COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

In the Matter of

NEWTON ZONING BOARD OF APPEALS

and

DINOSAUR ROWE, LLC

No. 15-01

INTERLOCUTORY DECISION
REGARDING SAFE HARBOR

June 26, 2015

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I. INTRODUCTION AND PROCEDURAL HISTORY

This is an interlocutory appeal pursuant to 760 CMR 56.03(8)(c) challenging the assertion of a "safe harbor" under the Comprehensive Permit Law, G.L. c. 40B, §§ 20-23.[1] On November 5, 2014, the developer, Dinosaur Rowe, LLC, filed an application with the Board for a comprehensive permit to build 135 units of affordable mixed-income rental housing on a 2.5 acre lot at 70 Rowe Street in Newton. On December 4, the Board opened its hearing on the application, and on December 18, it notified the developer that the town had achieved the safe harbor available to municipalities that have met the general land area minimum, that is, towns in which low or moderate income housing exists on sites

1. Two interlocutory appeals involving the same general land area minimum issues were filed with this Committee in February and March 2015. They are *In the Matter of Newton and Dinosaur Rowe, LLC*, No. 15-01, and *In the Matter of Newton and Marcus Lang Investments, LLC*, No 15-02. The parties were represented by the same lawyers, and the exhibits admitted into evidence and briefs filed were nearly identical. Since they raise the same issues, sections II and III of the decisions issued by the Committee are identical, except that the possible eligibility of a development called Kessler Woods was addressed in the *Marcus Lang Investments* appeal and not in the *Dinosaur Rowe* appeal.

comprising 1.5% or more of their total land area. G.L. c. 40B, § 20; 760 CMR 56.03(1)(a) and (3)(b). The developer, in turn, challenged that assertion by filing an appeal with the Department of Housing and Community Development (DHCD). DHCD issued a decision dated January 23, 2015 finding in favor of the developer. On February 12, 2015, the Board appealed to this Committee, which convened an expedited hearing pursuant to 760 CMR 56.03(8)(c).[2]

As in all of the Committee's proceedings, the hearing in this interlocutory appeal is *de novo*. G.L. c. 40B, § 22; also see *In the Matter of Bourne Zoning Board of Appeals and Chase Developers, Inc.*, No. 08-11, slip op. at 2 (Mass. Housing Appeals Committee Jun. 8, 2009). Further, pursuant to 760 CMR 56.03(8)(a), the Board has "the burden of proving satisfaction of the grounds for asserting [the safe harbor]." The parties agreed that the matter should be heard on a written record, and both filed briefs supported by a number of written documents; no testimony from witnesses was presented.

II. DISCUSSION

If the city of Newton 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...," then any decision made by the Board is consistent with local needs—and thus unassailable—as a matter of law. G.L. c. 40B, § 20; also see 760 CMR 56.03(1)(a) and 56.03(3)(b). 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 in the city that is zoned for residential, commercial, or industrial use. 760 CMR 56.03(3)(b).

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2. Since this Interlocutory Decision does not "finally determine the proceedings," the presiding officer might have ruled 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 therefore it was deemed prudent to permit the full Committee to consider the issues raised. Coincidentally, an additional case raising similar issues was pending at the same time, and the full Committee issues a decision in that case today as well. See *In the Matter of Stoneham Board of Appeals and Weiss Farms Apartments, LLC*, No. 14-10 (Mass. Housing Appeals Committee June 26, 2015).

A. Calculation of the Denominator

The Comprehensive Permit regulations specify in considerable detail what land is to be included in the denominator and what is to be excluded—generally, land owned by the government, land where development is prohibited, and water bodies. And, in most respects, the parties are in agreement.

Using the city's Geographic Information System (GIS), the Board calculated the city's total area as 7,901.3 acres. Board's Brief, p. 4. The developer does not dispute this figure. Developer's Brief, p. 4.

Government owned land totaling 55.0 acres is then excluded. Exh. B; Board's Brief, p. 5; Developer's Brief, p. 4.[3] See 760 CMR 56.03(3)(b(3).

Wetlands on which development has been prohibited by restrictive order of the Department of Environmental Protection pursuant to G.L. c. 131, § 40A is excluded. There are 83.5 acres of such land. Exh. C; Board's Brief, p. 5; Developer's Brief, pp. 4-8.[4] See 760 CMR 56.03(3)(b(4).

