COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

LAND COURT
FILED
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ESSEX, SS.

CIVIL ACTION NO.: ___________

CHEBACCO HILL CAPITAL PARTNERS, LLC,

Plaintiff,

v.

MARNIE CROUCH, BETH HERR, RICK MITCHELL, JONATHAN POORE, WILLIAM WHEATON, RICHARD BOROFF, PATRICK NORTON, and EMIL DAHLQUIST, as they are the members of the TOWN OF HAMILTON PLANNING BOARD,

Defendant.

COMPLAINT

Parties

1. Plaintiff Chebacco Hill Capital Partners, LLC ("Chebacco Hill") is a Massachusetts limited liability company with a principal place of business at 176 Barton Road, Stow, Massachusetts.

2. Chebacco Hill is the duly authorized agent of Country Squire Realty, Inc., which entity is the record owner of the parcel of land located at 133 Essex Street, Hamilton, Massachusetts ("Property").

3. Defendants Marnie Crouch, Beth Herr, Rick Mitchell, Jonathan Poore, William Wheaton, Richard Boroff, Patrick Norton, and Emil Dahlquist are the members of the Town of

Hamilton Planning Board (collectively hereinafter, "Board"), are named in this action in that capacity, and each reside within the Town of Hamilton, Massachusetts ("Town").

Jurisdiction

4. This Honorable Court has jurisdiction to: 1) review the Board's decisions and to assess costs against the Board pursuant to Mass. Gen. Laws ch. 40A, § 17; and 2) grant declaratory relief pursuant to Mass. Gen. Laws ch. 231A.

Factual Allegations

5. The Property is privately owned and is not open to public access.

6. The Property consists of two separate lots of land. Lot 1 contains 66.8 acres of vacant land, comprised of 44.62 acres of upland areas and 12.18 acres of jurisdictional wetlands. Lot 2 contains 9.4 acres of active farmland.

7. The Town classifies and taxes the Property as developable land.

8. In various Town documents, the Town identified the Property as a prime parcel for cluster/open space development.

9. The Property is not an environmentally sensitive site.

10. There are no underground aquifers on the Property. Nor is it associated with any drinking water resources or aquifer recharge areas or fault lines.

11. The Property has no environmentally fragile or sensitive characteristics or classifications.

12. The Property has not been mapped as habitat for any endangered or threatened species.

13. The Property has not been specifically identified as requiring any special protections by the Massachusetts Department of Environmental Protection, the Division of

Wildlife and Fisheries, the Town of Hamilton, the Army Corp of Engineers, or any other state or local environmental agency.

14. The Property is not in a Zone I or II wellhead protection area.

15. The Property is not in close proximity to any surface water drinking supply.

16. The Property is it not part of any protected aquifer.

17. The Property is a negligible contributor to the watershed, which consists of runoff from over 40,000 acres of land.

18. The Property is not in a surface water protection area, nor is any area within the Property a regional water source.

19. The Property is not in a protected Flood Plain area.

20. The Town has no regulations that protect or limit the regrading of undeveloped slopes or the creation of slopes.

21. On or about July 2, 2021, Chebacco Hill submitted an application to the Board ("Application") pursuant to § 8.2 of the Town of Hamilton Zoning Bylaw ("Zoning") (i.e., the Senior Housing Bylaw ("Bylaw")) seeking, *inter alia*, a special permit to construct a 50-unit, senior housing (55 years of age and older) development on Lot 1 ("Project").

22. The proposed development would generate approximately $750,000 in real estate taxes per year, with little financial or services burden to the Town.

23. The proposed development would provide the Town revenue of approximately $350,000 from one-time permitting fees.

24. The proposed development would contribute approximately $2,200,000 to the Hamilton Affordable Housing Trust.

25. Pursuant to § 8.2.25(2) of Zoning – Senior Housing Special Permit Application Process – Chebacco Hill attended two (2) pre-application conferences with the Board.

26. One such pre-application conference took place on November 17, 2020, while the other occurred on March 23, 2021.

27. At this time, Jonathan Poore and Emil Dahlquist were not on the Board.

28. Marnie Crouch, Rick Mitchell, William Wheaton, and Richard Boroff were members of the Board for both conferences.

29. Copies of all pre-application conference materials and the minutes of those discussions were submitted to the Board.

30. The stated purpose of the "pre-application conference is to identify the site's natural or historically important features, riding or walking trails on the site and abutting parcels, public safety, traffic or infrastructure issues, and areas the Town prefers to see preserved as open space or for agricultural or equestrian uses. The secondary purpose of a pre-application review is to minimize the applicant's cost of engineering and other technical experts, and to commence discussions with the Planning Board at the earliest possible stage of development."

31. Chebacco Hill submitted plans to the Board in compliance with the Open Space Farmland Preservation Development requirements set forth under § 8.1.7 of Zoning (§ 8.1 of Zoning hereinafter referred to as "OSFPD").

32. The plans identified wetlands; noted the absence of any floodplains; and identified the existing conditions of the Property, which included unprotected natural landscape features such as mature forest, granite outcroppings, slopes, farmland, and meadows.

33. Chebacco Hill identified the area to be developed and specified that the primary preservation goal of the design was to preserve jurisdictional wetland areas and their associated buffers. The plans included a delineation of the areas of disturbance, the location of the access drive and all resident driveways, and the anticipated location of the proposed public trails.

34. Chebacco Hill and the then-sitting members of the Board (including Marnie Crouch and William Wheaton) discussed the proposal and the importance of preserving the farmland, establishing open space, and creating public trails on the Property in the manner proposed.

35. Chebacco Hill was advised by the entire Board to proceed with its application under the Bylaw.

36. As part of Chebacco Hill's initial submittal, it provided the Board with a plan showing a 32-lot conventional residential subdivision.

37. The conventional plan was reviewed by the Town's peer review engineer.

38. The conventional plan was never considered by the Board in its deliberations.

39. The proposed entrance drive shown on the conventional plan would enter the Property off of Chebacco Road in the same location as the roadway proposed for the Project.

40. The proposed entrance drive shown on the conventional plan would require the same, if not greater, construction methodologies than the roadway proposed for the Project.

41. The conventional residential subdivision plan is a much more intrusive plan than the Project plan and will involve the alteration of jurisdictional wetland and buffer.

42. The conventional residential subdivision plan does not create open space, does not preserve farmland, and utilizes all 66 acres of land comprising Lot 1.

43. Following submission of the Application, the Board opened its public hearing regarding the Project.

44. The Board's public hearing and deliberative processes were consistently tainted by misapplications of the local and state rules and regulations and reliance on specious facts and unverified, inexpert conclusions.

45. During the public hearing, former member Corey Beaulieu's term as a full member of the Board expired; however, the Hamilton Board of Selectmen appointed him as an alternate so that he would be able to remain a voting member of the Board.

46. After Marnie Crouch was appointed Chair of the Board, the Board voted to remove Corey Beaulieu as a voting member and instead appointed Patrick Norton, who at all times was an alternate and has never been elected to the Board.

47. Up until his removal as a voting member, Corey Beaulieu had made favorable comments regarding the Project. During a discussion regarding the visual impact of the Project, Chebacco Hill had prepared and presented several different perspectives demonstrating that the Project was below the existing mature tree line, which would remain undisturbed. Therefore, Chebacco Hill showed the Project would not be visible from Essex Street, substantially all of Chebacco Road, and the neighboring properties. At the request of William Wheaton, Chebacco Hill prepared a final artist rendering that reflected a two hundred fifty (250) foot buffer that Chebacco Hill created by eliminating two (2) units from the front of the Project.

48. When a member of the public claimed that the artist rendering confirmed that the Project was visible, Corey Beaulieu, who is believed to be experienced in 3D architecture and was professionally qualified to opine on the rendering, corrected the record.

49. Corey Beaulieu stated that based on the elevations of the existing landscaping, the neighboring homes, and the proposed homes in the Project, the neighbors would be unable to see the Project above the tree line from their homes.

50. During deliberations, Jonathan Poore, Emil Dalhquist, and William Wheaton either willfully or negligently ignored Corey Beaulieu's statements and professional opinion.

51. In or around December 2021, Jonathan Poore, during the public hearing, incorrectly claimed that the Massachusetts Erosion and Sediment Control Guidelines for Urban and Suburban Areas and American Society for Landscape Architects contained "professionally accepted slope definitions" that prohibited 2:1 slopes in the design of stormwater management systems.

52. Brent Cole from Granite Engineering, Chebacco Hill's civil engineer, who is a licensed professional engineer and is experienced in stormwater management design, testified that no such "professionally accepted slope definitions" existed and that it is acceptable practice to use 2:1 slopes as part of a stormwater management system that complies with the Massachusetts Stormwater Rules and Regulations.

53. Brent Cole presented the stormwater management design to the Board and Chebacco Hill's hydrogeologist defended it, as did the Town's peer reviewing hydrogeologist.

54. Notwithstanding, during deliberations, Marnie Crouch, Jonathan Poore, and Emil Dahlquist either willfully or negligently ignored the expert opinions of Brent Cole and the town's peer review licensed engineer and instead presented their own incorrect opinion of slope definitions and how they apply to the Project.

55. In what appeared to be a bad faith attempt to support a denial of the Project, Jonathan Poore incorrectly stated that "the change of runoff direction, concentration, and speed

over the ledge under the BMPs and under the houses post-construction, what, what effect will that have environmentally? That, that hasn't been discussed" and Emil Dahlquist added that "...storm runoff, runoff because we have roughly nine acres of pervious land on top of the 14 acres that will allow water to be absorbed, go straight down through the rock, and hit the ledge. We don't know where it's going to move, because the rock is right now, until it's blasted, you're not going to know what the shape of that ledge is so it could go in any direction . . . all of that's outside of the BMPs, it's outside of the rain gardens, it's all excess water that has to go downhill to the wetlands."

56. The Board's public hearing and deliberative processes were consistently tainted by biased and improper conduct of Board members.

57. The decision that resulted from the Board's public hearing and deliberative processes was arbitrary, capricious, unreasonable, and legally untenable.

58. Board members frequently refused to review volumes of information provided by Chebacco Hill and ignored the salient reviews, testimony and written conclusions of the Town's expert peer reviewers and department heads.

59. Following the close of the public hearing, during the deliberations, substantially all discussions concerning the Project were one-sided and ignored the written testimony of Chebacco Hill's experts and the peer review experts hired by the Town.

60. Jonathan Poore and Emil Dahlquist relied on unreviewed documentation that they created or that was created by members of the public, notwithstanding that such information and/or conclusions were deemed to be inaccurate and misleading by the Town's own peer review experts.

61. Though Chebacco Hill expended over $45,000 to fund the Town's peer review experts, the Board generally ignored the experts' reports.

62. Throughout the public hearing process and more notably during the deliberations, the Board's discussion exhibited an anti-development bias.

63. Repeatedly during the public hearing and deliberative processes, the Board members appeared to ignore or trivialize the extensive factual record, discounted expert testimony, and projected opinions for subjects in which such members had no credentials or experience.

64. Marnie Crouch, Jonathan Poore, and Emil Dahlquist appeared to demonstrate substantial bias against the Project from the outset of the public hearing process.

65. Following the Board's meeting on March 15, 2022, Jonathan Poore and Emil Dahlquist appeared to cease active participation in the hearing process.

66. Following the Board's meeting on March 15, 2022, Jonathan Poore and Emil Dahlquist offered no critique, commentary, or conditions to ameliorate any of their concerns.

67. Jonathan Poore and Emil Dahlquist waited until the Board's deliberative process, following the close of the public hearing, to raise their concerns without providing an opportunity for correction from Chebacco Hill's development team and experts or the Town's peer review experts.

68. During the deliberative process, Jonathan Poore and Emil Dahlquist became extremely vocal.

69. Marnie Crouch, as Chair of the Board, and Emil Dahlquist created a memorandum which outlined a procedure for Board members to follow during their deliberations concerning the Project ("Memorandum").

