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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

June 3, 2010

Robert W. Healy
City Manager
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: *303 Third Street -- Awaiting Report No. 10-73*

Dear Mr. Healy:

City Council Order O-8, dated May 3, 2010, asks whether any action is necessary by the City as a result of a Summary Judgment ruling by the Suffolk Superior Court relating to 303 Third Street. In the case of *William Crowley, Jr., M.D. et al. v. 303 Third SPE LLC* seventeen plaintiffs sued the 303 Third Street SPE LLC seeking specific performance of purchase and sale agreements for residential condominiums. The developer evidently originally proposed that the building at 303 Third Street would be developed as a condominium, and executed the seventeen P&S agreements with the Plaintiffs with that intended plan. The developer subsequently changed its plans and chose to develop 303 Third Street as rental housing (along with a neighboring structure at 285 Third Street, also as rental housing). In the summary judgment decision of the Suffolk Superior Court the judge ruled that the Defendant, 303 Third Street SPE LLC, breached its purchase and sale agreement with each of the seventeen Plaintiffs by failing to provide notice to the Plaintiffs of a closing date for the sale of condominium units as described in the P&S Agreements.

While this legal dispute has been ensuing, the developer proceeded with the development of the two buildings at 285 and 303 Third Street. The developer executed an original Inclusionary Housing Covenant ("IHC") which was recorded on August 11, 2006 for 61 inclusionary units based upon an anticipated total unit count for the project of 531 units. The IHC was in rental form, but included standard condominium conversion language which outlines the process by which the IHC could be converted from rental to homeownership. On June 2, 2009 an amendment to the IHC was recorded identifying the Affordable Dwelling Units in the North Building (285 Third Street) and the South Building

(303 Third Street). In the amended IHC the total number of units in the project was referenced as 482, resulting in a reduction of inclusionary units for the project to 56 units (34 units in 303 Third Street and 22 units in 285 Third Street). All units in the project have been marketed as rental units, and all 56 of the inclusionary units are now occupied as affordable rental units.

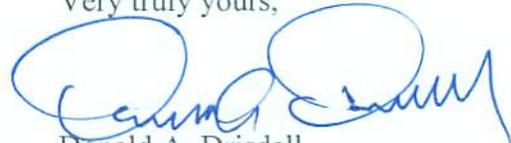
Section 11.204 of the Cambridge Zoning Ordinance entitled Standards for Construction and Occupancy of Affordable Units, provides in subsection (e) that:

the rental or ownership of affordable units shall mirror the project as a whole. For example, affordable units should be sold, not rented, where a majority of units will be offered for sale.

Nothing in the Inclusionary Housing provisions of the Zoning Ordinances authorizes the City to dictate whether a project shall be rental or homeownership. The developer of this project was free to proceed with its project as either rental or homeownership, and the only requirement of the ordinance is that the Affordable Units in the project "mirror" the project as a whole. The City's standard Affordable Housing Covenant contains provisions allowing conversion by an owner from a rental property to a homeownership property provided that the Affordable Units in the project continue to mirror the project as a whole, which would mean conversion of the Affordable Units to homeownership if the market units became owner-occupied condominiums.

In the recent court decision relating to 303 Third Street the Court held that specific performance of the P&S Agreements is an available remedy (i.e. ordering the developer to sell condominium units to the Plaintiffs), but ruled that whether or not that remedy should be used by the Court in this case has "...not been properly aired on this record". The Court has now ordered the parties to submit pleadings on the issue of whether or not specific enforcement should be ordered and has identified June 28, 2010 as the date for arguments on that issue. Any determination by the City as to necessary action relating to the Affordable Units will have to be made after further rulings by the Court, which could be affected by an appeal if that should occur. As the project is currently configured, the Affordable Units are properly being occupied as rental units.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Donald A. Drisdell", is written over a circular stamp or seal.

Donald A. Drisdell
City Solicitor