COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

In the Matter of

MEDFORD ZONING BOARD OF APPEALS

and

DIV FELLSWAY, LLC

No. 2020-07

DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR

October 10, 2023

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an interlocutory appeal to the Housing Appeals Committee brought by the Medford Zoning Board of Appeals (Board), pursuant to 760 CMR 56.03(8). The Board has appealed a determination by the Department of Housing and Community Development (DHCD)[2] that the City of Medford (Medford) has not met the general land area minimum, one of three statutory safe harbors that establishes that requirements and regulations imposed by a zoning board's decision, after hearing, are consistent with local needs under the Comprehensive Permit Law, G.L. c. 40B, § 20. *See* 760 CMR 56.03(1)(a). The general land area minimum safe harbor is met if low or moderate income housing exists on sites comprising 1.5 percent or more of all

[1] Consolidated with *Matter of Medford Zoning Board of Appeals and MVP Mystic, LLC*, No. 2020-06 (MVP). After the hearing, the MVP case was dismissed by agreement of the Board and MVP Mystic, LLC, upon the Board's withdrawal of its safe harbor assertion in that case alone. This decision addresses only the merits of the DIV Fellsway, LLC case.

[2] As of May 30, 2023, the Department of Housing and Community Development became the Executive Office of Housing and Livable Communities (EOHLC). St. 2023, c. 7. Since the proceeding was held before the change in agency status, we refer to the agency as DHCD throughout this decision.

land zoned for residential, commercial, or industrial use in a municipality. G.L. c. 40B, § 20; 760 CMR 56.03(3)(b).

Pursuant to 760 CMR 56.03(8)(a), a board seeking to rely on a safe harbor must notify the developer and DHCD of its 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 claim, it must provide written notice to DHCD and the board within 15 days thereafter, and DHCD "shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials." 760 CMR 56.03(8)(a).

Either party may file an interlocutory appeal of an adverse decision by DHCD to the Committee but must do so within 20 days of receipt of DHCD's decision. The interlocutory appeal to the Committee is conducted on an expedited basis, as the proceeding before the board is stayed pending our determination. 760 CMR 56.03(8)(c).

The developer, DIV Fellsway, LLC (DIV or developer) filed a comprehensive permit application with the Board on April 2, 2020, for the development of 278 rental units on approximately 3.4 acres of land located at 970 Fellsway in Medford. The Board opened a public hearing on the application on April 30, 2020, and on May 7, 2020, voted to declare that a denial of the requested comprehensive permit was consistent with local needs as a matter of law because housing eligible under DHCD's Subsidized Housing Inventory (SHI) exists on sites comprising 1.5 percent or more of the total land area in Medford zoned for residential, commercial, or industrial use. On May 7, 2020, the Board notified DIV and DHCD that it invoked the general land area minimum safe harbor. DIV notified the Board and DHCD of its challenge to the Board's claim on May 22, 2020. DHCD issued a letter dated August 4, 2020,[3] stating the Board was not entitled to the safe harbor. The Board filed this interlocutory appeal to the Committee on August 21, 2020.

At the initial conference of counsel on September 8, 2020, counsel for DIV raised the possibility of consolidating the matter with the *Matter of Medford Zoning Board of Appeals and MVP Mystic, LLC*, No. 2020-06 (MVP) and thereafter, DIV filed a motion to consolidate on September 17, 2020. The presiding officer denied the motion, which was opposed by MVP because its own motion to dismiss was pending. On April 12, 2021, MVP's motion to dismiss

[3] A corrected decision reaching the same conclusion was issued by DHCD on August 10, 2020.

was denied. *Matter of Medford and MVP Mystic, LLC*, No. 2020-06, slip op. at 4 (Mass. Housing Appeals Comm. Ruling on Motion to Dismiss, Apr. 12, 2021). At a joint conference of counsel on May 10, 2021, counsel in both matters revisited the issue of consolidation and, thereafter, a joint motion for reconsideration of the denial DIV's motion for consolidation was filed and granted. Both matters were heard together on February 2, 3 and 9, 2022, and pre-filed testimony and briefs were submitted jointly by MVP and DIV. After the parties filed post-hearing briefs, the parties to the MVP case reached a settlement and, on June 24, 2022, an Order on Stipulation and Joint Motion for Withdrawal was entered, leaving the DIV case pending.[4]

II. GENERAL LAND AREA MINIMUM

A. Comprehensive Permit Law and Regulations

We consider whether a city or town has met the safe harbor under the provisions of G.L. c. 40B, § 20 and 760 CMR 56.03(3). G.L. c. 40B, § 20 provides that:

> Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists ... on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial, or industrial use ... provided, however, that land area owned by the United States, the commonwealth or any political subdivision thereof, or any public authority shall be excluded from the total land area referred to above when making such determination of consistency with local needs.

The comprehensive permit regulations set out the requirements for calculating the percentage of land area with eligible housing. 760 CMR 56.03(3)(b). This percentage is calculated by dividing the eligible area of sites of affordable housing that are eligible to be inventoried on the SHI (the numerator), by the total land area in the municipality that is zoned for residential, commercial, or industrial use (the denominator). *Id. See Matter of Waltham and Alliance Realty Partners,* No. 2016-01, slip op. at 4-5 (Mass. Housing Appeals Comm. Interlocutory Decision Feb. 13, 2018); *Matter of Norwood and Davis Marcus Partners,* No. 2015-06, slip op. at 2-3 (Mass. Housing Appeals Comm. Interlocutory Decision Dec. 8, 2016). For calculation of the "total land area zoned for residential, commercial, or industrial use," 760

[4] On July 13, 2022, the Board filed a motion to strike pre-filed direct and rebuttal testimony, cross-examination testimony and any references in the record to MVP's witness, Nels Nelson. The Board's motion was denied and, accordingly, this decision will be based upon the complete record that was established at the hearing.

CMR 56.03(3)(b) and subsections 1 through 7 identify those areas that are included in or excluded from that area. For calculation of the area where low or moderate income housing exists, § 56.03(3)(b) states that:

> Only 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, shall be included toward the 1.5% 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).

760 CMR 56.03(3)(d) provides further that "[e]vidence regarding Statutory *Minima* submitted under 760 CMR 56.03(3) shall comply with any guidelines issued by [DHCD]." Regulations have the force of law and generally, an agency must comply with its own regulations. *Royce v. Commissioner of Correction*, 390 Mass. 425, 427 (1983).

B. DHCD Guidelines and the Board's Challenge to the GLAM Guidelines

DHCD has issued two sets of guidance that address methods for evaluating whether Medford has met the general land area minimum: 1) the Guidelines for Calculating General Land Area Minimum, issued January 17, 2018, revised January 31, 2020 (GLAM Guidelines), Exh. 8; and 2) the Guidelines, G.L. c. 40B Comprehensive Permit Projects, Subsidized Housing Inventory, updated December 2014 (40B Guidelines). Proposed Exh. 44.[5] The GLAM Guidelines were adopted in response to the Committee's encouragement to DHCD to "establish a methodology that provides clear guidance to municipalities and developers and promotes certainty and consistency" and, specifically with respect to the numerator, "to develop guidance with clear standards for reviewing the extent of impervious and landscaped areas 'directly associated' with SHI units." *Norwood, supra,* No. 2015-06, slip op. at 6, n.6; 19, n.12. The 40B Guidelines address the eligibility for units to be listed on the SHI. *See* Proposed Exh. 44, § II.A.2.

In its post-hearing brief, the Board's leading argument is that because the GLAM Guidelines were not adopted in compliance with statutory rulemaking procedures, they are *ultra vires,* invalid regulations without the force of law that improperly create binding rules and use mandatory language. It argues the application of these guidelines in this case is unlawful,

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[5] The 40B Guidelines were marked as Proposed Exhibit 44 for identification purposes but were not moved into evidence by either party.

arbitrary, and capricious. Board brief, pp. 11-15. It therefore asks the Committee to invalidate the guidelines, as well as those portions of 760 CMR 56.00, *et seq.,* that require compliance with the GLAM Guidelines as being inconsistent with G.L. c. 40B, §§ 20-23. The Board further argues that DHCD subcontracted the GLAM calculations to Tighe & Bond, a private entity, and in so delegating its review of the Board's safe harbor claim, DHCD has violated the Board's due process rights. Board brief, pp. 27-28.

The Board also claims that the GLAM Guidelines "operate to impose upon municipalities technical and burdensome submission and calculation requirements" which are not required by G.L. c. 40B or 760 CMR 56.00 and, therefore "cannot be used as a basis upon which to conclude that the [Board] 'has not met is burden of proof in asserting the 1.5% GLAM safe harbor.'" Board brief, p. 10.

The developer argues that the presiding officer's ruling on a motion to dismiss in the MVP case has already determined the Committee lacks the authority to strike down DHCD's regulations as invalid, illegal, or unconstitutional and that, to the extent the Board wishes to challenge the regulations, that challenge must proceed through a declaratory judgment action in Superior Court. *See* G.L. c. 30A, § 7; G.L. c. 231A. The developer argues that the Committee is not the forum for such challenges and has no jurisdiction to hear or resolve them. Developer brief, p. 40. DIV also argues that the Committee should reject the Board's challenge to the regulations and GLAM Guidelines for additional reasons. First, it argues that "[t]he Committee [already] has reviewed and interpreted [the] Chapter 40B regulations or guidelines put in place by DHCD to ensure they are consistent with the statute." *Id.,* citing *Matter of Weston and 518 South Avenue, LLC*, No. 2019-12, slip op. at 6 (Mass. Housing Appeals Comm. Interlocutory Decision Mar. 15, 2021). Second, it argues that the regulations are valid because Massachusetts courts have confirmed that they are clear and unambiguous, consistent with the statutory language, and rationally related to the statutory goals and are valid. *Id.* at 41, citing *Zoning Board of Appeals of Greenfield v. Housing Appeals Comm*., 15 Mass. App. Ct. 553, 559 (1983) (reasonable regulation of administrative agency which is clear and unambiguous on its face must, like comparable statute, be applied according to its terms). *See also Matter of Arlington and Arlington Land Realty, LLC*, No. 2016-08, slip op. at 21 (Mass. Housing Appeals Comm. Interlocutory Decision Oct. 15, 2019) ("the Committee and DHCD are expected to follow DHCD's regulations"), citing *Royce*, 390 Mass. 425, 427.

With regard to the GLAM Guidelines, the developer argues that the Committee should reject the Board's argument that they are *ultra vires* because an administrative agency "may adopt policies through adjudication as well as through rulemaking," and "policies announced in adjudicatory proceedings may serve as precedents for future cases." Developer brief, p. 43, citing *Weston, supra*, No. 2019-12, slip op. at 16, citing *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm.,* 457 Mass. 748,759 n.17 (2010). In addition, the developer argues that because the Board followed and applied the GLAM Guidelines in this matter it should not now be allowed to claim their invalidity. Developer brief, p. 43.