70. Jonathan Poore may have contributed to the creation of the Memorandum.

71. Using the Memorandum, Marnie Crouch and Emil Dahlquist – and possibly Jonathan Poore – appeared to curtail the individual deliberative authority of each individual Board member by proposing a uniform process for consideration of the Project.

72. The Memorandum was consistently untethered to applicable law. For example, the Memorandum called for a deliberative process focused on "keywords", some of which are not found anywhere in the Bylaw.

73. Some keywords instead apparently originated in the Massachusetts Stormwater Handbook and the OSFPD.

74. There was no basis in the Bylaw for such keywords to be considered during the Board's deliberative process, let alone for the keywords to guide the process.

75. The Board's improper keyword deliberative process was suggested in place of a process grounded in review of the actual requirements of the Bylaw.

76. Via the Memorandum, Marnie Crouch and Emil Dahlquist – and possibly Jonathan Poore – appeared to assert authority to impute standards not found in the applicable Bylaw.

77. Rick Mitchell commented on the impropriety of the keyword deliberative process.

78. At the Board's August 16, 2022, hearing, Rick Mitchell opined, "I think we are getting ahead of ourselves here . . . this needs to be a defensible position . . . you're having this . . . detailed academic discussion . . . I am trying to apply the bylaw as it is written and intended to determine, if, in fact, the applicant has met the criteria that is written in the bylaw."

79. Rick Mitchell suggested to Marnie Crouch that the Memorandum reflected her subjective approach to deliberation.

80. Marnie Crouch admitted the same to be true.

81. Rick Mitchell's objections to the process were maligned.

82. Rick Mitchell's objections to the process were summarily dismissed.

83. Marnie Crouch, Emil Dahlquist, and Jonathan Poore appeared to dominate the conversation during the Board's deliberative process.

84. The Board members ultimately followed the improper guidance of the Memorandum during the deliberative process.

85. Marnie Crouch and Emil Dahlquist, and Jonathan Poore appeared to monopolized the deliberative process and provided inaccurate and biased testimony.

86. The insistence upon the improper keyword deliberative process, and the Board's adherence to the same, was symptomatic of the flawed deliberations and the arbitrary and capricious decision making of the Board.

87. There are numerous additional examples of the Board's flawed deliberative process and arbitrary and capricious decision making.

88. In addition, during the public hearing and the deliberation, there are many instances where Board members acted with gross negligence and in bad faith by developing inaccurate testimony, relying on unreliable testimony, and providing inaccurate information to the public and other members of the Board.

89. Marnie Crouch insisted that the provisions of the OSFPD be fully incorporated in the Board's deliberations.

90. As a result, the Board erroneously applied the general design standards (§ 8.1.16 of Zoning) and site-specific standards (§ 8.1.17 of Zoning) of the OSFPD to the Project.

91. The Bylaw does not allow for such application of the OSFPD.

92. The Bylaw authorizes the application of only those certain provisions of the OSFPD explicitly identified within the Bylaw.

93. As such, only the intent provision (§ 8.1.1 of Zoning), pre-application meeting requirement (§ 8.1.7 of Zoning), and design process (§ 8.1.12 of Zoning) of the OSFPD may be lawfully applied by the Board to the Project.

94. In its Project Summary, dated July 26, 2022, Chebacco Hill presented the Board with detailed findings on the Project's compliance with the intent provisions of § 8.1.1, the pre-application requirements of § 8.1.7, and the design process of § 8.1.12.

95. Notwithstanding, during the deliberations, Board members intentionally, in bad faith, and with malice ignored the provisions set forth under § 8.1.1(3) and (5) that required comparisons of the Project's fiscal and environmental impact with those resulting from the development of the Property as a conventional residential/grid subdivision.

96. Instead, Marnie Crouch, Emil Dahlquist, and Jonathan Poore manipulated the discussion by: (i) limiting discussion to impacts of the Project based on alterations to undeveloped, raw land; (ii) applying nonexistent, arbitrary standards for stormwater management; (iii) claiming undifferentiated fears of noncompliance in connection with the operation and maintenance of the stormwater system; and (iv) refusing to consider or propose conditions to ensure that the Project did not unreasonably affect the Town or neighborhood.

97. When the Town Planner raised the concern that the Board had failed to compare the Project with a conventional subdivision design (as has been done with both of the approved Senior Housing Developments located in the Town), he was admonished by Marnie Crouch.

98. Jonathan Poore addressed the Board by stating that the comparison "is irrelevant to the vote."

99. Marnie Crouch declined to address the issue and stated "that ship sailed."

100. There is nothing in the Bylaw that references §§ 8.1.16 or 8.1.17 of Zoning or authorizes the Board to apply to the Project the general and site-specific standards applicable to the OSFPD.

101. Indeed, the standards for design and layout of a Senior Housing Development are clearly identified within the Bylaw, under §§ 8.2.13, 8.2.15, and 8.2.16 of Zoning.

102. The Board had no authority to apply the OSFPD as it did, just as it had no authority to engage in a deliberative process focused on keywords not found in the Bylaw.

103. The Board exceeded its authority and acted as it did because of its antidevelopment position, not because it was lawful for the Board to apply the OSFPD as it did or engage in its keyword deliberative process.

104. The Board also consistently compared the impacts of the proposed Project to the Property as vacant land, rather than comparing the impacts of the proposed Project to the impacts of a conventional subdivision, in violation of the requirements of the Bylaw and consistent with its antidevelopment position.

105. Patrick Reffett, Director of Planning and Inspectional Services, noted as much when, at the Board's September 13, 2022, hearing, he provided, "One of the important things that other senior housing special permit projects have wrestled with and have discussed at length is the comparison of their cluster design with a conventional subdivision design. I'm not sure that we've really addressed that in a robust way."

106. The Board likewise consistently analyzed the overall impacts of the Project by improperly discussing the Project site – comprising roughly 14.7 acres of land – as though it constituted the entire Property, ignoring the 9.4 acres of farmland on Lot 2 and the 52.1 acres of

open space on the balance of Lot 1, all of which would be placed in a perpetual conservation restriction.

107. Rick Mitchell perhaps summed up the Board's faulty deliberative process best when, at the Board's August 16, 2022, hearing, he told Marnie Crouch, "You cannot start applying other standards that are not in place, that were not considered as part of this process, and say, 'Well, gee, they didn't consider those' . . . you cannot regulate with an eraser."

108. Though, Emil Dahlquist may have best shed light on the Board's antidevelopment resolve in his statements to the other Board members at the September 13, 2022, hearing, providing, "What this really means is do not build on raw, undeveloped land."

109. Continued misapplication of the Town's Bylaws in this light will result in the taking of the Property.

110. Marnie Crouch, who is an attorney (though, not a land use attorney), further showed her antidevelopment stance and bias against the Project when she inaccurately and improperly rebutted guidance from Town Counsel in favor of telling the other Board members that MacGibbon v. Board of Appeals of Duxbury was inapposite to the Project.

111. Marnie Crouch deliberately or negligently advised the other members that legal counsel's advice was not compelling and that the MacGibbon decision was "wholly distinguishable from anything that we have in front of us . . . particularly because it doesn't involve any building permits."

112. The MacGibbon case involved an appeal of a denial of a special permit and the abuse of discretion by the Duxbury Board of Appeals in administering a zoning bylaw.

113. The case involved two (2) legal propositions that: (1) a decision centered on preserving "undeveloped land" in its natural state for the public's benefit and preventing a

landowner from a reasonable use of his or her land is legally untenable; and (2) the mere possibility of a negative outcome is not a legally tenable ground for denial if the special permit granting authority has the power to impose conditions or safeguards that can prevent and/or resolve such negative outcome.

114. After watching the Board's deliberations on August 16, 2022, and reviewing the deliberation outline set forth in the Memorandum, Chebacco Hill's permitting counsel, Jill Mann, attempted to warn the Board about its numerous arbitrary and capricious actions during the deliberative process.

115. Attorney Mann submitted to the Town Planner and Town Counsel a summary of issues which provided, "Board members commonly fall victim to the pressures of other board members and lose site of the limitations on their authority. . . . The following deliberation errors are clearly beyond the scope of the regulations – the use of the memorandum that improperly limits deliberations (which was intended to be private and not distributed to the public – which violates open meeting laws), the attempt to insert opinions when the public record debunks that position, ignoring peer review testimony, the desire to impose standards that exceed the existing regulations and to adopt additional requirements are all arbitrary and capricious and will fail to serve the best interests of the Town of Hamilton."

116. Members of the Board substituted their inexpert, personal opinions for facts, scientific evidence, and the framework of the Bylaw.

117. As a result of its arbitrary and capricious deliberative process, on or about October 11, 2022, the Board issued a decision denying the Project ("Denial").

118. The Denial was purportedly filed with the Town Clerk on October 19, 2022. An attested copy of the Denial issued by the Town Clerk is attached hereto as **Exhibit A.**

119. The Denial was produced by consistent misapplication of law, some of which has been discussed herein, while much will be raised as this litigation advances.

120. Examples include a distaste for 2:1 slopes in rear yards which was without basis under the Bylaw and improper issuance of the Denial where conditions, such as conditions regarding height of certain lighting, could have been placed on the Project.

121. The reasons elucidated in the Denial are contradicted by the evidence and testimony provided by Chebacco Hill and its experts; are inapposite to the applicable local and state rules and regulations; and conflict with the Town's peer review reports and direct testimony.

122. In fact, certain information relied upon in the Denial was developed by Jonathan Poore and delivered to the Board as pseudo expert conclusions.

123. Jonathan Poore has no degree in engineering and no credentials as a stormwater peer reviewer.

124. The Board refused the financial benefits of the Project listed in Paragraphs 21-23 of this Complaint in favor of adopting an antidevelopment position and issuing a Denial without basis in law or fact.

125. The Denial was produced by a biased and arbitrary and capricious deliberative process.

126. In its public hearing and deliberative processes, as well as in issuing the Denial, the Board acted with gross negligence, in bad faith, and with malice.

127. Chebacco Hill is aggrieved by the Denial and prays that the same be annulled.

128. This action constitutes Chebacco Hill's timely appeal of the Denial.

COUNT I:
APPEAL OF PLANNING BOARD DECISION
(Mass. Gen. Laws ch. 40A, § 17)

129. The Plaintiff restates each allegation of this Complaint as if set forth at length herein.

130. Chebacco Hill's proposed Project met the requirements for the grant of its requested special permit.

131. The Board applied inapposite requirements to the Application.

132. The Board improperly failed to impose conditions as an alternative to denying the Application.

133. The Board acted out of an antidevelopment posture and bias against the Project, rather than proceeding under the guidance of the Bylaw.

134. The Board improperly denied the Application.

135. The Plaintiff appeals the Board's Denial on the grounds that the Denial was arbitrary, capricious, unreasonable, and legally untenable.

COUNT II:
DECLARATORY JUDGMENT RE: PLANNING BOARD DECISION
(Mass. Gen. Laws ch. 231A)

136. The Plaintiff restates each allegation of this Complaint as if set forth at length herein.

137. Based on the foregoing facts, there exists an actual controversy regarding the requirement that the Board impose conditions where possible, rather than denying projects.

138. Based on the foregoing facts, there exists an actual controversy regarding which requirements the Board was permitted by the Bylaw to apply to the Project.

139. This Court has jurisdiction to decide the controversies before it.

WHEREFORE the Plaintiff respectfully requests that this Honorable Court:

A. Overturn the Denial;
B. Declare that the Plaintiff has met the requirements for the grant of its requested special permit;
C. Award the Plaintiff its costs and reasonable attorneys' fees incurred in this action; and
D. Order such other and further relief for the Plaintiff as is just and equitable.

