COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

In the Matter of

BRAINTREE ZONING BOARD OF APPEALS

and

383 WASHINGTON STREET

No. 2017-05

DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR

June 27, 2019

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an interlocutory appeal to the Housing Appeals Committee brought by the Braintree Zoning 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 Braintree has not met the general land area minimum, one of the three statutory safe harbors precluding the Housing Appeals Committee's overturning or modifying a board's decision under the Comprehensive Permit Law, G.L. c. 40B, §§ 20-23. Under DHCD's implementing regulations, any decision by a board either to deny a comprehensive permit or 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 1.5% 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).

Pursuant to 760 CMR 56.03(8)(a), a board seeking to rely on a safe harbor must notify the developer 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 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 Board's initial pleading for interlocutory appeal, 383 Washington Street, LLC (Washington) filed two comprehensive permit applications with the Board on February 14, 2017, for Parkside Apartments, a 70-unit rental apartment project, and for Parkside Condominiums, an 8-unit condominium project. On March 13, 2017, the Board opened the public hearing on the applications. On that date it determined that a denial of requested comprehensive permits or the imposition of conditions or requirements on the requested permits 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% or more of the total land area in Braintree zoned for residential, commercial or industrial use. The Board notified the developer and DHCD on March 23, 2017 that it invoked the general land area minimum safe harbor. On April 6, 2017, Washington notified the Board and DHCD that it challenged the Board's assertion. DHCD issued a letter dated May 4, 2017 stating that the Board was not entitled to the safe harbor,[1] and the Board filed this interlocutory appeal to the

[1] The presiding officer has taken official notice of DHCD's May 4, 2017 decision pursuant to 760 CMR 56.06(8)(b). The purpose of the official notice is to include the letter in the hearing record to establish the content of DHCD's decision. The Board objected only with respect to the Committee taking notice of the letter as to the truth and accuracy of the facts, findings and conclusions in the letter. We do not rely on any substantive findings and conclusions by DHCD in our decision, as this proceeding is *de novo*.

Committee on May 22, 2017.[2]

Following a conference of counsel, the presiding officer issued a protective order with respect to addresses of group homes on the SHI that are owned or operated by the Department of Mental Health (DMH) or the Department of Developmental Services (DDS), and thereafter the parties submitted pre-filed direct testimony and exhibits.[3] The presiding officer conducted a view with counsel of a number of sites agreed upon by the parties. An evidentiary hearing was held on December 12, 2017. On January 17, 2018, DHCD issued final guidelines regarding the calculation of the general land area minimum. On February 5, 2018, the Board moved to re-open the administrative record; the developer opposed the motion. On March 30, 2018, the motion to reopen was granted with certain specifications, and a schedule for additional pre-filed testimony was set. A second evidentiary hearing was held on June 14, 2018. The parties thereafter filed post-hearing memoranda and reply memoranda.

II. GENERAL LAND AREA MINIMUM OF 1.5 PERCENT

Under the Comprehensive Permit Law, the decision of a board would be consistent with local needs as a matter of law when the town has low or moderate income housing "on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial, or industrial use...." G.L. c. 40B, § 20. The general land area minimum

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[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 his or her discretion, may choose to bring the matter before the full Committee. Since a number of the issues are before the Committee for the first time, the presiding officer, the Chair of the Committee, determined it appropriate to bring this appeal to the full Committee.

[3] The protective order was issued to ensure the confidentiality of any addresses of the DMH and DDS properties, which are subject to the privacy protections of state and federal law, such as the Massachusetts Fair Information Practices Act, G.L. c. 66A, and the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104–191, 110 Stat. 1936, enacted August 21, 1996. *See Matter of Waltham and Alliance Realty Partners,* No. 2016-01, slip op. at 2-4 (Mass. Housing Appeals Comm. Feb. 13, 2018). Pursuant to that protective order the parties have worked together to provide redacted exhibits and pleadings for the official record, as well as a key and aliases for specific properties. We affirm that protective order.

percentage 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 residential, commercial, or industrial use (the denominator). 760 CMR 56.03(3)(b); *Matter of Waltham and Alliance Realty Partners,* No. 2016-01, slip op. at 4-5 (Mass. Housing Appeals Comm. Feb. 13 2018); *Matter of Norwood and Davis Marcus Partners,* No. 2015-06, slip op. at 2-3 (Mass. Housing Appeals Comm. Dec. 8, 2016). The Board believes that Braintree satisfies this 1.5% general land area minimum threshold. Washington argues the Board's methodology and calculations are flawed and the Town has not met the statutory minimum.

A. Methodology

1. Application of DHCD Guidance

The parties introduced into the record various guidance documents issued by DHCD. Two are most particularly relevant for consideration of whether the Town of Braintree has met the general land area minimum: 1) "Guidelines, G.L. c. 40B Comprehensive Permit Projects, Subsidized Housing Inventory, §§ I, II," updated December 2014 (Comprehensive Permit Guidelines), Exh. 54; and 2) "Guidelines for Calculating General Land Area Minimum" issued January 17, 2018 (2018 Guidelines),[4] Exh. 71. Also admitted into evidence were "Guidance for Interpreting 760 CMR 31.04(2) Computation of Statutory Minima pursuant to MGL c. 40B General Land Area Minimum," Exh. 55, and DHCD Draft Guidelines for Calculating General Land Area Minimum dated May 5, 2017 (draft guidelines), Exh. 64-6.[5]

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[4] In adopting the 2018 Guidelines, DHCD responded to our invitation in *Davis Marcus, supra,* No. 2015-06, 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. *Id.* at 6 n.6, 19 n.12.

[5] The Board has renewed its motion to strike Washington's testimony and evidence based on the draft guidelines, on the ground they never were in effect, have no evidentiary value or standing, and have been superseded by the 2018 Guidelines. Washington argues that it was appropriate for its expert witness, Mr. Nels Nelson, to consider the draft guidelines before the final 2018 Guidelines were issued, and that issues regarding his testimony based on those draft guidelines go to the weight, not the admissibility, of his testimony. In any event, it argues that any issue regarding his use of the draft guidelines became moot when the hearing was reopened and he performed a new analysis using the 2018 Guidelines. Mr. Nelson's earlier testimony based on the draft guidelines has been largely

DHCD guidance documents do not have the force of law because they have not been promulgated as regulations. *See 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." *Davis Marcus, supra,* No. 2015-06, slip op. at 4 and cases cited. Moreover, our regulation, 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]."

Since both parties have utilized the 2018 Guidelines to some extent for their calculations and arguments, our discussion considers that document and the Comprehensive Permit Guidelines, as applicable.[6] *See Davis Marcus, supra,* No. 2015-06, slip op. at 5.

2. The Parties' Data Sources

Both parties presented calculations for the general land area analysis, but used different data sources and methodologies. The Board used a combination of several data sources to calculate acreage for different types of land in the Town to derive the denominator and the acreage for SHI eligible housing, including Massachusetts Geographic Information Systems (MassGIS), local GIS, deeds, assessor's records and plans. The Board's expert, Rod Haywood, has worked in the field of digital cartography and GIS for over 30 years and currently acts as Braintree's GIS consultant. He testified that he developed the Town's GIS system from the beginning and now maintains and creates custom applications of the system. To calculate the denominator, he defined the total area within the town boundary using

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superseded by his subsequent testimony; however, it still provides context for his overall testimony. The motion to strike is denied.