"[A]n administrative agency may use sub-regulatory guidance to 'fill in the details or clear up an ambiguity of an established policy' without resort to formal rulemaking as long as it does not contradict its enabling statute or preexisting regulations." *Genworth Life Ins. Co. v. Commissioner of Ins*., 95 Mass. App. Ct. 392, 396 (2019) (quoting *Massachusetts Gen. Hosp. v. Rate Setting Comm'n*, 371 Mass. 705, 707 (1977)); *accord Boston Ret. Bd. v. Contributory. Ret. App. Bd*., 441 Mass. 78, 83 (2004) (stating formal rule making is unnecessary "where the agency is intending to fill in the details or clear up an ambiguity of an established policy, rather than to inaugurate a material change of policy"), quoting *Massachusetts Gen. Hosp*., 371 Mass. 705, 707; *Arthurs v. Board of Registration in Med*., 383 Mass. 299, 313 n.26 (1981) ("[a]gencies 'intending to fill in the details or clear up an ambiguity of an established policy' may issue interpretation or informational pronouncements without going through the procedures required for the promulgation of a regulation"); *Zoning Bd. of Appeals of Amesbury,* 457 Mass. 748, 759, n.17 (administrative agency may adopt policies through adjudication as well as through rulemaking); *Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave., LLC*, 490 Mass. 257, 265-66 (2022) (adjudicative interpretation fills in gaps in statutory and regulatory regimes, and absent clear directive to contrary from Legislature, regulatory agencies are entitled to fill such gaps). Thus, these guidelines appropriately filled in a gap in both the statute and the regulations by providing such a methodology.

Moreover, the Committee has reviewed and interpreted Chapter 40B regulations and guidelines put in place by DHCD to ensure they are consistent with the statute. *See, e.g., Matter of Hingham and River Stone, LLC,* No. 2016-05, slip op. at 4 (Mass. Housing Appeals Comm. Interlocutory Decision Oct. 31, 2017), and cases cited. The Committee has often recognized that, while it is appropriate to give deference to a policy articulated by DHCD, the Committee

would not be bound by such a policy if it were in violation of statutory provisions or statutory intent. *Id.,* slip op. at 7, n.9, and cases cited. As the Committee may adopt policies through adjudication, policies adopted through interpretation of the Guidelines are likewise subject to refinement through the Committee's adjudicatory process. *Zoning Bd. of Appeals of Milton*, 490 Mass. 257, 264.

The Committee has stated often that guidelines do not have the force of law, *see, e.g., Arlington, supra,* No. 2016-18, slip op. at 6, citing *Matter of Braintree and 383 Washington Street,* 2017-05, slip op. at 5 (Mass. Housing Appeals Comm. June 27, 2019), *aff'd,* Nos. 2282CV00344, 2282CV00345 (Norfolk Super. Ct. May 24, 2023); *Waltham*, *supra*, No. 2016-01, slip op. at 22, n.22. *See Town of Northbridge v. Town of Natick*, 394 Mass. 70, 76 (1985) (agency's guidance documents are policy statements without force of law). "Generally, in considering statutory and regulatory provisions, [the Committee gives] deference to policy statements issued by DCHD, the state's lead housing agency." *Arlington, supra,* No. 2016-18, slip op. at 6, citing *Braintree, supra,* No. 2017-05, slip op. at 5; *Norwood, supra,* No. 2015-06, slip op. at 4, and cases cited. Moreover, as noted above, 760 CMR 56.03(3)(d) provides that "[e]vidence regarding Statutory *Minima* submitted under 760 CMR 56.03(3) shall comply with any guidelines issued by [DHCD]."

Indeed, with regard to DHCD guidelines specifically, not only the Committee, but also the Supreme Judicial Court has observed that the agency's guidelines are to be considered with the comprehensive permit regulations. *Zoning Bd. of Appeals of Milton,* 490 Mass. 257, 264 (noting that in Chapter 40B context, agency "has provided more specific guidance through regulations, guidelines, and adjudicatory decisions, as is its right"). *See Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 47, n.12 (2013) (DHCD guidelines are directly relevant to understanding DHCD's regulations because subsidizing agencies have responsibility to enforce compliance with provisions of 760 CMR 56.00 and applicable DHCD guidelines). *See* 760 CMR 56.02: *Subsidizing Agency*. As noted above, several Massachusetts appellate decisions treat with approval sub-regulatory guidelines that "fill in the details" with binding effect. *See, e.g., Boston Ret. Bd. v. Contrib. Ret. App. Bd.,* 441 Mass. 78, 80 (2004) (upholding agency "memorandum" that "instructed" local retirement boards how to make a particular determination); *Genworth Life Ins. Co.*, 95 Mass. App. Ct. 392, 396 (2019); *Zoning Bd. of Appeals of Milton*, 490 Mass. 257,

264 (in Chapter 40B context, the agency has provided more specific guidance through regulations, guidelines, and adjudicatory decisions, as is its right).

As discussed below, this is a *de novo* proceeding; we review the evidence submitted in the hearing before the Committee, and we render our decision based on that evidence. The record before DHCD for its review of the safe harbor, and the calculation by Tighe & Bond, which the Board challenges as an unlawful delegation of authority, have no bearing on our decision. The Board's other challenges to the comprehensive permit regulations do not affect the merits of its appeal. The Committee and DHCD are expected to follow DHCD's regulations. *See Royce*, 390 Mass. 425, 427. The Committee may not strike down the regulations as invalid, illegal, or unconstitutional. *Doe v. Sex Offender Reg. Bd.*, 459 Mass. 603, 628 (2011). Furthermore, the Board challenges the legality of the GLAM Guidelines while simultaneously relying upon them in support of its position with regard to its method of calculating the numerator, *see* § II.F, *infra*. Therefore, the Board has offered no valid basis for the Committee to declare any portion of 760 CMR 56.00 or the GLAM Guidelines invalid.

C. Burden of Proof

The Committee's hearing on this issue, like all Committee proceedings, is *de novo*. G. L. c. 40B, § 22; *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 369-371 (1973); *Waltham*, *supra*, No. 2016-01, slip op. at 5. The Board carries the "burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs[.]" 760 CMR 56.03(8)(a). It must affirmatively prove that it has satisfied the statutory minimum based on reliable supporting evidence. *Brewster Commons, LLC v. Duxbury*, No. 2010-08, slip op. at 6 (Mass. Housing Appeals Comm. Ruling and Order Extending Comprehensive Permit Dec. 12, 2011); *see Braintree, supra*, No. 2017-05, slip op. at 32; *Norwood, supra*, No. 2015-06, slip op. at 20. DIV may introduce evidence to counter the Board's evidence, or it may simply challenge the sufficiently of the Board's case without providing its own contrary evidence. *Waltham*, *supra,* No. 2016-01, slip op. at 5.

D. Methodology

Under the Comprehensive Permit Law, the decision of a board is consistent with local needs as a matter of law when the town has low or moderate income housing on sites comprising 1.5 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). This general land area minimum is calculated

by dividing the area of sites of affordable housing that are eligible to be inventoried on the SHI (the numerator) by the total land area in the municipality that is zoned for the residential, commercial, or industrial use (the denominator). 760 CMR 56.03(3)(b); *Waltham, supra*, No. 2016-01, slip op. at 4-5; *Norwood, supra*, No. 2015-06, slip op. at 2-3.

The Board contends, based on its calculations, that Medford has satisfied the 1.5 percent general land area minimum threshold, with a general land area percent of 1.83. *See* Board brief p. 6. DIV argues the Board's methodology and calculations are flawed and therefore Medford has not met the statutory minimum.

Although the parties' experts both used maps and data drawn from MassGIS, they based their calculations on different methodologies. The Board submitted its calculation as performed by a three-person group comprised of Medford's (former) Land Use Planner, Amy Streetman, its Environmental Agent, Denis MacDougall, and GIS Coordinator, Steve Morse. Tr. I, 28; Exh. 34, p. 2. The Board's calculations included certain parcels of land in its denominator which DIV's experts contend should not have been included. Further, the Board based its numerator on certain zoning determinations affecting its calculation of "Directly Associated Area," which zoning determinations were disputed by DIV.

E. The Denominator

The comprehensive permit regulations provide that the denominator in the calculation is the "total land area," inclusive and exclusive of certain categories of land. 760 CMR 56.03(3)(b). Total land area includes: "all districts in which any residential, commercial, or industrial use is permitted, regardless of how such district is designated by name in the [municipality's] zoning bylaw," and "all unzoned land in which any residential, commercial, or industrial use is permitted." 760 CMR 56.03(3)(b)1–2. Total land area excludes the following: (1) land owned by the United States, the Commonwealth of Massachusetts or any political subdivisions, and the Department of Conservation and Recreation;[6] (2) any land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the Department of Environmental Protection (DEP) pursuant to G.L. c. 131, § 40A; (3) any water bodies; and (4) any flood plain, conservation or open space zone if such zone completely

[6] The denominator, however, "shall include any land owned by a housing authority and containing SHI Eligible Housing." 760 CMR 560(3)(b)3.

prohibits residential, commercial and industrial use, or any similar zone where residential, commercial, and industrial use are completely prohibited. 760 CMR 56.03(3)(b)3-6.

1. The Board's Calculation

The Board submitted its calculation of the denominator through the testimony of Mr. MacDougall and Mr. Morse. Exhs. 34, 35, 38. In their calculations, Mr. MacDougall and Mr. Morse determined that the total acreage for Medford was 5,532.88 acres. Exhs. 1, p.2; 34, ¶ 9, 38, ¶ 8. Mr. Morse testified he then made the following adjustments pursuant to the GLAM Guidelines: he determined that 353.552 acres representing water bodies should be excluded. Exh. 38, ¶¶ 5, 9. Next, Mr. Morse identified the "Recreation Open Space" zoning district (ROS land or ROS district) and excluded it in toto based on his determination that it is the only zoning district in Medford where any residential, commercial, and industrial uses are prohibited by the ordinance. Exhs. 38, ¶ 10; 1, p. 3; Tr. I, 38. This calculation resulted in an exclusion of about 1,065.99 acres. Tr. I, 52. He also excluded areas representing public rights-of-way, railroad rights-of-way and publicly owned land that is not subsidized housing but did not provide figures to represent the acreage of those exclusions in total or individually.[7] Exh. 1, p. 4. His subtraction of all "excluded land" from the total acreage for Medford of 5,532.88 acres resulted in the total land area of 2,589.61 acres, which he used as the denominator. Tr. I, 36-37; Exhs. 1, p. 5; 34, ¶ 20; 38, ¶19.

2. Challenges to Board Denominator Exclusions

DIV challenges the methodology used by Mr. MacDougall and Mr. Morse, as not adhering to the GLAM Guidelines. MVP's expert, Nels Nelson, Senior Planner with geospatial technology specialty at Stantec Consulting Services, and DIV's expert, Amy Haas, Senior Geospatial Technology Specialist at VHB, reviewed the testimony and exhibits, and each offered a separate calculation of the general land area minimum in accordance with the GLAM Guidelines.