Respectfully Submitted,
CHEBACCO HILL CAPITAL PARTNERS, LLC,
By its Attorneys,

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Dated: November 7, 2022

EXHIBIT A

TOWN OF HAMILTON
PLANNING BOARD

DECISION

CHEBACCO HILL CAPITAL PARTNERS, LLC'S APPLICATION FOR A SENIOR HOUSING SPECIAL PERMIT
(Section 8.2 of the Hamilton Zoning Bylaw)

Decision Date: October 11, 2022
Applicant: Chebacco Hill Capital Partners, LLC, 176 Barton Road, Stow, Ma 01775
Property Owner: Country Squire Realty, Inc., C/O Catherine Rich-Duval, 103 River Road, Topsfield MA 01983.
Property Address: 133 Essex Street
Assessor's Maps: Assessor's Map 65, Parcel 001
Title Reference: Essex South Registry of Deeds Book 4540, Page 467

I. Procedural and Factual Background

Chebacco Hill Capital Partners, LLC (the applicant), filed an application for a Special Permit pursuant to Section 8.2 of the Town of Hamilton Zoning Bylaw (the "Zoning Bylaw"), together with a Stormwater Management Permit application pursuant to Chapter XXIX of the Town of Hamilton By-laws, with the Town Clerk on July 2, 2021. The applicant proposes to construct a 50-unit, senior housing development at 133 Essex Street, Hamilton, MA. The development site is comprised of approximately 16 acres[1] of a 66-acre parcel owned by Country Squire Realty, Inc. (owner).

On or around September 29, 2021, the owner, submitted a Form A - Application for Endorsement of Plan Believed Not to Require Approval. The Planning Board endorsed the accompanying plan and the applicant divided the 66-acre parcel into two lots: a larger lot containing the upland development portion of the site, as well as significant wetlands and buffer areas, and a smaller lot containing 9.4 acres. The smaller lot is comprised of 5.57 acres of farmland and 3.84 acres of wetlands, all of which is in the Groundwater Overlay Protection District (GPOD). The effect of the division of the parcel into two separate lots was to remove the larger parcel from the GOPD. *See* Zoning Bylaw, Section 9.1.5.

[1] The development portion of the site contains unprotected natural landscapes features, most notably steep slopes, mature woodlands, and wildlife habitats, although the property is not mapped as Priority Habitats of Rare Species or Estimated Habitats or Rare Wildlife in the Natural Heritage and Endangered Species Program Atlas (5th ed. August 1, 2021).

The applicant appeared before the Planning Board on November 17, 2020 and April 6, 2021 at which time the Planning Board conducted a preliminary review of its proposed project. *See* Section 8.1.7 of the Zoning Bylaw, made applicable to the Senior Housing Bylaw by Section 8.2.25 and Section 8.2.31. Appearance at a Pre-Application conference is a predicate to filing a Special Permit application. Appearance at such conference neither constitutes approval of Senior Housing development nor a guarantee that a Special Permit will be granted.[2]

The Planning Board, consisting of Rick Mitchell, Richard Boroff, William Wheaton, Marnie Crouch, Corey Beaulieu, Emil Dahlquist, Jonathan Poore, and Pat Norton (Associate), commenced a duly noticed public hearing on the application on August 3, 2021 and continued the hearing from time to time until July 26, 2022, at which time the public hearing was closed. As a result of a Town Election on April 7, 2022, Elizabeth Herr was elected as a member of the Planning Board, replacing Corey Beaulieu. Because of her ineligibility to vote on the application, Associate Member Pat Norton became eligible to vote on the application.

The applicant submitted numerous plans, many of which it revised, including an overview plan (M-1), existing conditions plans (E1-E4), a removals plan (C1), site plans (C2-C4), grading and drainage plans (C5-C8), utility plans (C9-C12), erosion control plans (C13-C16), roadway profiles (C17-C20), utility profiles (C21-C25), an off-site improvement plan (C26), sight distance plan and profiles (C27-C29), a phasing plan (C30), "Details" (C31-C39), septic plans (S1-S2), landscape plans (L1-L2), lighting plans (LT1-LT4) and architectural plans (A101-A110 and OPT1-OPT3). It also submitted construction management plans, dated March 8, 2022. *See* Applicant's List of Exhibits (updated through July 21 2022) attached hereto as Exhibit A. The applicant originally contemplated constructing 14 single family homes and 18 duplexes in the pre-application phase of the project. In its application filed on July 2, 2021, it proposed to construct 12 single family homes and 19 duplexes. In December of 2021, it increased the number of duplexes to 21 and reduced the number of single-family homes to eight. The applicant finally settled on the construction of 44 duplexes and six single family houses in its final plans. The applicant also submitted artist renderings of the entrance to the project.

In addition to those materials, the applicant submitted a Controlled Blast Plan prepared by Maine Drilling & Blasting, Inc., a Blasted Rock Handling and Management Plan prepared by GEI Consultants (GEI), both of which were peer reviewed by Emery & Garrett, a division of GZA

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[2] At the time of the second Pre-Application conference, the applicant indicated that wetlands had not been delineated by the Conservation Commission and a waste water treatment system had not been designed. There was no in-depth discussion of regulated and unregulated conservation areas or other provisions of Section 8.1.12 of the Open Space and Farmland Preservation Development Bylaw (OSFPD). Indeed, in a memorandum to Planning Board members, dated March 23, 2021, the applicant stated: "[t]he Property is located partially in the Ground Water Protection Overlay District ("GWPOD") [sic] and has a series of wetland features all as show on the Plan. Based on the existence of these natural features, the Petitioner's Proposal limits the development area of the Property to the upland portions that lie well outside the GWPOD [sic] and outside the 100' buffer to all jurisdictional wetlands."

(GZA), as well as construction management materials comprised of documents submitted by Granite Engineering and John Durkin, Operations Manager of Onyx Corportion. Those materials included the following: 1) sites plans for construction mobilization and Phases I and II of construction; 2) a draft of a Stormwater Pollution Prevention Plan (SWPPP), prepared by Granite Engineering; LLC, 3) a spread sheet containing an estimate of the total amount of rock to be blasted (177,625 cubic yards), together with an estimate of the amount of rock to be exported from the site by Bentley Warren Trucking (80,721 cubic yards), leaving 96,904 cubic yards of rock to be processed and spread throughout the site; 4) spreadsheets containing construction sequencing, showing that the project will take approximately four years to complete in two phases; 5) a pamphlet for a dust control system for small to mediums size drills used in blasting; and 6) the haul route for exported rock to be transported to Bentley Warren Tucking, Inc.'s facility in Ipswich, MA, using Route 22 through Hamilton and Beverly to Route 128 and then Route 1 to the Ipswich facility. The applicant also submitted a Stormwater Management Plan prepared by Granite Engineering, LLC, which shall be considered separately. The applicant utilized PowerPoint presentations during the course of the hearings to present its evidence and facilitate testimony of its experts and engineers. *See* applicant's List of Exhibits attached hereto as Exhibit A.

As evident from the documents listed above, the applicant submitted substantial evidence and supported that evidence with testimony from its engineers and experts. In addition, Save Chebacco Trails and Watershed (SCT & W), an organization comprised of more than a thousand citizens from Hamilton and neighboring towns, and other interested parties, unaffiliated with either the applicant or SCT & W, submitted evidence, testimony, and arguments. Catherine Rich-Duval and Byran Rich, directors of Country Squire Realty, Inc also addressed the Planning Board. The Planning Board entertained questions and comments from the public during the public hearings and also received considerable correspondence from citizens voicing support for, and opposition to, the application. Correspondence received by the Planning Board and comments from the public made during the public hearings, however, reflect that opposition to the project significantly outweighed support for the project. Indeed, the Planning Board received just four letters in support of the project, in contrast to well-over one hundred letters in opposition to it. *See* applicant's List of Exhibits, Exhibit 16A-D comprising letters of support for the project as part of its proffered List of Exhibits.

The Town's peer review firms submitted reports concerning the Controlled Blast Plan, and the Rock Handling and Management Plan. The Town also engaged a peer reviewer, TEC Engineering, Inc. (TEC), to review the Traffic Assessment Study prepared by Vanasse & Associates on behalf of the applicant.

Interested parties, as well as the applicant and SCT & W, freely submitted memoranda, letters, and other information to assist the Planning Board in making its determination as to whether to grant or deny the applicant's Special Permit. Much of the expert evidence and testimony revolved around 1) the effects of blasting, as the applicant's proposed development requires removal of approximately 80,000 cubic yards of granite ledge on the 16-acre development portion of the site, as well as exportation of rock and extensive distribution of crushed stone that would have to be processed on site, and 2) potential impacts on the hydrology and hydrogeology of the site from blasting to remove ledge and rock handling. There also was information provided about construction activities on the development portion of the site, which contains an upland vernal pool, steep slopes, many of which border buffer areas and wetlands. The public and several Board members noted the absence of a hydrogeological study and potential long term consequences from construction activities and the completed project itself from uncaptured stormwater runoff in view of nearby Beck Pond, Chebacco Lake, and Round Pond and Gravelly Pond which provide drinking water to the Town of Manchester.[3] The scope and duration of the project and the concomitant truck traffic and other disturbances associated with removal of 80,000 cubic yards of rock and other material from the site, along with the handling of rock that would be processed on site also were addressed in depth by the applicant and SCT & W.

The full and complete record of all materials submitted to and use by the Planning Board during the public hearing on this application are on file with the Planning Board and can be obtained from the Director of Planning and Inspectional Services, Patrick Reffett.

On August 31, 2021, members of the Planning Board visited the 133 Essex Street site, ascertained the location of a vernal pool and the septic system, which subsequently was approved by the Hamilton Board of Health, viewed the location of the horizonal directional drilling for the septic system, and other features of the site. No deliberations were conducted during the site visit.

The credibility and probity of all the evidence was assessed by the Planning Board. With respect to its deliberations, the Planning Board over the course of two meetings after July 26, 2022 when the public hearing was closed used a format that permitted discussion of the project in relation to the natural environment, to site conditions, and to the neighborhood and community so as to focus on those sections of the Senior Housing Bylaw and other relevant bylaw provisions pertinent to the purposes the Planning Board is required to consider, and the Findings that the Planning Board is required to make in approving or disapproving a Special Permit. The Board also identified certain provisions of the Senior Housing Bylaw that, while significant, are not in dispute or whose provisions have been satisfied by the applicant (*see, e.g.,* Sections 8.2.2 Eligible Locations, 8.2.3 Administration, 8.2.4 Planning Board Rules and Regulations, 8.2.5 Age Restriction, 8.2.7 Permitted Uses, 8.2.8 Developable Acres, 8.2.9 Base Senior Housing Density, 8.2.10 Incentives to Increase Base Senior Housing Density, 8.2.11 Minimum Distance Between Projects, 8.2.14 Exemptions, 8.2.21 Parking, 8.2.25 Senior Housing Special Permit Application Process, 8.2.26 Definitive Subdivision Plan,[4] 8.2.27 Application Process, 8.2.30 Employment of Outside Consultants).

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[3] Neither the Town of Essex nor the Town of Manchester objected to the proposed project, although members or former members of the Town of Essex's Planning Board voiced concern in their individual capacities.

[4] The applicant submitted a proposed Conventional Plan, representing that, if the Special Permit application were to be denied, it would go forward with a Conventional Plan for construction of

On October 11, 2022, the Board, at a public meeting, reviewed and voted to authorize the filing of this decision with the Town Clerk.

