



November 20, 2023

BY HAND AND ELECTRONIC MAIL

Weston Zoning Board of Appeals
c/o Jane Fisher Carlson, Chair
11 Town House Road
Weston, MA 02493

Re: 269 North Avenue, Weston – Notice of Project Change (or Modification) and Request for Determination or Waiver

Dear Jane and Board Members:

As you know, this firm represents 269 North Ave, LLC (the “LLC”) in connection with the development of a 16-unit affordable rental project (the “Project”) at 269 North Avenue (the “Site”) under the Comprehensive Permit dated April 28, 2017 (the “Permit”) issued by the Weston Zoning of Board of Appeals (the “Board” or “ZBA”) to the LLC. In connection with the LLC’s efforts to secure a Building Permit, the LLC now seeks (i) minor or insubstantial project changes under 760 CMR 56.05(11)(a) and (ii) a determination compliance with a parking provision of the Zoning Bylaw or a waiver from it for the reasons discussed below.

Background

The LLC files this letter and supporting materials with the Board for two reasons. First, due to the roughly 45 prerequisites for the issuance of a Building Permit established in the Permit, the LLC was required to submit voluminous materials to numerous municipal officials and departments including the Health Agent, Department of Public Works, Fire Department, and Building Inspector for review and comment. In addition, the LLC was required to submit materials to a peer reviewer selected by the ZBA and Building Inspector and retained at the LLC’s expense (the “Weston Peer Reviewer”) who was charged with reporting on the Project’s compliance with (i) the Permit and (ii) various State Codes including, but not limited to, the State Building Code and Massachusetts Architectural Access Board Regulations. Given the voluminous materials provided and the multiple reviewing authorities, some changes to the plans approved in the Permit were virtually inevitable. In fact, however, despite this rigorous process, only a small number of minor changes to the plans are necessary. This NPC puts those changes before the ZBA for its consideration under process outlined in chapter 40B’s regulations, 760 CMR 56.00.

Second, at a public meeting of the Board on September 5, 2023, it was determined that the Project was not in compliance with Weston Zoning Bylaw (the “Bylaw”), § VIII.A.2, related



to parking. The discussion focused on the provision that, “Each parking space shall include space for maneuvering and for access to and from the parking area, shall be continually available and shall be not less than 350 square feet in area.” The “continual availability” of the tandem parking spaces for the eight townhouse units in Buildings C, D and E and whether 350 square foot requirement was met were both discussed. The LLC requests that the Board, based on the proposed changes, either now (i) find compliance with § VIII.A.2 or (ii) grant a waiver from § VIII.A.2.

Notice of Project Change (or Modification)

Accordingly, first, pursuant to 760 CMR 56.05(11)(a), this letter formally serves as the LLC’s Notice of Project Change (“NPC”) whereby the LLC “desires to change the details of its Project as approved by the Board...” Under § 56.05(11)(a), the Board has 20 days from the date of this letter to “determine and notify... [the LLC] whether it deems the change[s] substantial or insubstantial, with reference to the factors set forth at 760 CMR 56.07(4).”

Determination or Waiver Regarding Parking

Second, if the ZBA finds that the proposed changes related to parking are insubstantial or otherwise approves them, the LLC requests that the ZBA either (i) determine that the Project, as revised by the NPC, complies with the Bylaw, § VIII.A.2 or, in the alternative, (ii) grant a waiver from this provision of the Bylaw.

In support of this submission, the LCC submits the following:

Site Plans last revised 11/8/23:

- C2.00 Site Layout Plan
- C3.00 Grading and Drainage Plan
- C6.00 Emergency Vehicle Access Plan

Architectural Plans revised 8/23/23:

- C-6 Elevation I Building C
- D-6 Elevation I Building D
- C-2 Ground Floor Building C
- D-2 Ground Floor Building D

Turning Movement Diagrams all dated 10/18/23:

- SKC-001 Parking Area Plan
- SKC-002 Drive into/back out of westerly ADA space
- SKC-003 Back into/drive out of westerly ADA space
- SKC-004 Drive into/back out of easterly ADA space
- SKC-005 Back into/drive out of easterly ADA space



- SKC-006 Drive into/back out of easterly end space
- SKC-007 Back into/drive out of easterly end space

Copy of Planning Board Memorandum to Weston ZBA dated 10/5/23.

Excerpt of Final Project Review Letter, dated 3/8/17 from Ken Staffier of VHB to ZBA (“The ZBA Peer Review Letter”).