DIV argues that the Board improperly excluded the entirety of the ROS land. Mr. Nelson and Ms. Haas testified that this exclusion was improper because the ROS district does not

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[7] Subtracting the 1,065.99 acres of ROS land from the total acreage for Medford of 5,532.88 produces a figure of 4,466.89; the difference between 4,466.89 and the Board's final denominator of 2,589.61 is 1,877.28, but the Board has not provided the breakdown of that number into the individual categories that are excluded, with the exception of water bodies, discussed further, below.

completely prohibit development. Exhs. 39, ¶ 58; 41, ¶¶ 13-14. Second, DIV argues that the Board excluded from the denominator 11 rights-of-way totaling 23.311 acres, without providing any evidence that these parcels are publicly owned.[8] Exh. 41, ¶ 16. Mr. Nelson and Ms. Haas testified that a properly calculated denominator is 2,493 acres.[9] Exhs. 39, ¶ 27; 41, ¶ 17; Tr. II, 79; Tr. III, 54.

a. ROS Land

The ROS district is comprised of multiple areas of land, located in various parts of Medford. Exh. 33. Mr. Morse excluded all of the ROS land from the denominator, a total of 1,065.99 acres. Exhs. 38, ¶ 10; 1, p. 3; Tr. I, 37-38, 52. Uses allowed in the ROS district include bowling alleys, theaters, concert halls, private recreation club or lodge, production of crops, horticulture, and floriculture. Exhs. 39, ¶ 60; 9, p. 23. The Board argues that Mr. MacDougall's testimony that the ROS land consists of two water bodies that are restricted from development, such as Wright's Pond and the Winchester reservoirs, establishes that the entirety of the land within the ROS district is unbuildable and therefore was properly excluded from the denominator.[10] Board brief, p. 18; Exh. 33; Tr. I, 112-113. On cross-examination, Mr. MacDougall stated that, as a zoning matter, the ROS land does not prohibit all development and that, according to the Zoning Ordinance Table of Use Regulations (§ 94-148) certain uses, including public entertainment and recreation facilities, are allowed in the ROS district. Tr. I, 46-48, 53; Exh. 9, p. 23.

Mr. Nelson testified that the ROS land allows partial development and the fact that some of the ROS land is "publicly owned" does not change its zoning status; some of the land within the ROS land can be publicly owned without changing its zoning designation. Tr. II, 70-72. While Mr. Nelson testified that much, if not most, of the ROS land could be excluded for reasons other than zoning, he also stated the Board did not provide enough evidence to allow a determination of what acreage of the ROS land should be excluded. Exh. 41, ¶ 15. On the record

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[8] Mr. Nelson testified that the improperly excluded rights-of-way totaled 23.311 acres but did not provide the resulting total acreage of the rights-of-way after those rights-of-way were included. Exh. 41, ¶ 16.

[9] Mr. Nelson's denominator was 2,493.773 while Ms. Haas's denominator was 2,493.493. We find the difference in the two calculations to be *de minimis*.

[10] The Board excluded water bodies from its calculation; however, it is not clear from the Board's evidence that Wright's Pond and the Winchester Reservoirs were excluded from the ROS land.

before us, we cannot determine what portions of the ROS land should be excluded based upon public ownership or other characteristics. We agree with the developer that ROS land is not a zoning district in which all residential, commercial, and industrial uses are completely prohibited. Having failed to identify acreage of specific portions of the ROS land that is excludable, the Board has not demonstrated that any of the 1,065.99 acres may be excluded from the denominator.

b. Public Rights of Way

In addition to the ROS land, Mr. MacDougall testified that he excluded public and railroad rights of way from the total land area. Exh. 34, ¶ 12. For his calculation, he identified and created a map of the excluded land. Exh. 1, pp. 5, 10, Fig. 5. However, the Board provided neither a total acreage amount for all rights of way nor a breakdown of each excluded right of way. Further, its brief contains no argument addressing the exclusion of these rights of way.

Relying on Mr. Nelson's testimony, DIV argues that the Board failed to provide justification for excluding 11 out of the 18 rights of way. Developer brief, p. 19. Of the 18, seven are owned by the Massachusetts Bay Transit Authority (MBTA) and were properly excluded under the public land exclusion provision. Exh. 39, ¶ 63. *See* 760 CMR 56.03(3)(b)3. Mr. Nelson testified that for the remaining 11 rights of way, totaling 23.311 acres, no property owner was identified. The developer argues that with unknown, and potentially private ownership, exclusion of the 11 rights of way was improper. Exhs. 41, ¶ 16; 39, ¶ 63. Ms. Haas also opined that the Board's exclusion of the 11 challenged rights of way without evidence of public ownership was improper, and their total acreage of 26.656 acres should be included in the denominator, resulting in 984.84 acres of publicly owned rights of way eligible for exclusion. Exh. 39, ¶ 21.

We agree with the developer that the Board has failed to justify exclusion of the 11 disputed rights of way, and it should not have excluded 26.656 acres of disputed land. *Waltham*, *supra,* No. 2016-01, slip op. at 5. We accept Ms. Haas's testimony that 984.84 acres of publicly owned rights of way are eligible for exclusion in the denominator.[11]

[11] While Ms. Haas's and Mr. Nelson's calculations on the rights of way land differed slightly, we accept Ms. Haas's calculation as it was more detailed and credible on this issue. In any event, the difference does not change the total denominator, on which both Mr. Nelson and Ms. Haas agree. Indeed, the developer's denominator is more favorable to the Board than its own denominator.

3. DIV's Denominator Calculation

Ms. Haas calculated the denominator from a total land area starting point of 5,532.88 acres. Exh. 39, ¶ 21. She excluded 3,039.387 acres, representing water bodies, public rights of way, the ROS Land and publicly owned land without SHI parcels, as follows:

Total Land Area Subject to Exclusions	5,532.88
Public Rights of Way	-984.84
Zoning/ROS Land	-1,374.53
Water Bodies	-379.58
Publicly Owned Land without SHI Parcels	-300.437
Denominator	2,493.493

Exhs. 39, ¶ 21, 24; 14. Her calculations resulted in a denominator of 2,493.493 acres. Exh. 39, ¶ 24.

4. Denominator Conclusion

The Board's witnesses did not break down each exclusion category or provide specific acreage for each calculation, making it difficult or impossible to know exactly what the Board's acreage numbers were for each category. Even in the Board's initial calculation submitted to DHCD (Exh. 1), there is no breakdown of the exclusion calculations. The Board and its witnesses provided the technical description of how they arrived at the figures and maps showing the areas excluded, but neither description provided specific calculations of the component categories excluded, with the exception of water bodies. However, that figure, including water bodies within the disputed ROS land, leaves unclear whether there was double counting of water bodies. Although the amount of total ROS land was identified, the Board did not clarify whether it had already excluded previously excluded water bodies, and it failed to provide acreage of property where commercial activities were permitted. Therefore, the Board failed to demonstrate that this acreage should be excluded from the denominator. *See, e.g., Matter of Stoneham and Weiss Farm Apartments, LLC*, No. 2014-10, slip op. at 5-6 (Mass. Housing Appeals Comm. Interlocutory Decision June 26, 2015) (where board did not adequately explain difference between total area in town and its "total land area" figure, it "failed to provide sufficient evidence from which a finding of the General Land Area Minimum may be made") *Waltham,*

supra, No. 2016-01, slip op. at 13-14 (board's obligation to prove elements of land area minimum safe harbor includes "presenting sufficient comprehensible and credible evidence from which a persuasive calculation of land area may be made"); *Norwood, supra,* No. 2015-06, slip op. at 9 (argument, with no evidence to support methodology, is inadequate to sustain burden); *see also Braintree, supra,* No. 2017-05, slip op. at 21-23.

Using the figures offered by both MVP's expert, Mr. Nelson and DIV's expert, Ms. Haas, and based on the credible evidence, the Board, at best would have a denominator as calculated below:

Category	Board Calculation	VHB/Haas Calculation	Stantec/Nelson Calculation	Accepted by Committee
Total Land Area Subject to Exclusions	**5,532.88**	**5,532.88**	**5,532**	**5,532.88**
Public Rights of Way	Not provided	984.84	Not provided	984.84
Zoning/ROS Land	1,065.99	1,374.53	Not provided	1374.53
Water Bodies	353.552	379.58	Not provided	379.58[12]
Publicly Owned Land without SHI Parcels	Not provided	300.437	Not provided	300.437
Denominator	**2,589.606**	**2,493.493**	**2,493.773**	**2,493.493**

We therefore determine the denominator to be a total of 2,493.493 acres. Exhs. 39, ¶ 21-25; 14, 15.

F. The Numerator

To determine the numerator, that portion of the municipality where low or moderate income housing exists, 760 CMR 56.03(3)(b) states:

> Only 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

[12] No evidence was presented to allow a choice between the Board's and Ms. Haas's numbers for water bodies. Therefore, to provide for the exclusion most favorable to the Board, we accept Ms. Haas's acreage for water bodies.

> Applicant's initial submission to the Board, shall be included toward the [1.5] % 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 starting point for calculating the area of SHI eligible housing is a determination of the acreage of the SHI eligible housing units, and impervious and landscaped areas directly associated with these units. The GLAM Guidelines, through the definitions of "Actively Maintained" and "Directly Associated Area," provide guidance in determining the directly associated impervious and landscaped areas. Exh. 8, p. 3.

To calculate the final acreage of SHI eligible housing, the units countable on the SHI must be identified before calculating the acreage for the proportion of the site area that is occupied by SHI eligible housing units, including impervious and landscaped areas directly associated with those units. 760 CMR 56.03(3)(b). *Waltham*, *supra*, No. 2016-01, slip op. at 27. The GLAM Guidelines describe the process of prorating the SHI eligible acreage for developments with less than 100 percent of the units on the SHI. Exh. 8, § 3.3, p. 9.

For rental housing developments with at least 25 percent of the units reserved for low or moderate income housing, DHCD counts all units within the development on the SHI for the city or town. Exh. 8, § 3.3, p. 9; *see Braintree, supra*, No. 2017-05, slip op. at 10-11, citing *Norwood*, *supra,* No. 2015-06, slip op. at 11-12; *Stoneham, supra,* No. 2014-10, slip op. at 7; *Arbor Hill Holdings Ltd. P'ship v. Weymouth,* No. 2002-09, slip op. at 5, and n.7 (Mass. Housing Appeals Comm. Order of Dismissal Sept. 24, 2003). Thus, for purposes of the land area minimum, all such units count as SHI eligible housing units for the purposes of determining land occupied by the buildings and impervious and landscaped areas directly associated with the SHI eligible units.

For homeownership projects, and rental projects with less than 25 percent of the units reserved for low or moderate income housing, DHCD counts only the low or moderate income units on the municipality's SHI. *Matter of North Reading and NY Ventures, LLC,* No. 2019-11, slip op. at 15 (Mass. Housing Appeals Comm. Interlocutory Decision Oct. 10, 2023; *Braintree, supra*, No. 2017-05, slip op. at 11, citing *Norwood*, *supra,* No. 2015-06, slip op. at 11-12; *Stoneham, supra,* No. 2014-10, slip op. at 7; *Weymouth, supra,* No. 2002-09, slip op. at 5, and n.7. For these two categories of development, where affordable units are interspersed among market rate units, the area directly associated with all units can be calculated for the entire

development, and then "prorated" corresponding to the percentage of units in the development that are SHI eligible units.[13] *See* Exh. 8, App. A, § 3.4, p. 12; *see also North Reading, supra,* No. 2019-11, slip op. at 15; *Braintree, supra,* No. 2017-05, slip op. at 11; *Weymouth*, *supra,* No. 2002-09, slip op. at 5 and n.7; *Cloverleaf Apartments, LLC v. Natick*, No. 2001-21, slip op. at 3-5 (Mass. Housing Appeals Comm. Mar. 4, 2002). Finally, after a proration determination is made and any required adjustment performed, the GLAM Guidelines require comparison of the total acreage of SHI units and directly associated area to the minimum lot area required by zoning for an equivalent number of units. The guidelines then require that "the lower number—either the prorated area or the required lot area—is included towards the SHI Area calculation." [14] Exh. 8, App. B, Fig. 20, p. 14.

The parties dispute, among other things, whether SHI eligible sites with 100 percent affordable units are subject to comparison of the minimum lot area required under zoning with the post-proration acreage of directly associated area, and the zoning classification of two specific housing developments in Medford.

