

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

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

December 8, 2021

Ms. Sarah Mellish, Chair
Manchester-by-the-Sea Zoning Board of Appeals
10 Central Street
Manchester by-the-Sea, MA 01944

Re: Manchester-by-the-Sea Safe Harbor Decision, SLV School Street LLC., Manchester-by-the-Sea, MA: Certified Housing Production Plan as Defined under 760 CMR 56.03(1).

Dear Ms. Mellish:

The Department of Housing and Community Development (DHCD) is in receipt of a November 23, 2021 letter from Jason R. Talerman, Esq, who serves as counsel to SLV School Street LLC, (Applicant), which has proposed a Chapter 40B project known as SLV School Street in Manchester-by-the-Sea, MA. The Applicant challenges the November 8, 2021 letter by the Manchester by-the-Sea Zoning Board of Appeals (Board), which notified the Applicant that the Board considers the denial of the Applicant's application for a Comprehensive Permit to be consistent with local needs.

The Board claims that the denial is consistent with local needs based on the following assertion: it is entitled to Housing Production Plan (HPP) certification.

Procedural Background: 760 CMR 56.03(8)

Pursuant to 760 CMR 56.03(8), if a Board considers that, in connection with an Application, a denial of the permit or the imposition of conditions or requirements would be consistent with local needs on the grounds that the *Statutory Minima* defined at 760 CMR 56.03(3)(b) or (c) have been satisfied or that one or more of the grounds set forth in 760 CMR 56.03(1) have been met, it must do so according to the following procedures. Within 15 days of the opening of the local hearing for the Comprehensive Permit, the Board shall provide written notice to the Applicant, with a copy to the Department, that it considers that a denial of the permit or the imposition of conditions or requirements would be consistent with local needs, the grounds that it believes have been met, and the factual basis for that position, including any necessary supportive documentation. If the Applicant wishes to challenge the Board's assertion, it must do so by providing written notice to the Department, with a copy to the Board, within 15 days of its receipt of the Board's notice, including any documentation to support its position. The Department shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials.

The Board shall have the burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs, provided, however, that any failure of the Department to issue a timely decision shall be deemed a determination in favor of the municipality. This procedure shall toll the requirement to terminate the hearing within 180 days.

Regulatory background: Certified Housing Production Plan as Defined under 760 CMR 56.03(1)(b) and 56.03(4) (c) and(f):

760 CMR 56.03(1): *A decision by a Board to deny a Comprehensive Permit... shall be upheld if one or more of the following grounds has been met as of the date of the Project's application... (b) the Department has certified the municipality's compliance with the goals of its approved Housing Production Plan, in accordance with 760 CMR 56.03(4).*

760 CMR 56.03(4)(c): *Affordable Housing Goals. The HPP shall address the matters set out in the Department's guidelines, including: 1. a mix of types of housing, consistent with local and regional needs and feasible within the housing market in which they will be situated, including rental, homeownership, and other occupancy arrangements, if any, for families, individuals, persons with special needs, and the elderly; 2. a numerical goal for annual housing production, pursuant to which there is an increase in the municipality's number of SHI Eligible Housing units by at least 0.50% of its total units (as determined in accordance with 760 CMR 56.03(3)(a)) during every calendar year included in the HPP, until the overall percentage exceeds the Statutory Minimum set forth in 760 CMR 56.03(3)(a).*

760 CMR 56.03(4)(f): *Certification of Municipal Compliance. A municipality may request that the Department certify its compliance with an approved HPP if it has increased its number of SHI Eligible Housing units in an amount equal to or greater than its 0.5% production goal for that calendar year. SHI Eligible Housing units shall be counted for the purpose of certification in accordance with the provisions for counting units under the SHI set forth in 760 CMR 56.03(2). Requests for certification may be submitted at any time, and the Department shall determine whether a municipality is in compliance within 30 days of receipt of the municipality's request. If the Department determines the municipality is in compliance with its HPP, the certification shall be deemed effective on the date upon which the municipality achieved its numerical target for the calendar year in question, in accordance with the rules for counting units on the SHI set forth in 760 CMR 56.03(2). A certification shall be in effect for a period of one year from its effective date. If the Department finds that the municipality has increased its number of SHI Eligible Housing units in a calendar year by at least 1.0% of its total housing units, the certification shall be in effect for two years from its effective date.*

Notice Requirements under 760 CMR 56.03(8)

DHCD finds that the Board submitted notice to the Applicant within 15 days of opening the local hearing (October 26, 2021) through its November 8, 2021 letter. DHCD notes copies were sent to DHCD via certified mail and electronic mail. DHCD finds that the Applicant challenged the Board's assertion within the proper timeframe, 15 days from receipt of the Town's notification, through its November 23, 2021 letter. DHCD notes copies were sent by the Board and the Applicant to DHCD via mail and electronic mail. DHCD notes that although the State of Emergency has ended, DHCD continues to request electronic submission of documents.

