DAIN | TORPY

September 30, 2016

BY HAND DELIVERY

Broadstone Bare Cove Alliance, LLC
Attention: Michael J. Boujoulian, Vice President
One International Place, Suite 1400
Boston, MA 02110

RE: Broadstone Bare Cove Alliance, LLC Comprehensive Permit Application for *Broadstone Bare Cove*, 230 Beal Street, Hingham, Massachusetts

Dear Mr. Boujoulian:

On September 15, 2016, the Hingham Zoning Board of Appeals ("Hingham ZBA" or "ZBA") opened the local hearing on the Comprehensive Permit Application of Broadstone Bare Cove Alliance, LLC ("Applicant") for a proposed 300-unit rental development to be located at 230 Beal Street, Hingham, Massachusetts (the "Application"). On behalf of the ZBA, I hereby notify you that, pursuant to 760 CMR 56.03(8)(a), the ZBA considers that, in connection with your Application, a denial of the permit or the imposition of conditions or requirements would be consistent with local needs on the grounds that the Statutory Minima has been met as provided in 760 CMR 56.03(1)(a) and 760 CMR 56.03(3)(a), and on the grounds that, even if the Department of Housing and Community Development ("DHCD") disagrees with the Town's count of its Subsidized Housing Inventory, the Town has made recent progress toward achieving the Statutory Minima as recognized by DHCD, as provided in 760 CMR 56.03(1)(c) and 760 CMR 56.03(5). **Chart A** on page 3 reflects the Town of Hingham's understanding of the appropriate calculation of its affordable housing, with a total subsidized housing count of 16.85%.[1]

Please understand that this letter is not intended to address the underlying merits of your Application or to comment on whether the Application satisfies the requirements of Chapter 40B, §§ 20-23 and 760 CMR 56.00, et seq. (referred to herein collectively as "Chapter 40B"). Instead, this letter is written for the limited purpose of notifying you that the ZBA is invoking the procedures described in 760 CMR 56.03(8)(a).

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[1] The information reflected in Chart A is supported by the following exhibits: (i) the 2014 DHCD Subsidized Housing Inventory, attached hereto as Exhibit A; (ii) the 2014 DHCD Subsidized Housing Inventory corrected by Hingham, attached hereto as Exhibit B; and (iii) the DHCD updated Subsidized Housing Inventory for the Town of Hingham, dated May 26, 2016 ("May 2016 SHI"), attached hereto as Exhibit C reflecting the inclusion of additional units since the 2014 DHCD Subsidized Housing Inventory, including DHCD ID #9922 (Avalon Hingham Shipyard II).

LIMITATIONS OF THIS LETTER

In accordance with 760 CMR 56.03(8)(a), this letter notifies you that the ZBA "considers that a denial of the permit or the imposition of conditions or requirements would be consistent with local needs, the grounds that [the ZBA] believes have been met, and the factual basis for that position, including any necessary supportive documentation."

This letter focuses on two "safe harbors":

(A) The 10% Safe Harbor: The ZBA maintains that the Town has in excess of 10% affordable housing as a result of the Erickson Retirement Community's "Linden Ponds" rental project. This letter will review and confirm the Town of Hingham's Subsidized Housing Inventory ("SHI") as defined in the Chapter 40B. As discussed below, Linden Ponds is an approved Chapter 40B project, but DHCD currently counts only 25% of the rental units at Linden Ponds in the Town of Hingham's SHI. The ZBA maintains that 100% of the rental units at Linden Ponds should be included in the SHI.

(B) The Recent Progress Safe Harbor: In the event DHCD continues to disagree with the Town of Hingham's calculation of its SHI, this letter will confirm that, based on the filing of the Comprehensive Permit issued by the Hingham ZBA to Avalon Hingham Shipyard II (DHCD ID #9922) on May 17, 2016, for 190 rental units, the Town of Hingham has made recent progress toward the Statutory Minima as calculated by DHCD pursuant to 760 CMR 56.03(1)(c) and 760 CMR 56.03(5) and, therefore, in accordance with the methodology adopted by DHCD for calculating the Town's SHI, the denial of a comprehensive permit or the imposition of conditions or requirements would be consistent with local needs for a twelve month period expiring on May 16, 2017.

For purposes of efficiency, this letter begins with a discussion of the Recent Progress Safe Harbor. Under 760 CMR 56.03(8)(a), satisfaction of ***either*** the Recent Progress Safe Harbor or the 10% Safe Harbor will provide sufficient grounds for a finding that "a denial of the permit or the imposition of conditions or requirements would be consistent with local needs," although the Recent Progress Safe Harbor is limited to one year. If the Applicant concurs that the Town is entitled to the Recent Progress Safe Harbor, then there may be no reason for the Applicant to address the 10% Safe Harbor issue, at this time.

Likewise, if the Applicant elects to challenge the ZBA's Safe Harbor assertions, DHCD may confirm the ZBA's assertion of the Recent Progress Safe Harbor and its applicability to this Application, without reaching the question of whether the Town has achieved the 10% Safe Harbor. Such a determination by DHCD, limited to the Recent Progress Safe Harbor, is all that's necessary to decide that "a denial of the permit or the imposition of conditions or requirements would be consistent with local needs" and such a limited determination by DHCD would not be deemed, or asserted by the ZBA, to be a determination in favor of the municipality as to the 10% Safe Harbor.

CHART A

DHCD ID #	Project Name	Address	Type	Total SHI Units	Affordability Expires	Built w/ Comp. Permit?	Subsidizing Agency
1362	n/a	Thaxter St.	Rental	58	Perp	No	DHCD
1363	n/a	30 Thaxter St.	Rental	26	Perp	Yes	DHCD
1364	n/a	100 Beal St.	Rental	14	Perp	Yes	DHCD
1365	n/a	30 Thaxter St.	Rental	8	Perp	Yes	DHCD
1366	Whiting Lane	246 Whiting Lane	Ownership	6	2042	Yes	DHCD
1367	Lincoln School	86 Central Street	Rental	60	2015*	Yes	MassHousing
4093	Brewer Meadows	196-200 Summer Street	Rental	21	Perp	Yes	FHLBB
4094	Lincoln Hill (a.k.a. Adams Court)	West Street	Ownership	4	Perp	Yes	FHLBB
4312	DDS Group Homes	Confidential	Rental	10	N/A	No	DMR
5711	Linden Ponds	301-303 Linden Pond Way	CCRC	985 **(See Discussion Below)**	Perp	Yes	FHLBB
7192	Central Street	Central Street	Ownership	1	Perp	Yes	DHCD
7920	Ridgewood Crossing	French Street	Ownership	3	Perp	No	DHCD
9035	Avalon at Hingham Shipyard	349 Lincoln Street	Rental	91	Perp	No	DHCD
9132	Back River Condominiums	24 Beal Street	Ownership	4	Perp	No	DHCD
9475	Derby Brook	Derby Brook Way/Whiting St	Ownership	5	Perp	Yes	MassHousing
9476	80 Beal Street	80 Beal Street	Ownership	2	Perp	Yes	DHCD
9707	Damon Farms	1220-1222 Main Street	Ownership	2	Perp	Yes	MassHousing
9922	Avalon Hingham Shipyard II	319 Lincoln Street	Rental	190	Perp	Yes	MHP
	Hingham Totals			**1490**	**Census 2010 Year Round Housing Units 8,841**		
					Percent Subsidized		**16.85%**

A. RECENT PROGRESS SAFE HARBOR

DISCUSSION OF RECENT PROGRESS TOWARD STATUTORY MINIMA

Pursuant to 760 CMR 56.03(1)(c), a decision by the ZBA to deny a comprehensive permit or grant a comprehensive permit with conditions shall be upheld if the Town of Hingham has made recent progress toward the Statutory Minima. "Recent progress" is defined by 760 CMR 56.03(5) as follows:

> Recent progress toward a municipality's Statutory Minima shall mean that the number of SHI Eligible Housing units that have been created within the municipality during the 12 months prior to the date of the Comprehensive Permit application, evidenced by being inventoried by the Department or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, is equal to or greater than 2% of the municipality's total housing units, as determined in accordance with 760 CMR 56.03(3)(a).

