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

NORTH READING ZONING BOARD OF APPEALS

and

NY VENTURES, LLC

No. 2019-11

DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR

October 10, 2023

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

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

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

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

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

Either party may file an interlocutory appeal of an adverse decision by DHCD to the Committee but must do so within 20 days of receipt of DHCD's decision. The regulation provides that the interlocutory appeal to the Committee is conducted on an expedited basis, as the proceeding before the board is stayed pending our determination.[2] 760 CMR 56.03(8)(c).

NY Ventures, LLC (NY Ventures) filed a comprehensive permit application with the Board on or about July 9, 2019, to build a 200-unit rental housing project at 20 Elm Street in North Reading. On August 8, 2019, the Board opened the public hearing on the application, and on August 22, 2019, it voted that a denial of the comprehensive permit, or the imposition of conditions or requirements on the requested permit, would be consistent with local needs as a matter of law. Exh. 1, p. 1. On that date, it notified NY Ventures and DHCD that it invoked the general land area minimum safe harbor. *See* G.L. c. 40B, § 20; 760 CMR 56.03(3)(b), 56.03(8)(a). The Board also invoked the separate housing unit minimum safe harbor provision, asserting that its proposed addition of 42 units of rent-controlled mobile homes and the likely addition of some confidential group home units would demonstrate that SHI-eligible housing exists in in the Town in an amount over 10 percent pursuant G.L. c. 40B, § 20, and 760 CMR 56.03(3)(a)…." Exh. 1, p. 1. On September 6, 2019, NY Ventures

[2] Typically, however, the speedy scheduling of an evidentiary hearing anticipated by the comprehensive permit regulation has been precluded by the extensive fact issues involved in interlocutory appeals regarding the general land area minimum, as well as other safe harbors. Although this proceeding was not stayed for a concurrent court appeal, as has occurred in earlier cases involving confidential group home addresses, the number and nature of the parties' pre-hearing motions, including questions of first impression, extended the pre-hearing period.

notified the Board and DHCD that it challenged both of the Board's assertions. Exh. 2. DHCD issued a letter dated October 4, 2019, stating that the Board had not met its burden of proof with regard to either of these two grounds. Exh. 3, p. 7. The Board then filed this interlocutory appeal to the Committee on October 17, 2019.

An initial conference of counsel was held on November 25, 2019. Shortly thereafter, on December 26, 2019, the developer filed several motions. It moved for an order joining DHCD as an intervener or interested person and authorizing the issuance of subpoenas to DHCD, the Department of Mental Health (DMH), the Department of Developmental Services (DDS), and the Bureau of Geographic Information (MassGIS) for information relevant to the calculation of group homes acreage. NY Ventures also filed three motions to dismiss: 1) moving to dismiss on the ground the Board had failed to comply with evidentiary and procedural requirements of the regulations and guidelines, alternatively moving for an order *in limine* limiting the evidence that the Board may introduce in support of its safe harbor claim; 2) moving to dismiss Counts II and III of the Board's initial pleading, arguing improper venue and lack of subject matter jurisdiction; and 3) arguing the Board lacked proper authorization to file its appeal. The Board opposed all motions.

On August 28, 2020, the presiding officer denied the three motions to dismiss, denied the motion to join DHCD as an intervener or interested person, and deferred ruling on the motion for the issuance of subpoenas. On September 30, 2020, the presiding officer denied the Board's motion for reconsideration of the deferral regarding the issuance of subpoenas.[3] On October 8, 2020, the presiding officer allowed NY Ventures to serve the proposed subpoenas upon the state agencies, ordering the developer to inform the Committee of the date of service of each subpoena. On October 15, 2020, the Board filed a motion to quash the subpoenas, which NY Ventures opposed. On March 15, 2021, the presiding officer issued a ruling and order granting in part the motion to quash subpoenas served on MassGIS and DDS to the extent they sought confidential group home addresses from the state agencies. The order allowed NY Ventures to serve a subpoena upon MassGIS to provide testimony at