II. Applicable Standards

In order to grant the requested Special Permit, the Planning Board, pursuant to M.G.L. Ch. 40A, § 9, must determine that the proposed project is "in harmony with the general purposes and intent" of the Zoning Bylaw. The Planning Board also is required to make the Findings set forth in Section 8.2.31, which will be discussed in detail below, as well as to make the determination required by Section 10.5.2. Section 10.5.2 provides the following:

> 10.5.2 Criteria. Special Permits shall be granted by the SPGA, unless otherwise specified herein, only upon its written determination that the adverse effects of the proposed use will not outweigh its beneficial impacts to the town or the neighborhood, in view of the particular characteristics of the site, and of the proposal in relation to that site. In addition to any specific requirements and factors that may be set forth in this Bylaw, the determination shall include consideration of each of the following: 1. Social, economic, or community needs which are served by the proposal; 2. Traffic flow and safety, including parking and loading; 3. Adequacy of utilities and other public services; 4. Neighborhood *character* and social structures; 5. Impacts on the natural environment; and 6. Potential fiscal impact, including impact on town services, tax base, property values in the same or adjoining districts, and employment taking into account any proposed mitigation.

Section 10.5.2 will be discussed below both in relationship to the purposes of the Senior Housing Bylaw and the Findings required by Section 8.2.31.

III. Purposes of the Senior Housing Bylaw

As noted above, M.G.L. Ch. 40, § 9 provides in pertinent part: "Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law . . ." Accordingly, the purposes set forth in Section 8.2.1 are fundamental to the issuance of a Special Permit and cannot be ignored as merely "aspirational." The Planning Board evaluated

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over 30 single family homes. That plan was peer reviewed for dimensional requirements within the GPOD. Neither Section 8.2.26 nor any other provision of the Senior Housing Bylaw requires a comparison of a Conventional Plan with a proposed Design Plan, and the Conventional Plan submitted by the applicant was purely speculative. The Conventional Plan did not delineate the location of a septic system or systems and was predicated upon a determination that the Conventional Plan would be considered a "limited project." *See* 310 CMR 10.53(3) and Wetlands Policy 88-2: Access Roadways. Whether a Conventional Plan could be built on both the uplands and through the wetland areas was not pertinent to the Findings required by Section 8.2.31 and Section 10.5.2. *See generally* WPA Form 5 - Order of Conditions and Attachment A, Special Conditions, including Perpetual Conditions #25, #34 and #86-#95 regarding activities related to construction of the septic system in jurisdictional areas of the Massachusetts Wetlands Protection Act and the Hamiton Conservation Bylaw.

whether the applicant's proposed project satisfied the five purposes set forth in Section 8.2.1 of the Senior Housing Bylaw. Those purposes will be discussed in sequence with a synopsis of the conclusions of Board members voting to deny the Special Permit.

A. Section 8.2.1.1: 1. To permit the development of moderately priced, affordable, and market rate housing for elderly persons, by allowing for a greater variety of building types at a higher density than would normally be allowed.

The first purpose of the Senior Housing Bylaw regarding moderately priced, affordable, and market rate housing for elderly persons, is reflected in Section 8.2.16.3 which provides that, in order to achieve a development that reflects the residential character of the neighborhood in which it is located . . . there should be encouraged "a mixture of small, medium, and large Dwelling units in order to create a range of selling prices and to address the needs of various member of the population." Section 8.2.31.1 requires the Board to find that the proposed development is compatible with adjacent land uses and with the character of the neighborhood in which it is located. Accordingly, the discussion of the first purpose of the Senior Housing Bylaw is inextricably linked to the first Finding that the Planning Board must make in considering whether to grant the Special Permit, namely Section 8.2.31.1, as well as one of the criteria set forth in 10.5.2, namely the social, economic, or community needs which are served by the proposal.

The applicant represented that each unit will have two bedrooms, one of which will be a first-floor master bedroom, 2½ baths, and a 2-car garage. There will be three units with 1,453 square feet, three units with 1,778 square feet and 44 units with either 1,953 square feet or 2,105 square feet. *See* applicant's List of Exhibits, Ex. 6B. In its application, it stated that the units would be listed at $795,000.00, but that listing price undoubtedly will change, particularly given recent sales prices at the Village at Canter Brook Farm and Patton Ridge, where sales prices have sometimes exceeded $1 million. Moreover, circumstances, such as inflation, higher interest rates, and supply chain issues likely would affect the ultimate purchase price upon completion of construction.

There are two types of units: single family houses and duplexes, and just two different floor plans. There are no units under 1,300 square feet as set forth in Section 8.2.9 of the Senior Housing Bylaw, and no one-story units, handicapped accessible units (although handicapped accessibility features may be added), or apartment style units. The proposed development is a monoculture, lacking in variety, as well as amenities, and does not serve the needs of Hamilton's senior residents.

The development does not contain moderately priced or affordable units. Rather, the targeted buyers are active and financially secure "young seniors" who can afford the condominium units proposed to be constructed by the applicant.

The area median income for a family of two according to the 2021 HUD income limits for the Boston-Cambridge-Quincy Metropolitan Statistical Area is $101,062. A recent listing for a unit at the Village at Canter Brook Farm reflects a selling price of $849,000. The listing suggests that monthly payments would be $5,650, and it is unclear whether the monthly HOA fee of $586 is included in that figure. Accordingly, absent significant savings, median income seniors would not be able to purchase one of the proposed units.

The Housing Production Plan (HPP) (2019-2024), prepared by JM Goldson LLC and approved by the Department of Housing & Community Development in 2020, identified Hamilton's need to create 194 homes eligible for inclusion on the Subsidized Housing Index to reach the 10 percent affordability goal established by the Commonwealth. An "Affordable Housing Unit" is defined in the Zoning Bylaw 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 [i.e., households with income 50% or 80%, respectively, of area median income, adjusted for household size and the metropolitan area that includes the Town of Hamilton] and meets the requirements of the Local Initiative Program for inclusion on the Subsidized Housing Inventory." *See* Section 11.0 Definitions. The 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 that goal. *See* Senior Housing Bylaw Section 8.2.6 and Inclusionary Housing Bylaw Section 8.3. Thus, there is the 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.[5] Nevertheless, seniors in Hamilton with median incomes would not benefit from the project, except in conjunction with Purpose 8.2.4 regarding fiscal benefits to the Town.[6]

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[5] There is one potential development project under M.G.L. Ch. 40B in Hamilton, located directly adjacent to the Village at Canter Brook Farm. The project proponent intends to provide 45-units of rental housing for families with incomes at or below 60% of Area Medium Income. The proposed project has yet to be approved by the Zoning Board of Appeals and its financing is not in place.

[6] The HPP also sets forth the following:

> In contrast to regional trends, Hamilton's population is declining, dropping approximately 4 percent from 2000 to 2017. While many factors influence this trend, local housing options and housing costs have a large impact on the ability of current residents to remain in the community as well as for prospective residents to move to Hamilton. . . .
>
> Hamilton's population is aging, indicating a need for housing options that can accommodate retirees, empty-nesters, and older residents as they age. This includes smaller units for downsizing as well as housing options with accommodations for elderly residents. This housing need is also confirmed by a mismatch between the proportion of 1-or-2 person households in Hamilton and the proportion of 1-2-bedroom homes – 26 percent of homes are 1-or 2-bedrooms while 46 percent of households are one or two people. Hamilton also has a comparatively low disability rate, which may indicate that there is a need for housing that can support and accommodate residents with varying disabilities.

Finally, because of the size of the proposed project, the possibility of any other senior housing projects that might include smaller, less expensive units or rental units would be foreclosed for at least one year, and, because of the total cap of 100 senior housing units in Hamilton, *see* Section 8.2.6.1, if the proposed project were to be permitted, only fifteen (15) additional units could be built in Hamilton in view of the existing 35 total units of existing senior housing at Patton Ridge and the Village at Canter Brook Farm. The purpose of the bylaw is not served by allocating 85% of permissible senior housing units to above median income residents or affluent individuals from other areas.

The application failed to satisfy the purpose set forth in Section 8.2.1.1. The Planning Board determined that the adverse effects of the proposed use outweighed its beneficial impacts to the town or the neighborhood, in view of the particular characteristics of the site, and of the proposal in relation to that site, particularly in consideration of the "[s]ocial, economic, or community needs which are served by the proposal."

B. Section 8.2.1.2: To allow greater flexibility in land use planning in order to improve site layouts, protect natural features and environmental values and utilize land in harmony with neighboring properties;

The second purpose of the Senior Housing Bylaw requires consideration of flexibility in land use planning in order to improve site layouts, protect natural features and environmental values and utilize land in harmony with neighboring properties. This purpose is tied to Section 8.2.13.2 Minimizing Disturbance which encourages applicants to maintains as much of a site as possible in its natural state, as well as the Findings required by 8.2.31.6 and 8.2.31.7 and one of the criteria set forth in Section 10.5.2 which references impacts to the natural environment.

This purpose which, as noted, is tied to other sections of the Zoning Bylaw, is about site planning and ramifications stemming from the applicant's chosen site design. Section 8.1.12 OSFRD [sic] Special Permit Design Process, set forth in the Open Space and Farmland Preservation Development Bylaw (OSFPD) and incorporated by reference through Section 8.2.25 and Section 8.2.31.7 of the Senior Housing Bylaw, requires site design that is sensitive to site conditions as specifically set forth in the directives contained in Section 8.1.12 which requires, as a first step, identification of conservation areas that are defined to include regulated conservation areas **and** unprotected natural landscape features and further requires development outside identified conservation (regulated and unprotected) areas to the maximum extent feasible.

The applicant's proposal for the 16-acre development portion of the site would not utilize the land in a way that protects natural features and that would be in harmony with neighboring properties. Indeed, the failure to protect natural features would change the character of the area forever. The bylaws emphasize production of designs that disturb less land in order to protect

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HPP at p. 14. In sum, the drafters of the HPP recognized gaps in Hamilton's housing options as 1) rising and prohibitive costs; 2) limited rental options; 3) lack of *smaller* units, primarily one- and two-bedroom units; and 4) lack of accessible housing options that accommodate the needs of residents with disabilities or seniors.

natural features and environmental values, but the applicant did not propose to protect natural features and environmental values in the development portion of the site. There was no attempt to integrate units into the site and no showing that design plans, other than the one proposed, were considered and rejected as infeasible.

Increased density and protection of natural features are not mutually exclusive. Unprotected natural features on the 16- acre portion of the site were ignored in order to impose a development pattern used at the Village of Canter Brook Farm and the Village at Magnolia Shores. While the applicant intended to preserve 42 acres comprised in part of wetlands and buffer areas (regulated conservation areas),[7] as well as the farmland in lot 2, those circumstances are not a license to entirely destroy the topography of the 16-acre portion of the site.

The applicant's proposed project fails to satisfy Section 8.2.1.2. The Planning Board determined that the adverse effects of the proposed use outweighed its beneficial impacts to the town or the neighborhood, in view of the particular characteristics of the site, and of the proposal in relation to that site, particularly in consideration of the "[i]mpacts on the natural environment."

C. Section 8.2.1.3: To encourage the implementation of "Smart Growth" techniques to reduce land consumption and sprawl, provide for open space preservation, expand housing options, and encourage re-use of existing structures.

The third purpose of the Senior Housing Bylaw requires consideration of whether the proposed project implements "Smart Growth" techniques to reduce land consumption and sprawl, provides for open space preservation, and expands housing options.

In assessing whether the project utilizes "Smart Growth" techniques, it is important to ascertain what constitutes Smart Growth. The Commonwealth of Massachusetts has identified ten smart growth principals as follows: 1) Concentrate Development and Mix Uses; 2) Advance Equity; 3) Make Efficient Decisions; 4) Protect Land and Ecosystems; 5) Use Natural Resources Wisely; 6) Expand Housing Opportunities; 7) Provide Transportation Choice; 8) Increase Jobs and Business Opportunities; 9) Promote Clean Energy; and 10) Plan Regionally. *See* https://www.mass.gov/service-details/smart-growthsmart-energy-background-information. *See also* Exhibit A to Hamilton Planning Board Rules and Regulations Governing Special Permits for Senior Housing the "Rules and Regulations").

