COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

In the Matter of

STONEHAM BOARD OF APPEALS

and

WEISS FARM APARTMENTS, LLC

No. 2014-10

DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR

June 26, 2015

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

This case is an interlocutory appeal brought by the Stoneham Board of Appeals (Board) pursuant to 760 CMR 56.00. Under 760 CMR 56.03(8)(a), a board seeking to rely on one of several enumerated safe harbors precluding appeals to the Housing Appeals Committee of adverse decisions under G.L. c. 40B must notify the developer of such safe harbor claim within 15 days of the opening of the board's hearing on the comprehensive permit application. If the developer wishes to challenge the board's assertion of one of these statutory and regulatory protections, it must provide written notice to the Department of Housing and Community Development (DHCD) within 15 days. DHCD "shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials." *Id.* Either party may file an interlocutory appeal of an adverse decision by DHCD to the Housing Appeals Committee, but must do so within 20 days of receipt of DHCD's decision. The interlocutory appeal to DHCD is conducted on an expedited basis, as the proceeding before the board is stayed pending the Committee's determination. 760 CMR 56.03(8)(c). The Committee's hearing on the issue, like all of its

proceedings, is *de novo.* G.L. c. 40B, § 22. Section 56.03(8)(a) provides that the Board has "the burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs...."

In accordance with this regulatory scheme, after Weiss Farm Apartments, LLC (Weiss Farm) filed its application for a comprehensive permit with the Board, the Board notified the developer that it invoked two safe harbor provisions: 1) that in the Town of Stoneham, "low or moderate income exists ... on sites comprising one and one half percent or more of the total land area zoned for residential, commercial or industrial use." G.L. c. 40B, § 20. See 760 CMR 56.03(3)(b); and 2) that the developer had filed a "related application" under 760 CMR 56.03(1)(e) and (7)(a). Weiss Farm notified the Board and DHCD of its objection to the Board's assertion. DHCD issued a letter stating that the Board was not entitled to the safe harbor under either provision, and the Board appealed to the Committee.[1]

Following a conference of counsel, the presiding officer scheduled a hearing and conducted oral testimony on December 11, 2014 and January 9, 2015. The parties filed post-hearing memoranda on February 17, 2015. The Board requested a proposed decision in accordance with 760 CMR 56.06(7)(e)(5)(9) and G.L. c. 30A, § 11(7), which the presiding officer issued on May 8, 2015. The Board filed objections to the proposed decision and renewed its request for oral argument before the full Committee. The request for oral argument to the full Committee is denied.

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1. Since this Interlocutory Decision does not "finally determine the proceedings," the presiding officer may rule on it without consulting with the full Committee. 760 CMR 56.06(7)(e)(2). However, in cases of first impression or involving particularly weighty matters, the presiding officer, in his or her discretion, may choose to bring the matter before the full Committee. The general land area minimum is a complex measure, which has not been addressed extensively during the 45-year history of the Comprehensive Permit Law, and coincidentally, two other cases with similar issues were brought before the Committee at nearly the same time. The full Committee issues decisions in both of these other cases today. See *In the Matter of Newton Zoning Board of Appeals and Dinosaur Rowe, LLC*, No. 15-01 (Mass. Housing Appeals Committee June 26, 2015); *In the Matter of Newton Zoning Board of Appeals and Marcus Lang Investments, LLC*, No. 15-02 (Mass. Housing Appeals Committee June 26, 2015).

II. GENERAL LAND AREA MINIMUM OF 1.5 PERCENT

Under the Comprehensive Permit Law, the decision of the Board would be consistent with local needs as a matter of law when the town has low or moderate income housing "on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial, or industrial use...." G.L. c. 40B, § 20. The general land area minimum percentage is calculated by dividing the area of sites of affordable housing that are eligible to be inventoried on the DHCD Subsidized Housing Inventory (SHI) by the total land area zoned for residential, commercial, or industrial use. 760 CMR 56.03(3)(b). The Board believes that the Town of Stoneham satisfies this 1.5% General Land Area Minimum threshold. Weiss Farm challenges the methodology used by the Board in arriving at its figures.

A. Calculation of the Denominator

Under Chapter 40B, to determine the General Land Area Minimum threshold, the Town must demonstrate the "total land area zoned for residential, commercial or industrial use." G.L. c. 40B, § 20. The Committee's regulations clarify that this land includes un-zoned land in which residential, commercial, or industrial use is permitted; and excludes water bodies; land owned by the town and other political subdivisions, the United States, the Commonwealth of Massachusetts, and the Department of Conservation and Recreation; and land where all residential, commercial, and industrial uses are prohibited. 760 CMR 56.03(3)(b).