[3] The presiding officer granted the motion to participate as interested persons of Dorina Helferich and Laurine Pineo, asserted abutters to the proposed development. She granted the motion solely for the purposes of allowing them to receive all notices pursuant to 760 CMR 56.06(7)(b) and all other documents pursuant to 760 CMR 56.06(6) and denied it in all other respects.

the hearing but denied NY Ventures' request for production of documents and prohibited the developer, and the Board, from making discovery requests in this proceeding, consistent with the procedures in 760 CMR 56.06 and the Committee's long-standing practice of prohibiting discovery under 760 CMR 56.00.

On January 27, 2021, Julia Elizabeth Coolidge-Stolz moved to intervene on behalf of herself and her adult child, of whom she is guardian. On August 16, 2021, the presiding officer granted Ms. Coolidge-Stolz's motion solely for the purpose of protecting her ward's personally identifiable and medical information, "by means of raising argument and objections with respect to evidence and testimony the other parties seek to introduce or elicit during the hearing; and to the extent appropriate, submission of post-hearing written argument with respect to the issue of protection of this confidential information." The order specifically precluded her own testimony or written evidence.

On April 9, 2021, the developer moved for an order authorizing the issuance of a subpoena to compel MassGIS to designate a witness to provide testimony at the evidentiary hearing and to produce all documents requested. Both the Board and Ms. Coolidge-Stolz opposed the developer's motion. On August 18, 2021, the presiding officer granted the motion for a modified subpoena proposed by the developer that would protect confidential group home information.

The parties jointly prepared a draft pre-hearing order, and on September 15, 2021, the presiding officer issued a pre-hearing order. On January 25, 2022, she issued a protective order to ensure the confidentiality of DDS and DMH group homes.[4] Thereafter the parties

[4] The protective order was issued to protect all information that would reasonably lead to the identification of the addresses of DMH or DDS group homes, limit the use and provide for the destruction of confidential documents, and provide for the obligations of the protective order to survive the termination of this and any related appeals.This protective order is 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. Interlocutory Decision 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.

submitted pre-filed direct and rebuttal testimony and exhibits.[5] An evidentiary hearing was held on February 16, 2022. Three witnesses testified and 16 exhibits were admitted into evidence. The parties thereafter filed post-hearing memoranda and reply memoranda.[6]

II. GENERAL LAND AREA MINIMUM OF 1.5 PERCENT

A. Comprehensive Permit Law and Regulations

Under the Comprehensive Permit Law, a decision of a board to deny a comprehensive permit or to grant one subject to conditions is consistent with local needs as a matter of law when, as of the date of a developer's filing its application for a comprehensive permit with a zoning board, the municipality 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. *See* 760 CMR 56.03(1)(a).

The comprehensive permit regulations set out the requirements for calculating the percentage of land area with eligible housing. 760 CMR 56.03(3)(b). This percentage is calculated by dividing the eligible area of sites of affordable housing that are eligible to be inventoried on the SHI (the numerator), by the total land area in the municipality that is zoned for residential, commercial, or industrial use (the denominator). *Id. See Matter of*

[5] Following the submission of pre-filed direct and rebuttal testimony, the Board moved to strike paragraphs 48-62 of the direct testimony of the developer's expert witness, Nels Nelson, which sets out an analysis of SHI eligible acreage of DDS group home sites. It also moved to strike the resulting SHI eligible area percentage. The developer also moved to strike the rebuttal testimony of Danielle McKnight, the Town Planner, moving in the alternative to submit rebuttal testimony of Nels Nelson and Lynne Sweet as supplemental pre-filed testimony. By order dated January 11, 2022, the presiding officer denied the developer's motion to strike Ms. McKnight's testimony and granted the request to file the developer's responsive rebuttal testimony. At the hearing, the presiding officer denied the Board's motion to strike. Tr., 7.

