COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

In the Matter of

ARLINGTON BOARD OF APPEALS

and

ARLINGTON LAND REALTY, LLC

No. 2016-08

DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR

October 15, 2019

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Counsel for Arlington Board of Appeals
Jonathan D. Witten, Esq.
Barbara Huggins, Esq.
KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

Counsel for Arlington Land Realty, LLC
Stephanie A. Kiefer, Esq.
Smolak & Vaughan, LLP
21 High Street, Suite 301
North Andover, MA 01845

Arlington Board of Appeal's Witnesses
Kimberly Clougherty
Victor Hernandez
Adam Kurowski

Arlington Land Realty, LLC's Witness
Martin C. Curnan

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an interlocutory appeal to the Housing Appeals Committee brought by the Arlington Board of Appeals (Board), pursuant to 760 CMR 56.03(8), appealing a determination by the Department of Housing and Community Development (DHCD) that the Town of Arlington (Town or Arlington) has not met the general land area minimum, one of the three statutory safe harbors precluding the Housing Appeals Committee from overturning or modifying a board decision under the Comprehensive Permit Law, G. L. c. 40B, §§ 20–23. Under DHCD's implementing comprehensive permit regulations, any decision by a board to deny a comprehensive permit or to grant a permit with conditions "shall be upheld" if the municipality has achieved one of these statutory minima. 760 CMR 56.03(1)(a); *see* G.L. c. 40B, § 20. The general land area minimum is met if low or moderate income housing exists on sites comprising 1.5 percent or more of all land zoned for residential, commercial, or industrial use in the municipality. G.L. c. 40B, § 20; *see* 760 CMR 56.03(3)(b).

The general land area minimum is calculated by dividing the area of sites of affordable housing that are eligible for inclusion on the DHCD Subsidized Housing Inventory

(SHI) (the numerator) by the total land area in the municipality zoned for residential, commercial, or industrial use (the denominator). *Matter of Stoneham and Weiss Farm Apartments, LLC*, No. 2014-10, slip op. at 3 (Mass. Housing Appeals Comm. June 26, 2015). The Board argues the Town has satisfied the 1.5 percent general land area minimum threshold. The applicant, Arlington Land Realty LLC (ALR), challenges the methodology used by the Board in calculating its general land area minimum, specifically the denominator, and believes the Town has not met the statutory minimum.

Pursuant to the comprehensive permit regulation, specifically 760 CMR 56.03(8)(a), a board seeking to rely on a safe harbor must notify the developer and DHCD of such safe harbor claim within 15 days of the opening of the board's hearing on a comprehensive permit application. If the developer wishes to challenge the board's safe harbor assertion, it must provide written notice to DHCD and the Board within 15 days. DHCD "shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials." 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 Committee's hearing on the issue, like all of our proceedings, is *de novo*. G.L. c. 40B, § 22. Section 56.03(8)(a) provides that the Board has "the burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs...."

As alleged in the parties' briefs, ALR applied on September 1, 2016 for a comprehensive permit from the Board to build a 219-unit project on a parcel of land off Dorothy Road in Arlington. The Board opened a public hearing, and on October 6, 2016, it invoked the general land area minimum safe harbor on the ground that the Town had reached the 1.5 percent land area minimum under G. L. c. 40B, § 20 and 760 CMR 56.03(3)(b), and notified ALR and DHCD accordingly, pursuant to 760 CMR 56.03(8)(a). After ALR notified DHCD of its objection to the Board's position, DHCD issued a determination on November 17, 2016 that the Town had not reached the 1.5 percent land area threshold.

The Board filed this interlocutory appeal with the Committee on December 6, 2016. As alleged in the Board's brief, while the appeal was pending, the Middlesex Superior Court issued a decision on February 14, 2017 in *Zoning Bd. of Appeals of the City of Waltham v. Department of Housing and Community Dev.*, C.A. No. 16-1177-H. The Superior Court found, in the context of a comprehensive permit appeal, that a board may be entitled to confidential information from certain government agencies regarding units within a municipality that are eligible for inclusion on the SHI, subject to certain privacy protections. In that case, the Waltham Zoning Board of Appeals sought the confidential addresses of residential properties (group homes) licensed or operated by the Department of Mental Health (DMH) and the Department of Developmental Services (DDS). Group homes are eligible for inclusion on the SHI. *See* Guidelines, G.L. c. 40B Comprehensive Permit Projects, Subsidized Housing Inventory, December 2014, §§ I.A, II.A.2.e (40B Guidelines);[1] 760 CMR 56.03(2)(a). The Waltham zoning board had wished to include the land area for Waltham's group homes in its land area minimum calculation.

On June 5, 2017, the Board filed an action in Middlesex Superior Court to procure the residential addresses of DMH and DDS units in Arlington that were eligible for inclusion on the SHI. *Zoning Bd. of Appeals of the Town of Arlington v. Department of Housing and Community Dev., et al.*, C.A. No. 1781CV01688. On February 28, 2018, the Superior Court issued a memorandum and order, requiring DMH and DDS to disclose the confidential information sought by the Board, subject to procedures designed to protect confidentiality. Both agencies complied. At a telephone conference held on August 31, 2018, counsel for ALR stated ALR was not challenging the Board's total amount of land area attributable to group homes. The parties submitted pre-filed witness testimony regarding the land area minimum calculation. The evidentiary hearing was held on October 25, 2018 and November 2, 2018. The parties filed post-hearing briefs and reply briefs thereafter.[2] At the Board's

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[1] The Committee has taken official notice of the 40B Guidelines.

