to avoid the cost and time of producing and reviewing detailed engineering plans, for both the applicant and the Board, if there is some aspect of the overall concept that is a nonstarter. The other side of that coin is that, if an applicant obtains master plan approval, the applicant can take on the expense of having detailed engineering plans done, while relying on the fact that the overall concept of the application is approved and vested pursuant to RIGL 45-23-40(g). Pursuant to that statute, "[m]aster plan vesting includes the zoning requirements, conceptual layout, and all conditions shown on the approved master plan drawings and supporting materials." That is not to say that some aspects of the plan cannot change

at the preliminary plan stage, if the detailed engineering plans reveals a new reason why the plan must change. But, barring a newly discovered engineering impediment, the Board cannot revisit the aspects of the overall concept that were reviewed, approved, and vested at the master plan stage.

When considering a comprehensive permit application, the overall density, the number of LMI units, and the manner of providing the LMI units are all matters to be considered in the overall concept of the plan. These considerations are often essential to the economic viability of a proposal, which is why these major details are best addressed upfront, before the applicant produces and the Board considers the detailed engineering plans for the proposal. If an applicant failed to include these details in a comprehensive permit master plan application, the application would be incomplete. Without this information, the Board would not be able to make the finding required by RIGL 45-53-4(a)(4)(v)(C), which must be made for master plan approval of a comprehensive permit, that "[a]ll low and moderate income housing units proposed are integrated throughout the development."

Using a somewhat recent example to illustrate the point, on September 26, 2018, the Board issued a decision granting master plan approval for Fieldstone Farms, a comprehensive permit application that proposed 39 market rate single-family units and thirteen accessory apartment LMI units. In considering the Fieldstone Farm master plan proposal, the Board determined that placement of all the LMI in accessory units did not achieve the integration required by statute. Therefore, the Board put an explicit condition on the master plan approval that it did "not approve the provision of LMI Housing as accessory apartments. Therefore, the applicant shall submit a preliminary plan set which depicts the minimum of twenty-five percent of the single-household detached structures as deed-restricted LMI housing." With this condition on the master plan, the

Fieldstone Farms applicant chose not to proceed with the engineering required for preliminary plan, but instead appealed to the State House Appeals Board (SHAB). Of note, on appeal to SHAB, the Fieldstone Farms applicant argued that this condition should not have been addressed at the master plan stage and we opposed the applicant on that argument. Although a decision has not been rendered on that appeal yet, legal counsel for SHAB opined at oral argument that such conditions can and should be addressed at the master plan stage of review and should not wait until the preliminary plan stage.

Turning to the Village at Curtis Corner application, it appears that the integration concern of placing all of the LMI units in the duplexes was raised and addressed at the master plan stage. The minutes of the January 28, 2020 meeting, attached as **Exhibit A**, reflects the following exchange between Board member Murphy and Attorney Kenyon:

> "Mr. Murphy inquired if the affordable units will be spaced proportionally between the market rate and duplex structures and Mr. Kenyon indicated that those units would be within duplexes and would be confirmed at a later date. Mr. Murphy also asked if the affordable units would be constructed in the same size and finish as the market rate units and Mr. Petrucci indicated that from the outside there would be no difference in construction materials but that the market rate units are intended to have larger square footage. Mr. Murphy indicated that affordable units should meet the required standards for compatibility and integration."

At the February 25, 2020 meeting, the minutes of which are attached as **Exhibit B**, Attorney Kenyon again reiterated that there would be "one LMI unit per duplex building." The Board proceeded to approve the master plan submission without rejecting Attorney Kenyon's proposal. In approving the master plan, the Board found that "[t]he eight (8) low- and moderate-income housing units are integrated throughout the development, and are compatible in scale and architectural style to the market rate units within the project and with all required Conditions of Approval will be built and occupied prior to, or simultaneous with, the construction and occupancy

of market rate units." But, unlike for the Fieldstone Farms approval, the Board did not place a condition on the Village at Curtis Corner master plan approval requiring the applicant to alter its original proposal for placement of the LMI units.

One likely explanation for this series of events, where the proposed LMI placement was questioned in January and master plan approval issued without addressing that concern in February, is that the Affordable Housing Collaborative (AHC) gave a positive recommendation for the proposal after the January meeting and before the February meeting. That recommendation is attached as **Exhibit C**. In the recommendation, the AHC concluded that the duplex proposal presented an "innovative approach" that was "consistent with the requirement for affordable housing units to be compatible with market rate units."

