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

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

In the Matter of

FALMOUTH ZONING BOARD OF APPEALS

and

SANDWICH ROAD HOUSING, LLC

No. 2025-12

SUMMARY DECISION

April 13, 2026

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Counsel for Falmouth Zoning Bd. of Appeals
George X. Pucci, Esq.
KP Law
101 Arch Street, Suite 1200
Boston, MA 02110

Counsel for Sandwich Road Housing, LLC
Jesse D. Schomer, Esq.
Dain, Torpy, Le Ray, Wiest & Garner, P.C.
175 Federal Street, Suite 1500
Boston, MA 02110

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In the Matter of FALMOUTH ZONING BOARD OF APPEALS, Appellant, v. SANDWICH ROAD HOUSING, LLC, Appellee.	No. 2025-12

SUMMARY DECISION ON INTERLOCUTORY APPEAL

I. INTRODUCTION AND PROCEDURAL HISTORY

This is an interlocutory appeal to the Housing Appeals Committee (Committee) brought by the Falmouth Zoning Board of Appeals (Board) pursuant to 760 CMR 56.03(8)(c). The Board appeals the determination by the Executive Office of Housing and Livable Communities (EOHLC), dated November 13, 2025, that the Board had not established a safe harbor under 760 CMR 56.03(1) with respect to application for a comprehensive permit by Sandwich Road Housing, LLC (developer or Sandwich Road).

The Board appealed the EOHLC determination to the Committee on November 20, 2025. At the initial conference of counsel held on December 2, 2025, both parties reported that they believed this matter could be decided on summary decision papers. *See* Post-Conference of Counsel Scheduling Order, dated December 3, 2025.

The Board moved for summary decision on January 5, 2026, on the ground that EOHLC improperly suspended the Housing Production Plan (HPP) certification for the Town of Falmouth (Town), and thereby erred when it concluded that the Board had not established safe

harbor under 760 CMR 56.03(1)(a), (1)(b), (3)(a) and (4).[1] In support, the Board submitted Exhibits 1-2. Sandwich Road also moved for summary decision on January 5, 2026, arguing that the Town's safe harbor status had lapsed prior to filing the comprehensive permit application for Sandwich Road. It submitted Exhibits 1-12, including the affidavit of William Cumming. Both parties filed their oppositions on January 16, 2026.[2]

For the reasons discussed below, the Board's motion for summary decision is denied, and the developer's motion for summary decision is granted.

II. UNDISPUTED FACTS

The Town had an approved HPP, deemed effective on March 29, 2024, the date EOHLC received the complete plan submission, for a five-year period expiring on March 28, 2029, pursuant to 760 CMR 56.03(4). Approval of a HPP allows the municipality to request a Certification of Municipal Compliance once the community increases, within one calendar year, the number of housing units eligible for EOHLC's Subsidized Housing Inventory (SHI) by the prescribed percentage provided in its approval letter. 760 CMR 56.03(4)(f); Developer motion for summary decision (Developer motion), Exh. 1. In its letter, EOHLC advised the Town that approval of its HPP allowed the Town to request a certificate of compliance when units of SHI

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[1] The Board does not present any argument disputing EOHLC's determination that the Town no longer attained the 10 percent housing unit minimum as of the date on which the developer filed its comprehensive permit application; instead, the Board focuses on the suspension of the HPP certification and the deadline for issuance of a building permit. The Committee has a longstanding rule, consistent with court practice, that that failure to submit evidence or argument on any issue constitutes waiver of that issue in proceedings before Committee. Therefore, this issue is not before us. *River Stone, LLC v. Hingham,* No. 2016-05, slip op. at 24 n.19 (Mass. Housing Appeals Comm. Sept. 23, 2002), citing *Sugarbush Meadow, LLC v. Sunderland,* No. 2008-02, slip op. at 3 (Mass. Housing Appeals Comm. June 21, 2010), *aff'd Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadows, LLC,* 464 Mass. 166 (2013)*; Hilltop Preserve 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 Jun. 28, 1994); *see also Cameron v. Carelli,* 39 Mass. App. Ct. 81, 85-86 (1995), quoting *Lolos v. Berlin,* 338 Mass. 10, 13-14 (1958).

[2] The Board filed two interlocutory appeals with this Committee on November 20, 2025: *Matter of Falmouth and Falmouth Residential, LLC and Northland Residential Construction, LLC,* No. 2025-11 and *Matter of Falmouth and Sandwich Road Housing, LLC*, No. 2025-12. Counsel for the Board is the same in both matters. These matters raise essentially the same legal issues regarding certification of the Town of Falmouth's HPP, with comparable legal analysis.

Eligible housing had been produced totaling at least 1.0% of its year-round housing, or 159 units for a two-year certification period. *Id*.

On July 29, 2024, the Town approved with conditions a comprehensive permit for an unrelated project, the Easterly development, which permitted 300 units eligible to be included on the SHI. *Id*., Exh. 2. Based on the Board's approval of the Easterly project, the Town requested, and on October 21, 2024, EOHLC issued a certification of compliance with the previously approved HPP for a two-year period from July 29, 2024 to July 28, 2026 because the Town attained a 1.0% unit increase in eligibility for EOHLC's SHI for the applicable calendar year pursuant to 760 CMR 56.03(4)(f). *Id.,* Exh. 4. EOHLC stated in its certification that "…all units must retain eligibility for the SHI for the entire certification period. If units are no longer eligible for inclusion on the SHI, they will be removed and will no longer be eligible for certification. This action may affect the term of your certification." *Id*., p. 2.

