



Commonwealth of Massachusetts
EXECUTIVE OFFICE OF HOUSING &
LIVABLE COMMUNITIES

Maura T. Healey, Governor ◆ Kimberley Driscoll, Lieutenant Governor ◆ Edward M. Augustus Jr., Secretary

Via email: preffett@hamiltonma.gov

June 13, 2024

Mr. Bruce Gingrich, Chair
Hamilton Zoning Board of Appeals
Town of Hamilton
650 Asbury Street
Hamilton, MA 01982

Re: Hamilton Safe Harbor Decision, Village at Chebacco Hill Comprehensive Permit Application at 133 Essex Street, Hamilton.

Dear Mr. Gingrich:

The Executive Office of Housing and Livable Communities (EOHLC) is in receipt of a May 16, 2024, letter from Stephen J. Chaplin, Esq., who represents Chebacco Hill Capital Partners, LLC (Applicant), which has applied for a comprehensive permit for the Village at Chebacco Hill located at 133 Essex Street, Hamilton, MA (the Project). The Applicant challenges the May 2, 2024, letter by the Hamilton Zoning Board of Appeals (Board), which notified the Applicant that the Board considers the denial of the Applicant's application for a Comprehensive Permit to be consistent with local needs.

The Board claims that the denial is consistent with local needs based on the following assertion: that the Applicant's proposal is subject to the Related Application regulation (760 CMR 56.03(1)(e), 56.03(7)).

Procedural Background: 760 CMR 56.03(8)

Pursuant to 760 CMR 56.03(8), if a Board considers that, in connection with an Application, a denial of the permit or the imposition of conditions or requirements would be consistent with local needs on the grounds that the *Statutory Minima* defined at 760 CMR 56.03(3)(b) or (c) have been satisfied or that one or more of the grounds set forth in 760 CMR 56.03(1) have been met, it must do so according to the following procedures. Within 15 days of the opening of the local hearing for the Comprehensive Permit, the Board shall provide written notice to the Applicant, with a copy to the Department, that it considers that a denial of the permit or the imposition of conditions or requirements would be consistent with local needs, the grounds that it believes have been met, and the factual basis for that position, including any necessary supportive documentation. If the Applicant wishes to challenge the Board's assertion, it must do so by providing written notice to the Department, with a copy to the Board, within 15 days of its receipt of the Board's notice, including any documentation to support its position. The Department shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials.

The Board shall have the burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs, provided, however, that any failure of the Department to issue a timely decision shall be deemed a determination in favor of the municipality. This procedure shall toll the requirement to terminate the hearing within 180 days.

Regulatory Background: Related Applications Safe Harbor as Defined under 760 CMR 56.03(1)(e) and 760 CMR 56.03(7)

760 CMR 56.03(1): *A decision by a Board to deny a Comprehensive Permit... 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(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.

Notice Requirements under 760 CMR 56.03(8)

EOHLC finds that the Board submitted notice to the Applicant within 15 days of opening the local hearing on May 1, 2024, through its May 2, 2024 letter, which was sent by Certified Mail and received electronically by EOHLC on May 3, 2024. EOHLC finds that the Applicant challenged the Board's assertion within the proper timeframe, 15 days from receipt of the Town's notification, through its May 16, 2024 letter, which was sent by Certified Mail and received electronically by EOHLC on May 16, 2024.

EOHLC also received various documents outside the scope and deadlines pursuant to 760 CMR 56.03(8). EOHLC did not consider any of the documents submitted beyond the Applicant's May 16, 2024 challenge letter.¹

The Board's Submission

The Board's submission consists of a May 2, 2024 two (2) page notification letter to EOHLC of its Related Application safe harbor assertion, as well as a copy of the Board's May 2, 2024 two (2) page Notice of Safe Harbor – Related Application letter to the Applicant (referenced as Exhibit A) providing further details as to the grounds for the safe harbor assertion and the following two exhibits:

- **Exhibit 1:** "Case details" regarding pending litigation (Massachusetts Trial Court N6 (Case No. 22 MISC 000591) concerning the Applicant's application for a special permit (Exhibit 2).
- **Exhibit 2:** October 19, 2022 Town of Hamilton Planning Board Decision on Chebacco Hill Capital Partners, LLC's Application for a Senior Housing Special Permit.

¹ EOHLC received a "Memorandum in Defense of the Hamilton Zoning Board of Appeals" from an attorney for abutters to the proposed Project on May 29, 2024, which was followed by a "Request to Strike Memorandum of May 29, 2024" from Applicant's counsel received on May 30, 2024, and then by an email on May 31, 2024 from the Board's counsel stating that it "hereby adopts the position and arguments set forth in Attorney Hill's memorandum of May 29, 2024." submissions are limited to a Board's initial safe harbor assertion and the Applicant's responsive challenge. In rendering a decision, EOHLC will not consider submissions by other interested persons or supplemental assertions or submissions by the Board or Applicant, except for submission of new evidence when there is a question of fact as to whether procedural requirements were met. Such limited review is consistent with the regulatory provisions under 760 CMR 56.03(8)(a), which do not provide for supplemental responses, as well as the regulatory intent to provide for an expedited (30 day) EOHLC review prior to a party's interlocutory appeal before the HAC pursuant to 760 CMR 56.03(8)(c).

