COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES

CHEBACCO HILL CAPITAL PARTNERS, LLC,	)
Appellant	)
v.	)
HAMILTON BOARD OF APPEALS,	)
Appellee	)

Memorandum in Defense of the Hamilton Zoning Board of Appeals' Invocation of the "Related Application" Safe Harbor

On behalf of Hamilton resident Heather Ensworth, we respectfully request that the Executive Office of Housing and Livable Communities ("EOHLC") reject the appeal of Appellant, Chebacco Hill Capital Partners, LLC ("Developer") from the Appellee, Hamilton Zoning Board of Appeals' ("ZBA") invocation of the "related application" safe harbor under the Chapter 40B regulations, 760 CMR 56.03(7) (the "Appeal").

A. The "Related Application" Safe Harbor Regulation

Under the Chapter 40B regulations, there are several categories of "safe harbors" that, if applicable to a new Chapter 40B application, may be invoked by the local zoning board of appeals, resulting in any decision made by the board being immune from appeal by the applicant. One of these is the "related application" safe harbor, set forth under 760 CMR 56.03(7). Specifically, Chapter 40B regulations proscribe that "[a] decision by a Board to deny a Comprehensive Permit or (if the Statutory *Minima* defined at 760 CMR 56.03(3)(b) or (c) have been satisfied) grant a Comprehensive Permit with conditions, shall be upheld if one or more of the following grounds has been met as of the date of the Project's application: … (e) a related

application has previously been received as set forth in 760 CMR 56.03(7).” 760 CMR 56.03(1) (emphasis added).[1]

The “related application” safe harbor applies when there is a prior development permit application[2] concerning the same project site, which was pending within the 12 months preceding the subject comprehensive permit application. 760 CMR 56.03(7). The regulation specifically provides that the safe harbor is applicable if 12 months have not elapsed between the date of the comprehensive permit application and “the date of final disposition of such an application (including all appeals).” Id. 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.” (the “SHI Exception”) 760 CMR 56.03(7)(a).

This unique provision of the 40B regulations was adopted by EOHLC (before the name change from “DHCD”) as a means to control what was then a recurring problem of real estate developers weaponizing Chapter 40B as tool for retaliation or intimidation when the developer did not get its way with an application under conventional zoning. In a 2006 ruling, the state Housing Appeals Committee commented that the regulation was intended to “prevent developers from using the Chapter 40B process to coerce or intimidate local zoning boards and communities with respect to traditional zoning applications.” Grandview Realty, Inc. v. Lexington ZBA, HAC No. 05-11 (July 10, 2006), 2006 MA Housing App. LEXIS 7, *14 (copy attached as Exhibit A). Notably, the Housing Appeals Committee in Grandview was called upon to adjudicate an

[1] Reading this regulation strictly, a denial must be upheld whenever a safe harbor is met, but an *approval with conditions* is only upheld if the statutory general or annual land area minima are satisfied. It is unclear why this distinction exists in the regulation, which would seem to incentivize municipal zoning boards to deny a comprehensive permit application in circumstances when the land area minima have not been met, even if the board might have otherwise considered the application approvable with conditions.

[2] The regulations references applications for “variance, special permit, subdivision, or other approval related to construction on the same land.”

ambiguity in the regulation, and specifically resolved that ambiguity in a way that was consistent with this overriding purpose to prevent coercion.

B. The "Related Application" Safe Harbor Applies to the Chebacco Hill 40B Application.

The Developer filed a comprehensive permit application with the ZBA on or about March 22, 2024, for property located at 133 Essex Street in the town of Hamilton. The project site is described by the Developer as containing "56.81 +/- acres," and identified as "Lot 1" on an existing conditions plan dated Sept. 29, 2021, which was filed with the Developer's 40B Application (the "2021 Plan"). See Exhibit A attached.[3] The 2021 Plan shows a division of a 66.2-acre lot, identified as Hamilton Assessors' Parcel 65-0001, creating "Lot 1," containing 56.81 +/- acres, and "Lot 2," containing 9.41 +/- acres.[4] The proposed comprehensive permit project is apparently limited to just Lot 1; the application is silent as to the Developer's intentions with Lot 2. The 2021 Plan was endorsed as an "approval not required" plan by the Hamilton Planning Board under the state Subdivision Control Law in 2021.

On or about July 2, 2021, the Developer filed an application with the Hamilton Planning Board for a special permit under Section 8.2 of the Hamilton Zoning Bylaws, the Town's Senior Housing zoning bylaw, seeking zoning relief for the construction of a 50-unit multi-family residential development on 66.2-acre site. On October 18, 2022, the Planning Board voted unanimously to deny the special permit application. See, Special Permit Decision, attached as Exhibit B hereto. On November 2, 2022, the Developer filed a Complaint in the Land Court,

[3] This is the same plan that is attached the Developer's Appeal as Exhibit B.