Water bodies comprise 238.1 acres to be excluded. Exh. D; Board's Brief, p. 6; Developer's Brief, p. 4. See 760 CMR 56.03(3)(b)(5).

The Board also excludes 352.4 acres that are in a "flood plain [zone], conservation zone or open space zone, if said zone completely prohibits residential, commercial [and] industrial use." Board's Brief, p. 6. The Board's proof in this regard is limited; it is simply two small maps entitled "Excluded Flood Plains" and "Excluded Conservation Restrictions," which were prepared April 2, 2015, apparently for this appeal. See Exh. E-1, E-2. Thus, it is unclear whether this land is actually within *zones* in which development is prohibited or whether it simply consists of parcels on which development is restricted. See 760 CMR 56.03(3)(b)(6).[5] Nevertheless, the figure is not

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3. In stating that the figure for government owned land is not contested, the developer's Brief contains a typographical error indicating that that area is 83.5 acres.

4. The developer's Brief does not explicitly state that the 83.5-acre figure for land subject to restrictive order is uncontested, but it is uncontested in that the brief does not mention it at all.

5. Generally, in considering statutory and regulatory provisions, we give deference to policy statements issued by DCHD, the state's lead housing agency. See *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, at 9, n.6 (Mass. Housing Appeals Committee Mar. 5, 1999); *Whitcomb Ridge, LLC v. Boxborough*, No. 06-11, slip op. at 3 (Mass. Housing Appeals Committee (Jan. 22, 2008). Over ten years ago, DHCD issued such a statement entitled DHCD Guidance for

disputed by the developer, and for that reason we accept it. See Developer's Brief, p. 5.

The final undisputed figure is 2.6 acres which is to be added rather than subtracted because of certain duplications. Exh. G-1, G-2; Board's Brief, p. 7; Developer's Brief, p. 8.

What is disputed is whether the Board should be permitted to exclude the land of three private golf clubs, which total 539.8 acres. The Board concedes that all of this land is in single-family-residential zoning districts, but argues that it should be excluded from the general land area minimum calculation because it has "been classified by the Board of Assessors of the City of Newton as open space and recreation land" under Chapter 61B of the General Laws (Classification and Taxation of Recreational Land). Nowhere in the Comprehensive Permit Law or regulations, however, is there a suggestion that such land should be excluded. For instance, it is not in an "open space zone [that] completely prohibits residential, commercial and industrial use." See 760 CMR 56.03(3)(b)(6). Although the general expectation may be that this land will be used for quite some time for golf—just as other parcels of land in private ownership may continue to be held for low intensity uses or in an undeveloped state—the owners of this land could develop it for housing at any time by paying certain taxes and giving the city the opportunity to exercise its statutory right of first refusal to purchase. G.L. c. 61B, §§ 7, 8, 9. Nor are we convinced by the Board's argument that Chapter 61B cannot be overridden by the Comprehensive Permit Law. See Board's Reply Brief, pp. 3-4. The focus of the general land area minimum is not on the power to override zoning, but rather on zones in which development is completely prohibited. These golf courses are not within any such zones, and thus they should not be excluded from the total land calculation.

Interpreting 760 CMR 31.04(2). See Exh. D-C. But DHCD's interpretation of the regulation appears to conflict with the natural reading of that section. That is, the guidance indicates that agricultural preservation restrictions and conservation land with a recorded permanent use restriction are excludable. Exh. D-C, p. 8, §§ 12 and 13, p. 4, § (f). Though we need not and are not deciding the question in this case, as noted above, we read the regulation more narrowly—to say that excluded areas are only those in a "flood plain [*zone*], conservation [*zone*] or open space *zone* if said zone completely prohibits residential, commercial [and] industrial use, or any similar *zone* where residential, commercial [and] industrial use[s] are completely prohibited."

Based on the above, calculation of the denominator is as follows:

Total land		7,901.3 a.
	Government owned land	– 55.0 a.
	Restrictive orders	– 83.5 a.
	Water bodies	– 238.1 a.
	Zones with prohibitions	– 352.4 a.
	Correction for duplication	+ 2.6 a.
Total land zoned for residential, commercial, or industrial use		7,174.9 a.

