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

2006 MA Housing App. LEXIS 7

July 10, 2006

No. 05-11

MA Housing Appeals Committee

Reporter
2006 MA Housing App. LEXIS 7 *

GRANDVIEW REALTY, INC, AppellantÂ ; v.Â ; LEXINGTON ZONING BOARD OF APPEALS, Appellee

Core Terms

was, has, statutory minimum, attain, permit application, interested person, local permit, slip opinion, memorandum, cooling, parcel, affordable housing, prior application, zoning board, local needs, intervene, realty, burn, site

Panel: Werner Lohe, Chairman; Joseph P. Henefield; Marion V. McEttrick; Christine Snow Samuelson; James G. Stockard, Jr.; Shelagh A. Ellman-Pearl, Presiding Officer

Opinion

DECISION

Appellant Grandview Realty, Inc. (Grandview) has appealed, pursuant to G.L. c. 40B, Â§ 22, and 760 CMR 30.00 and 31.00, the decision of Appellee Lexington Zoning Board of Appeals (Board) denying a comprehensive permit with respect to property in Lexington, Massachusetts. For the reasons set forth below, the decision of the Board is upheld.

I. PROCEDURAL HISTORY

On August 17, 2004, Grandview submitted an application for a comprehensive permit for a multifamily rental project to be developed on three undeveloped parcels on Grandview Avenue, Lexington, Massachusetts. Exh. A., Burns Affidavit, P5. The proposed development would include 12 units consisting of 9 market rate units and 3 units affordable for tenants with incomes no greater than 50 percent of the area median income.

The Board's decision indicates that the public hearing began on September 9, 2004 and continued on September 21, November 18, and December 16, 2004 and on February 10, and March **[*2]** 10, 2005. A site visit was conducted on October 16, 2004. The Board deliberated on the application on March 24, April 7 and April 14, 2005. Exhs. H, 20, p. 2. The Board voted on the comprehensive permit on April 7, 2005, voting alternative decisions depending on whether the Town of Lexington reached the 10 percent statutory minimum for affordable housing provided in G.L. c. 40B, Â§ 20, by April 19, 2005, the date its decision was due. Exhs. H, 20, p. 3. On April 14, 2005, the Board voted by roll call to deny the comprehensive permit. The Board issued a decision denying Grandview's application for comprehensive permit on April 19, 2005, giving as a reason that the Subsidized Housing Inventory (SHI) maintained by the Massachusetts Department of Housing and Community Development

listed Lexington's affordable housing stock at 10.78%. According to Grandview, this decision was filed with the Town Clerk on April 19, 2005.

On May 3, 2005, Grandview filed its appeal with the Housing Appeals Committee. The Committee held a Conference of Counsel on May 20, 2005. On September 21, 2005, Grandview filed a motion for summary decision. Through counsel, several **[*3]** individuals filed a motion to intervene on November 2, 2005. The presiding officer conducted a conference with counsel for Grandview, the Board and the proposed interveners on January 31, 2006. Â [1] On February 10, 2006, she denied the motion to intervene without prejudice, but granted the proposed interveners status as Interested Persons. In her ruling, the presiding officer allowed the Interested Persons to submit argument, but not evidence, on "the issues raised by the motion for summary decision, on the timetable set for the Board's submissions on that motion." *Grandview Realty, LLC v. Lexington,* No. 05-11, slip op. at 5 (Mass. Housing Appeals Committee Ruling Feb. 10, 2006); see Tr. I, 41. On February 17, 2006, the Board filed its opposition to Grandview's motion for summary decision and a cross-motion for summary decision. Grandview filed its reply on March 6, 2006, and the Board and the Interested Persons filed sur-reply memoranda on March 20, 2006. Both Grandview and the Board submitted affidavits **[*4]** and exhibits in connection with these motions; the Interested Persons attached an affidavit to their memorandum. On March 24, 2005, Grandview moved to strike portions of the Interested Persons' memorandum as well as the affidavit they had submitted. The presiding officer granted Grandview's motion to strike on June 22, 2006. Â [2]

II. JURISDICTION

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee, three jurisdictional requirements must be met. Although this issue was not reached before the Committee, we note that the Board's decision indicates that Grandview met the following jurisdictional requirements: that it is a limited dividend organization as required by 760 CMR 31.01(1)(a) and that the project that is the subject of this proceeding is fundable through the MassDevelopment Tax-Exempt Bond Program as required by 760 CMR 31.01(1)(b). With regard to the issue **[*5]** of site control as required by 760 CMR 31.01(1)(c), the Board indicated that Grandview demonstrated adequate control over the parcels upon which the buildings would be constructed, but it questioned whether Grandview had adequate control over Grandview Avenue. This issue has not been reached by the parties in their pending motions and need not be addressed here.