[2] Since this interlocutory decision does not "finally determine the proceedings," the presiding officer may rule on it without consulting with the full Committee. 760 CMR 56.06(7)(e)2. However, in cases of first impression or those involving particularly weighty matters, the presiding officer, in their discretion, may choose to bring the matter before the full Committee. The Presiding Officer has

request, a proposed decision was issued to allow the parties to provide objections and written argument. *See* 760 CMR 56.06(7)(e)9. *See also* G.L. c. 30A, § 11(7). The Board submitted objections, and requested oral argument, with regard to the proposed decision. ALR did not respond to the proposed decision. The Board's request for oral argument on the proposed decision is denied. 760 CMR 56.06(7)(f).

II. GENERAL LAND AREA MINIMUM OF 1.5 PERCENT

A. Applicable Law and Regulations

The general land area minimum is met if the land area in the municipality dedicated for use as housing for low or moderate income households is 1.5 percent or more of all land zoned for residential, commercial, or industrial use. G. L. c. 40B, § 20; 760 CMR 56.03(3)(b). In a municipality that has met the safe harbor, the zoning board's denial of a comprehensive permit or grant of a permit with conditions will be conclusively deemed "consistent with local needs" and the board's decision will be upheld by the Committee. G. L. c. 40B, § 20; 760 CMR 56.03(1)(a).

The comprehensive permit regulation, specifically, 760 CMR 56.03(3)(b), sets forth the standards for calculating the general land area minimum. DHCD also issued guidelines on January 17, 2018, the Guidelines for Calculating General Land Area Minimum (GLAM Guidelines), to provide assistance and ensure consistency with land area minimum calculations.[3]

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deemed it appropriate that the full Committee consider the issues raised in this matter. *See Matter of Braintree and 383 Washington Street,* 2017-05, slip op. at 3 n.2 (Mass. Housing Appeals Comm. June 27, 2019); *Matter of Newton and Dinosaur Rowe, LLC*, No. 2015-01, slip op. at 2 n.2 (Mass. Housing Appeals Comm. June 26, 2015).

[3] DHCD issued the GLAM Guidelines in January 2018, during the pendency of this interlocutory appeal, following our invitation in a prior case to develop guidance for reviewing the extent of impervious and landscaped areas directly associated with SHI eligible units, as well as aspects of the denominator. *See Matter of Norwood and Davis Marcus Partners*, No. 2015-06, slip op. at 6 n.6, 19 n.12 (Mass. Housing Appeals Comm. Dec. 8, 2016).

The parties disagree regarding the applicability of the GLAM Guidelines, introduced into evidence by ALR. Exh. 6-8.[4] The Board argues that application of the GLAM Guidelines is unlawful and inconsistent with the Committee's practice because their adoption postdates both the filing of the Board's interlocutory appeal and ALR's application to the Board for a comprehensive permit. The Board argues the date of application to the Board is determinative for all issues relating to the project at issue, as well as proceedings before the Committee, and any new standards or rules should only be applied prospectively. The Board also argues the GLAM Guidelines add new definitions, procedural requirements, and substantive standards to be applied to the statutory land area minimum, and if DHCD or the Committee wishes to amend any of the above, it must do so by adopting regulations in accordance with the administrative process. Finally, the Board argues, to the extent the Committee seeks to apply the GLAM Guidelines, it is doing so on an *ad hoc* basis. For example, the GLAM Guidelines contain new procedures for gathering information on group homes through DHCD and MassGIS. The Board claims those procedures were not available to it in this case, and it obtained group home information through a Superior Court action to enforce subpoenas. By applying some parts of the GLAM Guidelines while not following the new group home procedures, the Board alleges, the Committee would be acting in an arbitrary and capricious manner.

ALR argues that consideration of the GLAM Guidelines, although they were not published in final form until after the commencement of this appeal, is pertinent to the interpretation of the general land area minimum safe harbor. It argues that with *de novo* review, the Committee may consider the published GLAM Guidelines because it is capable of accepting evidence and arguments proffered by the parties and independently determining whether the Town has reached the safe harbor. ALR notes that the Committee has previously exercised this independent decision making in *Matter of Newton and Dinosaur Rowe LLC,*

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[4] The Board filed a motion in limine to preclude consideration of the GLAM Guidelines, which ALR opposed. In her October 16, 2018 ruling, the Presiding Officer admitted the guidelines into evidence but deferred the consideration of their applicability to the full Committee. The ruling noted that "[t]he parties will not utilize the data gathering procedure established by these guidelines, but may cross-examine witnesses with regard to the guidelines."

No. 2015-01, slip op. at 3-4 n.5 (Mass. Housing Appeals Comm. June 26, 2015) (Committee disagreed with DHCD's guidance, interpreting applicable regulation differently than as set out in guidance document). ALR argues the Committee may recognize certain provisions and assign weight as it deems appropriate. The GLAM Guidelines, in ALR's view, provide only further refined guidance; the Committee must still reach its own conclusion, based on its understanding of the law and regulations.