The Board introduced into evidence two sources to demonstrate the total area of Stoneham. The DHCD Stoneham Geography Summary states that Stoneham has a total area of 6.70 square miles and a total land area of 6.14 square miles. Exh. 9. A document entitled Stoneham CDP Quick Facts from the US Census Bureau indicates the land area of Stoneham is 6.02 square miles. Exh. 13. A square mile contains 640 acres. Tr. I, 31. Thus, 6.70 square miles is 4,288 acres and 6.14 square miles is 3,929.60 acres. In providing his calculation of applicable land area, Mr. MacDonald, the Town's Assessor, testified that he started with the 6.14 square miles. From the 6.14 square miles, or 3,929.60 acres, he subtracted recreational

land, public roads,[2] land owned by the Town of Stoneham, and land owned by the Town of Wakefield within Stoneham, to arrive at what he considered to be the balance of land zoned for residential, commercial and industrial use. The exclusions included recreational land totaling 1,492.26 acres: Department of Conservation and Recreation (DCR) land (1,408.47 acres, including designated water bodies within the DCR land totaling totaled 381.09 acres) Exh. 3; other recreational land (83.79 acres) Exhs. 2, 12; public roads (480.16 acres) Exhs. 4, 5; and land owned by the Town of Stoneham (349.29 acres) Exh. 7, Tr. I, 43-44, and the Town of Wakefield (26.46 acres) Exh. 7. See Exh. 15. These exclusions reduced the applicable land area to 1,581.43 acres. Exh. 15. Mr. McDonald then included back into the land area sites owned by the Stoneham Housing Authority with SHI housing (16.55 acres).[3] Exh. 6. The resulting figure of 1,597.98 acres is the denominator proffered by the Board. Exh. 15.

Weiss Farm does not dispute these mathematical calculations; rather it disagrees with the starting point Mr. McDonald used, and the resulting denominator. Weiss Farm argues that the Board should have used the total area figure of 6.70 square miles or it should have acknowledged that the 6.14 square miles had already excluded water bodies. By ignoring this, it argues that the Board twice excluded the area represented by water bodies in DCR land, 381.09 acres. Exh. 3. In its brief, the Board argues that "[b]eginning the analysis with the *total area* of the Town of Stoneham, as oppose [sic] to the "*total land area zoned for*

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2. Although roads are not specifically identified in G.L. c. 40B or 760 CMR 56.03(b) as excludable, these were identified as public roads, and not disputed by Weiss Farm. See *Arbor Hill Holdings Limited Partnership v. Weymouth,* No. 09-02, slip op. at 2-3 (Mass. Housing Appeals Committee Sept. 24, 2003 Order of Dismissal).

3. The Board has objected that the inclusion of this land in the denominator, as required in 760 CMR 56.03(b)(3), is contrary to G.L. c. 40B, § 20. Section 20 provides the safe harbor "where ... low or moderate income housing exists ... on sites comprising one and one half percent or more of the total land area zoned for residential, commercial or industrial use...." Thus the statute provides that the numerator is a subset of the denominator. The Stoneham Housing Authority land, 16.55 acres, is used for the purpose of SHI housing and is included in the numerator for the calculation of the 1.5%. Exhs. 11A-11J. Therefore inclusion of this land in the denominator as well is consistent with both 760 CMR 56.03(b)3 and § 20. Also see *Weymouth, supra,* slip op. at 3 n.3 (not deducting South Weymouth Naval Air Station land from the denominator, "because, even though it may have been owned by the United States, it is available for development").

residential, commercial or industrial use," inflates the denominator beyond the value dictated by both statute and regulations. [Emphasis in original]. Board brief, p. 7 n.3. This is incorrect. The Board mistakenly argues that G.L. c. 40B, § 20 requires the starting point for the calculation to be "the total land area zoned for residential, commercial or industrial use." This argument also contradicts the Board's own evidentiary case, described above, which started with "total land area" and calculated sites to deduct from total land area to reach total land area zoned for residential, commercial or industrial use.

