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May 16, 2024

**VIA CERTIFIED MAIL  
& ELECTRONIC MAIL**

Mr. Phillip DeMartino  
Community Assistance Unit  
Executive Office of Housing and Livable Communities  
100 Cambridge Street, Suite 300  
Boston, MA 02114  
[phillip.demartino@mass.gov](mailto:phillip.demartino@mass.gov)

Re: Appeal of Notice of Safe Harbor  
Village at Chebacco Hill Comprehensive Permit Application  
133 Essex Street, Hamilton, MA

Dear Mr. DeMartino:

Reference is made to the above identified matter. In that regard, this office serves as counsel to Chebacco Hill Capital Partners, LLC ("Chebacco"). The above-referenced purported Notice of Safe Harbor is dated May 2, 2024 and was transmitted via email on Friday, May 3, 2024 to this office.<sup>1</sup> Pursuant to 760 CMR 56.03(8), enclosed for filing please find Chebacco's Appeal of the Hamilton Zoning Board of Appeals Notice of Safe Harbor, together with supporting materials referenced therein, a copy of which is being provided to Hamilton Zoning Board of Appeals.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Very truly yours,

*Stephen J. Chaplin*

Stephen J. Chaplin, Esq.

SJC/

Encl.

cc: Bruce Gingrich, Chair, Hamilton Zoning Board of Appeals (via *certified mail & email*)  
Patrick Reffett, Director of Planning and Inspectional Services (via *email* only)  
Joseph Domelowicz, Jr., Town Manager (via *email* only)  
Town of Hamilton Building Department (via *email* only)  
Amy E. Kwesell, Esq. (via *email* only)  
Chebacco Hill Capital Partners, LLC (via *email* only)  
Daniel C. Hill, Esq. (via *email* only)

*Newburyport Office*  
30 Green Street  
Newburyport, MA 01950  
Phone 978.463.7700  
Fax 978.463.7747

<sup>1</sup> The referenced transmittal email indicated that certified mailing would occur on Monday, May 6, 2024.

**EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES**

**APPEAL OF THE HAMILTON ZONING BOARD OF APPEALS  
NOTICE OF SAFE HARBOR  
PURSUANT TO THE PROVISIONS OF THE REGULATIONS AT 760  
CMR 56.03(8)  
APPELLANT – CHEBACCO HILL CAPITAL PARTNERS, LLC  
MAY 16, 2024**

**SECTION I  
INTRODUCTION**

This is an appeal, pursuant to the Regulations promulgated under M.G.L. c. 40B, §§ 20-23 by the Executive Office of Housing and Livable Communities (“EOHLC”) at 760 CMR 56.00, specifically 760 CMR 56.03(8) (the “Regulations”), from a decision of the Hamilton Zoning Board of Appeals (the “ZBA”) in a letter dated May 2, 2024 which purports to represent written notice to Chebacco Hill Capital Partners, LLC (“Chebacco”) as a Notice of Safe Harbor pursuant to 760 CMR 56.03 (7) and (8)(a) (the “Safe Harbor Letter,” a true and accurate copy of which is annexed as **Exhibit A**). The issue being appealed is whether the ZBA correctly invoked safe harbor with respect to Chebacco’s proposed project at 133 Essex Street, Hamilton, Massachusetts (the “Property”), which project is entitled the “Village at Chebacco Hill” (the “Project”). For the reasons set forth herein, Chebacco contends the ZBA’s invocation of safe harbor was erroneous.

**SECTION II  
SUMMARY OF RELEVANT FACTUAL AND PROCEDURAL HISTORY**

1. Unrelated to Chebacco’s c. 40B Project, on or about July 2, 2021, a single application for special permit (the “2021 Special Permit Application”) was filed with the Town of Hamilton Planning Board (the “Planning Board”) seeking to construct 50 for sale housing units upon an approximately 66-acre tract of land (the “2021 Special Permit Parcel,” which is shown on an ANR plan endorsed by the Planning Board, a true and accurate copy of which is annexed as

**Exhibit B).** While the 2021 Special Permit Parcel included as a subset the approximately 55 acres comprising the Property for Chebacco's present Project, the 2021 Special Permit Parcel was larger, differently shaped, and was bounded by Essex Street and Chebacco Road (whereas the Property here at issue is bounded only by Chebacco Road). The 2021 Special Permit Application was denied by the Planning Board on October 19, 2022, and is presently pending on appeal with the Land Court (Docket No. 22 Misc. 000591, a true and accurate copy of which is annexed as **Exhibit C**).<sup>1</sup> (See also Exhibit A, p.1, ¶¶1-2.)

2. The Town of Hamilton Zoning Bylaw (the "Zoning Bylaw") has specific provisions that are intended to facilitate the development of affordable housing. To wit, the particular provision governing the Special Permit Application, requires that in "all developments involving the creation of ten (10) or more Dwelling units or ten (10) or more lots for residential use..., the tenth dwelling unit and every seventh unit thereafter shall be an Affordable Housing Unit." (True and accurate copies of relevant provisions of the Zoning Bylaw are annexed, collectively, as **Exhibit E**.)

3. The Town's Zoning Bylaw further provides a variety of methods to achieve compliance for the provision of affordable units, as follows:

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

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<sup>1</sup> There is also an active appeal of the Planning Board's denial of an application for a Stormwater Management Permit, which is pending in the Essex County Superior Court. (See Docket No. 2277CV01137, a true and accurate copy of which is annexed as **Exhibit D**.)

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.

(Exhibit E, p.2.)

4. In connection with the 2021 Special Permit Application, the Planning Board received assistance from Town Counsel by way of two (2) letters dated October 18, 2021 and November 3, 2021 (the “Town Counsel Letters,” true and accurate copies of which are annexed, collectively, as **Exhibit F**). The October 2021 Town Counsel Letters state, in relevant part:

What is the correct number of required affordable units as per our Zoning Bylaw Section 8.3.2 and 8.3.3 in response to the 50-unit Senior Housing Project Proposal? Response: ... [A] plain reading of the Bylaw requires the 10<sup>th</sup>, 17<sup>th</sup>, 24<sup>th</sup>, 31<sup>st</sup>, 38<sup>th</sup> and 45<sup>th</sup> units, for a total of six (6) units, be Affordable Housing Units. ...

Section 8.3.4 provides alternatives to providing on-site Affordable Housing Units and is focused on the creation of those units. ...

Pursuant to Section 8.3.4.3 of the Town’s Zoning Bylaw (the “Bylaw”), a developer may meet its obligation to provide Affordable Housing Units (“Affordable Units”) by paying a fee in lieu (the “Fee”) of constructing the required Affordable Units.

(Exhibit E, pp.1-2 and 4.)

Chebacco determined that, in connection with the 2021 Special Permit Application, it would satisfy its obligations in this manner instead of constructing affordable units within the approximately 66-acre 2021 Special Permit Parcel. The required monetary amount was calculated using the Town’s prescribed formula for yielding an amount sufficient to actually construct the

required six (6) affordable units through the Hamilton Affordable Housing Trust<sup>2</sup> at a cost of \$362,400,<sup>3</sup> per unit which totals \$2,174,400 (the “Affordable Unit Construction Fee”).

5. Ultimately, however, the 2021 Special Permit Application was denied. While Chebacco maintains an appeal of such denial, it also presents an application to develop the Property via a comprehensive permit issued pursuant to G.L. c. 40B, §§ 20-23. The 40B application was submitted on March 22, 2024.

6. The ZBA opened its public hearing for Chebacco’s current Project on May 1, 2024. While the proceedings remain ongoing, the ZBA purported to vote at its May 1, 2024 meeting to “invoke Safe Harbor pursuant to 760 CMR 56.03(7) and (8)(a).” (Exhibit A, p.2, ¶2.)

7. On May 1, 2024, Chebacco, through legal counsel, provided a comprehensive memorandum to the ZBA, articulating the legal grounds for Chebacco’s position that the 2021 Special Permit Application does not constitute a “related application” as the same is defined by 760 CMR 56.03(7), and therefore, that ZBA cannot invoke Safe Harbor on account of a related application pursuant to 760 CMR 56.03(1)(e) (a true and accurate copy of the aforesaid memorandum is annexed as **Exhibit H**).

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<sup>2</sup> Notably, the Town’s Housing Production Plan (available at [https://www.hamiltonma.gov/wp-content/uploads/2020/07/2019-Hamilton-HPP\\_Approved.pdf](https://www.hamiltonma.gov/wp-content/uploads/2020/07/2019-Hamilton-HPP_Approved.pdf)) states a goal of “increases in [the Town’s] number of SHI eligible housing” by “being proactive and strategic in [its] housing initiatives and land-use policy choices...,” (*id.*, at p.9), including targeted development of the specific Property upon which the Project here at issue is proposed. (*Id.*, at p.31.) Moreover, one of Chebacco’s owners was required to pay to the Hamilton Affordable Housing Trust \$435,000 to be utilized for construction of affordable housing units for a previous, unrelated project. Subsequently, upon information and belief, the Affordable Housing Trust provided that \$435,000 to Habitat for Humanity to construct affordable housing on Asbury Street in Hamilton (a true and accurate copy of the mortgage evidencing the aforesaid payment is annexed as **Exhibit G**). Chebacco thus anticipated affordable housing units would similarly be constructed through the Hamilton Affordable Housing Trust in its presentation of the prior project.

<sup>3</sup> Affordable units are thereafter sold for \$280,000 +/- depending upon the then value as assigned by EOHLC for the HUD Region.

8. The ZBA's record of proceedings in this matter does not contain written guidance from Town Counsel regarding the invocation of safe harbor on account of a related application.