III. CROSS MOTIONS FOR SUMMARY DECISION

Grandview has moved for summary decision overturning the Board's permit denial, arguing that the determination by the Department of Housing and Community Development (DHCD) that Lexington has attained the statutory minimum violates Chapter 40B and applicable regulations. The Board has filed a cross-motion for summary decision on two grounds: 1) that DHCD's decision that Lexington has attained the 10 percent statutory minimum is valid; and 2) that Grandview filed and maintained open a related application within the "cooling off" period specified in 760 CMR 31.07(1)(h). The Interested Persons' memorandum supports summary decision for the Board and opposes summary decision for Grandview, on theories **[*6]** similar to those advanced by the Board.

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[1] A stenographic transcript was made of this conference.

[2] Grandview moved to strike the affidavit and portions of the memorandum supported by reference to the affidavit for the reason that they contravened the presiding officer's order regarding the scope of the Interested Persons' participation. The presiding officer's order specifically barred the Interested Persons from submitting evidence in this appeal, while allowing them to renew their motion to intervene if the case proceeded beyond the motions for summary decision. *Grandview Realty, Inc. v. Lexington,* No. 05-11, slip op. at 5 (Mass. Housing Appeals Committee Ruling Feb. 10, 2006); see Tr. I, 41. The presiding officer's order striking the affidavit and part of the memorandum is consistent with the scope of the Committee's customary grant of participation to interested persons. Interested persons are not parties, but rather have roles generally limited to providing commentary or legal argument in proceedings; they do not contribute evidence to the record. In addition, the portion of the memorandum stricken by the presiding officer also may have failed to comply with the prohibition in G.L. c. 233, Â§ 23C against the disclosure in an administrative proceeding of communications made in the course of a mediation session. We concur in the presiding officer's order striking the affidavit and related argument.

Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee if "the record before the committee, together with the affidavits shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 30.07(4). See *Catlin v. Board of Registration of Architects, 414 Mass. 1, 7, 604 N.E.2d 1301 (1992)*. As discussed below, we uphold the Board's decision under the related application provision, 760 CMR 31.07(1)(h).

A. Factual Background

As we decide this case based on our related application regulation, the factual background provided relates solely to this issue. In July 1999, a principal of Grandview, David E. Burns, acting through another entity, DEBCO Properties, Inc., submitted to the Lexington Planning Board an Application for Preliminary Subdivision Review for approval to develop market rate single-family housing on three undeveloped parcels on Grandview Avenue in Lexington. Burns **[*7]** Affidavit, Exh. A, P11. On May, 22, 2000, the Planning Board approved the subdivision application. Exh. 17. A group of abutters then appealed the Planning Board's decision in June 2000. On September 28, 2004, the Land Court overturned the subdivision approval. Exh. 18. The Land Court's decision was appealed and, according to the record, remains pending in the Appeals Court. See *Berg, et al. v. Lexington Planning Board,* Appeals Court No. 2005-P-0045. The subdivision approval appears not to have been recorded in the Registry of Deeds. Messenger Affidavit, Exh. 19. There is no record that Burns has withdrawn his application for approval of the subdivision plan for the parcels in issue from the Planning Board, the Land Court or the Appeals Court.

The Appellant is this proceeding, Grandview, has a purchase and sale agreement to buy the same three parcels on Grandview Avenue in Lexington. On August 17, 2004, Grandview submitted an application for a comprehensive permit for a project to be developed on these parcels. Exh. A., Burns Affidavit, P5. The Zoning Board conducted a site visit and held public hearings on the application on six days between September 9, 2004 and March 10, 2005. **[*8]** Exhs. H, 20, p. 2. Among the persons appearing before the Zoning Board, were neighbors to the site who raised objections to the project.

The Board issued its decision denying Grandview's application for a comprehensive permit on April 19, 2005, giving as a reason that the Subsidized Housing Inventory maintained by DHCD now listed Lexington's affordable housing stock at 10.78%. The Board attached to its decision, as an exhibit, a list of conditions that it would have required as part of the grant of the comprehensive permit it would have issued had Lexington not received notice from DHCD that it had attained the 10% statutory minimum before the decision on the comprehensive permit was issued. Â [3] Exhs. H, 20.