- The Special Permit Application

The Applicant's Submission

The Applicant's May 16, 2024 response to the Board's submission challenges the Related Applications safe harbor notice and includes an eleven (11) page Appeal of the Hamilton Zoning Board of Appeals Notice of Safe Harbor with various Exhibits (A-I). The exhibits include:

- **Exhibit A:** May 2, 2024 Notice of Safe Harbor letter from the Board to the Applicant, copied to EOHLC, and May 2, 2024 letter from the Board to EOHLC providing notice of its Related Application safe harbor assertion, copied to the Applicant.
- **Exhibit B:** "Plan of Land" in Hamilton, MA, dated September 29, 2021, identified in the Applicant's submission as a true and accurate copy of the map shown on the ANR plan endorsed by the Planning Board.
- **Exhibit C:** Case information identified by the Applicant's submission as pertaining to the Applicant's pending appeal of the Planning Board's denial of the Special Permit application, Case NO. 22 MISC 000591 Chebacco Hill Capital Partners LLC, vs. Marnie Crouch Member of Town of Hamilton Planning Board, et al. Speicher, including a 12/18/2023 docket entry stating, "Joint Motion to Extend stay, filed and Allowed" and the case disposition listed as "Undisposed."
- **Exhibit D:** Case information identified in the Applicant's submission as an active appeal of the Planning Board's denial of an application for a Stormwater Management Permit, pending in the Essex County Superior Court, Case NO. 2277CV01137 Chebacco Hill Capital Partners, LLC vs. Marnie Crouch as member of Town of Hamilton Planning Board et al., including a 4/08/2024 docket entry stating "...[t]his case has been stayed by the parties pending the result of Plaintiff's alternative permitting" and the case disposition listed as "Pending."
- **Exhibit E:** Town of Hamilton Zoning Bylaw cover page and pages 68-69.
- **Exhibit F:** November 3, 2021 and October 18, 2021 letters from KP Law to the Planning Board concerning the fee in lieu of Affordable Housing units requirement under the Bylaw as amended in 2019, with attachments to the latter containing related Bylaw provisions and the March 19, 2019 Hamilton Planning Board minutes regarding the fee calculation.
- **Exhibit G:** Town of Hamilton Affordable Housing Trust Fund Mortgage concerning an unrelated property on Asbury Street in Hamilton that was loaned \$435,000 for the construction of ten dwelling units for affordable housing purposes, which according to the Applicant's submission, "based on information and belief," was funded through a payment of the same amount by one of the Applicant's owners to the Affordable Housing Trust Fund.
- **Exhibit H:** May 1, 2024 Memorandum to the Town of Hamilton Zoning Board of Appeals from counsel to the Applicant concerning the validity of the Board's claim of safe harbor under the Related Applications safe harbor, concluding that the Board cannot invoke the safe harbor.
- **Exhibit I:** Chebacco Hill Capital Partners, LLC vs. Marnie Crouch, et al. (Case NO. 22 MISC 000591), Joint Motion to Extend Stay dated December 18, 2023.

Background and Discussion

Background

Based on the submissions of the parties, the Applicant applied for a Senior Housing Special Permit (the Special Permit application) on July 2, 2021 for a residential development of 55 units on a parcel of approximately 66 acres. The applicant applied for an Endorsement of Plan Believed Not to Require Approval on or about September 29, 2021 to divide the parcel to create 2 lots, one approximately 56 acres and the other approximately 10 acres (the latter consisting of farmland and wetlands as discussed below), which was endorsed by the Town's Planning Board on October 5, 2021. The Special Permit application was denied by the Planning Board on October 19, 2022, and the Applicant appealed the Special Permit denial to the Land Court where the matter is still pending. The Applicant's

application for a comprehensive permit was submitted on March 22, 2024. The Board opened the hearing on the Applicant's comprehensive permit application for the Project on May 1, 2024.

The Board argues that the comprehensive permit application is a Related Application because: 1) it concerns construction on the same property (133 Essex Street) as the Special Permit application; and 2) the special permit application was for a project that did not specifically include SHI Eligible Housing units as explicitly stated in 760 CMR 56.03(7)(a); and 3) that there has been no final disposition on the Special Permit application, as the Town's denial of said application is on appeal before the Land Court.