As we noted recently in *Matter of Braintree and 383 Washington Street,* 2017-05 (Mass. Housing Appeals Comm. June 27, 2019), the GLAM Guidelines do not carry the force of law as they were not promulgated as regulations. *Id.* at 5, citing *Town of Northbridge v. Town of Natick*, 394 Mass. 70, 76 (1985) (agency's guidance documents are policy statements without force of law). However, "[g]enerally, in considering statutory and regulatory provisions, [the Committee gives] deference to policy statements issued by DCHD, the state's lead housing agency." *Braintree, supra,* No. 2017-05, slip op. at 5, citing *Matter of Norwood and Davis Marcus Partners,* No. 2015-06, slip op. at 4 (Mass. Housing Appeals Comm. Dec. 8, 2016) and cases cited. Moreover, 760 CMR 56.03(3)(d) states that "[e]vidence regarding Statutory Minima submitted under 760 CMR 56.03(3) shall comply with any guidelines issued by [DHCD]." In this *de novo* appeal before the Committee, we are charged with interpreting Chapter 40B and its implementing regulations. As an expression of DHCD's interpretation of the regulations, the GLAM guidelines may be of assistance in this appeal. Therefore, we may consider the guidance offered by DHCD's GLAM Guidelines with respect to interpretation of language in the statute and regulations. Interpretation of the regulation is different than establishing a procedure for municipalities to gather land area data, which should only apply prospectively.[5] However, as we discuss below, the GLAM

[5] We have previously noted that when DHCD changed regulations during the pendency of an appeal before the Committee, questions of fairness with regard to retroactive application may preclude application of certain provisions. *See, e.g., Green View Realty, LLC v. Holliston,* No. 2006-16, slip op. at 1 n.1 (Mass. Housing Appeals Comm. Jan. 12, 2009); *Brierneck Realty, LLC v. Gloucester*, No. 2005-05, slip op. at 1 n.1-2 (Mass. Housing Appeals Comm. Aug. 11, 2008); *Cozy Hearth Community Corp. v. Edgartown,* No. 2006-09, slip op. at 3-4 (Mass. Housing Appeals Comm. Apr. 14, 2008) and cases cited. For this reason, the data gathering procedures in the GLAM Guidelines, which provide for steps a board should undertake immediately upon the filing of an application for a comprehensive permit, are inapplicable, as the Presiding Officer ruled during the hearing.

Guidelines, while supporting our rulings, are not determinative of the issues before us in this particular appeal.

B. Burden of Proof

The Committee's hearing on this issue, like all Committee proceedings, is *de novo*. G. L. c. 40B, § 22; *Matter of Waltham and Alliance Realty Partners*, No. 2016-01, slip op. at 5 (Mass. Housing Appeals Comm. Feb. 13, 2018). 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). ALR may introduce evidence to counter the Board's evidence, or it may simply challenge the sufficiency of the Board's case without providing its own contrary evidence. *Waltham, supra,* No. 2016-01, slip op. at 5.

C. The Numerator

The Board must prove that SHI eligible housing exists on sites comprising 1.5 percent or more of the total land area zoned for residential, commercial or industrial use in Arlington. G. L. c. 40B, § 20; 760 CMR 56.03(3)(b). For the above ratio, the comprehensive permit regulations clarify 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 1½% minimum. For such sites, that proportion of the site area shall count that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units).

760 CMR 56.03(3)(b). The Board presented evidence that the numerator is 30.14 acres. Exhs. 4, ¶ 16; 4-1, p. 1; Tr. I, 26. Although ALR's expert witness raised an issue with the numerator,[6] ALR has not disputed the Board's figure for the numerator for the purposes of

[6] ALR's expert suggested the Board's expert had claimed as SHI eligible a property of .189 acres that is not listed on the SHI. Exh. 6, ¶ 26 and n.17. The SHI is presumed accurate; thus, the Board has the burden of proving any additional SHI eligible properties should be counted. *See Braintree, supra,* No. 2017-05, slip op. at 28-31.

the appeal. It argues that, even accepting the Board's numerator, the Town has failed to reach the 1.5 percent general land area minimum safe harbor. Since ALR has not contested the numerator, we accept the Board's figure for the purposes of this appeal.

D. The Denominator

The comprehensive permit regulations provide that the denominator 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 by law," 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: 1) land owned by the United States, the Commonwealth of Massachusetts or any political subdivisions, and the Department of Conservation and Recreation;[7] 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 said zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial or 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 Adam Kurowski, the Town's Director of Geographic Information Systems and Systems Analyst. Mr. Kurowski provided pre-filed testimony dated March 31, 2017, supplemental pre-filed testimony dated May 16, 2018, and additional supplemental pre-filed testimony dated August 16, 2018.[8] He testified regarding his methodology for calculation of the total land area and his conclusion that the general land area minimum for Arlington is 1.53 percent. Exhs. 3-5; Tr. I, 12-13. He stated that he consulted with town counsel and special

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[7] The denominator, however, "shall include any land owned by a housing authority and containing SHI Eligible Housing." 760 CMR 56.03(3)(b)3.

[8] Mr. Kurowski confirmed at the hearing that his May 2018 supplemental pre-filed testimony (Exh. 4) superseded his original March 2017 pre-filed testimony (Exh. 3). Tr. I, 12-13.

town counsel regarding interpretation of Chapter 40B and relevant regulations. He stated he applied formulas found in G.L c. 40B, § 20, and, using the Town Geographic Information System (GIS), determined "total zoned land area" to be 2,556.59 acres and "total excluded land" to be 588.88 acres, Exh. 4, ¶¶ 7, 12-13. Mr. Kurowski's Summary of Affordable Housing GIS Calculation stated:

> Total Zoned Land (a)
> **Process:** Arlington's GIS parcel layer includes acreage for fee owned parcels (FEE), road rights-of-way (ROW), railroad/Minuteman Bikeway (RAILROAD), and water (WATER). Arlington's GIS zoning layer was applied to each parcel … [A]ll residential, commercial, or industrial land that is not considered road right-of-way, railroad/Minuteman Bikeway, or water was calculated. From this total land area, the acreage of all water bodies were subtracted. [Sic]

Exh. 4-1, p. 2. Mr. Kurowski's testimony also included a table listing "Total Land Zoned R, C, or I; non-water, non-ROW." The zoning categories included in the table, all fee parcels, were identified as various business, industrial, and residential districts, as well as multi-use, open space, planned unit development, and transportation. Exh. 4, p. 4. Although Mr. Kurowski's definition of "total zoned land" under (a) is consistent with § 56.03(3)(b)1, he did not discuss his treatment of land "regardless of how such district is designated by name in the city or town's zoning bylaw." *Id.* He did state that Arlington does not have unzoned land in which any residential, commercial, or industrial use is permitted, which is includable in the denominator under 760 CMR 56.03(3)(b)2. Exh. 4-1, pp. 1-2.