Following the Board's conditioned approval of the Easterly comprehensive permit, the developer for Easterly, Falmouth Southerly LLC, filed an appeal with the Committee on August 8, 2024. *See Falmouth Southerly LLC v. Falmouth Zoning Board of Appeals,* No. 2024-07, (Mass. Housing Appeals Comm. Decision on Stipulation and Entry of Judgment, April 18, 2025). The Easterly appeal was resolved by a revised comprehensive permit agreed upon by the parties and incorporated into a decision on stipulation and entry of judgment issued by the Committee on April 18, 2025. *Id*.

On September 3, 2025, the developer filed an application for a 50-unit homeownership development, and by agreement, the Board opened the public hearing on October 9, 2025. Initial pleading, p. 1; Developer motion, Exhs. 7, 9. By letter dated October 10, 2025, the Board notified the developer and EOHLC pursuant to 760 CMR 56.03(8)(a) that it considered a denial of the requested comprehensive permit would be consistent with local needs on the ground that Town had achieved the housing unit minimum safe harbor, as defined in G.L. c. 40B, § 20, 760 CMR 56.03(1)(a) and (3)(a), and the certified HPP safe harbor under 760 CMR 56.03(1)(b) and (4). *Id*., Exh. 9.

On October 15, 2025, the developer filed with EOHLC, by certified mail and email, a notice of challenge to the Board's assertion of the certified HPP safe harbor and achievement of the 10 percent housing unit minimum safe harbor. *Id*. Exh. 10. By letter dated October 22, 2025,

EOHLC notified the Town that it had suspended its safe harbor status because the Easterly project had not secured building permits within one year of the date of issuance of the original comprehensive permit date on July 29, 2024.[3] *Id.*, Exh. 11. Therefore, EOHLC concluded that those units became ineligible for inclusion on the SHI as of July 28, 2025, and were no longer eligible to be credited towards certification. *Id.*, Exh. 11. EOHLC issued a decision dated November 13, 2025, finding the Board had not established safe harbor under 760 CMR 56.03(1)(a), (1)(b), (3)(a) and (4). *Id.*, Exh. 12. On November 20, 2025, the Board appealed EOHLC's determination to the Committee.

III. STANDARD OF REVIEW

When the Board files an interlocutory appeal to the Committee of an adverse decision by EOHLC, it carries the burden of proving satisfaction of the grounds for asserting that a denial of a comprehensive permit is consistent with local needs. *See* 760 CMR 56.03(8)(a). Like all appeals to the Committee, an interlocutory appeal is heard de novo. G. L. c. 40B, § 22; *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 369-371 (1973); *Matter of Pembroke and River Marsh LLC*, No. 2019-04, slip op. at 2 (Mass. Housing Appeals Comm. Summary Decision July 20, 2020) and cases cited. The appeal is not restricted to evidence submitted to EOHLC and EOHLC's decision carries no evidentiary weight. *Id.*, citing *Kirkwood v. Board of Appeals of Rockport*, 17 Mass. App. Ct. 423, 426-427 (1984).

Summary decision is appropriate if "the record before the Committee, together with the affidavits (if any) shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 56.06(5)(d); *see also River Marsh, supra*, No. 2019-04, slip op. at 2; *Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992); *Warren Place, LLC v. Quincy*, No. 2017-10, slip op. at 4 (Mass. Housing Appeals Comm. Aug. 17, 2018), *aff'd sub nom Haugh v. Housing Appeals Comm.*, Norfolk Super. Ct. No. 1882CV01167, Aug. 7, 2019; *Delphic Assocs., LLC v. Duxbury*, No. 2003-08, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 14, 2010); *Grandview Realty, Inc. v. Lexington*,

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[3] William Cumming, the principal of Sandwich Road Housing, LLC, stated he had called the Town's Building Department sometime after July 29, 2025, but before September 3, 2025, and went in-person on October 14, 2025. In both instances, Building Department staff reported to Mr. Cumming that no building permit had been issued to the Easterly development at that time. Developer motion, Exh. 6, ¶¶ 2 - 3.

No. 2005-11, slip op. at 4 (Mass. Housing Appeals Comm. July 10, 2006). To rule on a motion for summary decision, the Committee must "examine whether the undisputed evidence, when considered in the light most favorable to the nonmoving party … is legally sufficient to support a decision in favor of the movant." *Matter of Oxford and 722 Main Street*, No. 2021-11, slip op. at 3 (Mass. Housing Appeals Comm. Nov. 16, 2022), citing *Warren Place, supra*, No. 2017-10, slip op. at 12; *Litchfield Heights, LLC v. Peabody*, No. 2004-20, slip op. at 4 (Mass. Housing Appeals Committee Jan. 23, 2006), citing *Donaldson v. Farrakhan*, 436 Mass. 94, 96 (2002) (comparing standard to summary judgment standard). *See Commercial Wharf East Condominium Assoc. v. Department of Env'l. Protection*, 93 Mass. App. Ct. 425, 427 n.2 (2018), citing *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm*., 457 Mass. 748, 763 (2010) (motion for summary decision "is the administrative equivalent of a motion for summary judgment"). "Summary decision may be made against the moving party, if appropriate." 760 CMR 56.06(5)(d); *Delphic Assocs., LLC v. Duxbury*, No. 2003-08, slip op. at 11, n.7 (Mass. Housing Appeals Comm. Ruling and Order Extending Comprehensive Permit Jan. 12, 2010); *Taylor Cove Dev., LLC v. Andover*, No. 2009-01, slip op. at 1, n.1 (Mass. Housing Appeals Comm. Ruling on Motion for Summary Decision July 7, 2009).

