

FINDINGS

1. The Board finds that the Applicant has not yet demonstrated that the Project is fundable by a subsidizing agency as required under 760 CMR 56.04(1)(b). This finding is based upon the Town's continuing challenge to the Project Eligibility Letter (PEL) issued by MassDevelopment. A Superior Court Judge has determined that, notwithstanding DHCD Regulations, determinations as to the adequacy of PELs are permissible in the administrative process. The Board finds that the Town's challenge to the PEL raises legitimate questions and, accordingly, the Board finds that the PEL does not and cannot satisfy the requirements of 760 CMR 56.04(1)(b) unless and until the Applicant (and/or MassDevelopment) prevails in the existing litigation (and any appeals) with the Town.
2. The Board finds that the Applicant possesses adequate title to the subject site. However, the Board finds that there are significant remaining questions regarding the sufficiency of the Applicant's rights to construct the Project as shown on the Plans. These questions are based upon the effect of a certain 1946 Agreement by and between the Town and the Applicant's predecessor in title. This Agreement, which is expressly binding upon the successors in title such as the Applicant, was a key component of rezoning of the subject property in the 1940s. Per the terms and restrictions contained in the 1946 Agreement, the proposed Project would not be possible. The enforceability of the 1946 Agreement is the subject of ongoing litigation by and between the Applicant and the Town. As a consequence, the Board finds that the Applicant cannot demonstrate adequate "control" of the site under 760 CMR 56.04(1)(c) unless and until the Applicant prevails in the existing litigation (and any appeals) with the Town. The Board finds that, in addition to issues arising under 760 CMR 56.04(1)(c), the 1946 Agreement, if enforceable, would create a practical barrier that would prevent the construction of the proposed Project.

CONDITIONS

1. The Applicant may not commence construction hereunder and is not entitled to the issuance of any building permits unless and until the Applicant prevails, with finality, in the litigation filed by the Town wherein the adequacy of MassDevelopment's PEL is challenged. Receipt of "final approval" under 760 CMR 56.04(7) is inadequate to satisfy the requirements of project eligibility under 760 CMR 56.04(1)(b).
2. The Applicant may not commence construction hereunder and is not entitled to the issuance of any building permits unless and until the Applicant prevails, with finality, in the litigation filed by the Town wherein the enforceability of the above-described 1946 Agreement will be determined. In the event that the 1946 Agreement is determined to be enforceable, the conditions of approval contained herein shall be null and void.