Mr. Kurowski's summary also listed the following component categories of excluded land: "Zoning – any parcel having a non-residential, non-commercial, or non-industrial zoning type," government-owned parcels, "[p]ermanently protected land – any parcel or portion of a parcel protected under Article 97 of the Massachusetts Declaration of Rights or by conservation restriction," wetlands, and water bodies. He also noted that "[a]ny parcel having one or more of the items listed [in those categories] was considered excluded land." Exh. 4-1, p. 2. *See* Exh. 4, ¶¶ 8, 12-13. He provided a list of parcel identification numbers for "Excluded Land due to LU Code, Ownership, Land Protection or Wetland," which he testified totaled 354.707 acres. Exh. 4-1, pp. 6-11. He identified the total acreage of water bodies to be 234.176 in his May 2018 supplemental testimony. However, in his August 2018

supplemental testimony he stated that he revisited his analysis because Mr. Curnan had highlighted oversights in Mr. Kurowski's water data, and also because group home data had been provided by the Commonwealth of Massachusetts, and he also conducts routine GIS parcel boundary maintenance twice annually. He testified that Arlington has approximately 231 acres of open water. Exhs. 4-1, p. 5; 5, ¶¶ 2-3; 6, ¶¶ 9, 21.

Mr. Kurowski's summary identified as the total excluded land 588.88 acres, the sum of 354.707 and 234.176.[9] Exh. 4-1, p. 1. His excluded land total also included 19.5 acres of land owned by the Arlington Housing Authority containing SHI housing.[10] Tr. I, 67-68. Subtracting excluded land of 588.88 acres from total zoned land of 2,556.59 acres, Mr. Kurowski arrived at a denominator of 1,967.71 acres, which he described as "the developable or general land area of the Town." Exhs. 4, ¶ 14; 4-1.[11] Calculating the SHI land area percent with this denominator and the Board's numerator of 30.14 acres results in the Board's figure of 1.53%. Exh 4, ¶ 17.

2. ALR's Criticisms of the Board's Calculations

ALR challenges the methodology used by Mr. Kurowski and the resulting denominator. It argues that the Board's calculation improperly failed to set forth a total land area in Arlington as a starting point in accordance with G.L c. 40B, § 20. It also argues that the Board improperly excluded the acreage for water bodies twice and improperly excluded

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[9] Mr. Kurowski's summary contains inconsistent statements regarding whether water bodies are included in his exclusion categories "c, d and f" totaling the 588.88 figure. *See, e.g.,* "Summary of Affordable Housing GIS Calculation" (which does not suggest water bodies – identified as category "e" – were part of the 588.88 total, Exh. 4-1, p. 1; "Total Zoned Land (a);" and "Total Excluded Land (c, d, & f) (listing water bodies as part of these three categories). Exh. 4-1, p. 2.

[10] For purposes of illustration only, the Board asserts that the addition of the 19.5 acres of Arlington Housing Authority land back into the denominator, results in a total of 1,987 acres, arguing that even with this change the Town has achieved the 1.5 percent safe harbor. Board brief, p. 19, n.13.

[11] The Board introduced no evidence in the record regarding the acreage of roadways it excluded from the denominator; nor did it distinguish between public roads and private roads in making that exclusion, as ALR noted in its brief. *See* Tr. I, 42. We have previously rejected the argument that private roadways may be excluded under 760 CMR 56.03(3)(b). *Braintree, supra,* No. 2017-05, slip op. at 8, n.9, citing *Norwood, supra,* No. 2015-06, slip op. at 10. This omission also impairs the credibility of the Board's figure. We also note that the GLAM Guidelines are consistent with the Committee's interpretation. *See* Exh. 6-8, pp. 4-5.

other specific parcels from the Town's total land area: 1) Arlington Housing Authority property containing SHI units, 2) tax title properties, 3) permanently protected open space and wetlands, and 4) other parcels lacking evidence of ownership or any exclusion category. It argues these were outside the permitted exclusions in 760 CMR 56.03(3)(b)3-6.[12] ALR asserts that Mr. Kurowski's summary chart of excluded parcels is insufficient to meet the Board's burden of proof. In particular, it cites a 2.119 acre excluded parcel lacking any identifying address or owner information to support the exclusion rationale asserted by the Board; a 3.099 acre parcel owned by the Arlington Housing Authority that is identified as an SHI property; parcels owned by private entities and individuals identified as open space acreage without evidentiary support demonstrating their consistency with 760 CMR 56.03(3)b)6; "wet" parcels excluded although the Town has not been shown to have wetlands restrictions under G.L. c. 131, § 40A; and parcels identified as "TAX POSS" without evidence demonstrating the Town has taken possession of these properties through foreclosure proceedings. Exh. 4-1, pp. 6-12; 6-9. Accordingly, ALR argues the Town failed to meet the burden of proof required to support exclusion of these parcels of land.

