

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

ESSEX, SS.

SUPERIOR COURT
C.A. NO.: 2277CV01137-C

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 by Certiorari the Board's decisions pursuant to Mass. Gen. Laws ch. 249, § 4; 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 56.8 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. The Property is not part of any protected aquifer.

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

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

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

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

15. The Property has no environmentally fragile or sensitive characteristics or classifications.
16. The Property has not been mapped as habitat for any endangered or threatened species.
17. 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.
18. The Property is a negligible contributor to the watershed, which consists of runoff from over 40,000 acres of land.
19. The Property is not in a protected Flood Plain area.
20. On or about July 2, 2021, Chebacco Hill submitted an application to the Board ("Application") pursuant to Chapter 29 of the Town of Hamilton Bylaws a/k/a the Stormwater Management Bylaw ("Bylaw"). Thereafter, the Bylaw was amended, however, the Board unanimously voted to apply the version of the Bylaw that was in effect when the Application was filed.
21. The Application concerned Chebacco Hill's planned stormwater management for its proposed 50-unit, senior housing (55 years of age and older) development on Lot 1 ("Project").
22. Following submission of the Application, the Board opened its public hearing regarding the Project.

23. 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, inexperienced conclusions.

24. 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.

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

26. Up until his removal as a voting member, Corey Beaulieu had appeared to hold a favorable view of the Project.

27. The Board's public hearing and deliberative processes were consistently tainted by the biased, improper conduct of Board members and the Chair.

28. The decision that resulted from the Board's public hearing and deliberative processes was arbitrary and capricious, unreasonable, not based on substantial evidence, and based on errors of law.

29. 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.

30. Following the close of the public hearing, during the deliberations, substantially all discussions concerning the Project were one-sided and ignored the public record, including, but not limited to, written testimony from Chebacco Hill's experts and the peer review experts hired by the Town.

31. In fact, 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.

32. Indeed, though Chebacco Hill expended over \$45,000 to fund the Town's peer review experts, the Board generally ignored the experts' reports.

33. The Board likewise ignored the opinions of numerous experts employed by Chebacco Hill and conveniently omitted reference to the fact that civil engineer hired by the vocal opposition to the Application stated as part of the public record that the stormwater management design complied with the local and state stormwater management regulations.

34. The conclusion of the experts who reviewed the Application was that the stormwater management system design was well prepared and in full compliance with the applicable state and local requirements.

35. Board members also appeared to consider the stormwater management system design to be based upon best management practices ("BMP").

36. For example, at the Board's hearing on August 16, 2022, Rick Mitchell asked Jonathan Poore, "Jonathan, are you indicating that both the applicant and the peer review are relying on faulty engineering and that they're not using best practices to control runoff?"

37. Jonathan Poore responded, "No . . . they've met the BMP standards."

38. Yet, Jonathan Poore proceeded to question whether Chebacco Hill's proposed stormwater management system design complied with the intent and standards of Volume 2 of the Massachusetts Stormwater Handbook.

39. On September 20, 2022, during deliberations under the Bylaw, Rick Mitchell continued questioning the propriety of Jonathan Poore's assertion that Chebacco Hill failed to follow the "guidelines" set forth in Volume 2.

40. Jonathan Poore misled the discussion with his statement that "so much of 8.1.12 is environmental sensitive site design, which is what the stormwater management lens for the same process is. They're the same thing, just different words."

41. Rick Mitchell pointed out that Jonathan Poore and Marnie Crouch were improperly conflating special permit standards and findings with the objective criteria required for the issuance of a stormwater management permit under the Bylaw.

42. Jonathan Poore begrudgingly conceded that the criteria set forth in Volume 2 of the Massachusetts Stormwater Management regulations are "nonengineering...planning board related type criteria" that are not statutory requirements and offered that the stormwater design was "excellent engineering."

43. Marnie Crouch further conceded that the guidelines of Volume 2 are not mandatory design requirements and that the applicants are required to provide designs that meet the guidelines of Volume 2 "to the maximum extent practicable".

44. Rick Mitchell unsuccessfully advised Marnie Crouch and Jonathan Poore to refrain from substituting their own opinions for the opinions of the experts who reviewed the system design.

45. To wit, Rick Mitchell stated, "I would venture that this Board is not qualified to have any opinion on Volume 2 because we are not engineers and nor are we practicing . . ."

46. Jonathan Poore interrupted and said, "I would disagree."

47. Rick Mitchell pointed out, "Our peer review said they met the standard. . . . We had here a reviewer who's looking at this, who does this professionally all the time for cities and towns around Massachusetts. They looked at . . . the information that was presented and said, this met the standards, the statutory standards of what is required for stormwater management. So, I'm confused as how we've leaped from, and I, I'm really seeking clarification here. We've leaped from what I understand to be that our peer reviewer said the stormwater management system, as designed, met requirements and criteria needed to function adequately for the runoff on this site."

48. Rick Mitchell went on to question why he should favor the inexpert opinions of Board members who "are not registered professional engineers who have a liability, professional liability, and can lose their license".

49. However, Rick Mitchell did not manage to persuade the Board to follow the guidance of experts over Board members' inexpert, contradictory, and arbitrary opinions and feelings regarding the standards by which to review proposed stormwater management systems.

50. Such was the case even though Jonathan Poore admitted, "All of these things are . . . very well engineered, my kudos to [the Project engineer], they just . . . they did a great job."