[6] The Board did not pursue the housing unit minimum safe harbor argument in its brief, and therefore has waived it. *See, e.g., 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. P'ship 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 Comm. 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). In any event, the unchallenged DHCD SHI for North Reading dated July 15, 2019, states that of the Town's year round housing units, 9.61 percent is subsidized housing on the SHI. Exh. 6.

Waltham and Alliance Realty Partners, No. 2016-01*,* slip op. at 4-5 (Mass. Housing Appeals Comm. Interlocutory Decision Feb. 13, 2018); *Matter of Norwood and Davis Marcus Partners,* No. 2015-06*,* slip op. at 2-3 (Mass. Housing Appeals Comm. Interlocutory Decision Dec. 8, 2016). For calculation of the "total land area zoned for residential, commercial, or industrial use," 760 CMR 56.03(3)(b) and subsections 1 through 7 identify those areas that are included in or excluded from that area. For calculation of the area where low or moderate income housing exists, § 56.03(3)(b) provides:

> Only sites of SHI Eligible Housing units inventoried by [DHCD] or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, shall be included toward the 1.5% minimum. For such sites, that proportion of the site area shall count that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units).

760 CMR 56.03(3)(d) provides further that "[e]vidence regarding Statutory *Minima* submitted under 760 CMR 56.03(3) shall comply with any guidelines issued by [DHCD]."

Land area calculations performed pursuant to the statute and regulations have been aided by DHCD guidance. The factual analysis required to determine the acreage of both the denominator and the numerator has led to much detailed testimony regarding minute aspects of the calculation, which our decisions have had to address. *See, e.g., Matter of Braintree and 383 Washington Street,* No. 2017-05, slip op. at 5 (Mass. Housing Appeals Comm. Interlocutory Decision June 27, 2019), *aff'd,* Nos. 2282-CV00344, 2282-CV00345 (Norfolk Super. Ct. May 24, 2023); *Norwood, supra,* No. 2015-06*,* slip op. at 3-4; *Waltham, supra*, No. 2016-01, slip op. at 22, n.22; *Matter of Stoneham and Weiss Farm Apartments, LLC*, No. 2014-10, slip op. at 9 n.6 (Mass Housing Appeals Comm. Interlocutory Decision June 26, 2015) (encouraging DHCD to provide detailed guidance to municipalities "to enable them to determine with more certainty their status with regard to the general land area minimum").

B. DHCD Guidelines

Pursuant to 760 CMR 56.03(3)(d), DHCD has issued the Guidelines for Calculating General Land Area Minimum (GLAM Guidelines). These guidelines were first issued January 17, 2018, and revised April 20, 2018 (2018 GLAM Guidelines). Exh. 8. DHCD

issued further revised guidelines on January 31, 2020 (2020 GLAM Guidelines), a portion of which is included as Exhibit 9-1. DHCD has also issued the Guidelines, G.L. c. 40B Comprehensive Permit Projects, Subsidized Housing Inventory, updated December 2014 (40B Guidelines).[7] Exh. 7. The GLAM Guidelines were adopted following the Committee's encouragement to DHCD to "establish a methodology that provides clear guidance to municipalities and developers and promotes certainty and consistency" and, specifically with respect to the numerator, "to develop guidance with clear standards for reviewing the extent of impervious and landscaped areas 'directly associated' with SHI units." *See Norwood, supra*, No. 2015-06, slip op. at 6, n.6; 19, n.12. The 40B Guidelines address the eligibility for units, including group homes, to be listed on the SHI. Exh. 7, § II.A.2. Thus, these sets of guidelines appropriately filled in a gap in both the statute and the regulations by providing such a methodology. *See Boston Ret. Bd. v. Contributory Ret. App. Bd*., 441 Mass. 78, 83 (2004) (stating formal rule making is unnecessary "where the agency is intending to fill in the details or clear up an ambiguity of an established policy, rather than to inaugurate a material change of policy"), quoting *Massachusetts Gen. Hosp. v. Rate Setting Comm'n*, 371 Mass. 705, 707 (1977); *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748, 759, n.17 (2010) (administrative agencies may adopt policies through adjudication as well as through rulemaking); *Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave., LLC*, 490 Mass. 257, 265-266 (2022) (adjudicative interpretation fills in gaps in statutory and regulatory regimes, and absent clear directive to contrary from Legislature, regulatory agencies are entitled to fill such gaps).