The applicant's project only partially satisfies the third purpose of the Senior Housing Bylaw regarding Smart Growth principles and techniques. While the project design, as proposed, is compact, it would be a misnomer to describe the project as embodying Smart Growth as undeveloped land is to be utilized for an auto-centric community. Other Smart Growth

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[7] The applicant is not developing wetlands or the 9.4-acre farm lot which the owner split from the original lot by means of an ANR application. The proposed developed is not in a protected aquifer or within a protective radius of a public water supply. Similarly, the development site is not a priority habitat under the National Heritage and Endangered Species Program.

principles set forth in Appendix A to the Rules and Regulations for Senior Housing Special Permits that are not exhibited by the project include: "advance equity," "expand housing opportunities," and "provide transportation choice." While preserving regulated conservation areas outside the development area together with the vernal pool within it, the senior housing residents would be required to use motor vehicles to access shops and the Commuter Rail as the Dial-A-Ride Service of the Cape Ann Transportation Authority is only available to those over 60 or those with disabilities. In other words, the issue of sprawl would persist.

With respect to open space preservation, the applicant's proposed project protects open space in regulated conservation areas. Within the development portion of the site, there is little open space in the front of units except for lawns and a water feature that will be constructed in the turnaround roadway for Phase II of the project. The open space and trails are not readily accessible to residents and, for those using the trails, the open space will be diminished by the views of the backs of the units and the rip rap armoring of steep slopes on the south and west sides of the development area.

The applicant partially satisfied Section 8.2.1.3.

D. Section 8.2.1.4: To allow a type of development which has positive fiscal benefits to the Town.

The fourth purpose of the Senior Housing Bylaw is to allow a type of development that has positive fiscal benefits to the Town and that purpose is satisfied, although there was recognition that the "jury was out" as to potential long-term costs that might be associated with the project. Were the 50 units to be completed and sold, the applicant estimated the project would yield approximately $750,000 in annual real estate tax revenues, permitting fees totaling $350,000, and a payment to the Affordable Housing Trust in the total sum of $2,174,000, payable in installments, coupled with the absence of any burden on the Hamilton-Wenham Regional School District. The positive fiscal impact, however, must be weighed against the length of time it will take for all units to be constructed and sold and the potential long-term costs to the Town from wear and tear on roads that the Town is obligated to maintain, as well as costs associated with the Town's duty to monitor compliance with the Blasted Rock Handling Plan, the Storm Water Pollution Prevention Plan (SWPPP), and the requirement that the Homeowners' Association undertake maintenance of the stormwater management system in perpetuity were the Special Permit to issue.

The applicant satisfied Section 8.2.1.4. That said, the Planning Board was unable to determine that the adverse effects of the proposed use outweighed its beneficial impacts to the town or the neighborhood, in view of the particular characteristics of the site, and of the proposal in relation to that site, in consideration of "potential fiscal impacts, including impacts on Town services, tax base, property values in the same or adjoining districts and employment taking into account any proposed mitigation."

E. Section 8.2.1.5: To protect Hamilton's rural New England character by permitting development of residential housing in clusters and villages, in a manner which is in harmony with Hamilton's historic development patterns and is less demanding on its natural resources.

The final purpose of the Senior Housing Bylaw is mirrored in part in Section 8.2.24 that requires open space to be unaltered and functional for the purposes of the Senior Housing Bylaw, as well as the criteria set forth in Section 10.5.2.4 (neighborhood character and social structure) and 10.5.2.5 (impacts on natural environment). In addition, this purpose implicates Section 8.2.16.1 concerning the residential character of the Town.

Rural New England character is not served because the design is more urban than rural. The project also has nothing in common with a village and clustering is different than what is proposed by this project which, in essence, is a dense subdivision and is unlike a traditional village. The architecture also is unlike the existing vernacular architecture in Hamilton as it is merely an amalgam of duplexes and single-family houses that prominently feature two-car garages in front of units, typical of many condominium developments, but atypical of vernacular New England architecture. In sum, there is nothing rural or New England about the project, and the project would not look like or function like a New England village.

The project also is demanding on natural resources, particularly geological features, although admittedly residents of senior housing developments use less water than subdivision residents. Nevertheless, the site would not have to be topographically obliterated to have an appropriate development that could be consistent with rural New England characters. True cluster developments typically have clusters of units separated by landscape buffering and have common land for the benefit and enjoyment of residents. The applicant's site design, however, provides for open space at the rear of units and that open space is mostly inaccessible except at the entrance or by traversing rip rap on steep slopes in two places. Moreover, a village feel would have been more achievable through protection of at least some of the mature forests and other unprotected conservation resources.

The final purpose of the Senior Housing Bylaw is not served by the applicant's proposed project. The Planning Board determined that the adverse effects of the proposed use outweighed its beneficial impacts to the town or the neighborhood, in view of the particular characteristics of the site, and of the proposal in relation to that site, particularly in consideration of "[n]eighborhood character and social structures."

For the reasons set forth above, the Planning Board finds that the project is not in harmony with the intent and purpose of Section 8.2.1.1, 8.2.1.2, and 8.1.2.5 and that it only partially meets the intent and purpose of Section 8.2.1.3 of the Zoning Bylaw. Accordingly, the Planning Board cannot issue a Special Permit under M.G.L. Ch. 40A, § 9. Moreover, because the Planning Board determined that three out of five purposes of the Senior Housing Bylaw were not satisfied, the Board cannot make the determination required by Section 10.5.2 of the Zoning Bylaw in order to grant a Special Permit.

IV. Planning Board Findings

Section 8.2.31 provides:

> 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.

Section 8.2.25 provides that "[i]f an application contains an open space element, then the requirements of Section 8.1, Open Space and Farmland Preservation Development, Pe-Application Conference and OSFPD Special Permit Design Process, shall apply. Following the conclusion of this procedure, an application may be filed as set forth below." Sections 8.1.12, the Special Permit Design Process and Section 8.2.25 will be discussed in more detail below. The thrust of those provisions, however, is that the first step in the design process for a Senior Housing Special Permit is to consider site conditions, namely regulated conservation areas and unprotected natural features, such as steep slopes mature woodlands and wildlife habitats. The design process under Section 8.1.12 and the accompanying Rules and Regulations Governing Special Permits under the OSFPD Bylaw and the Senior Housing is a process similar to "environmentally sensitive site design," required by the Massachusetts Stormwater Management Handbook, Vol. 1 and Vol. 2, made applicable to stormwater management applications by the Town of Hamilton By-laws and Stormwater Management Permit Rules & Regulations.[8]

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[8] The Zoning Bylaw does not define "environmental sensitive site design." Section 8.2.20, however, provides, in pertinent part, that "[g]eneral soil erosion of the proposed

A. Section 8.2.31.1: Is the project compatible with adjacent land uses and with the character of the neighborhood in which it is located?

Section 8.2.31.1 is informed by Section 8.2.16.2 and Section 8.2.16.3 Building and Design Standards. *See also* Section 10.5.2.4 and Section 10.5.2.5. The first questions to ask with respect to this Finding are 1) what are adjacent land uses, and 2) what is the character of the neighborhood. The ultimate question, of course, is whether the project is compatible with those adjacent land uses and the character of the neighborhood.

The adjacent land uses are exclusively residential and the project seeks to add residential units to the neighborhood. Accordingly, the proposed use is not per se incompatible with the neighborhood. Homes in the neighborhood vary in size and concomitantly fair market value. Small, medium and large homes exist in the neighborhood. Most are characterized by natural landscape buffering along Chebacco Road and nearby streets and all have limited lawn space. The character of the neighborhood is unique in Hamilton: Chebacco Road is a scenic road and the neighborhood is rural - - even by Hamilton's standards. Chebacco Road has a remote ambiance owing to the extensive woodlands, ponds, and Chebacco Lake, as well as Chebacco Woods conservation area. Moreover, the neighborhood is quiet and not well lit by street lighting. Residents described walking their dogs in the middle of the road because of the absence of through traffic on Chebacco Road which is unpaved in the area east of Chebacco Woods. The rural character of Chebacco Road and nearby roads is exemplified by swales instead of curbs and random plantings instead of uniformly planted trees and shrubs.

In contrast, the project, as designed, disturbs 230 linear feet along Chebacco Road, features a sheer, 20-foot cliff face topped with a chain link fence, as well as 2:1 embankments, a "causeway" like roadway at the entrance, plus 10% grades in parts of it, resulting in units stacked one on top of the other, with units 1 and 2 visible from the west side of the rain garden on Chebacco Road. Moreover, the project, as proposed, would utilize 16-18 vertical feet of rip rap behind units on the south and west side of the development and unit 2 towers over unit 1 - - all of which is out of character with the neighborhood. Lawns with 2:1 slopes in contravention of

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development site shall be minimized by *integrating the development into the existing terrain and by reasonably retaining natural grades and soil cover*." (emphasis supplied). That concern, integrating development into existing terrain, is made explicit for the issuance of stormwater management permits *See* Massachusetts Stormwater Management Handbook, Vols. 1 and 2, which applies to this project pursuant to the Ch. XXIX of the Town By-law and Section 4D of the Town's Stormwater Regulations. The Wetlands Regulations 310 CMR 10.04, and the Water Quality Certification Regulations, 314 CMR 9.02, define environmentally sensitive site design "to mean design that incorporates low impact development techniques to prevent the generation of stormwater and non-point source pollution by reducing impervious surfaces, disconnecting flow paths, treating stormwater at its source, *maximizing open space, minimizing disturbance, protecting natural features and processes, and/or enhancing wildlife habitat*." Vol 1, Ch. 1, p.4 (emphasis added).

8.2.13.2, which emphasizes minimizing disturbance, are also present in the proposed design and are out of character with the neighborhood.

The addition of 50 condominiums units, coupled with denuding forested land, a newly landscaped entranceway, and potential glare from emanating from the roadway lighting, coupled with light from sidewalk and porch fixtures and light from the interiors of the units themselves, would alter the landscape in ways that are incompatible with the character of the neighborhood. An urban form would be imposed on a rural neighborhood.

While the architectural designs do not reflect vernacular New England architecture, the actual architectural design of the units is less significant than how the units fit within the landscape. The units do not reflect traditional siting of homes as the units are situated on steep slopes, rather than areas more sheltered from weather. The use of approximately 1,600 linear feet of rip rap to armor slopes for erosion control, as shown on Erosion Controls maps C-13-C-15, would be particularly unappealing as rip rap would be visible from the proposed trail that circumnavigates the south and west portions of the site and likely would be visible from Essex Street, particularly in winter, owing to sun glare from the rock.

Approval of the project would require approval of the design choices the applicant made, and those choices negate a finding of compatibility with the character of neighborhood. Had unprotected natural features, such as steep slopes and mature forests, been at least partially maintained and units integrated into the site, the destruction of all mature forests and the need for unsightly rip-rap could have been significantly reduced and enabled the units to blend into the site and concomitantly into the neighborhood. The project, as designed, imposes itself on the site, undermining both the unprotected natural features and landscapes that make the neighborhood unique in Hamilton. The project is not comparable to the Village of Magnolia Shores and using its typology as the applicant proposes to do violates the design sensitivities required by Section 8.1.12.

In sum, the existing proposed entrance with the sheer ledge cliff and nearby rip rap is completely antithetical to the character of the neighborhood and completely inconsistent with adjacent land uses that fit unobtrusively within the landscape. The project is enormously over-engineered and will change the character and topography of the land. Blasting the hill, leveling it, and clear cutting all the trees exhibited a lack of sympathy for the neighborhood. As designed, the project, owing in part to its scale, imposes itself on the neighborhood. Rather than minimizing disturbance in accordance with Section 8.2.13.2, the project does just the opposite - - it maximizes disturbance. It would alter the terrain in ways no one could imagine and does not use low impact development techniques except as afterthoughts. The whole neighborhood would be changed, not for the better, but for the worse.