The LLC seeks the following minor changes: Seven changes to the Site Plan, one change to the Front Elevation and two changes to the Ground Floor of Buildings C and D for the reasons stated below:

Site Plan Note #	Change to Project Details	Reason for Change
Parking		
1) C2.00	Increase width of parking space at edge of parking area by 1 foot.	Change to increase parking area maneuverability by providing an extra wide 18-foot x 10-foot parking space at end of parking area. The height of the curb bordering this space is the customary 6 inches. See also, SKC-006 and SKC-007 demonstrating vehicle’s ability to <u>both</u> (i) drive into/back out of and (ii) back into/drive out of the parking space at the easterly end of this parking area.
2) C2.00	Increase from 22 feet to 24 feet the back-up distance for the parking spaces at both ends of parking areas.	Change to increase parking area maneuverability by providing extra area to access these two spaces at either end of the parking areas. See also, SKC-002, SKC-003, SKC-006 and SKC-007 demonstrating vehicle’s ability to <u>both</u> (i) drive into/back out of and (ii) back into/drive out of parking spaces at both ends of these parking areas.
3) C2.00	Shift six outdoor parking spaces two to three feet under overhangs for Buildings C and D.	Change necessary to provide customary 18 FT parking space length. (See also, #8 below)

Fire Protection		
4) C2.00	Widen entry drive, move eastern crosswalk further east, remove sidewalks.	<p>Change to widen driveway <u>required</u> by Fire Department so that ladder truck entering Site does not use opposite travel lane. Sidewalks' removal <u>required</u> by handicap regulation that accessible route shall coincide with the route for the general public. Crosswalk location shifted in response to above changes and to improve site plan.</p> <p>See also, C6.00, the Emergency Vehicle Access Plan which the Fire Department has approved.</p>
5) C2.00	Provide permeable rip-rap surface instead of pavement in reduced (1,199 SF to 621 SF) snow storage area.	<p>Change to reduce snow storage area <u>required</u> by Fire Department to eliminate overlap of ladder truck turning movement. Change to rip-rap to reduce impervious surface area. Snow storage reduction to be offset by an <u>Agreed Additional Permit Condition</u> of heated driveway for the parking areas between Buildings A and D (3,213 SF) and Buildings B and C (3,071 SF).</p> <p>See also, C6.00, the Emergency Vehicle Access Plan which the Fire Department has approved.</p>
Handicapped Accessibility		
6) C2.00	Create handicap accessible walkway from North Avenue into property.	<p>Change <u>required</u> by handicap regulations requiring accessible routes from accessible parking, accessible loading zones, and public streets or sidewalks to the accessible buildings (Buildings A and B only).</p> <p>See also, C3.00 for accessibility details. The Weston Peer Reviewer has signed-off on this plan.</p>
7) C2.00	Remove sidewalks and crosswalks.	<p>Change made as no accessible routes are required in this area of the Site.</p> <p>See also, C3.00 for accessibility details. The Weston Peer Reviewer has signed-off on this plan.</p>

Parking		
8) Front Elevations C-6 & D-6	Recess garage doors.	Change necessary to provide customary 18 FT parking space length to outdoor townhouse spaces. (See, #3 above)
9) Ground ¹ Floor C-2 & D-2	Shift interior walls 1 to 2 FT. These sheets show the “Construction Dimensions” of the townhouse ground floor spaces labeled “garage” and “family room,” the latter of which can be used for any purpose including an office or storage space. Subtracting the width of various walls to provide “Room Dimensions,” the change from the Permit’s “Plans of Record” are as follows to accommodate the 18 FT length for the outdoor townhouse parking space: <i>the garage length is reduced by 1 foot</i> from 20’ X 12’ 6” to 19’ X 12’ 4” and <i>the width of other space is reduced by 2 feet</i> from 16’ X 9’ 6” to 7’ X 6.”	Change necessary to provide customary 18 FT parking space length to outdoor townhouse spaces. (See, #3 above)

As part of this NPC, the LLC also seeks changes in the form of Additional Permit Conditions as follows:

¹ The LLC makes this particular waiver request under a reservation of rights as it does not understand that a comprehensive-permit-granting authority has jurisdiction over interior building space. Moreover, the Weston Peer Reviewer has already signed-off on these plans.

Additional Permit Conditions	Reason for Additional Condition
1) All tenant leases at the Project shall include a provision requiring that tenants with two cars shall have access to both cars at all times that they are parked in their unit’s parking spaces including, but not limited to, a requirement that each tenant have keys to both cars and/or a lock box in the garage containing keys to both cars.	Enhance “continually availability” of six outdoor parking spaces for Buildings C and D.
2) All Certificates of Occupancy for the Project shall include a provision that tenants with two cars shall have access to both cars at all times that they are parked in their unit’s parking spaces. Spaces including, but not limited to, a requirement that each tenant have keys to both cars and/or a lock box in the garage containing keys to both cars.	Enhance “continually availability” of six outdoor parking spaces for Buildings C and D.
3) The LCC shall install and maintain a heated driveway for the parking areas between Buildings A and D (3,213 SF) and Buildings B and C (3,071 SF).	Offset reduction in snow storage area.