B. Calculation of the Numerator

The numerator of the percentage calculation consists of "[o]nly sites of SHI Eligible Housing units inventoried by [DHCD] 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" (in this case, November 5, 2014). (The reference to section 56.03(3)(a) reinforces the Board has the burden of proof with regard to any housing units not inventoried on the SHI.)

The Board has submitted many documents, included in Exhibits H and I, to show a slightly over 100 acres to be counted in the numerator.[6]

The developer challenges a number of the sites claimed by the Board. Its first argument, however, is that the last paragraph of 760 CMR 56.03(3)(b) precludes the Board from claiming any housing sites if it had not identified them prior to the date on which the developer filed its comprehensive permit application. See Developer's Brief, pp. 8-10. This is not the correct reading of the regulatory language. The words, "Only sites… established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the [application], shall be included" do not mean what the developer suggests. They do not mean that "Only sites… established, as of the date of the [application], according to 760 CMR 56.03(3)(a), as occupied… shall be included." Rather, they mean, "Only sites… established according to 760 CMR 56.03(3)(a) as occupied… as of the date of the [application] shall be included."

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6. Exhibit H shows affordable housing developments that have been inventoried on the SHI. Exhibit I is a spread sheet listing 39 sites of group homes for people with disabilities and deed-restricted units rehabilitated under the HOME Investment Partnerships Program or administered by the Newton Community Development Authority. See Board's Brief, p. 9; also see section II-B(3), below.

1. DHCD-Inventoried Sites (Exhibit H) - Exhibit H is a very useful and easily comprehensible spreadsheet prepared by the Board of nearly 100 housing developments. Each is listed with a DHCD identifying number, which shows that housing units have been inventoried on the SHI. For each development, in addition to the identifying number, the owner of the property, the property address, the tenure (rental or ownership), total housing units, total affordable units, percentage of affordable units, gross acreage, and countable acreage are clearly shown. The total of countable acres shown is 93.4. The developer challenges only two of the items.

(a) The West Suburban YMCA SRO development is a mixed use development on a 6.1-acre (266,209 sq. ft.) site. Exh. H, no. 2201. In addition to extensive outdoor recreation space, there is a health club with gross building area of 80,784 sq. ft. and 28 single-room-occupancy apartments with gross building area of 9,678 sq. ft., for a total gross building area of 90,462 sq. ft. If this were a traditional rental development in which at least 25% of the units were affordable, the entire site would count toward the numerator. See *Arbor Hill Holdings Ltd. Partnership v. Weymouth*, No. 02-09, slip op. at 3-5 (Mass. Housing Appeals Committee Sep. 24, 2003); also see Exh. D-C, p. 5. But, neither the regulations nor the DHCD guidance address this sort of development. Nevertheless, we agree with the developer that a mixed-use development in which only one tenth of the floor area is dedicated to affordable housing should be treated the same as a homeownership development or a rental development in which fewer than 25% of the units are affordable. Thus, since the SRO units represent 10.7% of the gross building area, and the same proportion of the site—0.7 acres—is includable in the numerator. As a result, the DHCD-inventoried area calculated by the Board should be reduced by 5.4 acres (from 6.1 acres to 0.7 acres).

(b) Arbor Point at Woodland Station is a development on an approximately seven-acre site that contains affordable rental housing and also facilities for Massachusetts Bay Transit Authority (MBTA) commuters. The developer points out that the comprehensive permit granted for the development states that the developer "controls approximately 3.863 acres of the total 6.983-acre site under a 70-year land lease with the MBTA...." Exh. D-G, p. 4. The Board presented this site as 6.9 acres. Exh. H, no. 7153. It should be reduced by 3 acres (from 6.9 acres to 3.9 acres) since the transit facilities are

not ancillary to the housing.