A review of the papers submitted by the parties in support of their motions for summary decision demonstrates that the central issue dividing the parties is a question of law and material facts remain undisputed. Summary decision is therefore appropriate.

IV. DISCUSSION

The question before us is whether the undisputed evidence establishes that, as of the date of the developer's comprehensive permit application, the Board had maintained its HPP certification and thereby was eligible for the safe harbor. *See* 760 CMR 56.03(1)(b). We have previously had occasion to address whether a HPP that has been certified can be suspended. *See Matter of Wall Street Dev. Corp. and Walpole*, Nos. 2022-08, 2022-09, slip op. at 7-12 (Mass. Housing Appeals Comm. Summary Decision May 11, 2023) (concluding EOHLC has authority under comprehensive permit regulations to suspend a certified HPP). While acknowledging that decision by the Committee, the Board makes several arguments seeking to persuade us that our

earlier decision was incorrect, or, alternatively, it has been invalidated by a decision of the Supreme Judicial Court.

A. Status of Falmouth's HPP Certification

Regarding the challenge to the *Wall Street* decision's analysis, we find none of the Board's arguments persuasive. These arguments rest largely on the claim that once granted, a certification on a HPP must continue for the entire period for which it was certified. The Board argues that after EOHLC granted Falmouth a certification of its HPP, it remained effective for the full two-year period from July 29, 2024, to July 28, 2026, pursuant to 760 CMR 56.03(4)(f), and it cannot be suspended by EOHLC before the end of its term. Motion for summary decision of Falmouth Zoning Board of Appeals (Board motion), p. 5.

Even if EOHLC has the authority to suspend a HPP certification, the Board argues, EOHLC miscalculated the one-year period for issuance of a building permit for the Easterly project. *Id*., pp. 2, 6. The Board contends that building permits could not be applied for while the Easterly permit was under appeal with the Committee, without Easterly risking its pending appeal. Under the Board's theory, the one-year period for issuance of a building permit began on April 18, 2025, the date the Committee issued its decision on stipulation and entry of judgment. Because the developer filed its comprehensive permit application within one year after that date, the Board argues the Easterly units were eligible for inclusion on the SHI and therefore the Board's safe harbor claim was properly invoked. *Id*., pp. 6-7.

Sandwich Road argues that EOHLC properly suspended the Town's certified HPP safe harbor because the Easterly units, which were counted toward HPP certification, had lost eligibility for the SHI. Opposition to Board motion for summary decision (Developer opposition), p. 3. It contends that the regulations provide EOHLC with the authority to suspend the certification of the Town's HPP. Developer motion, p. 8 n.4. Sandwich Road also argues that any lapse in SHI eligibility is not extended under 760 CMR 56.03(2)(c) pending an appeal initiated by the developer. Developer motion, p. 2.

1. EOHLC Has Authority to Suspend a Certified Housing Production Plan

Whether a Board's entitlement to rely on a certification of its HPP to invoke a safe harbor is derived from the comprehensive permit regulations, specifically 760 CMR 56.03(4)(a)-(f), 760 CMR 56.03(1)(b) and 760 CMR 56.03(2). *Wall Street Dev. Corp., supra*, Nos. 2022-08, 2022-09, slip op. at 7 (determining safe harbor based on HPP certification relies on relevant provisions of 760 CMR 56.00). We construe the regulatory language using well-established principles of construction. *Matter of Dighton and Stoney Ridge Estates, LLC*, No. 2010-01, slip op. at 5 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal, June 21, 2010); *see also Matter of Bourne and Chase Developers, Inc*., No. 2008-11, slip op. at 6 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal, June 8, 2009) (interpretation of regulatory provisions must be read in same manner as statute). Regulatory interpretation is consistent with the "principles of construction that are well established by the courts," and regulations should be "read in the same manner as a statute" with words given "their plain and ordinary meaning." *Stoney Ridge, supra*, No. 2010-10, slip. op at 5, citing *Ingalls v. Board of Registration in Medicine*, 445 Mass. 291, 294 (2005).

Where, as here, the relevant provisions of the comprehensive permit regulations are so closely intertwined that one regulatory provision cannot be understood without the other, the regulation must be read together to "give effect to all its provisions." *Stoney Ridge, supra*, No. 2010-01, slip op. at 5 ("we should seek to interpret the regulation to give effect to all of its provisions"), citing *Bottomley v. Division of Admin. Law Appeals*, 22 Mass. App. Ct. 652, 657 (1986). In *Wall Street,* we ruled that all pertinent regulatory provisions must be read "in a way that gives meaning and purpose to each [provision], as is the case in interpreting the language of a statute, where a court looks at the instrument as a whole to give meaning to all of its provisions." *Wall Street*, *supra*, Nos. 2022-08, 2022-09, slip. op. at 9, citing *Matter of Norwood and Davis Marcus Partners*, No. 2015-06, slip op. at 13 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal Dec. 8, 2016), citing *Wolfe v. Gormally*, 440 Mass. 699, 704 (2004). Therefore, the applicable regulations in this matter, 760 CMR 56.03(4)(a)-(f), 760 CMR 56.03(1)(b) and 760 CMR 56.03(2), must be interpreted together.

