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TO: **TOWN OF HAMILTON ZONING BOARD OF APPEALS**

FROM: **LISA L. MEAD, ESQ.**

RE: **APPLICATION OF CHEBACCO HILL CAPITAL PARTNERS FOR DEVELOPMENT OF ASSESSORS PARCEL 65-0001**

DATE: **MAY 1, 2024**

ISSUE(S) PRESENTED: Whether the Town of Hamilton Planning Board's denial of a prior application concerning the same property (the "Prior Project") is grounds pursuant to which the Zoning Board of Appeals ("ZBA") may invoke the "related application" safe harbor set forth within 760 CRM 56.03(7), the full context of the inquiry being that the Prior Project included a lump-sum payment of $2.2 Million to the Town pursuant to the Town of Hamilton Zoning Bylaw (the "Zoning Bylaw") Section 8.3.4(3)[1] to meet the Town's affordable housing requirement that all developments of more than 10 housing units make the "tenth dwelling unit and every seventh unit thereafter…an Affordable Housing Unit."

CONCLUSION: The ZBA cannot invoke the "related application" safe harbor. Zoning Bylaw Section 8.3.4 requires a higher percentage of affordable housing units than the minimum "10% SHI Eligible Housing units" needed under 760 CMR 56.03(7). Because the more onerous local

[1] The amount of the payment was calculated with the advice and assistance of Town Counsel.

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standard was achieved, a safe harbor is not available under the less rigorous state standard.

DISCUSSION: The question presented is whether the Planning Board's denial of Chebacco Hill Capital Partners ("Chebacco")'s Prior Project is grounds for the ZBA to invoke the "related application" safe harbor set forth in 760 CRM 56.03(7). The applicable regulations define a related application as follows:

> (7) Related Applications. For the purposes of 760 CMR 56.03(7), a related application shall mean that less than 12 months has elapsed between the date of an application for a Comprehensive Permit and any of the following:
>
> (a) the date of filing of a prior application for a variance, special permit, subdivision, or other approval related to construction on the same land, if that application was for a prior project that was principally non-residential in use, or if the prior project was principally residential in use, if it did not include at least 10% SHI Eligible Housing units;
>
> (b) any date during which such an application was pending before a local permit granting authority;
>
> (c) the date of final disposition of such an application (including all appeals); or
>
> (d) the date of withdrawal of such an application.
>
> An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.

760 CMR 56.03(7).

Because the Prior Project application was never withdrawn, is not presently pending before the Planning Board, and is presently under appeal, the crux of the inquiry is whether the Prior Project falls within the scope of clause (a) quoted above. As the Prior Project was "principally residential in use," so long as the Prior Project contained "at least 10% SHI Eligible Housing units," the Prior Project does not constitute a "related application." See 760 CMR 56.03(7). As is referenced above, the Town's Zoning Bylaw contains a more onerous standard

than 760 CMR 56.03(7) for developments of more than 10 residential units, requiring that the tenth unit and every seventh unit thereafter be "an Affordable Housing Unit."

To the extent the ZBA may have concerns as to whether Section 8.3 of the Zoning Bylaw and the state regulations share a common purpose, their express language unambiguously provides that their purpose is one in the same. The state regulations state, in pertinent part:

> The Comprehensive Permit Statute, St. 1969, c. 774, now codified at M.G.L. c. 40B, §§ 20 through 23, was adopted by the legislature to address the shortage of low and moderate income housing in Massachusetts and to reduce regulatory barriers that impede the development of such housing. … The purpose of 760 CMR 56.00, is to implement the statutory scheme.

760 CMR 56.01.

Zoning Bylaw Section 8.3 similarly provides:

> 8.3.1 Purpose. The purpose of the Inclusionary Housing Bylaw is to:
>
> 1. Produce high-quality Affordable Housing Units to Low or Moderate Income Households;
> 2. Encourage more housing choices in Hamilton;
> 3. Promote geographic distribution of Affordable Housing Units throughout the Town and avoid over-concentration; and
> 4. Assist the Town in creating units eligible for the Chapter 40B Subsidized Housing Inventory through means other than a comprehensive permit.

(Zoning Bylaw, Section 8.3.1.) Accordingly, the above-quoted language compels the conclusion that the state regulations and Zoning Bylaw provisions advance the exact same goal – making affordable housing units available to low-income or moderate-income households.

As referenced previously, Section 8.3 of the Town's Zoning Bylaw contains two (2) features of particular relevance to the present inquiry. First, Sections 8.3.2 and 8.3.3 combine to impose a more onerous requirement than the state regulations upon developments of more than 10 units, requiring that "the tenth dwelling unit and every seventh unit thereafter shall be an

Affordable Housing Unit." (Zoning Bylaw Section 8.3.3; see also id. at Section 8.3.2.) Second, the Zoning Bylaw explicitly authorizes the following variable methods pursuant to which affordable housing minimums may be accomplished:

> 8.3.4 Methods of Providing Affordable Housing Units. The Planning Board may approve one (1) or more of the following methods, or any combination thereof, for the provision of Affordable Housing Units:
>
> 1. The Affordable Housing Units may be constructed or rehabilitated on a locus different from that of the development. The Planning Board may allow a developer of non-rental dwelling units to develop, construct or otherwise provide Affordable Housing Units reasonably equivalent to those required by this Section in an off-site location in the Town of Hamilton. …
>
> 2. A donation of land may be made in lieu of providing Affordable Housing Units. An applicant may offer, and the Planning Board may accept, subject to approval of the Board of Selectmen, donations of land in fee simple, on-or off-site, that the Planning Board determines are suitable for the construction of an equivalent number of Affordable Housing Units. Land donated for this purpose shall be subject to a restriction assuring its use for affordable housing. …
>
> 3. An equivalent fee in lieu of units for each required unit shall be 3 times the Area Median Income (AMI) as determined by HUD (US Department of Housing and Urban Development) income limits which includes Hamilton.

(Zoning Bylaw, Section 8.3.5.)

Turning to Chebacco's Prior Project, that project satisfied the Town's affordable housing minimums utilizing method number three (3) set forth above. There were questions concerning calculation of the payment, and as a result, Town Counsel was engaged to assist and provided an opinion to ensure the payment amount of $2.2 Million was commensurate with the affordable housing mandate and methodology set forth within the Zoning Bylaw. Because Chebacco achieved compliance with this local affordable housing requirement which is more onerous than the 10% minimum imposed by 760 CMR at the state level, Chebacco necessarily met the lesser state minimum of 10%, thus taking the Prior Project outside of the regulatory definition of a

"prior application." Consequently, the Prior Project was not a "related application," and as such, the "related application" safe harbor cannot be invoked.