3. ALR's Evidence and Comparison to the Board's Evidence

ALR's GIS expert, Martin C. Curnan, reviewed Mr. Kurowski's testimony and exhibits. Using the Arlington GIS dataset and raw data provided to him by the Town, Mr. Curnan offered two separate calculations of the general land area minimum in accordance with 760 CMR 56.03(3)(b), one similar to the Board's methodology (Analysis A), and a second following the GLAM Guidelines (Analysis B). Under Analysis A, he determined the total municipal area in Arlington to be 3,509.86 acres, with 726.28 acres and 224.95 acres having POLY_TYPE attributes, respectively of ROW (rights of way) and WATER. He calculated the land area excluding these poly types to be 2,558.63 acres, which he noted was

[12] ALR also takes issue with Mr. Kurowski's reliance on the "Guidance for Interpreting 760 CMR 31.04(2) Computation of Statutory Minima Pursuant to M.G.L. c. 40B General Land Area Minimum." Tr. I, 27; Exh. 6-7. This guidance interpreted 760 CMR 31.00, DHCD's former regulation superseded by 760 CMR 56.00. ALR argues that Mr. Kurowski's use of guidance for outdated regulations undercuts his credibility. It also argues that he did not apply that guidance correctly.

close to the Mr. Kurowski's "total zoned land" calculation of 2,556.59 acres.[13] Exh. 6, ¶¶ 7, 8, 20. Mr. Curnan excluded the acreage for water and rights-of-way categories at this stage to provide a side-by-side comparison to the Board's calculation. He then deducted remaining exclusions of 361.77 acres, for government owned land (exclusive of housing authority land), land in transportation and open space districts, and floodplain, conservation or open space zones where residential, commercial or industrial use is completely prohibited.[14] Exh. 6, ¶ 22. Under Analysis A, Mr. Curnan subtracted these exclusions from the total zoned land figure to achieve a denominator of 2,196.86 acres.[15] Calculating the SHI land area percent with this denominator and the Board's numerator of 30.14 acres he derived a result of 1.37%, compared to the Board's 1.53%. Exh 6, ¶¶ 7-8, 17-26.

Although both witnesses relied on the same original data, the data were not admitted into evidence. The Committee has available to it only the conclusions and explanations made by the parties' expert witnesses. Based on our review of the witnesses' testimony, including as shown below, we find the testimony of Mr. Curnan explaining his calculations in reaching the denominator conclusion to be more credible than that of Mr. Kurowski.

a) Water Bodies

Mr. Kurowski's calculation of 588.88 acres of total excluded land is the sum of 234.176 acres for water bodies and 354.707 acres for other excluded land. Exh. 4-1, pp. 1, 5-11. Relying on Mr. Curnan's testimony, ALR argues that 234.176 acres for water bodies was already omitted from the Board's calculation of its total land area of 2,556.59 acres. Mr. Curnan testified that Mr. Kurowski's calculations indicated exclusion of water as part of Step

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[13] Mr. Curnan also pointed out that Mr. Kurowski's calculations indicated exclusion of water as part of Step (a) and again within calculated "Water Bodies" excluded to reach total excluded land. Exh. 6, ¶ 20 and n.12.

[14] Mr. Curnan questioned whether the open space feature class was properly established. He stated, however, that as a conservative measure, he retained the feature class within his exclusions, noting this may have reduced the denominator more than necessary. Exh. 6, ¶ 6, n.15.

[15] We do not need to consider Analysis B (applying the GLAM Guidelines), which resulted in a denominator of 2,211.84 acres, even less favorable to the Board. Exh. 6, ¶ 34.

(a) (calculation of total zoned land), and again within calculated "water bodies" excluded to reach total excluded land. Exh. 6, ¶¶ 9-10, 20. *See* Exh. 4-1, pp. 1-2, 4-5.

Mr. Curnan reviewed the GIS data and Mr. Kurowski's summary showing the total acreage of excluded water bodies to be 234.176 acres. Based on his review of the data, Mr. Curnan determined that the "water bodies feature class" was 236.130 acres. He pointed out that a feature class is not synonymous with a POLY-TYPE. Because the term "water bodies," as used by the Town, is a feature class, it can include areas of water that may be contained within fee/tax parcels on a parcel map.[16] Exh. 6, ¶ 21. Under Analysis A, Mr. Curnan first removed acreage associated with the field attributes ROW and WATER POLY-TYPES from the parcels layer. He determined that the remaining water acreage contained in the water bodies feature class totaled 10.87 acres, and later calculated and excluded that, with other exclusions, in accordance with 760 CMR 56.03(3)(b)3-7. He also found several errors in Mr. Kurowski's calculation of acreage of water bodies: approximately 0.35 acres of the Arlington Reservoir that were attributed to Arlington actually fell beyond the town boundary; Mystic River and Lower Mystic Lake included approximately 0.09 acres that fell outside of the town boundary; and Hill's Pond (2.39 acres) was missing from the excluded water bodies table. He stated this explained the discrepancy between his water bodies calculation of 236.130 acres and Mr. Kurowski's of 234.176 acres. Exhs. 4-1, p. 5; 6, ¶ 21.

Mr. Curnan determined the difference between the denominators he calculated under his analyses, and the denominator calculated by Mr. Kurowski, which he stated was a difference of at least 229 acres, was largely "attributable to the fact that the Town has erroneously excluded acreage associated with Arlington's water bodies twice to arrive at its claimed denominator," noting this conflicts with the regulatory prohibition against counting excluded land more than once. Exh. 6, ¶¶ 9-10, 20.