B. A Pending Related Application Requires that the Board's Decision be Upheld

The Committee's regulations establish a twelve-month protective period for zoning boards when a comprehensive permit developer has had a related application pending on the same property site. The developer is not prohibited **[*9]** from filing a comprehensive permit application within the same period. However, any decision issued by the zoning board must be upheld as a matter of law if twelve months have not elapsed between the date

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[3] The Board's decision notes that it was aware of the possibility that housing units in an Avalon Bay development would be included in the SHI before the Grandview decision was issued, and that it voted alternative decisions, one granting a comprehensive permit in the event the Board's decision was rendered before the SHI was amended, and the version it actually issued, denying the permit on the ground that Lexington had attained the statutory minimum. Exhs. H, 20, p. 3. This approach creates a conundrum. Section 20 of Chapter 40B provides only that attainment of the statutory minimum renders any decision made by the Board consistent with local needs as a matter of law; it does not establish attainment of the minimum as a ground for denial. Even when a town attains the statutory minimum, the statute envisions the Board giving full consideration to the application to build housing, and granting or denying it on substantive grounds relating to the merits of the specific application, and not merely on the town's attainment of the minimum. *Id.* Rather, it is on appeal to this Committee that attainment of the statutory minimum can be raised by the Board as an affirmative defense. See *East Homes Trust v. Tyngsborough,* No. 02-37, slip op at 2 (Mass. Housing Appeals Committee July 21, 2003). Although the Board's couching its grounds for denial in terms of the statutory minimum is illogical, and inconsistent with the spirit of Chapter 40B, it has no practical effect, since however the decision is worded, the Board may raise the affirmative defense on appeal. See G.L. c. 40B, Â§ 20; 760 CMR 31.06(5).

of the comprehensive permit application and the dates of certain actions relating to a prior application for a special permit or other approval that does not include low or moderate income housing. The regulation, 760 CMR 31.07(1)(h), states:

> (h) Related Applications. A decision by the Board to deny a comprehensive permit or grant a permit with conditions shall be consistent with local needs if 12 months has not elapsed between the date of application and any of the following:
>
> 1. 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 included no low or moderate income housing,
>
> 2. any date during which such an application was pending before a local permit granting authority,
>
> 3. the date of disposition of such an application, or
>
> 4. the date of withdrawal of such an application.
>
> An application shall not be considered a prior **[*10]** application if it concerns insubstantial construction or modification of the preexisting use of the land. Â [4]

There is no dispute that the prior subdivision application was an application for approval related to the same land and that it included no low or moderate income housing. The parties' disagreement focuses on the meaning of subsection (3) of Â§ 31.07(1)(h): "the date of disposition of such an application." The Board argues that the word "disposition" must be construed to mean "final" disposition and to require the conclusion of all appeals following action by the local board. Here, it argues, because the subdivision approval remains on appeal at the Appeals Court, the comprehensive permit application was filed before the expiration of the one-year protection, or "cooling off," period contemplated by the regulation. Grandview argues that "disposition" refers only to the final decision at the local permit granting authority and therefore, the August 2004 filing of the comprehensive permit application, **[*11]** compared to the Board's May 2000 approval of the subdivision application more than meets the "cooling off" requirements of Â§ 31.07(1)(h).

Our first step in understanding the meaning of "disposition," as it is used in 760 CMR 31.07(1)(h)(3), requires examining the word in the context of the language of the regulation. Grandview compares the language of subsections (h)(1) and (h)(2), which refer, respectively, to "the date of filing of a prior application ....", and to "any date during which such an application was pending before a local permit granting authority," to argue that "disposition" must be construed to refer back to the "local permit granting authority" mentioned in subsection (h)(2). Grandview also contrasts the lack of a reference to any appeal period in Â§ 31.07(1)(h) with the specific reference to filing appeals in 760 CMR 31.08(4), which governs lapse of permits, to argue that the lack of a specific reference in the related application section means that "disposition" was not intended to encompass any appeal period.

The presence or lack of a specific reference to appeal periods in **[*12]** Â§ 31.07(1)(h), however, is not dispositive. Subsection (h)(2) sets the twelve-month clock running from the end of the period encompassed by "any date during which such an application was pending before a local permit granting authority." If subsection (h)(3) only refers to a local board's final decision, the date of disposition would be the same as the last day on which the application was pending before the local board. In this circumstance, subsection (h)(3) would be superfluous. The same reasoning applies to the "withdrawal" provision of subsection (h)(4).

A construction that would make subsections (h)(3) and (h)(4) unnecessary must be avoided, if possible. In order to give subsection (h)(3) meaning, it would have to refer to more than the time period during which the application is pending before the local board. Interpreting "disposition" and "withdrawal" to include appeals of local board decisions adds meaningful content to the regulation.

Moreover, interpreting "disposition" to mean a final disposition after appeal is consistent with the language of G.L. c. 41, Â§ 81V, which suggests that subdivision approvals are not considered disposed **[*13]** of until after appeals

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[4] In proceedings before the Committee, the existence of a related application establishes an irrebuttable presumption that the board's action is consistent with local needs. 760 CMR 31.07(1).

have been resolved. The comparison to 760 CMR 31.08(4), which governs lapses of comprehensive permits and does not address conventional permits, is not meaningful in this context. Therefore, interpreting disposition to mean final disposition after the conclusion of all appeals renders the regulation provisions consistent and meaningful. To do otherwise would lead to an illogical result. See *Apple Farm Estates, LLC v. Medway,* No. 04-26, slip op. at 2-3 (Mass. Housing Appeals Committee Ruling Feb. 16, 2005).

