

DRAFT
HAMILTON ZONING BOARD OF APPEALS
MINUTES OF MEETING
April 12, 2022
7:00 p.m.
Hybrid/Zoom Meeting
818 3204 3799
Passcode 090795
Hamilton Town Hall
299 Bay Road, Hamilton, MA

Members Present: Bill Bowler (Chairman), Steven Derocher (Associate), Bruce Gingrich, David Perinchief (via Zoom), and Andie Philip (via Zoom).

Others Present: Patrick Reffett.

This meeting was called to order at 7:00 pm with a quorum established.

PUBLIC HEARINGS:

466 Highland St. Harborlight Community Partners – Applicant. Britton Family Trust LLC – owner. Comprehensive Permit (40B) for the construction of a 45 unit multifamily housing project.

Andie Philip, who was not able to attend the April 6, 2022 meeting, stated that she had watched the recording of the meeting.

Bill Bowler announced there was a fifteen day Safe Harbor opportunity, which would be discussed during the hearing. Mr. Bowler reviewed that the abutter’s attorney raised the issue and Patrick Reffett had corresponded with the Department of Housing and Community Development (DHCD), the applicant, and the abutters, whose responses and opinions were part of the record.

Patrick Reffett reviewed his discussion with the Department of Housing and Community Development (DHCD) and read the email from Phillip D’Martino, (DHCD). The DHCD had reviewed the Housing Production Plan (HPP) certification request for 2022 that included the Willow St. project, which became Subsidized Housing Inventory (SHI) eligible before 2022, when the building permit was issued on April 2021. The Willow St. project was also not eligible for certification in 2022. The units in the Asbury St. Comprehensive Permit project were eligible but the permit issuance was in 2021 as the eligibility date would have been November 2021. The units would not be eligible for the Housing Production Plan in 2022 as it was not in the calendar year. The units must be initially eligible for HPP certification in the same calendar year as certification is requested. DHCD would have 30 days to issue a HPP certification letter. According to Mr. Reffett, the Town would pursue certification when units were finished and certifiable.

Dennis Murphy (Hill Law) was present via Zoom to represent the abutters. Attorney Murphy noted that if the Board did not elect to invoke Safe Harbor, it would be waived and gone forever. Attorney Murphy suggested the Board, if in doubt, default to reserving the Town's rights under Safe Harbor rather than waiving the right. Attorney Murphy noted that Site Plan Approval (Willow St./Willow St. Flats) had been approved in December 2019 but more than a year transpired before building permits were issued in April of 2021, which made the project ineligible until the building permits were issued. Attorney Murphy read 760 56.03C that proved that if more than one year elapsed between the date of Site Plan Approval under Chapter 40A and the issuance of the building permit, the units would become ineligible for the Subsidized Housing Inventory (SHI) until the date the building permit was issued on November 3, 2021. On April 22, 2021 a ten unit project at Asbury St. (Habitat for Humanity) also became eligible. There was a six month period of time between them, according to Attorney Murphy.

Dennis Murphy asserted that the Regulation stated that the Town may request certification at any time. Attorney Murphy cited 56 03 Section 4F: "request for certification may be submitted at any time... certification is effective upon the date on which the municipality achieved its numerical target" which Attorney Murphy opined was retroactive to the date when the Town met its Housing Production Plan progress number. Fourteen units were needed to meet the .5% progress needed within the same twelve months. Attorney Murphy noted that the Regulation did not say a calendar year, but rather during the twelve months prior. Attorney Murphy said DHCD had responded quickly rather than taking the usual 30 day time to offer their opinion.

Dennis Murphy noted that the Regulations cited the Board and developer don't have to make this an adversarial relationship if the Board didn't know if they had Safe Harbor. Attorney Murphy referred to 56.031, which indicated that the Board may elect to produce and issue a permit even if Safe Harbor ground had been met. Attorney Murphy suggested the Board invoke Safe Harbor.