NPC Proposes Insubstantial Changes

Like the changes proposed in this NPC for the Project, *Marion Village Estates, LLC v. Marion Zoning Board of Appeals*, Mass. Housing Appeals Committee (“HAC”), No. 2022-01, March 24, 2023, concerned proposed changes not included in the examples of “substantial” or “insubstantial” changes listed in chapter 40B’s regulations at 760 CMR 56.07(4). In such cases, the HAC explained that

the issue of whether proposed project modifications are ‘substantial’ is one that requires a careful factual analysis.... The specific changes proposed must be examined in relation to the original project, taking into consideration the adverse impacts, if any, the changes could have on residents or on the surrounding area.... Additionally... the importance of the effect of proposed changes on local concerns [is a consideration] and... ‘[c]hanges that lessen the impact of a project will not be considered substantial.... However, in the context of a change after the



issuance of a comprehensive permit, we have also noted the importance of an opportunity to review the proposed change, and *thus the standard of what is substantial can be higher in this context.*

(Citations omitted.)(Emphasis added.)²

Here, the minor nature of the specific changes to the Site Plan and Additional Permit Conditions in relation to the original project are self-evident based on their size and nature. The changes to the parking areas to enhance vehicular maneuverability and tandem parking space availability and modifications to meet fire protection and handicap regulations will only benefit the municipality and Project residents while having no impact – material or otherwise – on abutters or the neighborhood. Any local concerns are better addressed, not adversely impacted, by these changes. This is especially true where the Board is charged with applying a “higher...standard...of what is substantial” since the Permit has already been issued.

For all these reasons, the Board should find the proposed Site Plan changes and Additional Permit Conditions “insubstantial.”

Determination or Waiver

Determination. As previously explained, the determination was made that the Project was not in compliance with Weston Zoning Bylaw (the “Bylaw”), § VIII.A.2, related to parking which, in pertinent part, states that, “Each parking space shall include space for maneuvering and for access to and from the parking area, shall be continually available and shall be not less than 350 square feet in area.” The LLC continues to maintain no waiver from this provision of the Bylaw is needed as these spaces are continually available since each Townhouse tenant will have the ability to move both cars parked in the unit’s two spaces. The tenant(s) of a unit with two cars control their two cars and can move the outdoor car if and when the other car needs to enter or leave the garage. Moreover, adding the 162 square feet of each parking space (18’ X 9’) to the 198 square feet of the maneuvering area directly behind each space (22’ aisle width X 9’) yields a minimum of 360 square feet – and this accounts for only a fraction of each parking area adjacent to the Townhouse buildings, each of which exceeds 3000+ square feet.³ *As stated in the*

² This test also calls for review of HAC rulings examining comparable modifications. Cases involving sufficiently similar changes were not located.

³ Although there was already an adverse ruling (by a 1-2 vote) at the last ZBA session on compliance with the parking provision of the Bylaw, it is worth recalling the context of this issue. Aside from the minor NPC changes, the LLC is not asking for anything new. During the 13-month review of the LLC’s application, despite reviews by the LLC, the ZBA, the ZBA’s peer reviewer (VHB), numerous neighbors, the two immediate abutters’ peer reviewer (TetraTech), no one ever understood that a waiver was needed from this one sentence of the Bylaw. The ZBA approved the Comprehensive Permit and the Site Plans showing the parking based on the understanding that the Project included the required number of parking spaces and that no waiver was required from this provision.

Planning Board's attached Memorandum dated 10/5/23, it agrees with this interpretation. Moreover, as stated in the ZBA Peer Review Letter, the drive aisle width of 22 feet is sufficient.

Especially with the NPC's Site Plan changes and Additional Permit Conditions which serve to augment maneuverability in the parking areas and the continual availability of the tandem parking spaces, the LLC maintains – as it did without these enhancements – that the townhouse parking spaces are continually available since each townhouse tenant has sole control over both of the unit's two spaces. Backed by written Lease provisions and Certificate of Occupancy requirements, all townhouse tenants with two cars will continue to have control of their two cars and can move the car in the outdoor parking space if and when the car parked indoors needs to enter or leave the garage. Moreover, adding the 162 square feet of each parking space (18' X 9') to the 198 square feet of the maneuvering area directly behind each space (22' aisle width X 9') yields a minimum of 360 square feet – and this accounts for only a fraction of each parking area adjacent to the Townhouse buildings, each of which exceeds 3000+ square feet.⁴

Waiver. If the Board does not find the parking as modified by the NPC meets this Bylaw provision, then the LLC requests that the Board grant a waiver from it. Under 760 CMR 56.05(7), the LLC may request a waiver from the Bylaw “and the Board shall grant such Waivers as [1] are Consistent with Local Needs and [2] are required to permit the construction and operation of the Project.” Under the former standard, the Board examines whether the Bylaw provision [1] is “reasonable in view of the regional need for Low and Moderate Income Housing, [2] considered with the number of Low Income Persons in the affected municipality⁵ and [3]