### **SECTION III** **LEGAL ANALYSIS**

The question presented is whether the 2021 Special Permit Application constitutes a "related application" as the same is defined in 760 CMR 56.03(7), and consequently, whether safe harbor is unavailable in the present proceedings before the ZBA. EOHLC's 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) (emphasis supplied).

Because the 2021 Special Permit Application proposed a project which was “principally residential in use,” and because an appeal of the Planning Board’s denial is presently underway<sup>4</sup> in the Land Court, the determinative inquiries are (a) whether the 2021 Special Permit Application “related to construction on the same land” as the current Project, and if so, (b) whether the 2021 Special Permit Application “include[d] at least 10% SHI Eligible Housing units.” See 760 CMR 56.03(7).

First, the Regulations do not define the term “land,” nor do they define the term “same land.” See 780 CMR 56.02. Notably, Chebacco received an ANR approval<sup>5</sup> from the Planning Board in October of 2021 to create two (2) parcels of land, one which was approximately 56 +/- acres and one which was approximately 10 +/- acres, but the 2021 Special Permit Application concerned both parcels for a total of 66 +/- acres, as was noted in both the application and the Planning Board’s decision, notwithstanding the ANR division. The larger 66-acre +/- parcel which was the subject of the 2021 Special Permit Application is bounded by both Essex Street and Chebacco Road and is both larger and differently shaped when compared to the smaller 56-acre +/- parcel that is the subject of Chebacco’s current Project. The Town bears the burden of proving the Property here at issue and the 2021 Special Permit Parcel are one and the same under the Regulations. Given the significant differences explained herein, Chebacco takes the position that the Town fails to meet its burden. See In the Matter of Altham Zoning Board of Appeals and

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<sup>4</sup> As the Land Court’s Docket indicates, the appeal is currently stayed pending the results of these alternative permitting proceedings (a copy of the allowed Joint Motion to Extend Stay is annexed as **Exhibit I**).

<sup>5</sup> ANR approval does not “relate to construction” and thus does not trigger a related application safe harbor. In the Matter of Stoneham Board of Appeals and Weiss Farm Apartments, LLC, 2015 WL 4061439, \*6 (HAC 2015).

Alliance Realty Partners, 2018 WL 992415 (“the Board has failed to show that DMH 3-4 are DMH 3 and 4...”).

Second, even when assuming arguendo that the approximately 66-acre 2021 Special Permit Parcel and the approximately 56-acre Property upon which Chebacco proposes to construct its current Project are one in the same under the Regulations, the 2021 Special Permit Application included at least 10% SHI eligible housing units under the Town’s Zoning Bylaw. Indeed, there can be no doubt that Section 8.3 of the Zoning Bylaw and EOHLC’s Regulations share a common purpose. The 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. Similarly, Zoning Bylaw Section 8.3 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.)<sup>6</sup>

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<sup>6</sup> The following definitions from the Zoning Bylaw – articulating specific criteria for affordability and tying the same to EOHLC affordability standards – only cement the conclusion that the Zoning Bylaw and the Regulations overlap in subject matter:



Sections 8.3.2 and 8.3.3 of the Town's Zoning Bylaw combine to impose stringent requirements for the development of affordable housing, including the requirement that "the tenth dwelling unit and every seventh unit thereafter shall be an Affordable Housing Unit."

(Exhibit E, p.3, Zoning Bylaw Section 8.3.3; see also id. at Section 8.3.2.)

Section 8.3.4 of the Town's 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...
2. A donation of land may be made in lieu of providing Affordable Housing Unit...
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.

(Exhibit E, p.3, Zoning Bylaw, Section 8.3.4.)

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Affordable Housing Unit: A dwelling, or a unit in an assisted living facility or congregate residence, that is affordable to and occupied by a low- or moderate-income household and meets the requirements of the Local Initiative Program for inclusion on the Chapter 40B Subsidized Housing Inventory.

Local Initiative Program: A program administered by the Massachusetts Department of Housing and Community Development (DHCD) pursuant to 760 CMR 45.00 to develop and implement local housing initiatives that produce low and moderate income housing.

Low Income Household: A household with income at or below 50% of area median income, adjusted for household size, for the metropolitan or non-metropolitan area that includes the Town of Hamilton as determined annually by the United States Department of Housing and Urban Development (HUD).

Moderate Income Household: A household with income at or below 80% of area median income, adjusted for household size, for the metropolitan or non-metropolitan area that includes the Town of Hamilton as determined annually by the United States Department of Housing and Urban Development (HUD).

It is implicit in this language that the alternatives are intended to facilitate the development of the same amount of affordable housing, as if the developer were building the units themselves. In fact, the actual amount of the Affordable Unit Construction Fee was calculated by reference to the cost to construct the required number of affordable units. In this instance, \$362,400 per unit where an affordable unit will actually sell for approximately \$280,000 +/- and would actually cost approximately \$350,000 to build.

As Town Counsel stated in connection with the 2021 Special Permit Application:

Pursuant to Section 8.3.4.3 of the Town's Zoning Bylaw (the "Bylaw"), a developer may meet its obligation to provide Affordable Housing Units ("Affordable Units") by paying a fee in lieu (the "Fee") of constructing the required Affordable Units.

(Exhibit F, p.4, ¶1.) Indeed, Town Counsel further opined:

Section 8.3.4 provides alternatives to providing on-site Affordable Housing Units and is focused on the creation of those units.

(Exhibit F, p.2, ¶2.)

Here, the Project contemplated by the 2021 Special Permit Application was able to "meet[] its obligation to provide Affordable Housing Units..." pursuant to Zoning Bylaw Section 8.3.4.3. (See id., at p.4, ¶1.) Indeed, the express language of the Zoning Bylaw, with explicit cross-references to EOHLC affordability requirements, defines affordable units in a way that plainly satisfies all SHI eligibility criteria. Therefore, the 2021 Special Permit Application not only met the requirements of the Town's Zoning Bylaw with respect to affordability, but by implication, necessarily exceeded the 10% minimum set forth within 760 CMR 56.03(7)(a). Consequently, the affordability component of the 2021 Special Permit Application rendered inapplicable the related application safe harbor under 760 CMR 56.03(1)(e).

Chebacco understands that the ZBA may rely on a narrow reading of the Regulations for the proposition that use of the Affordable Unit Construction Fee rather than actual construction

of the units precludes a conclusion that the Special Permit project included 10% affordable housing. However, such a conclusion is belied by the fact that the Town, by the language of its own bylaws, provided alternative means of developing the exact number of affordable units that would be developed had Chebacco performed the construction themselves. Accordingly, the Town has acknowledged this method as providing the equivalent of more than 10% affordable housing. Indeed, this, in fact, does and has happened in the Town. In the prior personal experience of Chebacco's Managing Partner, an inclusionary payment of \$435,000, an affordable housing payment amount calculated based on the total units available, was paid to the Affordable Housing Trust, and the Affordable Housing Trust subsequently provided \$435,000 to Habitat for Humanity, for the purposes of building affordable units on Asbury Street in Hamilton (Chebacco's understanding is that these were the very same funds previously paid to the Affordable Housing Trust by Chebacco's Managing Partner). Therefore, the required payment is not a nominal amount used to provide lip service to the cause for affordable housing. As noted in the Zoning Bylaw and as required in the Regulations, the payment is the equivalent of affordable housing units, here resulting in a payment of \$2,174,400 to the Affordable Housing Trust.

Moreover, from a policy perspective, disallowing the invocation of the safe harbor would be consistent with the goal of the Regulations in the first instance – not penalizing a developer who, despite best intentions to build affordable housing, was stymied by a board during a conventional zoning proceeding. Stated differently, it would be counter to the purpose of the provisions of 760 CMR 56.03(7)(a) if a developer who filed a conventional (i.e., non-40B) application that included a prescribed method of developing 10% affordable housing, would have to wait twelve months in the event that the presiding board denied that application.

**REQUESTS FOR RELIEF BY EOHLC**

**WHEREFORE**, Chebacco requests that the EOHLC find the following:

1. The Town's Notice of Safe Harbor, dated May 2, 2024 was incorrect in that the 2021 Special Permit Application does not constitute a related application, as the same is defined by 760 CMR 56.03(7), and therefore, safe harbor cannot be invoked pursuant to 760 CMR 56.03(1)(e).

Respectfully submitted,  
**APPELLANT,**  
**CHEBACCO HILL CAPITAL PARTNERS, LLC**  
By its Attorney,

/s/ Stephen J. Chaplin

Lisa L. Mead, Esq. (BBO# 550901)  
Stephen J. Chaplin, Esq. (BBO# 685571)  
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# **EXHIBIT A**



Town of Hamilton Inspectional Services  
Office of the Director of Planning & Inspectional Services  
650 Asbury Street, Hamilton, MA 01982  
Telephone Number: 978-626-5248 - Email Address: [preffett@hamiltonma.gov](mailto:preffett@hamiltonma.gov)

May 2, 2024

BY CERTIFIED MAIL

Lawrence Smith  
Chebacco Hill Capital Partners, LLC  
176 Barton Road  
Stow, MA 01775

Re: Notice of Safe Harbor – Related Application  
Village at Chebacco Hill Comprehensive Permit Application  
133 Essex Street, Hamilton, MA

Dear Mr. Smith:

On May 1, 2024 at the opening hearing on your application for a comprehensive permit for the proposed G.L. c. 40B development at 133 Essex Street, Hamilton, MA, consisting of 59 mixed income residential dwelling units in 32 buildings (15 affordable units) on approximately 56.81 acres (the "Application"), the Town of Hamilton Zoning Board of Appeals (the "Board") voted to invoke Safe Harbor pursuant to 760 CMR 56.03(7) and (8)(a) as a related application is pending at the Massachusetts Land Court.