Andrew DeFranza (Harborlight Community Partners) said the letter from Mr. Tymman disagreed with Attorneys Murphy and Hill as no certification had been issued. Mr. DeFranza referred to the good faith and spirit of the intent of rules as well as the three or four Housing Production Plans that had been initiated by the Town. Mr. DeFranza encouraged the Board not to invoke Safe Harbor.

George Pucci (KP Law) stated that if the HPP were certified, the ZBA could declare the denial or condition of the project, which would be consistent with the local needs as a matter of law. Attorney Pucci noted the inconsistency of the Regulations and that the term "Safe Harbor" was not mentioned in the Regulations. Attorney Pucci added that until the Department had certified fourteen units, the Town was not in the Safe Harbor zone but in accordance with 56.03 Section 4F, the Municipality with eligible housing certification requests may submit a request for certification at any time for the Department to determine if the Town was in compliance with HPP certification. The certification would then be deemed effective on the date when the

Town achieved its numerical target. The determination would refer back to when the Town qualified for compliance.

Another ambiguity was regarding when units become eligible for SHI. It was the earlier of when the permit was filed with the Clerk or the date of the occupancy permit. George Pucci opined that the units that were approved lapsed after a year without a building permit having been issued. A separate fourteen units were issued building permits in 2021. Attorney Pucci said it was not disrespectful to disagree with DHCD and offered a draft motion as well as defining next step processes.

Bill Bowler noted that neither the Select Board nor Housing Trust had opined on the project. George Pucci reviewed the consequences of invoking Safe Harbor and having an adverse ruling. Attorney Pucci noted that the Housing Appeals Committee were developer friendly. A valid Safe Harbor would enable the Town to avoid the appellate process with the Housing Appeal Committee.

George Pucci noted that the applicant pointed to one section of the Regulation that indicated the Town needed certification while Attorney Murphy found language that indicated the Town could request certification at any time and the certification would relate to the date the Habitat for Humanity units came online.

David Perinchief noted that the project would return to the Town sooner or later as the Town would come in and out of Safe Harbor status. Steven Deroucher said if the Town were certified as Safe Harbor, it could still hear the petition and issue conditions of approval, which could not be appealed. The position would be a benefit to the Board.

The process would be that the planner noticed the applicant and DHCD. DHCD would have 30 days to render a decision. If the DHCD ruled for the Town, the applicant could appeal. If the DHCD ruled for the applicant, the Town could appeal. The appellate body would be the Housing Appeal Committee. The Town did not need to appeal. If either parties appealed the adverse ruling, the process could be stayed for one to two years

The Town needed .5% or 14 units in a twelve month period to be in Safe Harbor.

The Willow St. project (Willow Flats) was permitted under Site Plan Approval in December of 2019 when units became eligible to be added to the SHI. A form to make the units effective was not submitted. By December of 2020, the units were ineligible as no building permit had been issued within the year. If a building permit is not issued within a year after permitting, the Town is not eligible for Safe Harbor. A building permit was issued in April 2021, when the units became eligible for a second time. Units are not yet on the SHI but are eligible.

Asbury St. (Habitat for Humanity) was a ten unit 40B project, which was approved in November of 2021. The additional ten units created more than fourteen units (when combined with

Willow Flats) even though they had not been put on the SHI and did not have certification. Safe Harbor becomes valid when units are SHI eligible.

Both Asbury St. (Habitat for Humanity) and Willow St. (Willow Flats) were eligible for SHI in 2021. The applicant had a valid argument that certification had to be issued in that year when units came online but George Pucci did not agree with that interpretation. As Attorney Pucci had opined the Appeals Committee was not friendly to municipal interests and it would benefit the Town having Safe Harbor, it meant the applicant had to convince the Board on the merits of the project.

Members discussed their inclination to invoke Safe Harbor, noting that the Town had an obligation toward developing affordable housing but that invoking Safe Harbor may give the Town a better chance to assist in the design of the project.

