ZBA Minutes July 22, 2009 – Oakridge

Members Present: Chase Duffy, Cynthia Maxwell, Robert Cadle, Alison Manugian, Harris McWade

Atty. Bobrowski was present. Bruce Easom was present.

Audience members present: Pierre Comtrois, Jayme Kulesz, Anna Eliot, Dennis and Kristen McEvoy, Josh Degen arrived after the meeting began.

Chairman Cadle reconvened the Oakridge modification hearing, noting that the public hearing has been closed after Mr. Jacobs discussed his report and at Atty. Deschenes' request. He said that the Board needs to decide what to do with the application, which can be denied, approved, or approved with conditions. He said that the applicant is claiming that the restriction makes the project uneconomic and the Board needs to decide whether they have proved that it is uneconomic, or less uneconomic, noting that if proved, they would be entitled to a grant, with whatever conditions the Board thinks necessary.

Atty. Bobrowski said that the Chairman had explained it correctly, that that is the legal test.

Chairman Cadle said that the main item is Mr. Jacob's analysis, which is not a "slam dunk" either way. He said that one of the things Mr. Jacobs said at the end and Atty. Deschenes picked up on, is the extended absorption time that would make the project more uneconomic, and removing the age restriction would decrease the absorption time. He asked whether the Board should just accept that because they don't have anything else.

Mrs. Maxwell said that that point was finally reached but she has a problem with the fact that Mr. Jacobs didn't have enough data, but was hired to do the review and thus the Board needs to rely on him.

Discussion ensued whether it makes sense that keeping the age restriction would make the project more or less economic.

Chairman Cadle said that in other 40Bs the Board has had more substantial reviews done by Mr. Jacob's because there was more data available to him, noting that here he had to go out and develop two pro formas almost on his

own. He said that he doesn't think Mr. Jacobs was given enough data and that of 80 projects, Mr. Jacobs said this developer has been the worst to deal with in terms of getting information.

Mrs. Duffy said that she looked at the Sunday real estate section and the general sense she had was that non-age restricted are a sales benefit primarily due to a shorter sales cycle. She noted that Groton Gardens has many units available and is not age restricted. She noted Mr. Easom's chart but was a little unsure of the areas of the units.

Mrs. Manugian asked whether it was okay for the Board to look at the chart.

Atty. Bobrowski said that Mr. Easom was an alternate member of the Board and thus could make a submission, noting that the chart was not new material.

Mr. Easom said that it seems that the Board has decided that the chart is not new information and thus is okay to submit, noting that the graph is using data that Mr. Jacobs submitted on July 8th. He said that he used two colors and two symbols to show the data and then explained the two different graphs. He said that the Board needs to decide if it is a real norm or just "noise" and not a standard deviation. The key difference between the situations charged was that one included all age-restricted units and one included only age restricted units selling at market rate. Including the 'low income' units makes it appear that age restricted units sell for a lower price. Removing the 'low income' units from this comparison and the date shows that age restricted units sell for more than non-age restricted units. In both scenarios comparing age restricted and non-age restricted, the non-age restricted, the age restricted units take longer to sell. He said that if one just compares price, the non-age restricted units sell for a higher price, noting that days on the market is significant statistically because the finance costs are higher. He then described more of the statistical analysis and how to figure it and then submitted a cumulative total of units sold vs. time on the market graphic curve. He said that the data set is small but consistent.

Ms. McWade said that what bothered her regarding the set of data given was using two car garages vs. one car garages and thus it was not a good comparison, noting that she would have liked to have seen units of similar size, etc.

Atty. Bobrowski said that it is up to the applicant to provide and is not Mr. Jacob's fault if it is incomplete.

Ms. McWade said that she is not sympathetic to the applicant that no real new information was provided.

Atty. Bobrowski said that that then should be factored into the decision.

Chairman Cadle asked whether 10% is a reasonable interest rate for carrying costs.

Atty. Bobrowski said that that was probably high but using current numbers, he got lower carrying costs, and asked whether the10% includes insurance.

Mrs. Manugian asked whether the Board had a feeling about Mr. Jacob's figures being more uneconomic, and whether he was basing these on experience and expertise or actual data.