Noting our previous statements that DHCD guidelines do not have the force of law, the Board argues that the 2018 GLAM Guidelines provide "non-binding 'guidance to municipalities and developers.'" Board brief, p. 9, quoting *Norwood, supra,* No. 2015-06, slip op. at 6 n.6, 19 n.12. In *Norwood,* we stated, "[g]enerally, in considering statutory and regulatory provisions, [the Committee gives] deference to policy statements issued by

[7] Pursuant to 760 CMR 56.06(8)(b), by order dated February 2, 2022, the presiding officer took official notice of the 40B Guidelines, which were then admitted into evidence as Exhibit 7, and the Guidelines for Calculating the General Land Area Minimum dated January 17, 2018, revised April 20, 2018 (2018 GLAM Guidelines), admitted into evidence as Exhibit 8. The order noted no official notice was required for the 2020 GLAM Guidelines, which are attached to the Affidavit of Michael Trust. Exh. 9-1.

DCHD, the state's lead housing agency." *Norwood, supra,* No. 2015-06, slip op. at 4, and cases cited. *See, e.g., Matter of Arlington and Arlington Land Realty, LLC,* No. 2016-18, slip op. at 6 (Mass. Housing Appeals Comm. Interlocutory Decision Oct. 15, 2019), citing *Braintree, supra,* No. 2017-05, slip op. at 5; *Waltham, supra*, No. 2016-01, slip op. at 22, n.22. *See also Town of Northbridge v. Town of Natick*, 394 Mass. 70, 76 (1985) (agency's guidance documents are policy statements without force of law). The Board further maintains that "if the Committee is to apply the Guidelines at all, which the Board objects to as non-binding, *ultra vires*, and inconsistent with the statutory scheme, it may only apply the [2018 GLAM Guidelines]," which were in effect at the time of the developer's application.[8] Board brief, p. 9 n.2; *see id.,* p. 10.

As noted above, several Massachusetts appellate decisions treat with approval the application of sub-regulatory guidelines that "fill in the details" with binding effect. *See, e.g., Boston Ret. 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. v. Commissioner of Ins*., 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).

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[8] The Board's argument ignores the fact that, if guidelines are *ultra vires* and invalid, it would have no basis to include land area for group homes, since group homes are not counted on the SHI pursuant to regulation, but instead identified as SHI eligible in the 40B Guidelines. *See* Exh. 7, § II.A.2.e. Although it did not pursue the argument in its brief, the developer submitted testimony addressing the issue whether the group homes met the requirements of 760 CMR 56.03(2)(a) that they have an affordable housing restriction and an affirmative fair housing marketing plan. *See* Exh. 12, ¶¶ 36-38.

Indeed, with regard to DHCD guidelines specifically, not only the Committee but also the Supreme Judicial Court has observed that the agency's guidelines are to be considered with the comprehensive permit regulations. *Zoning Bd. of Appeals of Milton,* 490 Mass. 257, 264 (noting that in Chapter 40B context, agency "has provided more specific guidance through regulations, guidelines, and adjudicatory decisions, as is its right"). *See Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 47 n.12 (2013) (DHCD guidelines are directly relevant to understanding DHCD's regulations because subsidizing agencies have responsibility to enforce compliance with provisions of 760 CMR 56.00 and applicable DHCD guidelines).