[6] Neither party has made a specific argument regarding potential retroactive application of the 2018 Guidelines; under the circumstances of this case, we need not address this issue. 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. 2005-06, slip op. at 1 n.1 (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.

controlled survey points provided by the Massachusetts Geological Survey, using AutoCad and coordinate geometry (COGO). He compared the result to the MassGIS town line. Exhs. 31; 57, ¶¶ 1, 6. He provided the GIS data for the testimony of Melissa SantucciRozzi, the town's planner, who opined on the calculations for the numerator and denominator.

Washington uniformly used MassGIS data. Its expert, Nels Nelson, is a senior planner at Stantec Consulting Services, Inc. with a geospatial technology specialty. He testified that his primary source was the "Level 3 Assessors' Parcel Mapping GIS layer obtained from MassGIS, which contains all the Assessors' parcels in Braintree." Exh. 63, ¶¶ 1, 5-6.

Washington argues that Mr. Nelson's consistent use of the MassGIS data set and the ESRI Arc GIS measuring tool to determine the land areas to be included made its calculations more reliable. Tr. I, 109-110; Tr. II, 86, 89. The Board takes the position that it chose the best data for each category and that the developer's methodology was flawed because its MassGIS calculation omitted portions of the Fore River on the Braintree town boundary that the Board included in total town area and then deducted from the denominator. Exhs. 47; 57, ¶ 6; 58, ¶¶ 3-4.

The parties submitted their initial calculations before the 2018 Guidelines were issued. These guidelines provide that "General Land Area Minimum submittals must utilize parcel (land lot) and assessor data consistent with the MassGIS Level 3 Digital Parcel Standard," used by Washington, while acknowledging that "[i]f the municipality is maintaining parcel data consistent with the Level 3 Digital Parcel Standard, the current fiscal year's parcels and assessors' records can be used." Exh. 71, App. A., p. 1, Data Sources.

On the record before us, the difference in the parties' methodologies and data sources does not affect our decision. Under either methodology, the Board has not demonstrated that Braintree has met the general land area minimum. Therefore, we need not address the appropriateness of their methodologies. For many components of the denominator and numerator, Washington did not specifically challenge the Board's calculation of acreage. For the purposes of our analysis, we accept the figures used by the Board which the developer did not specifically challenge in its brief.

B. Calculation of the Denominator

To determine the denominator, the Town must demonstrate the "total land area zoned for residential, commercial or industrial use" (total land area). G.L. c. 40B, § 20. The Committee's regulations clarify that 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 city or town'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 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. The Board calculated a total land area (denominator) of 5,120.97 acres, and the developer calculated 5,522 acres. Exhs. 9B; 63, ¶ 20.

Despite testifying to different calculations of components of the denominator in the hearing, Washington addressed only two areas of disagreement with the Board in its brief. We have consistently held that issues that are not briefed are waived. *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 3 (Mass. Housing Appeals Comm. June 21, 2010) (issue not briefed is waived); *Hilltop Preserve Ltd. 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 June 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). The Board's expert put forth testimony of 9,322 acres for total acreage within the limits of the municipality, and the following exclusions from the denominator, which were not specifically addressed by Washington in its brief: 2,266.6 acres

[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.

for government owned land; 827.93 acres for water bodies and flood plain zone;[8] and 1,198.9 acres for roadways.[9] Exh. 9B.

In its brief, other than the general argument described above that the developer's use of MassGIS data was preferable to the data sources of the Board, Washington's only specific challenges to the Board's denominator relate to the exclusion of open space zones and restricted land. The Board's expert excluded 133.3 acres for an open space zone and 244 acres for land for which development is restricted. Exh. 9B. Washington noted in its brief that Mr. Nelson had stated that, except for the open space zone and restricted land categories, he agreed with Mr. Haywood that the acreage difference between their figures can be attributed to the difference in their datasets. Exh. 64, ¶ 3. Accordingly, except as noted below, we accept the Board's figures for the denominator components.

1. Open Space and Conservancy District

The Board excluded 133.3 acres of land in the Open Space and Conservancy District (OSC). Exh. 9B. In support of excluding the OSC, the Board argues that no residential, commercial or industrial uses are allowed in this district, other than allowing a property

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[8] For water bodies and flood plain, the Board argues 88 acres of the difference between its 827.93 acres and Washington's 709 acres is attributed to the different treatment of the Fore River, which forms the boundary between Braintree and Weymouth, and the remaining 30 acres resulted from data accuracy and water bodies not detected by the MassGIS data layer used by the developer. Mr. Haywood observed portions of water bodies using a scale of 1 inch equaling 40 feet that Mr. Nelson's use of a scale of 1 inch equaling 12,000 to 25,000 feet did not identify. The Board argues that the developer's calculation missed portions of rivers, leaving unconnected segments of rivers on the developer's maps. Exhs. 2; 9B; 47-49; 57, ¶ 10; 58, ¶¶ 1, 4-5; 62, ¶ 5; 63, ¶ 17; Tr. I, 129. However, Mr. Nelson's scale is consistent with the approach specified in the 2018 Guidelines that "call for the use of MassGIS data on the location and extent of water bodies" and instruct municipalities to identify water bodies using "MassGIS' MassDEP Hydrography (1:25,000) data layer and the HYDRO 25K_POLY feature class." Exh. 71, App. A, § 2.2. Since Washington did not challenge the Board's figure in its brief, we accept the Board's figure.

[9] Mr. Haywood excluded 1,198 acres excluded for roadways on the ground they are not zoned for any residential, commercial or industrial use. Exh. 57, ¶ 13. Mr. Nelson testified that the acreage for public roadways was 1,204.8 acres. Exh. 63, ¶ 18. We have previously rejected the argument that private roadways may be excluded under 760 CMR 56.03(3)(b)2. *Davis Marcus, supra,* No. 2015-06, slip op. at 10. The 2018 Guidelines also exclude only publicly-owned rights-of-way from the denominator. Exh. 71, App. A, § 2.8. Washington's figure, identifying only public roadways, however, is larger than the Board's figure. Since the developer did not challenge the Board's figure in its brief, we accept the Board's figure.

owner to cross the OSC by special permit, which, it argues, is not the kind of residential industrial or commercial use contemplated by 760 CMR 56.03(3). It also claims that the only allowed uses are those, including commercial day care centers, which it asserts G.L. c. 40A, § 3 prohibits excluding from any zone. Exhs. 33; 63, ¶ 11.

Washington disagrees with the Board's premise, arguing that the OSC does not exclude all commercial uses. It points to the Braintree Zoning By-law Open Space and Conservancy District Use Table, which identifies the following permitted uses in the OSC: Day Care, Accessory; Cemetery; Church, Synagogue, and Similar Use; Community Center; Municipal Building; School; Golf Course; Riding Stable/Academy; Rod and Gun Clubs; Agriculture, Horticulture, Floriculture, Nurseries, and Similar Uses; Day Care, Commercial; and Essential Services. Exh. 33. As the developer argues, these uses identified in the bylaw go beyond the statutory parameters of G.L. c. 40, § 3. We agree with the developer that the OSC is not an open space zone where residential, commercial, and industrial uses are completely prohibited. 760 CMR 56.03(3)(b)6. Therefore, the Board has not demonstrated that the 133.3 acres may be excluded from the denominator.

2. Devon Woods Cluster Condominium Development

The Board argues that the Devon Woods cluster development includes a large required open space area permanently protected from any commercial, residential or industrial use. It excluded 244 acres from the denominator as restricted land because, it claims, under the zoning bylaw in effect when the development was permitted, 50 percent of the development was required to be open space subject to a recorded deed restriction restricting commercial, residential or industrial use. Exhs. 8; 53; 61, ¶ 31.