[4] According to the Planning Board's decision on the Developer's 2021 Special Permit Application, Lot 2 is located within the Town's Groundwater Protection Overlay District [("GPOD")], and that the "effect of the division of the parcel into two separate lots was to remove the larger parcel from the [GPOD]." See, Decision, attached as Exhibit B. The existing conditions plan in fact delineates the boundary of the GPOD on the site, clearly showing Lot 2 as being wholly within the GPOD. See, Exh. A.

seeking judicial review of the Special Permit Decision pursuant to G.L. c. 40A, § 17 (Case No. 22 MISC 000591). On October 11, 2022, the Planning Board also denied the Developer's application for a stormwater management permit under Chapter XXIX of the Hamilton General Bylaws, for the same 50-unit multi-family residential development. The Developer appealed that decision to the Essex Superior Court on November 23, 2022. As the Developer admitted in its Appeal, both the Land Court and Superior Court cases are still pending. Appeal, p. 2. There has been no "final disposition" of the 2021 special permit application or stormwater management permit application, because the Developer's court appeals are still pending.

In its Appeal, the Developer raises two principal grounds for the inapplicability of the "related application" safe harbor provision. First, the Developer contends that the land that was the subject of the 2021 special permit application is different from the land that is the subject of the Chapter 40B application. Second, the Developer argues that the SHI Exception is appliable because its 2021 special permit application included the creation of SHI Eligible housing units equal to at least 10% of the total number of units proposed. Neither argument is valid.

A. The "Related Application" Relates to the Same Land as the Chapter 40B Application.

It is undisputed that in both the 2021 special permit application and the current Chapter 40B application, the Developer seeks to construct a residential development on the 66.2-acre parcel identified as Hamilton Assessors' Parcel 65-0001. However, the Developer contends that the land is not the "same" for purposes of the safe harbor regulations, because the special permit project encompassed the entire 66.2-acre parcel, whereas the Chapter 40B project is limited to just the 56.81-acre "Lot 1" on the 2021 plan. This is not a credible argument, as construction of both the 2021 special permit project and the 2024 comprehensive permit project would be limited to the Lot 1.

First, it is undisputed that the site development plans filed with the Developer's Chapter 40B application show the Chapter 40B project being confined to Lot 1. See, Exhibit C attached hereto. The special permit project was also proposed to be confined to Lot 1. In its Special Permit Decision, the Planning Board quoted from the Developer, stating that "the Petitioner's Proposal limits the development area of the Property to the upland portions that lie well outside the [GPOD] and outside the 100' buffer to all jurisdictional wetlands." Special Permit Decision, p. 2, fn. 2.[5] As noted above, the 2021 Plan delineates the boundaries of the Town's Groundwater Protection Overlay District on the site, and it is evident that a portion of Lot 1 and all of Lot 2 is located within the GPOD. See, Exh. A. Thus, if the entirety of Lot 2 is located within the GPOD, and the special permit project was designed to *avoid* the GPOD, construction of the special permit project would have had to be limited to Lot 1.

B. The "Related Application" Did Not Include At Least 10% SHI Eligible Housing Units.

The Developer next makes the fantastical argument that its 2021 special permit application "included at least 10% SHI eligible housing units under the Town's Zoning Bylaw." Appeal, p. 7. This is demonstrably false. Not only did that project not "include" any SHI Eligible Housing units, the monetary donation the Developer proposed in connection with that application is not the functional equivalent of "including" affordable housing units within a project, because a donation does not ensure that SHI Eligible Housing units would ever be constructed.

The Chapter 40B regulation plainly requires that for this SHI exception to apply, the related application had to "include at least 10% SHI Eligible Housing *units*." 760 CMR

[5] The Planning Board further observed that "the applicant is not developing the 9.4-acre farm lot which the owner split from the original lot by means of an ANR application." Id., p. 9, fn. 7. The 9.4-acre lot is Lot 2 as shown on the existing conditions plan.

56.03(7)(a) (emphasis added). The term "SHI Eligible Housing" is capitalized because it is a defined term, meaning housing units that would be eligible to be included on the town's Subsidized Housing Inventory. 760 CMR 56.02. SHI Eligible Housing generally means "Low or Moderate Income Housing," which is itself a defined term, but could also include other housing units "defined" or "allowed" under EOHLC's guidelines. The common thread, however, is that housing units that are "SHI Eligible" are housing units that would be added to the Town of Hamilton's SHI, and therefore count towards the Town's progress to achieve all of the statutory and regulatory safe harbors.

It is undisputed that to comply with the Town's "inclusionary zoning" requirements of Section 8.3 of the Zoning Bylaw (copy attached as Exhibit D), the 2021 special permit application would have had to either provide a certain number of deed-restricted "Affordable Housing Units" within the proposed project, or propose an alternative that complies with Section 8.3.4, which are: (1) construct the required number of Affordable Housing Units at a different location in Hamilton; (2) donate land to the Town for affordable housing development; or (3) donate money to the Town for each required affordable unit in an amount equal to three-times the area median income. See, Zoning Bylaw, § 8.3.4.