As noted on the Town's SHI, DHCD has determined that the Town has 8,841 Census 2010 Year Round Housing Units.

8,841 x .02 = 176.82 (rounded to 177 units)

On May 17, 2016, the ZBA filed with the Hingham Town Clerk a Comprehensive Permit issued to Avalon Hingham Shipyard II (DHCD ID #9922) for 190 rental units. As the total number of units created exceeds the 177 units required to demonstrate "recent progress" under DHCD's calculation of the Town's SHI, the denial of a comprehensive permit or the imposition of conditions or requirements would be consistent with local needs for a twelve month period expiring on May 16, 2017.

B. 10% SAFE HARBOR

PROCEDURAL STATUS RE STATUTORY MINIMA

In connection with at least three prior comprehensive permit applications, the ZBA provided notice to the applicants that the Town has met the Statutory Minima on the basis that 100% of the Linden Ponds units should be counted in the Town's SHI. The ZBA has consistently treated Linden Ponds as a rental project, and it continues to maintain this position.

On July 12, 2012, the ZBA notified AvalonBay Communities, Inc./Avalon Hingham, Inc. ("AvalonBay"), that it considered the Town to have in excess of 10% affordable housing as a result of the Linden Ponds rental units. In its letter of August 17, 2012, DHCD found that the ZBA had "not met the burden of proof in its assertion that a denial or approval with conditions would be consistent with local needs on the grounds that Hingham has achieved a 'safe harbor' pursuant to the statutory minima provisions as set forth at 760 CMR 56.03(8)(a)".

The ZBA appealed the DHCD ruling to the Housing Appeals Committee ("HAC"). In an Interlocutory Decision dated January 14, 2013, the HAC concluded "that Hingham had not achieved the 10% housing unit minimum...and therefore may not avail itself of the safe harbor, and we affirm DHCD's August 17, 2012 finding that 'the Board has not met the burden of proof...that Hingham has achieved a 'safe harbor'...'" (citations omitted). The HAC then "remanded to the Board pursuant to 760 CMR 56.03(8)(c) for further proceedings in accordance with 760 CMR 56.05." On or about May 21, 2013, AvalonBay notified the ZBA that it was

withdrawing its application for a comprehensive permit. On June 20, 2013, the Town of Hingham and its ZBA filed a complaint in the Suffolk Superior Court appealing the HAC's Interlocutory Decision. The Court dismissed that case on the ground of mootness.

On April 12, 2013, the ZBA notified SEB/Hingham LLC ("SEB") that pursuant to 760 CMR 56.03(8)(a) the ZBA considered that in connection with its Application a denial of the permit or the imposition of conditions or requirements would be consistent with local needs on the grounds that the Statutory Minima as defined at 760 CMR 56.03(1) had been satisfied. By letter dated May 20, 2013, DHCD found that the Board had not met the burden of proof in its assertion that a denial or approval with conditions would be consistent with local needs on the grounds that Hingham has achieved a "safe harbor" pursuant to the statutory minima provisions as set forth at 760 CMR 56.03(1).

The ZBA appealed the DHCD ruling in the SEB matter to the HAC. In an Interlocutory Decision dated November 7, 2013, the HAC concluded that "Hingham had not achieved the 10% housing unit minimum at the time of [SEB's] application, and we affirm DHCD's ... finding that 'the Board has not met the burden of proof ... that Hingham has achieved a 'safe harbor' ... See 760 CMR 56.03(1)(a)." The matter was remanded to the ZBA for further proceedings. On or about July 28, 2014, the ZBA issued a decision granting a comprehensive permit with conditions to SEB and preserving the ZBA's position that Hingham has achieved its 10% safe harbor.

On or about August 15, 2014, SEB filed an Appeal of Comprehensive Permit with Conditions with the HAC. That proceeding is still pending. Accordingly, pursuant to 760 CMR 56.03(8)(c), "[a]ny appeal to the courts of the Committee's ruling shall not be taken until after the Board has completed its hearing and the Committee has rendered a decision on any subsequent appeal." Since the SEB matter is still pending with the HAC, no appeal to the courts of the HAC's Interlocutory Decision has yet been taken. The ZBA reserves its rights to appeal the HAC's Interlocutory Decision in the SEB matter.

On or about May 12, 2016, the ZBA notified River Stone, LLC ("River Stone") that pursuant to 760 CMR 56.03(8)(a) the ZBA considered that in connection with its Application a denial of the permit or the imposition of conditions or requirements would be consistent with local needs on the grounds that the Statutory Minima as defined at 760 CMR 56.03(1) had been satisfied. By letter dated June 16, 2016, DHCD found that the Board had not met the burden of proof in its assertion that a denial or approval with conditions would be consistent with local needs on the grounds that Hingham has achieved a "safe harbor" pursuant to the statutory minima provisions as set forth at 760 CMR 56.03(1).

The ZBA appealed the DHCD ruling in the River Stone matter to the HAC. The Town is awaiting an Interlocutory Decision from the HAC. The ZBA reserves its rights to appeal the HAC's Interlocutory Decision in the River Stone matter.

DISCUSSION OF STATUTORY MINIMA

From the beginning, Linden Ponds was a "rental" project. As such, 100% of its units should be included in the Town's SHI.

The Site Approval Letter for Linden Ponds was Based on Rentals

One of the first steps in the Chapter 40B process, the Site Approval Letter, clearly established that the Linden Ponds project was a rental project. See Exhibit D. The Site Approval Letter was "a necessary preliminary step" in the Chapter 40B application and review process. See also 760 CMR 31.01(2). On its face, the Site Approval Letter is expressly issued "[u]nder the NEF Program for **rental housing**." Exhibit D, at p. 2 (emphasis added). The Site Approval Letter analyzes and reviews the Linden Ponds project by making specific calculations utilizing "**rent**" and "proposed market **rents**" and "imputed **rents**." Exhibit D, pp. 1 – 2. The Site Approval Letter requires that Erickson provide NEF and the Town of Hingham with "annual monitoring" reports to confirm that "25% of the units continue to meet the household income and **rent test** to comply with the comprehensive permit." Exhibit D, p. 2 (emphasis added). There is no ambiguity that NEF classified Linden Ponds as a rental project.

According to DHCD regulations effective August 31, 2001, "Fundability shall be established by a submission of a written determination of Project Eligibility (Site Approval) by a subsidizing agency." 760 CMR 31.01(2); Exhibit E. Specifically, the regulations require that the Site Approval Letter "include . . . the number and type (**ownership or rental**) of housing units proposed." 760 CMR 31.01(2)(a)3 (emphasis added). Therefore, Fleet Bank's determination to proceed with Linden Ponds "[u]nder the NEF Program for rental housing" established the mandatory framework within which the Hingham ZBA was required to proceed under DHCD's regulations for issuance of the comprehensive permit. The NEF determination was an "agency" decision entitled to deference.