Washington argues that the restriction in question is not a restrictive order of DEP pursuant to G.L. c. 131, § 40A, as required by 760 CMR 56.03(3)(b)4, and therefore does not fall within the regulatory exclusion. It points out that the Devon Woods restriction recites that the conservation restriction was granted to the Town under G.L. c. 184, §§ 31-33. It also relies on our confirmation in *Alliance Realty, supra*, No. 2016-01, slip op. at 17, that exclusions of restricted land from the denominator are applicable only to land restricted pursuant to G.L. c. 131, § 40A. The Board has not demonstrated that this restriction falls

within the exclusion of our regulation. The 2018 Guidelines, Appendix A, Technical Instructions also make clear that "[n]on-zoning restrictions such as conservation restrictions, easements, Chapter 61 land, or deed restrictions do not qualify as an eligible rationale for exclusion" from the denominator. Exh. 71, App. A, § 2.4. We agree with the developer that the plain language of the regulation does not allow this exclusion. Accordingly, the 244 acres shall be included in the denominator.

3. Denominator Conclusion

Since Washington has not offered argument in its brief against the specific calculations of the Board for exclusions other than the OSC and the Devon Woods restricted land, which must be included in the denominator, we will add the area for the OSC and the Devon Woods restricted land to the Board's total denominator of 5,120.97 acres to arrive at the denominator of 5,498.27 acres.

C. Calculation of the Numerator

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

> 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).

See G.L. c. 40B, § 20. To calculate the area of SHI eligible housing, the countable units 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). The 2018 Guidelines, through the definitions of "Actively Maintained" and Directly Associated Area," provide new guidance in determining the directly associated impervious and landscaped areas. *See* § II.C.4, *infra.*

The countable units are determined based on the composition of the housing development. For rental housing developments with at least 25% 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. 54, Comprehensive Permit Guidelines, § II.A.2.b.1. *See Davis Marcus, supra,* No. 2015-06, slip op. at 11-12; *Matter of Stoneham and Weiss Farm Apartments, LLC,* No. 2014-10, slip op. at 7 (Mass. Housing Appeals Comm. June 26, 2015); *Arbor Hill Holdings Ltd. Partnership v. Weymouth,* No. 2009-02, slip op. at 5 and n.7 (Mass. Housing Appeals Comm. Order of Dismissal Sept. 24, 2003). Thus, for the purposes of the land area minimum, these developments are measured as 100% of the property that consists of land occupied by the buildings and impervious and landscaped areas directly associated with the SHI eligible units.

For home ownership projects, and rental projects with less than 25% of the units reserved for low or moderate income housing, DHCD counts only the low or moderate income units on the municipality's SHI inventory. Exh. 54, § II.A.2.a.-2.c. Consequently, for these two categories of developments, land area is measured as a percentage of the directly associated area of the property equal to the percentage of all units in the development that are SHI eligible units. Exh. 71, App. A. § 3.4. *See Arbor Hill, supra,* No. 2009-02, slip op. at 5 and n.7; *Cloverleaf Apartments, LLC v. Natick,* No. 2001-21, slip op. at 3-5 (Mass. Housing Appeals Comm. Order Mar. 4, 2002).[10] For a mixed-use 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. *Alliance Realty, supra,* No. 2016-01, slip op. at 27; *Dinosaur Rowe*, *supra,* No. 2015-01, slip op. at 6.

1. The Board's Calculation of the Numerator

The Board submitted a figure calculating the total acreage of all parcels containing Braintree's SHI properties. For this calculation, Ms. SantucciRozzi did not follow the

[10] Where the affordable units are interspersed among market rate units, the directly associated area can be calculated for the entire development, and then prorated corresponding to the percentage of units in the development that are SHI eligible units. *See* Exh. 71, App. A., § 3.4. *See Cloverleaf, supra,* No. 2001-21, slip op. at 4 (where development was configured so that it adjoined another related development exclusively of market rate units, Committee excluded entire market rate development from SHI eligible area). *See also Robinwood Inc., v. Rockland*, No. 1972-03, slip op. at 8-9 (Mass. Housing Appeals Comm., Dec. 3, 1975).

requirement of 760 CMR 56.03(3)(b) to include only that portion of each SHI property that constitutes the area "occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units)." It also provided a calculation based on counting entire parcels for ownership developments with at least 25% affordable housing. As noted above, both of these calculations conflict with our requirements. While maintaining its argument, the Board also submitted alternate calculations based on analyzing the directly associated area for each parcel, which Ms. SantucciRozzi characterized as "developed." Exh. 61, ¶ 9. The Board also provided alternate calculations based on our precedents requiring a reduction of the land area to conform to the percentage of SHI eligible units in a development.

Following the issuance of the 2018 Guidelines, and the reopening of the hearing, the Board submitted revised calculations based on the definitions of directly associated area in the guidelines. Ms. SantucciRozzi testified that the total directly associated area on this basis is 84.517 acres, which, divided by the Board's denominator of 5,120.97 acres, is 1.65%. Exhs. 86A; 99, ¶¶ 23-25. In its brief, the Board argues that for 31 of the 41 properties with SHI eligible housing, the entire acreage should be included in the numerator under the guidelines. It also notes that Washington has not opposed the inclusion of entire parcels for 11 of those 31 properties.

2. Requirement to Consider Directly Associated Area

In its brief, the Board maintains its argument that the entirety of SHI parcels should count toward the numerator. It argues that the entire lot is usually considered by the Board when assessing density, and in considering costs for a pro forma, dimensional requirements for waivers, and design and engineering. It argues that the definition of directly associated area in the 2018 Guidelines "is aimed at discounting those sites with excessive surplus area containing a minimal number of SHI Eligible units," but argues that the developments at issue in Braintree are completely built out. Board brief, p. 12.

DHCD promulgated the comprehensive permit regulations to interpret G.L. c. 40B, § 20 and define eligible SHI land area as acreage of land directly associated with the affordable housing units. 760 CMR 56.03(3)(b). The Board's argument is inconsistent with

this regulation, and for the reasons we stated in *Alliance Realty, supra,* No. 2016-01, slip op. at 28-30, we do not adopt it. We agree with the Board that for some properties the developer agreed the entire parcel should be counted as directly associated, and for other properties, the developer did not challenge the Board's calculation in its briefs. Where there is no dispute regarding what constitutes directly associated area, we accept the Board's figure for those properties.

3. Acreage is Proportional to Percentage of SHI Units

The Board also argues that condominium units with at least 25% affordable units should be treated similarly to rental units, arguing that the statute does not treat developments differently based on the form of tenure. Our longstanding interpretation of the statute and regulations, consistent with the Comprehensive Permit Guidelines, and now the 2018 Guidelines, is that for home ownership projects, DHCD counts only low or moderate income units in the municipality's SHI inventory. Thus, the numerator shall consist only of land directly associated with those units, as specified in 760 CMR 56.03(3)(b) ("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"). *Davis Marcus, supra,* No. 2015-06, slip op. at 11-12.

It is an accepted principle that an administrative agency "may adopt policies through adjudication as well as through rulemaking" and that "[p]olicies announced in adjudicatory proceedings may serve as precedents for future cases." *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee,* 457 Mass. 748, 760 n.17 (2010), quoting from *Arthurs v. Board of Registration in Med.,* 383 Mass. 299, 312–313 (1981). In decisions regarding general land area safe harbor appeals, we have applied and interpreted Chapter 40B and our regulation regarding the treatment of categories of land area with respect to both the numerator and the denominator. On occasion we must address issues not expressly covered by statute or regulation. *See Davis Marcus, supra,* No. 2015-06, slip op. at 9-10 (discussing requested exclusions of land area excluded for railroad rights-of-way and private roadways).