1. The Board's Calculation of the Numerator

The parties agree there are 35 SHI sites for Medford. Exh. 1, p. 3; Developer brief, p. 8. For each of these properties, the Board is required to calculate the area of the SHI eligible units and area directly associated with those units. The Board proffered its numerator relying on the calculations of Mr. MacDougall, its environmental agent, and Ms. Streetman, former City Planner. Exh. 38, ¶¶ 4, 20; Tr. I, 28, 53-54. Mr. MacDougall used the Town's GIS to inventory the total acreage of parcels on which qualifying affordable housing exists to derive a total

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[13] Unless the SHI eligible units are easily distinguished from the remaining units for calculation of directly associated area, land area is measured as a percentage of the directly associated area of the entire site equal to the percentage of all units in the development that are SHI eligible units. *See* Exh. 8, App. A, § 3.4, p. 12; *see also Braintree, supra,* No. 2017-05, slip op. at 11; *Weymouth*, *supra,* No. 2002-09, slip op. at 5 and n.7; *Cloverleaf Apartments, LLC v. Natick*, No. 2001-21, slip op. at 3-5 (Mass. Housing Appeals Comm. Mar. 4, 2002).

[14] For a mixed-used development including residential and commercial uses, SHI land area is subject to an additional rule. It is the product of SHI eligible housing land area and the percent of residential use, based on the ratio of floor space dedicated to residential use to total floor space of the project's buildings. *Braintree, supra,* No. 2017-05, slip op. at 11; *Waltham*, *supra*, No. 2016-01, slip op. at 27; *Matter of Newton and Dinosaur Rowe*, No. 2015-01, slip op. at 6 (Mass. Housing Appeals Comm. Interlocutory Decision June 26, 2015).

acreage of 45.917 acres. Exh. 34, ¶ 18. To that number, he added the 1.51 figure for group home acreage provided pursuant to the GLAM Guidelines[15] to reach a total of 47.427 acres.[16] Exh. 34, ¶ 20. Mr. MacDougall then performed an analysis of directly associated area only for those 18 of the 35 sites that had been prorated because less than 100 percent of the units on those sites counted as SHI eligible housing units. For those 18 sites, he also calculated the minimum required lot area. For the remaining 17 sites, he did not calculate directly associated area; further, he testified that he did not "have to calculate Required Lot Area where the site is a hundred percent eligible for inclusion of a hundred percent of the units on the SHI inventory." Tr. I, 69. He stated that, it was "[o]ur interpretation is if it's a hundred percent, it's a hundred percent." Tr. I, 70. Thus, the Board limited the comparison of the prorated area to the required lot area to only those sites with less than 100 percent eligible housing units. Tr. I, 61-62; 69-70; Exh. 1, p. 61.

2. Calculation of Directly Associated Area

The comprehensive permit regulation states, in regard to calculation of the numerator for the general land area minimum, that "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)." 760 CMR 56.03(3)(b). The GLAM Guidelines define "Directly Associated Area" as "[l]andscaping maintained principally for the benefit of the residents of a development containing SHI Eligible Housing and impervious surfaces adjacent to such a development that may be included in the SHI-Eligible Area." Exh. 8, p. 3. The GLAM Guidelines also state that "[f]eatures that generally will not be considered Directly Associated include: … non-Actively Maintained wooded or vegetated areas that are not within required side, front, or rear yard dimensional requirements and not within 50 feet of a building footprint…." *Id.* Remote, non-actively maintained areas are not landscaping principally for the benefit of the development's residents. Based on our consideration of the regulation and the GLAM Guidelines, we only include non-actively maintained wooded or vegetated areas as SHI eligible area if they meet

[15] Pursuant to the GLAM Guidelines, upon request by the Board, the group home acreage is calculated by MassGIS, which informs DHCD of the resulting figure. DHCD then informs the Board of that number. *See* Exh. 8, § 1.3, p. 7.

[16] The developer does not dispute the Board's group home acreage.

local yard dimensions and are within 50 feet of building footprints. *Braintree, supra*, No. 2017-05, slip op. at 16; *Weston, supra,* No. 2019-12, slip op. at 18.

The Board calculated directly associated area for the 18 sites with less than 100 percent SHI eligible housing units. Exh. 1, p. 61. It did not submit evidence specifically addressing directly associated area for developments with all units counted as SHI eligible because, it asserts, the total sites should count. Exh. 1, pp. 20, 61. The Board argues that under the statute and regulations, the numerator used to determine whether the Town has achieved the 1.5 percent statutory minimum is the "total acreage of sites containing SHI eligible housing units," meaning the entire parcels on which the developments are located. Board brief p. 19, citing G.L. c. 40B, § 20 and 760 CMR 56.03(3)(b). The Board argues that requiring calculation of the required lot area for all SHI Sites, without exception is "another way" for the developer to "attempt to manipulate the calculations" against municipalities. Board reply, pp. 4, 5.

With respect to those sites for which it did calculate directly associated area, the Board argues that the Committee's definition of "landscaped area" is unduly narrow and that the GLAM Guidelines "fail to recognize the importance of natural screening for these (usually) dense projects." Board brief, p. 20. The Board argues that "[s]ite and building design entails the use of existing features of the site, including natural features, as part of the project design. The preservation of natural features that enhance the project and provide benefits to its residents are as integral to the design—including the landscape design—as any areas in which the 'plant cover' has been altered." Board brief, p. 20. It argues that "by severely limiting what is 'directly associated' [the GLAM Guidelines] fl[y] in the face of the statutory scheme that values 'site and building design in relation to the surroundings' (as well as 'preserv[ing] open spaces')" citing G.L. c. 40B, § 20. Board brief, p. 20.

The developer argues that the Board failed to exclude from the numerator portions of several SHI sites that are not "directly associated" with those sites within the meaning of 760 CMR 56.03(3)(b) and the GLAM Guidelines. It argues that the Board ignored the clear instructions of the regulations and GLAM Guidelines and improperly inflated Medford's numerator, resulting in an inaccurate percentage. Developer brief, p. 20. Furthermore, the developer argues that the Board failed to apply the directly associated analysis for those sites with 100 percent eligible units. Developer brief, pp. 9, 22; Exhs. 2; 32; 41, ¶ 28. The Board responds that "he did not figure out the setback requirements for each property to determine what

non-Actively Maintained wooded or vegetated areas can be considered 'Directly Associated.'"[17] Board brief, p. 21.

We have previously rejected the Board's argument that assumes developers design developments to maximize the land area that would be counted as directly associated area. The comprehensive permit law makes clear that these issues are separate. *Weston, supra*, No. 2019-12, slip op. at 19. While G.L. c. 40B, § 20 refers to better site and building design, and preservation of open space, these are references to local concerns that are to be balanced against the need for low and moderate income housing, not to the general land area minimum that is described in the next sentence of the statute. G.L. c. 40B, § 20. In *Norwood, supra*, No. 2015-06, slip op. at 14, the Committee determined that the term "landscaped" suggests:

> … landscaped areas associated with SHI units are altered areas, including gardens, lawns, and other areas that have been improved or are maintained specifically for the benefit of the residents of the affordable units. Unaltered wooded areas do not fall within the portion of the site to be designated as SHI area, unless the tree canopy is above an area shown to be used by the residents.

Adjustments for landscaped areas directly associated with SHI eligible housing units is a regulatory requirement, applied in Committee decisions since long before the issuance of the GLAM Guidelines. *See Waltham, supra*, No. 2016-01, slip op. at 30. The language in 760 CMR 56.03(3)(b) regarding areas directly associated with SHI eligible units does not prevent or discourage developers from including wooded areas and natural features in affordable housing developments. *See Weston supra,* No. 2019-12, slip op. at 18-19; *Braintree, supra*, No. 2017-05, slip op. at 16.

a. The Eight Disputed Sites—Area Directly Associated with SHI Units

Of the 18 SHI sites, Mr. Nelson and Ms. Haas identified eight SHI sites for which they testified the Board overstated the directly associated SHI area by including land that does not meet the definition of "Directly Associated Area" under the GLAM Guidelines.[18] Exhs. 4, pp.

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[17] The Board seeks to discredit Mr. Nelson's testimony by arguing he erroneously assumed certain factors of the Board's experts' calculations and used those assumptions in his own calculations. The fact that Mr. Nelson relied on some of the Board's calculations, it argues, is proof that he did not perform an independent calculation to determine the general land area percentage. Board brief, p. 22.

[18] Of the eight sites challenged by DIV, Mr. MacDougall testified that he disagreed with Mr. Nelson's calculations on only four of those sites: Tempone Manor, 75 SL, Lumiere, and Modera Medford. Exh. 35, ¶ 5; Tr. I, 78. Since Mr. MacDougall did not offer any rebuttal testimony or otherwise dispute the developer's calculations on the remaining sites, we accept the developer's numbers for those sites:

16-33; 27; 39, ¶ 34; 41, ¶¶ 45-47. Mr. Nelson and Ms. Haas each testified that Mr. MacDougall failed to properly apply § 56.03(3)(b)'s requirement to include only "impervious and landscaped areas directly associated with [the SHI eligible units]," as expressed in Committee decisions and the GLAM Guidelines. Exhs. 39, ¶ 16; 41, ¶ 11. Mr. Nelson and Ms. Haas reviewed satellite imaging in MassGIS of each SHI property in Medford in order to determine which portions of each property were directly associated with the SHI eligible units. They also reviewed the Medford Zoning Ordinance and public records, including assessor's records and building permit records, and they performed site visits. Tr. II, 65; Exhs. 39, ¶¶ 8, 33; 41, ¶¶ 32, 35, 38-42. Ms. Haas and Mr. Nelson prepared images of the adjustments they made to these eight disputed properties using aerial photographs that are publicly accessible from MassGIS as well as assessor's maps. Exhs. 2; 14; 15; 32; 33, 39 ¶ 33; 41, ¶ 45. Citing their testimony, the developer argues that the Board included acreage for portions of sites that are not "exclusively or principally" intended for use by residents of those sites. Developer brief, p. 24. Mr. MacDougall testified on cross-examination that "things like wooded areas that aren't primarily for the residents of an SHI site or paved areas" such as public ways and public sidewalks "that aren't primarily for the residents of an SHI site, those are not allowed to be included as Directly Associated Areas." Tr. I, 73.

<u>Tempone Manor</u>: Mr. Nelson testified that his calculation excluded the wooded areas along the western, southern, and eastern edges of the parcel, which Mr. MacDougall confirmed on cross-examination were located outside of a chain link fence enclosing the property. Exhs. 41, ¶ 46(a); 4, p. 20; Tr. I, 82-85. Mr. MacDougall further testified that the wooded areas along the western, southern, and eastern edges of the property provide "important buffers and screening from and to roadways and adjacent properties…" and should be included as directly associated area. Exh. 35, ¶ 5(a). On cross-examination, he testified that at least some of the areas included by the Board as directly associated are located outside of a 6-8 foot high chain link fence

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Weldon Gardens, Riverside Towers, Residences at One St. Clare, or Sphere Apartments. Exh. 35. Accordingly, the Board has waived its dispute as to the calculation of SHI eligible acreage for those developments since issues that are not briefed are waived. *See Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 3 (Mass. Housing Appeals Comm. June 21, 2010), *aff'd Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadows*, LLC, 464 Mass. 166 (2013); *Hilltop Preserve Lid. Partnership v. Walpole*, No. 2000-11, slip op. at 2 n.1 (Mass. Housing Appeals Comm. Apr. 10, 2002); *An-Co, Inc. v. Haverhill*, No. 1990-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994)*; see also Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85-86 (1995), quoting *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

enclosing the property, but he could not say how the area outside of the fence is used by the residents of Tempone Manor. Tr. I, 90, 91; Exh. 1, p. 25.