In response to Mr. Curnan's testimony, Mr. Kurowski stated that there are approximately 231 acres of open water within Arlington's municipal boundaries. However,

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[16] Mr. Curnan explained that "[u]sing a Parcel Map, one can identify Tax/Fee, as well as non-fee POLY_TYPES (notably ROW or WATER). The digitalized "Water Bodies" – as that term is used by the Town – is a 'feature class,' which can include areas of water as may be contained within fee/tax parcels." Exh. 6, ¶ 21. Mr. Curnan provided a map distinguishing between water included as POLY_TYPE WATER compared to the water body feature class. Exh. 6-14.

he did not explain why he subtracted water bodies from a "total land area" figure that he stated was land not considered to include water. Exhs. 4, ¶ 8; 4-1, p. 2; 5, ¶¶ 2-3. Nor did he disagree in his rebuttal testimony with Mr. Curnan's opinion that Mr. Kurowski had excluded water bodies twice. We find Mr. Curnan's testimony credible that at most only approximately 10.87 acres of water bodies would have been included in the water bodies feature class to be deducted from total land area. Exhs. 4,-1, p. 4; 6, ¶ 21. Thus, we find Mr. Curnan's water body calculation is more credible than that of Mr. Kurowski and we agree with Mr. Curnan that the Board improperly excluded the acreage associated with Arlington's water bodies twice, in violation of the regulatory provision that "[n]o excluded land area shall be counted more than once under the above criteria." 760 CMR 56.03(3)(b)7.

b) Arlington Housing Authority Land

Mr. Kurowski testified that he excluded all lands owned by a housing authority on which SHI eligible units existed, testifying that the acreage of such parcels is 19.5 acres. Tr. I, 30, 67. His list of excluded parcels identifies various parcels owned by the Arlington Housing Authority that contain SHI housing. Exhs. 4-1, pp. 12-13; 6-15A. The Board argues that the inclusion of this category of land in the denominator runs counter to G.L c. 40B, § 20 because the land is government-owned.

The comprehensive permit regulations provide that housing authority acreage containing SHI properties is included in the numerator. Under G.L. c. 40B, § 20, the SHI eligible land includes land "where … low or moderate income housing exists … on sites comprising one and one half percent or more of the total land area zoned for residential, commercial, or industrial use." Thus the statute provides that the numerator is a subset of the denominator. *Stoneham, supra*, No. 2014-10, slip op. at 4 n.3.

Mr. Kurowski's table "Affordable Housing and Special Needs Housing Land," included the Arlington Housing Authority parcels listed as SHI housing and thus included in the numerator for the calculation of the 1.5 percent. Exh. 4-1, pp. 12-13. Inclusion of this land in both the numerator and denominator is consistent with both 760 CMR 56.03(3)(b) and G.L c. 40B, § 20. *Stoneham, supra*, No. 2014-10, slip op. at 4 n.3; *Arbor Hill Holdings Ltd. P'ship v. Weymouth*, No. 2009-02, slip op. at 3 n.3 (Mass. Housing Appeals Comm. Order of Dismissal Sept. 24, 2003) (not deducting South Weymouth Naval Air Station land

from denominator because, "even though it may have been owned by the United States, it is available for development"). Consistent with its inclusion on the SHI and hence the numerator, all Arlington Housing Authority land containing SHI housing is to be included in the denominator, as Mr. Curnan has done.

c) Tax Title Land

Mr. Kurowski excluded at least 42 parcels identified as owned by the "Town of Arlington Tax Poss." Exh. 4-1, pp. 6-11.[17] ALR argues that the Board has not established that it has completed foreclosure proceedings, foreclosing the right of redemption in these parcels, pursuant to G. L. c. 60. "Not until the right of redemption is terminated by a carefully defined legal process in the Land Court ... does tax title land become town-owned land specifically excluded in [G. L. c. 40B, § 20] as government-owned land." *Dartmouth West Housing Assocs. v. Dartmouth*, No 1991-04, slip op. at 16 (Mass. Housing Appeals Comm. Aug. 27, 1973). We agree with ALR that the Board failed to provide sufficient credible evidence that these parcels are eligible for exclusion as government-owned land. Therefore, these properties should be included in the denominator. Even Mr. Curnan's denominator is likely understated, as it does not appear that he treated these parcels differently than Mr. Kurowski had done.[18] Additionally, we note that the GLAM Guidelines expressly exclude tax title properties from the definition of land owned by a political subdivision for purposes of the land area calculation. Exh. 6-8, pp. 4-5.

d) Protected Open Space

The Board identified several parcels as protected open space parcels that were challenged by ALR as unsupported. These included parcels owned by the Medford Boat Club and by individuals. Exh. 4-1, pp. 6-10. ALR argues that the Board did not provide any maps depicting the areas it has excluded as constituting protected open space, and has provided no

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[17] The parties have not identified the total acreage of these tax title parcels, although it could ascertained by adding the acreage totals in Mr. Kurowski's summary.

[18] Mr. Curnan's testimony regarding excluding government-owned parcels refers only to inclusion of SHI eligible properties. *See* Exh. 6, ¶ 22.

other support or documentation to verify that the parcels identified above were properly excluded.

