



Massachusetts Housing Finance Agency
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December 10, 2021

VIA EMAIL: gengler@s-e-b.com
AND FEDERAL EXPRESS

Mr. Geoffrey Engler
SEB Wellesley, LLC
257 Hillside Avenue
Needham, MA 02494

Re: 136-140 Worcester Street, Wellesley
Project Eligibility/Site Approval
MassHousing ID No. 1025

Dear Mr. Engler:

I write regarding the Application for Chapter 40B Project Eligibility/Site Approval for MassHousing-Financed and New England Fund (“NEF”) Rental Projects (the “Application”) that you submitted on behalf of SEB Wellesley, LLC (“SEB”) to the Massachusetts Housing Finance Agency (“MassHousing”) in connection with your proposal to build 64 rental units at 136 & 140 Worcester Street in Wellesley, Massachusetts (the “Application,” “Project,” and “Property,” respectively). For the reasons set forth herein, MassHousing hereby revokes the Project Eligibility Letter (the “PEL”) for the Project and concludes that the Project is not eligible for MassHousing’s final written approval pursuant to 760 Code Mass. Regs. 56.04(7) (“Final Approval”).

Massachusetts General Laws c. 40B, §§ 20-23 (“Chapter 40B”), promotes responsible housing growth by creating a streamlined permitting process for eligible projects that utilize subsidized financing to meaningfully accommodate lower-income residents. As the Supreme Judicial Court has recognized, Chapter 40B was enacted to address an acute shortage of decent, safe, low and moderate cost housing throughout the Commonwealth. The success of Chapter 40B projects is of critical importance to the Commonwealth of Massachusetts as it has, since its enactment, supported the vast majority of affordable housing construction in Massachusetts outside of our

largest cities.

MassHousing is an independent, quasi-public agency charged with providing financing for safe, affordable housing in Massachusetts. MassHousing takes its mission very seriously, and integrity is among the core values that guide our culture. Indeed, some of the functions that MassHousing performs with respect to the Chapter 40B process are designed to prevent fraud and ensure compliance with the complex regulations governing Chapter 40B projects. Chapter 40B developers must strictly comply with the statute and applicable regulations, including adherence to affordability restrictions and limitations on profits and dividends. Accordingly, MassHousing must be able to rely on developers to be truthful and forthright throughout the process.

On May 8, 2018, Dean Behrend submitted an application on behalf of Riverview Crossing, LLC for Project Eligibility/Site Approval for the Project. The application listed you as the “Secondary Contact” and indicated Mr. Behrend had retained you as a “40B Consultant” for the Project. On December 14, 2018, MassHousing denied Mr. Behrend’s application. MassHousing based its denial on Mr. Behrend’s lack of candor and forthrightness that MassHousing expects and requires from applicants for Chapter 40B Project Eligibility.

On February 13, 2019, two months after MassHousing denied Mr. Behrend’s application, you submitted an application for Project Eligibility/Site Approval on behalf of SEB for the same Project and Property (the “Application”).^{1/} Prior to submitting the Application, you and Mr. Behrend executed (1) a Purchase & Sale Agreement that transferred interest in the Trust Parcel to SEB (the “P&S”), and (2) an Assignment that transferred Behrend Construction’s interest in the Cartwright P&S to SEB (the “Assignment”). You supplied these documents to MassHousing to establish site control of the Property.

In your cover letter submitted to MassHousing along with the Application, you represented that:

The previous applicant (Riverview Crossings, LLC — Dean Behrend, Principal) does not have any membership or financial interest in SEB Wellesley, LLC and **is no longer involved in the development process.**” (Emphasis added).

^{1/} The Property consists of two parcels: (1) 136 Worcester Street (the “Trust Parcel”); and (2) 140, 140R and 142 Worcester Street (the “Cartwright Parcel”). At the time of his application on behalf of Riverview Crossing, LLC, Dean Behrend controlled the Trust Parcel as trustee for the Worcester Road Realty Trust (the “Trust”) which owned it. As to the Cartwright Parcel, Mr. Behrend executed a Purchase and Sale agreement, on behalf of Behrend Construction, LLC (“Behrend Construction”), with the current owner (Mr. Cartwright) pursuant to which the deed would be delivered to Behrend Construction after Mr. Behrend obtained all permits required to construct the Project (the “Cartwright P&S”).

However, on March 11, 2019, you, on behalf of SEB, and Mr. Behrend, on behalf of himself, the Trust, and Behrend Construction, executed a Development Agreement with respect to the Project which was, pursuant to its terms, effective February 11, 2019 (two days prior to the date of the Application and the date the Assignment was executed). The Development Agreement reveals that, despite your representation to the contrary, Mr. Behrend was still involved in the development process for the Project. You did not, however, disclose the Development Agreement or Mr. Behrend's involvement to MassHousing.^{2/}

The Development Agreement provides, among other things, that:

- “Owners [which are defined to include Mr. Behrend, on behalf of himself, the Trust, and Behrend Construction] are desirous of obtaining a so-called comprehensive permit (the “Permit”)... in order to allow Behrend Construction to construct... the [Project].”
- “SEB is willing to undertake the permitting process and the Owners are willing to allow SEB to do so, under the terms and conditions of this Agreement.”
- “SEB will diligently pursue the Permit, as well as all other permits and approvals up to and through the issuance of the Comprehensive Permit, and specifically excluding any post Comprehensive Permit obligations and responsibilities including but not limited to any final approval by MassHousing (the “Entitlements”)... .”
- “SEB will consult with the Owners and the Owners will participate in design decisions and other matters that may arise during obtaining the Entitlements.”
- “The Owners shall pay all of SEB’s fees... as well as reasonable third-party expenses in connection with the Entitlements including, without limitation, architectural design, civil design, traffic study and any and all consultative services required as well as any legal services and any cost of defending or prosecuting an appeal.”
- Mr. Behrend retained the right to “abandon the Development”; “elect not to proceed with the Development”; and “direct SEB to cease the Permit Process”.
- The Owners, specifically Behrend Construction, would “review and approve” proposals from two engineering firms for “all necessary site planning and civil engineering related work” and “all necessary landscape architecture and site planning related work,” as well as “review and consider all other proposals for other disciplines (e.g. architectural, environmental, etc.) recommended by SEB.”

