

TO: Town Administrator
FR: Michael Goldsmith, RRK&H
DT: 01-08-2024
RE: PHP RFP Committee Questions December 8, 2023

Please see comments on the issues outlined in the December 8, 2023 (draft) memo to the Select Board in connection with the proposed RFP for the Peaked Hill Affordable and Community Housing project.

Issue 1: Total Number of Rental Units

Option 1: *Limiting the rental portion of the project to nine units.* We understand that a total of 13.5 acres of the approximately 16.67 acres of contiguous town land at Peaked Hill is planned to be devoted to rental housing. If so, Section 6.10(A)(2) allows for two dwelling units of affordable housing for each three acres. Section 6.10(B)(3) provides that the “[b]uildings may be clustered provided the open space is not further developed” By allotting 1.5 acres per dwelling unit – and by clustering them to maintain the integrity of the open space – nine units could be placed on a 13.5 parcel or combination of parcels ($9 \times 1.5 = 13.5$) created from a portion of the existing lots. This calculation assumes adequate water supply and septic design flow for the targeted number of bedrooms.

Option 2: *Alternatives to site ten units of rental housing on the designated 13.5 acres.*

1. Variance. Applying for variances from the Board of Appeals (ZBA) is not a promising route. Section 9.8 of the ZBL provides that “[a] variance from any requirement of this bylaw shall be granted only in accordance with the criteria set forth in Section 10 of the Zoning Act.” First, Section 6.10 itself provides an “exception” to both the density and use requirements of the ZBL. Section 10 of the Zoning Act (G. L. c. 40A, § 10), and the case law, establish that “[a] use variance . . . is authorized only if expressly permitted by local ordinances or by-laws.” Maurice Callahan & Sons, Inc. v. Board of Appeals of Lenox, 30 Mass. App. Ct. 36, 40 n. 4, rev. denied, 409 Mass. 1104 (1991). Section 9.8 does not expressly provide for use variances. While no court of which we are aware has made a determination whether Section 9.8 authorizes use variances, the ZBA argued in the Squibnocket Pond District-Phragmites case involving herbicides that the ZBL did not authorize use variances in Chilmark. To the extent that a request for increasing the rental units from 9 to 10 could be construed as a dimensional variance, it is not likely to be successful. Massachusetts is clear that “no person has a legal right to a variance and they are to be granted sparingly.” Kirkwood v. Board of Appeals of Rockwood, 17 Mass. App. Ct. 423 (1984)(quoting from Damaskos v. Board of Appeal of Boston, 359 Mass. 55, 61 (1971)). Dimensional variances can only be granted on a showing of hardship, and based on the anomalies of a parcel’s soil, shape, or topography. None of these factors is present here.
2. Chapter 40B – comprehensive permit. Chapter 40B provides that, when a municipality does not meet maintain a certain level of affordable housing stock (as Chilmark does not), a developer may seek a comprehensive (or single) permit from the ZBA to create low and moderate income housing units at densities greater than permitted by local

zoning. The procedure triggers involvement from several state agencies and requires partnership with a qualifying developer. State informational guides provide that, to qualify for Chapter 40B, a development proposal must first receive a letter of project eligibility under a state or federal housing program, such as MassHousing, MassDevelopment, the Department of Housing and Community Development, or the U.S. Department of Housing and Urban Development. For rental housing, I am advised that the project must provide at least 20% of the units to households below 50% of the average median income. I am also advised that Towns are allowed to establish a local preference for residents (currently, up to 70% of the units can be for local preference), but current state guidelines *also* limit the local preference to the “first lease out” -- leases after the first round cannot be governed by a local preference.

3. Zoning amendments. Amendments to the ZBL to permit greater density for projects of this nature is a viable possibility. The Town could achieve this in a number of ways. On a broad scale, municipalities can generally provide an exemption for municipal uses, or possibly on municipal land, in their zoning by-laws. Sinn v. Board of Selectmen of Acton, 357 Mass. 606, 610 (1970). Another approach would be to amend the Zoning By-laws to reduce the acreage required for affordable rental housing units; for example, lowering the current three acre requirement to support 2 rental units to a two acre requirement to support 2 rental units. We’d be happy to work through the mechanics and legalities of these possible options with you.

Issue 2: Developer Participation in Affordable Homesite Construction.

Option 1 suggests having the developer selected under the RFP build two “turnkey” homes on two home site lots, whereas Option 2 contemplates a process by which the chosen developer would be given the opportunity to submit proposals for construction of single family residences on the home site lots, from which the applicants who are awarded a home site lot could choose. We appreciate that the Committee put time and effort into recommending Option 2.

The Board will have the opportunity to hear more detail on the basis of the Committee’s recommendation. We do not see any legal issues with either option. Option 2 appears more complicated because the bidding developer would not necessarily know the timing of building out the home site lots with construction of the rental housing.

Issue 3 – Infrastructure considerations.

We have looked at the relevant legal instruments concerning the Town’s rights to provide utilities for the project. Under an “easement and notice of option” (the “Access and Utility Easement”) recorded in the Registry in Book 486, Page 287 (recorded on October 16, 1987), David and Steven Flanders granted the Peaked Hill Pastures Realty Trust the non-exclusive, perpetual right and easement for passage and for installation and maintenance of utilities over a fifty foot wide strip of land from Tabor House Road (the easement area is shown on a sketch attached to that instrument). The Town acquired ownership of the land comprising Peaked Hill pastures under a deed recorded in the Registry in Book 585, Page 821 (recorded on July 29, 1992). The Town’s deed recites that its grant includes the rights established by the Access and

Utility Easement. As we are sure the Town is aware, there are existing lines providing power located within the Access and Utility Easement, and coordinating any upgrades, and sharing the costs, is a question to consider when ultimately plans are created to address the provision of utilities for the Town's project.

As to the Committees' presentation of options whether the Town would delegate that responsibility to the developer (Option 1) or whether the Town would undertake any upgrades itself (Option 2), either option is legally viable. The Committee's recommendation appears to be more efficient because the Town would not be required to oversee additional bidding to obtain contractors, and would not be responsible for coordinating the work.

Again, please let us know if there is anything else we can do at this point.

-Michael

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From: Tim Carroll [<mailto:townadministrator@chilmarkma.gov>]
Sent: Tuesday, December 12, 2023 3:58 PM
To: Ron Rappaport (rrappaport@rrklaw.net)
Cc: Bill Rossi (bill.rossi@compass.com); James Malkin (jimmalkin@gmail.com); Marie L (marie.chilmarkselectboard@gmail.com); Assistant Exec Sec
Subject: FW: Memo to Select Board from Peaked Hill Pastures RFP Committee

Ron

The Peaked Hill Pastures RFP committee fired the consultant and has sent the Select Board the attached RFP draft.

The Select Board will be meeting jointly with the RFP committee on January 2, 2024 to review the draft RFP and respond to questions posed by the RFP committee.

Chairman Rossi has asked that I send this correspondence to you now in advance of the Select Board meeting.

He is requesting that you review their three questions (issues) and respond to us before the January 2 meeting of the Select Board and their public discussion.

Tim Carroll

Town Administrator
Town of Chilmark