Mr. MacDougall's testimony that certain wooded areas provide important buffers and screening provided no specific factual basis for including the disputed areas. Other than that generalized testimony, the Board provided no other evidence regarding Tempone Manor. He did not provide evidence that this area was landscaped, as required by the regulation, or that it meets the requirements for directly associated area under the GLAM Guidelines. Therefore, the Board has failed to demonstrate that the disputed 0.214 acres are eligible for inclusion. The parties' calculations are below:

Property	Board	Stantec (Nelson)	VHB (Haas)
Tempone Manor	1.834	1.620	1.642

We accept the developer's calculation of 1.620 acres of Tempone Manor as eligible for inclusion in the numerator.[19] Exhs. 41, ¶ 29; 27; 1, p. 61.

75 SL: Mr. Nelson testified that he excluded all land not directly associated with the property, specifically parts of the adjacent roads (Earhart Landing and Station Landing), street parking, public sidewalks, and a parking lot not exclusively used by the residents of 75 SL. The Board and Mr. Nelson have the same parcel area calculation, and each uses the same percentage of SHI eligible units, but their eligible area calculations differ based on different areas that were excluded, as explained by Mr. Nelson, resulting in a difference in their calculations by 0.023, as shown below. Exhs. 41, ¶ 46(e); 1, p. 61.

Property	Board	Stantec (Nelson)	VHB (Haas)
75SL	0.051	0.028	0.027

Mr. MacDougall did not dispute excluding the parts of the "adjacent roads (Earhart Landing and Station Landing), street parking, public sidewalks, and a parking lot not exclusively used by the residents of 75SL," but he stated that the Board correctly determined that "the section of the building to the Southeast corner of the property that is off the boundary provided"

[19] We accept Mr. Nelson's calculations here rather than Ms. Haas's as we find his testimony to be more thorough and credible in explaining his calculations and conclusions, but we note that the differences between Mr. Nelson's calculations and Ms. Haas's are negligible, and without any impact on our ultimate conclusion regarding the numerator.

should be considered directly associated area. Exh. 35, ¶ 5(b). On cross-examination, Mr. MacDougall testified that the southeast corner of the 75SL property was part of the parking lot associated with an adjacent hotel and that, at the time of his calculation, he understood those parking spaces to be associated with 75 SL and not the hotel. He testified that he does not have any evidence to support his understanding that those parking spaces are associated with 75SL. Tr. I, 93-94. Exh. 1, p. 46.

We agree with the developer that the southeast corner of the 75SL site has not been demonstrated to be exclusively or principally intended for use by the residents of 75 SL. Therefore, the Board has failed to demonstrate that the disputed 0.023 acre is eligible for inclusion. We accept the developer's calculation of 0.028 acres of 75 SL as eligible for inclusion in the numerator. Exhs. 41, ¶¶ 29, 46(e); 27.

Lumiere: Mr. Nelson excluded "publicly accessible sidewalks that pass through the site to other uses." Exh. 41, ¶ 46(f). Mr. MacDougall testified that the "sidewalks serving this parcel are principally intended for use by the residents of the development as there are no other existing developments adjacent to the development." Exh. 35, ¶ 5(c). He testified that the Board included what it calls the entire site boundary as the SHI area. Tr. I, 94; Exh. 1, p. 50. On cross-examination, Mr. MacDougall stated that, on the adjacent lot, abutting the back of the Lumiere building, on its northerly side, there is a public ice rink and a large parking area that serves Hormel Stadium. Tr. I, 95; Exh. 1, p. 50. Mr. McDougall testified that the sidewalks in the area, which the Board counted as directly associated area, pass through the Lumiere site, are open to the public and used by people walking to and from Hormel Stadium and the ice rink, or to retail stores across the street. Tr. I, 95.

Property	Board	Stantec (Nelson)	VHB (Haas)
Lumiere	0.233	0.212	0.221

We agree with the developer that the Board overstated the eligible SHI area by approximately 0.021 acres because it included areas of publicly accessible sidewalks that pass through the site to other uses. *See* Exhs. 41, ¶ 46(f); 2, p. 9; Tr. I, 95. Therefore, the Board has failed to demonstrate that the disputed acres are eligible for inclusion. We accept the developer's calculation of 0.212 acres of Lumiere as eligible for inclusion in the numerator. Exhs. 41, ¶¶ 29, 46(f); 27.

Modera Medford: Mr. Nelson testified that "according to research conducted by or on behalf of Stantec, the fire lane to the north of the [Modera Medford] building has an access easement for the adjacent office building. The land to the east of the building has a DCR [Department of Conservation and Recreation] public access easement. The surface parking to the west of the building has an office parking easement or parking that is open to members of the public using the DCR access area. Once these areas are excluded, the eligible area decreases from the [Board's] claim of 8.432 acres to 4.952 acres." Exh. 41, ¶ 46(h).

Mr. MacDougall testified that he included a public path and an emergency access lane on the Modera site in the directly associated area but, on cross-examination, he acknowledged that these areas are not used exclusively by residents of the development. Tr. I, 102, 104, 106; Exh. 1, p. 55. He testified that it was "perhaps" not proper for him to include a public path that runs through the Modera site. Tr. I, 102-104. He also testified that he has seen landscaping and other vehicles using the emergency access roadway for non-emergency purposes and conceded that it is not exclusively or primarily for the residents of Modera to use. Tr. I, 105-106.

Property	Board	Stantec (Nelson)	VHB (Haas)
Modera Medford	0.625	0.500	0.494

We agree with the developer that the Board overstated the eligible SHI area by approximately 0.125 acres because it had not demonstrated that areas of publicly accessible paths and easements and access lanes on the SHI site that are used by non-residents of Modera were principally for the residents of the affordable housing development. Exh. 2, p. 13. Therefore, the Board has failed to demonstrate that the disputed acres are eligible for inclusion. We accept the developer's calculation of 0.500 acres of Modera Medford as eligible for inclusion in the numerator. Exhs. 41, ¶ 29; 27.

Weldon Gardens: Mr. Nelson excluded land areas beyond the fence on the southern and eastern sides of the property, land used for parking by an abutting property on the northern side, and land along the western edge that is a public sidewalk as divided by a chain link fence in his calculation of directly associated area of 1.193 acre for this site. He opined that the Board's calculation of eligible area for directly associated areas was overstated by 0.083 acres. Exh. 41, ¶ 46(b). Mr. MacDougall did not offer any rebuttal testimony to the testimony of Mr. Nelson (and Ms. Haas) concerning their calculations of eligible area for Weldon Gardens. The aerial images for this site confirm that the Board improperly included areas of public sidewalks located

outside a fence enclosing Weldon Gardens as well as a parking area used by an adjacent property. Exh. 32, p. 2. On this record, the Board has not shown that the disputed area is directly associated to the affordable units, and we therefore accept the developer's calculation of 1.193 acres for inclusion in the numerator.

Riverside Towers: Mr. Nelson testified that the Board used the entire parcel as eligible area, while Stantec excluded areas beyond the fence on the eastern side of the property, land along the southern edge that falls within the Medford Water exclusion layer, and land in the northern part of the site that serves as a shared access lane with the abutting Medford Council on Aging's Senior Center at 101 Riverside Avenue. He determined the eligible acreage to be 1.680 acres. He testified that, in his opinion, the Board's calculation for directly associated areas is overstated by 0.530 acres. Exh. 41, ¶ 46(c). Mr. MacDougall did not offer any rebuttal testimony in response to the testimony of Mr. Nelson (or Ms. Haas) concerning their calculations of eligible area for Riverside Towers. Exhs. 35, 36. From the aerial images for this site, a fence along the easterly boundary is visible and it is clear that the Board included the area beyond the fence as directly associated area, as well as land on the southerly portion of the parcel, which is also outside of the fenced area and within the water exclusion layer and land on the northern portion of the site that is an access lane shared by the abutting unrelated property. Exh. 32, p. 3. On this record, the Board has not shown that the disputed area is directly associated to the affordable units, and we therefore accept the developer's calculation of 1.680 acres for inclusion in the numerator. Exh. 41, ¶ 46(e).

Residences at One St. Clare: Mr. Nelson testified that the Board counted the entire parcel as eligible area, while Stantec excluded areas that are public sidewalks on the eastern and southern sides of the site, calculating eligible area to be 0.284 acre. In his opinion, the Board's calculation for directly associated areas is overstated by 0.024 acres. Exh. 41, ¶ 46(d). Mr. MacDougall did not offer any rebuttal testimony in response to the testimony of Mr. Nelson (and Ms. Haas) concerning their calculations of eligible area for Residences at One St. Clare. Exhs. 35, 36. The aerial images for this site confirm that the Board improperly included a public sidewalk on the easterly and southerly sides of this site as eligible area. Exh. 32, p. 4. On this record, the Board has not shown that the disputed area is directly associated to the affordable units, and we therefore accept the developer's calculation of 0.284 acre for inclusion in the numerator. Exh. 41, ¶ 46(d).

Sphere Apartments: Mr. Nelson testified that, by means of a site visit and satellite imagery, Stantec confirmed that there were construction activities on a portion of the site which appear to be unrelated to the SHI site, including the shared use of the lane between the buildings during the construction of the new building. He testified that subtracting this area from the eligible area reduces the Board's claim of 0.049 acres to 0.039 acres. Exhs. 41, ¶ 46(g); 27. On cross-examination, Mr. MacDougall testified that he included a triangular area in the southeast corner of the site based upon City assessor's maps and because the assessed property of that site includes the triangular section. Tr. I, 98-100; Exh. 1, p. 54. Mr. MacDougall did not conduct a site visit with regard to this property. Tr. I, 100-101. He did not offer any rebuttal testimony in response to Mr. Nelson's opinion that the triangular area should not have been included in the numerator. Tr. I, 98. The aerial images and photographs for the site confirm Mr. Nelson's testimony that there are construction activities and equipment on a portion of the site that appear to be separated from the site by fencing. Exhs. 32, p. 7; 2, p. 11. The developer's testimony calculating 0.0.39 acre is more credible than that of Mr. MacDougall, and we accept it for inclusion in the numerator. Exhs. 27; 41, ¶ 46(g).

Since the Board did not calculate directly associated area for all SHI sites, its acreage calculation for the numerator is flawed and not credible. Where there is no dispute, we do accept the Board's figures. However, for disputed sites, we consider the evidence supplied by the developer's witnesses to be more credible and apply their calculations for directly associated area.

3. Calculation of Minimum Lot Area

The GLAM Guidelines provide, for all sites, the calculated eligible area must be compared to the required minimum lot area as follows:

> Once the prorated areas have been calculated, the Analyst must check to ensure the prorated area is not larger than the lot area that would be required by zoning for an equivalent number of units. If the prorated area exceeds this required lot area, the excess acreage is not Directly Associated with SHI Eligible Housing units and will not count toward the SHI-Eligible Area."