^{2/} Counsel for the Town of Wellesley provided a copy of the Development Agreement to MassHousing after the Town discovered it in and attached to a lawsuit filed by SEB Wellesley against Mr. Behrend over unpaid fees, allegedly due under the Development Agreement. *See SEB Wellesley LLC vs. Behrend, Dean F. et al.* Norfolk Superior Court, 2182CV00687.

- Upon receipt of the Comprehensive Permit, SEB agreed to “transfer all of SEB’s right, title and interest in and to the Permit to Behrend Construction or an entity to be designated by Behrend Construction.”
- SEB and Mr. Behrend agreed to cancel and reassign the P&S and Assignment used to establish site control if (a) the Comprehensive Permit issued, or (b) if the ZBA denied Comprehensive Permit and such denial was affirmed on appeal.

Your statement that “the previous applicant (Riverview Crossings, LLC — Dean Behrend, Principal) ... is no longer involved in the development process,” is inconsistent with the terms of the Development Agreement. In short, pursuant to your Development Agreement, SEB agreed to pursue a Comprehensive Permit for Mr. Behrend and entities that Mr. Behrend controlled to allow Behrend Construction to construct the Project, and you agreed to cancel the P&S and Assignment through which you established site control if the Comprehensive Permit issued, and to transfer the Comprehensive Permit to Behrend Construction or an entity to be designated by Behrend Construction. Mr. Behrend further retained the right to participate in design decisions and “other matters that may arise during obtaining the Entitlements” and review and consider proposals for architectural and environmental work. Mr. Behrend also agreed to pay, “directly,” fees of Project consultants. None of these rights and duties are consistent with your representation that “the previous applicant (Riverview Crossings, LLC —Dean Behrend, Principal) ... is no longer involved in the development process.” As SEB itself alleges in its Complaint against Mr. Behrend, “SEB agreed to undertake the permitting process pertaining to Owner’s [(Behrend, the Trust, and Behrend Construction)] proposed development of [the Property.]” *SEB Wellesley LLC vs. Behrend, Dean F. et al.* Norfolk Superior Court, 2182CV00687, Complaint ¶ 5.

On May 17, 2019, MassHousing issued the PEL to SEB for the Project. After explaining that we had previously denied Mr. Behrend’s application due to concerns related to his qualifications and capacity, the PEL states:

MassHousing’s review of the Project as proposed by SEB Wellesley, LLC is conditioned upon the previous applicant no longer having any membership, financial interest, or involvement in the Project.

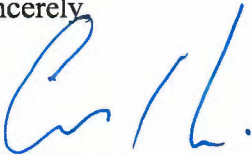
The Development Agreement demonstrates that Mr. Behrend remained involved in the Project and had financial interest in the Project continuing through the date of the PEL. Therefore, the condition was not satisfied. Nevertheless, on May 24, 2019, SEB filed an application for a Comprehensive Permit with the Town, without disclosing the Development Agreement to MassHousing.

We further understand that, on January 30, 2020, you and Mr. Behrend executed an amendment to the Development Agreement. The amendment does not remedy the issues addressed herein.

As amended, the Development Agreement provides that SEB “will transfer all of SEB’s right, title, and interest in and to the [Comprehensive Permit] to an entity to be designated by the Owners. Said entity which must be an unrelated third party in which the Owners, and any of their affiliates have absolutely no financial interest, shares, management interest or membership interest whatsoever (the “Third Party Entity”).” SEB would have the obligation to transfer the Comprehensive Permit once, among other things, “the Owners and the Third Party Entity have consummated the transfer and sale of the Development from the Owners to the Third Party Entity.” With respect to the Property, the Amendment provides that, once Mr. Behrend paid fees to SEB and the Comprehensive Permit was transferred, among other things, “the Parties shall cancel and void the Trust P&S and shall effect an assignment to the Third Party Entity of [SEB’s rights under the assignment of the Cartwright P&S from Behrend Construction to SEB].” Thus, under the as-amended Development Agreement, you agreed to transfer the Comprehensive Permit and control of the Property so that Mr. Behrend could sell the Project to a third party. Accordingly, Mr. Behrend retained a financial interest and involvement in the Project.

For all of these reasons, MassHousing hereby revokes the PEL and will not grant final approval for the Project. Had you disclosed the Development Agreement to MassHousing in connection with the Application, MassHousing would not have issued the PEL for the Project.

Sincerely



Colin McNiece
General Counsel

cc: Thomas Harrington, Esq. (Counsel, Town of Wellesley) (tom@miyares-harrington.com)
Dean Behrend (behrendconstruction@verizon.net)
The Honorable Cynthia Stone Creem
The Honorable Rebecca L. Rausch
The Honorable Alice Hanlon Peisch