Atty. Bobrowski said that he is basing them on the 15% formula used by HAC. He said that if you factor in margin of error, the profit comes out at 12.2%, but it could be over 15% due to the small database.

Discussion ensued regarding the figures.

Atty. Bobrowski said that times are different, noting that developers get a certain rate and if they work on more of the project, can get profit from other areas. He said that Mr. Jacobs was not given any further variables from '03 or '04 and cement, etc. costs differently now, as it is a very different time.

Discussion ensued regarding how this should be handled due to the lack of other costs being given to Mr. Jacobs do his review.

Mrs. Duffy said that she never liked the idea of having children at that location, noting that the site is not near anything that is safely accessible.

Atty. Bobrowski said that that expands the test and if the applicant does not prove that the project is less economic then the decision is done there, and if the Board decides that the economic case is proven, the request can be denied due to safety.

Mrs. Manugian asked what Atty. Bobrowski thoughts were of Mr. Easom's analysis of using age restricted vs. non age restricted units, and whether the affordable units should be dropped out.

Atty. Bobrowski said that there is a premium on the age restricted unit, which are more expensive but take longer to sell. He said that the bottom line is the pro forma, 12.3 vs 16.5 % profit and whether claim of a 500 day absorption has been proven. He said that if this has been proven, then Mr. Jacob's figures are good, and if not proven, the figures are no good. He stressed that the burden of proof is on the applicant.

Chairman Cadle said that he is not hearing confidence from anyone on this and if the Board is to go on burden of proof, the applicant loses.

Mrs. Manugian asked whether Mr.Jacob's report should match up with the chart.

Mrs. Duffy said that it is hard to determine what the real price is, given bonuses given in newspaper ads, etc.

Discussion ensued regarding what reports to look at, etc.

Ms. McWade said that she doesn't feel that the evidence proves beyond a reasonable doubt that the age restriction is less economic.

Chairman Cadle said that he doesn't think beyond reasonable doubt is the standard to be used, the applicant just has to prove it's case by a preponderance of the evidence, i.e. 50%.

Ms. McWade reiterated that she has doubts.

Mrs. Maxwell said that she has had a hard time getting that the project would be less uneconomic from Mr. Jacobs.

Atty. Bobrowski said that if the project makes 15.2% vs. 16.3% it is well within the Board's right to keep the age restriction.

Mrs. Duffy said that she does not think Mattbob will even build the project.

Mrs. Manugian said that she is not comfortable with assuming anything because the Board is only relying on carrying time and sales price. She said that if one looks at the age restriction information without artificial means, then there are different results.

Mrs. Duffy said that the market rate units subsidize the affordable units and now they are being cut out of the figures.

Mrs. Manugian agreed, noting that age restricted units sell for a higher price, with carrying costs at one-quarter of that.

Discussion ensued regarding how to utilize the figures and what the significance is of the 10% figure.

Chairman Cadle said that very little came from Mattbob and it is their burden to prove. He said that he doesn't have a clear sense that leaving the age restriction in place has been proved uneconomic, noting that he does not sense that other members are in favor of removing the restriction. He said that he thinks there should be a motion to deny.

Ms. McWade agreed.

Atty. Bobrowski suggested that a motion be made to instruct counsel to craft a denial.

A motion was made to instruct counsel to craft a denial draft decision for the reasons discussed above; the motion was seconded.

The Chairman suggested citing Atty. Bobrowski as the Board's 40B consultant. The Board agreed and the motion was amended to have the Board's 40B consultant write a draft denial, seconded and passed unanimously.

Discussion ensued regarding whether to meet with Atty. Bobrowski.

The hearing was continued to 8/6/09 at 8:00 am.

Discussion ensued regarding what the status is of some of the issues discussed at the meeting with Mark Haddad.

Discussion ensued regarding the letter to the Town Manager from the Inspector General.

Discussion ensued regarding whether the ZBA has any course of action regarding any of the allegations made.

A motion was made to adjourn the meeting at 8:25 pm. The motion was seconded and passed unanimously.