The Board's Submission

The Board's submission consisted of a November 8, 2021 notification letter asserting the Town's belief that it is entitled to certification of compliance with its HPP, an attached copy of an October 5, 2021 letter addressed to DHCD Undersecretary Jennifer Maddox, and an attached copy of a May 13, 2021 Memorandum of Understanding between the North Shore Community Development Coalition, Inc. (NSCDC), the Manchester Affordable Housing Trust (MAHT), and Powder House Manchester LLC. The letter to Undersecretary Maddox requests that DHCD count all 29 units at the apartment complex known as Powder House Lane (PHL). The October 5, 2021 letter provides an overview of PHL apartments and recent efforts to sustain affordability for low-income tenants, noting that based on NSCDC "surveying" of residents, "18 of the 29 units are occupied by income-qualified, racially

diverse households.” The October 5, 2021 letter also expresses an apparent belief that tenants must be vacated and the units “re-tenanted” in order for the units to be approved under DHCD’s Local Action Units (LAU) guidelines. In concluding the letter, the Town requests that DHCD consider allowing “naturally occurring affordable housing” such as PHL to count on the SHI, “provided the property is restricted, the residents’ incomes are certified, and the property otherwise meets DHCD standards for inclusion.”

The May 13, 2021 MOU details the local donation of funds through MAHT to assist NSCDC with the purchase of PHL. The MOU also denotes “Affordability Agreements” (section 1.2) by which the parties agree to develop and enter into a mutually agreeable affordable housing restriction, to govern affordability for at least 25% of the units, in a form acceptable to DHCD and enforceable by MAHT for a term of 20 years.

The Applicant’s Submission

The Applicant’s submission consisted of a November 23, 2021 formal appeal letter. The Applicant challenges the validity of the Town’s claim of safe harbor. The Applicant points out that the Town’s HPP has not been certified and that the units at PHL cannot count towards certification as they are not currently eligible for inclusion on the SHI. In addition, for the Town to use PHL units for certification, the units would need to be eligible at the date of the filing of the comprehensive permit application, which was September 27, 2021. The Applicant further states that the units are not currently deed restricted with affordability requirements, there is no firm proof of income eligibility (a survey is noted) for current residents, and no Affirmative Fair Housing Marketing (AFHMP) is in place yet.

Findings and Discussion

DHCD finds that the Town does not have a certified HPP as required to assert a safe harbor under 760 CMR 56.03(1)(b). Manchester-by-the-Sea does have an approved Housing Production Plan (HPP) which is valid from February 2, 2021 to February 21, 2026. However, the Town did not request certification of its HPP, and DHCD can only grant Certification of Municipal Compliance (HPP Certification) when the following occurs:

- Housing units affordable to low- and moderate-income households and eligible for inclusion on the SHI have been produced during one calendar year, the same year for which certification is requested, during the initial year of SHI eligibility.¹
- Units must total at least 0.5% of year-round housing units for one-year of certification (11 units for Manchester-by-the-Sea). A total of 1% of year-round housing units are needed for a two-year certification (23 units for Manchester-by-the Sea).
- All units have been produced in accordance with the approved HPP and DHCD’s Guidelines.²

DHCD further finds that even if the Town had requested HPP Certification pursuant to the guidelines, the PHL units are not currently eligible for SHI inclusion at this time and were not SHI eligible on September 27, 2021 when the SLV School Street LLC comprehensive permit application was filed with the Board. Thus, the PHL units are not eligible for HPP Certification and do not provide grounds for the Town’s safe harbor assertion.

An essential component of SHI eligibility under G.L. c. 40B § 20 is the requirement of an eligible state or federal subsidy program.³ Integral to Subsidy program requirements imposed by the Subsidizing Agency,⁴ are

¹ Certification may also be requested up to January 10th of the following year.

² <https://www.mass.gov/files/documents/2017/10/10/guidecomprehensivepermit.pdf> (section II.B), also available at <https://www.mass.gov/doc/housing-production-plan-guidelines/download>.

³ *Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm.*, 385 Mass. 651, 654, 433 N.E.2d 873 (1982).

