C O M M O N W E A L T H O F M A S S A C H U S E T T S
H O U S I N G A P P E A L S C O M M I T T E E

ARBOR HILL HOLDINGS LIMITED PARTNERSHIP, Appellant	)	
v.	)	No. 02-09
WEYMOUTH BOARD OF APPEALS, Appellee	)	

ORDER OF DISMISSAL

PROCEDURAL HISTORY

On August 30, 2001, the Applicant Developer, Arbor Hill Holdings Limited Partnership, applied to the Zoning Board of Appeals of the Town of Weymouth for a comprehensive permit to build 396 units under the Federal Home Loan Bank of Boston's New England Fund on a 29.5-acre site on Burkhall Street in Weymouth. The Board held several public hearings related to the application, and rendered a decision on April 2, 2002. The Board denied the permit on various substantive grounds, including traffic concerns, pedestrian safety, and storm water management design. It also found that the Town of Weymouth exceeded the 1.5 percent General Land Area Minimum threshold contained in G.L. c. 40B, § 20.[1] (Also see 760 CMR 31.04(2).) On April 23, 2002 the Developer filed this appeal.

1. The Board also argues that the Annual Land Area Minimum has been exceeded. See G.L. c. 40B, § 20; 760 CMR 31.04(3). We need not decide that issue.

At the opening hearing session before this Committee, a Conference of Counsel held pursuant to 760 CMR 30.09(4) on May 23, 2002, attorneys for the Board, the developer, and abutters agreed that the Committee should decide the threshold issue before conducting evidentiary hearings on the merits of the Comprehensive Permit Application. An evidentiary session was scheduled for August 6, 2002. The parties entered into negotiations, and ultimately, at a hearing session on July 17, 2003, the parties presented the Committee with a Stipulation of Facts and a Pre-Hearing Order.

DISCUSSION

Under the Comprehensive Permit Law, the decision of the Board is consistent with local needs as a matter of law when the town either has low or moderate income housing in excess of 10% of its total housing units or has low or moderate income housing "on sites comprising 1.5% or more of the total land area zoned for residential , commercial, or industrial use…." G.L. c. 40B, § 20. The Board believes that the Town of Weymouth satisfies the 1.5% requirement, which is referred to as the general land area minimum, and that therefore its appeal to this Committee should be dismissed. The Developer challenges the methodology the Board used in arriving at its figures. By and large, we agree with the Board.

The Denominator

The parties stipulated that the gross land area of Weymouth is 13,774.0 acres. Stip., ¶ 4. However, roads; water bodies; land owned by the town, the United States, or the Commonwealth of Massachusetts; and land where all residential, commercial, and industrial uses are prohibited must be deducted from the gross land area to determine the total land zoned

for residential, commercial or industrial use under the Comprehensive Permit Law. 760 CMR 31.04(2); Exh. 3, pp. 3,4, 8 (DHCD[2] Guidance for Interpreting 760 CMR 31.04(2)). Such areas in Weymouth are:[3]

roads	1,129.5 acres
water bodies	3,006.5 acres
town land	1,658.0 acres
U.S. of Commonwealth land	78.8 acres
land where uses are prohibited	154.8 acres

Simple calculation shows that gross land area (13,774.0 acres) less the acreage of the five excludable categories of land (6,027.6) is a total land area of 7,746.4 acres.

The Numerator

In Weymouth, there are 18 rental developments that qualify for inclusion on the DHCD Subsidized Housing Inventory and that also contain at least 25% low and moderate income housing units. For each of these, the Board has provided a figure representing the total land area (buildings, impervious surface, landscaped area, and natural area) occupied by the development. See Stip., ¶ 6; Stip., Exh. A. This is the best evidence presented to us and we find that it is accurate. These developments are:[4]

Avalon Ledges	58.2 acres
Cadman Towers	1.2 acres
Pleasantville	2.9 acres
Lakeview Manor	16.4 acres
Calnan Circle	3.8 acres
Harrington Circle	2.2 acres
Pope Towers	1.0 acres
Allerton House	4.2 acres

2. DHCD is the Massachusetts Department of Housing and Community Development.

3. The South Weymouth Naval Air Station (676 acres) is not to be deducted because, even though it may have been owned by the United States, it is available for development pursuant to the 1998 Act Authorizing the Establishment of the South Shore Tri-Town Development Corporation. Mass. St. 199, c. 301; Stip., ¶ 5.

4. The Board expressed the area in square feet. We have converted it to acres.

Broad Street Acquisition	0.3 acres
Colonial Village	1.3 acres
Front Street Rehab	0.8 acres
Queen Anne's Gate I	11.2 acres
Queen Anne's Gate IV	6.3 acres
Tammy Brook	5.6 acres
Union Towers I	1.7 acres
Union Towers II	6.0 acres
Pierce Road Acquisition	0.3 acres
Colonel Lovells Gate	14.6 acres

These total 138.0 acres.