These precedents and the Comprehensive Permit Guidelines make clear that the only SHI eligible units in ownership developments are the affordable units. Exh. 54, § II.A.2.c.

Therefore, consistent with 760 CMR 56.03(3)(b), the site area directly associated with the SHI eligible units alone is countable as SHI eligible area.

4. Non-Actively Maintained Wooded and Vegetated Areas

Following the issuance of the 2018 Guidelines, the parties supplemented their testimony to provide new calculations taking into consideration the treatment of certain non-actively maintained wooded and vegetated areas.

The 2018 Guidelines provide that "Directly Associated Area" is "Landscaping 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." The guidelines provide further that "Features 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…." Exh. 71, p. 3. The principal disagreement between the parties arose from their analysis of this exclusion. The Board's planner, Ms. SantucciRozzi, interpreted this to require the inclusion of all side, front and rear yard setbacks for each SHI site as directly associated area. She also included 100-foot buffer areas between commercial and conservation districts under the Braintree code. She and Mr. Haywood presented testimony calculating the directly associated area with these assumptions. Exhs. 96, ¶¶ 1-4; 97; 99; 100. Based on her analysis of directly associated area, Ms. SantucciRozzi found a total of 84.517 acres of SHI eligible area. Exh. 86A. Applying this figure to the denominator we have accepted of 5,498.27, would derive a percent of 1.54%. *See* § II.B.3, *supra.*

The developer's GIS expert, Mr. Nelson, prepared two alternate calculations based on the 2018 Guidelines. He put forth a numerator of 70.862 acres under Interpretation 1 and 67.844 acres under Interpretation 2. Applying those to Washington's denominator of 5,522 acres, he derived percentages of 1.28% and 1.23%, respectively. Exh. 98-2. Mr. Nelson's first interpretation was more similar to that of the Board witnesses with respect to yard dimensions, although he used different setback distances in some instances, and disagreed with Ms. SantucciRozzi regarding inclusion of the 100-foot buffer between commercial and

conservation districts, which he did not include in his calculation of directly associated area. Exh. 98, ¶ 7. Under this interpretation, Mr. Nelson calculated a SHI eligible acreage of 70.862 acres which, applied to our accepted denominator of 5,498.27, would result in a percent of SHI eligible area of 1.29%.[11] Exh. 98-2.

Noting that with this interpretation of the guidelines, some of the strips of side, front and rear yards that counted as directly associated were remote from the housing development, Mr. Nelson prepared another version, Interpretation No. 2, in which he measured the yard dimensions outward from the buildings to the lot line. He thus excluded all non-actively maintained wooded or vegetated areas in the side, front and rear yard dimensions for each SHI site unless they were both within 50 feet of the building footprint of the development and within required yard dimensions. With this approach, his calculated SHI eligible area of 67.844 acres, divided by our accepted denominator, would result in a percent of SHI eligible area of 1.23%. Exh. 98-2.

Although both of Mr. Nelson's approaches result in a land area below the minimum of 1.5%, Washington argues in its reply memorandum that Interpretation 2 is more consistent with our regulations. In particular, it argues that the use of the conjunction "and" in the 2018 Guidelines between "non-Actively Maintained wooded or vegetated areas that are not within required side, front, or rear yard dimensional requirements" and areas "not within 50 feet of a building footprint," requires both conditions to be met for a non-actively maintained area to be considered directly associated.

We agree with the developer that the yard dimension and the 50-foot perimeter requirement must be seen as a combined requirement for the inclusion of non-actively maintained wooded and vegetated areas as directly associated areas. The conjunction "and" should be treated as joining the two phrases as one requirement. "Generally, the conjunctive 'and' should not be considered as the equivalent of the disjunctive 'or.'" *Siebe, Inc. v. Louis M. Gerson Co., Inc.*, 74 Mass. App. Ct. 544, 551 n.16 (2009) (citation omitted). Additionally, "[s]tatutory phrases separated by the word 'and' are usually to be interpreted in the conjunctive." *Id.*, citing 1A Singer, Sutherland Statutory Construction § 21.14 (6th ed. 2002).

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[11] Mr. Nelson's lower percent is also based on exclusions he applied that the Board did not, as well

See Commonwealth v. Aponte, 71 Mass. App. Ct. 758, 761 (2008). We are also mindful that we should construe various provisions of the guidance in harmony with one another. *See Commonwealth v. Gopaul*, 86 Mass. App. Ct. 685, 688 (2014). A "statute must be viewed 'as a whole'; it is 'not proper to confine interpretation to the one section to be construed.'" *Wolfe v. Gormally*, 440 Mass. 699, 704 (2004), quoting 2A N. Singer, Sutherland Statutory Construction § 46.05 at 154 (6th ed. 2000). The intent of the 2018 Guidelines to exclude non-actively maintained areas that may be within yard dimensions but not within the 50 foot building footprint is also made clear by illustrations accompanying example calculations in Appendix B to the 2018 Guidelines. In particular, Figures 14 and 18 show exclusions of setback areas away from the building footprint. *See* Exh. 71, Fig. 14, p. 11; Fig. 18, p. 13.

Finally, directly associated area is defined in the guidelines as "Landscaping maintained principally for the benefit of the residents of a development containing SHI Eligible Housing and impervious surfaces adjacent to such a development...." Exh. 71, p. 3. Remote, non-actively maintained areas are not landscaping principally for the benefit of the development's residents. Accordingly, we will only include non-actively maintained wooded or vegetated areas as SHI eligible area if they meet local yard dimensions and are within 50 feet of building footprints.

5. Developments with Disputed Acreage

In their briefs, the parties addressed several specific properties. Some of the developments discussed by the Board were not challenged by Washington in its brief, and therefore it has waived its dispute as to the calculation of SHI eligible acreage for those developments. *See* § II.B, *supra*.

The Board argues that its calculation is more accurate because it relied on surveyed plans, development plans, property deeds, other "precise descriptions" and digitized parcels. Board brief, p. 23. Mr. Haywood stated that the Braintree GIS system is more accurate. Exh. 58, ¶ 1. Washington argues that it adhered to the 2018 Guidelines' requirements by applying MassGIS and then leaf on and leaf off aerial images of each of the properties. It argues that this use of a single source for calculation of land areas is very accurate. Tr. I,

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as differences in interpretation of stormwater management systems, among other things.

132-133. Mr. Nelson also testified that he field verified his delineations, except for confidential property. Tr. I, 134; II, 109-110.

As we noted in § II.A.2, *supra,* the difference in the parties' methodologies does not affect the result. More importantly, since the Board has the burden of proof on the amount of SHI eligible acreage, a failure to provide accurate calculations of acreage may impact its ability to meet its burden.

a) The Ridge at Blue Hills

The Ridge at Blue Hills is a rental development. Exh. 61, ¶ 26. Because the parties' total acreage for this property differed, the Board argues that its figure, based on an ANR plan based on a site survey, was more accurate than the MassGIS calculation by the developer's witness. Washington argues that its GIS methodology was used to measure the directly associated area and the differences in total acreage of properties is immaterial. We agree with the developer that it is not necessary to calculate total parcel acreage to calculate the acreage of directly associated areas.

The Board argues that 10.075 acres should be included in the calculation of the numerator for this site, representing the entire site except for area excluded from the denominator as floodplain and area subject to a conservation restriction. Exh. 15A. Because Ms. SantucciRozzi determined that .67 acres of the floodway area contain a portion of the parking lot south of Garage A, a cleared area to the south of the parking lot and drainage structures and a fenced play area, the Board takes the position that the .67 acres within the floodway should be added to the denominator and should count as directly associated area for the numerator.[12] Tr. I, 24-28; Exhs. 9B; 15A; 61, ¶ 27.