The Applicant primarily argues that the comprehensive permit application is not a Related Application because: 1) the Board has not proven that it concerns the same property since the Special Permit application concerned the entire 66 acre (undivided) parcel, and 2) the Town's underlying Zoning Bylaw applicable to the Special Permit application requires at least 10% of the constructed units to be SHI Eligible Housing units, or in lieu of such construction, a donation of land or fee payment for creating SHI Eligible Housing units.² Although the Applicant opted to pay the fee, the Applicant argues that because the fee can be used to construct SHI Eligible Housing units through the Affordable Housing Trust Fund, the Special Permit application should be treated as including at least 10% SHI Eligible Housing units. The Applicant does not dispute that less than 12 months have elapsed between the date of the comprehensive permit application and a date delineated under 760 CMR 56.03(7).

Discussion

DHCD agrees with the Board that the Applicant's comprehensive permit application was a Related Application.

As to the first disputed issue, EOHLC finds that the Applicant's comprehensive permit application relates to construction on the same land that was the subject of its Special Permit application. The Special Permit decision, a copy of which is provided as Exhibit 2 to the Board's submission, states that "[t]he smaller lot is comprised of 5.57 acres of farmland and 3.84 acres of wetlands, all of which is in the Groundwater Protection Overlay District (GPOD). The effect of the division of the parcel into two separate lots was to remove the larger parcel from the GPOD." Therefore, it is evident that construction, whether under a comprehensive permit or special permit, concerned the land comprising the larger lot, as the smaller lot was protected as farmland or wetlands.

As to the second disputed issue, EOHLC finds that the Special Permit application was not for a project containing at least 10% SHI Eligible Housing units, as the relevant Town Bylaw allows for payment of a fee in lieu of construction of such units. Moreover, the Applicant sought such a payment. The Applicant's submission states that "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."³ Even if the fee was payable towards the Town's Affordable Housing Trust Fund for future construction of SHI Eligible Housing units⁴ as the Applicant suggests, such a payment is still not equivalent to

² Applicant's submission cites language from the Town's Bylaw defining an Inclusionary Housing "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."

³ Additionally, Board's Exhibit 2, the Town's Special Permit decision, states "[t]he applicant intends to make payments pursuant to the Town's Inclusionary Housing Bylaw in the total sum of \$2,174,000 to enable the Town to address [the SHI] goal."

⁴ Applicant's Exhibit F references "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)," which provides the following as a method for meeting Inclusionary Housing requirements under the Bylaw: "[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." This language contains no specific reference to payment towards the Affordable Housing Trust Fund, in contrast with language in the Bylaw prior to the 2019 amendments as shown in Applicant's Exhibit F (requiring a "cash payment to the Town through its Affordable Housing Trust Fund"). Moreover, no Bylaw language showing that the Affordable Housing Trust Fund can only be used for the construction of SHI Eligible Housing units has been provided.

construction of SHI Eligible Housing units because it is unknown whether the construction would actually be pursued by a developer or approved by the Town through its applicable boards in the future.⁵

Conclusion

EOHLC finds the Board has met its burden of proving satisfaction of the grounds for asserting the Related Application safe harbor under 760 CMR 56.03(1)(e) and 760 CMR 56.03(7)).

If either the Board or the Applicant wishes to appeal this decision pursuant to 760 CMR 56.03(8), that party shall file an interlocutory appeal with the Housing Appeals Committee (HAC) on an expedited basis, pursuant to 760 CMR 56.05(9)(c) and 56.06(7)(e)(11), within 20 days of its receipt of the decision, with a copy to the other party and to the Department.

EOHLC notes the HAC issued “Standing Order 2020-01: Filing and Service in Cases before the Committee” and “Housing Appeals Committee Rules for Electronic Filing,” both of which became effective April 15, 2020 and have been posted on the Committee’s webpage at <https://www.mass.gov/service-details/housing-appeals-committee-hac>.

If you have further questions, please contact Phillip DeMartino, Technical Assistance Program Coordinator, at (617) 573-1357 or Phillip.DeMartino@mass.gov.

Sincerely,



Amy Stitely
Undersecretary of Strategy and Climate, EOHLC

Cc: Senator Bruce E. Tarr
Representative Kristin E. Kassner
Joseph J. Domelowicz, Jr. Town Manager, Town of Hamilton
Patrick Reffett, Director of Planning and Inspectional Services, Town of Hamilton
Stephen J. Chaplin, Esq.
Amy E. Kwesell, Esq.
Lisa Mead, Esq.
Chebacco Hill Capital Partners, LLC
Daniel C. Hill, Esq.

⁵ The Town noted as much in the Board’s Exhibit 2, the Special Permit decision, acknowledging only a “potential that low-and-moderate income seniors could benefit at some uncertain time in the future from the applicant’s [payment] proposal, if an affordable housing project were to be approved.”