



Commonwealth of Massachusetts
**DEPARTMENT OF HOUSING &
COMMUNITY DEVELOPMENT**

Charles D. Baker, Governor ♦ Karyn E. Polito, Lt. Governor ♦ Jennifer D. Maddox, Undersecretary

July 7, 2022

Mr. John Lee, Chair
Walpole Zoning Board of Appeals
Town of Walpole / Walpole Town Hall
135 School Street
Walpole, MA 02081

Re: Walpole Safe Harbor Decision, Residences at Darwin Commons, Darwin Lane, Walpole MA

Dear Mr. Lee:

The Department of Housing and Community Development (DHCD) is in receipt of a June 13, 2022 letter from Louis Petrozzi, President of Wall Street Development Corporation, (Applicant), which has proposed a Chapter 40B project known as Residences at Darwin Commons, Darwin Lane, Walpole, MA. The Applicant challenges the June 2, 2022 letter by the Walpole 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: certified Housing Production Plan (HPP) as defined under 760 CMR 56.03(1)(b) and 56.03(4).

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: Certified Housing Production Plan as Defined under 760 CMR 56.03(1)(b), 56.03(4)(c) and(f), and 56.03(2)(b) and (c):

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... (b) the Department has certified the municipality's compliance with the goals of its approved Housing Production Plan, in accordance with 760 CMR 56.03(4).*

760 CMR 56.03(4)(c): *Affordable Housing Goals. The HPP shall address the matters set out in the Department's guidelines, including: 1. a mix of types of housing, consistent with local and regional needs and feasible within the housing market in which they will be situated, including rental, homeownership, and other occupancy arrangements, if any, for families, individuals, persons with special needs, and the elderly; 2. a numerical goal for annual housing production, pursuant to which there is an increase in the municipality's number of SHI Eligible Housing units by at least 0.50% of its total units (as determined in accordance with 760 CMR 56.03(3)(a)) during every calendar year included in the HPP, until the overall percentage exceeds the Statutory Minimum set forth in 760 CMR 56.03(3)(a).*

760 CMR 56.03(4)(f): *Certification of Municipal Compliance. A municipality may request that the Department certify its compliance with an approved HPP if it has increased its number of SHI Eligible Housing units in an amount equal to or greater than its 0.5% production goal for that calendar year. SHI Eligible Housing units shall be counted for the purpose of certification in accordance with the provisions for counting units under the SHI set forth in 760 CMR 56.03(2). Requests for certification may be submitted at any time, and the Department shall determine whether a municipality is in compliance within 30 days of receipt of the municipality's request. If the Department determines the municipality is in compliance with its HPP, the certification shall be deemed effective on the date upon which the municipality achieved its numerical target for the calendar year in question, in accordance with the rules for counting units on the SHI set forth in 760 CMR 56.03(2). A certification shall be in effect for a period of one year from its effective date. If the Department finds that the municipality has increased its number of SHI Eligible Housing units in a calendar year by at least 1.0% of its total housing units, the certification shall be in effect for two years from its effective date. (See 760 CMR 56.03(2) citations below.)*

DHCD's HPP and DHCD's G.L. c. 40B Guidelines (the "guidelines") also state as follows:

Term of Certification. *So long as the units produced are SHI Eligible Housing units (see 760 CMR 56.03), a certification shall be in effect for a period of one year from its effective date if the community has increased its SHI Eligible Housing units 0.5% of the total year round housing units or two years from its effective date if it has increased its number of SHI Eligible Housing units 1.0% of total year round housing units. If the units by which the municipality achieved its certification become ineligible for the SHI, then the certification shall lapse as of the date that the units became ineligible for the SHI. If such units become eligible for the SHI during the remaining term of the certification period, then the certification shall be re-instated for such remaining term.¹*

760 CMR 56.03(2)(b): *Units shall be eligible to be counted on the SHI at the earliest of the following:*

- 1. For units that require a Comprehensive Permit under M.G.L. c. 40B, § 20 through 23, or a zoning approval under M.G.L. c. 40A or completion of plan review under M.G.L. c. 40R, the date when:
 - a. the permit or approval is filed with the municipal clerk, notwithstanding any appeal by a party other than the Board, but subject to the time limit for counting such units set forth at 760 CMR 56.03(2)(c); or*
 - b. on the date when the last appeal by the Board is fully resolved;**
- 2. When the building permit for the unit is issued;*
- 3. When the occupancy permit for the unit is issued; or*
- 4. when the unit is occupied by an Income Eligible Household and all the conditions of 760 CMR 56.03(2)(b) have been met (if no Comprehensive Permit, zoning approval, building permit, or occupancy permit is required.)*

¹ Section II.B.9 of the guidelines, available at <https://www.mass.gov/files/documents/2017/10/10/guidecomprehensivepermit.pdf>, also contained within stand-alone HPP guidelines, available at <https://www.mass.gov/doc/housing-production-plan-guidelines/download>.

760 CMR 56.03(2)(c): *Time Lapses. If more than one year elapses between the date of issuance of the Comprehensive Permit or zoning approval under M.G.L. c. 40A or completion of plan review under M.G.L. c. 40R, as that date is defined in 760 CMR 56.03(2)(b)1., and issuance of the building permit, the units will become ineligible for the SHI until the date that the building permit is issued. If more than 18 months elapse between issuance of the building permits and issuance of the certificate of occupancy, the units will become ineligible for the SHI until the date that the certificate of occupancy is issued...*

Notice Requirements under 760 CMR 56.03(8)

DHCD finds that the Board submitted notice to the Applicant within 15 days of opening the local hearing (May 25, 2022) through its June 2, 2022 letter. DHCD notes copies were sent to DHCD via certified mail and electronic mail. DHCD finds that the Applicant challenged the Board's assertion within the proper timeframe, 15 days from receipt of the Town's notification, through its June 13, 2022 letter. DHCD notes that copies of the Applicant's letter were sent to DHCD via certified mail and electronic mail. DHCD notes that although the State of Emergency has ended, DHCD continues to request electronic submission of documents.