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[12] The Board added .67 acres of floodway to the denominator. Exh. 9B. It is not clear that it added the .67 acres to the SHI acreage for this property. *See* Exh. 86A. The parties did not address whether the entire flood plain should consequently be included in the denominator under 760 CMR 56.03(3)(b)6, which excludes such zone only if "residential, commercial or industrial use are completely prohibited."

Under the 2018 Guidelines, stormwater management facilities, as therein defined,[13] qualify as directly associated. Washington points out that on cross-examination, Ms. SantucciRozzi acknowledged that she and Mr. Nelson were in close agreement on the location and size of the stormwater management facilities on the property. Tr. II, 42. We agree with the Board that Mr. Nelson's aerial photograph, compared to the as built plans, appears to show he has excluded portions of the parking lot and Forebays 2A and 2B identified on the as-built plans. Exhs. 15B; 65; 98-23B. The Board argues that these are impervious surfaces and stormwater management facilities that should be included in directly associated area under the 2018 Guidelines. While the MassDEP Stormwater Handbook was not introduced into evidence, Ms. SantucciRozzi provided some testimony about its requirements and the Board argues that the link in the guidelines to the handbook shows that stormwater management facilities include drainage swales, pipes and riprap.[14] Exh. 99, ¶ 8; Board brief. p. 31. On cross-examination, Mr. Nelson acknowledged that a detention basin can consist of "grasses and swales and depressions in the ground" and he agreed that a view of vegetation from aerial photographs alone could not necessarily determine whether it was a detention basin. Tr. II, 94-95. However, Mr. Nelson did not indicate a different acreage for the part of the floodway occupied by the parking lot and stormwater management facilities.[15] Therefore, on the record before us, .67 acres from the floodway area should be included in the directly associated area for this development. Exhs. 15B; 65; 98-23B.

The Board also argues that it included the entire area of a drainage swale on the west part of the parcel as part of the site, although it did not explain its inclusion of the entire southwest portion of the parcel that Mr. Nelson excluded. Therefore, in seeking to include

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[13] Under the 2018 Guidelines, "Directly Associated Area" includes "stormwater management facilities as defined in the MassDEP Massachusetts Stormwater Handbook including both conventional and low-impact BMPs (Best Management Practices)." Exh. 71, § V.

[14] In future appeals, we expect parties to introduce into evidence relevant portions of the handbook or request that we officially notice the handbook. We will not consider argument in parties' briefs based on material outside the record. *See* G.L. c. 40B, § 22; 760 CMR 56.06(8).

[15] In light of the 2018 Guidelines, Mr. Nelson analyzed the SHI sites for eligible stormwater management facilities and determined there were no changes in his directly associated area on this basis. Exh. 98, ¶ 9.

the entire lot except the wetlands and floodway, the Board has not demonstrated that the entire southwest portion of the parcel is directly associated. While the Board points out a small forebay area identified on the as-built plans that it seeks to include is attributable to the stormwater management facilities, it has not shown the acreage attributable to it, and in any event it has not supported the inclusion of most of that area. Also, Ms. SantucciRozzi acknowledged on cross examination that, other than the .67 acres, Mr. Nelson's depiction of the directly associated area was very close to that of the Board. Tr. I, 32. Therefore, we will exclude the area in the southwest portion of the parcel beyond the area included by Mr. Nelson.

The remaining disagreement between the parties relates to whether the developer had applied all of the setback requirements under the Braintree code that the Board had applied. Since we have determined that non-actively maintained areas that are not within required yard dimensions and 50 feet of building footprints, the Board's inclusion of those areas was improper. In all respects except the directly associated portion of the floodplain, Mr. Nelson's calculation is more credible.

Since we will include the .67 floodplain acres identified by the Board in the directly associated area, and it appears that Mr. Nelson did not include this in his calculation, we will add .67 to Mr. Nelson's SHI eligible acreage of 8.312 acres for this property, for a total of 8.982 acres as the extent of acreage that has been substantiated. Exhs. 15B; 65; 98-2; 98-23B.

b) Reservoir Crossing

Reservoir Crossing is a condominium development.[16] The Board submitted evidence that the plans for Reservoir Crossing show a total of 15.65 acres, which is comparable to the developer's 15.646 acres. Exhs. 61, ¶ 28; 63, ¶ 25. Calculating directly associated area, the Board argues that only two areas should be excluded, two conservation easements totaling 4.5 acres and two undisturbed areas totaling .421 acres, for a total of 4.92 acres. *See* Exhs.

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[16] As discussed at § II.C.3, *supra,* we reject the Board's argument that, even though this is a condominium development, the SHI eligible land area should not be reduced proportionate to the percentage of SHI eligible units. The Board provided an alternative calculation based on the percentage of affordable units. On that basis, the Board argues that 27.27% of 11.71 acres, or 3.193 acres should be included. Exhs. 61, ¶ 28; 86A.

18A; 61, ¶ 28; 66. It stated that the resulting directly associated area for the site is 11.71 acres. Exh. 86A.

Washington criticized the Board's application of the Braintree zoning ordinance to apply a 100-foot setback on the northern property line, disputing the Board's assertion that the buffer area benefits the development. Tr. II, 60. *See* Exh. 72, p. 13549. It also argues that the Board used an overly broad interpretation of stormwater management facilities under the Stormwater Handbook, without credible evidence that the areas fit in the definition required by the 2018 Guidelines. The Board sought to include a buffer strip along the northern boundary line; a triangle shaped area of land to the north of the site drive at the entrance containing drainage structures, fencing, wetlands replication, and a sewer easement; flood storage and wetlands replication areas near the south property line; and areas along the north and south sides of the access near Building 1. Exhs. 18A; 18B; 61, ¶ 28; 99, ¶¶ 6-7. It argues that drainage areas and wetlands replication areas are a necessary part of a development and should be included, citing *Davis Marcus, supra.*

Ms. SantucciRozzi stated she did not know whether the wooded area along the northern boundary of the property was actively maintained. Tr. I, 68; II, 72. The Board, however, included this vegetated area that Washington characterizes as physically separated by a guardrail, natural barriers and fencing to prevent residents from entering it. Tr. I, 60-61, 65-69. Washington's calculation of directly associated area excluded this area.

We agree with Washington that the area beyond the fencing has not been demonstrated to be actively maintained. As we noted above, non-actively maintained vegetated and wooded areas that are not within both zoning yard and 50 feet of building footprints are excluded from SHI eligible area. Therefore, areas within these setbacks are excluded unless they meet both conditions. *See* § II.C.4, *supra.*

Both parties included testimony that their experts considered stormwater management facilities under the 2018 Guidelines. Mr. Nelson determined there were no changes in directly associated area on this basis. Exh. 98, ¶ 9. Ms. SantucciRozzi testified that the as-built plans show that pipes convey stormwater runoff into a wetland area that was altered to serve as a detention basin. She stated that the entire northwest corner of the parcel should be

counted as directly associated area because it was graded and altered to accommodate stormwater runoff. She also stated that drainage pipes convey stormwater runoff into the wetland in front of Building 1, which serves as a detention basin. The Board contends that, even though the wetland previously existed, its alteration and regrading now makes it an integral part of the site's stormwater management facilities. Tr. II, 27-28, 31; Exh. 99, ¶¶ 6-7. Ms. SantucciRozzi also testified that there was a 20-foot wide sewer easement and 20-foot wide water easement that must be maintained. Exhs. 99, ¶ 6.