51. Despite the many reports, plans, expert testimony, and responses to the inaccurate and misleading assumptions of Jonathan Poore that are included in the record of the public and that provide uncontroverted evidence that the design complies fully with Volume 1 and complies *to the extent practicable* with the guidelines of Volume 2, the Board purposely chose to ignore the facts and improperly denied the Application.

52. Additionally, Marnie Crouch improperly raised concerns about climate change as a basis for applying theoretical future stormwater regulations to current review of the stormwater

management system design, saying, “The stormwater management regulations evolve with time. They’re not static . . . with climate change . . . it’s important to get this right because if it works now it doesn’t mean it would work in the future.”

53. Indeed, Marnie Crouch concerned herself with theoretical events far into the future, providing, “I would like to talk about . . . maintenance and the cost associated with maintaining this stormwater management system and how effective that it will be over time when none of us here are on the planning board . . . **even on earth** . . . we have to look to the future as to efficaciousness of how this is designed.”

54. William Wheaton added, “If we don’t approve this and they go ahead with some other plan and it has problems, at least our name isn’t on it. Whereas, if we approve it in some sense, then we have approved their choices. And if we get into situations of, you know, more climate change and more rain and the whole system doesn’t work, then our name is on it. We approved it.”

55. Rick Mitchell noticed and argued, “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.”

56. Additionally, Chebacco Hill’s hydrogeologist and the Board’s own peer review hydrogeologist debunked the Board’s concerns relating to climate change, which concerns were rooted in misunderstandings concerning the Project site’s hydrogeology.

57. Throughout the public hearing process and more notably during the deliberations, there was an antidevelopment flavor to the Board’s discussion.

58. Repeatedly during the public hearing and deliberative processes, the Board members ignored or trivialized the extensive factual record, discounted expert testimony, and projected opinions for subjects in which such members had no credentials or experience.

59. In particular, Marnie Crouch, Jonathan Poore, and Emil Dahlquist demonstrated substantial bias against the Project from the outset of the public hearing process.

60. Marnie Crouch, Emil Dahlquist, and Jonathan Poore monopolized the deliberative process.

61. While Emil Dahlquist and Jonathan Poore both admitted they were not licensed engineers and did not have any experience designing stormwater management facilities, the Board's deliberative process misapplied the standards of the Bylaw and erroneously relied on unsupportable and controverted opinions regarding the stormwater management system design, thereby ignoring objective, credible reports of the numerous experts who reviewed the Project.

62. In fact, certain information relied upon in the Board's permit denial was developed by Jonathan Poore and Emil Dahlquist and delivered to the Board as pseudo expert conclusions, which conclusions were jointly rebutted during the public hearing and in writing by the hydrogeologists hired by the Town and by Chebacco Hill.

63. The Board relied on the inexpert opinions of Jonathan Poore and Emil Dahlquist where even the engineering consultant employed by the parties opposing the Project conceded that the Project satisfied all local, state, and federal stormwater rules and regulations, a fact expressly noted by Marnie Crouch.

64. In addition to their application of nonexistent, arbitrary standards for stormwater management, Marnie Crouch, Emil Dahlquist, and Jonathan Poore manipulated the Board's

discussion concerning the Project by claiming undifferentiated fears of noncompliance in connection with the operation and maintenance of the stormwater system.

65. For example, at the Board's hearing on August 16, 2022, Marnie Crouch emphasized concerns that "if" the owners of the condominium fail to maintain the system and "if" the system fails because of some future event that is not yet known or provided for in any written regulation, the Town will be responsible and residents could be harmed.

66. Marnie Crouch referenced these baseless, improper, and theoretical concerns as grounds to deny the stormwater management permit.

67. Rick Mitchell again cautioned Marnie Crouch, "We need to be careful about making a decision here because our decision needs to be based on objective criteria. This is speculation that it might not work, but our role is to make sure that we are following the engineering, and if we do have concerns just make sure it's built into the condition."

68. The Board exceeded its authority and acted as it did because of its antidevelopment position.

69. 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."

70. Further showing his bias against the Project, Emil Dahlquist manipulated the facts and claimed that the 4.9 acres of impervious surface to be created by the Project would constitute 25 to 30 percent of the site. He willfully or negligently ignored the facts included in the public record that the Project is proposed on Lot 1, which contains 56.8-acres of land, and that the Project will cover only 8 to 9 percent of Lot 1.

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

72. 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.

73. Indeed, 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 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."

74. Regardless, members of the Board substituted their inexpert, personal opinions for facts, scientific evidence, and the framework of the Bylaw.

75. As a result of its arbitrary and capricious deliberative process, on or about October 11, 2022, the Board issued a decision declining to issue the Project a stormwater management permit ("Denial").

76. The Denial was purportedly filed with the Town Clerk on October 19, 2022. A true and accurate copy of the Denial is attached hereto as **Exhibit A**.

77. 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.

78. 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.

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

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

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

COUNT I:
APPEAL OF PLANNING BOARD DECISION
(Mass. Gen. Laws ch. 249, § 4)

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

83. Chebacco Hill's proposed Project met the requirements for the grant of its requested stormwater management permit.

84. The Board applied inapposite requirements to the Application.

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

86. The Board improperly denied the Application.

87. The Plaintiff appeals the Board's Denial on the grounds that the Denial was arbitrary and capricious, unreasonable, not based on substantial evidence, and based on errors of law.

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

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

89. 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.

90. This Court has jurisdiction to decide the controversy 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 stormwater management 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,

/s/ Donald F. Borenstein

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