2. Un-Inventoried Sites (Exhibit H) - Also listed separately on Exhibit H are two developments that have not yet been inventoried by DHCD. The developer does not challenge the nine-unit Jennie Marie One site, which is 0.3 acres. It does, however, challenge the Riverside Station development, concerning which the Board argues that 3.9 acres are includable as affordable housing. For that development, a special permit was granted in October 2013, but progress was delayed by an appeal, and ultimately a building permit was not issued until February 2015. Board's Brief, pp. 10-11. The last paragraph of § 31.03(3)(b), in referring clearly to "SHI Eligible Housing units," incorporates both the eligibility and time-lapse provisions of 760 CMR 56.03(2)(Subsidized Housing Inventory). Thus, pursuant to 760 CMR 56.03(2)(b)(1)(a), the Riverside Station development became SHI-eligible when the special permit was "filed with the municipal clerk, notwithstanding any appeal by anyone other than the Board, but subject to the time limit for counting such units set forth at 760 CMR 56.03(2)(c)." That is, since the Board has not alleged that the appeal that delayed the development was filed by the Board itself, the development became eligible in October 2013. See Board's Brief, pp. 10-11.[7] Therefore, there was no tolling of the lapse date contained in § 56.03(2)(c), and the development became ineligible in October 2014. It did not become eligible again until the building permit was issued in 2015. Meanwhile, the application in the current case was filed in November 2014, which is the relevant date in this appeal. The development was not SHI-eligible at that time, and thus a portion of the site cannot be included in the numerator.

3. Un-Inventoried Sites (Exhibit I) - Finally, the Board argues that Exhibit I shows 39 additional sites of group homes for people with disabilities and deed-restricted units rehabilitated under the HOME Investment Partnerships Program or administered by the Newton Community Development Authority.[8] Board's Brief, pp. 8-9. It states that

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7. We note that the Board's brief on this point is cursory, and provides no reference to any exhibit in the voluminous record that might clarify the procedural history of the special permit and the appeal.

8. As the Board points out, due to concerns for the privacy of the residents, identifying the locations of these units is not easy. Nevertheless, after "extensive research," the Board was able to identify them. Board's Reply Brief, p. 4. (In most communities the information is maintained

ten of these, with a total of 152 housing units, were listed in aggregate under four DHCD identification numbers on Exhibit H, but no acreage was assigned to them. The Board argues that these 39 sites total 7.3 acres.

The developer appears to make a broad argument that none of these sites should be included because the Board did not identify them in sufficient detail, nor did it provide sufficient evidence of the documentation required to establish SHI eligibility. Developer's Brief, pp. 10-11. Generally, we agree that it would expected that the community would have submitted eligible sites to DHCD to be included on the SHI as they were permitted and constructed, and when this has not been done it is fair in our hearings to hold the Board to a high burden of proof in establishing that those sites meet all of DHCD's SHI eligibility standards. We also acknowledge that the evidence in Exhibit I is difficult to interpret and could have been presented more clearly and with more supporting detail. Nevertheless, we do not accept the developer's general contention because we understand the Board's position to be that the majority of these units and sites have already been included on the SHI by DHCD. That is, the DHCD SHI identification numbers assigned to 152 units indicate that DHCD was satisfied with the documentation when it placed them on the inventory. See Exh. H.[9] Specifically, 109 units operated by the Department of Developmental Services (DDS) as group homes, 34 units administered by the Department of Mental Health (DMH) as group homes or with Section 8 vouchers, and 9 other unspecified units have been inventoried on the SHI and aggregated under

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on a confidential basis by the municipality's emergency-services departments.) Exhibit I shows the owner of the site (often a non-profit organization), the street address, the tenure (rental or ownership), the total number of units, the number of deed-restricted affordable units, and the lot size (prorated if not all units on the site are affordable). To protect the privacy of the residents of this housing, the presiding officer issued a protective order: only a redacted version of this document is available to the public.

We must also note that this current process for maintaining the confidentiality of the addresses during litigation is 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. This might also result in more reliable data. C.f. n. 10, below. 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.

9. No evidentiary foundation concerning these identification numbers was laid by the Board, but the developer did not challenge the evidence on this basis.

DHCD identification numbers 4393, 4591, 7852, and 7853, while keeping their locations confidential. Exh. H. These total 152 SHI eligible units, and the Board takes the position that "[it] identified all of these confidential properties in Exhibit I...."[10] Board's Reply Brief, p. 4. Perhaps many of the sites on Exhibit I could be challenged since from the evidence presented it is unclear which sites listed on Exhibit I are not among the confidential sites on Exhibit H. But the developer challenges only four sites, arguing that that they should be subtracted from the Board's Exhibit-I total of 7.3 acres, and therefore we will address only those.