Exh. 8, § 3.3, p. 9. Further, Appendix B, Figure 20, states: "Step 3.4 requires the prorated acreage to be calculated for each SHI Site. Additionally, the minimum required lot area under local zoning *must be calculated*." *Id.,* p. 35. [Emphasis added.] The example of the methodology to be used in calculating the eligible area as compared to the required minimum lot area includes

sites with 100 percent eligibility. In that example, several of the 100 percent eligible sites are sites where the required lot area is lower than the prorated area and therefore the SHI-eligible area is shown as equal to the required lot area. Exh. 8, Appendix B. The GLAM Guidelines also direct the Board to determine the minimum lot area required by zoning, and to include in the numerator for the SHI eligible property the lower of the lot areas required by zoning or the calculated directly associated area. The GLAM Guidelines state that: "If the prorated area exceeds this required lot area, the excess acreage is not Directly Associated with SHI Eligible Housing units and will not be counted toward the SHI-Eligible Area." Exh. 8, § 3.3, p. 9.

The Board argues the GLAM Guidelines do not require it to conduct a comparison of the prorated areas to required lot areas for sites with 100 percent eligible housing units. Exh. 35, ¶ 2; Board brief, p. 19, 22-23. It argues that under the statute and regulations, the numerator used to determine whether the Town has achieved the 1.5 percent statutory minimum is the "total acreage of sites containing SHI Eligible Housing units," meaning the entire parcels on which the developments are located. Board brief p. 19, citing G.L. c. 40B, § 20 and 760 CMR 56.03(3)(b). Mr. MacDougall testified that, for 17 of the 35 SHI sites, which count 100 percent of their units as SHI eligible, he and Ms. Streetman did not perform a minimum required lot area calculation because 100 percent of the units were included, and the calculation instructions he followed do not state the required lot area was necessary. Tr. I, 62-63, 69; Exh. 1, p. 61. Other than Willis Avenue and LaPrise Village, which are discussed separately below, the Board offered no evidence establishing the minimum required lot area for these 17 sites.

Ms. Haas and Mr. Nelson disagreed with the Board's calculations for the 17 SHI sites because the Board's witnesses failed to 1) calculate their required lot area under zoning; 2) conduct a comparison between the required lot area and the "prorated" area; and 3) include in the numerator only the lower of those two numbers. Exhs. 39, ¶¶ 41-42; 41, ¶ 28. The developer also points to Mr. MacDougall's testimony on cross-examination that the GLAM Guidelines state that the comparison is to be done for every site and that only the lesser of the prorated area or the required lot area can be included in the numerator. Tr. I, 59-62; 67-68; 76-77. The developer argues that "the required lot area limitation serves the important function of preventing a municipality from placing a small number of SHI-eligible units on a large lot and then taking the position that the entire area of the large lot can be included in the GLAM numerator as a means of preventing additional affordable housing development. That function is just as important when

a site with 100 percent eligible housing units is at issue as when a site with less than 100 percent eligible housing units is at issue." Developer brief, p. 23.

The Board's argument is at odds with the GLAM Guidelines, which provide that "lot area in excess of what would be required under the zoning ordinance or bylaw provisions generally applicable in the zoning district" "will not be considered Directly Associated." *See* Exh. 8, p. 3. Appendix A, § 3.4 to the GLAM Guidelines reinforces this requirement and instructs the analyst to "check to ensure the prorated area is not larger than the lot area that would be required by local zoning for an equivalent number of units" and then to include in the SHI area the lesser of the "prorated area" or the "required lot area." Exh. 8, p. 21. Furthermore, the definition of "Directly Associated Area," provides that lot areas in excess of what would be required under the zoning ordinance or bylaw provisions generally applicable in the zoning district will not be considered "Directly Associated" and makes no distinction or exception for sites with 100 percent eligible housing units. Exh. 8, p. 3. Use of the term "prorated" in the GLAM Guidelines does not limit the minimum lot area analysis to only those properties with less than 100 percent eligible housing units that have been adjusted by proration. Read as a whole, the GLAM Guidelines treat proration as a process performed for all SHI sites, with the result that only those SHI properties with less than 100 percent SHI units have a proportional reduction in directly associated area. However, all sites must be reviewed to ensure that the appropriate percentage of directly associated area reflects the percentage of SHI eligible units on the site. Once the adjustment, if any, is made, the comparison to the minimum required lot area is made for all properties. The purpose of the required minimum lot area is to ensure that acreage attributed to SHI eligible units is directly associated with those units. To meet this purpose, the requirement that the associated area exclude excessive acreage through the required lot area calculation applies equally to sites with 100 percent SHI eligible units and those with less than 100 percent affordable housing. Accordingly, the required lot area calculation applies for all SHI sites.

We agree with the developer that the Board improperly failed to calculate the required lot areas for all 35 SHI sites and exclude from the numerator, as it is required under the GLAM Guidelines, only the lesser of the required lot area and the prorated area. The Board limited its comparison of the prorated area to the required lot area only for sites with less than 100 percent eligible housing units. Further, the Board has offered no evidence establishing the required lot

area for the 17 sites with 100 percent eligible housing units and the developer disputes the acreage of some of those 17 SHI sites.

a. The 17 Sites with 100 Percent SHI Eligible Units—Required Lot Area

We conclude that the Board's evidence failed to justify its calculation for the 17 SHI sites with 100 percent SHI eligible units.[20] For this reason, the Board has failed to prove a numerator that establishes it has met the 1.5% statutory minimum. We have reviewed the calculations presented by the developer for the 17 SHI sites to determine whether applying its figures in the record could demonstrate the Board has met the statutory minimum. Accordingly, for the purposes of this demonstration, we apply the developer's calculations for those of the 17 disputed sites that differ from the Board's figures as follows:[21]

Property	Board SHI Area	Board Prorated Area	Nelson Total DAA	Nelson Prorated Area	Nelson SHI Area	Haas Total DAA	Haas Prorated Area	Haas SHI Area	Required Lot Area	Committee Applied
MHA Phillips Apts	0.383	0.383	0.383	0.383	0.383	0.383	0.383	0.383	0.448	0.383
MHA Doherty Bldg	0.159	0.159	0.159	0.159	0.159	0.159	0.159	0.159	0.402	0.159
MHA Leverett Saltonstall	4.150	4.150	4.150	4.150	3.308	4.099	3.951	3.336	3.336	3.336
MHA Tempone Manor	1.834	1.834	1.620	1.620	1.620	1.708	1.642	1.642	2.353	1.620
MHA Willis Ave	9.518	9.518	9.518	9.518	3.478	9.518	9.518	3.478	3.478	3.478
MHA LaPrise Vill	9.847	9.847	9.847	9.847	3.294	9.847	9.847	3.294	3.294	3.294
MHA Walking Ct	3.969	3.969	3.969	3.969	3.363	3.969	3.969	3.340	3.340	3.363
MHA Weldon Gardens	1.276	1.276	1.193	1.193	1.193	1.253	1.253	1.253	1.641	1.253
MHA Foster Ct	0.305	0.305	0.305	0.305	0.241	0.358	0.358	0.241	0.241	0.241

[20] While the Board did not perform the required analysis with regard to all 17 sites, when the calculation was performed for those sites, only eleven resulted in a disputed calculation.

[21] To the extent that Ms. Haas's and Mr. Nelson's figures differ slightly, we accept the figures more favorable to the Board, except for the eight properties identified in § II.F.2, *supra*, for which we apply Mr. Nelson's figures.

Property	Board SHI Area	Board Prorated Area	Nelson Total DAA	Nelson Prorated Area	Nelson SHI Area	Haas Total DAA	Haas Prorated Area	Haas SHI Area	Required Lot Area	Committee Applied
4-6 Ashland St	0.090	0.090	0.090	0.090	0.090	0.90	0.090	0.090	0.425	0.090
Water Street Apts	0.668	0.668	0.668	0.668	0.668	0.668	0.668	0.668	0.705	0.668
Mystic Valley Towers	8.920	8.920	8.920	8.920	7.739	8.920	8.920	7.757	7.757	7.757
Riverside Towers	1.820	1.820	1.680	1.680	1.680	1.668	1.668	1.668	3.225	1.680
Wolcott St	0.157	0.157	0.157	0.157	0.149	0.157	0.157	0.149	0.149	0.149
Tri-City Housing Task Force	0.077	0.077	0.077	0.077	0.077	0.077	0.077	0.077	0.126	0.077
Boston Ave-W. Medford Baptist Church	0.092	0.092	0.092	0.092	0.092	0.092	0.092	0.092	0.103	0.092
Hillside School	0.675	0.675	0.675	0.675	0.333	0.675	0.675	0.333	0.333	0.333

b. Willis Avenue and LaPrise Village

A significant amount of testimony was dedicated to the issue of the zoning classification for two public housing projects with 100 percent affordable units, Willis Avenue and LaPrise Village. The Board argues they must be classified for purposes of determining the minimum required lot area as "attached single family dwellings" as opposed to "multiple dwellings." The developer argues the two properties must be classified as "multiple dwellings."[22] The Zoning Ordinance requires that a multiple dwelling have a lot area of at least 4,500 square feet (s.f.) for the first two dwelling units, plus 1,000 s.f. for each additional dwelling unit on the first three floors, and an additional 600 s.f. for each additional dwelling unit on or above the fourth floor. Exh. 9, p. 30. An attached single family dwelling, on the other hand, must have at least 3,500 s.f.

[22] The Board's argument regarding the zoning categorization of these two properties is intended to determine the amount of land that should be counted towards the numerator based upon minimum lot size requirements. Despite arguing that the GLAM Guidelines do not require it to conduct a comparison of the prorated areas to required lot areas for sites with 100 percent eligible housing units, it nevertheless seeks to apply this principle to these two properties, both of which contain 100 percent eligible units.

for end dwelling units and at least 2,500 s.f. for middle dwelling units. Based upon these requirements, the resulting required lot area for each development differs as follows:

	Multiple Dwelling (Developer)	**Attached Single-Family Dwelling (Board)**
Willis Avenue	3.478 acres	9.518 acres
LaPrise Village	3.294 acres	9.847 acres

Exhs. 1, p. 61; 17, 27, 39, ¶ 82; 41, ¶ 29. In their arguments for their respective positions, the parties rely on their interpretations of the relevant provisions of the Zoning Ordinance.[23]

The Board's argument that Willis Avenue and LaPrise Village should be considered attached single family dwellings is based largely upon the determination of Building Commissioner Paul F. Mochi, which the Board argues is conclusive and not subject to challenge. The Board relies upon § 94-31 of the Ordinance, which states "[t]he building commissioner shall interpret, administer, and enforce this chapter on his own initiative and on referral from other city officials or on written complaint." Exh. 9, p. 13. The Board also argues that G.L. c. 40A, § 7 "bestows the authority to interpret zoning bylaws and ordinances upon '[t]he inspector of buildings, building commissioner or local inspector, or if there are none, in a town, the board of selectmen, or person or board designated by local ordinance or by-law.'" Board brief, p. 25. It argues that the Committee must accord greater weight to the opinion of the building commissioner than to those of other expert witnesses, citing *Morganelli v. Building Inspector of*

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[23] Those provisions are:

Dwelling, multiple:

> [A]n apartment house or building designed for or occupied as a residence by more than two families; or a building designed for or occupied by one or more families in addition to a nonresidential use, but not including a group of three or more attached single-family dwellings, a lodging house, a hotel or motel, a dormitory, fraternity or sorority house.

Exh. 9, p. 7.

Building: "a combination of any materials, whether portable or fixed, having a roof, to form a structure for the shelter of persons, animals or property." Exh. 9, p. 7.

Building, attached: "a principal building separated from another principal building on one or both sides either by a vertical party wall or walls or by a solid contiguous wall or walls without any side yards." Exh. 9, p. 7.

Building, principal: "any building devoted to a principal use…" Exh. 9, p. 7.