760 CMR 56.03(1)(b) establishes a safe harbor for municipalities that are certified as in compliance with an approved HPP, in accordance with 760 CMR 56.03(4). The necessary steps to request the certification of a HPP are set out in 760 CMR 56.03(4)(f) which states "SHI Eligible Housing units shall be counted for the purpose of certification in accordance with the provisions for counting units under the SHI set forth in 760 CMR 56.03(2)." 760 CMR 56.03(2) specifies when units become SHI-eligible, and how the passage of certain time periods will impact SHI eligibility following the issuance of the comprehensive permit. Particularly, this regulation states "[i]f more than one year elapses between the date of issuance of the [comprehensive permit] …and issuance of the building permit, the units will become ineligible for the SHI…." 760 CMR 56.03(2)(c).

The Board argues that once the HPP certification has been granted the regulations require that certification remains in place for the entirety of its term, and EOHLC lacks the authority to suspend the certification before the term expires. Board motion, pp. 5-6. The Board relies on 760 CMR 56.03(4)(f), which states, in part:

> (f) Certification of Municipal Compliance. A municipality may request that [EOHLC] certify its compliance with an approved HPP if it has increased its number of SHI Eligible Housing units in an amount equal to or greater than its 0.50% production goal for that calendar year. SHI Eligible Housing units shall be counted for the purpose of certification in accordance with the provisions for counting units under the SHI set forth in 760 CMR 56.03(2)….[T]he certification shall be deemed effective on the date upon which the municipality achieved its numerical target for the calendar year in question, in accordance with the rules for counting units on the SHI set forth in 760 CMR 56.03(2).
>
> A certification shall be in effect for a period of one year from its effective date. If [EOHLC] finds that the municipality has increased its number of SHI Eligible Housing units in a calendar year by at least 1.0% of its total housing units, the certification *shall be in effect for two years from its effective date*.

760 CMR 56.03(4)(f) (emphasis added). Specifically, the Board argues that "*shall be in effect"* as used in 760 CMR 56.03(4)(f) mandates that a HPP certification remain in place "no matter what occurs subsequently" to the units underlying the certification. Appellant's opposition/reply to Appellee's cross-motion for summary decision (Board opposition), pp. 5-6. The Board notes that 760 CMR 56.03(4)(f) is separated into two regulatory subsections with the first outlining the necessary steps to request HPP certification and the second providing the term of the certification. *Id*., pp. 4-5. The Board

acknowledges that § 56.03(4)(f) references the lapse provision set forth in 760 CMR 56.03(2)(c), but it contends the lapse provision refers only to the initial certification request included in the first subpart of 760 CMR 56.03(4)(f). *Id*., pp. 5-6. However, once EOHLC issues a certification of the Town's HPP, the Board argues, § 56.03(2)(c) does not pertain to the units underlying the certification, and therefore, it is immaterial if those SHI-units lose eligibility. *Id*., p. 5. The Board contends that reading the regulatory provision under 760 CMR 56.03(4)(f) as isolated subparts is consistent with the intent of the certified HPP safe harbor and will not be at odds with other mandatory provisions in the comprehensive permit regulations. *Id*., p. 6.

We addressed this issue in *Wall Street, supra.* The plain language and regulatory construction of 760 CMR 56.03(4)(f) does not support the argument that § 56.03(4)(f) should be read as independent from § 56.03(2)(c). *Wall Street*, *supra*, Nos. 2022-08, 2022-09, slip op. at 10 (stating that "[i]f the intent of the regulation was to apply only subparts of 760 CMR 56.03(2), those would have been explicitly listed"). The Board's argument that the language "*shall be in effect"* used in § 56.03(4)(f) requires the certification to remain in place for two years conflicts with the Committee's ruling in *Wall Street,* where we held that the use of "shall" in § 56.03(4)(f) is directive rather than mandatory. *Id.*at 11. The Supreme Judicial Court has confirmed that "although 'shall' commonly means mandatory, it is flexible and can be interpreted as permissive or directory in order to effectuate legislative purposes." *Id.* at 10, citing *Wilson v. Commissioner of Transactional Assistance*, 441 Mass. 846, 852-853 (2004), citing *Swift v. Registrars of Voters of Quincy*, 281 Mass. 271, 276 (1932). Thus, the cross reference to § 56.03(2) within §56.03(4)(f) incorporates the criteria for SHI eligibility and removal from the SHI into the entirety of 760 CMR 56.03(4)(f): "SHI Eligible Housing units shall be counted for the purpose of certification in accordance with the provisions for counting units under the SHI set forth in 760 CMR 56.03(2)." *See* 760 CMR 56.03(2); *Wall Street, supra*, Nos. 2022-08, 2022-09, slip. at 10.