The project fails to satisfy Section 8.2.31.1, and the Planning Board cannot make the determination required by Section 10.5.2 taking into consideration both neighborhood character and social structure and impacts on the natural environment.

B. Section 8.2.31.2: Does the project mitigate impact to abutting land and natural resources by reason of air or water pollution, noise, dust, vibration, or stormwater runoff?

In considering this Finding, Section 8.2.13.2 General Requirements, regarding minimizing disturbance and maintenance of as much of the site as possible in its natural state, and Section 8.2.17 Lighting, are pertinent. In addition, with respect to mitigation of impacts, Planning Board Rules and Regulations for Senior Housing at Section 3.d.ii.2 require an analysis of existing and expected post-development environmental conditions. *See also* Section 10.5.2.4 and Section 10.5.2.5 and Section 10.5.2.6.

Section 3.d.ii.2 of the Rules and Regulations requires consideration of both existing and post-development environmental impacts. The project design entails the use of 48-inches of crushed stone, on average, to serve as a substrate for construction of units. Uncaptured stormwater would permeate that layer of crushed stone that would be placed on the ledge after blasting and used as structural fell below buildings and roadways throughout the development site. That water would hit the ledge and move in any direction the ledge is pitched toward and potentially into wetlands in unpredictable concentration, thus posing a risk to natural resources that could not be mitigated.[9] In addition, because the stormwater and erosion control system is characterized as high maintenance and low resiliency, the Homeowners' Association, or the Town, would have to address potential impacts if the rain gardens, detention pond, and infiltration pond were not kept free from debris and the site itself, especially lawns and rip rap on steep slopes, were not well-maintained to prevent erosion.

With respect to light pollution there are three type to address: trespass, glare, and intensity. The applicant submitted photometric data showing a 0-foot candle level on the ground surface at the property lines for the street lighting to address the trespass matter. However, the cumulative effects from all lighting sources, including the 16-foot high street fixtures with a 5% +/- cutoff shield, as well as other lighting sources not submitted for approval including entrance fixtures,

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[9] Rule 3.d.II.2 provides for analyses of environmental impacts. It provides:

> The applicant shall submit an analysis of existing and post-development environmental conditions, including but not limited to the use of best practices to prevent pollution of surface and ground water, erosion of soil, excessive runoff of precipitation, excessive raising or lowering of the water table, or flooding of other properties, measures to protect air quality, conserve water, minimize noise levels, prevent harmful or noxious emissions, and damage or threat to wetlands and flood plain, and the visual environments.

A hydrogeological study was requested by SCT & W. GZA opined that a hydrogeological study was unwarranted. GZA addressed stormwater runoff in the context of blasting and rock handling, concluding that there would be no harmful impacts to nearby wells or potential sources of drinking water. Its peer review, however, was limited to those specific activities without consideration of potential long-term impacts following completion of construction.

yard floodlighting, sidewalk safety illumination, and housing interior lighting, were not submitted for review. Because of the highly concentrated development area and the various numbers, locations, and intensity of all illumination sources, two pollutants – glare and intensity – will be unmitigated. This is not a problem that can be simply solved by applying project Conditions for approval. Sharper cut-off luminaries will not mitigate pollution exacerbated by steep slopes and clear cutting of mature forests. Sharper cut-off angles or lower fixture heights will require more street luminaries for an equivalent lighting level which means more, not less, lighting. In addition, because of the development placement in the pre-existing dark neighborhood with little artificial lighting, the highly lit development on the hill will stand in contrast to the neighboring properties.

The use of closed-cell foam for insulation, the most toxic and environmentally damaging type available, is associated with off-gassing which may affect future residents. In addition, dust from PVC siding products requires use of respirators by workers and cleanup to prevent airborne contaminants. The applicant addressed the second issue but not the first.

The choices made by the applicant directly lead to problems associated with noise and dust owing to the duration of the project . The duration of the project is unknown. The applicant's construction sequence spreadsheets are confusing, but, in any event, the duration of the project is unknown because it is tied to 1) the sale of 50% of the units in Phase I, sales which must take place before Phase II construction is undertaken; and 2) the absence of time allocated to weather delays other than for road paving and blasting. Moreover, the construction sequencing is based on a five-day work week, but proposed Conditions submitted by the applicant contain a provision for a 6-day work week, i.e., from 7:00 am to 7:00 pm Monday through Friday and from 7:30 am to 7:00 pm on Saturday. The shorter work week adds to the duration of the project and noise, dust and poor air quality; the longer work week potentially reduces the duration of the project, but would increase the disruptions associated with it and the adverse effects on the neighborhood. *See generally,* applicant's List of Exhibits, Exhibit 12A-12I. The best-case scenario for the duration of the project is four years and the duration in and of itself would place an enormous burden on the neighborhood and the Town.[10]

The impacts to abutting land cannot be satisfactorily mitigated. The applicant submitted a certified list of in accordance with M.G.L Ch. 40A, § 11.[11] The certified list contained over 30

[10] Ransom Consulting engineers challenged the applicant's assumptions about the duration of the project criticizing them as overly optimistic, indeed, unrealistic.

[11] M.G.L. Ch. 40A, § 11 provides in pertinent part the following:

> In all cases where notice to individuals or specific boards or other agencies is required, notice shall be sent by mail, postage prepaid. "Parties in interest" as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list, notwithstanding that the land of any such owner is

owners of land abutting or nearby the property. The disruptions owing the scale of the project, and noise, both from construction and from the ***untold*** number of trucks entering and leaving the site, would place an intolerable burden on abutters and nearby residents. The duration of the project in and of itself is problematic, but more significantly, the applicant did not demonstrate by way of credible or convincing evidence any effective means of mitigating noise, diesel fumes from the voluminous truck traffic, or dust, particularly in very dry conditions such as those occasioned by the draught that has impacted central and eastern Massachusetts this year.

The applicant submitted minimal evidence regarding noise mitigations and did not comply with Rule 3.d.ii.2 of the Rules and Regulations regarding Senior Housing Special Permits. The Massachusetts Department of Environmental Protection's Noise Level Policy which implements 310 CMR 7:10 specifies that the ambient sound level, measured at the property line of the project site or at the nearest inhabited buildings, shall not be increased by more than 10 decibels.

With respect to noise mitigation, the applicant stated that it would place the rock crusher, which likely would produce considerable noise, at the lowest portion of the development site. The location of the rock crusher, however, is unknown as it does not appear on the Phase A Construction Management Plan or the Phase 2 Construction Management Plan, but appears in two different places on two different Phase B Construction Management Plans, both of which are dated March 8, 2022. On those plans, it appears once in the Phase 2 portion of the development, and once at an elevation lower that the upland vernal pool but above wetlands. As 87,748 cubic yards of rock is to be exported in Phase I and hauled off site for 93 days in Phase A, it is unclear where the rock crusher will be in Phase A, unless no rock crushing will take place during that phase. *See* applicant's List of Exhibits, Exhibits 12A – 12I. The placement of the rock crusher, however, has not been established. Without a definitive location of the rock crusher, which is intended to crush 96,904 cubic yards of ledge on site, *see* id., the applicant did not establish that it could mitigate noise from that piece of equipment or that placing it at a lower elevation than the highest point on the development site would significantly reduce noise in a denuded landscape. Moreover, the applicant did not address noise from the distribution of rock on the site after it was crushed.

John Durkin, of Onyx Corporation, stated unequivocally that he was not an expert on noise. He stated that the rock hammer used for blasting has a noise dampening enclosure, but he did not address noise from the rock crushing piece of equipment (at least 100 decibels as OSHA lists "construction activities at 100 decibels), chain saws (110 decibels), truck traffic entering and exiting the site, or construction activities such as road paving, grading, and crushed rock distribution throughout the site.[12]

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located in another city or town, the planning board of the city or town, and the planning board of every abutting city or town.

[12]*See generally* https://wsdot.wa.gov › *Env-FW-BA_ManualCH07 7.0 Construction Noise Impact Assessment.*

The applicant specifically did not address the level of noise associated with large trucks entering and leaving the site, including Bentley Warren's 18-wheel trucks used for exporting crushed rock, which trucks most likely would have decibel levels of 90-95 at the property line. The applicant estimated the number of truck trips for the Bentley Warren trucks hauling rock from the site, namely 4,324 trips leaving and 4,324 entering the site, but it did not provide any reliable estimates of traffic for any of the other trucks and equipment that would be required to enter and leave the site over the four-year period of construction.[13] The level of traffic for trucks delivering materials for the installation of the roadways and utilities, for grading, for construction of the units themselves, for landscaping and all other construction activities would be enormous and would not even include the workers driving to and from the site every work day and parking on Chebacco Road. The ambient noise level at the property line unquestionably would increase dramatically, certainly far in excess of the noise pollution standard of an additional 10 decibel level above the ambient level of 30-35 decibels for a country road.

The applicant did not produce any written materials with specific commitments as to when and how it would measure and address noise, other than the rock hammer, and it did not directly address the provisions of 310 CMR 7.10, and the Massachusetts Noise Policy, other than to indicate that there would be compliance, together with statements by its counsel that noise dissipates with distance. The calculations related to noise measurements, however, are different for sound pressure and sound intensity, and are by no means as simplistic as stated. The applicant's attorney stated berms would be constructed, but she is an attorney, not an engineer, and there was no testimony, expert or otherwise, as to where the berms would be located and how effective they would be.

The applicant provided woefully insufficient evidence that it could even address construction noise in view of how quiet Chebacco Road is relative to the decibel levels of the equipment to be used on the site and truck traffic. "Trust us" is insufficient evidence to enable a Finding as to mitigating impacts to abutting land from noise. There was no acoustic study and no Town peer reviewer addressed noise or for that matter dust. A Condition of the Special Permit that would permit construction to begin with a later determination of the adequacy of noise mitigation would leave the site adversely impacted with unforetold problems if noise mitigation were later determined to be impossible or inadequate.

With respect to dust mitigation, the rock drills for blasting are self-contained and fitted with vacuum system filters; water can also be added to ensure removal of heavier silica dust. The rock crusher can also be sprayed with water. Nevertheless, there was agreement that there would be some level of dust at the site. The questions are how much, and when is how much too much.

The proposed project does not satisfy Section 8.2.31.2,and the Planning Board cannot make the determination required by Section 10.5.2 taking into account neighborhood character and social structures, impacts on the natural environment, and potential fiscal impacts to the Town.

[13] The applicant's attorney at the February 8, 2022 meeting stated that there would be 400 truckloads relating to the septic system and between 46 and 50 truckloads at the site itself. It is unclear whether the number of truckloads accounted for the 8,648 Bentley Warren round trips to export ledge.

C. Section 8.2.31.3: Does the project 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?

Section 8.2.31.3 implicates Section 8.2.19 Site Access, Roadway Design and Management. *See also* Section 10.5.2.2.

The applicant's attorney was candid that the Village of Chebacco Hill is not for seniors in the familiar sense of the term; rather is it is for "a younger segment of the senior population," those that are "generally vibrant, active individuals." In sum, they are "healthy individuals who no longer want to bear the burden of single-family home ownership."[14] The applicant, however, also touted the concept of aging in place, but did not discuss the ramifications of what aging sometimes entails after 55 years of age: hip replacements and heart conditions, just to name a few. It also did not address what individuals who experience those or any other conditions associated with aging will do to overcome the challenges of the steep slopes that riddle the property, even between the front and backyards of some units, without relocating.

In sum, because of the *imposition* of the project on the site, the sidewalks and roadways, a portion of which contain 10% grades, likely will pose challenges for residents if they intend to "age in place" at the Village of Chebacco Hill. For example, the Town's peer review consultant, TEC, observed:

> The sidewalk adjacent to the internal roadway has a slope equaling the roadway slope of up to 10%. Sidewalks with a running slope of over 5% are considered ramps and shall comply with 521 CMR 24.00. Ramps may not have slopes over 8.3% without landings provided for turning and resting every 30 feet and must provide handrails. The Applicant should discuss the need for a waiver request from the Massachusetts AAB requirements of 521 CMR 24.00.