Further, DHCD's regulations specifically addressed the consequences of possible funding changes: "A change in the program under which the applicant plans to receive financing shall require a new determination . . ." 760 CMR 31.01(4); Exhibit E. Thus, if Erickson, NEF, or even DHCD had determined that funding for Linden Ponds should not proceed under NEF's program for rental housing, but instead should proceed under a different program, then a new Site Approval Letter would have been required.

DHCD and HAC strictly prohibit zoning boards from interfering with determinations made by subsidizing agencies such as NEF. "Zoning boards of appeals may not under any circumstances impose conditions in a comprehensive permit that impinge on the regulatory responsibilities of the subsidizing agency. Accordingly, ZBAs should not impose any conditions that specify how cost certification, project monitoring or the sale or rental of affordable units is to be performed, or by whom those tasks will be performed during the period the subsidizing agency retains regulatory oversight." Attitash Views v. Amesbury Zoning Board of Appeals,

HAC No. 06-17, slip op. at 7 (October 15, 2007), aff'd, Zoning Board of Appeals of Amesbury v. HAC, 457 Mass. 748 (2010). (quoting from DHCD Guidelines).

ZBA Communications with DHCD Confirm the Units As Rentals

According to DHCD's guidelines that were applicable to the Linden Ponds Chapter 40B application when its Comprehensive Permit was approved in 2001, all rental units in an approved Chapter 40B project are to be counted in the SHI. See Chapter 40B Subsidized Housing Inventory 2001 Notes to Accompany DHCD's Chapter 40B Subsidized Housing Inventory, Exhibit F. On January 31, 2001, the administrator of the ZBA spoke with a representative of DHCD concerning the counting of the Linden Ponds units in the SHI. See Exhibit G. This discussion was soon after the issuance of the Site Approval Letter. According to the memo written at the time by the ZBA administrator, DHCD explained that "100% of the rental units can be included in the [SHI]". Exhibit G. The memo further described the reasoning of DHCD at the time, "He explained that the state in effect gives a bonus to towns to get them to accept rental developments." Exhibit G.

A few months later, the ZBA's representative also specifically communicated with DHCD as to whether the Linden Ponds units would be considered "rental". On March 19, 2001, the Hingham ZBA, through its consultant Michael Jacobs, sent a fax to Catherine Racer, Deputy Director for Private Housing at DHCD. See Exhibit H.

The first page of the March 19, 2001[2], fax consists of a cover page that identifies it as "RE: 40B Clarification" and states in the COMMENT line, "I am transmitting a clarification letter for Erickson Retirement Communities comprehensive permit in Hingham." The first sentence of the letter makes its purpose clear: "I am writing on behalf of the Town of Hingham Zoning Board of Appeals for a clarification concerning whether and **how a proposed comprehensive permit project will be counted in the town's subsidized housing inventory**." (emphasis added) See Exhibit H, p. 2. The letter explains: "There are some unique aspects of the project which have led the ZBA to request a clarification concerning general eligibility under 40B as well as the **method in which units would be counted as affordable**." (emphasis added) Id. The Hingham ZBA's letter of March 19, 2001, specifically asks the question that underlies this issue: "Will a project with an entrance fee **count as a rental project in which all of the units would be included in the town's Subsidized Housing Inventory?**" (emphasis added) Id. at p. 3.

DHCD answered that very question. In a letter dated June 14, 2001, from DHCD's Acting Director to Michael Jacobs, the response begins by thanking Mr. Jacobs for his participation in numerous discussions with DHCD: "Thank you for your correspondence and your participation in **several telephone discussions with Department staff** regarding the Erickson Retirement Community project proposed for a site in Hingham." (emphasis added)

[2] The date listed on the fax cover sheet is "Sept 27, 2000", however the fax cover sheet is attached to the letter dated March 19, 2001 and the fax tag lines at the top of the three page document all reflect a fax date of "Mar. 26 2001". Therefore, it appears that the fax cover sheet is misdated and accompanied the March 26, 2001 letter.

See Exhibit I, p. 1. The response letter continues: "On behalf of the Hingham Zoning Board of Appeals, you have asked the Department to consider the proposed project while providing answers to four questions. . ." Id. DHCD's response letter then specifically answers the very question that the Hingham ZBA had posed concerning whether the units would be counted as rentals. "Will a project with an entrance fee count as a **rental project** in which **all of the units would be included in the town's Subsidized Housing Inventory**? **All units in a rental project can be included in the state Subsidized Housing Inventory** if the project meets the state's 40B requirements. . ." (emphasis added) Id. at p. 2.

On September 11, 2001, the Hingham ZBA proceeded to approve the Linden Ponds project. At that time, the ZBA understood that all of Linden Ponds rental units were to be included in the SHI.

The Regulatory Agreement Confirms the Rental Nature of the Units

The Hingham ZBA decision specifically describes the Linden Ponds project, in the first paragraph on the first page of the permit decision, as comprised of "rental apartments".[3] The ZBA's determination comports with the terms of the Site Approval Letter and is consistent with DHCD's June 14, 2001, response letter. Likewise, the draft Regulatory Agreement, which was attached to and adopted by the Hingham ZBA permit decision, was written and approved for a rental project. See Exhibit J.

More specifically, the draft Regulatory Agreement defines the term "Monthly Payment" to mean "monthly payments comprised of a **rental** component and fees for utilities, food and supportive services." (emphasis added) See Exhibit J, at exhibit E, p. 1. The Regulatory Agreement, at Paragraph 2, defines "**Monthly Rent** and Services Fee" and, at Paragraph 3, sets out conditions applicable to the Dividend Limitation in the event that "all Units in the Project have not been **rented** as of the date [of certain financial calculations]." There is no doubt or ambiguity that as of September 18, 2001,[4] the date the Hingham ZBA Comprehensive Permit was filed with the Hingham Town Clerk, all participants in the process understood that the Linden Ponds units were rentals.[5]

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[3] The exact language from the ZBA's comprehensive permit decision describes Linden Ponds as "a continuing care retirement community pursuant to MGL Chapter 93, Section 76 comprised of [1,750] rental apartments with amenities and services for the elderly, . . ." Exhibit J, at p. 1. Substantially the same description appears again on the second page of the permit decision.

[4] See Exhibit J, p. 1, for the filing stamp from the Hingham Town Clerk.

[5] The Regulatory Agreement as executed on September 15, 2003 by Hingham Campus, LLC ("Developer"), Fleet National Bank ("member bank" of FHLBB), and Citizens' Housing and Planning Association ("CHAPA", the "Monitoring Agent") includes all of the "rental" language that was contained in the draft Regulatory Agreement. See Exhibit K.

The Town has Consistently Maintained Its Position

The ZBA has consistently asserted that the Town of Hingham has exceeded the 10% threshold for SHI and yet the ZBA has continued to approve numerous Chapter 40B projects. The Town of Hingham shares DHCD's goal of expanding the stock of affordable housing. The Town seeks nothing more than a lawful and accurate count of its SHI.