Finally, the Board argues that the approval and certification of the HPP consists of a "long and arduous process," in which few municipalities have been issued certification of an

approved HPP.[4] Board motion, p. 4. It contends that the HPP approval and certification is intended to provide a process in which a municipality partners with EOHLC to create affordable housing in a realistic manner. *Id*. Therefore, the Board claims, suspension of an approved HPP certification constitutes "unsound public policy" and is adversarial to the HPP program. *Id*. The developer counters that notwithstanding the HPP program's incentives for municipalities to encourage the building of affordable housing, the underlying benefit of the HPP safe harbor "occurs when these units are actually built and occupied." Developer opposition, p. 4. The developer suggests that the regulations intend to provide a deadline requiring the approved SHI-eligible units to be built or occupied within a set amount of time. *Id*., pp. 3-4; *see* 760 CMR 56.03(2)(c).

As noted by the developer, the purpose of the HPP safe harbor, under 760 CMR 56.03(1)(b), is to encourage communities to plan for and construct affordable housing. Developer opposition, pp. 3-4; *see also Alexander Estates LLC v. Billerica*, No. 2005-14, slip op. at 2 (Mass. Housing Appeals Comm. Ruling on Motion to Dismiss Mar. 27, 2006) (affirming, with respect to predecessor comprehensive permit regulation, that purpose of HPP safe harbor is to give municipality plan for and construct affordable housing); *Hanover*, 363 Mass. 339, 355 (1973) (stating that overarching purpose of Chapter 40B is "promoting construction of [low] and moderate income housing"). The certification of the HPP, therefore, reflects the positive measures undertaken by a municipality toward affordable housing by the prescribed percentage once a comprehensive permit approval is filed. *Wall Street, supra*, Nos. 2022-08, 2022-09, slip. op. at 10-11. Thereafter, those units are included on the SHI, with the inclusion limited to one year unless building permits are issued, as "the SHI is intended to represent actual affordable housing in a municipality." *Id.*

Accordingly, the comprehensive permit for the Easterly development was filed with the Town Clerk on July 29, 2024, and the Board has presented no evidence that a building permit

[4] The Board reported that the process to update the Town's HPP took approximately eight months, in which the Town employed consulting firms, Horsley Witten Group and Barrett Planning Group, and spent over $70,000.00 during the process. The Board stated that two public meetings were held in November 2023 and January 2024 and three regulatory presentations to the Planning Board were presented in December 2023 and February 2024 and to the Select Board in February 2024. *Id*.

had issued for the Easterly project as of one year later. *See* Developer motion, p 4, Exh. 6. EOHLC issued the HPP certification on October 21, 2024, relating to July 29, 2024, as provided under 760 CMR 56.03(2)(b). *Id*., Exh. 4. The undisputed record reflects that EOHLC removed the Easterly units from the SHI because it had no record that the Town issued building permits within one year of July 29, 2024, and EOHLC informed the Town that its HPP certification was suspended as of July 30, 2025. *Id*., Exh. 11. Because the Town was not certified as in compliance with its HPP as of September 3, 2025, the date of the developer's application, the Board cannot invoke its safe harbor status under 760 CMR 56.03(1)(b). *See Wall Street, supra*, Nos. 2022-08, 2022-09, slip. op. at 15.

2. While a Comprehensive Permit is Under Appeal, the Timing for Adding and Removing Units from the SHI is Not Tolled or Extended

The Board argues that, even if EOHLC has the authority to suspend the Town's certification, EOHLC miscalculated the one-year period during which the Easterly project was required to secure building permits to maintain the certification of the HPP. Board motion, p. 6. It contends that the Easterly comprehensive permit appeal to the Committee tolled the "start [of] the one-year time clock" for those units to secure a building permit, reasoning that the Easterly developer "could not have applied for a building permit 'at risk' of its own appeal." *Id*., p. 6. Therefore, the Board asserts that there was "no operative permit" until the Committee issued its decision on stipulation and entry of judgment on April 18, 2025. *Id*., pp. 6-7. The Board claims the one-year period for a building permit to issue under 760 CMR 56.03(2) does not expire until April 18, 2026*,* but it cites no decisions or regulatory provisions to support its arguments. *Id.*

Sandwich Road responds that the Board is attempting "to double-count the same SHI-Eligible units." Developer motion, p. 10. The developer argues that, where the SHI-eligible units contribute to more than one regulatory safe harbor, the date those units are deemed eligible for the SHI "must be the same regardless of which [s]afe [h]arbor is claimed" to prevent municipalities from receiving double credit for the same housing units eligible for the SHI. *Id*.,

pp. 1-2, citing *Matter of Wakefield and The Residences at Nahant, LLC,* Nos. 2023-11, 2024-02, slip. op. at 9 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal May 28, 2024).[5]

The arguments put forth by the Board are unconvincing. 760 CMR 56.03(2)(b) sets forth the criteria for when housing units become eligible to count on the SHI: 1) the date that the permit is filed with the municipal clerk, or 2) the date that the last appeal brought by the Board has been resolved. 760 CMR 56.03(2)(b)[6]. The inclusion of such units remains expressly subject to the time lapse provision under 760 CMR 56.03(2)(c), (2)(b). In this case, the Easterly comprehensive permit was filed with the Town Clerk on July 29, 2024. *See* Developer motion, Exh. 2. Although the developer for the Easterly project appealed the Board's decision on August 8, 2024, the Town still requested a certification of compliance for its approved HPP on September 30, 2024. Board motion, Exh. 2; Developer motion, Exh. 4. Thereafter, EOHLC issued the Town's certification of its HPP, noting the following:

> The project for which certification is requested is The Easterly at 375 Sandwich Road. The units became initially eligible for the SHI when the project's Comprehensive Permit was filed with the Falmouth Town Clerk on July 29, 2024.