In response, the applicant indicated that "the Village of Chebacco Hill project does not fall under the jurisdiction of any accessibility condes including MAAB [Massachusetts Architectural Access Board], FHA [Fair Housing Act] and ADA [American with Disabilities Act]." TEC's response to the applicant's position was to recommend that accessibility requirements be met "to the greatest extent possible within the site, due to the proposed senior housing use." The issue with the road and sidewalk gradients will be compounded in inclement weather, particularly as it is unclear where snow removed from sidewalks and driveways would be shoveled or plowed other than into the street, or whether it would have to be trucked off site

While the applicant may have established that it is not obligated to comply with MAAB, FHA and ADA standards, its position is inconsistent with good practice and the spirit of the Planning Board Rule and Regulations Governing Special Permits. Section 5.b.iii. of the Rules and Regulations provides that "[a]ccess to open spaces and recreation areas or facilities should be barrier-free to serve the physically handicapped, elderly, and children through the provision of

[14] Email from Jill Mann to Jodi Llacera Klien dated March 24, 2022 transmitted to members of the Planning Board on March 24, 2022.

accessible, pedestrian-oriented features such as walkways, outdoor seating plazas, and drop-off areas."

The 2:1 slopes between front and back yards of some units pose a safety risk. Indeed, such slopes can pose a fall risk even for able bodied individuals, let alone those who would be age in place. The 20-foot sheer ledge poses another potential safety hazard in the absence of any guarantee that there will be no falling rock or ice from that ledge face over time. A trench has been proposed to capture any rock or ice, but any further mitigation of that risk would just compound the unattractiveness of the entrance to the site. Rip rap could also pose a safety hazard as trails cross armored slopes in two places. In addition, the roadway grade would require the use of deicers to ameliorate safety concerns, which use could potentially threaten water resources.

Due to the increase in the number of homes on Chebacco Road if the project were to be permitted, safety concerns were raised, but unresolved, as to the accuracy of the traffic study owing to the economic status of potential residents whose homes will feature two car garages.

TEC observed in its August 30, 2021 report the following:

> [T]he exiting roadway width of Chebacco Road is between 20 and 27 feet in width with no separate facilities for pedestrians or bicyclists. Pedestrian and bicyclist safety may be impacted with the addition of project vehicular traffic volumes. The applicant should discuss any mitigation that may be appropriate to provide pedestrian and bicycle safety accommodations along Chebacco Road between the site driveway and Essex Street.

The applicant responded by stating that "[i]t is not likely that the Project residents will be walking from the site along Chebacco Road. However, the Project is proposing on-site parking areas where people are able to walk or bike the trails connect to Chebacco Woods." [sic]. Notably, the applicant failed to address, indeed, it ignored the safety of non-residents walking or biking on Chebacco Road after project completion.

More importantly, the applicant did not address pedestrian and bicyclist safety *during* construction when there will be at least 4,324 Bentley Warren Trucks leaving the site and 4,324 Bentley Warren trucks returning to the site during rock export and *countless* other trucks and vehicles of varying sizes associated with construction using Chebacco Road, Essex Street, and other streets in Hamilton and immediately adjacent communities, not just the haul route proposed for Bentley Warren trucks. The large trucks and the volume of truck traffic navigating rural roads in Hamilton during construction pose a serious safety hazard to pedestrians, bicyclists, and equestrians, particularly as large trucks have difficulty making 45 degree turns without interfering with local traffic. Moreover, the applicant indicated that an unspecified but potentially large number of construction workers would be parking on Chebacco Road every work day, creating safety issues for residents driving, walking, and cycling on the road given its width.

The applicant's project failed to satisfy Section 8.2.31.3, and the Planning Board cannot make the determination required by Section 10.5.2.2 taking into consideration traffic flow and safety, particularly during the four years of construction.

D. Section 8.2.31.4: Does the project provide for adequate capacity for public services, facilities, and utilities to service the proposed development such as water pressure and sewer capacity?

The applicant's proposed project is predicated on a tie in to Hamilton's water system, and it submitted several exhibits to assuage all concerns about the availability of water to the development. Those exhibits predate both the severe draught that has affected central and eastern Massachusetts and parts of New England this year, as well as a study funded in part by the Town regarding its water supply. Nevertheless, the project, as designed, provides adequate water pressure and sewer capacity.

The applicant's project satisfied Section 8.2.31.4. That said, given all of the Planning Board's concerns with the proposed project, the Planning Board cannot make the determination required by Section 10.5.2 taking into consideration the adequacy of utilities and other public services. *See* Section10.5.2.3.

E. Section 8.2.31.5: Does the project provide for visual and noise buffering of the development to minimize impact to abutting properties?

Section 8.2.31.5 implicates Section 8.2.13 General Requirements which requires the use of low impact development techniques where applicable and minimizing disturbance. *See also* Section 10.5.2.4 and Section 10.5.2.5.

This Finding requires an examination of buffering *during* the four-year duration of the project and *after* project completion. As the Finding pertinent to Section 8.2.31.2 demonstrates, the applicant submitted insufficient evidence as to noise buffering during the development phases of the project both respect to the use of construction equipment and the extraordinary number of vehicles that would enter and exit the site or park along Chebacco Road each work day for at least four years.

Were the project to be completed, noise buffering would cease to be an issue, but visual buffering would not be achieved. Section 8.2.22 requires a landscape buffer around the perimeter of the property. As designed, approximately 710 linear feet of buffer is disturbed over and above what would reasonably be required for a curb cut and a portion of the buffer is replaced with 2:1 planted embankments. This is indicated in the applicant's drawings. *See* C13 of C42 Erosion Control Plan, C14 of C42 Erosion Control Plan, C15 of C42 Erosion Control Plan, and C16 of C42 Erosion Control Plan. The existence and maintenance of buffer areas would be affected by the removal of ledge and construction activities that likely could damage complex root systems, causing tree stress or tree die back. Changing the grade around trees and compacting soils damages root systems and trees can eventually die over a span of several years. Moreover, the applicant failed to submit credible evidence of visual buffering as the artist renderings did not present an accurate depiction of grading, topography, vegetation, or site characteristics. It merely showed trees and shrubs that would not mature for years and would only partially obscure the entranceway from late spring to mid-fall.

Another significant aspect of visual buffering is the reduction in light pollution, yet when the proposed roadway lighting is coupled with lighting from walkways, porches and building interiors, the project would create a very bright hilltop, the impact of which would be difficult to minimize owing to the absence of any mature vegetation around buildings. In short, the removal of all mature trees that currently provide a buffer between that development area and 133 Essex Street and Chebacco Road could not be replaced with young trees placed in 4-8 feet of crushed stone with a layer of soil on top to create a buffer anywhere equivalent to the existing buffering on Chebacco Road. Assuming the survival of shrubs and trees through periods of draught and deer pressure, they would not mature to provide any kind of reasonable buffer that would minimize impacts to abutting properties for five to ten years **after** completion of construction so that there would be no effective screening of the site for ten years or more.

The applicant failed to satisfy Section 8.2.31.5, and the Planning Board cannot make the determination required by Section 10.5.2 taking into consideration both neighborhood character and social structures and impacts on the natural environment.

F. Section 8.2.31.6: Does the project provide for the perpetual preservation and maintenance of open space, trails, and recreation areas?

Section 8.1.31.6 implicates Section 8.2.13 General Requirements which provides that all existing paths and trails shall be connected, preserved, and increased when possible. . . . and Section 8.2.23 Open Space and Natural Resources which provides that open space can be "conveyed to a corporation or trust owned or to be owned by the owners of Lots or residential units within the plan, as provided by G.L. c. 40A, § 8 . . . [and] [i]n any case where the common open space is not conveyed to the Town, a perpetual restriction enforceable by the Town or the Conservation Commission shall be recorded providing that such land shall be kept in an open or natural state and not be built for residential use or developed for accessory uses such as parking or roadway [sic]." *See also* Section 105.2.1.

The applicant proposes a Conservation Restriction to provide for the preservation of open space in the regulated conservation area outside the development area, as well as the farmland in lot 2. The proposed condominium documents do not specifically provide for the maintenance of trails, but undoubtedly, they could be amended to do so.

The only amenity for residents is the trail system and it is not readily accessible to residents unless they access the trails at the entrance or traverse areas adjacent to rip rap. Because the owner of the property cut off access to trails that had been utilized in the past, the applicant contends that there are no existing trails, and the trails it is providing are sufficient.

As noted, the trails contemplated by the applicant are only accessible from a few lots - - the primary access is from the parking area at the entrance where there is an erosion control feature. Despite Planning Board Rules addressing barrier free access to open space and recreation areas, *see* Rule 5.b.iii, access to trails is not suitable for handicapped individuals. In addition, the view from some trails, as has been noted, will not be scenic as walkers or hikers will see backs of units and extensive rip rap that is used for erosion control on steep slopes.

The proposed Conservation Restrict is sufficient for a Finding that the applicant's proposed project satisfies Section 8.2.31.6 with caveats that the intent of Section 8.2.31.6 is compromised and the open space, as proposed, does not function as an amenity. Due to the imposition of the development on the site, hard against buffers and existing steep slopes with approximately1650 linear feet of rip rap visible and sometimes abutting the trails, trails would not constitute an amenity, regardless of the perpetual conservation of open space. *See* C13 of C42 Erosion Control

Plan, C14 of C42 Erosion Control Plan, C15 of C42 Erosion Control Plan, and C16 of C42 Erosion Control Plan.

The applicant partially satisfied Section 8.2.31.6, but the Planning Board cannot make the determination required by 10.5.2 taking into consideration social, economic or community needs to served by the proposed project.

> G. Section 8.2.31.7: Does the project 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?

Section 8.2.31.7 provides in pertinent part that "[i]n addition to the criteria set forth in Section 8.2.25, the Planning Board must make written findings on the following standards . . . [d]emonstrate compliance with the *intent* of Section 8.1.12 Open Space and Farmland Preservation Development Special Purpose Design Process, in order to encourage cluster development. Section 8.2.25 provides that if an application contains an open space element, the OSFPD Special Design Process shall apply. Although Section 8.1.12 is *captioned* OSFRD [sic] Special Permit Design Process, its *content* is much more than its caption; its content, not its caption, must control its interpretation for purposes of the Finding under Section 8.2.31.7. Accordingly, in condensed form, an applicant must address the following provisions applicable to this project in order to satisfy Section 8.1.12 and thus 8.2.31.7 so as to demonstrate compliance with the *intent* of Section 8.1.12:

> 1) "[I]dentif[y] . . . conservation areas on the site, including wetlands, riverfront areas, and floodplains regulated by state, federal, or local laws; unprotected natural landscape features such as steep slopes, mature woodlands, prime farmland, meadows, wildlife habitats and wildlife corridors or connections thereto; cultural and features such as historic or archeological sites and scenic views; and recreational features such as established trails used for horseback riding, walking, and cross-country skiing. To the maximum extent feasible, conservation areas shall include areas identified by the Planning Board during the pre-application conference."
>
> 2) "To the maximum extent feasible, the proposed development area shall consist of land outside the identified conservation areas" (i.e., areas comprised of both regulated and unprotected natural features, cultural features and the like).
>
> 3) "The location of Dwelling units should account for proximity to common open space and other amenities, including community buildings for use by residents of the development. Toward this end, the number of Dwelling Units with direct access to the amenities of the development should be maximized."
>
> 4) "The layout of trails should anticipate internal and external connections to existing and/or potential roads, trails and sidewalks."