Neither the statute nor the regulations, however, indicate explicitly that all of this area land should be included when calculating the town's progress toward the general land area minimum. The general land area minimum section of the statute simply refers to "low and moderate income housing… on sites…." G.L. c. 40B, § 20. The implication of this simple language, however, is that sites are to be counted in the most natural, straightforward way, that is, that the entire sites should be counted. This is also consistent with the DHCD guidance on the matter. Exh. 3, p. 5. Thus, the entire 138.0 acres should be included in the numerator of the percentage calculation.

The developer argues, relying on *Archstone v. Woburn*, No. 01-07, slip op. at 4-7 (Mass. Housing Appeals Committee, June 11, 2003), that only part of most of these sites should be counted.[5] Reliance on *Archstone*, however, is misplaced. In that case, we ruled that only land actually disturbed during construction or landscaping should be counted for purposes of applying the separate, 0.3% "annual land area minimum," which is also found in

5. The developer also cites *Robinwood, Inc. v. Rockland*, No 72-03, slip op. at 8-9 (Mass. Housing Appeals Committee order Dec. 3, 1975). We discussed that case in *Archstone*, and noted that it too dealt not with the general land area minimum, but with the annual land area minim. More important, while there was considerable ambiguity in the opinion, its conclusion was not based upon how the land area should be calculated, but instead upon the developer's ability to comply with the annual limit by constructing the development in phases. *Robinwood, Inc. v. Rockland, supra*, slip op. at 9.

G.L. c. 40B, ¶ 20. That part of the statute, which could have simply referred to the addition of housing sites in any year, instead referred specifically to "the commencement of construction of housing on sites" in any one year. Here, we are applying a different provision, the general land area minimum. Since that provision refers simply to sites, a different, simpler methodology for calculating the land area is appropriate.[6]

In addition to the eighteen fully counted rental developments, there are four homeownership or Section 8 "sticky voucher" developments concerning which the parties have stipulated that only a part of the each development site is to be counted.[7] Stip. ¶ 7; Stip., Exh. A. They are:

Green Tree Condo Acquisition	0.2 acres
Pine Grove	5.4 acres
Queen Anne's Gate II	1.5 acres
Weymouth Commons East	1.6 acres

Thus, an additional 8.7 acres are to be included in the numerator of the calculation.

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6. The developer has correctly pointed out that there may be circumstances in which this simple counting methodology would lead to a result that is inconsistent with the legislative intent. For instance, it would seem anomalous to count all of a very large lot containing only a very small number of affordable units. But we have not been presented with such a situation here, and if or when it arises, we are confident that we or DHCD can craft an appropriate exception to the general rule.

7. For homeownership developments or rental developments in which fewer than 25% of the units are affordable, only the same proportion of the land as affordable units are in proportion to total units is counted. Exh. 3, p. 5 (DHCD Guidance…). This *pro rata* calculation policy is consistent with DHCD's policy of counting homeownership units on a *pro rata* basis toward the 10% housing-unit threshold in G.L. c. 40B, § 20. Exh. 5 (DHCD Subsidized Housing Inventory, note 5(B)(1)(b)). We upheld this approach in *Cloverleaf Apartments, LLC v. Natick Board of Appeals*, No. 01-21, slip op. at 3-5 (Mass. Housing Appeals Committee order Mar. 4, 2002). In *Cloverleaf Apartments*, the issue before the Committee was how to calculate the acreage of Natick's homeownership developments for the purposes of the 1.5% land area minimum, and as here, calculation of the denominator was not in dispute. Unlike the current case, however, the parties had not stipulated as to how much of homeownership developments should be included on a *pro rata* basis. The Board argued that each entire homeownership site should be counted, as it is for rental developments. We looked to the legislative intent of the Comprehensive Permit Law, and ruled that the land area that should be counted toward the 1.5% minimum should be proportional to the percentage of affordable units in each development.

Summing the rental-units area of 138.0 acres and the *pro rata* area of 8.7 acres results in 146.7 acres, which is 1.9% of the total land area of 7,746.4 acres. Thus, low and moderate income housing already exists on sites comprising more than 1.5% of the total land area zoned for residential, commercial, or industrial use in Weymouth, the decision of the Board is consistent with local needs as a matter of law, and this appeal must be dismissed. G.L. c. 40B, § 20.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, §22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of this decision.

Housing Appeals Committee

Date: September 24, 2003

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Frances C. Volkmann