Washington disputes the extent of the area the Board has categorized as a stormwater management facility. In particular, it criticized the Board's inclusion of wetlands as a stormwater management system because of the existence of certain subsurface pipes. It argues that wetlands, either natural or replicated, are not directly associated because they do not meet the definition of a stormwater management facility and there was no evidence of their being maintained as required by the Stormwater Handbook. Tr. II, 25-31. It argues that the operation and maintenance plan the Board submitted for the property is blank and is insufficient evidence of a functioning stormwater management facility under the requirements of the handbook. Exh. 87; Tr. II, 37.

Wetlands are specifically excluded from directly associated area under the 2018 Guidelines. Accordingly, they may not be included in SHI eligible area for this development. The Board has not demonstrated what would be an appropriate area to account for the drainage pipes. Tr. II, 101-102. *See* Exh. 76A. Although the 2018 Guidelines provide for the inclusion of actively maintained stormwater management facilities, this inclusion must be read consistent with the specific exclusion of wetlands. Although the Board would be entitled to include the area for drainage pipes that are part of actively maintained stormwater management facilities, the Board has not offered a calculation of acreage for this area, and we cannot extrapolate from the acreage supplied for larger areas, including entire wetlands and wooded areas. *See* Exh. 76A.

Washington also challenges the Board's inclusion of Town of Braintree easement areas for water and sewer, respectively, arguing that they encumber, but do not benefit, the property. Ms. SantucciRozzi did not know when the water and sewer lines were installed or

whether they were installed by the developer of this project, and acknowledged on cross examination that the sewer easement probably serves multiple properties. Tr. II, 34-36. In light of this testimony, the evidence in the record does not demonstrate that the easements were granted primarily for the benefit of the Reservoir Crossing development or that the development must actively maintain them. Therefore the Board has not demonstrated that acreage associated with them should be included.

We find the calculation submitted by Washington in Interpretation 2 to be more credible and accept that figure of 1.901 acres. Exh. 98-2.

c) Sunset Lake

The Sunset Lake Apartments are a rental development of which 11% of the units are SHI eligible. The development sits on a 1.48-acre site. The Board's witnesses excluded .23 acres adjacent to the Monatiquot River. Exhs. 52, 86A. Based on the 2018 Guidelines, the Board included as directly associated area the sloped area beyond the parking lot, claiming it was regraded at some point in the past, as well as the area of an existing sewer easement. Exh. 52; Tr. II, 45. The Board also argues that the area beyond the parking lot includes a drainage outlet that should be included as part of the stormwater management system. Exh. 52. It counted .139 acres for this site. Exh. 86A.

Washington disputes the inclusion of the slope, arguing that the sloped area is steep and beyond a guardrail at the rear of the parking lot that impedes the passage of people to the sloped area on the other side, and contains unmaintained vegetation. Tr. I, 88-89. It also disputes the area encumbered by a sewer easement because it asserts the easement does not benefit the project and there is no evidence the owner of the project must actively maintain the easement area. Tr. II, 46. Therefore it argues it does not meet the definition of directly associated area. Washington calculated .109 acres as SHI eligible area for the site (Int. 1) and .104 acres (Int. 2). Exhs. 98-2; 98-27A; 98-27B.

The acreage for an actively maintained drainage outlet that is part of a stormwater management system would be included as directly associated, if the Board had provided a calculation of that acreage. However, we agree with the developer that the record does not demonstrate that the existing sewer easement principally benefits the development or is

actively maintained, and therefore this area is not directly associated. Nor has it shown that the slope is impervious or an actively maintained landscaped area. Since the Board has not adequately demonstrated the area of the drainage outlet, this cannot be included as directly associated area. The Board has not demonstrated that more than the developer's acreage of .104 acres may be included in the calculation of the numerator. Exh. 98-27B.

d) Logan Park

Logan Park is a rental development. The Board included all 4.19 acres toward the numerator. Exh 86A, and argued that even counting only directly associated area, only .424 acres should be excluded, citing Exh. 98-16A. The Board criticizes Washington for excluding area along the western property line that it argues was cleared, landscaped and mowed. The Board does not point to specific evidence in the record supporting this assertion, but argues that it was evident from the view taken by the presiding officer, although the aerial photographs do not depict such landscaping. Even assuming evidence in the record of this, the Board has not demonstrated that the acreage that would be attributable to this cleared, landscaped and mowed area would be the entire .182 acres the Board calculated for the western property line, or some other figure. Exhs. 83; 91. Accordingly, this area is not included.

The Board also contends that the area of two 20-foot-wide easements for drainage and sewer comprise .02 acres of directly associated area. Exhs. 90, 91, 99, ¶ 10; 100, ¶¶ 2-5. It argues that these easements were required to develop the site, relying on the as-built plan for this development, which indicates easements for sewer and drainage crossing from abutting property into the development parcel. Exh. 90.

Washington argues that the 20-foot-wide easements with buried 24-inch sewer and water pipe beneath should be excluded as the land is not actively maintained for the development. Tr. II, 47-49; Exhs. 90, 98-2. It also argues that these easements are not within the definition of directly associated land area in the 2018 Guidelines.

Ms. SantucciRozzi testified that "As the As-Built plan for this site reflects … there are two 20 foot wide easements, one for drainage and one for sewer, which were required to accommodate development at this site and are required to be maintained." Exh. 99, ¶ 10. She

also testified that the as-built plan shows the sewer pipe "comes up and ties into the building" and stated that "the drainage pipe …shown with a manhole 24-inch pipe to another manhole that goes off and connects to the catch basins …." Tr. II, 48; Exh. 90.

Based on the evidence, we will include the .02 acres for the two easements, which are reasonably sized for their purpose. We note that, despite Washington's argument that the easements are not explicitly identified as directly associated in the 2018 Guidelines, we will treat wastewater treatment facilities in a similar manner to the guidelines' treatment of stormwater management facilities. Therefore, we will include 3.466 acres of SHI eligible area for this development.

e) PO 1

The Board seeks to include the entirety of a single residential lot that contains 4 units which it states comprises .925 acres. Washington argues that the rear of the parcel is characterized by large rock outcroppings, overhead high-tension power lines that do not connect to the property and a non-actively maintained wooded area at its eastern boundary. It argues that only .541 acres (Int. 1) or .364 acres (Int. 2) should be considered directly associated area. Exhs. 63-20; 82A; 82B; 98-2; 98-13A; 98-13B. The Board contends that the area of land cleared by the power company for the high-tension power lines overhead benefits the residents. However, this disregards the language in the 2018 Guidelines that the directly associated area is "[l]andscaping maintained principally for the benefit of the residents of a development containing SHI Eligible Housing." Exh. 71, § V. The Board has not demonstrated that the purpose of the clearing of the back of the rear yard is any purpose other than for the power company; it has not shown that any benefit of the cleared land for the residents is principal, rather than ancillary. Therefore, the Board has not demonstrated that this area should count as directly associated. The Board also relies on its argument that all areas within the zoning side, front and rear yard setbacks must be included as directly associated. As we have discussed above, only areas that are within such setbacks and within the 50-foot perimeter of the SHI buildings will count as directly associated. We find that the acreage calculated by the developer in its Interpretation 2 of .364 acres is more credible and we will include that figure in the numerator.

f) Braintree Village (formerly Monatiquot Village)

Braintree Village is a rental development. The Board excluded .807 acres that had been excluded from the denominator as a water body, leaving 23.943 acres according to its witnesses. Exh. 86A. The Board included as directly associated a band of trees along lot lines that it argues serves as a buffer between the large multistory buildings on the site and the neighboring single-family homes. It also argues that because this portion of the parcel has steep slopes, the vegetation serves to hold the slope in place, although Ms. SantucciRozzi acknowledged that it is not actively maintained. Tr. I, 80-82, 100-102.