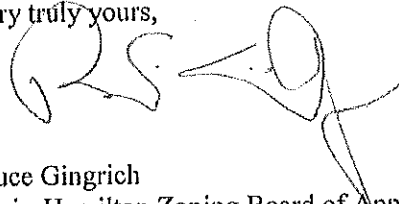
Here, the Board determined that the Application concerns the same property (133 Essex Street) on which there is a pending application for a similar real estate development project (50 housing units) under the Town of Hamilton Zoning Bylaw, Section 8.2, Senior Housing. That application for a special permit pursuant to Section 8.2 was filed on July 2, 2021 and was denied by the Planning Board on October 19, 2022. Said denial was appealed to the Land Court (Case No. 22 MISC 000591) which is still pending in the Land Court. See, Docket attached as Exhibit 1. Since the Land Court case is still pending, there has not been a "final disposition [of that related application] including all appeals" within 12 months of the current Application.

While the Board acknowledges that the "Related Application" safe harbor does not apply when the prior application proposed a development that "include[d] at least 10% SHI Eligible Housing units."

[emphasis added] (760 CMR 56.03(7)(a)), here, the 2021 special permit application proposed to donate \$2,174,000 to Hamilton's Affordable Housing Trust to fulfil its obligations under Hamilton's inclusionary zoning bylaw, Section 8.3. See Planning Board Decision attached hereto as Exhibit 2. Under that section, all developments involving the creation of ten (10) or more dwelling units must either contain a minimum number of deed-restricted affordable units, must provide a donation of land for the creation of affordable units, or the applicant must make a payment "in lieu" of providing those units. See, Zoning Bylaw, Section 8.3.4(1-3). Here, the 2021 application was for a project that did not specifically include any SHI Eligible Housing units as explicitly stated in 760 CMR 56.03(7)(a).

Therefore, at its May 1, 2024 the Board voted to invoke Safe Harbor pursuant to 760 CMR 56.03(7) and (8)(a).

Very truly yours,

A handwritten signature in black ink, appearing to read "B. Gingrich", with a long horizontal flourish extending to the right.

Bruce Gingrich  
Chair, Hamilton Zoning Board of Appeals

Enc.

cc: Phil DeMartino, EOHLC (via certified mail and email: [phillip.demartino@mass.gov](mailto:phillip.demartino@mass.gov))  
Town Manager  
Lisa Mead, Esq. (by email: [lisa@mtclawyers.com](mailto:lisa@mtclawyers.com))  
Dan Hill, Esq. (by email: [dhill@danhilllaw.com](mailto:dhill@danhilllaw.com))



Town of Hamilton Inspectional Services  
Office of the Director of Planning & Inspectional Services  
650 Asbury Street, Hamilton, MA 01982  
Telephone Number: 978-626-5248 - Email Address: [preffett@hamiltonma.gov](mailto:preffett@hamiltonma.gov)

May 2, 2024

BY EMAIL AND CERTIFIED MAIL

Phillip DeMartino  
Senior Technical Program Assistance Coordinator  
Community Assistance Unit, Executive Office of Housing and Livable Communities (EOHLC)  
Division of Livable Communities  
100 Cambridge Street, Suite 300  
Boston, MA 02114  
[phillip.demartino@mass.gov](mailto:phillip.demartino@mass.gov)

Re: Village at Chebacco Hill Comprehensive Permit Application  
133 Essex Street, Hamilton, MA

Dear Mr. DeMartino:

Please allow this letter to serve as a notice of safe harbor pursuant to 760 CMR 56.03(7) and (8)(a) issued by the Town of Hamilton Zoning Board of Appeals (the "Board") for a comprehensive permit application filed by Chebacco Hill Capital Partners LLC ("Applicant") regarding the proposed G.L. c. 40B development at 133 Essex Street, Hamilton, MA, consisting of 59 mixed income residential dwelling units in 32 buildings (15 affordable units) on approximately 56.81 acres (the "Application"). Please find the Notice of Safe Harbor issued to Applicant attached hereto as Exhibit A.

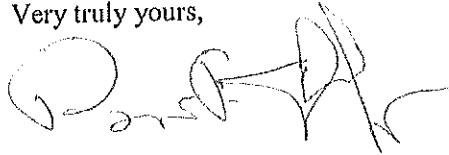
The Board voted at the May 1, 2024 opening public hearing on the Application that the Application was a Related Application as the Application concerns the same property (133 Essex Street) on which there is a pending application for a similar real estate development project (50 housing units)



under the Town's Senior Housing zoning bylaw. That application for a special permit, which was filed on July 2, 2021, was denied by the Planning Board on October 19, 2022 and is currently under appeal at the Land Court (Case No. 22 MISC 000591). The Land Court case is still open and therefore there has been no "final disposition" of the 2021 special permit application.

Please consider this the official notice as provided in 760 CMR 56.03(8)(a).

Very truly yours,

A handwritten signature in black ink, appearing to read "Bruce Gingrich", with a stylized flourish at the end.

Bruce Gingrich  
Chair, Hamilton Zoning Board of Appeals

Enc.

cc: Town Manager  
Chebacco Hill Capital Partners LLC  
Lisa Mead, Esq. (by email: [lisa@mtclawyers.com](mailto:lisa@mtclawyers.com))  
Dan Hill, Esq. (by email: [dhill@danhilllaw.com](mailto:dhill@danhilllaw.com))

# **EXHIBIT B**



# **EXHIBIT C**

# 22 MISC 000591 Chebacco Hill Capital Partners, LLC v. Marnie Crouch Member of the Hamilton Planning Board , et al. SPEICHER

- Case Type:  
Miscellaneous
- Case Status:  
Open
- File Date  
11/07/2022
- DCM Track:
- Initiating Action:  
ZAC - Appeal from Zoning/Planning Board, G.L. Chapter 40A, § 17
- Status Date:  
11/07/2022
- Case Judge:  
Speicher, Hon. Howard P.
- Next Event:

## Property Information

133 Essex Street  
Hamilton

All Information Party Event Docket Financial Receipt Disposition

## Party Information

**Chebacco Hill Capital Partners, LLC**  
- Plaintiff

### Party Attorney

- Attorney  
Borenstein, Esq., Donald Francis
- Bar Code  
566810
- Address  
Johnson and Borenstein, LLC  
12 Chestnut St  
Andover, MA 01810
- Phone Number  
(978)475-4488
- Attorney  
Glass, Esq., Gordon T
- Bar Code  
706234
- Address  
Johnson and Borenstein, LLC  
12 Chestnut St  
Andover, MA 01810
- Phone Number  
(978)475-4488

[More Party Information](#)

**Crouch, Marnie**  
- Defendant

### Party Attorney

- Attorney  
Mullen, Esq., Connor A
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[More Party Information](#)

**Herr, Beth**  
- Defendant

**Party Attorney**

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- Address
- KP Law, P.C.  
101 Arch St  
Boston, MA 02110
- Phone Number
- (617)654-1706

[More Party Information](#)

**Mitchell, Rick**  
- Defendant

**Party Attorney**

- Attorney
- Mullen, Esq., Connor A
- Bar Code
- 703742
- Address
- K.P. Law, PC  
101 Arch St  
12th Fl  
Boston, MA 02110
- Phone Number
- (617)556-0007
- Attorney
- Stein, Esq., Robin
- Bar Code
- 654829
- Address
- KP Law, P.C.  
101 Arch St  
Boston, MA 02110
- Phone Number
- (617)654-1706

[More Party Information](#)

**Poore, Jonathan**  
- Defendant

**Party Attorney**

- Attorney
- Mullen, Esq., Connor A
- Bar Code
- 703742
- Address
- K.P. Law, PC  
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- Address
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- Phone Number
- (617)654-1706

[More Party Information](#)

**Wheaton, William**  
- Defendant

**Party Attorney**

- Attorney
- Mullen, Esq., Connor A
- Bar Code
- 703742
- Address
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- Phone Number
- (617)654-1706

[More Party Information](#)

**Boroff, Richard**  
- Defendant

**Party Attorney**

- Attorney
- Mullen, Esq., Connor A
- Bar Code
- 703742
- Address
- K.P. Law, PC
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- 654829
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[More Party Information](#)

**Norton, Patrick**  
- Defendant

**Party Attorney**

- Attorney
- Mullen, Esq., Connor A
- Bar Code
- 703742
- Address
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- Boston, MA 02110
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- Attorney
- Stein, Esq., Robin

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- 654829
- Address
- KP Law, P.C.
- 101 Arch St
- Boston, MA 02110
- Phone Number
- (617)654-1706

#### More Party Information

**Dahlquist, Emil**  
- Defendant








- **Party Attorney**
- Attorney
- Mullen, Esq., Connor A
- Bar Code
- 703742
- Address
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- 12th Fl
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- Bar Code
- 654829
- Address
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- 101 Arch St
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- Phone Number
- (617)654-1706

#### More Party Information








#### **Events**

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
12/15/2022 11:45 AM	J. Speicher	Courtroom 401 - Fourth Floor	Case Management Conference	Speicher, Hon. Howard P.	Rescheduled
01/05/2023 10:45 AM	J. Speicher	Courtroom 401 - Fourth Floor	Case Management Conference	Speicher, Hon. Howard P.	Held via video

#### **Docket Information**

<u>Docket Date</u>	<u>Docket Text</u>	<u>Amount Owed</u>	<u>Image Avail.</u>
11/07/2022	Complaint filed.		
11/07/2022	Case assigned to the Fast Track per Land Court Standing Order 1:04.		
11/07/2022	Land Court miscellaneous filing fee Receipt: 435721 Date: 11/07/2022	\$240.00	
11/07/2022	Land Court surcharge Receipt: 435721 Date: 11/07/2022	\$15.00	
11/07/2022	Land Court summons Receipt: 435721 Date: 11/07/2022	\$40.00	
11/07/2022	Uniform Counsel Certificate for Civil Cases filed by Plaintiff.		
11/15/2022	Event Scheduled Judge: Speicher, Hon. Howard P. Event: Case Management Conference Date: 12/15/2022 Time: 11:45 AM		
11/15/2022	The case has been assigned to the F Track. Notice sent.		
11/25/2022	Appearance of Robin Stein, Esq., Connor A Mullen, Esq. for Marnie Crouch Member of the Hamilton Planning Board, filed		
11/25/2022	Affidavit of Compliance with Notice requirements of Chapter 40A, Sec. 17 filed by Gordon T Glass, Esq..		
12/05/2022	Assented to Motion to continue Case Management Conference, filed and Allowed.		