Similarly, reference to the proposed draft of the regulation submitted for public comment does not require any different result. The proposed regulation provided for a six-month, rather than a twelve-month cooling off period, and only in the case of a denial by the local permit granting authority. Â [5] Exh. O, p. 2. As promulgated, the regulation expands the scope of related applications, by eliminating the restriction to denials by **[*14]** local authorities and by lengthening the protection period; thus commentary on the proposed regulation is unpersuasive. See Exh. O, p. 4; Exhs. S, T.

Finally, and most importantly, our interpretation of the meaning of "disposition" is also consistent with and advances the purpose and overall policy of the related application provision, which was promulgated to prevent developers from using the Chapter 40B process to coerce or intimidate local zoning boards and communities with respect to traditional zoning applications. See *Stanley Realty Holdings, LLC v. Watertown,* No. 04-04, slip op. at 3 (Mass. Housing Appeals Committee Apr. 15, 2004); *Apple Farm Estates, LLC v. Medway,* No. 04-26, slip op. at 3 (Mass. Housing Appeals Committee Ruling Feb. 16, 2005). It is also intended to discourage developers from maintaining multiple pending applications for the same property. *Stanley Realty Holdings,* No. 04-04, slip op. at 3. Chapter 40B affords developers great flexibility in developing affordable housing projects for submission to local zoning boards for approval. This flexibility is not intended, however, to grant them additional leverage with respect to conventional applications **[*15]** they may pursue.

Grandview's arguments that it is being punished because abutters appealed the grant of the subdivision application, and that applying the related application provision to it would amount to retroactive treatment, are without merit. Grandview could have withdrawn its subdivision application and waited the one-year cooling off period before filing its comprehensive permit application. Furthermore, the related application provision was promulgated well before Grandview filed its comprehensive permit application. Indeed, the subdivision application could have been withdrawn following the promulgation of this provision in 2001, and Grandview then could have chosen to file a comprehensive permit application a year thereafter, well before the date on which it did file the application.

We therefore conclude that "disposition" means final disposition after the conclusion of all appeals with respect to a prior application under Â§ 31.07(1)(h)(3). Therefore an active, related application exists for the property in question. A determination that the pending subdivision appeal constitutes an active related application, and that the comprehensive permit application was filed during **[*16]** the protected period, triggers an irrebuttable presumption that the Board's denial of Grandview's application is consistent with local needs under 760 CMR 31.07(1)(h). Such an irrebuttable presumption requires that the Board's denial of the comprehensive permit be upheld.

IV. CONCLUSION

Accordingly, we conclude that the developer's subdivision application constitutes a related application. The Board's denial of the comprehensive permit is therefore deemed consistent with local needs under 760 CMR 31.07(1)(h).

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[5] DHCD stated that the proposed regulation would "[i]nvoke a 6-month 'cooling off' period" and that:

> 760 CMR 31.08 would be amended to add a section that bars an applicant from filing a comprehensive permit for 6 months from the date of a prior application or, if later, the date of denial by the local permit granting authority, for a building permit, variance, special permit, subdivision or other approval related to construction on the same land if that application included no low or moderate income housing.

Exh. O. DHCD's letter accompanying the proposed regulatory change stated that the proposed regulatory changes, including the proposal above, "reflect our continued support of affordable housing development, but are responsive to many of the concerns that we have heard from local communities." Exh. O, p. 1; See Exh. T.

The Board's motion for summary decision is granted. We therefore need not reach Grandview's motion for summary decision.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, Â§ 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Date: July 10, 2006