The Board's argument that vegetation on steep slopes should count as directly associated is not supported by the guidelines. Washington also correctly notes that buffer zones under the Braintree code are not included in directly associated area, where the areas are not actively maintained, unless they fall within the area of yard dimensions and within 50 feet of the building footprint. *See* § II.C.4, *supra*. The Board suggests that the difference between its figure and that of the developer is minutiae, a handful of mature trees. However, where the Board has the burden of proof, and it has not demonstrated that the area in dispute is directly associated area, we find Washington's calculation under Interpretation 2 to be more credible and will include 22.253 acres to the denominator. Exhs. 98-2; 98-17A; 98-17B.

g) Skyline Drive Properties

The Skyline Drive development is a rental development consisting of four parcels. Both parties agreed that a portion of Eaton's Pond, located on the property, should be excluded as it was excluded from the denominator as a water body. The Board's expert included the remainder of the property in its calculation for a total of 13.486 acres. Exhs. 86A; 100, ¶ 8. Washington excluded additional area along the entrance drive and street frontage on the ground these areas are wooded or fenced, and that there were power lines at the rear that did not contribute to the property. It determined that the directly associated area was 12.988 acres (Int. 1) and 12.47 acres (Int. 2). Exh. 98-2; Tr. I, 83-84.

The Board criticized Washington for excluding areas along the site driveway, which Ms. SantucciRozzi characterized as high steep slopes held in place by "wall sections" and

"impervious granite blocks." Tr. I, 84-85, 97-98. We agree with the Board that the slopes maintained by walls that are impervious along the site driveway should be included. However, the non-actively maintained areas along the public road have not been shown to meet the standard of directly associated area, if they are outside the yard dimension and outside 50 feet of building footprints. Finally areas behind fencing have not been shown to be directly associated areas. The Board has not established the specific acreage for the walled slopes along the site driveway. However, the Board is entitled to count at least the acreage advocated by the developer in Interpretation 2 toward the numerator, and we will include that figure of 12.47 acres. Exh. 98-2.

h) Unchallenged Properties

Highlands Green and Heritage Lane. Highlands Green and Heritage Lane are housing developments operated by the Braintree Housing Authority. The Board included the entire site for both of these developments, 4.85 acres for Highlands Green and 6.75 for Heritage Lane. Exh. 86A. For each of these properties, the developer excluded a small, wooded, jutting portion of the site that lies outside the 50 foot perimeter of buildings. However, in its brief, Washington made no specific argument regarding these sites. It therefore has waived its challenge to the inclusion of the entire site. *See* § II.B, *supra*. Accordingly we accept the figures of 4.85 acres for Highlands Green and 6.75 acres for Heritage Lane.

Independence Manor. Independence Manor consists of three sites, 41, 49 and 53 Independence Avenue. The Board argues that the entire development should be counted, for a total of 3.4 acres. Exh. 86A. In its testimony, Washington disputed only the acreage for 41 Independence Avenue, but Washington offered no argument regarding 41 Independence Avenue in its brief. Since it waived any objection to the Board's figure of 2.204 acres for that property, we accept the Board's figure for 41 Independence Avenue. Exh. 86A.

Turtle Crossing. The Board sought to include a total of 12.3 acres for this condominium site, arguing that only the 4.6 acres of wetlands should be excluded from the numerator. Exhs. 57, ¶ 18; 61, ¶ 29. The Board's argument for treating all ownership units as SHI eligible fails. Rather, the directly associated area will be reduced proportionally based on

the percentage of affordable units in the development. *See* § II.C.3, *supra*. The Board, however, acknowledges that considering directly associated area, the parties' calculations are not far apart. Since Washington has presented no argument respecting this development, we accept the Board's figure of 1.958 acres representing the 15.92% affordable units as the SHI eligible area for this site. Exh. 86A.

6. Group Homes

Under the Comprehensive Permit Guidelines, SHI eligible housing includes properties of group homes operated by DDS and DMH.[17] The Board included 6.576 acres for group homes identified on the SHI.[18] Exh. 86A. The developer challenges the inclusion of any acreage for these sites, relying on testimony of Lynne Sweet, managing member and founder of LDS Consulting Group, LLC, a real estate advisory firm, that her research of the Norfolk Registry of Deeds showed the properties do not have the standard universal deed rider required by the state subsidizing agencies for low and moderate-income projects under Chapter 40B. Exh. 60, ¶ 17. It argues that, for those properties, the Board has failed to provide evidence that these units are subject to the use restriction and affirmative fair marketing plan required by 760 CMR 56.03(2)(a).[19]

The Board argues 1) that there is an evidentiary presumption that properties listed by DHCD on the town's SHI are eligible to be included on the SHI, and 2) citing the Comprehensive Permit Guidelines, Exh. 54, § II.A.1.e, that a use restriction is not required for group homes. The Board also identified two group home properties which Ms.

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[17] The definition of Group Home in the 2018 Guidelines supersedes the former definition in the Comprehensive Permit Guidelines. Exh. 71, p. 4.

[18] The 2018 Guidelines require boards to implement a specific process to determine acreage of group homes immediately on submission of a comprehensive permit application to the board. While this procedure will obviate the necessity of examining specific sites of group homes in future appeals, it was unavailable for this matter, and therefore is inapplicable.

[19] 760 CMR 56.03(2)(a) states: "The SHI is not limited to housing units developed through issuance of a Comprehensive Permit; it may also include SHI Eligible Housing units developed under M.G.L. chs. 40A, c. 40R, and other statutes, regulations, and programs, so long as such units are subject to a Use Restriction and an Affirmative Fair Marketing Plan, and they satisfy the requirements of guidelines issued by [DHCD]."

SantucciRozzi reported she had requested DHCD to add to the SHI. DHCD responded that it adds group home properties "solely based on reporting by DDS and DMH." Exh. 11. *See* Exhs. 61, ¶ 11.[20] The record does not indicate whether those two properties were already listed on the SHI.

While there is no stated presumption of evidence for the general land area statutory minimum in 760 CMR 56.03(3)(b), a presumption is implicitly established by 760 CMR 56.03(3)(b)'s reference to "SHI Eligible Housing units inventoried by [DHCD] or established according to 760 CMR 56.03(3)(a)." Section 56.03(3)(a) not only states the "presumption that the latest SHI contains an accurate count of SHI Eligible Housing and total housing units," it provides a procedure by which a party can challenge this presumption for specific properties. The pertinent language of § 56.03(3)(a) reads, "[i]n the course of a review procedure pursuant to 760 CMR 56.03(8), a party may introduce evidence to rebut this presumption, which [DHCD] shall review on a case-by-case basis, applying the standards of eligibility for the SHI set forth in 760 CMR 56.03(2)." This demonstrates that the presumption not only applies to the count of SHI eligible properties, but also to the properties themselves and their eligibility as SHI eligible housing. *Alliance Realty, supra,* No. 2016-01, slip op. at 27-28.

With the presumption that the challenged properties are SHI eligible properties, Washington has the burden of producing evidence that the SHI properties were not qualified to be on the SHI. See *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 34 (2006) (presumption destroyed upon offer of evidence warranting finding contrary to presumed fact).