"[L]and area zoned for residential, commercial or industrial use" could be the starting point: a Board could choose to begin the calculation of the denominator by adding the acreage of each portion of the Town zoned for residential, commercial or industrial use, and then determining what other land in the Town was required to be included or excluded. However, the Board started with another figure, "total land area." As the developer points out, the Board's analysis ignores the discrepancy between the total or "gross" area in Stoneham and the total land area. The Board failed to determine what land makes up this difference in area. Yet its witness, Mr. McDonald, acknowledged on cross-examination that the difference was likely the result of excluding water bodies in the Town. Tr. II, 30. If this is the case, Mr. McDonald's exclusion of the entirety of DCR land, which includes 381.09 acres of water bodies within the DCR land amounted to double counting. The Board's argument fails to address the nature of the difference between the total area of 6.70 square miles and the total land area of 6.14 square miles. See *Arbor Hill Holdings Ltd Partnership v. Weymouth,* No. 02-09, slip op. at 2-3 (Mass. Housing Appeals Committee Order of Dismissal Sept. 24, 2003), which applied the exclusions to the "gross" land area of the town. For this reason, the Board's resulting figure cannot be accepted. Weiss Farm suggests that adding in the 381.09 acres representing the water bodies is required. That addition would bring the resulting denominator to 1,979.09 acres. Alternatively, the acreage difference between 6.70 and 6.14 square miles is 358.4 acres, which, added to the Board's starting figure of 3,929.60, would bring the resulting denominator to 1,956.38 acres.[4] Yet, because

4. The Board's argument confuses the area required by the statute, which is the land area resulting from the analysis, for the starting figure used to derive the resulting denominator. Indeed, despite arguing that the calculations must start with "total land area zoned for residential, commercial or

the Board submitted no evidence explaining the difference, the evidence does not support selecting either of these alternatives. Accordingly, the Board has failed to provide sufficient evidence from which a finding of the General Land Area Minimum may be made.

B. Calculation of the Numerator

To calculate the land area of low or moderate income housing, 760 CMR 56.03(3)(b)[5] provides:

> Only sites of SHI Eligible Housing units 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, shall be included toward the 1½% minimum. For such sites, that proportion of the site area shall count that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units.).

See G.L. c. 40B, § 20. The Town assessor, Mr. McDonald identified the following properties listed on the DHCD SHI for rental and ownership units in Stoneham, and provided the acreage for the developments:

DHCD ID No.	Address	Acreage
3041, 9648	Calthea/Washington St.	4.95
3042-3045	Prospect St., Washington Ave., Parker Chase Rd,	8.77
3046	Duncklee Ave.	2.83
3049	Mountain View Drive	8.17
9094	Christopher St.	1.017
4469	Department of Developmental Services (DDS) Group Homes - 14 units – address unknown	
	Total (excluding DDS Group Homes)	**25.74**

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industrial use," the Board was not consistent with its own argument, since, for example, it deducts Department of Recreation and Conservation land, zoned Recreation Open Space, from its starting figure. Had the Board started with land zoned for residential, commercial or industrial use, there would have been no reason to deduct the DCR land from that acreage. Exhs. 1, 2, Tr. I, 11, 34-35. Board Objections, pp. 2-3 n.2. Such a deduction would violate 760 CMR 56.03(3)(b). The Board could have started from the total area figure, and proceeded by deducting all excluded categories. By starting at "total land area," the Board was required to prove what had already been excluded and ensure that those areas were not deducted from the total land area. But it did not.

5. The Board notes that 760 CMR 56.03(3)(b) improperly requires the Town to achieve "*more than* 1.5%" of the total land area, which is inconsistent with G.L. c. 40B, § 20. Although this issue is not squarely presented in this instance, since the Town has not attained 1.5%, the statutory provision, not the regulatory language, would govern.

Tr. I, 47-52; Exhs. 10, 11A-11J, 15. These properties, except for Christopher Street, are rental properties; the Board included the total acreage of each of these project sites.

Weiss Farm argues that for the home ownership property, only 25% of the units (2 of the 8 units) of the Christopher Street property are low or moderate income; therefore the acreage for that site should be limited to 25% of the project site. It argues that Mr. McDonald acknowledged he had not reduced the 1.017 acreage for Christopher Street to account for this. Tr. II, 46. Although the Board offered a calculation using only 25% of the Christopher Street site in its brief, it maintains that c. 40B, § 20, which refers to "sites" should be interpreted to require inclusion of the entire lot on which affordable housing is located. Board brief, p. 16 n.16. That argument is not persuasive. 760 CMR 56.03(3)(b). See *Cloverleaf Apartments, LLC v. Natick,* No. 01-21 slip op. at 4 (Mass. Housing Appeals Committee Order Mar. 4, 2002); *Arbor Hill Holdings Limited Partnership v. Weymouth,* No. 09-02, slip op. at 5 and n.7. The Christopher Street property consists of 8 home ownership units, of which 2 are on the SHI. Therefore, only 25% of the acreage of the site, or .25 acres, should be included.