Developer motion, Exh. 4. It remains undisputed that the Easterly units first became eligible for inclusion on the SHI on July 29, 2024, and the Town enjoyed the temporary benefit of that inclusion for one year starting on that date.

If a development does not secure a building permit within one year from the date of initial eligibility, then those units will be removed from the SHI under 760 CMR 56.03(2)(c).

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[5] In *Residences at Nahant*, we held that the creation of SHI-eligible units should not be interpreted "in a manner which allows a board to double and even triple-dip on counting the same units toward multiple safe harbors" under 760 CMR 56.03(5). *The Residences at Nahant, LLC, supra,* Nos. 2023-11, 2024-02, slip. op. at 9-10.

[6] Section 56.03(2)(b) states:
"Units shall be eligible to be counted on the SHI at the earliest of the following:
1. For units that require a Comprehensive Permit…, the date when:
> a. the permit or approval is filed with the municipal clerk, notwithstanding any appeal by a party other than the Board, but subject to the time limit for counting such units set forth at 760 CMR 56.03(2)(c); or
> b. on the date when the last appeal by the Board is fully resolved;

2. When the building permit for the unit is issued;
3. When the occupancy permit for the unit is issued; or
4. When the unit is occupied by an Income Eligible Household and all the conditions of 760 CMR 56.03(2)(b) have been met…."

Therefore, the start date for this one-year eligibility period is the date the Easterly permit was filed with the Town Clerk, July 29, 2024. EOHLC became aware that building permits had not been issued for the Easterly project based on information provided to EOHLC[7] and EOHLC otherwise having no record for the issuance of building permits for the project. Developer motion, Exh. 6, p. 1. In this case, the passage of one year from July 29, 2024, without the issuance of building permits, provided grounds for removal of the Easterly units from the SHI. Additionally, the subsequent modification of the Easterly permit did not extend this one-year period. 760 CMR 56.03(2)(c); *see Wall Street, supra,* Nos. 2022-08, 2022-09, slip. op. at 14-15 (concluding that while comprehensive permit appeal is pending lapse provision under 760 CMR 56.03(2)(c) is not extended); *see Matter of Newton and Marcus Lang Investments, LLC*, No. 2015-02, slip op. at 7 (Mass. Housing Appeals Comm. Interlocutory Decision Regarding Safe Harbor June 26, 2015) (determining that subsequent modification of initial permit did not toll development's SHI-eligibility for which no building permits had issued).

Moreover, the Board's argument that the Easterly developer could not apply for a building permit without risking its appeal is without merit. The comprehensive permit regulations, set forth in 760 CMR 56.05(12)(a), govern when a comprehensive permit becomes final, and state, in relevant part:

> [a] Comprehensive Permit shall become final on the date that the written decision of the Board is filed in the office of the municipal clerk, if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of, provided however that if a Comprehensive Permit is issued by the Board or the Committee and is subsequently subject to legal appeal, *an Applicant may elect to proceed at risk with construction of the Project …*

760 CMR 56.05(12)(a) (emphasis added).[8] The regulations explicitly allow for the developer to proceed with construction at its own risk pending its appeal. *Wall Street, supra*, Nos. 2022-08,

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[7] By letter dated October 2, 2025, Attorney Peter L. Freeman, who represents the developer in the Easterly project and the developer in *Matter of Falmouth and Falmouth Residential, LLC and Northland Residential Construction, LLC,* No. 2025-11, informed EOHLC that a building permit had not been issued for the Easterly units. Developer motion, Exh. 6, p.1 n.2.

[8] In *Wall Street*, we noted that when a comprehensive permit becomes final under 760 CMR 56.05(12)(a) affects the date in which the final comprehensive permit would lapse under 760 CMR 56.05(12)(c), providing for the tolling of the three-year period before a comprehensive permit lapses. This provision has

2022-09, slip. op. at 14, n. 8, citing *Herring Brook Meadow, LLC v. Scituate*, No. 2007-15, slip op. at 4 (Mass. Housing Appeals Comm. Ruling and Order on Motion to Quash Dec. 13, 2010) (stating comprehensive permit regulations do not preclude developers from proceeding with projects at their own risk pending appeal).[9] The concept of starting construction simultaneously with appealing a comprehensive permit decision is consistent with the intent of G.L. c. 40B "to effect an expedited procedure" in furtherance of the primary goal of promoting construction of affordable housing. *Milton Commons Assocs. v. Board of Appeals of Milton*, 14 Mass. App. Ct. 111, 118 (1982); *Hanover*, 363 Mass. 399, 355 (1973); *see also Taylor v. Board of Appeals of Lexington*, 451 Mass. 270, 279 (2008) (Chapter 40B requires the parties "to proceed expeditiously as possible").