Chapter 40B defines "consistent with local needs" in such a manner as to allow a zoning board to deny or impose conditions or requirements on a comprehensive permit where ten (10%) percent of a town's existing housing is deemed affordable as reflected in the SHI. M.G.L. c. 40B, § 20 and 760 CMR 56.00, et seq. "To the extent that a city or town does not have an adequate supply of affordable housing . . . its local autonomy in zoning matters is curtailed. Once its obligation is met, the override power delegated to HAC is extinguished." Zoning Board of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811, 824 (2002).

DHCD is the state governmental agency responsible for creating and maintaining the SHI for the Commonwealth of Massachusetts, which tracks the number of affordable housing units in each city and town in Massachusetts. The SHI is not a formal or final determination by the agency but, rather, carries only a presumption of correctness, which may be rebutted in any later proceedings before the Housing Appeals Committee ("HAC"). 760 C.M.R. 56.03(3)(a); Zoning Board of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811, 826 n. 29 (2002)("the regulations promulgated by the [DHCD] provide only that there is a rebuttable presumption that the inventory contains an accurate count").

The May 2016 SHI sent to Hingham by DHCD stated that only 246 Linden Ponds units are counted in the SHI, which is only approximately 25% of the units at Linden Ponds. This gives Hingham a count of 8.49% affordable housing. See Exhibit A. The evidence presented and attached hereto rebuts DHCD's count that includes only 25% of the units at Linden Ponds which have received building permits; the ZBA's evidence shows that 100% of the units at Linden Ponds should be included on the SHI. Thus, 985 rental units that have received building permits at Linden Ponds should be counted as affordable, which gives Hingham 16.85% affordable housing. *See* Chart A on page 2.

Upon approval of the project and the issuance of the building permits, the Town requested that, in accordance with DHCD's own written guidelines, all of the project's rental units should be counted towards the Town's SHI. Despite DHCD's own written guidelines counting all rental units toward the Town's SHI when twenty-five (25%) percent of those units are affordable, the DHCD informed the Town in a letter dated November 16, 2005, that it had come up with a new method for counting the units at Linden Ponds and that it would only count twenty-five (25%) percent of the units in the project which had received building permits toward the Town's SHI. A copy of the November 16, 2005 letter from DHCD is attached hereto as Exhibit L (the "2005 Letter").

Hingham has consistently maintained the position that it has met the 10% affordable housing requirement. In 2006, the Town of Hingham and the ZBA attempted to obtain judicial confirmation of their position by seeking a declaratory judgment and a writ of mandamus against DHCD, which would have invalidated DHCD's conclusion that only twenty-five per cent of the units at Linden Ponds count toward Hingham's SHI. However, DHCD responded with a motion to dismiss based on Hingham's failure to exhaust its administrative remedies. The Superior Court, and ultimately the Supreme Judicial Court, dismissed Hingham's complaint, concluding that "the town is challenging a nonfinal administrative ruling." Hingham v. Department of Housing & Community Development, 451 Mass. 501, 505 (2008). The SJC specifically found that "[DHCD]'s letter dated November 16, 2005, informing the town that it would only count twenty-five per cent of the Linden Ponds units toward the town's SHI, is not formally binding on the HAC." Id. at 505-506.

Consistent with the Town of Hingham's position that 100% of the units at Linden Ponds should be counted in the Town's SHI, the ZBA has continued to keep applicants on notice that the Town has met the 10% requirement. Indeed, it has been the ZBA's ongoing practice to reference its position on the Town's SHI in its decisions concerning applications filed under Chapter 40B. True and accurate copies of the first few pages of ZBA Decisions from 2008, 2009, 2011 and 2014 are attached hereto as Exhibit M. Even though the ZBA has maintained its position that the Town of Hingham has met or exceeded the requisite 10% threshold, the Town has continued to move forward with affordable housing projects because it is dedicated to bringing affordable housing into Hingham in a manner that is consistent with Chapter 40B.[6]

Linden Ponds Expands Affordable Housing in Hingham

Hingham Campus, LLC is the developer of Linden Ponds, a continuing care retirement community ("CCRC") serving low and moderate income senior citizens. The Hingham ZBA issued the comprehensive permit for Linden Ponds on September 11, 2001 ("Comprehensive Permit"). A true and accurate copy of the Comprehensive Permit for Hingham Campus/Erickson Retirement Communities/Linden Ponds is attached hereto as Exhibit J. At the time Linden Ponds was applying for the Comprehensive Permit, the ZBA was aware that the percent of low and moderate income residents in Hingham was low. Id. at p. 4 (The Comprehensive Permit states that Hingham "has only between (2%) percent and three (3%) percent of its available housing stock affordable to low or moderate income persons and families"). After months of public hearings on the application and multiple deliberation sessions, the ZBA determined that Linden Ponds would bring more affordable housing into Hingham as all of the criteria necessary for the grant of a comprehensive permit existed. Exhibit J, p. 1-2.

The ZBA noted in the Comprehensive Permit that the project would not have been permitted under the provisions of the Hingham Zoning By-Laws. Exhibit J, p. 3. The project as

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[6] "Even if a municipality meets its statutory minimum, the local board of appeals may, in its discretion, grant comprehensive permits." Hingham v. Department of Housing & Community Development, supra, 451 Mass. at 504 n.5. Indeed, in one project in 2016, the ZBA (while not waiving and reserving its rights) and the applicant mutually withdrew their 10% letters upon a vote of approval of the comprehensive permit for the project.

designed would exceed the allowed height of new construction. Id. Further, such large-scale residential developments are not permitted in Hingham. Id. The ZBA also found that "had the Project been proposed under a request for a Variance, it is very unlikely that a Variance would be granted." Id.

As stated in the Comprehensive Permit, the Hingham Zoning Board of Appeals was guided by and adhered to the "provisions of Chapter 40B, the regulations promulgated pursuant thereto, and the guidance of the decisions of the Housing Appeals Committee and the Courts of the Commonwealth" as they existed at the time the Comprehensive Permit was issued, to bring more affordable housing into the Town. Id. The Comprehensive Permit decision went through a detailed analysis of the law as it existed at the time the permit was issued and states that the project met the requirements of Chapter 40B and its regulations. Id.

The ZBA reviewed the relevant law in 2001 to determine that Linden Ponds would bring affordable housing into Hingham. M.G.L. c. 40B, § 20 defined "Low or moderate income housing" in pertinent part as "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization."[7] In 2001, the regulations which DHCD promulgated pursuant to Chapter 40B were codified at 760 CMR 31.01, et seq.[8] The regulation for establishing affordable housing which may be counted towards the SHI was 760 CMR 31.04 which stated in pertinent part:

> (1) Housing Unit Minimum. For purposes of calculating whether the city or town's low and moderate income housing units exceed 10% of its total housing units, pursuant to M.G.L. c. 40B, § 20:
>
> > (a) . . . In examining particular housing developments or units, it shall first be guided by the intent expressed in the regulations governing the program under which the housing is financed (e.g., 760 CMR 45.06 for the Local Initiative Program and 760 CMR 37.10 for the HOP program). It shall also be guided by the latest Department of Housing and Community Development Listing of M.G.L. c. 40B Low or Moderate Income Housing Programs.

A true and accurate copy of 760 CMR 31.04 (Effective 8/31/01) is attached hereto as Exhibit E. Additionally, in 2001, when determining whether units would be counted on the SHI the DHCD used the guidelines that will be discussed in detail below. A true and accurate copy of the

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[7] The definition in the Housing Appeals Committee regulations in 2001, 760 CMR 30.02, was virtually identical and stated in pertinent part: "any units of housing subsidized by federal and/or state government and/or local housing authority under any program to assist the construction or substantial rehabilitation of low or moderate income housing, as defined in the applicable federal or state statute or regulation."