MA Housing Appeals Committee

EXHIBIT B

LOCUS MAP
1" = 1,000' ±

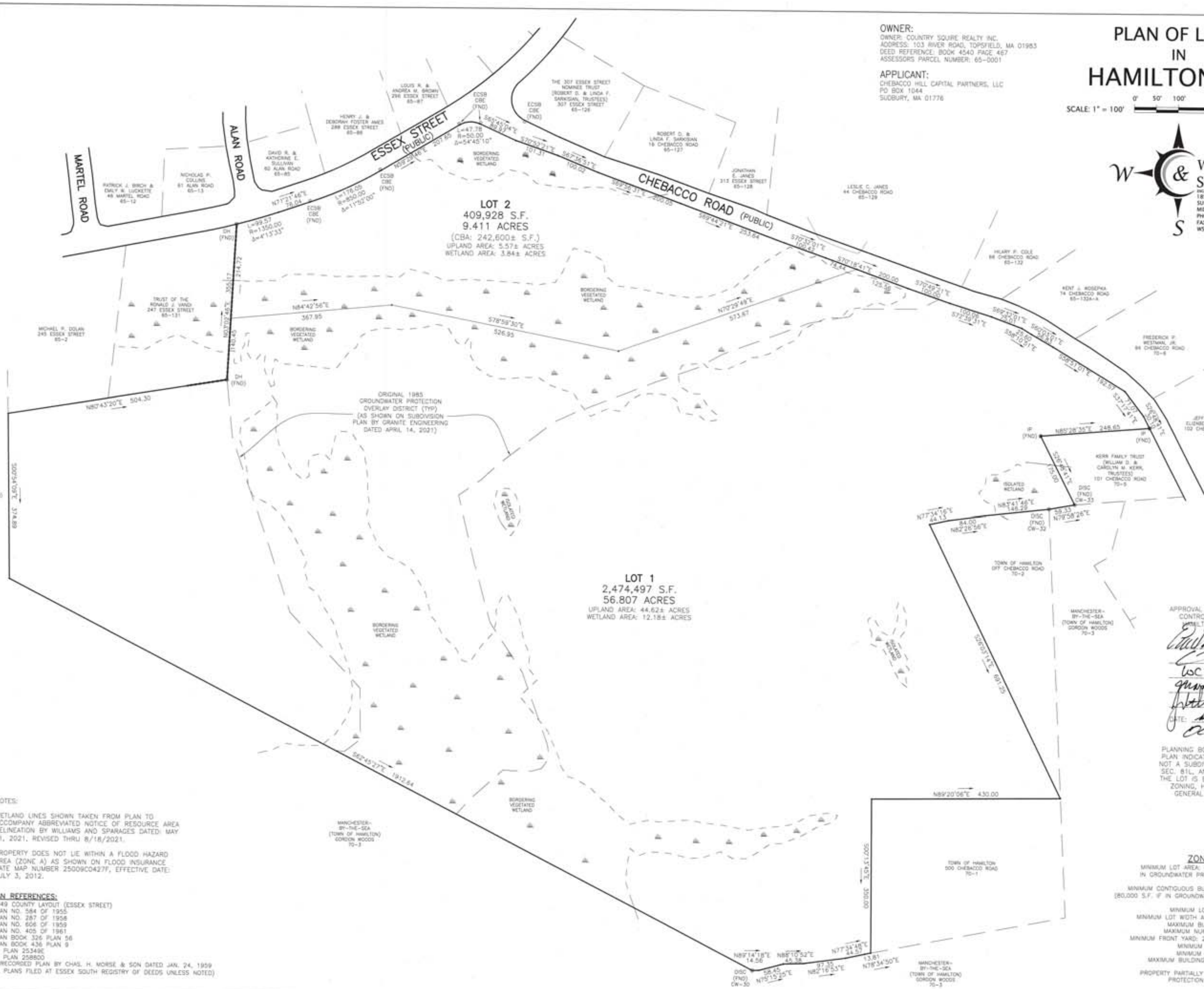
PLAN OF LAND IN HAMILTON, MA

SCALE: 1" = 100' 0' 50' 100' 200' DATE: SEPTEMBER 29, 2021

OWNER:
OWNER: COUNTRY SQUIRE REALTY INC.
ADDRESS: 103 RIVER ROAD, TOPSFIELD, MA 01983
DEED REFERENCE: BOOK 4540 PAGE 467
ASSESSORS PARCEL NUMBER: 65-0001

APPLICANT:
CHEBACCO HILL CAPITAL PARTNERS, LLC
PO BOX 1044
SUDBURY, MA 01776

WILLIAMS & SPARAGES
ENGINEERS | PLANNERS | SURVEYORS
189 NORTH MAIN STREET
SUITE 101
MIDDLETON, MA 01949
PHONE: (978) 539-8088
FAX: (978) 539-8200
WSENGINEERS.COM



APPROVAL UNDER THE SUBDIVISION CONTROL LAW NOT REQUIRED
HAMILTON PLANNING BOARD

DATE: OCT. 5, 2021

PLANNING BOARD ENDORSEMENT OF THIS PLAN INDICATES ONLY THAT THE PLAN IS NOT A SUBDIVISION UNDER M.G.L. CH. 41, SEC. 81L, AND DOES NOT INDICATE THAT THE LOT IS BUILDABLE OR THAT IT MEETS ZONING, HEALTH, CONSERVATION OR GENERAL BY-LAW REQUIREMENTS.

LEGEND OF ABBREVIATIONS
DH - DRILL HOLE
ECSB - ESSEX COUNTY STONE BOUND
CBE - CENTER BACK EDGE
IP - IRON PIPE
(FND) - FOUND

I CERTIFY THAT I HAVE CONFORMED WITH THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS IN PREPARING THIS PLAN.

P.L.S.
WILLIAMS & SPARAGES LLC

NOTES:

WETLAND LINES SHOWN TAKEN FROM PLAN TO ACCOMPANY ABBREVIATED NOTICE OF RESOURCE AREA DELINEATION BY WILLIAMS AND SPARAGES DATED: MAY 11, 2021, REVISED THRU 8/18/2021.