<u>Docket Date</u>	<u>Docket Text</u>	<u>Amount Owed</u>	<u>Image Avail.</u>
12/05/2022	Event Resulted: Case Management Conference scheduled on: 12/15/2022 11:45 AM Has been: Rescheduled Hon. Howard P. Speicher, Presiding		
12/05/2022	Event Scheduled Judge: Speicher, Hon. Howard P. Event: Case Management Conference Date: 01/05/2023 Time: 10:45 AM		
12/16/2022	Summons returned to Court with service on Emil Dahlquist Member of the Hamilton Planning Board, Marnie Crouch Member of the Hamilton Planning Board, Beth Herr Member of the Hamilton Planning Board, Jonathan Poore Member of the Hamilton Planning Board, Richard Boroff Member of the Hamilton Planning Board, Patrick Norton Member of the Hamilton Planning Board, William Wheaton Member of the Hamilton Planning Board filed. Summons returned to Court with service on Frederick Mitchell		 <a href="#">Image</a>
12/27/2022	Joint Case Management Conference Statement, filed.		 <a href="#">Image</a>
01/05/2023	Case management conference held by videoconference. Early intervention event held. Attorneys Donald Borenstein and Robin Stein appeared. Counsel provided an overview of the dispute and legal issues. All discovery, including expert disclosures and depositions, if any, to be completed by May 6, 2023. If either party intends to file a motion for summary judgment, counsel is instructed to contact sessions clerk Emily Rosa to request a status conference. Assuming neither party decides to file a motion for summary judgment, at the close of discovery, counsel for plaintiff is instructed to contact sessions clerk Emily Rosa to schedule a pretrial conference. Parties encouraged to explore settlement.		
01/05/2023	Alternative Dispute Resolution: Early Intervention Event held.  Judge: Speicher, Hon. Howard P.		
01/19/2023	Answer, filed.		 <a href="#">Image</a>
03/07/2023	Joint Motion to Stay, filed and Allowed. Parties to file a status report at the end of the 90-day stay.		 <a href="#">Image</a>
05/26/2023	Joint Motion to Extend Stay, filed and Allowed.		 <a href="#">Image</a>
08/03/2023	Joint Motion to Extend Stay, filed and Allowed to November 17, 2023. The parties should not anticipate any further extensions.		 <a href="#">Image</a>
12/18/2023	Joint Motion to Extend Stay, filed and Allowed.		 <a href="#">Image</a>

### Financial Summary

<u>Cost Type</u>	<u>Amount Owed</u>	<u>Amount Paid</u>	<u>Amount Dismissed</u>	<u>Amount Outstanding</u>
Cost	\$295.00	\$295.00	\$0.00	\$0.00
	\$295.00	\$295.00	\$0.00	\$0.00

### Receipts

<u>Receipt Number</u>	<u>Receipt Date</u>	<u>Received From</u>	<u>Payment Amount</u>
435721	11/07/2022	Borenstein, Esq., Donald Francis	\$295.00
			\$295.00

### Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Undisposed		Speicher, Hon. Howard P.

# **EXHIBIT D**

# 2277CV01137 Chebacco Hill Capital Partners, LLC vs. Marnie Crouch As member of Town of Hamilton Planning Board et al

- Case Type:  
Administrative Civil Actions
- Case Status:  
Open
- File Date  
11/23/2022
- DCM Track:  
X - Accelerated
- Initiating Action:  
Certiorari Action, G. L. c. 249 § 4
- Status Date:  
11/23/2022
- Case Judge:
- Next Event:

All Information Party Tickler Docket Disposition

## Party Information

### Chebacco Hill Capital Partners, LLC - Plaintiff

#### Alias

#### Party Attorney

- Attorney
- Borenstein, Esq., Donald Francis
- Bar Code
- 566810
- Address
- Johnson and Borenstein, LLC
- 12 Chestnut St
- Andover, MA 01810
- Phone Number
- (978)475-4488
- Attorney
- Glass, Esq., Gordon T
- Bar Code
- 706234
- Address
- Johnson and Borenstein, LLC
- 12 Chestnut St
- Andover, MA 01810
- Phone Number
- (978)475-4488

[More Party Information](#)

### Crouch, Marnie - Defendant

#### Alias

#### Party Attorney

- Attorney
- Stein, Esq., Robin
- Bar Code
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- Phone Number
- (617)654-1706
- Attorney
- Weisheit, Esq., A. Alexander
- Bar Code
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- Address
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- 101 Arch St
- Boston, MA 02110

- Phone Number
- (617)556-0007

[More Party Information](#)

Herr, Beth  
- Defendant

Alias

**Party Attorney**

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[More Party Information](#)

Mitchell, Rick  
- Defendant

Alias

**Party Attorney**

- Attorney
- Stein, Esq., Robin
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- Phone Number
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[More Party Information](#)

Poore, Jonathan  
- Defendant

Alias

**Party Attorney**

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- Attorney
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[More Party Information](#)

**Wheaton, William**  
- Defendant

**Alias**

**Party Attorney**

- Attorney
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- Bar Code
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- Attorney
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- Address
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- Phone Number
- (617)556-0007

[More Party Information](#)

**Boroff, Richard**  
- Defendant

**Alias**

**Party Attorney**

- Attorney
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- Bar Code
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- Attorney
- Weisheit, Esq., A. Alexander
- Bar Code
- 682323
- Address
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- 101 Arch St
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- Phone Number
- (617)556-0007

[More Party Information](#)

**Norton, Patrick**  
- Defendant

**Alias**

**Party Attorney**

- Attorney
- Stein, Esq., Robin
- Bar Code
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- 101 Arch St
- Boston, MA 02110
- Phone Number
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- Bar Code
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- 101 Arch St
- Boston, MA 02110
- Phone Number
- (617)556-0007

[More Party Information](#)

**Dahlquist, Emil**

- Defendant

**Alias**

**Party Attorney**











- Attorney
- Stein, Esq., Robin
- Bar Code
- 654829
- Address
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- Phone Number
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- Attorney
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- Phone Number
- (617)556-0007















[More Party Information](#)

**Ticklers**

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Service	11/25/2022	02/23/2023	90	12/23/2022
Judgment	11/25/2022	11/27/2023	367	
Status Review	06/01/2023	03/29/2024	302	07/24/2024

**Docket Information**

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
11/23/2022	Complaint electronically filed.	1	
11/23/2022	Civil action cover sheet filed.	2	
11/25/2022	Case assigned to: DCM Track X - Accelerated was added on 11/25/2022		
11/28/2022	Amended: First amended complaint filed by Chebacco Hill Capital Partners, Llc	3	
12/19/2022	Attorney appearance electronically filed. Applies To: Stein, Esq., Robin (Attorney) on behalf of Beth Herr As member of Town of Hamilton Planning Board, Emil Dahlquist As member of Town of Hamilton Planning Board, Jonathan Poore As member of Town of Hamilton Planning Board, Marnie Crouch As member of Town of Hamilton Planning Board, Patrick Norton As member of Town of Hamilton Planning Board, Richard Boroff As member of Town of Hamilton Planning Board, Rick Mitchell As member of Town of Hamilton Planning Board, William Wheaton As member of Town of Hamilton Planning Board (Defendant); Weisheit, Esq., A. Alexander (Attorney) on behalf of Beth Herr As member of Town of Hamilton Planning Board, Emil Dahlquist As member of Town of Hamilton Planning Board, Jonathan Poore As member of Town of Hamilton Planning Board, Marnie Crouch As member of Town of Hamilton Planning Board, Patrick Norton As member of Town of Hamilton Planning Board, Richard Boroff As member of Town of Hamilton Planning Board, Rick Mitchell As member of Town of Hamilton Planning Board, William Wheaton As member of Town of Hamilton Planning Board (Defendant)		
12/23/2022	Service Returned for Defendant Marnie Crouch As member of Town of Hamilton Planning Board: Service made in hand	4	
12/23/2022	Service Returned for Defendant Beth Herr As member of Town of Hamilton Planning Board: Service made at last and usual	5	
12/23/2022	Service Returned for Defendant Rick Mitchell As member of Town of Hamilton Planning Board: Service made at last and usual	6	
12/23/2022	Service Returned for Defendant Emil Dahlquist As member of Town of Hamilton Planning Board: Service made at last and usual	7	
12/23/2022	Service Returned for Defendant William Wheaton As member of Town of Hamilton Planning Board: Service made at last and usual	8	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
12/23/2022	Service Returned for Defendant Jonathan Poore As member of Town of Hamilton Planning Board: Service made at last and usual	9	 <a href="#">Image</a>
12/23/2022	Service Returned for Defendant Patrick Norton As member of Town of Hamilton Planning Board: Service made at last and usual	10	 <a href="#">Image</a>
12/23/2022	Service Returned for Defendant Richard Boroff As member of Town of Hamilton Planning Board: Service made in hand	11	 <a href="#">Image</a>
03/07/2023	Plaintiff Chebacco Hill Capital Partners, Llc's Joint Motion to Stay	12	 <a href="#">Image</a>
03/13/2023	Endorsement on Motion to Stay (#12.0): ALLOWED  Judge: Howe, Hon. Janice W		 <a href="#">Image</a>
05/26/2023	Plaintiff Chebacco Hill Capital Partners, Llc's Joint Motion to Extend Stay	13	 <a href="#">Image</a>
06/01/2023	Endorsement on Motion to extend time for, to stay an action (#13.0): ALLOWED		 <a href="#">Image</a>
08/03/2023	Plaintiff Chebacco Hill Capital Partners, Llc's Motion to Extend Stay	14	 <a href="#">Image</a>
08/07/2023	Endorsement on Motion to stay an action (#14.0): ALLOWED		 <a href="#">Image</a>
12/11/2023	ORDER sent for Status Review, if notice is not received by 01/25/2024 the complaint will be dismissed.	15	 <a href="#">Image</a>
12/18/2023	Plaintiff Chebacco Hill Capital Partners, Llc's Joint Motion to Extend Stay	16	 <a href="#">Image</a>
12/20/2023	Endorsement on Motion to extend stay is ALLOWED (#16.0): ALLOWED  Judge: Howe, Hon. Janice W		 <a href="#">Image</a>
03/29/2024	ORDER sent for Status Review, if notice is not received by 04/29/2024 the complaint will be dismissed.	17	 <a href="#">Image</a>
04/08/2024	Status review notice returned This case has been stayed by agreement of the parties pending the result of Plaintiff's alternative permitting.  Applies To: Borenstein, Esq., Donald Francis (Attorney) on behalf of Chebacco Hill Capital Partners, Llc (Plaintiff)	18	 <a href="#">Image</a>

### Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Pending		

# **EXHIBIT E**





## TOWN OF HAMILTON ZONING BYLAW

FIRST ADOPTED 1954 INCLUDING AMENDMENTS UP TO OCTOBER 22, 2019  
ADOPTED PURSUANT TO THE MASSACHUSETTS ZONING ACT  
M.G.L. CHAPTER 40A AS AMENDED

8.2.30 Employment of Outside Consultants. The Planning Board may employ outside consultants, at the applicant's expense, under the terms of G.L. c. 44, s. 53G, and Planning Board Rules and Regulations Governing Special Permits, to assist in its permit decision, including but not limited to plan review, drainage and stormwater analysis, to determine conformance with this Section and other requirements, and for construction, inspection, etc.

8.2.31 Planning Board Findings. In addition to the criteria set forth in Section 8.25.2, the Planning Board must make written findings on the following standards for the proposed use, buildings and structures for a Senior Housing Development. The proposed Senior Housing Development must:

1. Be compatible with adjacent land uses and with the character of the neighborhood in which it is located;
2. Mitigate impact to abutting land and natural resources by reason of air or water pollution, noise, dust, vibration, or stormwater runoff;
3. Provide safe and convenient access to the site from existing or proposed roads, and to proposed structures thereon, with particular reference to pedestrian and vehicular safety, traffic flow and control, and access in case of fire or emergency;
4. Provide for adequate capacity for public services, facilities, and utilities to service the proposed development such as water pressure and sewer capacity;
5. Provide for visual and noise buffering of the development to minimize impact to abutting properties;
6. Provide for the perpetual preservation and maintenance of open space, trails, and recreation areas; and
7. Demonstrate compliance with the intent of Section 8.1 Open Space and Farmland Preservation Development, Special Permit Design Process, in order to encourage cluster development.

8.2.32 Expansion. Once any Senior Housing development has been permitted under this Section, further expansion shall not be permitted, and no subdivision of the property or change in property lines shall be allowed. A notation to this effect shall be written on the plan.

8.2.33 Annual Reporting. The organization of homeowners established for the management of the development, or if none, the owners individually, shall annually file a written report with the Building Commissioner listing the residents of each occupied Dwelling Unit. The format for the Annual Report shall be obtained from the Building Commissioner. Said Annual Report shall include the names and ages of the owners and each person residing in each Dwelling Unit as of January 1st of each year, and any other information necessary to ensure compliance with and enforce any required conditions of Special Permit. The Annual Report shall be filed with the Building Commissioner on January 15th of each year.

### 8.3 INCLUSIONARY HOUSING.

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.

8.3.2 Applicability. This Section applies to all developments involving the creation of ten (10) or more Dwelling units or ten (10) or more lots for residential use.

Developments may not be segmented to avoid compliance with this Section. Divisions of land that would cumulatively result in an increase by ten (10) or more residential lots or dwelling units above the number existing on any parcel or any contiguous parcels in common ownership in the twenty-four (24) months prior to any application for development under this Bylaw or the Subdivision Control Law are subject to this Section. For purposes of this Section, a division of land shall mean any division of land subject to G.L. c. 41, s. 81K-81GG.

8.3.3 Mandatory Provision of Affordable Housing Units. In any development subject to this Section, the tenth dwelling unit and every seventh unit thereafter shall be an Affordable Housing Unit. Nothing in this Section shall preclude a developer from providing more Affordable Housing Units than are required hereunder.

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. All requirements that apply to on-site provision of Affordable Housing Units shall apply to provision of off-site Affordable Housing Units. In addition, the location of the off-site Affordable Housing Units shall be approved by the Planning Board as an integral element of the development review and approval process.
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. Prior to accepting land as satisfaction of the requirements of this Section, the Planning Board may require the applicant to submit an appraisal or other data relevant to the determination of suitability for an equivalent number of Affordable Housing Units.
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.

8.3.5 General Provisions. The Planning Board shall be charged with administering this Section and shall promulgate Inclusionary Housing Rules and Regulations, including but not limited to submission requirements and procedures, application and review fees, minimum requirements for a marketing plan,

# **EXHIBIT F**

November 3, 2021

**Robin Stein**  
[rstein@k-plaw.com](mailto:rstein@k-plaw.com)

**BY ELECTRONIC MAIL ONLY** ([rmitchell@hamiltonma.gov](mailto:rmitchell@hamiltonma.gov))

**CONFIDENTIAL - NOT A PUBLIC DOCUMENT**

Mr. Rick Mitchell, Chair  
Members of the Planning Board  
Hamilton Town Hall  
577 Bay Road  
Hamilton, MA 01936

Re: Zoning Bylaw, Section 8.3 Inclusionary Housing

Dear Members of the Planning Board:

You have asked for guidance regarding the interpretation of portions of Section 8.3 of the Town's Zoning Bylaw (the "Bylaw"). I have reprinted the Planning Board's three (3) specific questions below and have responded in kind.

1. What is the correct number of required affordable units as per our Zoning Bylaw Section 8.3.2 and 8.3.3 in response to the 50-unit Senior Housing Project proposal?

Response:

It is my understanding that there is no question that Section 8.3.2 applies to the proposed 50-unit project. Where Section 8.3.3 provides: "In any development subject to this Section, the tenth dwelling unit and every seventh unit thereafter shall be an Affordable Housing Unit", it is my opinion that the project is required to provide six (6) Affordable Housing Units. Specifically, a plain reading of the Bylaw requires the 10<sup>th</sup>, 17<sup>th</sup>, 24<sup>th</sup>, 31<sup>st</sup>, 38<sup>th</sup> and 45<sup>th</sup> units, for a total of six (6) units, be Affordable Housing Units.

## **CONFIDENTIAL - NOT A PUBLIC DOCUMENT**

Mr. Rick Mitchell, Chair  
Members of the Planning Board  
November 3, 2021  
Page 2

2. We would like your opinion whether the Inclusionary Housing Bylaw supports reducing the base number of Senior Housing units allowed to be built on site by the equivalent number of approved Inclusionary Housing units in the instance where an applicant is either paying an in-lieu of fee, building "equivalent" units off site, or donating land as provided under Section 8.3.4?

Response:

In my opinion, Section 8.3 does not admit of such an interpretation. Section 8.3.4 provides alternatives to providing on-site Affordable Housing Units and is focused on the creation of those units. There does not appear to be anything in Section 8.3 that contemplates a reduction in the proposed number of overall units in a project when an applicant is providing Affordable Housing Units pursuant to Section 8.3.4. To the contrary, where the number of required Affordable Housing Units is based on the total number of units in the project, it is my opinion, that the proposed number of units should remain constant.

In my opinion, seeking to reduce the overall number of units in a project while also requiring the developer to provide Affordable Housing Units by one or a combination of the methods specified in Section 8.3.4 could be subject to a legal challenge.

3. In two prior instances the Planning Board approved Senior Housing projects (Patton Ridge and Canterbrook) where the number of Inclusionary Housing units were not deducted from the base number of units built on site. If the Planning Board were to adopt different decision-making criteria e.g., deducting the Inclusionary units from the base number of units allowed to be built on site, to what extent is the Planning Board bound by these prior decisions, and what legally defensible criteria would the Planning Board need to justify changing its interpretation and application of the Inclusionary Housing bylaw requirement for providing affordable housing units?

Response:

With reference to my response to question No. 2, in my opinion, the prior approach taken by the Planning Board, to not make a deduction in the number of units proposed to be built, is sound and should continue.



**CONFIDENTIAL - NOT A PUBLIC DOCUMENT**

Mr. Rick Mitchell, Chair  
Members of the Planning Board  
November 3, 2021  
Page 3

Please let me know if there are additional facts of which I should be aware, and I can review the same for any impact on this opinion. Otherwise, if you have any questions, please do not hesitate to contact me.