[8] The regulations are now codified at 760 CMR 56.00.

Chapter 40B Subsidized Housing Inventory 2001 Notes to Accompany DHCD's Chapter 40B Subsidized Housing Inventory ("2001 DHCD Guidelines") are attached hereto as Exhibit F.

Pursuant to Chapter 40B, the Regulations and the 2001 DHCD Guidelines Linden Ponds is an Eligible Development for Purposes of the Chapter 40B SHI

In 2001, the DHCD used the following guidelines to determine whether a project is eligible to be included on the SHI:

A. Eligible Development – A PROJECT MUST MEET THE FOLLOWING CRITERIA TO BE ELIGIBLE FOR THE CHAPTER 40B SUBSIDIZED HOUSING INVENTORY:

(1) It has been approved or is approvable by the **federal or state government** under any program to assist the construction or substantial rehabilitation of housing which is **affordable to people or families with incomes no higher than 80% of the median income** for the MSA, PMSA, or the non-metropolitan county in which the unit is located, (see, e.g., 42 U.S.C. § 5302(a)(20))

(2) 25% or more of the units in the development,[9] are affordable, as defined above, and subject to **use restrictions or re-sale controls to preserve its affordability as follows:**

(a) **for thirty years or longer** from the date of subsidy approval or construction for new construction, (new units occupied before Oct. 1, 2001 can have a 15-year deed restriction to qualify for the inventory)

(b) **for fifteen years or longer** from the date of subsidy approval or completion for substantial rehabilitation, (rehabilitated units occupied before Oct. 1, 2001 can have a 5-year deed restriction to qualify for the inventory)

(3) It is subject to, or will be subject to **a Regulatory Agreement** or the equivalent between the developer and the subsidizing agency which adequately specifies material provisions for affordability, monitoring and enforcement.

(4) It is subject to or will be subject to an **Affirmative Fair Marketing Plan** approved by the subsidizing agency.

(emphasis added) Exhibit F. To be sure that Linden Ponds would actually bring affordable housing into the Town, the ZBA made sure that the project complied with these requirements of the 2001 DHCD Guidelines and included the following requirements in the Comprehensive

[9] Alternatively, 20% of the units may be set-aside for those with incomes equal to or less than 50% of the median income.

Permit as will be discussed in detail below: (1) Linden Ponds must be approved by a federal government program and qualified as affordable housing pursuant to Chapter 40B and its regulations, (2) more than 25% of the units at Linden Ponds must be affordable in perpetuity, (3) Linden Ponds would be subject to a Regulatory Agreement and (4) Linden Ponds would be subject to an Affirmative Fair Marketing Plan.

Linden Ponds was Approved by a Federal Government Program

At the time the Comprehensive Permit was issued, M.G.L. c. 40B, § 20 defined "Low or moderate income housing" in pertinent part as "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization." DHCD's regulations stated in pertinent part: "In examining particular housing developments or units, [DHCD] shall first be guided by the intent expressed in the regulations governing the program under which the housing is financed (e.g., 760 CMR 45.06 for the Local Initiative Program and 760 CMR 37.10 for the HOP program). It shall also be guided by the latest Department of Housing and Community Development Listing of M.G.L. c. 40B Low or Moderate Income Housing Programs." Exhibit E (760 CMR 31.04(1)(a)). Additionally, the DHCD 2001 Guidelines state that the first criteria that the project must meet is to be "approved or is approvable by the federal or state government under any program to assist the construction or substantial rehabilitation of housing which is affordable to people or families with incomes no higher than 80% of the median income for the MSA, PMSA, or the non-metropolitan county in which the unit is located, (see, e.g., 42 U.S.C. § 5302(a)(20))." Exhibit F, p. 2.

The 2001 DHCD Guidelines explain: "As a guide for the public, DHCD publishes a listing of Chapter 40B Low-or Moderate-Income Housing Programs, which lists programs that normally would qualify under [Chapter 40B]." Exhibit F, p. 1. This "Listing of Chapter 40B Eligible Housing Programs" is attached to the 2001 DHCD Guidelines as Appendix A. The regulations specifically state that the DHCD shall be guided by this listing when determining whether a project should be included on the SHI. 760 CMR 31.04(1)(a). This listing of Chapter 40B Eligible Housing Programs includes under the heading "Federal Programs" the "FHLB New England Fund (units will count if they meet affordability standards)" ("NEF"). Exhibit F, Appendix A, p. 6. Linden Ponds was funded under this program. Exhibit J, p. 5.

Additionally, to make sure Linden Ponds was affordable, the ZBA relied upon the guidance of the HAC in Stuborn Ltd. Partnership v. Barnstable Board of Appeals, HAC No. 98-01. The ZBA stated in the Comprehensive Permit: "In Stuborn the HAC noted that when a local zoning board of appeals is considering Chapter 40B projects funded under [NEF] the local board is "empowered to shape individual developments to fit their particular circumstances" as the NEF projects do not necessarily adhere to a Federal or State subsidized housing development program with its attendant panoply of regulations, requirements, and restrictions." Exhibit J, p. 4. The ZBA, therefore, used the guidance of Stuborn to include conditions in the Comprehensive Permit that would ensure that Linden Ponds would bring more affordable housing into Hingham.

First, the Hingham ZBA included provisions in the Comprehensive Permit to require long-term affordability as all affordable units are required to remain affordable in perpetuity. Exhibit J, p. 10. Second, the ZBA required the developer's profits to be limited by the Regulatory Agreement to "not exceed ten percent (10%) of the Imputed Equity per year, as determined from audited financial statements provided to the member bank and the Monitoring Agent." A true and accurate copy of the Regulatory Agreement is attached hereto as Exhibit K, p. 3. Additionally, the Comprehensive Permit specifically states that "land shall be owned by the Applicant (which, by signing the Regulatory Agreement is deemed a limited dividend entity) and that the facility shall be operated by a second entity, Hingham Village LLC, a 501(c)(3) non-profit entity." Exhibit J. Third, the ZBA required long-term compliance with the Comprehensive Permit requirements by requiring a monitoring services agreement to be executed by the developer with Citizens Housing and Planning Association ("CHAPA") which is exactly what was done in Stuborn to make sure the requirements of Chapter 40B and its regulations were met.

The ZBA also proactively addressed the Linden Ponds entrance deposit in the Comprehensive Permit and Regulatory Agreement. The range for entrance deposits is $142,000 for the smallest studio apartment units to $360,000 for the largest two-bedroom apartment units. Exhibit J, p. 6. This entrance deposit is fully refundable, without interest, upon termination of the residency. Exhibit J, p. 3. However, in the event that a resident becomes ill or requires assisted living or skilled nursing services, the entrance deposit may be applied towards the payment of those services. Id. Additionally, the resident would continue to receive those assisted living or skilled nursing services even if the entrance deposit funds were depleted. Id.