PROPERTY DOES NOT LIE WITHIN A FLOOD HAZARD AREA (ZONE A) AS SHOWN ON FLOOD INSURANCE RATE MAP NUMBER 25009C0427F, EFFECTIVE DATE: JULY 3, 2012.

PLAN REFERENCES:
- 1949 COUNTY LAYOUT (ESSEX STREET)
- PLAN NO. 584 OF 1955
- PLAN NO. 287 OF 1958
- PLAN NO. 606 OF 1959
- PLAN NO. 405 OF 1961
- PLAN BOOK 326 PLAN 56
- PLAN BOOK 436 PLAN 9
- LC PLAN 25349E
- LC PLAN 25880D
- UNRECORDED PLAN BY CHAS. H. MORSE & SON DATED JAN. 24, 1959

(ALL PLANS FILED AT ESSEX SOUTH REGISTRY OF DEEDS UNLESS NOTED)

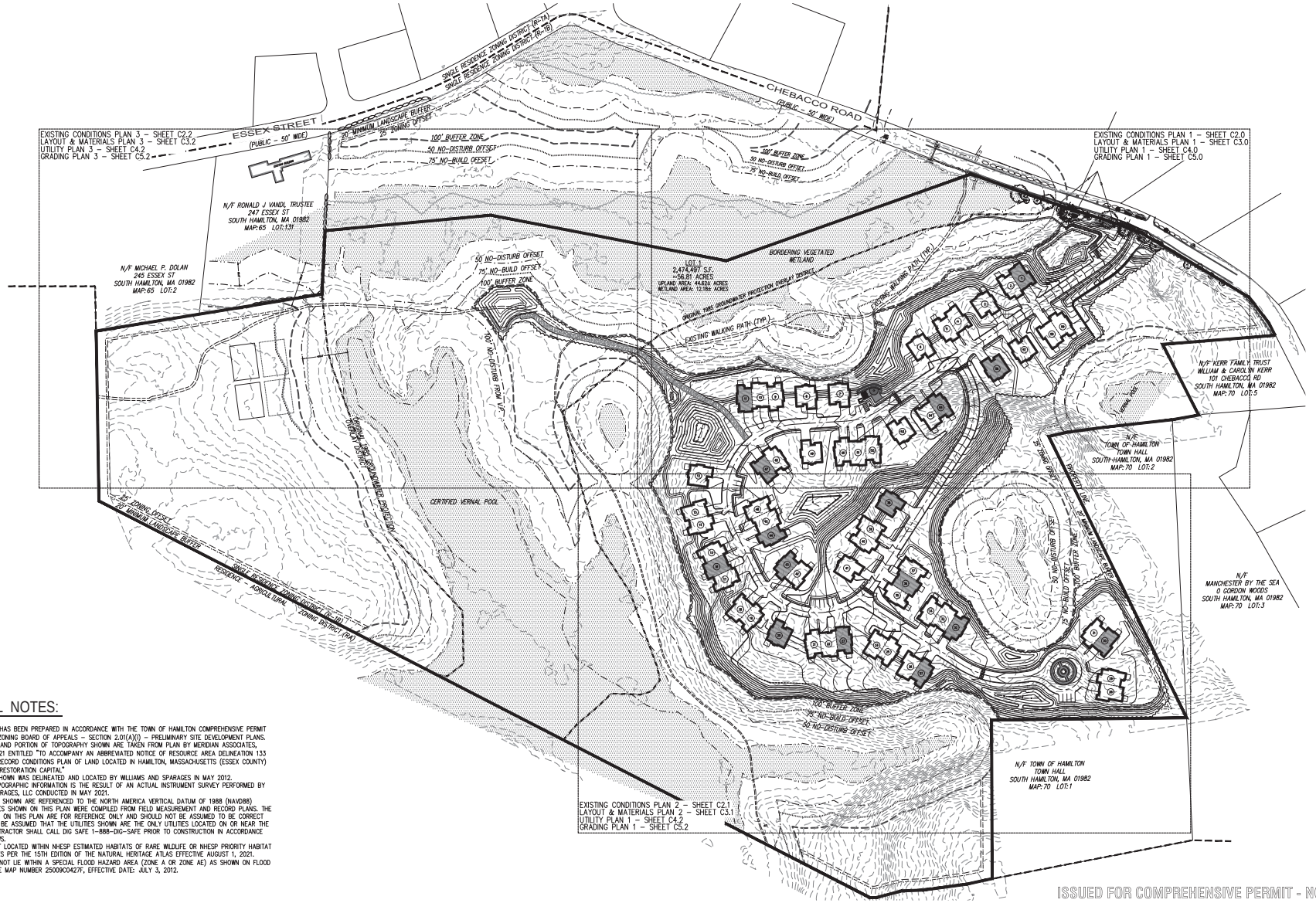
ZONE: R-1B
MINIMUM LOT AREA: 40,000 S.F. (80,000 S.F. IF IN GROUNDWATER PROTECTION OVERLAY DISTRICT)