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Robin Stein'.

Robin Stein

RS/

cc: Town Manager (by electronic mail only)  
Director of Planning and Inspections (by electronic mail only)

786407/HAML/0082

October 18, 2021

**Robin Stein**  
[rstein@k-plaw.com](mailto:rstein@k-plaw.com)

**BY ELECTRONIC MAIL ONLY** ([rmitchell@hamiltonma.gov](mailto:rmitchell@hamiltonma.gov))

**CONFIDENTIAL - NOT A PUBLIC DOCUMENT**

Mr. Rick Mitchell, Chair  
Members of the Planning Board  
Hamilton Town Hall  
577 Bay Road  
Hamilton, MA 01936

Re: Fee in Lieu of Affordable Housing Units, Zoning Bylaw Section 8.3.4.3

Dear Members of the Planning Board:

Pursuant to Section 8.3.4.3 of the Town's Zoning Bylaw (the "Bylaw"), a developer may meet its obligation to provide Affordable Housing Units ("Affordable Units") by paying a fee in lieu (the "Fee") of constructing the required Affordable Units. You have asked for guidance regarding the calculation of the Fee.

Based on the facts set forth herein, and on the language of the second sentence of Section 8.3.4.3, it is my opinion, that the Fee for each required Affordable Unit should be three (3) times the base Area Median Income ("AMI") as determined by the United States Department of Housing and Urban Development ("HUD") for the income limit area that includes the Town of Hamilton, without accounting for household size or income level.

The pertinent facts, as I understand them, are as follows:

There is currently pending before the Planning Board an application for a Senior Housing Special Permit pursuant to Section 8.2 of the Bylaw, which project also requires the provision of Affordable Units pursuant to Section 8.3 of the Bylaw.

Section 8.3.4.3, as published in the version of the Bylaw currently available on the Town's website (including amendments up to October 22, 2019), provides that "[a]n 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." (Tab 1). There has been discussion between the project applicant, the Planning Board and the public regarding the proper calculation of the Fee including if, and to what extent, household size and income levels are relevant.



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Mr. Rick Mitchell, Chair  
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Prior to a Bylaw amendment adopted by the Town at the April 6, 2019 Town Meeting (Article 2019/4 3-2) (the "Amendment"), Section 8.3.4.3 was numbered Section 8.3.4.4 and provided as follows:

An equivalent fee in lieu of units may be made. The Planning Board may allow a developer of non-rental Dwelling Units to make a cash payment to the Town through its Affordable Housing Trust Fund for each Affordable Housing Unit required herein. The cash payment per unit shall be in accordance with the following formula: two times an amount equal to eighty (80) percent of area median income for a Family of four (4) in the metropolitan or non-metropolitan area that includes the Town of Hamilton, as determined annually by the U.S. Department of Housing and Urban Development. (Tab 2).

The Amendment removed all but the first sentence of Section 8.3.4.4, thus eliminating the formula based on income level and household size. The Town also created a new way of calculating the Fee by adding a new sentence to the new Section 8.3.4.3 that provides: "[A] fee in lieu payment 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." (Tab 3).

Thus, as amended, it appears that the new Section 8.3.4.3 provides:

"[a]n equivalent fee in lieu of units may be made. A fee in lieu payment 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."

Of note, on March 19, 2019, the Planning Board held a public hearing on the Amendment. The minutes from that Planning Board public hearing indicate that "[i]t was agreed that the Board wanted to pursue obtaining the full median income rather than a percentage." (Tab 4).

Accordingly, in my opinion, the Fee for each required Affordable Unit should be three (3) times the base AMI as determined by HUD for the income limit area that includes the Town of Hamilton, without accounting for household size or income level.



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Members of the Planning Board  
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Page 3

Please let me know if there are additional facts of which I should be aware, and I can review the same for any impact on this opinion. Otherwise, if you have any questions, please do not hesitate to contact me.

Thank you.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Robin Stein", with a stylized flourish at the end.

Robin Stein

RS/smm

Enc.

cc: Town Manager (by electronic mail only)  
Director of Planning and Inspections (by electronic mail only)

783948/HAML/0001

Tab 1

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.

8.3.2 Applicability. This Section applies to all developments involving the creation of ten (10) or more Dwelling units or ten (10) or more lots for residential use.

Developments may not be segmented to avoid compliance with this Section. Divisions of land that would cumulatively result in an increase by ten (10) or more residential lots or dwelling units above the number existing on any parcel or any contiguous parcels in common ownership in the twenty-four (24) months prior to any application for development under this Bylaw or the Subdivision Control Law are subject to this Section. For purposes of this Section, a division of land shall mean any division of land subject to G.L. c. 41, s. 81K-81GG.

8.3.3 Mandatory Provision of Affordable Housing Units. In any development subject to this Section, the tenth dwelling unit and every seventh unit thereafter shall be an Affordable Housing Unit. Nothing in this Section shall preclude a developer from providing more Affordable Housing Units than are required hereunder.

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. All requirements that apply to on-site provision of Affordable Housing Units shall apply to provision of off-site Affordable Housing Units. In addition, the location of the off-site Affordable Housing Units shall be approved by the Planning Board as an integral element of the development review and approval process.
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. Prior to accepting land as satisfaction of the requirements of this Section, the Planning Board may require the applicant to submit an appraisal or other data relevant to the determination of suitability for an equivalent number of Affordable Housing Units.
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.

8.3.5 General Provisions. The Planning Board shall be charged with administering this Section and shall promulgate Inclusionary Housing Rules and Regulations, including but not limited to submission requirements and procedures, application and review fees, minimum requirements for a marketing plan,

Tab 2

### **8.3 INCLUSIONARY HOUSING.**

**8.3.1 Purpose.** The purpose of the Inclusionary Housing By-law 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.

**8.3.2 Applicability.** This Section applies to all developments involving the creation of ten (10) or more Dwelling Units or ten (10) or more Lots for residential use.

Developments may not be segmented to avoid compliance with this Section. Divisions of land that would cumulatively result in an increase by ten (10) or more residential Lots or Dwelling Units above the number existing on any parcel or any contiguous parcels in common ownership in the twenty-four (24) months prior to any application for development under this By-law or the subdivision control law are subject to this Section. For purposes of this Section, a division of land shall mean any division of land subject to G.L. c. 41, s. 81K-81GG.

**8.3.3 Mandatory Provision of Affordable Housing Units.** In any development subject to this Section, the tenth Dwelling Unit and every seventh unit thereafter shall be an Affordable Housing Unit. Nothing in this Section shall preclude a developer from providing more Affordable Housing Units than are required hereunder.

**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 the locus of the development.
2. 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. All requirements that apply to on-site provision of Affordable Housing Units shall apply to provision of off-site Affordable Housing Units. In addition, the location of the off-site Affordable Housing Units shall be approved by the Planning Board as an integral element of the development review and approval process.

3. 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. Prior to accepting land as satisfaction of the requirements of this Section, the Planning Board may require the applicant to submit an appraisal or other data relevant to the determination of suitability for an equivalent number of Affordable Housing Units.

4. An equivalent fee in lieu of units may be made. The Planning Board may allow a developer of non-rental Dwelling Units to make a cash payment to the Town through its Affordable Housing Trust Fund for each Affordable Housing Unit required herein. The cash payment per unit shall be in accordance with the following formula: two times an amount equal to eighty (80) percent of area median income for a Family of four (4) in the metropolitan or non-metropolitan area that includes the Town of Hamilton, as determined annually by the U.S. Department of Housing and Urban Development.

**8.3.5 General Provisions.** The Planning Board shall be charged with administering this Section and shall promulgate Inclusionary Housing Rules and Regulations, including but not limited to submission requirements and procedures, application and review fees, minimum requirements for a marketing plan, and documentation required by the Town to qualify the Affordable Housing Units for listing on the Chapter 40B Subsidized Housing Inventory.

1. Affordable Housing Units shall be dispersed throughout the Building(s) in a development and shall be comparable to market housing units in terms of location, quality and character, room size, bedroom distribution, and external appearance.

2. The selection of qualified purchasers or qualified renters shall be carried out under a marketing plan approved by the Planning Board and shall comply with Local Initiative Program guidelines. The marketing plan must describe how the applicant will accommodate local preference requirements, if any, established by the Board of Selectmen.

3. Developers may sell Affordable Housing Units to the Town of Hamilton, the Hamilton Housing Authority, or to any non-profit housing development organization that serves the Town of Hamilton, in order that such entity may carry out the steps needed to market the Affordable Housing Units and manage the choice of buyers.

4. Developers shall be responsible for preparing applications and other documentation required by the Department of Housing And Community Development (DHCD) to assure that the Affordable Housing Units are eligible for listing on the Chapter 40B Subsidized Housing Inventory.

Tab 3



**PROPOSED AMENDMENTS TO THE HAMILTON ZONING BYLAW -- DEFINITIONS  
SECTION AND SECTION 8.3 INCLUSIONARY HOUSING**

- A. Amend Section 11.0 Definitions in the appropriate alphabetical order to include the following term:

**Area Median Income (AMI)** – The midpoint household gross income for a specified geographic area determined by the US Department of Housing and Urban Development (HUD) annually.

- B. Amend the Zoning Bylaw in Section 8.3.4.1. by removing it. Correspondingly reorder the numbers for 8.3.4.2, 8.3.4.3 and 8.3.4.4.
- C. Amend the Zoning Bylaw in the existing Section 8.3.4.4 (which will become 8.3.4.3 with the preceding amendment) by eliminating all sentences after the first one which will remain.
- D. Amend the Zoning Bylaw in the existing Section 8.3.4.4 (which will become 8.3.4.3 with Amendment B, above) by adding the following text: A fee in lieu payment 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.

