Office of the

LITTLETON BOARD OF APPEALS

Petitioner:	M & M Realty Trust
Property Address:	EAU 19/20 Dean Lane
Case No:	22-962
Date Filed:	July 19, 2022

The Littleton Board of Appeals (the "Board") conducted a public hearing on August 18, 2022 at Shattuck Street Municipal Building, 37 Shattuck Street, Littleton, MA on the petition of M & M. Realty Trust, Matthew Field, Trustee, (hereinafter "Petitioner"), on an appeal from a written order of the Building Commissioner denying a building permit for EAU 19/20 Dean Lane, pursuant to Section 173-6 of the Littleton Zoning Bylaw. Notice of the hearing was given by publication in the Lowell Sun, a newspaper published in Acton and circulated in Littleton, on August 4, and August 11, 2022 and by mail to all abutters and parties in interest. Present and voting were Sherrill Gould, Chair, Cheryl Cowley Hollinger, Vice Chair, John Sewell, Rod Stewart, Members and Kathleen O'Connor, Alternate. Present but not voting were Eli Constantinou, Alternate. John Field, Member, recused himself and did not participate in discussion.

The following persons were present and appearing for the parties:

Jennifer Platt, attorney for Petitioner

Matthew Field, Trustee representing Petitioner

Ed Mullen, Building Commissioner

Planning Board members: Mark Montanari, Anna Hueston, and Jeff Yates

Town Counsel, Christopher Heep, requested by the ZBA to be available to answer legal questions.

The petitioner, represented by Atty. Jennifer Platt, presented the argument that the Petitioner had obtained a Special Permit from the Littleton Planning Board in March, 2017, to develop what is commonly referred to as the Couper Farm Development (Development). The original plans, as revised, included a certain number of unrestricted units (not relevant to this appeal) and 16 age restricted units permitted pursuant to the then applicable "Over 55 Senior Residential Housing Bylaw", which contained provisions for 25% of the units to be affordable, as that term was defined in the Bylaw and pursuant to the Department of Housing and Community Development (DHCD) definition of affordability. (See Article XXIII, Over 55 Housing Developments (Added 11-8-2005 STM, Art. 4)), (hereinafter "Housing Bylaw"). The Petitioner stated that although the Special Permit granted by the Planning Board for this Over 55 Housing Development did not specifically require any affordable units, the Zoning Bylaw then in effect required Petitioner to provide 4 affordable units pursuant to the requirement of 25% of the 16 units to be affordable. (The Housing Bylaw was subsequently amended in the Fall of 2017.)

After constructing 15 units, the Petitioner applied for a Building Permit to construct the 16th unit in the Development on or about July 7, 2022. At this time, Petitioner had constructed three (3) affordable units within the Over 55 Housing Development.

The Building Division denied the application stating that the 16th unit must be built as an affordable unit, and that an earlier issued permit for the same lot "is on hold until we receive conformation (*sic)* from the Planning Board the Special Permit is complied with." (Ed Mullen). Petitioner appeals that decision of the Zoning enforcement officer.

The primary dispute is over the manner in which the required "affordable units" for the Over-55 Housing Development have been calculated and whether or not Petitioner has fulfilled the requirement to provide 4 affordable units.

Petitioner's counsel argued that Petitioner had negotiated with the Select Board of the Town for Petitioner to convey an existing farm house to the Town. Pursuant to a Host Community Agreement dated April 25, 2016, the Petitioner was required to: "Donate the existing residential home in the Couper family memory to the Littleton Housing Authority or Habitat for Humanity for affordable housing for a DHCD eligible family, or for such other public use as determined by the Town which use shall not be detrimental to the proposed residential development. In addition, and at the Town's discretion, (i) the existing residential structure may remain in its current location or be relocated to Open Space Area 'A', 'B', or 'E', to another location in Town or may be demolished." This existing residential home is not located within Petitioner's Over-55 Housing Development and is not mentioned in the Planning Board's permit authorizing that development. As described in more detail below, the Petitioner and the Select Board thereafter amended the Host Community Agreement on May 14, 2021 to allow Petitioner to pay the sum of $350,000 for the exclusive use of the Littleton Affordable Housing Trust in lieu of conveying the house to the Town.

The Planning Board argued that the agreement with the Town relating to the farm house was an agreement with the Select Board separate and distinct from the Special Permit granted by the Planning Board and the Zoning Bylaw; that the Select Board had no authority to modify or alter either the Planning Board Special Permit decision or the provisions of the Bylaw then in force. They also added that the farmhouse could not be counted as one of the "affordable units" under the Bylaw due to the fact that it was not one of the 16 permitted units in the Development; that it was not built pursuant to the Bylaw provisions as to size and layout; and it was not marketed pursuant to the DHCD's marketing requirements for affordable units. They further argued that even if the farmhouse were counted toward the 25% affordability, the addition of another unit now would create a 17 unit development, of which 25% must be affordable and by virtue of rounding, (which DHCD regulations require) this unit must also be affordable.