In considering cases before the Committee, we have reviewed and interpreted Chapter 40B regulations and guidelines put in place by DHCD to ensure they are consistent with the statute. *See, e.g., Matter of Hingham and River Stone, LLC,* No. 2016-05, slip op. at 4 (Mass. Housing Appeals Comm. Interlocutory Decision Oct. 31, 2017), and cases cited. We have often recognized that, while it is appropriate to give deference to a policy articulated by DHCD, the Committee would not be bound by such a policy if it were in violation of statutory provisions or statutory intent. *Id.,* slip op. at 7, n.9, and cases cited. Similarly, as the courts have noted, guidelines may fill in details as long as they do not contradict their enabling statute or preexisting regulations. *Massachusetts Gen. Hosp.*, 371 Mass. 705, 707; *Genworth Life Ins. Co.*, 95 Mass. App. Ct. 392, 396. As the Committee may adopt policies through adjudication, policies adopted by the guidelines are likewise subject to interpretation and refinement through the Committee's adjudicatory process. *Zoning Bd. of Appeals of Milton,* 490 Mass. 257, 264.

C. Burden of Proof

The Committee's hearing on this issue, like all Committee proceedings, is *de novo*. G. L. c. 40B, § 22; *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 369-371 (1973); *Waltham, supra*, No. 2016-01, slip op. at 5. The Board carries the "burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs…." 760 CMR 56.03(8)(a). It must affirmatively prove that it has satisfied the statutory minimum based on reliable supporting evidence. *Brewster Commons, LLC v. Duxbury*, No. 2010-08, slip op. at 6 (Mass. Housing Appeals Comm.

Ruling and Order Extending Comprehensive Permit Dec. 12, 2011); *see Braintree, supra*, No. 2017-05, slip op. at 32; *Norwood, supra*, No. 2015-06, slip op. at 20. NY Ventures may introduce evidence to counter the Board's evidence, or it may simply challenge the sufficiency of the Board's case without providing its own contrary evidence. *Waltham*, *supra,* No. 2016-01, slip op. at 5.

D. 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;[9] 2) any land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the Department of Environmental Protection (DEP) pursuant to G.L. c. 131, § 40A; 3) any water bodies; and 4) any flood plain, conservation or open space zone if such zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial and industrial use are completely prohibited. 760 CMR 56.03(3)(b)3-6. Danielle McKnight, the North Reading Town Planner, testified that the final calculated total land area (denominator) is 5,954.113 acres. Exh. 16, ¶ 9. NY Ventures' expert witness, Nels Nelson, testified that the calculated total land area is 5,965.261 acres. Exh. 14, ¶ 5.

1. Parcels with Publicly Owned Land Designations

The dispute between the Board and NY Ventures focuses on only one issue—the Board's exclusion of seven parcels of land from the denominator that total 10.089 acres on the ground that they are public land. *See* Exhs. 14, ¶ 4; 16, ¶¶ 5-7. Citing Mr. Nelson's

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

testimony identifying private owners of the seven parcels, NY Ventures argues that since the parcels are owned by private organizations, not the Commonwealth, they are not eligible for exclusion from the denominator. NY Ventures brief, p. 3. *See* Exh. 14, ¶¶ 4-9. The Board, however, argues that the properties were properly excluded pursuant to technical instructions to the 2018 GLAM Guidelines. Board brief, p. 18.

In her pre-filed sur-rebuttal testimony, Ms. McKnight agreed with Mr. Nelson and identified private organizations that owned the disputed seven parcels.[10] Ms. McKnight testified, however, that she treated the seven parcels as publicly owned lands, following the technical instructions to the 2018 GLAM Guidelines. Exh. 16, ¶¶ 7-8. She stated that upon discussion with the Town's assessing manager, she determined that two other properties originally challenged by the developer should have been classified as "951-Charitable – Other" and she added those properties back to the denominator. *Id.*, ¶ 6. She stated, however, that the disputed seven properties are, or should be, classified as Code 914, which is identified as "Department of Mental Health/Department of Mental Retardation."[11] *Id.*, ¶¶ 7-8.