In the Comprehensive Permit the ZBA stated its concern that the requirement of an entrance deposit in the amounts established by the Applicant might disqualify those retired persons/families who have sufficient income to pay the fees for housing and the amenities and services offered by the project, but who have insufficient assets for the entrance deposit. Therefore, the ZBA imposed two conditions in the Comprehensive Permit to overcome the cost of the entrance deposit. First, the ZBA imposed a condition that the Applicant establish a fund to be offered to those income-eligible retirees who lack sufficient funds for the entrance deposit. The fund in aggregate "shall initially be Five Million Six Hundred Thousand ($5,600,000.00) Dollars and shall be adjusted on an annual basis to reflect the same percentage change as has occurred in the past year the Monthly Rent and Services Fee for the Affordable Units (as defined in the Regulatory Agreement)." Exhibit J, p. 11; See also Regulatory Agreement Exhibit K, p. 9, para. 13. As of August 2015, Linden Ponds had awarded $2,466,531 of these funds to qualifying residents to pay their entrance deposits. A true and accurate copy of the CHAPA Report on Linden Ponds dated August 6, 2015 (without exhibits)[10] is attached hereto as Exhibit N, p 2.

Second, to incorporate the cost of the entrance deposit into the affordability analysis, the ZBA required that the "lost opportunity cost" of the entrance deposit be computed and included

[10] If any exhibits are required, they will be provided.

in the Income-Based eligibility standard for Linden Ponds. Exhibit J, p. 9. Therefore, 5% of the entrance deposit is calculated and added to the computation of the monthly rental fee for individuals who are considered to be low or moderate income for purposes of the income test.

In addition to the refundable entrance deposit, the residents of Linden Ponds pay on a monthly basis a combined rental and service fee. Exhibit J, p. 2. Included in the monthly fee is rent for the apartment, one meal a day, cable television, heat and air conditioning, electricity, water, septic, appliance maintenance and repair, trash removal, apartment maintenance and repair, complimentary shuttle service, snow removal, professional landscaping and lawn care, front desk services, security, leisure facilities, and social and community activities. Id. Therefore, the monthly fee is providing the residents of Linden Ponds with far more than most affordable rental housing which would only include the right to occupy the rental unit.[11]

The Regulatory Agreement requires 27.7% of the apartments at Linden Ponds to be priced affordably. Exhibit K. As explained previously, the Comprehensive Permit requires 5% of the entrance deposit to be added to the monthly rent to determine affordability. "CHAPA has reviewed this methodology for determining the affordable prices and finds it acceptable." A true and accurate copy of the 2004 CHAPA Interim Report on Linden Ponds at Hingham is attached hereto as Exhibit O[12]. Additionally, the Comprehensive Permit and Regulatory agreement requires Linden Ponds to make sure that the 27.7% units are rented to "persons/families with incomes no higher than eighty (80%) percent of the HUD-determined median income for the PMSA applicable to the Project." Exhibit J, p. 9.

CHAPA was retained to monitor compliance with the regulatory agreement for Linden Ponds. Exhibit N, p. 1. "We have been in regular communication with Linden Ponds staff and have conducted annual site visits to ensure compliance with the various aspects of the regulatory agreement." Id. "According to the Regulatory Agreement, at least 27.7% of the apartments must be reserved for occupants who earn no more than 80% of area median income." Id. at p. 2. "CHAPA has been conducting site visits and income verification reviews at Linden Ponds since 2004...To date, the total number of certified households that currently reside at Linden Ponds is 287..." Id. "As a result, 30.1% of the residents have been certified as income eligible to date." Id.[13]

More than 25% of the Units at Linden Ponds Are Affordable

The second criteria of the 2001 DHCD Guidelines for determining whether a project is affordable and should be included on the SHI states in pertinent part "**25% or more of the units in the development, are affordable**, as defined above, and subject to **use restrictions or re-sale**

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[11] Although the subject of deducting the additional services and amenities from the monthly fee to determine the cost of rent at Linden Ponds received considerable attention during the hearings on the Comprehensive Permit, it was determined that the monthly fee was affordable even without deducting the cost of the services and amenities.
[12] The last two pages of Exhibit O have been redacted for personal information.
[13] The SHI should include all income eligible units. The ZBA would expect that DHCD will include them irrespective of the 10% issue.

controls to preserve its affordability as follows: (a) for thirty years or longer from the date of subsidy approval or construction for new construction, (new units occupied before Oct. 1, 2001 can have a 15-year deed restriction to qualify for the inventory). (Emphasis added). Exhibit F, p. 2.

Linden Ponds meets the requirement that 25% or more of the units in the development are affordable. The Comprehensive Permit requires 27.7% of the units to be affordable and CHAPA has confirmed that this requirement has been continually met by Linden Ponds. Exhibit N. Additionally, Linden Ponds meets the requirement that the units be "subject to use restrictions or re-sale controls to preserve its affordability" for thirty years. The Comprehensive Permit explains that the 27.7% of the units are required to remain affordable in perpetuity. Exhibit J, p. 10; See also Regulatory Agreement, Exhibit K p. 6, para. 6(h).

Linden Ponds is Subject to a Regulatory Agreement

The third criteria of the 2001 DHCD Guidelines is that the project must be "subject to, or will be subject to a Regulatory Agreement or the equivalent between the developer and the subsidizing agency which adequately specifies material provisions for affordability, monitoring and enforcement." Exhibit F.

The ZBA took great care in promulgating a Regulatory Agreement with Linden Ponds that would strictly adhere to the income limits required in Chapter 40B and the DHCD regulations. See Exhibit K. The Comprehensive Permit specifically states: "The approval of the Comprehensive Permit is conditioned upon the creation and execution of a Regulatory Agreement." Exhibit J, p. 10. Additionally, the Comprehensive Permit required that the Applicant "make a report to the Board within 90 days of the date of this decision that it has met with the Monitoring Agent contemplated by the Regulatory Agreement, agreed to a fee for the Monitoring Agent and reviewed with the Monitoring Agent the form of the Regulatory Agreement for purposes of working out any details remaining so that it is ready for execution by the Town, the Monitoring Agent and the Applicant." Id. Linden Ponds adhered to this requirement and entered into a Regulatory Agreement with Hingham and the monitoring agent, CHAPA, as has been previously discussed. Exhibit K. CHAPA has been continually monitoring Linden Ponds since 2001, originally under the supervision of Aaron Gornstein, the Executive Director of CHAPA. Exhibits N and O.

Linden Ponds is subject to an Affirmative Fair Marketing Plan

The fourth criteria of the 2001 DHCD Guidelines is that the project "is subject to or will be subject to an Affirmative Fair Marketing Plan approved by the subsidizing agency." Exhibit F, p. 2. The Comprehensive Permit was conditioned "upon the existence of an Affirmative Marketing Plan which shall be incorporated in the Regulatory Agreement." Exhibit J, p. 10. The Regulatory Agreement requires Linden Ponds to "affirmatively market at its own expense the Affordable Units to minority households through direct outreach efforts to local churches, social service and civic organization as well as local and area-wide newsprint media where minority

households are most likely to be contacted using an affirmative marketing plan satisfactory to the Monitoring Agent and the Municipality. . . The Developer agrees to maintain for at least five (5) years following the rental of the Affordable Units, a record of all newspaper ads, outreach letters, translations, leaflets and any other outreach efforts, which may be inspected by the member bank or the Municipality." Exhibit K, p. 4, para. 4.