Tab 4

HAMILTON PLANNING BOARD  
MINUTES OF MEETING  
March 19, 2019

Members Present: Richard Boroff, Peter Clark, Janel Curry, Ed Howard, Rick Mitchell, and Brian Stein (Chair).

Associate Members:

Planning Director: Patrick Reffett

This meeting was called to order in the Memorial Room at Town Hall at 7:04 with a quorum established.

**Conceptual 40B Project Presentation**

Peter Conant, who has an option on the 19.75 acres Gordon Conwell Theologic Seminary site, was present to discuss the project. Mr. Conant would be filing a Project Eligibility Letter for 43 single family detached homes, which would be sold in condominium form of ownership. 25% of the homes (11 total) would be affordable (\$216,000) of which seven would be local preference. One unit would be devoted to a minority family whether it be one of the 25% or another one. The remainder would be sold at about \$500,000. Brian Stein noted that no application had been filed and the presentation was only an informal conceptual plan. Mr. Conant had previously been to the Affordable Housing Trust. Patrick Reffett explained that after the 40B plan had been submitted to the Town, the ZBA would review the plans rather than the Planning Board, in accordance with State law.

The applicant said he needed to be in touch with the Planning Board, Selectmen, ZBA, Town Manager, and Affordable Housing Trust before he could file an application. Peter Conant thought the site was unique with the homes being built on a steep slope, which would not be visible from Bridge St. due to a dense evergreen screen. Mr. Conant said he was aware of water runoff issues and thought he would be able to solve the problem. Mr. Conant added that he would address the traffic problems on Bridge St.

Peter Conant presented the plans and listed the towns in which he had previously developed (Concord, Winchester, Stowe, Bolton, Bedford, Acton, Lynn, Chelsea, and Framingham). Mr. Conant explained the site, including the top of the hill at the Gordon Conwell library with placeholder contours exhibited. Mr. Conant noted the two catch basins that drained onto the site resulting in a lot of run off down the steep hill.

The proposed project would include three or four models of two bedroom homes with a percentage (10%) of three bedroom units. The site was in Zone II due to a local well. A group septic system would be used and a 3.5 acre open space area, which would include walking trails and a picnic area. Mr. Conant pointed to judicious cuts and fills in the hill needed to preserve areas of existing trees. The units would have 900 sf walk out basements with windows on three

sides. The upper floors of the units would be between 1,100 sf and 1,200 sf. The units would feature a one car garage and would be marketed to first time buyers or those wanting to downsize to a cottage in Hamilton.

Rick Mitchell noted that the median income for the affordable units would be \$65,000. Peter Conant added that the State wanted to have the range deflated by \$10,000 to \$55,000. The projected price of \$216,000 might increase slightly. Mr. Conant reiterated that 10% would be three bedroom units, which would bring the 110 gallon per day per bedroom up to the Board of Health limit. The timeline for the full proposal would include filing with the State within one month, having the State take 60 days to respond, having one month to file with the Town, and having the ZBA take up to a year to approve the project.

Once the application was filed with the ZBA, the ZBA would require the applicant to place funds in escrow to hire a consultant for traffic, environmental, septic, and soil review. Peter Conant noted that 40B reviews would not go into specific details such as siding. The ZBA would request input from all Town departments and condition their Decision based on all received information. Mr. Conant added that he had never received an onerous Decision. Mr. Conant explained that traffic increase would be non-existent and that there were no special endangered species or wetlands to contend with on site. The perc rate was wonderful according to Mr. Conant.

Peter Conant would send a list of completed projects to Patrick Reffett and suggested that Board members speak with Towns in which he had completed projects. The sketch of the project indicated that the entrance and exit would be from Bridge St. and not Miles River Road. The Board noted that they had received letters from residents who were concerned with Miles River Road access. Mr. Conant added that open space would be along Miles River Road and emergency access would be to the Gordon Conwell Seminary, if necessary. The proposed roadway would be less than 500' long and could be built as a dual carriage way. Rick Mitchell requested the applicant conduct a fiscal impact analysis of the project to show tax revenue and potential costs. Mr. Conant explained that he would only be able to profit 20% as per 40B law. The land was purchased for \$2.5M. Homes would cost \$200 per foot. Other costs would include soft costs for financing and marketing.

#### **Public Hearing – Zoning By-law Amendments.**

Rick Mitchell read the public hearing notice to open the public hearing.

#### **Signage**

Brian Stein noted that the By-law had been modified to address constitutional issues per Town Counsel and had been simplified in the Residential District by only allowing two temporary signs per contiguous lots in the same ownership. Temporary signs would be allowed for no more than two months in a calendar year. Five election signs per lot would be allowed. The Business District did not change. Discussion ensued regarding the applicability of a "For Sale" sign and it

was decided that it would be excluded from the provisions of the By-law. The word "temporary" was added to "signs per contiguous lots" in Section 6.3.2.

Rick Mitchell moved to accept amending the Hamilton Zoning By-law Section 6.3. to allow the Town to regulate signs within all zoning districts with the language as amended at this hearing to include new language in 6.3.1. and new language in 6.3.2.

Janel Curry seconded.

Vote: Unanimous in favor.

#### Micro Cellular Facilities

Patrick Reffett noted that Micro Cell Facilities term would be changed to Small Wireless Facilities (SWF). Mr. Reffett said the language was derived from the Worcester Ordinance with aesthetic language being added from the Peabody Ordinance. The Worcester language was changed from having the DPW review proposals to having the Planning Board review proposals as part of the Special Permit process. The placement of facilities would be in public right of ways, private right of ways, private property, and public property was included as it would comprise the entire community. Formatting and duplicative wording would be fixed. Mr. Reffett explained that once the application requirements were met, the application would be brought to the Planning Board to fulfill the Special Permit process. Facilities could be reviewed in batches of up to ten poles or individually. An overall plan would need to be submitted. It was determined that National Grid would not accept this type of addition to their poles, according Mr. Reffett, which would force installations on private barns or steeples close to density centers. It was noted that the Town-owned poles in the park might be a proper solution.

Janel Curry moved to approve the amendment to the Hamilton Zoning By-law in Section 7.3. to allow the Town to regulate Micro Cell or Small Wireless Facilities renumbering the existing 7.3 "Wind Facilities" to become 7.4 with the elimination of the second number 2.

Seconded by Richard Boroff.

Vote: Unanimous in favor.

#### Inclusionary Housing

Brian Stein said the changes were for defining the area median income and changing the fee in lieu of construction from two times to three times the median income. Rick Mitchell said the median income, which was calculated the HUD, was now approximately \$100,000 for a family of four. Mr. Stein thought it was \$80,000, of which 80% would calculate to \$65,500. It was agreed that the Board wanted to pursue obtaining the full median income rather than a percentage. Janel Curry suggested removing the term 80% and defining average median income. Patrick Reffett said the Selectmen's previous discussion had centered on raising Senior Housing By-law age requirement to 62, which should not be confused with the Inclusionary Housing By-law as they were separate By-laws. Mr. Stein suggested ending the definition sentence with "HUD."

Rick Mitchell made motion to adopt the amendment to the Hamilton Zoning By-law to add a definition to the median income and modify the Inclusionary Housing By-law Section 8.3. and appropriate sections to allow the Town to impose Inclusionary Housing requirements as part of applicable projects as amended relating to the area median income.

Janel Curry seconded.

Vote: Unanimous in favor.

#### **Master Planning (Residential Update)**

Patrick Reffett said he had distributed the graphic to be circulated and reviewed by those who would attend the second forum. The forum was postponed until April 29, 2019 to allow for more time for fiscal analysis and for advertising the forum on that night. The compiled data would be reviewed at the meeting of April 2, 2019 with Jennifer Goldson. Projected fiscal data should be available.

#### **Board Business**

The public hearing for Green Meadows Farm Site Plan Review would be on April 2, 2019. The Selectmen had asked that the Board review impacts such as odors as part of their review, which had not been considered in the Host Community Agreement (HCA). The peer review engineer (BETA) would submit information after a scope had been written. Patrick Reffett would provide a summary of Host Community issues. The Police Chief would need to provide comments regarding traffic related matters, while the peer consultant would review items such as trip distribution, loading, and unloading times and place. There were water main considerations. The large building would need to comply with the rural look of the area. The structure which is designed like a barn would be set back from Asbury Street. The Meyer Road Subdivision would be considered on April 2, 2019 as well. The Board was asked to review correspondence provided as well as Site Plan Review Regulations and process.

Richard Boroff wondered if residents' correspondence could be improved. Ed Howard agreed but thought it was important to have those who were not articulate, be able to speak. Brian Stein did not want to police what was received. Patrick Reffett had the Canter Brook Temporary Sign Decision based on plans received and board acceptance thereof ready for signature. Richard Boroff updated the Board regarding the Open Space Committee. Mr. Boroff was Chairman and said the Committee would meet weekly. A representative from MAPC would be at the April 4, 2019 meeting to offer his help.

#### **Minutes**

Janel Curry made motion to approve the minutes of March 5, 2019.

Richard Boroff seconded.

Vote: Unanimous in favor.

#### **Adjournment**

Motion made by Rick Mitchell to adjourn.

Seconded by Richard Boroff.  
Vote: Unanimous to adjourn at 8:25 pm.