Use, principal: "the main use on a lot." Exh. 9, p. 11.

Lot: [in pertinent part] "a parcel of land laid out by plan or deed duly recorded, used or set aside and available for use as the site of one or more buildings …" Exh. 9, p. 8.

Canton, 7 Mass. App. Ct. 475 (1979). *Morganelli*, however, related to whether citizens have a private cause of action for direct enforcement of zoning regulations, and in that context, the court held that the right to seek enforcement lies with the appropriate municipal official, the building inspector. *Id*. at 481. Under *Morganelli,* in the context of *res judicata*, an adjudication of a building inspector's determination is binding upon the parties involved. However, *Morganelli* does not stand for the principle that a building inspector's zoning determination is not subject to challenge or review. *See Stevens v. Board of Appeals of Bourne*, 97 Mass. App. Ct. 713, 715, n.6 (zoning enforcement is matter directed by statute to building inspector or commissioner, *subject to review* by zoning board of appeals under G.L. c. 40A, §§ 7, 8) (emphasis added).

Mr. Mochi testified that, in his opinion, "three or more attached single-family dwellings are townhouse style buildings." Exh. 36, ¶ 6. He relied upon the state building code definition of "Townhouse" as: "a single-family dwelling unit constructed in a group of three or more attached units in which each unit extends from foundation to roof and with open space on at least two sides." Exhs. 11; 36, ¶ 7. With respect to Willis Avenue, he testified that: "[w]hile each unit shares one full crawlspace, there is no separation between the units in the crawlspace and no access to the crawl space from the units and therefore the crawlspace is not considered part of the unit…. Each unit extends from the first floor to the roof and in my opinion are townhouses or attached single-family dwelling units." Exh. 36, ¶ 9. As to the LaPrise Village development, Mr. Mochi testified that: "Each unit has a separate basement and each unit extends from the foundation to the roof. Construction of the LaPrise Village development was completed in 1951. In my opinion, each unit is a townhouse or attached single-family dwelling." Exh. 36, ¶ 10. Mr. Mochi disagreed with the developer's experts' opinion that the two developments could not be considered townhouses, stating that: "[p]ursuant to the Medford Zoning Ordinance, it is my duty as Building Commissioner and not that of hired consultants to interpret sections of the Zoning Ordinance, particularly where there is no finite definition." Exh. 37, ¶ 6.

On cross-examination, the developer engaged Mr. Mochi in a review of the relevant definitions in the Zoning Ordinance, *see* note 28, and following that analysis, Mr. Mochi testified as follows:

> Q: So, isn't it true that in the case of attached buildings each of those buildings has to be a separate structure because each building has to be a structure?
>
> A. That is correct.
>
> Q. So, that means in the case of attached buildings there has to be, if you will,

> structural independence. Each of them has to be an independent structure, is that accurate?
>
> A. That's correct.

Tr. I, 136. Mr. Mochi then testified that he could not say whether the housing units within each building of Willis Avenue or LaPrise Village are structurally independent from one another. Tr. I, 138. He also stated that he could not tell if the walls separating the units meet the fire resistance requirements for townhouses under the current state building code [780 CMR] and stated that common walls separating townhouse units have to meet these particular fire resistance ratings. Tr. I, 153-155. He further testified that he could not state whether the common walls between the units were constructed without plumbing or mechanical equipment, ducts, or vents in the cavity of the common wall. Tr. I, 155-160. He stated that his site visit at the Willis Avenue development was just "in and out" and he "didn't really look around that much." Tr. I, 159-160.

Similarly, Mr. Mochi testified that his inspection at LaPrise Village lasted "about five minutes," and he could not recall whether he noticed the physical configurations of the units or the office, or whether the bathroom plumbing is located on a common wall. Tr. I, 156. He did recall that, at LaPrise Village, an air handler in the basement has a vent that penetrated one of the walls that separates that unit from the adjacent unit. Tr. I, 157. He stated that under the current State Building Code, common walls shared by two townhouses may not have plumbing or mechanical equipment in the common wall. Tr. I, 155. He testified that he could not recall the orientation of the fixtures at LaPrise Village but agreed that if the sink and toilet were on the common wall and the plumbing fixtures, water line and drain go into that wall, it would not comply with the current state building code applicable to townhouses.[24] Tr. I, 156-157.

Relying on the definitions contained in the Zoning Ordinance, the developer argues that the two developments ought to be considered as "multiple dwellings." Because the Zoning Ordinance does not define "attached single-family dwellings," the developer argues that, when read together, various other definitions establish that the only possible way for a group of buildings to qualify as "attached single-family dwellings" under the Zoning Ordinance is that there "must be separate, structurally independent buildings standing next to one another on

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[24] 780 CMR 51 R302.2. contains a requirement that individual townhouses must be structurally independent from one another, with listed exceptions not relevant here. Tr. I, 152; Exh. 25.

separate lots, with each lot devoted to single-family use, with the buildings separated by a party or solid contiguous wall." Developer brief, p. 32. Based upon its analysis of the Zoning Ordinance, the developer claims that neither the Willis Avenue nor LaPrise Village developments meet those criteria.

The developer argues that "Willis Avenue and LaPrise Village fall squarely within this definition: each of the buildings in these developments is an apartment house or building designed for and occupied as a residence by more than two families. They are traditional multi-family apartment buildings owned and operated by the City's Housing Authority as public housing." Developer brief, p. 31. The developer argues that the definitions compel a conclusion that the buildings are not attached single family dwellings, separate structures located on separate lots.[25] Developer brief, p. 32. On behalf of the developer, Eric Cote, P.E, testified that "Willis Avenue and LaPrise Village were planned and constructed as multiple dwelling apartment houses under the building code provisions that were in effect in the late 1940s and early 1950s. They were not planned and constructed as townhouses (or attached single-family dwellings) because there was no residential townhouse code path under the applicable building code(s) in the late 1940s and early 1950s." Exh. 40, ¶ 10(a). He gave his opinion that "Willis Avenue and LaPrise Village do not satisfy the requirements applicable to townhouses under the current Massachusetts Residential Code [780 CMR Chapter 51.00, the Massachusetts State Building Code, Ninth Edition, Residential Volume] … in numerous, material respects, including: i) the dwelling units in each structure are not separated by code-compliant fire walls that run from foundation to roof; ii) there are no intervening parapets at the demise walls of the common roofs shared by all dwelling units in each building; and iii) the dwelling units in each building are not structurally independent from one another."[26] Exh. 40, ¶ 10(b).

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[25] DIV argues that "[w]hen read together, these definitions establish that 'attached single-family dwellings' must consist of two or more separate 'principal buildings,' each constituting a separate 'structure' that is located on a separate 'lot' on which the 'principal use' is single-family residential, with a 'vertical party wall or ... solid contiguous wall' separating them. Under the 'building' definition, each 'building' must be a separate 'structure' with a roof, and under the 'building, attached' definition, an 'attached building' means two or more 'principal buildings' separated from one another by a party wall or similar, contiguous wall. Under the 'building, principal' definition, each 'principal building' must be devoted to a 'principal use.' And under the 'use, principal' definition, a principal use is the 'main use on a lot,' which means (under the 'lot' definition) the main use on the 'parcel of land.'"

[26] While it is undisputed that the current provisions of the State Building Code were not in existence at the time of the construction of these two developments, both Mr. Cote and Mr. Mochi relied upon its

Based upon this analysis, the developer argues that the units in the Willis Avenue and LaPrise Village buildings are not structurally independent, and they do not stand on separate lots. Each of Willis Avenue and LaPrise Village consists of approximately 30 buildings, each containing multiple apartment units, located on a single "lot" or "parcel of land." Exhs. 21, 22; Tr. III, 68-70. The developer argues that the principal use on each of those lots is "multiple dwelling" as they are "apartment house[s] or building[s] designed for or occupied as a residence by more than two families" and not "single-family." Developer brief, p. 33. As further support for this argument, it argues that the physical attributes of each building support this conclusion as each building at each development is a single structure, not a collection of structurally independent buildings attached to one another by a party wall or solid contiguous wall. The developer notes that Mr. Mochi testified that there is no wall separating the common crawlspace under each building at Willis Avenue Home. Exh. 36, ¶ 9. There is, therefore, it argues, no "vertical party wall or walls or ... solid contiguous wall or walls" separating multiple attached buildings (each structurally independent) from one another. For this additional reason, the developer argues, the apartment units do not qualify as "Building[s], attached" or "attached single-family dwellings" under the definitions contained in the Zoning Ordinance.

Second, the developer claims that various Medford records support the conclusion that Willis Avenue and LaPrise Village should be categorized as multiple dwellings. The developer points to the building permits issued when these two developments were first constructed, which, for LaPrise Village, describes the development as a "six apartment dwelling" and refers to the project as a "dwelling" consisting of "six apartment[s]." Exh. 23. The building permit for the Willis Avenue development provides that it was being issued for construction of a single "superstructure," which, the developer argues, is not multiple separate, attached principal structures or attached single family dwellings. Exh. 31; Developer brief, p. 34. Next, the developer argues that the fact that the assessor's records do not individually assess each unit in each development, but rather each development is valued and assessed as a single parcel, supports the legal classification of both developments as multiple dwellings. Exhs. 21, 22. In addition, the developer argues that the assessor's cards for both developments describe the "style" of each building as "apartments." Id.

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provisions to aid their analyses; therefore, we consider as informative the relevant provisions of the Massachusetts State Building Code (780 CMR) to aid in our analysis.

Finally, the developer argues, relying on the testimony of Mr. Nelson and Ms. Haas, and photographs taken by Mr. Nelson of relevant features of the buildings, that the physical characteristics of each development show that they are multiple dwellings and not attached single-family dwellings. Exhs. 29, 30. For instance, Mr. Nelson and Ms. Haas testified that: the buildings present as a unified whole in terms of structure, siding, and other exterior elements; the apartment units are not visually separated from the outside, such as by being offset from one another or disambiguated in any way; there is a single common roof for each building, without separating elements for each apartment unit; and there are no separate yards or private outdoor spaces for each apartment. Exhs. 39, ¶ 67; 41, ¶ 39; 41, ¶ 41-43. Ms. Haas testified that there are shared yards for each building. Exh. 39, ¶ 67. At Willis Avenue, Mr. Nelson testified that he observed a common utility room at the end of each building, housing a single furnace and hot water tanks that appeared to serve the entire building. Exhs. 41, ¶ 36; 39, ¶ 67. At LaPrise Village, Mr. Nelson testified that he observed that buildings had exterior bulkhead doors on the rear, with a single bulkhead serving more than one unit. Exh. 41, ¶ 39.

We agree with the developer that the developments at Willis Avenue and LaPrise Village should be classified under the Zoning Ordinance as “multiple dwellings” and not “attached single family dwellings.” The Board has not demonstrated that the developments at Willis Avenue or LaPrise Village should be categorized as attached single family dwellings rather than multiple dwellings.