Additionally, at the request of DHCD, Linden Ponds "implemented changes to its marketing advertisements beginning in 2008." Exhibit N, p. 3. Linden Ponds and "DHCD worked together to develop marketing ads and language regarding opportunities for low and moderate income households at Linden Ponds. These revised ads have been placed in the Hingham Journal, the Patriot Ledger, Portuguese Times, Sampan, El Mundo, Bay State Banner, and the Greater Boston Lesbian Gay Bisexual and Transgender (LGBT) Quarterly newsletter." Id.

All Units at Linden Ponds Should Be Counted on the SHI

DHCD's 2001 Guidelines state in pertinent part:

B. Counting of Units

(1) Units in Eligible Developments – Unless the regulations governing the subsidy program provide otherwise, housing in an eligible development is counted as follows:

(a) Rental Units – **All rental housing units are counted** as low-or moderate-income housing (**i.e., included in this inventory**).
(b) Ownership Units – Only those ownership units which are affordable and restricted, as defined in § A(1) and A(2) above, are counted as subsidized low-or moderate-income housing and included in this inventory. (Emphasis added.)

At the time the Comprehensive Permit was issued, the units at Linden Ponds were properly characterized as rental units not ownership units. The Comprehensive Permit granted the applicant the right to build "one thousand seven hundred fifty (1,750) **rental apartments** with amenities and services for the elderly." (emphasis added) Exhibit J, p. 2. The residents of these rental apartments pay a refundable entrance deposit and on a monthly basis pay a combined rental and service fee. Id. Included in the monthly fee is rent for the apartment, one meal a day, cable television, heat and air conditioning, electricity, water, septic, appliance maintenance and repair, trash removal, apartment maintenance and repair, complimentary shuttle service, snow removal, professional landscaping and lawn care, front desk services, security, leisure facilities, and social and community activities. Exhibit J, p. 2.

The arrangement is clearly that of rental and not ownership as the individual paying the rental fee does not record a deed with the registry of deeds. When residents of Linden Ponds obtain their units there is no real estate transaction, no buying, and no purchase because they do

not own the units. The owner of the property is Hingham Campus, LLC. Linden Ponds, Inc. holds a master lease. There is no record of any units being deeded out from Linden Ponds or Hingham Campus, LLC to any of the residents of Linden Ponds. Because none of the residents at Linden Ponds have a deed for their rental units there is no ownership, only rental of the units. Likewise, not a single resident at Linden Ponds has secured financing through a mortgage on a Linden Ponds unit; no resident at Linden Ponds has a mortgage recorded at the Plymouth County Registry of Deeds against the unit where he or she resides.

Linden Ponds residents do not own their units or any of the common areas, unlike a condominium where the residents own their units and a percentage of undivided interest in the common areas. The Linden Ponds Residence Care Agreement states on page 18: "Resident acknowledges that, except as expressly set forth in this Agreement, the rights and privileges granted by this Agreement **do not include any right, title or interest in** any part of the personal property or **real property** – including land, buildings and improvements – owned, leased, or administered by LINDEN PONDS. Resident's rights are limited to the rights provided in this Agreement for services and **the occupancy of the Living Units.**" (Emphasis Added). A true and accurate copy of the Linden Ponds Residence and Care Agreement dated September 2009 is attached hereto as Exhibit P.

Additionally, none of the residents at Linden Ponds pay real estate taxes. Property tax bills are issued to the owner of record as shown at the Plymouth County Registry of Deeds. None of the residents at Linden Ponds have a recorded deed for the property at Linden Ponds and, therefore, no Linden Ponds resident receives a property tax bill from the Town of Hingham. The Hingham Assessor's Office lists Hingham Campus, LLC as the official owner of the property at 300 Linden Ponds Way. See Assessor's Card attached as Exhibit Q. Therefore, Hingham Campus, LLC is the recipient of Hingham's property tax bills and is responsible for paying all applicable property taxes.

None of the residents at Linden Ponds have the right to sell the units because they do not own any interest in real property that may be sold. The term of the rental is limited to when a resident moves out or passes away. The entrance deposit is 100% refundable when the resident vacates the unit and someone else reoccupies that unit. The word deposit does not imply ownership. A deposit only gives the right to use the property. If the residents at Linden Ponds had any ownership rights in their units, those rights would be subject to the laws of testate and intestate succession. This would give the heirs of Linden Ponds residents rights in Linden Ponds which are in direct contradiction to the project operating documents and could raise estate issues.

The Linden Ponds Resident Handbook (page 12) requires residents of Linden Ponds to obtain **renter's** insurance. Exhibit P. The insurance companies and Linden Ponds are not requiring owner's policies because the residents of Linden Ponds do not own their units.

Finally, when DHCD used its Guidelines to classify Linden Ponds on the 2005 and 2006 SHI reports it classified the units as "Rental", not ownership. True and accurate copies of the 2005 and 2006 DHCD Subsidized Housing Inventory are attached hereto as Exhibit R. The units

should clearly be classified as rental. Even DHCD has made such "Rental" classification based upon its own regulations and guidelines.

The units at Linden Ponds are rental units and 27.7% of the units are affordable. Therefore, pursuant to the 2001 DHCD Guidelines when 25% of the rental units are affordable: "All rental housing units are counted as low-or moderate-income housing." Therefore, all 985 units at Linden Ponds which have received building permits should be counted towards the SHI for the Town of Hingham.

DHCD's 2005 Newly Created Methodology for Counting 25% of the Units Should Not Be Applied to Linden Ponds

The Supreme Judicial Court has held: "Although courts give the force of law only to formal agency regulations, administrative agencies must abide by their own internally promulgated policies." Commissioner of Revenue v. Baybank Middlesex, 421 Mass. 736, 739 (1996); See Broadway Nat'l Bank of Chelsea v. Commissioner of Corps. & Taxation, 321 Mass. 25, 30 (1947)(interpreting bank excise tax provisions in light of commissioner's prior position, not a recently adopted contrary one.); Biogen IDEC v. Treasurer & Receiver, 454 Mass. 174, 908 N.E.2d 740 (2009) (holding that the current Massachusetts Treasurer is bound by predecessor's "internal policy" for applying the "outstanding credit balance exemption").

The administrative agency is bound to follow these policies regardless of whether the policy "exists pursuant to a formal rule or an informal guideline." Id. at 739-740 (internal citations omitted). The Supreme Judicial Court has further held, where guidelines are promulgated to assist cities and towns regarding how an agency viewed compliance with "certain constitutional and statutory requisites . . . the unexplained deviation from the guidelines . . . may undermine public confidence in the [agency's] integrity and impartiality." Macioci v. Commissioner of Revenue, 386 Mass. 752, 763 (1982)(internal citations omitted).

In Baybank, the taxpayer followed "a valid instruction sheet" which was sent out by the Commissioner of Revenue. 421 Mass. 740. The Court held that the Commissioner of Revenue was bound by the "broad policy" announced in the instruction sheet which the taxpayer followed. Id. The Court held: "We cannot sanction the retroactive application of a change in policy when the department itself made a clear policy statement to the contrary." Id. at 743. Similar to Baybank, the 2001 DHCD Guidelines were sent to all cities and towns as an attachment to the SHI count and represented the official policy of DHCD for counting affordable housing. The DHCD is not free to ignore these guidelines and come up with a different way of counting affordable housing four years after Hingham relied upon those guidelines in issuing the Comprehensive Permit to Linden Ponds.

Despite the 2001 DHCD Guidelines where 100% of the rental units would be counted, the DHCD created a new way of counting the units at Linden Ponds in the 2005 Letter. Exhibit L, p. 2. The new methodology created in the 2005 Letter counts only 25% of the total rental units on the SHI.