Andrew DeFranza disagreed with Attorney Murphy and Attorney Hill, noting the spirit of the Regulation, ethics, and whether the relationship would become adversarial. Mr. DeFranza referred to the Willow St. project approved in 2019 and it becoming ineligible then eligible again was not within the spirit of the law as it was unfair to count the project twice. Mr. DeFranza said legal and ethical were two different concepts. The intent of 40B was to create housing and not to block it. Mr. DeFranza said he had spent many months with the Planning Board and neighbors in a good faith effort.

Members discussed that even if the Board had the right to invoke Safe Harbor that it didn't need to but it would give the Board a chance to control issues such as water shortage, traffic, taxes, etc. Members were concerned about potential delays by appeals if Safe Harbor were invoked. A concern was issued that if Asbury St. was delayed, it might cause the Town to be taken out of Safe Harbor.

Bill Bowler reviewed the process. If the Board declared Safe Harbor, the applicant would appeal and the DHCD would rule within 30 days. The Town would have the option to appeal assuming the DHCD ruled against town. Mr. Bowler said he did not see a basis that he would vote in favor of a further appeal because the overall goal as a Town and as a Board was to encourage affordable housing.

Bill Bowler said: "I move to declare that the denial of the Asbury Commons 40B application is consistent with local needs under 760 CMR 56.03(1)(b) and (4) because the town increased the number of SHI eligible housing units in accordance with the Housing Production goals stipulated in the Town's Housing Production Plan in the 2021 Calendar Year by fourteen units an increase in the proportion of affordable housing in Hamilton by 5% and that requisite written notice to the applicant and DHCD be issued accordingly."

The motion was not seconded.

As the motion failed, two options were available: continue discussion or accept the failure as indication that the Board was not inclined to invoke Safe Harbor.

Members discussed that they were open to further discussion.

Motion was seconded by David Perinchief.

Phil Blake (16 Gale Ave.) encouraged the Board to invoke Safe Harbor as a means to condition, consider local needs, or address environmental and traffic concerns. Mr. Blake said it was odd that the Board was willing to give away the ability to regulate the project as it was contrary for the Board to act in the best interest of the Town. Bill Bowler responded that if the Board goes forward, the Board wouldn't be able to meet and discuss the project before the DHCD ruled.

Evelyn Rothman (Canterbrook) said Safe Harbor would give the Town an opportunity to negotiate and have conditions in place regarding light, traffic, and septic concerns.

Bill Bowler reread the motion: "I move to declare that the denial of the Asbury Commons 40B application is consistent with local needs under 760 CMR 56.03(1)(b) and (4) because the town increased the number of SHI eligible housing units in accordance with the housing production goals stipulated in the Town's Housing Production Plan in the 2021 Calendar Year by fourteen units an increase in the proportion of affordable housing in Hamilton by 5% and that requisite written notice to the applicant and DHCD be issued accordingly." Mr. Bowler noted that the motion had been seconded.

Roll Call Vote: David Perinchief- aye, Bruce Gingrich – nay, and Bill Bowler – aye. Majority (2-1) in favor to invoke Safe Harbor. Motion passes.

Bill Bowler said: "I move further that the public hearing be continued to a date and time certain beyond 45 days to allow for the applicant's fifteen day appeal deadline, DHCD's 30 day ruling and to meet within the subsequent 20 day deadline to determine whether the Board wants to appeal a potentially adverse ruling to Housing Appeals Committee or proceed with the hearing on Wednesday June 1, 2022 at 7:00 pm."

Seconded by David Perinchief.

Roll Call Vote: David Perinchief – aye, Bruce Gingrich – aye, and Bill Bowler – aye.

Unanimous in favor.

DOCUMENTS REVIEWED.

Letter from Daniel Hill, dated April 11, 2022

Letter from Benjamin B. Tymann, dated April 12, 2022

Email from Philip D'Martino, (DHCD)

ADJOURNMENT

Motion made by Bruce Gingrich to adjourn at 8:28.

Seconded by David Perinchief.

Roll Call Vote: David Perinchief – aye, Bruce Gingrich – aye, and Bill Bowler – aye.

Unanimous in favor.

Respectfully submitted as approved at the _____ meeting.

Bill Bowler