See Section 8.1.12.1 - Section 8.1.12.4. Those directives reflect the **purpose and intent** of the **process** referenced in the **caption** to Section 8.1.12. The process is not just an exercise that can be undertaken and then jettisoned. There are purposes to the process, and those are specifically set forth in Section 8.1.12.1 through Section 8.1.12.4. Were the provisions to be interpreted in a way that ignores Section 8.1.12's mandatory directives and view the process as merely an exercise, the purposes and intent would be superfluous and irrelevant. Section 8.1.12 and Section 8.2.31.7 would be in conflict, rather than in harmony. Interpreting the provisions merely through the lens of the caption leads to the absurd result of sanctioning a process that could conceivably have no meaningful outcome. Requiring an applicant to expend funds to comply with Section 8.1.12, soliciting comments from the Board with respect to Section 8.1.12, but in the end permitting an applicant do whatever it wants with a site, as long as the site does not contain regulated conservation areas and there is a nod to open space, is an interpretation that makes it impossible to reconcile Section 8.1.12, Section 8.2.25, and Section 8.2.31.7 and leads to an absurd result. Moreover, ignoring compliance with Section 8.1.12 altogether is a dereliction that would sanction a design that is environmentally insensitive and lacks resiliency and sustainability.

Section 8.1.16, Special Permit Design Standards, is unique to the OSFPD bylaw and its provisions are mandatory. There is no comparable provision in Section 8.2, the Senior Housing Bylaw. Nevertheless, Section 8.2.16 Building and Design Standards identifies as its sixth standard compliance with "[o]ther Building and Design Standards in applicable Planning Board Rules and Regulations" in order to achieve a development that reflects the residential character of the neighborhood in which it is located. Moreover, Section 8.2.4, which implements the Senior Housing Bylaw, provides:

> 8.2.4 Planning Board Rules and Regulations. The Planning Board shall adopt and from time to time may amend Senior Housing Special Permit Rules and Regulations **to implement this Section**. Such regulations shall include but will not be limited to submission requirements, fees, plan requirements (such as size, form, number and contents), *development standards, site standards, and standards for building placement and design.* Such Rules and Regulations are required and authorized under G.L. c. 40A, s. 9, and shall be adopted after vote by the Planning Board.

(emphasis supplied). Indeed, the OPFPD Bylaw has a provision virtually identical to Section 8.2.4, namely Section 8.1.5, and, more significantly, the substantive Rules and Regulations that **implement** both the OSFPD Bylaw and the Senior Housing Bylaw are identical in all material respects.

Thus, to satisfy Section 8.1.12 and the directives embedded in that provision, an applicant must be guided by the identical provisions of the Rules and Regulations that implement both bylaws, regardless of whether the Senior Housing Bylaw lacks a provision similar to Section 8.1.16. The only difference in the approaches to site design embedded in Section 8.1.12 and the Planning Board Rules and Regulations is that 8.1.16 has five standards that are mandatory. To reiterate, an applicant must demonstrate compliance with the ***intent*** of Section 8.1.12, and that is more than what its caption suggests as Section 8.1.12 contains directives as to how to implement site design that takes into account both regulated conservation areas and unprotected natural features as well as cultural and recreational features.

To implement the Senior Housing Bylaw, the Planning Board's Rules and Regulations provide that an applicant "should (i.e., the applicant is expected to meet the requirement "through all commercially reasonable efforts,")[15] achieve a reasonable and appropriate relationship between the proposed development and the topography of the site, considering features important to the site, the surrounding area and the Town as a whole." *See* Section 5.a.ii. The regulations also indicate that "natural features such as topography, streams, mature trees or clusters of trees, slopes, natural drainage areas . . . should be treated as *fixed determinants* of road configuration and building envelopes rather than elements that can be changed for a particular development scheme." (emphasis supplied). *See* Section 5.a.iii. (Indeed, this rule is mirrored in Section 8.1.16.1.).

With respect to the open space design standards, the Board's Rules and Regulations indicate that large buffer areas should be provided around building groupings and building envelopes to *minimize site clearing and grading* in order to preserve existing land cover and mature vegetation. In addition, access to open space should be barrier free. *See* Section 5.b.ii and iii.

With respect to environmental standards, the Rules and Regulations also provide that the common open space requirements "*shall* be met first by protecting features of the environment that are unique or peculiar to the site and its context as identified in the open space design process. (emphasis supplied). *See* Section 5.c.i.

Section 8.2.31.7, when coupled with Sections 8.1.12 and Section 8.2.25, requires consideration of whether the applicant considered site design as required by Section 8.2.16.6 and as laid out in detail in the Planning Board Rules and Regulations. The process can be understood in non-engineering terms. Moreover, and more importantly, consideration of integration of the project into the site, instead of its imposition upon it, is required as the first step in the overall design process. Indeed, reading the bylaws as a whole and in harmony with one another, the process starts with Section 8.1.12 which is the first step due to the prefatory language of Section 8.2.31 (i.e., the reference to Section 8.2.25) and ends with the Finding required by Section 8.2.31.7 with respect to whether the applicant demonstrated compliance with the intent of Section 8.1.12. In other words, Section 8.1.12 bookends the Findings required by the Senior Housing Bylaw.

The applicant made critical choices at the outset of its design process and did not fully comply with Section 8.1.12 or the Planning Board's Rules and Regulations. The applicant identified regulated conservation areas, but did not identify all unprotected natural landscape features (it identified farmland outside the development area), providing the Board only with existing

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[15] The Rules and Regulations provide that "A standard expressed as 'shall' is a requirement for any Senior Housing Development unless the applicant demonstrates to the satisfaction of the Planning board that strict compliance would render the development infeasible. A standard expressed as 'should' indicates a local priority that the applicant is expected to meet through all commercially reasonable efforts." *See* Rule 5, Senior Housing Design Standards.

conditions plans (E1-E4) and contours as set forth in its grading and drainage plans ((C5-C8). Steep slopes were only delineated by a Board member in a composite site plan derived from the applicant's existing conditions plans.[16] The applicant neither identified wildlife habitats and corridors, nor cultural features, namely Chebacco Road as a scenic road, and recreational features. In this regard, trails, initially were not identified with precision owing to the owner's decision to bar access to trails that once had been utilized by the public.

With respect to Section 8.1.12.2, within the development area itself, the applicant did not identify any unprotected natural features or other features set forth in Section 8.1.12.1, namely unregulated conservation areas. In the applicant's proposed plans, steep slopes are disturbed, as well as approximately 710 linear feet of the required vegetated buffer zone, *see* Section 8.2.15 and Section 8.2.22. *See* C13 of C42 Erosion Control Plan, C14 of C42 Erosion Control Plan, C15 of C42 Erosion Control Plan, and C16 of C42 Erosion Control Plan. Thus, the applicant did not comply with Section 8.1.12.2.

The applicant also failed to satisfy the directives set forth in Section 8.1.12.3 and Section 8.1.12.4, as it its proposed plans lack meaningful connections to open space and access to trails from proposed units. Open space in the development area itself is predominantly steeply sloped lawns with adjacent steep slopes, and there is an absence of any communal space.[17]

Rather than following spirit and intent of the Senior Housing Bylaw and its design provisions as implemented in the Planning Board's Rules and Regulations with respect to the site, the applicant delineated regulated conservation areas and farmland and disregarded the other conservation areas (i.e., the unregulated conservation areas). Utilizing the development model it successfully employed elsewhere, it **imposed** its development on the upland portion of the site, instead of attempting to **integrate** it into the landscape. The bylaws, however, do not grant an applicant a license to delineate just protected resources areas, and then do whatever it wants with the site; rather, the bylaws directed the applicant to respond to the topography and to areas that can be preserved to the greatest extent possible to produce something more than a dense subdivision on a foundation of crushed granite. The Senior Housing Bylaw was intended to foster cluster development, *see* Section 8.2.1.5. The applicant's proposed project, while limiting development to the upland portion of the site, does not in fact cluster units; it merely lays them out on 16 acres of a 66-acre site in a manner just like a typical subdivision. There are no actual cluster of units surrounded by buffer areas between groups of units. *See* Rules and Regulations, Section 5.b.ii and iii.

[16] Planning Board's Rules and Regulations define steep slopes as 15%, *see* Section 5.c.iv, and Massachusetts Erosion and Sediment Control Guidelines for Urban and Suburban Areas, A Guide for Planners, Designers, and Municipal Officials, in which steep slopes are defined at 18%.

[17] Interestingly in its first concept plan, dated December 2, 2019, the applicant included a pool and a clubhouse at the entrance to the development portion of the site. *See* applicant's List of Exhibits, Ex. 2B.

The applicant's decisions led to a cascade of issues, most notably those relating to lack of adequate visual and noise buffering, and ramifications to abutters and the wider neighborhood and community from years of construction with concomitant noise and road safety issues. While all construction has its disruptions, a project spanning at-best four years with associated noise, diesel fumes, and voluminous truck traffic establishes that site design principles embodied in the Zoning Bylaw and the Rules and Regulations were not utilized. Those principles must be the predicate for and the first step in the development of a Senior Housing project and are derived from reading Sections 8.1.12, 8.2.25 and 8.2.31.7 in harmony with one another.

Because there are only a few tracts of land in Hamilton where a project similar in size to the one proposed by the applicant can be built, development should be guided by principles of sustainability and resiliency, not merely increased density and fiscal benefits at the expense of planning principles embedded in the Zoning Bylaw. While fiscal concern must be weighed, they cannot be exclusive drivers in this process; rather, they are considerations that must be contextualized where the thrust of the bylaws is to provide the Town with development plans that emphasize sustainability and resiliency, not perpetual maintenance and oversight with their associated unknown costs.

The applicant failed to demonstrate compliance the intent of Section 8.1.12 and, thus, failed to satisfy Section 8.2.31.7. Accordingly, with the exception of Section 8.2.31.4, the Planning Board cannot make the Findings required by Section 8.2.31 or make the determination required under Section 10.5.2 that the beneficial impacts of the proposed use outweigh its adverse effects in view of the particular characteristics of the site, and of the proposal in relation to that site when considering the following: 1. Social, economic, or community needs which are served by the proposal; 2. Traffic flow and safety, including parking and loading; 3. Adequacy of utilities and other public services; 4. Neighborhood character and social structures; 5. Impacts on the natural environment; and 6. Potential fiscal impact.

V. DECISION

Based upon and in consideration of the foregoing, and upon a Motion, made and seconded, to approve the application of Chebacco Hill Capital Partners, LLC for a Senior Housing Special Permit pursuant to Section 8.2 of the Town's Zoning Bylaw, the Planning Board voted by a vote of two in favor (Rick Mitchell and Richard Boroff) and five opposed (Marnie Crouch, Emil Dahlquist, Jonathan Poore, William Wheaton, and Patrick Norton). Accordingly, the Motion failed and the application is DENIED.

Upon a Motion made and seconded, the Planning Board voted by a vote of seven in favor (Marnie Crough, Emil Dahlquist, Jonathan Poore, William Wheaton Rick Mitchell, Richard Boroff, and Patrick Norton) and none opposed to adopt generally as the Findings and determinations of the Board in support of its decision, the Findings and determinations articulated by Marnie Crough, Emil Dahlquist, Jonathan Poore, William Wheaton, and Patrick Norton during deliberations on the application, subject to any revision that the Planning Board may make during the Planning Board's review of the draft written decision regarding this matter.

Upon a Motion made and duly seconded, the Planning Board voted by a vote of seven in favor (Marnie Crough, Emil Dahlquist, Jonathan Poore, William Wheaton Rick Mitchell, Richard Boroff, and Patrick Norton) and none opposed to approve the form of this written Decision.

Appeals of this Decision, if any, shall be made pursuant to M.G.L. Ch. 40A, § 17 and shall be filed within twenty days after the date of the filing of the notice of this Decision in the office of the Town Clerk.

Date Oct. 18, 2023 **Town of Hamilton Planning Board**

William Wheaton

Margaret M. Crouch

Jonathan Poore

This Decision was filed with the Hamilton Town Clerk on October 19, 2022

Richard L Boroff