Weiss Farm also suggests that the Board failed to calculate the specific acreage associated with housing units, impervious surface and landscaping. It argues that since the Board has the burden to demonstrate that the entire sites should be included and failed to do so, there is no competent testimony to permit a finding of the actual acreage attributable to SHI housing. As noted below, even including the entire lots for the rental projects, and 25% of the acreage of the ownership project, will not bring the numerator to 1.5% of the denominator; therefore the Committee need not reach this issue. 760 CMR 56.03(3)(b).

Substituting .25 acres for the 1.017 acres listed for Christopher Street in the table above results in a figure of 24.97 acres of SHI housing in Stoneham. No acreage for the 14 units of DDS group homes has been included in the record. See Section II.C. below. Even if one of the alternate denominator figures described above were applicable, applying this numerator to the lower of those two denominators, 1,956.38 acres, demonstrates that 24.97 acres would represent only 1.3% of the general land area. Therefore, the Board has failed to show it is entitled to the safe harbor for the General Land Area Minimum.

C. DDS Group Homes

The Board did not introduce evidence of the acreage of the 14 units of DDS group homes that are included on the Town's SHI. See Exhs. 10, 11H. In its brief, it states that "[a]lthough these group homes are listed by DHCD on the Town's SHI, the location and land area associated with these group homes are unknown to the Town, *save one*," [emphasis added]. Board brief, p. 13, citing Exh. 10; Tr. I, 11, 14-15, 51; II, 41-43. The Board has not indicated whether the acreage of this "one" group home is already included in the identified SHI housing acreage described above.

Mr. McDonald testified that the Town does not possess knowledge of the addresses of the 14 DDS units. Included in the record is a letter from the presiding officer on behalf of all counsel to the DHCD Associate Director for the Division of Community Services requesting information regarding the land area or addresses for the DDS units. His response indicated DHCD did not have this information. Further correspondence between the Board's counsel and counsel at DHCD resulted in DHCD counsel's statement that DHCD did not maintain this information and her suggestion that the Board seek the information from DDS. See Letters of Presiding Officer Shelagh A. Ellman-Pearl (October 23, 2014); Leverett Wing, DHCD Associate Director (October 29, 2014); Jonathan D. Witten, Board counsel (November 24, 2014) and Margaux LeClair, DHCD Counsel (December 8, 2014). Tr. I, 24, II, 58-61.

The Board's counsel stated at the hearing that the Board did not pursue obtaining the addresses directly from DDS because it believed that option would be unavailing. Counsel stated at the hearing that in a case pending in Superior Court, *Hardiman v. Department of Developmental Services*, Suffolk Superior Ct. No. SUCV201401561, the court had denied a request to allow that plaintiff access to group home information under a protective order, where a public records request to DHCD for the identification of the group homes in Norwood, had been denied by both DHCD and the Secretary of State. Tr. II, 58-61. He stated he therefore believe it was unnecessary to pursue this course while the issue was pending in the Superior Court.

The Board claims that requiring it to bear the burden of proving the acreage of these sites is a violation of constitutional due process under the United States Constitution and the Massachusetts Declaration of Rights as well as G.L. c. 40B, §§ 20-23. It argues that DHCD maintains the SHI, and DHCD's regulations state that the SHI is presumptively accurate, thereby placing the responsibility for obtaining this information on the keeper of the list, DHCD. In its objections to the proposed decision, it asks the Committee for something new: a specific finding that DHCD failed to fulfill its statutory duty. However, the Board could have, but did not seek testimony from DHCD staff regarding this role.