B. Reliance on Comprehensive Permit Guidelines

The Board places great emphasis on their contention that in the November 13, 2025, safe harbor denial, EOHLC improperly relied on § II.B.9 of DHCD's G.L. c. 40B Comprehensive Permit Project Subsidized Housing Inventory Housing Guidelines updated October 2020 (40B Guidelines), which, it argues, do not have the force of law because they were not promulgated as proper regulations in accordance with G.L. c. 30A, the Administrative Procedures Act (APA).[10] Board motion, pp. 5-6. The Board relies on the Supreme Judicial Court ruling in *Attorney General v. Town of Milton,* 495 Mass. 183 (2025) to support its argument. It claims that this recent decision supersedes our *Wall Street* decision. Board motion, p. 5. The Board argues that in

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no effect on the timing requirement for a project to secure building permits. *Wall Street, supra*, Nos. 2022-08, 2022-09, slip. op. at 14 n.9.

[9] The Board further argues that in *Wall Street* an abutter appealed the comprehensive permit to superior court; whereas, here, the developer appealed the Easterly comprehensive permit, thereby ostensibly distinguishing these two matters. Board motion, p. 6, citing *Wall Street, supra*, Nos. 2022-08, 2022-09, slip. op. at 14 n. 8. The Board's argument is unsupported by the plain reading of the comprehensive permit regulations. *See* 760 CMR 56.05(12)(a) (… if a Comprehensive Permit is issued by the Board or the Committee and is subsequently subject to legal appeal, an Applicant may elect to proceed at risk with construction of the Project").

[10] On March 27, 2026, the presiding officer issued an order notifying the parties of her intention to take official notice of the guidelines referenced in their briefings, the "G.L. c. 40B Comprehensive Permit Project Subsidized Housing Inventory Guidelines, Updated December 2014" and "Housing Production Plan Section II.B of G.L. c. 40B Comprehensive Permit Projects Subsidized Housing Inventory Guidelines, Updated October 2020," and offered them the opportunity to contest the taking of official notice pursuant to 760 CMR 56.06(8)(b)1. Neither party contested.

Milton the Court held that agency guidelines that interpret or implement G.L. c. 40A, § 3A, the MBTA Communities Act, were legally ineffective until repromulgation under the APA. *Id,* pp. 5-6, citing *Milton*, 495, Mass. 183, 193-196 (2025).

Recognizing that the courts give deference to an agency when they are interpreting their own regulations, the Board argues that such deference will be overruled if that agency's interpretation is "arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself." Board opposition, p.3, quoting *Zoning Board of Appeals of Hanover v. Housing Appeals Comm*., 90 Mass. App. Ct. 111, 117 (2016), *rev. denied* 476 Mass. 1107 (2016), quoting *Warcewicz v. Department of Environmental Protection*, 410 Mass. 548, 550 (1991).The Board also maintains that § II.B.9 of the 40B Guidelines circumvents the unambiguous language in the regulations which mandates a HPP certification to remain in effect for the entirety of its two-year term.[11] *See* 760 CMR 56.03(4)(f); Board motion, pp. 5-6. Therefore, the Board argues the 40B Guidelines remain "unenforceable unless duly enacted under the requirements of the APA." *Id.*, p. 6.

Sandwich Road contends that the comprehensive permit regulations provide EOHLC with the authority to suspend the certification of the Town's HPP, and therefore reliance on the 40B Guidelines is unnecessary. Developer opposition, p. 6. Even if EOHLC relied on its 40B Guidelines, Sandwich Road correctly notes that case law has recognized that agencies have the authority "to 'fill in the details or clear up an ambiguity of an established policy'…[if] it does not contradict its enabling statute or preexisting regulations." *Id*., pp. 6-7, quoting *Genworth Life Ins. Co. v. Comm'r of Ins.*, 95 Mass. App. Ct. 392, 396 (2019), quoting *Mass. Gen. Hosp. v. Rate Setting Comm'n*, 371 Mass. 705, 707 (1977). The developer argues that § II.B.9 merely clarifies

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[11] Section II.B.9 of the 40B Guidelines states:

> Term of Certification: So long as the units produced are SHI Eligible Housing units (see 760 CMR 56.03), a certification shall be in effect for a period of one year from its effective date if the community has increased its SHI Eligible Housing units 0.5% of the total year round housing units, or two years from its effective date if it has increased its number of SHI Eligible Housing units 1.0% of total year round housing units. If the units by which the municipality achieved its certification become ineligible for the SHI, then the certification shall lapse as of the date that the units became ineligible for the SHI. If such units become eligible for the SHI during the *remaining term of the certification period,* then the certification shall be re-instated for such remaining term.

a specific requirement already implemented under 760 CMR 56.03(2) and 760 CMR 56.03(4), which requires "the housing units giving rise to a 2-year HPP Safe Harbor under 760 CMR 56.03(4) must remain SHI-eligible for the entirety of the 2-year period, otherwise the [s]afe [h]arbor will lapse." *Id*., p. 7.

The *Milton* decision is distinguishable from these circumstances and therefore it does not require us to disregard the 40B Guidelines since they do not implement G.L. c. 40B, the comprehensive permit regulations do. *See* 760 CMR 56.00, *et seq*. In *Milton*, the Supreme Judicial Court evaluated the newly enacted MBTA Communities Act, G.L. 40A, § 3A, which directed EOHLC to "promulgate guidelines" (rather than regulations) to determine whether communities complied with the Act. [12] *Milton*, 495 Mass. 183, 185 (2025). There, EOHLC implemented sub-regulatory guidance alone to determine whether an MBTA community complied with G.L. 40A, § 3A. *Id*. at 194. Thus, the Court held that the guidelines functioned as regulations, directly "interpreting and implementing [G.L. c. 40A, § 3A.]." *Id*. at 194-195. Unlike *Milton*, this matter involves G.L. c. 40B, for which there is a body of well-established case law and extensive regulations promulgated pursuant to the APA that interpret and implement the statute.