The comprehensive permit regulations provide that "[t]otal land area shall exclude any flood plain, conservation or open space zone if said zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial or industrial use are completely prohibited." 760 CMR 56.03(3)(b)6. The Board has not introduced evidence to establish that these parcels are subject to an open space restriction that completely prohibits residential, commercial, or industrial development. *See Braintree, supra,* No. 2017-05, slip op. at 9-10. Moreover, we have previously stated that "a piece of land subject to a use restriction that is not residential, commercial, or industrial use is not an 'open space zone [that] completely prohibits residential, commercial, and industrial uses,' which is expressly excluded from the denominator." *Newton, supra,* No. 2015-01, slip op. at 2, quoting 760 CMR 56.03(3)(b)6. *See Waltham, supra,* No. 2016-01, slip op. at 18-19 (lots of land in which all residential, commercial, and industrial uses may be prohibited or hindered will not be excluded, unless they are within excluded land use zones or fall within other expressed exclusions in statute and regulation). Because the Board failed to introduce credible evidence to support the exclusion claim, it did not carry its burden of proving these parcels may be excluded; therefore, they are not to be deducted from the denominator.[19]

e) Wetlands

The Board excluded from the denominator a number of parcels owned by private entities or individuals designated as "wet" parcels in Mr. Kurowski's summary. Exh. 4-1, p. 9. Pursuant to 760 CMR 56.03(3)(b)4, only land where all residential, commercial, and industrial development has been prohibited by a DEP restrictive order under G.L. c. 131, § 40A may be excluded from the total land area. The regulation expressly provides that "[n]o other swamps, marshes, or other wetlands shall be excluded." *Id.* The Town currently has no wetlands restriction order in place, as demonstrated by DEP's database of Communities with

[19] As Mr. Curnan notes, although he questioned whether the Board's open space classification was established by the Board's evidence, to be conservative he retained the open space feature class that parallels this classification within the exclusions from the denominator, although this may result in understating the denominator. Exh. 6, ¶ 22 and n.15.

Previously Registered Wetland Restriction Orders. Exh. 6-9. ALR's expert, Mr. Curnan, did not exclude any of the parcels Mr. Kurowski designated as "wet" from his calculation, as no swamps, marshes or other wetlands, except areas subject to the above DEP restriction order, may be excluded. *Id.* We agree that these "wet" parcels identified by the Board may not be excluded from the total land area.[20]

4. Methodology

The Board asserts that in accordance with G.L. c. 40B, § 20 and 760 CMR 56.03, the 1.5 percent target is the land area containing SHI-eligible housing, and the "denominator" is the total land area zoned for residential, commercial or industrial use, subject to certain adjustments under 760 CMR 56.03(3)(b). Mr. Kurowski's starting point for the denominator was neither the total area of land within the municipality nor the total land area as defined in 760 CMR 56.03(3)(b)1. Instead, his starting point was the GIS parcel layer exclusive of rights of way and water bodies. Exh. 4-1, p. 2. The Board argues that this is the starting point from which excluded areas should be subtracted. It contends that a calculation that uses the total area of the Town as the starting point "inflates the denominator beyond the value dictated by both statute and regulations," resulting in a "grossly incorrect denominator, to the Town's disadvantage." Board brief, p. 11, n.1. It argues that the Legislature, in defining the denominator in G.L. c. 40B, § 20 as the "total land area zoned for residential, commercial or industrial use," intended to measure the area dedicated to affordable housing, or the 1.5 percent numerator, against the Town's developable area, and not the Town's total area. Under this theory, it argues that establishing as the baseline a municipality's developable area, or area upon which things might actually be built, the Legislature puts all cities and towns on an equal footing.[21] *See* Board brief, pp. 11-12 and nn.1-2.

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[20] We note the GLAM Guidelines are consistent with this requirement. Exh. 6-8, p. 4.

[21] The Board suggests the Legislature took into account the varied composition of cities and towns across the Commonwealth when drafting this statutory provision, in terms of water bodies; federal, state and local parks; forests, and other lands unavailable for development, and claims its proffered methodology allows municipalities with large tracts of such land an opportunity to reach the 1.5 percent threshold. The Board argues that calculating the denominator as the total area of a municipality makes it almost impossible for those cities and towns to achieve 1.5 percent. Board brief, p. 12.

ALR argues the Board's methodology fails to set forth a "total land area" in the Town as a starting point and instead uses a starting point of 2,556.59 acres, which is exclusive of all roads and water bodies. ALR argues that the Board's exclusions extended beyond permissible categories, and the excluded total of 588.88 acres is excessive and unsupported.

Both parties ignore the simplicity of DHCD's regulations. The Board's argument, in particular, suggests that the regulations do not exclude land where residential development is not permitted. Its argument that municipalities are treated unequally is inapposite. The Board's argument also confuses the starting point in calculating the denominator with the end result. The denominator, or end point, results from a calculation of inclusion and exclusion of categories of land within the municipal boundary. 760 CMR 56.03(3)(b)1-6. The excluded categories of land referenced by the Board must be excluded – only once – from the total land area figure. *See Stoneham, supra,* No. 2010-14, slip op. at 5.

To the extent the Board suggests that other non-governmental land is unavailable for development and should be excluded from the denominator, it has offered no evidence to support the exclusion of any such land in this proceeding. In any event, Mr. Kurowski's analysis did not follow the regulation and failed to demonstrate or support the acreage for his inclusion and exclusion of land to achieve "total land area," the denominator in 760 CMR 56.03(3)(b). Although his "total zoned land" appears to be similar to the category of land identified in 760 CMR 56.03(3)(b)1,[22] the Board has not shown that it has included all land "regardless of how such district is designated by name in the city or town's zoning bylaw," *id.*, and we note Mr. Kurowski stated Arlington does not have unzoned land in which any residential, commercial, or industrial use is permitted, which is includable in the denominator under 760 CMR 56.03(3)(b)2.