In this instance, the Board did not explain how it had knowledge of the address of only one of the DDS units, if indeed, that is what the Board intended by its reference to "save one" in its brief. Nevertheless, the Board bears the burden of proof on establishing its entitlement to one of the safe harbors. On the record presented here, the lack of information about the 14 DDS units cannot be the basis to grant the Town a safe harbor it has not demonstrated that it has achieved.[6]

III. RELATED APPLICATION

The Committee's regulations establish a twelve-month protective period for zoning boards when a comprehensive permit developer has had a related application pending on the same property site. The developer is not prohibited from filing a comprehensive permit application within the same period. However, any decision issued by the zoning board must

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6. Nor did the Board address whether the Town's asserted lack of knowledge of the location of group homes would be in keeping with the role of town emergency services departments to be prepared to meet individualized emergency services needs for town residents with special circumstances. As we noted in the *Dinosaur* decision, the locations of group homes for people with disabilities in Newton was known to the city. See *Dinosaur Rowe, supra,* No. 15-01, slip op. at 7-8 n.8. As we stated in *Dinosaur Rowe, supra,* and *Marcus Lang, supra,* No. 15-02, slip op. at 8 n.8, the current process for maintaining the confidentiality of these addresses makes litigation of land area cumbersome. In order to ease the burden on municipalities, we would encourage DHCD, DDS, and DMH to investigate whether there may be a simpler administrative approach. Finally, as both this and the two *Newton* cases decided today demonstrate, litigants suffer from confusion regarding the methodology for calculating the land area for both the denominator and the numerator. We strongly encourage DHCD to provide detailed guidance to municipalities to enable them to determine with more certainty their status with regard to the general land area minimum.

be upheld as a matter of law if a related application has previously been received, as set forth in 760 CMR 56.03(7). This provision states:

> For the purposes of 760 CMR 56.03(7), a related application shall mean that less than 12 months has elapsed between the date of an application for a Comprehensive Permit and any of the following:
>
> (a) the date of filing of a prior application for a variance, special permit, subdivision or other approval related to construction on the same land, if that application was for a prior project that was principally non-residential in use, or if the prior project was principally residential in use, if it did not include at least 10% SHI Eligible Housing units;
>
> (b) any date during which such an application was pending before a local permit granting authority,
>
> (c) the date of final disposition of such an application (including all appeals); or
>
> (d) the date of withdrawal of an application.
>
> An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.

Attached to the Board's appeal is a copy of a December 2, 2013 cover letter and an "Application for Endorsement of Planning Board Believed not to require approval." The ANR allowed the division of the parcel at 170 Franklin Street, Stoneham, MA into two separate lots. As stipulated by the parties, on or about December 4, 2013, the Stoneham Planning Board voted to approve Weiss Farm's request for approval of endorsement of a plan to divide a 26.834 acre parcel into two lots. Prehearing Order p. 2. See G.L. c. 41, § 81-P. On December 24, 2013, the plan approving the land division was recorded at the Middlesex Registry of Deeds. On or about June 30, 2014, Weiss Farm filed a comprehensive permit application for 264 rental units on a 25.657 acre parcel located at 170 Franklin Street, Stoneham, Massachusetts, one of the two lots created by this land division. Prehearing Order, p. 1.

DHCD, in its letter denying the safe harbor on this ground, stated that the ANR did not relate to construction on the land. Indeed, the ANR served only to separate the parcel into two lots, one of which became available for the comprehensive permit application. Although there is no direct evidence that the comprehensive permit application was the

reason for the ANR application, there is no evidence of an attempt to obtain approval to construct another project on the site before Weiss Farm submitted its comprehensive permit application. Therefore Board has not submitted any evidence to show that the ANR application related to construction or was for a prior project that was "principally non-residential in use" or a residential project that "did not include at least 10% SHI Eligible Housing units." 760 CMR 56.03(7).

Accordingly, the Board has not demonstrated that a related application was made by the developer and has not shown that it is entitled to a safe harbor under the related application provision.

IV. CONCLUSION AND ORDER

The Board's claims that the Town is entitled to a safe harbor under either the General

Land Area Minimum threshold or the Related Application provision are denied. Accordingly this appeal is dismissed and the matter remanded to the Board for further proceedings.[7]

Housing Appeals Committee

Dated: June 26, 2015

Werner Lohe, Chairman

Joseph P. Henefield

Constance Kruger

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer

7. The Board also argues that the interlocutory appeal procedure, with the 15-day deadline in local proceedings to assert consistency with local needs, and the scheme of DHCD review of this issue, is *ultra vires* and invalid. See 760 CMR 56.03(8)(a). It argues that the requirement is not found in Chapter 40B, and is therefore beyond DHCD's authority to impose. This issue has been inadequately briefed by the parties for consideration in this appeal.