MINIMUM CONTIGUOUS BUILDING AREA (CBA): 20,000 S.F. (80,000 S.F. IF IN GROUNDWATER PROTECTION OVERLAY DISTRICT)

MINIMUM LOT FRONTAGE: 175'
MINIMUM LOT WIDTH AND DEPTH: 100' AT BUILDING
MAXIMUM BUILDING HEIGHT: 35'
MAXIMUM NUMBER OF STORIES: 3
MINIMUM FRONT YARD: 25' (OR 50' FROM CENTERLINE)
MINIMUM SIDE YARD: 15'
MINIMUM REAR YARD: 15'
MAXIMUM BUILDING COVERAGE OF LOT: 25%

PROPERTY PARTIALLY LIES IN THE GROUNDWATER PROTECTION OVERLAY DISTRICT

EXHIBIT C



GENERAL NOTES:

1. THIS PLAN SET HAS BEEN PREPARED IN ACCORDANCE WITH THE TOWN OF HAMILTON COMPREHENSIVE PERMIT RULES OF THE ZONING BOARD OF APPEALS – SECTION 2.01(A)(1) – PRELIMINARY SITE DEVELOPMENT PLANS.
2. WETLAND LINES AND PORTION OF TOPOGRAPHY SHOWN ARE TAKEN FROM PLAN BY MERIDIAN ASSOCIATES, DATED 1/25/2021 ENTITLED "TO ACCOMPANY AN ABBREVIATED NOTICE OF RESOURCE AREA DELINEATION 133 ESSEX STREET RECORD CONDITIONS PLAN OF LAND LOCATED IN HAMILTON, MASSACHUSETTS (ESSEX COUNTY) PREPARED FOR RESTORATION CAPITAL"
3. VERNAL POOL SHOWN WAS DELINEATED AND LOCATED BY WILLIAMS AND SPARAGES IN MAY 2012.
4. PORTION OF TOPOGRAPHIC INFORMATION IS THE RESULT OF AN ACTUAL INSTRUMENT SURVEY PERFORMED BY WILLIAMS & SPARAGES, LLC CONDUCTED IN MAY 2021.
5. ALL ELEVATIONS SHOWN ARE REFERENCED TO THE NORTH AMERICA VERTICAL DATUM OF 1988 (NAVD88)
6. EXISTING UTILITIES SHOWN ON THIS PLAN WERE COMPILED FROM FIELD MEASUREMENT AND RECORD PLANS. THE UTILITIES SHOWN ON THIS PLAN ARE FOR REFERENCE ONLY AND SHOULD NOT BE ASSUMED TO BE CORRECT NOR SHOULD IT BE ASSUMED THAT THE UTILITIES SHOWN ARE THE ONLY UTILITIES LOCATED ON OR NEAR THE SITE. THE CONTRACTOR SHALL CALL DIG SAFE 1-888-DIG-SAFE PRIOR TO CONSTRUCTION IN ACCORDANCE WITH STATE LAWS.
7. THE SITE IS NOT LOCATED WITHIN NHESP ESTIMATED HABITATS OF RARE WILDLIFE OR NHESP PRIORITY HABITAT OF RARE SPECIES PER THE 15TH EDITION OF THE NATURAL HERITAGE ATLAS EFFECTIVE AUGUST 1, 2021.
8. THE SITE DOES NOT LIE WITHIN A SPECIAL FLOOD HAZARD AREA (ZONE A OR ZONE AE) AS SHOWN ON FLOOD INSURANCE RATE MAP NUMBER 25009C0427F, EFFECTIVE DATE: JULY 3, 2012.

ISSUED FOR COMPREHENSIVE PERMIT - NOT FOR CONSTRUCTION

PREPARED BY:
DILLIS & ROY CIVIL DESIGN GROUP
CIVIL ENGINEERS LAND SURVEYORS WETLAND CONSULTANTS
1 MAIN STREET, SUITE 1
LUNENBURG, MA 01462
PHONE: (978) 779-6091
www.dillisandroy.com

OWNER:
COUNTRY SQUIRE REALTY, INC.
103 RIVER ROAD
TOPSFIELD, MASSACHUSETTS

APPLICANT:
CHEBACCO HILL CAPITAL PARTNERS, LLC
P.O. BOX 1044
SUDBURY, MASSACHUSETTS

SCALE:
100 0 50 100 200 400
1 in. = 100 ft.