Prior to the *Milton* decision, the Supreme Judicial Court recognized that the 40B guidelines issued by EOHLC are appropriately applied to understand regulations issued pursuant to G.L. c. 40B. *See Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm*., 464 Mass. 38, 47 n.12 (2013) (noting that 40B Guidelines "are directly relevant to understanding [EOHLC's] regulations because subsidizing agencies have responsibility to enforce compliance with provisions of 760 CMR 56.00 and applicable [EOHLC] guidelines"). Specifically, in *Zoning Bd. of Appeals of Milton v. HD/MW Randolph Avenue, LLC*, 490 Mass. 257 (2022), the Supreme Judicial Court recognized the agency's authority to use sub-regulatory guidance in the

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[12] In *Milton*, EOHLC issued the guidelines and the Attorney General brought an enforcement action against the town of Milton, the town challenged both the constitutionality of the Act and EOHLC's promulgation of the implementing guidelines. *Milton*, 495 Mass. 183, 185 (2025). The Supreme Judicial Court upheld the constitutionality of the MBTA Communities Act but determined that, "[g]iven the breadth, detail, substance, and mandatory requirements" of the guidelines in implementing the Act, they fell within "the APA's broad definition of 'regulation.'" *Id.* at 195. The Court concluded that EOHLC "failed to comply with the APA" and therefore the "guidelines are legally ineffective and must be repromulgated in accordance with G.L. c. 30A, § 3, before they may be enforced." *Id.*

Chapter 40B context, stating that EOHLC "has provided more specific guidance through regulations, guidelines, and adjudicatory decisions, as is its right." *Id. at* 264. Presumably, in deciding the *Milton* case, the Court was aware of its prior decision in *HD/MW Randolph Avenue* recognizing the 40B guidelines, and if the Court intended to reverse that position in *Milton*, it could have done so.

As noted by the developer, several Massachusetts appellate decisions treat with approval sub-regulatory guidelines that "fill in the details" with binding effect. Developer opposition, pp. 6-7; *see, e.g., Boston Retirement Bd. v. Contributory Retirement Appeal Bd.*, 441 Mass. 78, 80 (2004) (upholding agency "memorandum" that "instructed" local retirement boards how to make particular determination). "[A]n administrative agency may use sub-regulatory guidance to 'fill in the details or clear up an ambiguity of an established policy' without resort to formal rulemaking, as long as it does not contradict its enabling statute or preexisting regulations." *Genworth Life Ins. Co.,*95 Mass. App. Ct. 392, 396 (2019), quoting *Massachusetts Gen. Hosp*., 371 Mass. 705, 707; *accord Boston Ret. Bd*., 441 Mass. 78, 83; *Arthurs v. Board of Registration in Med*., 383 Mass. 299, 313 n.26 (1981) ("Agencies 'intending to fill in the details or clear up an ambiguity of an established policy' may issue interpretation or informational pronouncements without going through the procedures required for the promulgation of a regulation"), quoting *Massachusetts Gen. Hosp*., 371 Mass. 705, 707. *See also Royce v. Commissioner of Correction*, 390 Mass. 425, 427 (1983) (regulations have force of law and generally, an agency must comply with its own regulations).

The Committee has reviewed and interpreted Chapter 40B regulations and guidelines put in place by EOHLC to ensure they are consistent with the statute. *Matter of Hingham and River Stone, LLC*, No. 2016-05, slip op. at 4 (Mass. Housing Appeals Comm. Interlocutory Decision Oct. 31, 2017), and cases cited. Indeed, we have acknowledged, while it is appropriate to give deference to a policy articulated by EOHLC, the Committee would not be bound by such a policy if it were in violation of statutory provisions or statutory intent. *River Stone, supra,* No. 2016-05*,* slip op. at 7 n.9, and cases cited. As addressed in § IV.A.1, *supra*, 760 CMR 56.03(4)(f) incorporates by reference the SHI eligibility and time lapse provisions of 760 CMR 56.03(2) to make clear that "[i]f the units by which a municipality achieved its certification become

ineligible for the SHI, then the certification shall lapse as of the date that the units became ineligible for the SHI." 40B Guidelines, § II.B.9. Accordingly, we conclude that the 40B Guidelines "fill in the details" to address the circumstances under which a HPP certification may lapse and find that this interpretation does not contradict G.L. c. 40B or its regulations.

V. CONCLUSION

Based on the foregoing, the Board is not entitled to invoke the safe harbor under 760 CMR 56.03(1)(b) and 56.03(4). Accordingly, the Board's motion for summary decision is denied. The developer's motion for summary decision is granted.

HOUSING APPEALS COMMITTEE

April 13, 2026

Shelagh A. Ellman-Pearl
Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain
Lionel G. Romain

James G. Stockard, Jr.
James G. Stockard, Jr.

Alexandra C. Noonan
Alexandra C. Noonan, Presiding Officer