With regard to the structural characteristics of the developments, the Board presented no evidence to indicate that the buildings at either Willis Avenue or LaPrise Village were structurally independent or separated by a vertical party wall or a solid contiguous wall, as required by the definition of “building, attached.” “A party wall is a wall common to two adjoining buildings, in which the owners of the two buildings that share the wall have mutual easements of support.” *Chicago Title Ins. Co. v. City of Cambridge*, 24 Mass. App. Ct. 285, 287 (1987). Mr. Mochi could not confirm whether the buildings and units in either development contain party walls or are structurally independent from one another. He testified that the buildings at Willis Avenue are built over crawl spaces that are open to the whole building with no walls dividing the crawl space between units and at LaPrise Village, there is an air handler in the basement with a vent that penetrated one of the walls that separates that unit from the

adjacent unit. Tr. I, 157, 163. Mr. Mochi also agreed with Mr. Cote's testimony that both developments lack parapets, which are a requirement for townhouses under the current state building code and, therefore, do not meet the building code requirements for townhomes in that regard. Tr. I, 160-162. Further, Mr. Mochi agreed that the buildings at Willis Avenue, where units within each building share a common crawlspace with no dividing walls, do not satisfy the definition of the term "townhouse" under the State Building Code, which requires units to extend "from foundation to roof." 780 CMR 120.Z102.1; Exh. 11; Tr. I, 146, 162-164:

> Q. So, am I right then that the units at Willis Avenue do not satisfy this townhouse definition because you have an open crawl space underneath all of them that intervenes between the foundation and the unit above?
>
> A. That's correct. They don't comply with this definition in the current building code.

Tr. I, 164.

In support of his opinion that the developments should be considered attached single family dwellings, Mr. Mochi testified that both "housing developments contain over three attached single-family dwellings where there[are] no interior connections between units." Exh. 37, ¶ 5. However, the lack of an entrance common to more than one unit or other interior common area does not turn a building with three or more units into three or more "attached single-family dwellings." Mr. Mochi's testimony on the structural characteristics of both properties was scant, based upon short and cursory inspections of LaPrise Village and Willis Avenue. Tr. I, 155-160. The Board provided no additional evidence to support its contention that either development should be considered attached single family dwellings, relying on its argument that the Committee "must rely on the Building Commissioner's interpretation of what the uses are at Willis Avenue and LaPrise Village as that interpretation is reasonable based upon his experience." Board brief, p. 27.

The Committee is not bound by Mr. Mochi's opinion. "We accord deference to a local board's reasonable interpretation of its own zoning bylaw ... with the caveat that an 'incorrect interpretation of a statute ... is not entitled to deference'" (citations omitted). *Shirley Wayside Ltd. P'ship v. Bd. of Appeals of Shirley*, 461 Mass. 469, 475 (2012); *Pelullo v. Croft*, 86 Mass. App. Ct. 908, 909-910 (2014) (rescript); *Goldlust v. Board of Appeals of North Andover*, 27 Mass. App. Ct. 1183, 1184 (1989) (rescript) (zoning by-law interpretations are purely questions of law reviewable by boards of appeals and courts). Decisions and determinations of building inspectors are subject to administrative and judicial review under G.L. c. 40A, §§ 8, 15, 17.

Vokes v. Avery W. Lovell, Inc., 18 Mass. App. Ct. 471, 482-483 (1984) (person aggrieved by inspector's decision has right to seek administrative relief from board under G.L. c. 40A, §§ 8 and 15, and, after exhausting administrative remedies, right to obtain judicial review pursuant to G.L. c. 40A, § 17); *Hebb v. Lamport*, 4 Mass. App. Ct. 202, 209 (1976) ("blind deference to the building inspector would be tantamount to our abdicating the judicial function"); *Board of Appeals of Hanover v. Housing Appeals Comm*., 363 Mass. 339, 355 (1973) (Committee has power to override local zoning ordinances and bylaws; in order to determine whether decision is reasonable and consistent with local needs; Committee must be free to consider any evidence relevant to those issues).

Both Willis Avenue and LaPrise Village meet the definition of "multiple dwellings" in the Zoning Ordinance, as each of the buildings in these developments is an apartment house or building designed for and occupied as a residence by more than two families. While "attached single family dwellings" is not a defined term in the Zoning Ordinance, the Zoning Ordinance, when read as a whole, supports the conclusion that an attached single family dwelling must be one that is comprised of "a principal building separated from another principal building on one or both sides either by a vertical party wall or walls or by a solid contiguous wall or walls without any side yards." Exh. 9, p. 7. *Miles-Matthias v. Zoning Bd. of Appeals of Seekonk*, 84 Mass. App. Ct. 778, 788 (2014) (bylaw provision "must be construed in the context of the by-law as a whole, and it must be given a sensible and practical meaning within that context").

Additional evidence presented by the developer such as assessor records and building permits, while not dispositive on its own, supports the conclusion that both Willis Avenue and LaPrise Village have historically been treated by Medford as multiple dwellings or apartments, rather than attached single family dwellings. The building permits indicate that, at the time of construction, LaPrise Village was permitted as "apartment dwellings" and Willis Avenue as a "superstructure" and not single family dwellings. Exhs. 23, 31. Similarly, assessor records describe both developments as "apartments" and each development is assessed and valued as a single parcel rather than as individual parcels for each unit. Exhs. 21, 22. In response to the developer's argument in support of consideration of these documents, the Board argues "that one cannot rely upon Assessor Records when determining the appropriate zoning use for a Property, particularly when a property consists of a pre-existing nonconforming use and structures." Board Reply, p. 6. Nevertheless, assessor records and building permits are official municipal records

that evidence an intent to treat these two developments in a certain manner. The testimony of the developer's experts, Mr. Cote, Mr. Nelson, and Ms. Haas, supports this premise.

Based upon the credible evidence presented by the parties, we find that the minimum lot area for Willis Avenue and LaPrise Village, as multiple dwellings under the Zoning Ordinance, is 4,500 s.f. for the first two dwelling units, plus 1,000 s.f. for each additional dwelling unit on the first three floors, plus an additional 600 s.f. for each additional dwelling unit on or above the fourth floor. Accordingly, we accept the developer's calculation of 3.478 acres for Willis Avenue and 3.294 acres for LaPrise Village as eligible for inclusion in the numerator.

G. Numerator Conclusion

The Board calculated a total of 47.427 acres of SHI eligible area.[27] For sites with 100 percent SHI eligible housing, the Board improperly omitted calculating directly associated area and performing a comparison of the directly associated area with the minimum required lot area. Because of these flaws, its numerator calculation is not credible.

Based on their analyses of eligible area under the comprehensive permit regulation and the GLAM Guidelines, Mr. Nelson calculated 31.172 acres of SHI eligible area and Ms. Haas calculated the numerator to be 31.269 acres, resulting in a final calculation that Medford has low or moderate income housing on sites comprising 1.25% percent of the total land area zoned for residential, commercial, or industrial use. Exhs. 39, ¶ 51; 41, ¶ 48-49. As noted above, we accept as more credible the developer's calculations of directly associated area for the eight prorated sites that were disputed. Of the 17 sites with 100 percent SHI eligible units, only eleven sites have disputed figures for eligible acreage. For those sites, as discussed above, we apply the developer's figures. The following chart lists each of these disputed sites, and also adds the totals of eligible acreage for undisputed sites[28] and group homes:

[27] Totaling the individual figures provided by the Board, Mr. Nelson and Ms. Haas, results in numerators 0.001 more than their stated numerators, possibly a result of scrivener's errors during their calculations. This *de minimis* discrepancy does not affect the final calculation.

[28] We have included DHCD 9101 West Street in the undisputed sites figure as neither party discussed this property in its briefs and Mr. Nelson agreed with the Board's figure of 0.117, treating it as undisputed.

DHCD_ID	Project Name	Address	SHI Area Counted Towards Numerator			
			Board	*Stantec /Nelson*	*VHB/Haas*	*Committee*
1895	MHA - Leverett Saltonstall Center	121 Riverside Ave	4.150	3.308	3.336	3.336
1896	MHA - Tempone Manor	22 Allston Street	1.834	1.620	1.642	1.620
1897	MHA - Willis Avenue Homes	0 Willis Avenue	9.518	3.478	3.478	3.478
1898	MHA - LaPrise Village	2 Lightguard Drive	9.847	3.294	3.294	3.294
1899; 1900	MHA - Walking Court	Walking Court	3.969	3.363	3.340	3.363
1901	MHA - Weldon Gardens	35 Bradlee Road	1.276	1.193	1.253	1.253
1902	MHA - Foster Court	Foster Court	0.305	0.241	0.241	0.241
1905	Mystic Valley Towers	3600 Mystic Valley Pkwy	8.920	7.739	7.757	7.757
1906	Riverside Towers	9 Riverside Ave	1.820	1.680	1.668	1.680
1907	Wolcott Street	81 Wolcott Street	0.157	0.149	0.149	0.149
9957	Residences at One St. Clare	1 St. Clare Road	0.034	0.032	0.034	0.032
9958	75SL	75 Station Landing	0.051	0.028	0.027	0.028
9962	Lumiere	Mystic Valley Pkwy	0.233	0.212	0.221	0.212
10325	Sphere Apartments	640 Boston Avenue	0.049	0.039	0.040	0.039
10326	Modera Medford	5 Cabot Road	0.625	0.500	0.494	0.500
10337	Hillside School Apartments[29]	15 Capen Street	0.675	0.333	0.333	0.333
		Disputed SHI-Eligible Area	43.463	27.209	27.307	27.315
		Undisputed SHI-Eligible Area	2.455	2.454	2.453	2.454
		Group Home Area	1.510	1.510	1.510	1.510
		Numerator	**47.428**	**31.173**	**31.270**	**31.279**

[29] Neither party provided any argument regarding the disputed acreage for Hillside School Apartments, which consists of 100 percent SHI eligible units. Since the Board has the burden of proof on the amount of SHI eligible acreage and did not challenge the developer's calculation for this property in its evidence or brief, we apply the developer's calculation.

Exhs. 1; 17; 18; 27; 34, ¶18; 39, ¶ 41-46; 41, ¶ 29. The total acreage we find credible and accept is 31.279 acres.[30]

H. Final Calculation of the Percentage of SHI Acreage

The Board asserts that it has established that SHI eligible acreage represents 1.83 percent of total land area. Board brief, p. 1; Exh. 34, ¶ 20. Since the Board failed to provide credible evidentiary support for either the numerator or the denominator of its proposed calculation, it has failed to demonstrate a credible numerator for the general land area minimum calculation, and therefore has failed to establish that the Board has a met the 1.5 percent general land area safe harbor. Considering all the evidence, we would accept the credible evidence submitted by the developer. Its evidence and testimony demonstrated a denominator of 2,493.493 acres and a numerator of 31.279, which would result in the eligible acreage for SHI eligible units representing 1.25 percent of total land area, which is below the statutory minimum of 1.5 percent. Even using Ms. Haas's numerator, 31.270, the resulting percentage would be 1.25. Therefore, the Board has failed to meet its burden of proof that Medford has met the statutory general land area minimum of 1.5 percent. G. L. c. 40B, § 20.

[30] We accept Mr. Nelson's acreage calculations as we found his testimony and supporting documentation to be highly credible, thorough, and detailed. Ms. Haas's testimony was likewise highly credible, thorough, and detailed and differed only slightly from Mr. Nelson's. As indicated below, the result using either calculation is the same.

III. CONCLUSION AND ORDER

The Board's claim that the City of Medford is entitled to a safe harbor under the general land area minimum threshold is denied. Accordingly, this appeal is dismissed, and the matter remanded to the Board for further proceedings.

HOUSING APPEALS COMMITTEE

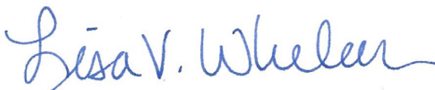
October 10, 2023

Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain

Rosemary Connelly Smedile

James G. Stockard, Jr.



Lisa V. Whelan, Presiding Officer