Prepared by:

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Marcie Ricker

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Attest

Date

# **EXHIBIT G**





*Mortgaged Premises:*

434-436 Asbury Street, Hamilton, MA

**TOWN OF HAMILTON AFFORDABLE HOUSING TRUST FUND**

**MORTGAGE**

**Essex County Habitat for Humanity**, a Massachusetts non-profit corporation organized pursuant to G.L. c. 180, having an address of 14 Park Street, Danvers, MA 01923, (the "Borrower"),

for consideration paid,

grants to the **Town of Hamilton Affordable Housing Trust Fund**, a municipal affordable housing trust created pursuant to G.L. c. 44, s. 55C, having an address of P.O. Box 429, 577 Bay Road, Hamilton, MA 01936 (the "Trust"),

with MORTGAGE COVENANTS,

a mortgage on real property known and numbered as 434-436 Asbury Street, Hamilton, Massachusetts, which property is described more particularly in a deed, recorded with the Southern Essex District Registry of Deeds herewith, with such improvements that may now or hereafter be constructed or placed thereon, as more particularly described in Exhibit A, attached hereto and incorporated herein (the "Mortgaged Premises").

Said mortgage is to secure the payment of Four Hundred Thirty-Five Thousand Dollars (\$435,000.00), loaned to Borrower in connection with the acquisition of the Mortgaged Premises and the development of ten dwelling units for affordable housing purposes thereon, said Mortgaged Premises and each of the ten dwelling units developed thereon to be the subject of a permanent affordable housing deed restriction, and as evidenced by that certain Promissory Note of even date herewith (the "Note") and to secure Borrower's performance of the terms and conditions of the Note.

Included as a part of the Mortgaged Premises are any and all buildings and other improvements, including, without limitation, any and all fixtures, on the Mortgaged Premises, or hereafter constructed or placed thereon, prior to the full payments and discharge of this Mortgage.

A. Borrower hereby covenants that:

1. It shall use the Mortgaged Premises solely for affordable housing purposes;
2. Except for a mortgage to a lender approved by the Trust in connection with the acquisition of the Mortgaged Premises and the construction of the dwellings on the Mortgaged Premises for affordable housing purposes, (the "Senior Mortgage"), Borrower shall not alienate or encumber the Mortgaged Premises without the prior written consent of the Trust. The Trust

covenants and agrees to execute and deliver to Borrower a subordination of this Mortgage to the Senior Mortgage) in form reasonably acceptable to the Trust; The Trust's consent to the sale of dwelling units to financially eligible purchasers of affordable housing units shall not be unreasonably withheld;

3. Borrower shall perform all of its obligations under the Senior Mortgage, including Borrower's covenants to make payments when due. Borrower shall pay or cause to be paid all taxes, assessments and other charges, fines and impositions attributable to the Mortgaged Premises, which may attain a priority over this Mortgage;

4. Borrower shall at all times comply with the provisions of any and all agreements requiring that the Mortgaged Premises shall be used only for affordable housing purposes;

5. Borrower shall keep improvements now existing or hereafter erected on the Mortgaged Premises insured against loss by fire and other hazards included within the term "extended coverage";

6. Borrower will not use nor permit the Mortgaged Premises to be used in violation of any law or municipal ordinance or regulation or for any unlawful or improper purpose;

7. Borrower shall keep the Mortgaged Premises in good repair and condition and shall not commit, permit or suffer any waste, impairment, or deterioration of the Mortgaged Premises or any part thereof;

8. Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant, and convey the Mortgaged Premises, and that other than the mortgage granted to the Senior Mortgage holder as provided above, the Mortgaged Premises are otherwise unencumbered. Borrower warrants and covenants to defend generally the title to the Mortgaged Premises against all claims and demands, subject to encumbrances of record;

B. In the event Borrower sells or transfers the Mortgaged Premises to a third party that is not an Eligible Third Party as such term is defined in the Note, or if Borrower defaults under any other provisions of the Note or this Mortgage, Borrower shall repay to the Trust any outstanding principal on the Note.

C. No sale of the Mortgaged Premises and no forbearance on the part of the Trust and no extension whether oral or in writing of the time for the payment of the debt hereby secured given by Borrower shall operate to release, discharge, modify, change or affect the original liability of Borrower herein, either in whole or in part.

D. If Borrower fails to perform the covenants and agreements contained in this Mortgage, the Note, or if any action or proceeding is commenced which materially affects the Trust's interest in the Mortgaged Premises, the Trust, at the Trust's option, upon notice to Borrower, may take such actions as are necessary to protect the Trust's interest, and any expenses so incurred by the Trust, including reasonable attorneys' fees, shall be secured by this Mortgage.

E. Borrower's interest under the Note and this Mortgage may not be transferred, assigned, or assumed without the written consent of the Trust, which may be withheld in the Trust's sole discretion. Consent to refinance the Senior Lender's mortgage upon commercially reasonable terms and conditions shall not be unreasonably withheld. The covenants and agreements herein contained shall bind, and the rights hereunder shall inure to, the respective successors and assigns of the Trust and Borrower. All covenants and agreements of Borrower shall be joint and several.

This Mortgage is upon the STATUTORY CONDITION, and upon the further condition that all covenants and agreements of Borrower herein, or all covenants and agreements of Borrower contained in said Program requirements or the Note, shall be kept and fully performed, for any breach of which the Trust shall have the STATUTORY POWER OF SALE.

If the Trust invokes the STATUTORY POWER OF SALE, the Trust shall mail a copy of a notice of sale of its interest in the Mortgaged Premises to Borrower and the Senior Lender and to any other person required by applicable law, in the manner provided by applicable law. The Trust shall publish the notice of sale and its interest in the Mortgaged Premises shall be sold in the manner prescribed by applicable law. The Trust or the Trust's designee may purchase the Mortgaged Premises at any sale. The proceeds of the sale shall be applied in the following order: (a) to all reasonable costs and expenses of the sale, including reasonable attorneys' fees and costs of title evidence; (b) to all sums secured by the Senior Mortgage, if then in effect; (c) to all sums secured by this Mortgage; and (d) the excess, if any, to the person or persons legally entitled thereto.

Title reference: Being the Premises conveyed to Borrower by deed of Nancy P. Ahern, Trustee of the Philip C. Marcorelle Irrevocable Trust 2020, dated July 30, 2021, recorded with the Southern Essex District Registry of Deeds herewith.

[End of document text – signature page follows]

3<sup>rd</sup> August 110  
EXECUTED as a sealed instrument this ~~30~~<sup>3</sup>th day of ~~July~~<sup>August</sup>, 2021.

Borrower:

ESSEX COUNTY HABITAT FOR HUMANITY

By: 

Name: Megan O'Neil

Title: Executive Director

COMMONWEALTH OF MASSACHUSETTS

Essex County

On this 3 day of AUGUST, 2021, before me, the undersigned notary public, personally  
Appeared Megan O'Neil, proved to me through satisfactory evidence of  
identification, which is personal knowledge to be the person whose name is  
signed on the Mortgage and acknowledged to me that he/she/they signed it voluntarily and with  
due authority for its stated purpose on behalf of Essex County Habitat for Humanity and as their  
free act and deed.



Notary Public

My commission expires:



ROXANNA MOTA  
Notary Public  
Commonwealth of Massachusetts  
My Commission Expires  
February 14, 2025

## EXHIBIT A ~ LEGAL DESCRIPTION

The land with the buildings thereon situated at 434-436 Asbury Street, Hamilton, Essex County, Massachusetts, being shown as Lot 2 and Lot 3 shown on a plan entitled "Plan of Land for 434-438 Asbury Street (Assessor's Map 37, Lots 43 & 44), South Hamilton, Massachusetts", Prepared for: Philip C. Marcorelle, dated February 27, 2014, by the Morin-Cameron Group, Inc., recorded with said Deeds, Plan Book 443, Page 27.

For title, see Deed recorded herewith.

# **EXHIBIT H**



Mead, Talerman & Costa, LLC  
Attorneys at Law

30 Green Street  
Newburyport, MA 01950  
Phone 978.463.7700  
Fax 978.463.7747  
www.mtclawyers.com

**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**

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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)<sup>1</sup> 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

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<sup>1</sup> The amount of the payment was calculated with the advice and assistance of Town Counsel.

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.

# **EXHIBIT I**

COMMONWEALTH OF MASSACHUSETTS  
LAND COURT  
DEPARTMENT OF THE TRIAL COURT

ESSEX, SS.

CIVIL ACTION NO.: 22 MISC 000591 (HPS)

CHEBACCO HILL CAPITAL  
PARTNERS, LLC,

Plaintiff,

v.

MARNIE CROUCH, BETH HERR,  
RICK MITCHELL, JONATHAN POORE,  
WILLIAM WHEATON, RICHARD  
BOROFF, PATRICK NORTON,  
and EMIL DAHLQUIST, as they are  
the members of the TOWN OF  
HAMILTON PLANNING BOARD,

Defendant.

**JOINT MOTION TO EXTEND STAY**

The parties to this action hereby report that the plaintiff has begun the process of applying for alternative permitting for the property at issue. Accordingly, the parties move this Court to extend the stay in this action pending the outcome of that alternative permitting process. Extending the stay will preserve the parties' and the Court's resources as it would be wasteful to actively litigate this case while the plaintiff is pursuing alternative permitting. If the plaintiff is not satisfied with the outcome of the alternative permitting process, the parties anticipate requesting that the Court restore the case to the active docket and establish new deadlines for discovery.

Respectfully Submitted,  
**CHEBACCO HILL CAPITAL  
PARTNERS, LLC,**  
By its attorneys,

Respectfully Submitted,  
**TOWN OF HAMILTON  
PLANNING BOARD,**  
By its attorneys,

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December 18, 2023

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#### Certificate of Service

I, Robin Stein, hereby certify that I served the instant motion this 18<sup>th</sup> day of December 2023 upon the aforesaid plaintiff's counsel by e-mail.

/s/Robin Stein