By starting with the total zoned land figure, the Board "was required to prove what had already been excluded and ensure that those areas were not deducted from the total land area." *Stoneham, supra,* No. 2014-10, slip op. at 5-6, n.4. When calculating the total land area, the Board could have used the total area of the Town and then deducted water bodies,

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[22] Section 56.03(3)(b)1 states: "[t]otal land area shall include all districts in which any residential, commercial, or industrial use is permitted, regardless of how such district is designated by name in the city or town's zoning bylaw."

and other excluded areas, or acknowledged that the figure it used already excluded water bodies and refrained from omitting water bodies a second time. It did not do so. As we said in *Stoneham,* the Board's "argument confuses the area required by the statute, which is the land area resulting from the analysis, for the starting figure used to derive the resulting denominator." *Id.* at 5, n.4.

5. Denominator Conclusion

The Board failed to provide credible evidentiary support for total land area and its exclusions of acreage in the Town from total land area, including the categories of water bodies, public roadways, tax title parcels, open space zones, housing authority sites with SHI housing, wetlands, as well as exclusion of parcels lacking ownership or exclusion information. Therefore it has not demonstrated a credible denominator. The denominator calculation in Analysis A submitted by Mr. Curnan has adopted some of the exclusions that are inadequately supported, and rejected others. Overall, however, we find Mr. Curnan's result more credible, although he accepted some of the Board's improper exclusions. Therefore, for the purposes of our analysis, we will use Mr. Curnan's denominator as that most favorable to the Board, even though it is understated based on Mr. Curnan's testimony. The parties' calculation of components of the denominator and our assumptions for the purposes of calculation are below:

	Board	ALR (A)	Assumed by Committee
Total Municipal Area		3,509.86	3,509.86
Water Body Poly Type		-224.95	-224.95
ROW Poly Type		-726.28	-726.28
Total Zoned Included Land	2556.59	2,558.63	2,558.63
Exclusions	-588.88	-361.77	-361.77
Denominator	1,967.71	2,196.86	2,196.86

When the SHI eligible land area percent is calculated by dividing the Board's numerator of 30.14 by the assumed denominator of 2,196.86, the resulting percent is 1.37%, below the 1.5 percent threshold. The Board therefore has not established the Town has achieved the 1.5 percent statutory minimum, even with this favorable assumption.

III. BOARD'S CHALLENGE TO REGULATION

The Board has also challenged various provisions of 760 CMR 56.00 as in conflict with Chapter 40B. As previously noted, the regulation requires a board to assert compliance with one of the statutory minima within 15 days of the opening of the public hearing. 760 CMR 56.03(8)(a). The Board argues that because this requirement is not expressly provided in G.L. c. 40B, §§ 20-23, setting such a deadline is beyond DHCD's authority to impose and thus invalid. The Board also takes issue with the process of DHCD's review of a board's assertion of compliance with one of the statutory minima, for the same reason, citing *Massachusetts Federation of Teachers, AFT, AFL-CIO v. Board of Education*, 436 Mass. 763, 773 (2002) (agency may not exceed powers expressly conferred on it by statute or reasonably necessary to carry out purpose of statute). It argues that the two-step review process is inconsistent with the statute and *ultra vires*. The Board also argues that DHCD's review of the Board's claim of the 1.5 percent safe harbor status without having the complete and relevant data required for such review, specifically the locations of DDS and DMH addresses, was arbitrary and a violation of due process. It suggests that the *de novo* review by the Committee did not cure the defects of the DHCD review process.

Additionally, the Board argues that 760 CMR 56.03(3)(b) improperly requires a municipality to achieve "more than" 1.5 percent, in conflict with G.L. c. 40B, § 20, requiring 1.5 percent "or more." This discrepancy between the regulation and the statute has no bearing on the facts in this appeal. The Board also asserts that the inclusion of Arlington Housing Authority owned land in the denominator pursuant to 760 CMR 56.03(3)(b)3 violates G.L. c. 40B, § 20. We addressed this argument above.

ALR argues the regulations pertaining to G.L. c. 40B have been well-established as furthering the statutory language and intent of the statute, and that the Committee has properly applied and interpreted both the statute and regulation in past decisions. ALR further

asserts that an administrative agency may adopt policy through adjudication to serve as precedent, *see Zoning Board of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748, 760 n.17 (2010), and that the Board's challenges to the regulations and the interlocutory appeal procedure have been refuted in the existing body of administrative law and past Committee decisions.

As we stated earlier, the appeal before the Committee is a *de novo* proceeding, and we have reviewed the evidence submitted in this appeal, and we render our decision based on that evidence. Therefore, the record before DHCD for its review of the safe harbor has no bearing on our decision, and we need not address the Board's complaints regarding the validity of the interlocutory appeal process. Similarly, the Board's other challenges to the comprehensive permit regulations do not affect the merits of its appeal. Moreover, the Committee and DHCD are expected to follow DHCD's regulations. *See Royce v. Commissioner of Correction*, 390 Mass. 425, 427 (1983). Finally, the Board has cited no authority nor offered any persuasive argument why its contentions should alter the result of our decision.

IV. CONCLUSION AND ORDER

The Board has not established that the Town of Arlington has achieved the 1.5 percent statutory minimum, and its claim that the Town is entitled to a safe harbor pursuant to G.L. c. 40B, § 20 under the general land area minimum threshold of 1.5 percent is denied. Accordingly, this appeal is dismissed and the matter remanded to the Board for further proceedings.

Housing Appeals Committee

October 15, 2019

Shelagh A. Ellman-Pearl, Chair

Marc L. Laplante

Rosemary Connelly Smedile

James G. Stockard, Jr.