

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

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

November 24, 2021

Mr. John Lee, Chair
Walpole Zoning Board of Appeals
Town of Walpole
325 Main Street
Walpole, MA 01540

Re: Walpole Safe Harbor Decision, Residences at Darwin Commons, Darwin Lane, Walpole, MA, Certified Housing Production Plan as Defined under 760 CMR 56.03(1)(b) and 56.03 (4).

Dear Mr. Lee:

The Department of Housing and Community Development (DHCD) is in receipt of an October 31, 2021, 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 October 18, 2021 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) and 56.03(4) (c) and(f):

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.*

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 (October 13, 2021) through its October 18, 2021 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 City's notification, through its October 31, 2021 letter. DHCD notes copies 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 Boards submission consisted of an October 18, 2021 notification letter 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 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.*

The Applicant's Submission

The Applicant's submission consisted of an October 31, 2021 formal appeal letter with various exhibits. The Applicant challenges the validity of the September 10, 2021 Certification determination, including the number of SHI-eligible units and utilization of 2010 Census Data. The Applicant claims that Cedar Crossing (212 rental units, of which 53 are to be restricted as affordable, and 212 units are counted on the SHI) and Cedar Edge (56 ownership units, of which 14 are to be restricted as affordable, and 14 units are counted on the SHI) should be considered one project in determining the numbers of SHI Eligible Housing units. The Applicant argues that the project is not consistent with the HPP's "high priority local needs" and therefore is not "consistent with local needs" as provided for in c. 40B.

The Applicant further states that DHCD lacks the mandate to issue regulations granting safe harbor beyond the Statutory Minima created under Chapter 40B in 1969. The Applicant is critical of the Walpole's implementation of the HPP and DHCD's lack of "due diligence" in oversight of the Town's affordable housing initiatives. The Applicant also points out the amount of funds the Town has dedicated to major projects and "open space" preservation (whilst not investing in affordable housing initiatives). Finally, the Applicant argues that its application was constructively approved due to its claim that the Board failed to open the public hearing in a timely manner.

Findings and Discussion

DHCD reminds both parties that this decision is focused on the narrow scope of "safe harbor" assertion procedures outlined in the regulations under 760 CMR 56.03(8).¹ Therefore, DHCD will not address the opening of the public hearing in a timely manner or constructive approval. The appropriate venue for that matter is the Housing Appeals Committee (HAC).

Subsidized Housing Inventory (SHI)

DHCD finds that the use of the 2010 Census Data (for HPP Goal and the SHI) is appropriate since the 2020 Census data necessary for DHCD to determine "year-round" housing units in accordance with the regulations at 760 CMR 56.03(3)(a) has yet to be released by the U.S. Census Bureau.² DHCD also finds that the number of SHI Eligible Housing units detailed in the September 10, 2021 DHCD Certification Approval letter are consistent with DHCD regulations and G.L. c. 40B Guidelines³ (the "guidelines"). DHCD's counting policy reflected in the guidelines provides for inclusion of 100% of units in a rental development on the SHI if at least 25% of the units are affordable

¹ Although the Applicant alleges that, in addition to not meeting the HPP certification safe harbor, the Board had not met the requirements of 760 CMR 56.03(5) regarding recent progress towards a municipality's Statutory Minima, since the Board did not assert the "recent progress" safe harbor, DHCD need not make a determination on such recent progress.

² The Subsidized Housing Inventory (SHI) is used to measure a community's stock of low- or moderate-income housing for the purpose of M.G.L. Chapter 40B. Please note, the SHI has not yet been updated to reflect 2020 Census figures. The 2020 Census Redistricting Data (Public Law 94-171) Summary File that has been released by the U.S. Census Bureau does not include data on vacant "seasonal, occasional, or recreational use" units used by DHCD to determine Census "year-round housing units" for the SHI. The SHI will therefore continue to reflect the 2010 Census Year-Round Housing unit figures until such data is released.

³ Available at <https://www.mass.gov/files/documents/2017/10/10/guidecomprehensivepermit.pdf>.

to households earning at or below 80% of the Area Median Income (or alternatively, if at least 20% of the units are affordable to households earning at or below 50% of the Area Median Income) and otherwise meet SHI eligibility criteria.⁴ This counting policy has been in effect for over thirty years and has been recognized by the Housing Appeals Committee (see, e.g., *AvalonBay Communities, Inc. v. Hingham Zoning Board of Appeals*, No. 12-03, slip op. at 4-5 (Mass. Housing Appeals Committee, January 14, 2013)). The guidelines, in providing criteria by which all units in a rental development may count on the SHI, do not suggest that a rental development must encompass all units covered under a single comprehensive permit. Moreover, the Subsidizing Agency may subject rental and ownership units permitted under a single comprehensive permit to separate and distinct requirements, as is expected for Cedar Crossing and Cedar Edge since MassHousing imposes separate regulatory agreements for ownership and rental developments.

HPP Certification

DHCD finds that its certification of Walpole's HPP was proper. A minimum of 90 SHI-eligible units were needed to achieve a two-year certification, and DHCD deemed 226 units to be SHI-eligible in accordance with the counting policy under the guidelines. Furthermore, such units initially became SHI-eligible in the calendar year in which certification was sought pursuant to 760 CMR 56.03(4)(f) and the guidelines.⁵ DHCD also notes that the regulatory provision for the HPP certification safe harbor, although not expressly contained in the c. 40B statute, has been upheld by the Housing Appeals Committee. See, e.g., *Alexander Estates, LLC v. Billerica Board of Appeals*, No. 05-14, slip op. at 5 (Mass. Housing Appeals Committee, March 27, 2006 (finding the HPP certification safe harbor a "legitimate exercise of DHCD's regulatory power to advance a program for open and adequate housing by employing sophisticated policy considerations in refining and interpreting the concept of consistency with local needs, and it is consistent with the purpose and intent of the Comprehensive Permit Law"))).

Lastly, as Massachusetts is a Home Rule state, each city and town control its own zoning and has significant discretion in the allocation of funds. DHCD has limited regulatory oversight of implementation of HPPs other than certifying compliance based on creation of SHI Eligible Housing, and cannot require communities to allocate funds towards affordable housing, adopt zoning changes, or create and staff a housing trust or partnership. DHCD can, however, incentive creation of subsidized housing in accordance with Chapter 40B, as it has done through HPP certification and other initiatives. Here, the Town of Walpole set a goal of expanding the supply of affordable rental and ownership units, which it accomplished in issuing a comprehensive permit for Cedar Crossing and Cedar Hill.

Conclusion

DHCD finds the board has 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.

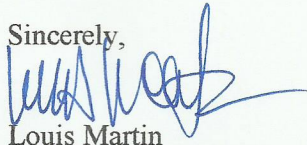
DHCD notes the HAC issued "Standing Order 2020-01: Filing and Service in Cases before the Committee" and "Housing Appeals Committee Rules for Electronic Filing," both of which became effective April 15, 2020 and have been posted on the Committee's webpage at <https://www.mass.gov/service-details/housing-appeals-committee-hac>.

⁴ Section II.A.2(b)(1) of the guidelines.

⁵ Section II.B(6) of the guidelines.

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

Sincerely,



Louis Martin

Director

Division of Community Services

- cc: James Johnson, Town Administer, Walpole
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