One final issue is that, in condition 4 of the Village at Curtis Corner master plan approval, the Board required that the "[p]roposed LMI Housing units shall be integrated throughout the development, shall be compatible in scale and architectural style to the market rate units within the project, and they shall be built and offered for occupancy simultaneously with the construction and occupancy of the market rate units." The question arose at the recent 12/1/20 Board meeting of whether this condition in the master plan allows the Board to revisit at the preliminary plan stage the placement of LMI units in duplexes. In our opinion, it does not.

Unlike the Fieldstone Farms conditional approval, which explicitly rejected the applicant's proposal with regard to placement of LMI units, condition 4 of this master plan approval does not reject or address the applicant's proposal at master plan to have the LMI units placed in the duplexes. Instead, condition 4 requires the applicant to follow the statutory compatibility and integration requirements in the preliminary plan proposal. Condition 4 is best understood as addressed to aspects of LMI housing that were not raised in the master plan proposal, such as

bedroom count, unit size, architectural renderings, *etc*. Because the applicant expressly proposed placing the LMI units in the duplexes as part of the master plan proposal, and the Board approved the master plan without rejecting that aspect of the proposal, that aspect of the applicant's proposal is vested pursuant to RIGL 45-23-40(g). Because the engineering plans produced at the preliminary plan stage have not introduced a newly discovered engineering reason to not place the LMI units in the duplexes, the Board cannot now reconsider this issue at the preliminary plan stage.

III. The LMI units must be compatible with all market rate units in the project, including both the duplex market rate units and the single-family market rate units.

In addition to the requirement of integration of LMI units, RIGL 45-53-4(a)(4)(v)(C) requires that "[a]ll low and moderate income housing units proposed" must be "compatible in scale and architectural style to the market rate units within the project." The question presented is what the comparators are when making the determination of compatibility. This question is answered by the text of the statute. On one side of the ledger is "[a]ll low and moderate income housing units." This means that the LMI units themselves must be judged for compatibility, not the duplexes in which the LMI units are located. The LMI units must be compared to "the market rate units within the project." The statute does not allow for the LMI units to only be compared to a subcategory of market rate units in the project. Instead, the LMI units must be compared to all of the market rate units in the project, including both the market rate units in the duplexes and the market rate single-family homes.

In making this comparison, the statute does not require the LMI units and the market rate units to be ***equal*** in size, scale, or architecture. Instead, the statute requires that the LMI units and market rate units be ***compatible***. The LMI Housing Act does not define compatibility, so an ordinary dictionary definition of this term should be applied. Merriam-Webster defines

"compatible" as "capable of existing together in harmony." Therefore, in order to make a positive finding on this prong, the LMI units must fit harmoniously with both the market rate duplex units and market rate single-family homes. This doesn't mean that the LMI units must be exactly the same size as all of the other market rate units. But it does mean that the LMI units should not stick out or be treated as less important than the market rate units. For instance, if all of the market rate single-family homes have at least three bedrooms and two bathrooms to accommodate a family with children, the Board could reasonably conclude that the LMI units should not be restricted to having fewer bedrooms or one bathroom and, thus, not be suitable for a family. If the Board determined that presented a concern when comparing LMI duplex units to single-family units, the Board could impose a condition to address that concern, in order to make a positive finding on RIGL 45-53-4(a)(4)(v)(C).

Finally, determining whether the LMI units are compatible or harmonious with the market rate units in a development is not reducible to a bright-line test. Therefore, making this comparison requires the exercise of judgment and discretion by the Board. The Board should exercise this discretion in light of the stated purpose of the LMI Housing Act, which is "to provide for housing opportunities for low and moderate income individuals and families in each city and town of the state." See RIGL 45-53-2; Grilli, *et al.*, v. Atlantic East, *et al.*, P2-2009-7122, P2-2009-7095 (R.I. Super. Ct., filed Feb. 10, 2012). In that case, which is the only published Rhode Island case that sheds light on this question. Judge McGuirl affirmed SHAB's decision to overturn the Narragansett Planning Board's denial of a proposed development containing LMI housing. In affirming SHAB's decision, the Court noted that the Act does not define the term "integration," and that this term should be interpreted in light of the Act's stated purpose, which is to promote affordable housing. The same can be said for the term "compatible."