⁴ The Planning Board (“PB”) Memorandum contends that the 350 SF refers to the sum of the parking space (18 X 9 or 162 SF), one-half of the drive aisle immediately behind the space (22 FT/2 or 11 FT), the wheel stop area, snow storage area and snowplow area. This formula is not supportable as it results in doubling the size of a standard drive aisle to 42 feet in all cases where parking spaces are on both sides of a drive aisle. Subtracting the parking space area (162 SF) from the Bylaw's minimum area (350 SF) means, according to the PB, that another 188 SF is needed to meet the Bylaw's minimum square footage. Assuming the entire 188 SF is behind the car so it has the maximum area to enter/exit the space, dividing the 188 SF by the width of parking space (9 FT) is roughly 21 FT. Therefore, in any location where spaces are on both sides of the drive aisle, a 42 FT drive aisle would be required by the PB. This would result in a massive increase in impervious surface area and apply to this affordable housing project a standard that likely has never been used for any previous market rate or other project. Even if a portion of the 188 SF area were redistributed to the front of the parking space, the same huge increase in impervious area would result. Also, the Project has separate, dedicated snow storage areas and will provide heated pavement in the parking areas behind Buildings A and B.

⁵ Weston's 2021 Housing Production Plan (the “HPP”) includes the following “Key Findings”:

- “Twenty-three percent of Weston households are low income...and therefore may be eligible for housing assistance through most federal and state programs.”
- “Data from Trulia.com and Apartments.com indicate that Weston has very limited rental housing, and the pricing of these markets is not affordable to low-income households.”

(See HPP, p. 62.) (Moreover, the HPP speaks to conditions as of 2021, not the relevant point of analysis, the Project's application date of March, 2016.)

with Local Concerns, and [4] if...[the Bylaw provisions] are applied as equally as possible to both subsidized and unsubsidized housing.” 760 CMR 56.02.

Where, under this Permit, Weston “has not met its minimum housing obligations, the board must rest its decision on whether the required need for low and moderate income housing outweighs the valid planning objections to the details of the proposal.... If the regional need for such housing outweighs these objections, the board must override any restrictive local requirements and regulations which prevent the construction of the housing and grant the comprehensive permit.” *Bd. of Appeals of Hanover v. Hous. Appeals Comm. in Dep't of Cmty. Affairs*, 363 Mass. 339, 367 (1973). Application of this standard is simplified in this case since, as a matter of law, Weston’s “failure to meet its minimum housing obligations, as defined in [c. 40B,] §20, provide[s] compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal. *Ibid.* Moreover, the only impact which NPC has on local concerns is to ameliorate them by meeting fire protection and handicap accessibility standards.⁶ Thus, the waiver of the parking provision – as it relates to “continually availability” of the townhouse parking spaces, the provision of at least 350 square feet for parking area or spaces or otherwise– is Consistent with Local Needs and is required to permit the construction and operation of the Project. Moreover, the ZBA has already seen fit to grant other waivers for this Project.

Finally, just prior to the vote at the last session on September 5, 2023, an abutter asserted that this parking waiver request was previously sought by the LLC, but considered and denied by the Board. This is false. The Project’s Revised Waiver List on the Town’s website states only that the Project was not seeking a waiver from § VIII.A(1)(i) which governs the number of parking spaces (2 spaces per unit for multi-family housing which the Project meets). The current request is for a waiver from § VIII.A(2) governing the “Location and Size of Parking Area.” Therefore, the LLC never sought nor did the ZBA ever consider or deny the current waiver request.

For all these reasons, the Board should grant a waiver from the Bylaw, § VIII.A.2.

Thank you in advance for your consideration of these requests on November 27, 2023.

⁶ The one other basis for denial of the waiver request as Consistent with Local Needs – the Town’s satisfaction of statutory minima constituting a so-called Safe Harbor – is unavailable to it. The Permit includes a finding that “the Town of Weston does not satisfy any of the statutory and regulatory exemption thresholds outlined in Chapter 40B and 780 CMR 56.00.” (See, Permit, Finding 9.) Further, Chapter 40B’s regulations make clear that the achievement of any statutory minima is measured at the time of the Project’s application. 760 CMR 56.03.



Very truly yours,

A handwritten signature in black ink, appearing to read "Brian C. Levey", written over a light blue horizontal line.

Brian C. Levey

BCL/lcb

Enclosures

cc: Valerie Geary, ZBA Staff Assistant (By Hand and Via electronic mail)
John Field, Building Inspector (Via electronic mail)
Michael Boucher (Via Electronic Mail)
J. Patrick Duffy (Via Electronic Mail)
Dan Hill (Via Electronic Mail)