DIG SAFE 1-888-344-7233

COMMONWEALTH OF MASSACHUSETTS
GREGORY S. ROY
CIVIL
No. 49168
REGISTERED PROFESSIONAL ENGINEER

DATE: 3/04/24
DESIGN BY: RPV
DRAWN BY: RPV
CHECKED BY: GSR

PRELIMINARY KEY SHEET
VILLAGE AT CHEBACCO HILL
133 ESSEX STREET
HAMILTON, MASSACHUSETTS

NO.	DATE	DESCRIPTION	BY

JOB NO. 7465
DRAWING NO. 7465-KEY
SHEET NO. C1.1

EXHIBIT D

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

08-11-2021

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,

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.

8.3.6 Timing of Construction. Unless a different schedule is approved by the Planning Board, Affordable Housing Units shall be provided in proportion to the development of market-rate units, but in no event shall the construction of Affordable Housing Units, the payment of fees in lieu of constructing Affordable Housing Units, or the provision of off-site Affordable Housing Units be delayed beyond the schedule below. Fractions shall be rounded to the nearest whole number.

% Building Permits Issued for Market Rate Units	**% Affordable Units (Building Permits, Fees, Off-Site Units, or Land, as Applicable)**
Up to 29%	None required
30%	At least 10%
50%	At least 30%
70%	At least 50%
85%	At least 70%
90%	100%

8.3.7 Certificate of Occupancy. A Certificate of Occupancy for an Affordable Housing Unit shall not be issued until the applicant submits evidence to the Building Commissioner that an Affordable Housing Restriction or a regulatory agreement for the project has been approved by the Planning Board.

8.3.8 Preservation of Affordability; Restrictions on Resale. An Affordable Housing Unit created in accordance with this Section shall be subject to an Affordable Housing Restriction or regulatory agreement that contains limitations on use, resale and rents. The Affordable Housing Restriction or regulatory agreement shall meet the requirements of the Town and the Local Initiative Program, and shall be in force for the maximum period allowed by law.

1. The affordable housing restriction or regulatory agreement shall be enforceable under the applicable provisions of G.L. c. 184, as amended.

2. The Planning Board shall require that the applicant comply with the mandatory provision of Affordable Housing Units and accompanying restrictions on affordability, including the execution of the Affordable Housing Restriction or regulatory agreement.

3. All documents necessary to ensure compliance with this Section shall be subject to the review and approval of the Planning Board and, as applicable, Town Counsel. Such documents shall be executed prior to and as a condition of the issuance of any Certificate of Occupancy.

SECTION 9.0 SPECIAL DISTRICT REGULATIONS

9.1 GROUNDWATER PROTECTION OVERLAY DISTRICT (GPOD).

9.1.1 Purpose. The purpose of the Groundwater Protection Overlay District (GPOD) is:

1. To promote the health, safety and general welfare of the Town by ensuring an adequate quality and quantity of drinking water for the residents, institutions, and businesses of Hamilton.

2. To preserve and protect existing and potential sources of drinking water supplies and recharge areas;

3. To conserve the natural resources of the Town; and

4. To prevent temporary and permanent contamination of the environment.

9.1.2 Overlay District. The GPOD is an overlay district and shall be superimposed on the other zoning districts established by this Bylaw. This overlay district shall apply to all new construction, reconstruction or expansion of existing buildings, and new or expanded uses. Applicable activities or uses which fall within the Well Head Protection District must additionally comply with the requirements of the GPOD. Uses that are prohibited in the underlying districts shall not be permitted in the GPOD.

9.1.3 Location. The GPOD shall consist of those areas shown on the Hamilton Groundwater Protection Overlay District Map, dated May 1985, amended May 2000 to include the aquifer protection districts of neighboring communities that lie within the Town of Hamilton, amended October 2004, and amended Fall 2015 to incorporate Weston & Sampson's Zone II delineations map dated January 2013. Said map is hereby incorporated into the Zoning Bylaw by reference, and shall be on file with the Town Clerk.

9.1.4 Dimensional Requirements. Regardless of the minimum Lot size of the underlying zone, there shall be a minimum lot area of eighty thousand (80,000) square feet for a building Lot in the GPOD. See Section 4.0 for Computation of Lot Area.

9.1.5 Lot Partially in the GPOD. Any Lot, which has one-third (1/3) or more of its total area falling in the GPOD, must meet all the requirements of the GPOD.

9.1.6 Boundary in Doubt. If the location of the GPOD boundary in relation to a particular parcel is in doubt, resolution of boundary disputes shall be through a Special Permit application to the Zoning Board of Appeals. Any application for a Special Permit for this purpose shall be accompanied by adequate documentation. The burden of proof shall be upon the owner(s) of the land to show where the bounds should be located. At the request of the owner(s), the Town may engage a professional engineer, hydrologist, geologist, or soil scientist to determine more accurately the boundaries of the GPOD with respect to individual parcels of land, and may charge the owner(s) for the cost of the investigation.