With regard to a five-unit group home maintained by Toward Independent Learning and Living (TILL), the developer argues that the 0.3 acres allocated to that should be deducted since there is no evidence of an affordable housing deed rider or fair housing marketing plan. Developer's Brief, p. 12. The Board responds by stating only that the group home "serv[es] individuals with special needs, and is a non-profit, tax exempt organization., [which]... was created as part of a settlement involving [DDS]." Board's Reply Brief, p. 6. This is insufficient to meet its burden of proof, and the 0.3 acres will be subtracted from the Board's 7.3-acre figure.

The developer makes the identical argument with regard to 0.3-acre Hasseltine House. The Board responds only that it "operates as a group home for disabled individuals." Board's Reply Brief, p. 6; also see Exh. H-5. This is insufficient to meet its burden of proof, and the 0.3 acres will be subtracted.

The developer also challenges a Habitat for Humanity unit near Webster Street, arguing that "no deed rider is shown." Developer's Brief, p. 12. The Board had originally introduced only the condominium unit deed into evidence, but produced an affordable housing deed rider when it filed its reply brief. Exh. H-18.1; Q. The Board has met its burden, and the 0.2 acres will remain included in the Board's figure.

Finally, the developer challenges the 1.4 acres listed for the Swedish Charitable Society. The only evidence introduced by the Board is a special permit granted and

10. In fact, although Exhibit I describes group homes and other properties in great detail—providing exact addresses and acreages—it shows a total of only 138 units. But neither the Board nor the developer addressed this discrepancy. Despite the Board's claim to have identified all of the properties, one inference that might be drawn from the discrepancy is that a number of sites remain unidentified.

recorded by the Newton Board of Aldermen. Exh. H-26. It appears that half of the assisted living units on the site are intended to be affordable: "The petitioner shall dedicate at least ten units with services for low income persons as defined by HUD income standards and at least ten units with services for moderate income persons." Exh. H-26, p. 4 (condition 6). Although it appears that these are the sort of units that are often eligible for inclusion on the SHI, the record before us is very limited. There is no indication under what, if any, state or federal program these units are subsidized (or whether the city has qualified them as Local Initiative Units, which is often the easiest way to establish SHI-eligibility), whether affirmative fair housing marketing requirements have been complied with, whether asset limits are in place, and so on. Under these circumstances, we must find that the Board has not met its burden of proof.[11] The 1.4 acres will be subtracted form the 7.3 acres shown by the Board on Exhibit I, as shown here:

Board's Exhibit I sites	7.3 a.
TILL	– 0.3 a.
Hasseltine House	– 0.3 a.
Habitat for Humanity	included
Swedish Charitable Society	– 1.4 a.
Corrected Exhibit I sites	5.3 a.

11. Of course, as with other sites that we have not included, the Board may be able to present additional evidence of SHI-eligibility in some future case.

4. The Numerator - The total area to be included in the numerator in calculating the general land area minimum consists of:

Board's DHCD-Inventoried Sites (Exhibit H)	93.4 a.
YMCA Reduction	– 5.4 a.
Arbor Point at Woodland Station reduction	– 3.0 a.
DHCD-Inventoried-Sites (Exhibit H, Corrected)	85.0 a.
Un-Inventoried Sites (Exhibit H)	
Jennie Marie One	+ 0.3 a
Riverside Station	not included
Un-Inventoried Sites (Exhibit I, Corrected)	+ 5.3 a.
Numerator	90.6 a.

C. Calculation of General Land Area Minimum

The general land area minimum is the 90.6 acres divided by 7,174.9 acres or 1.26%.

III. CONCLUSION

For the reasons stated above, we conclude that Newton has not achieved the 1.5% general land area minimum. Therefore, this matter is hereby remanded to the Board pursuant to 760 CMR 56.03(8)(c) for further proceedings in accordance with 760 CMR 56.05.

Housing Appeals Committee

Date: June 26, 2015

Werner Lohe
Chairman

Joseph P. Henefield

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James G. Stockard, Jr.