⁴ Defined at 760 CMR 56.02 (Subsidizing Agency “means any agency of state or federal government that provides a Subsidy for the construction or substantial rehabilitation of Low or Moderate Income Housing. If the Subsidizing Agency is not an

requirements pertaining to income eligibility, allowable housing costs, an affordable Use Restriction, and affirmative fair housing marketing and resident selection. These requirements are incorporated into SHI eligibility criteria under the c. 40B regulations at 56.03(2), which is a non-waivable provision pursuant to 760 CMR 56.08(2), and are set forth in further detail in the G.L. c.40B guidelines (see section II.A). Units that are not otherwise subject to an eligible Subsidy program may obtain eligible Subsidy status through approval under DHCD's Local Initiative Program ("LIP") as "Local Action Units," which is considered a Subsidy under c. 40B regulations and guidelines by way of the technical assistance that is provided through DHCD.⁵

The requirement that units be marketed and made available subject to an AFMHP has also been a longstanding criterion for SHI inclusion. Federal and state housing programs in Massachusetts have historically required affirmative fair housing marketing and resident selection plans (collectively referred to as "AFHMPs") that comply with state and federal fair housing laws for the purpose of promoting and achieving equal housing choice and opportunity and reducing segregation.⁶ AFMHPs generally include affirmative and regional outreach and informational efforts to those who are least likely to know about and apply for the housing, including racial/ethnic minority groups, persons with limited English proficiency, persons with disabilities, and families with children under 18. Application and resident selection provisions must also provide equal access for these and other protected classes in compliance with state and federal fair housing laws, and are therefore subject to Subsidizing Agency approval under DHCD's AFMHP guidelines.⁷ AFMHP requirements, along with other requirements to effectively restrict occupancy to income-eligible households and to ensure affordable housing costs, are also imposed through the Subsidizing Agency's required Use Restriction so that the Subsidizing Agency may monitor and enforce compliance.⁸

Here, the Board has not established an eligible Subsidy program (and consequently the units are not subject to a Use Restriction under such a program), and acknowledges that the units were not affirmatively marketed nor were residents selected pursuant to an AFMHP in accordance with the c. 40B guidelines. While it may be the case that the Town will seek DHCD LIP LAU approval and the units will fulfill these SHI eligibility criteria in the future,⁹ their current SHI ineligibility precludes HPP certification under 760 CMR 56.03(4)(f) and the c. 40B guidelines, section II.B, at this time.

DHCD is hopeful that units at PHL will be eligible for SHI inclusion in the future once the development achieves the eligibility requirements. DHCD applauds the significant investment being made by the Town.

Conclusion

DHCD finds the board has not met its burden of proving satisfaction of the grounds for asserting the certified Housing Production Plan safe harbor as defined under 760 CMR 56.03(1)(b) and 56.03(4). If either the Board or the Applicant wishes to appeal this decision pursuant to 760 CMR 56.03(8), that party shall file an interlocutory

agency of state government, the Department may appoint a state agency to administer some or all of the responsibilities of the Subsidizing Agency with respect to 760 CMR 56.00...").

⁵ See 760 CMR 56.02; c. 40B guidelines, sections I, II.A.1.a, II.A.2.a., and Appendix II.1 for eligible Subsidy program requirements, and section VI for LIP requirements.

⁶ Such plans are also a component of carrying out the U.S. Department of Housing and Urban Development's Affirmatively Furthering Fair Housing mandate under the Fair Housing Act (Title VIII of the Civil Rights of 1968), which HUD has imposed on its funding recipients. See U.S. Department of Housing and Urban Development 2021 Interim Final Rule (IFR), "[Restoring Affirmatively Furthering Fair Housing Definitions and Certifications](#)," ("Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of discrimination and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.").

⁷ Section III of the c. 40B guidelines.

⁸ See Section II.A.1.e of the c. 40B guidelines.

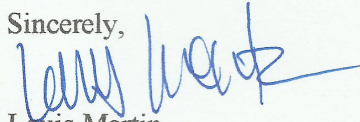
⁹ DHCD has not and does not suggest (nor do its guidelines require) that a Town should seek to displace tenants in order to achieve SHI eligibility of units, but instead that it may seek SHI eligibility upon natural unit turnover when the units are subject to Subsidy program Use Restriction and AFMHP requirements.

appeal with the Housing Appeals Committee (HAC) on an expedited basis, pursuant to 760 CMR 56.05(9)(c) and 56.06(7)(e)(11), within 20 days of its receipt of the decision, with a copy to the other party and to the Department.

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

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

Sincerely,



Louis Martin

Director

Division of Community Services

cc: Jennifer Maddox, Undersecretary, DHCD
Gregory Federspiel, Town Administrator, Manchester-by-the-Sea
Jeffery Bobmer-Turner, Chairman, Board of Selectman, Manchester-by-the-Sea
Jason R. Talerman, Esq., Meade, Talerman & Costa