The 2005 Letter never addressed the issue of whether the units should be classified as rental or ownership. Exhibit L. The only rational in the 2005 Letter was the blanket statement that "we were concerned that the mandatory entrance deposit coupled with a monthly fee constituted a much greater expense than the affordability standard 30% of 80% of area median income. In addition, asset limits are not used to determine income eligibility." Exhibit L, p. 2. The 2005 Letter found issue with the required entrance deposit without considering the fact that the ZBA required 5% of the entrance deposit to be factored into the analysis of whether the units were affordable or that the entrance deposit was refundable upon termination of the tenancy.

Further, the DHCD did not take into consideration that CHAPA found the methodology of adding 5% of the entrance deposit to the monthly fee a suitable methodology for determining affordability. See Exhibit O. The DHCD also did not take into account all of the other services and amenities that the monthly fee was providing to the residents of Linden Ponds including one meal a day, cable television, heat and air conditioning, electricity, water, septic, appliance maintenance and repair, trash removal, apartment maintenance and repair, complimentary shuttle service, snow removal, professional landscaping and lawn care, front desk services, security, leisure facilities, and social and community activities.

The DHCD stated in the 2005 Letter that "Linden Ponds is the only Continuing Care Retirement Community that has been permitted using a c. 40B Comprehensive Permit." Exhibit L, p. 2. The letter further stated: "This methodology was developed specifically for Linden Ponds as it was a unique model in the 40B context. Should any project sponsor seek a Comprehensive Permit for a CCRC in the future, **this same counting methodology will not necessarily be applied.**" Id. (Emphasis added.).

The Supreme Judicial Court has held: "We cannot sanction the retroactive application of a change in policy when the department itself made a clear policy statement to the contrary." BayBank Middlesex, 421 Mass. 736, 743 (1996); Brookline v. Commissioner of the DEQE, 387 Mass. 372, 379, 439 N.E.2d 792 (1982) ("We recognize, of course, that the application of new principles or standards announced in a decision may be so unfair as to amount to an abuse of discretion"). Additionally, the Court in Baybank stated that letters did not state a policy in any official way. Id. at 741. The 2005 Letter from DHCD in this case was clearly not an official policy of the DHCD; indeed, the letter expressly disclaims that its counting methodology would be binding on any other project. Therefore, the DHCD should not have used this methodology.

The 2001 DHCD Guidelines represented the official policy of the DHCD and it should control in this case. DHCD's actions undermine the stated goals of Chapter 40B which are to encouraging affordable housing while allowing Towns to plan for the development of that housing in a comprehensive manner.

New DHCD Guidelines Promulgated in 2008 are Not Applicable to Linden Ponds

DHCD issued new guidelines in 2008 which create a new methodology for counting affordable units of a continuing care retirement community. This methodology is not the same as the one dictated in the 2001 DHCD Guidelines for apartments or ownership, and is different from the methodology that the DHCD stated in its 2005 Letter in which it decided to count 25% of the units at Linden Ponds. The 2008 Guidelines specifically state: "With respect to provisions of these Guidelines that are new or that expand the applicability of pre-existing guidance, the effective date, unless otherwise specifically stated herein or in the Regulations at 760 CMR 56.00, is **February 22, 2008**." (emphasis added).

"As a general matter, 'all statutes are prospective in their operation, unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of the subject matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations.... It is only statutes regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights, that commonly are treated as operating retroactively, and as applying to pending actions or causes of action.'" Fleet Nat. Bank v. Commissioner of Revenue, 448 Mass. 441, 448-449 (2007), quoting from Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1, 3 (1914). Further, "[t]o the extent that there may be uncertainty about the application of new legislation, it must be resolved against retroactivity." Id. at 449. The 2008 DHCD Guidelines clearly do not express any intent to apply retroactively and in fact specifically state that they apply prospectively from February 22, 2008 forward.

Additionally, the SJC has already upheld the DHCD's selection of the date of filing of the board's comprehensive permit decision as the date for measuring compliance with the statutory minimum of Chapter 40B. Zoning Bd. of Appeals of Canton v. Hous. Appeals Comm., 451 Mass. 158, 161 (2008); Taylor v. Hous. Appeals Comm., 451 Mass. 149, 155-57 (2008). The regulation central in Canton was 760 CMR 31.04(1)(a) ("housing units authorized by a comprehensive permit shall be counted when the comprehensive permit becomes final . . . provided that any housing units, for which building permits have not been issued within one year of the date when the comprehensive permit becomes final, shall no longer be counted until building permits have been issued.")[14] Therefore, the relevant time period for counting eligible units is either at the time the Comprehensive Permit is issued or at the time the building permits are issued. The Comprehensive Permit for Linden Ponds was issued in 2001 and the building permits for the 986 units at Linden Ponds were issued in or before 2006. Therefore, the 2008 Guidelines are not applicable because they were issued long after the Comprehensive Permit or the building permits were issued for all of the units that Hingham contends should be counted on the SHI.

The informal, unannounced methodology in the 2005 Letter from DHCD and the 2008 Guidelines (the first guidelines purporting to change the way in which continuing care retirement

[14] This rule is now codified at 760 CMR 56.03(2)(b)(1).

community units are counted) would, if applied to the Linden Ponds project, affect the Town's substantive rights. According to the SJC in Taylor, the DHCD regulation, 760 CMR 31.04(1)(a), "favors municipalities by giving them greater flexibility to deny applications, particularly as they approached the 10% threshold … because the application(s) that it decides to approve will allow it to satisfy the statutory minimum," rejecting others "without the burden of being overturned on appeal." 451 Mass. at 156. To apply an accounting methodology different from the one upon which the Town relied on when granting the Comprehensive Permit to Linden Ponds would affect the Town's "well-recognized autonomy generally to establish local zoning requirements" and would substantively interfere with its planning ability. 451 Mass. at 157.

Retroactive application of policy or guidelines developed after the ZBA's decision granting the Linden Ponds Comprehensive Permit is not only inconsistent with DHCD's regulation requiring a determination of whether a Town has met the statutory minimum to be made as of the time the decision granting the comprehensive permit was filed, but also gives both an unannounced policy and a guideline added many years later retroactive effect to which it would not be entitled if it were a statute or regulation. The Town reached the statutory minimum when it filed a decision granting a Comprehensive Permit for Linden Ponds in 2001.

CONCLUSION

The Town of Hingham has been committed to bringing more affordable housing into the Town and now has 16.85% affordable housing. Therefore, the Statutory Minima as defined at 760 CMR 56.03(1) has been satisfied as the Town of Hingham's SHI Eligible Housing units exceed 10% of its total housing units pursuant to Chapter 40B. However, it is not necessary for the Applicant to agree or disagree with the ZBA's assertion of the 10% Safe Harbor, nor for DHCD to reach that question in its determination, because, even if it is ultimately determined that the Town has not currently satisfied the 10% Statutory Minima, there is no doubt that the Town has made "Recent Progress Toward the Statutory Minima" and thus currently qualifies for the Recent Progress Safe Harbor. For the foregoing reasons, the ZBA may, consistent with local needs, approve with conditions or deny Broadstone's Application for a comprehensive permit.

Please let me know if you have any questions.

Very truly yours,

Susan C. Murphy
Special Counsel to Town of Hingham

Enclosures

cc: Department of Housing and Community Development
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