The Comprehensive Permit Guidelines provide that DMH and DDS group homes are eligible for inclusion on the SHI, but also make clear that eligibility requirements for inclusion on the SHI are consistent with 760 CMR 56.03(2). Exh. 54, §§ II.A.2.e; II.A.1. Washington's witness, Ms. Sweet, testified that based on on-line registry research, she "did

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[20] Since the identity of the group homes counted on the SHI has not been provided, the Board has not specifically shown that the 6.576 acres it seeks to include matches the acreage of the specific group homes on the SHI. However, Washington raised no challenge to the acreage allocated to group homes, only to whether they should be counted at all.

not identify affordability or use restrictions recorded at the Norfolk Country Registry of Deeds for the group homes listed by the Town." Exh. 60, ¶ 17. She also stated that the deeds do not have the standard universal deed rider, and "there is no way to verify if these properties complied with all of the SHI eligibility requirements, including but not limited to the requirement to have an Affirmative Fair Housing Marketing Plan." Exh. 60, ¶ 17.

The Board's argument that the guidelines do not require a use restriction misreads the guidelines, which require compliance with 760 CMR 56.03(2)(a). Exh. 54, § II.A.1. However, this does not end the discussion. *West Wrentham Village, LLC v. Wrentham,* No. 2005-04 (Mass. Housing Appeals Comm. Ruling on Motion to Dismiss July 13, 2005), discussed the inclusion of group homes under the predecessor regulation to 760 CMR 56.00 and noted that 760 CMR 30.02 provided:

> Low or moderate-income housing shall include housing subsidized by the federal, state, or local government to provide long-term housing for individuals who are mentally ill or mentally retarded, including all group home units in each community as reported annually to [DHCD] by the department of mental health and department of mental retardation.

Id. at 5. Although the provisions of § 30.02 have been superseded, the record does not show when the group home units were added to the Braintree SHI, and specifically whether they were added after the promulgation of 760 CMR 56.00 on February 22, 2008. In addition to knowing when the units were added, it would be important to consider arguments of the parties regarding the effect of the current regulation upon units added to the SHI under former requirements. Since the record is incomplete and the issue has not been fully briefed, the Board's presumption prevails for the units on the SHI, and the Board's group home property figure of 6.576 acres, the acreage it requested in its brief, will be included in the numerator.[21]

7. South Shore Habitat Homes

The Board included 1.338 acres for South Shore Habitat for Humanity properties, arguing that these properties, which are not on the SHI, are eligible to be included on it. The

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[21] Acreage for new group home units not on the SHI would not benefit from the presumption. The Board did not specifically address in its brief including the 1.136 acres it assigned to the two new group home properties. Exh. 86A. *See* note 20, *supra.*

Board submitted a copy of its July 26, 2017 request to DHCD to include these properties on the SHI, attaching copies of deed riders for the properties. Exhs. 20; 21; 61, ¶¶ 12-13; 86A. The Board did not submit a response from DHCD to its request regarding these properties.

Washington excluded this acreage based on testimony of Ms. Sweet that the properties of South Shore Habitat homes "do not have the have standard universal deed rider required by the state subsidizing agencies for low and moderate-income projects under Chapter 40B, and some appreciation is allowed." Exh. 60, ¶ 18. For these parcels, she also stated there is no way to verify if these properties complied with all of the SHI eligibility requirements. *Id.* Washington argues that, unlike group homes, these properties are not treated specially in the Comprehensive Permit Guidelines or the 2018 Guidelines and thus must comply with the requirements for a standard deed rider. The Comprehensive Permit Guidelines define "use restriction" as "a deed restriction or other legally binding instrument in a form consistent with these Guidelines and, in the case of a Project subject to a Comprehensive Permit, in a form also approved by the Subsidizing Agency, which meets the requirements of these Guidelines." Exh. 54, § I.A. Sections II.A.1.e. and II.A.1.f. set out the requirements for a use restriction and affirmative fair housing marketing plan. *Id.*

The Board argues that the Comprehensive Permit Guidelines were adopted after the four Habitat homes were constructed and after all but one had obtained a certificate of occupancy, and therefore they should not apply to these units. Exhs. 20; 54, § I.B. In any event, it argues the deed riders comply with the guidelines. It also asserts that the guidelines' requirement of an affirmative fair housing marketing plan was adopted after these homes were constructed, and should not apply to them.

Since these properties have not been included on the SHI, the burden is on the Board to demonstrate that they were eligible to be included as of the date of the developer's comprehensive permit application. Therefore, the applicable date for determining eligibility is February 14, 2017. The Board has not met its burden. Specifically, it has not demonstrated that the properties complied with the affirmative fair marketing plan requirement of 760 CMR 56.03(2)(a) and the guidelines at the time Ms. SantucciRozzi sought to have them included on the SHI. The Board argues that the current guidelines do not apply to these

properties because they were constructed before February 22, 2008, when the guidelines took effect. An affirmative fair marketing plan is also required by 760 CMR 56.03(2)(a), yet the Board has not argued that the regulation does not apply. Nor has it sought to admit into evidence earlier guidance or regulations it argues should be applicable. Therefore it has not demonstrated that the properties are eligible to be counted on the SHI.

Finally, the Board's argument that the Committee counted a Habitat for Humanity property as SHI eligible in *Marcus Lang, supra,* No. 2015-02, slip op. at 10, is not persuasive, as that decision does not address in detail the arguments that were raised by the parties. In particular, there is no indication whether an affirmative fair marketing plan was raised or considered by the Committee. Therefore, *Marcus Lang* is not controlling. Since the Board has not met its burden, the Habitat property acreage may not count as SHI eligible acreage.

8. Numerator Conclusion

Based on her analysis of directly associated area, Ms. SantucciRozzi found a total of 84.517 acres of SHI eligible area. Exh. 86A. Under Interpretation 1, Mr. Nelson counted 70.862 acres of SHI eligible area, and using Interpretation 2, he determined a total acreage of SHI eligible area of 67.844 acres. Exhs. 98, ¶¶ 12, 18; 98-2. Below is the calculation of acreage for the disputed developments:

Contested Project	Board Acreage	Washington Int. 2	Committee's Finding	Reduction from Board Acreage
Ridge at Blue Hills	10.075	8.312	8.982	1.093
Reservoir Crossing	3.193	1.901	1.901	1.292
Sunset Lake	0.139	0.104	0.104	0.035
Logan Park	4.19	3.446	3.466	0.724
PO 1	0.925	0.364	0.364	0.561
Braintree Village	23.943	22.253	22.253	1.69
Skyline Drive	13.486	12.47	12.47	1.016
Group Homes on SHI	6.576	0	6.576	0
Habitat for Humanity	1.338	0	0	1.338
Total Difference from Board Acreage				**7.749**

The above acreage to be subtracted from the Board's numerator of 84.517 is 7.749, results in a numerator of 76.768 acres without further reduction for the new group homes. *See* notes 20-21, *supra.*

D. Final Calculation of the Percentage of SHI Acreage

Based on the credible evidence submitted by the Board, it has demonstrated at best a denominator of 5,498.27 acres and a numerator of 76.768 acres. The resulting percent representing the acreage for SHI eligible units is 1.396%, below the safe harbor of 1.5%. Therefore, the Board has failed to meet its burden of proof that Braintree has met the statutory general land area minimum of 1.5 percent. G.L. c. 40B, § 20.

III. CONCLUSION AND ORDER

The Board's claim that the Town 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

June 27, 2019

Shelagh A. Ellman-Pearl, Chair

Joseph P. Henefield

Marc L. Laplante

James G. Stockard, Jr.