Petitioner's counsel introduced into evidence a copy of the Planning Board Special Permit, the Bylaw provisions in effect, a copy of the Host Community Agreement negotiated with the Select Board for the donation of the farmhouse, (together with the amendment), and a copy of the Planning Board minutes of October 2, 2019, which minutes reflected that Planning Board had voted positively on a Motion "…to accept the (farm)house as a count on the affordable units in the Couper Farm Development, once the definition of habitable is agreed upon by the BOS (Board of Selectmen) with the exception of the septic." At the time of this vote, the Petitioner

was obligated under the terms of the Host Community Agreement to convey the house to the Town.

Evidence was then presented that by 2020, Petitioner had completed construction of 15 age restricted units, three of which were built and marketed as "affordable units"; Petitioner had renovated the farmhouse to the satisfaction of habitability; and Petitioner had physically delivered a deed of the farmhouse to the Town through the Select Board. Petitioner's counsel argued that those actions fulfilled their obligations to the Town to build 4 affordable units in the Couper Farm Development as required by the Bylaw and their obligations to provide 4 "affordable units" should have ended with those actions.

Sometime in 2021, on request of the Petitioner, whose family member was occupying the farmhouse, the Petitioner asked the Select Board if they would accept a cash payment in lieu of the Petitioner conveying the farmhouse to the Town under the existing terms of the Host Community Agreement. The evidence presented indicated that the Select Board (and not the Planning Board) agreed it would be beneficial to have cash in lieu of ownership of the house, based in part on anticipated obligations to complete renovations and the cost to the Town of constructing a septic system for the farmhouse. After negotiation, the Petitioner and the Select Board agreed that the Petitioner would pay $350,000.00 to the Town's Affordable Housing Trust in exchange for the deed to the farmhouse. The payment was made, the deed was returned, and a Modification to the Host Community Agreement was executed by the Select Board on May 14, 2021. The Petitioner argues that the payment of money in lieu of the deed to the farmhouse satisfies all of the obligations of Petitioner to deliver the 4th "affordable unit".

A discussion ensued including Town Counsel's summary of the timeline and history of the project for the Board's benefit. The Building Commissioner stated that he acted on direction of the Planning Board in denying the permit. The Planning Board introduced into evidence a letter supporting their position. The Planning Board represented by Chair, Mark Montanari, and member, Jeff Yates, stated that in their opinion, the next unit to be built in the Development had to be an affordable unit. They argued that an agreement with the Select Board to substitute cash in lieu of an affordable unit was not approved as a modification to the Planning Board Special Permit. They argued that the farmhouse could not have served as an age restricted unit, pursuant to the Bylaw. Therefore the agreement and modification with the Select Board was irrelevant to, and separate and distinct, from the Planning Board Special Permit. (It was presented by Planning Board and Town Counsel that the Host Community Agreement predated the Planning Board Special Permit for the Development, and that the proffered donation of the farmhouse at that early stage was negotiated in connection with the Select Board waiving a right of first refusal to purchase the underlying land under M.G.L. Chapter 61A; which was the impetus to the Developer and the Town to allow the purchase the land free of the agriculture lien and developing it however they could through a Planning Board permitting process.)

Abutters to the Development and the lot in question were in attendance. One Abutter stated that the community of residents preferred to see the construction of a market rate unit on the available lot.

The hearing was closed and deliberations ensued.

FINDINGS: The Board made the following findings:

1. The Fields had not satisfied their obligation to provide 25% affordability under the Zoning Bylaw in existence when they obtained their Development permit.

2. That the agreement for the farmhouse was not a part of the Planning Board Special Permit and could not serve to satisfy the requirements of the Bylaw for 16 age restricted units, 4 of which had to be built and marketable as affordable.

3. That even if one were to accept the argument that the Petitioner had reasonably relied on the Planning Board motion to count the farmhouse as an affordable unit, then the farmhouse counts as the 16th unit and the request for a building permit for EAU 19/20 constitutes a 17th unit, requiring the Petitioner to build an additional affordable unit to reach 25% under the practice of "rounding" which DHCD requires.

DECISION: The Board voted unanimously to DENY, the Petitioner's appeal of the Building commissioner's denial of the Building permit

Appeals, if any, shall be made pursuant to M.G.L. C. 40A, Section 17 and shall be filed within twenty (20) days after the date of filing of this Decision in the office of the Town Clerk.

Signed: Sheila K. Gould Chairperson

Date: August 31, 2022

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I herby signify that twenty (20) days have elapsed since the filing of the above Decision by the Board of Appeals and that no appeal concerning said decision has been filed or that any appeal that has been filed has been dismissed or denied.

True Copy Attest: _____ Town Clerk, Littleton, Massachusetts