The Board's Submission

The Board's submission consisted of a June 2, 2022 safe harbor assertion notification letter based on Walpole's September 10, 2021 HPP Certification and an attachment. The attachment was the September 10, 2021 DHCD HPP Certification Approval letter. In the September 10, 2021 DHCD letter, the following findings were made:

1. *Walpole has a valid HPP. The effective date for the HPP is April 23, 2019 the date that DHCD received a complete plan submission. The HPP has a five-year term and will expire on April 22, 2024.*
2. *The project for which certification was requested for is known as Cedar Crossing/ Cedar Edge (SHI ID# 10582) which consists of 226 SHI units.*
3. *DHCD finds that the units are eligible for SHI inclusion and have been added to the SHI. The number of SHI units (226) is enough for a two-year certification period (90).*
4. *The certification period will run from April 27, 2021 to April 26, 2023.*

DHCD's September 10, 2021 HPP Certification Approval letter also states:

"Please note that all units must retain eligibility for the SHI for the entire certification period. If units are no longer eligible for inclusion on the SHI, they will be removed and will no longer be eligible for certification. This action may affect the term of your certification."

The Applicant's Submission

The Applicant's submission consisted of a June 13, 2022 formal appeal letter that also includes the procedural history of Darwin Commons, various exhibits including but not limited to the September 10, 2021 DHCD HPP Certification Approval letter, the Town's HPP certification request with accompanying documentation that the Town submitted for inclusion of the Cedar Crossing/Cedar Edge units on the SHI, excerpts from the DHCD guidelines, and a copy of a June 2, 2022 email from Walpole's Building Commissioner confirming that building permits had not been issued for Cedar Crossing/Cedar Edge.

The Applicant's main argument against the validity of the Board's safe harbor assertion is that, as of the date of the Applicant's Comprehensive Permit application for Darwin Commons April 28, 2022, building permits for the Cedar Crossing/Cedar Edge development had not been issued within the required time frame under the terms of the HPP Certification, 760 CMR 56.03(2)(b.1)&(c), and the guidelines.

Findings and Discussion

HPP Certification

DHCD finds that the Board did not have grounds to claim an HPP Certification safe harbor. A minimum of 90 SHI-eligible units were needed to achieve a two-year certification, and through its September 10, 2021 DHCD HPP Certification Approval letter, DHCD deemed 226 units to be SHI-eligible in accordance with the counting policy under the guidelines and countable towards HPP certification as of April 27, 2021. However, as referenced above, said letter informed Walpole that all units must maintain eligibility for the SHI during the two-year term of certification, which is consistent with DHCD's regulations and guidelines. Pursuant to 760 CMR 56.03(4)(f), SHI Eligible Housing units shall be counted for the purpose of certification in accordance with the provisions for counting units under the SHI set forth in 760 CMR 56.03(2); 760 CMR 56.03(2)(b.1)&(c) in turn provide that if more than one year elapses between the date of issuance² of the Comprehensive Permit (or other zoning approval as further described under the regulation), and issuance of the building permit, the units will become ineligible for the SHI until the date that the building permit is issued.

The guidelines also make clear that if the units by which the municipality achieved its certification become ineligible for the SHI, then the certification shall lapse as of the date that the units became ineligible for the SHI. In summary, since building permits were not issued within one year of April 27, 2021, the issuance date of the comprehensive permit, the Cedar Crossing/Cedar Edge units became ineligible for inclusion on the SHI as of April 26, 2022 and were also not eligible to be counted towards certification as of that date until building permit issuance occurred.

DHCD sent an email to the Town on May 24, 2022 requesting building permit issuance information for Cedar Crossing/Cedar Edge. DHCD has not received a response to this request from the Town, although the Applicant's submission shows, through a copy of Applicant's email correspondence with the Town's Building Commissioner, that building permits had not been issued for Cedar Crossing/Cedar Edge. Thus, at the time the Residences at Darwin Commons Application was filed with the Board on or about April 28, 2022, the units were no longer SHI Eligible Housing units and the HPP Certification consequently lapsed. Furthermore, as DHCD had no record of building permit issuance for Cedar Crossing/Cedar Edge, it removed the units from the SHI and sent a letter to the Town on June 22, 2022, informing the Town that its HPP Certification was suspended as of April 26, 2022, the date of said lapse.

Conclusion

DHCD finds the board has not met its burden of proving satisfaction of the grounds for asserting the certified Housing Production Plan safe harbor as defined under 760 CMR 56.03(1)(b) and 56.03(4). 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.

DHCD 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>.

² Defined at 760 CMR 56.03(2)(b.1.a) as the date the permit or approval is filed with the municipal clerk, notwithstanding an appeal by a party other than the Board, but subject to the time limit for counting such units as set forth at 760 CMR 56.03(2)(c).

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

Sincerely,

A handwritten signature in blue ink that reads "Caroline 'Chris' Kluchman". The signature is written in a cursive style with a long, sweeping tail on the last name.

Caroline "Chris" Kluchman
Deputy Director, Division of Community Services

Cc: James Johnson, Town Administer, Walpole
George Pucci, Esq., Town Counsel, Walpole
Patrick Deschenes, Director of Economic Development, Walpole
Louise Petrozzi, President, Wall Street Development Corporation
Jay Taleran, Esq., Meade, Taleran & Costa
Dean Harrison, 40B Consultant