The Zoning Bylaw defines "Affordable Housing Unit" as "[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." Zoning Bylaw, § 11. Since the Bylaw requires "Affordable Housing Units" to meet the requirement for inclusion on the SHI, Affordable Housing Units are the equivalent of SHI Eligible Housing units. However, only under option (1), creating Affordable Housing Units off-site, is there certainty that in connection with a special permit development under Section 8.2, SHI Eligible Housing units would actually

be created. Contrary to the Developer's representations, nothing in Section 8.3.4 of the Zoning Bylaw mandates that an "in lieu" monetary payment under § 8.3.4(3) be used by the Town of Hamilton for the creation of SHI Eligible Housing units, or even "Affordable Housing Units." It merely requires a donation of funds.

Here, the Developer elected to opt-out of providing "Affordable Housing Units" within its special permit project by proposing to make the monetary payment under Section 8.3.4(3) instead. The Developer contends that the donation of $2,174,000 is the functional equivalent of "including" SHI Eligible Units in its project, because its donation would have "yielded an amount sufficient to actually construct the required six (6) affordable units," specifically, $362,400 per unit. Appeal, p. 4. This is false and misleading for multiple reasons.

First, as noted above, there is nothing in the Zoning Bylaw, Section 8.3.4(3) that directs funds paid under § 8.3.4(3) to be earmarked for affordable housing creation, much less SHI Eligible Housing unit creation, and nothing that commits the Town of Hamilton to actually create SHI Eligible Housing Units from donated funds. As such, the Developer's contention that the Bylaw "defines affordable units in a way that plainly satisfies all SHI eligibility criteria" is simply wrong when made to suggest that a monetary "opt-out" under Section 8.3.4(3) satisfies the criteria of 760 CMR 56.03(7)(a). Appeal, p. 9.

Second, the assertion that that $2,174,000 would be sufficient to create six affordable housing units (even assuming that the Town was legally obligated to do so) is totally speculative, lacking any supporting documentation such as a realistic *pro forma* itemizing the costs for the Town of Hamilton to acquire the necessary land rights (assuming they are even available to be acquired) and then to construct six homes under public procurement, borrowing, and public construction laws that generally make the construction of buildings more expensive than if undertaken by the private sector. See, i.e., G.L. c. 149, c. 30, § 39M, c. 30B. The Developer

states that "the actual amount of the Affordable Unit Construction Fees was calculated by reference to the cost to construct the required number of affordable units," but the Developer fails to explain its construction cost assumptions, and what specifically is included, such as land acquisition or borrowing costs. Appeal, p. 9.

The Developer further argues that the provisions of Section 8.3.4 (1) – (3) must be interpreted as "providing the equivalent of more than 10% affordable housing," because this provision provides an alternative means of complying the mandate of Section 8.3.3. However, the Developer cites to no legislative history, or any other source of legal authority, and its theory is belied by two components of this bylaw. First, under Section 8.3.4(2), the Planning Board may accept a donation of land, but it cannot be reasonably suggested that a donation of land, alone, creates the same number of Affordable Housing Units as would be created under Section 8.3.3. Further, the Developer ignores the fact that the Board under Section 8.3.4 may "approve one (1) or more of the following methods, or any combination thereof, for the provision of Affordable Housing Units," implying that selecting one of the three alternatives may not be sufficient, alone, to substitute for the creation of Affordable Housing Units within the subject project. The Board never considered whether the Developer's proposal of $2,174,000 was the financial equivalent to creating the requisite number of Affordable Housing Units within the 2021 special permit project, because it denied the application on substantive grounds.

The Chapter 40B regulation is very specific, requiring that the related project "include" affordable units within the project. 760 CMR 56.03(7). Notably, the Planning Board agreed that a monetary donation is not an equivalent substitute, stating in its Special Permit Decision that with this donation, "there is a potential that low- and moderate-income seniors could benefit at some uncertain time in the future from the applicant's proposal, if an affordable housing project were to be approved." Decision, p. 7. There is no ambiguity in the safe harbor regulation, and

therefore its plain language must be enforced. Warcewicz v. Department of Envtl. Protection, 410 Mass. 548, 550-551 (1991) (agencies are not free to interpret their own regulations in ways that "arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself."); Theophilopoulos v. Board of Health of Salem, 85 Mass. App. Ct. 90, 100 (2014). It requires actual affordable units to be proposed as part of the prior application, not monetary donations. If the EOHLC wanted to include "payment in lieu" proposals within this exception, it could have easily written the regulation as such.

In conclusion, the ZBA properly invoked the "related application" safe harbor in connection with the Chebacco Hill 40B application, based on the still pending 2021 special permit application affecting the same land. The Developer's contentions that the land is different, or that the SHI Exception applies, are simply wrong and therefore the Appeal should be dismissed.

/s/ *Daniel C. Hill*

Daniel C. Hill (BBO #644885)
HILL LAW
6 Beacon Street, Suite 600
Boston, MA 02108
(617) 494-8300
dhill@danhilllaw.com

Dated: May 29, 2024

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D