Mr. Nelson testified that none of these parcels are publicly owned but are owned by private organizations. He stated that when they are added back into the denominator, the resulting denominator is 5,965.261 acres. Exh. 14, ¶¶ 4-5. Ms. McKnight agreed that none of these parcels are government owned. Exh. 16, ¶¶ 7-8. Although she acknowledged that Town records identify private entities as owners of the seven properties, she maintained they should be excluded from the denominator because the 2018 GLAM Guidelines' technical instructions "direct us to exclude parcels with a 914 land use code, and so they are staying in our list of excludable properties and are still removed from our denominator." Exh. 16, ¶ 8.

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[10] The names of the private owners Mr. Nelson and Ms. McKnight identified in their testimony, Exhs. 14, ¶ 4; 16, ¶¶ 7-8, were removed for the redacted versions of their testimony. Nevertheless, even the redacted versions make clear Ms. McKnight did not reject Mr. Nelson's testimony that the properties were not publicly owned; rather she relied on the assessor coding. *See* Exhs. 14, ¶ 4 (redacted); 16, ¶¶ 7-8 (redacted).

[11] The latter agency's name is now the Department of Developmental Services (DDS).

Ms. McKnight stated that the exclusion of only the seven parcels results in a denominator of 5,954.113. Exh. 16, ¶ 9. *See* Exhs. 1; 3.

NY Ventures argues that the 2018 GLAM Guidelines require further review of parcels to ensure that privately owned parcels are not excluded, and since none of the seven parcels are publicly owned, regardless of their designation for assessment, the Board has not shown they should be excluded. Developer brief, pp. 19-20. The Board argues that the 2018 Guidelines do not require it to inquire into the ownership status of parcels of land that are "otherwise [publicly] used and operated for the services of the Commonwealth's 'political subdivisions' as 'reimbursable land,' as was the case for the seven properties at issue here." Board reply brief, pp. 4-5.

As discussed above in § II.B, the GLAM Guidelines must be read to be consistent with Chapter 40B, which excludes only publicly owned land, and with the comprehensive permit regulations, which provide:

> Total land area shall exclude land owned by the United States, the Commonwealth or any political subdivision thereof, the Department of Conservation and Recreation or any state public authority, but it shall include any land owned by a housing authority.

760 CMR 56.03(3)(b)3. *See* G.L. c. 40B, § 20. This requirement pertains only to publicly owned land, not private land that may be used by a governmental entity.[12]

2. Denominator Conclusion

The Board's argument for excluding the seven properties fails. Although the 2018 GLAM Guidelines do provide that the numerical designation indicates publicly owned land, they also state, consistent with the regulations, that parcels should be reviewed to ensure that they actually meet the requirement that they are publicly owned. Most importantly, as the

[12] Moreover, to the extent the Board may argue that these seven properties are used by DMH or DDS, we note that the 2018 GLAM Guidelines state that public housing authority land that includes SHI eligible units is included in the denominator. Exh. 8, App. A, § 2.9, pp. 9-10. This ensures that land that contributes SHI units and counts in the numerator is likewise included in the denominator consistent with both 760 CMR 56.03(3)(b) and G.L c. 40B, § 20. *Stoneham, supra*, No. 2014-10, slip op. at 4 n.3. *Cf. Arbor Hill Holdings Ltd. P'ship v. Weymouth*, No. 2002-09, slip op. at 3 n.3 (Mass. Housing Appeals Comm. Order of Dismissal Sept. 24, 2003) (not deducting South Weymouth Naval Air Station land from denominator because, "even though it may have been owned by the United States, it is available for development").

developer's evidence shows, and the Board's witness agrees, these parcels are not publicly owned. Any calculation of publicly owned land based on an incorrect reliance on the assessor codes referred to in the guidelines fails when contradicted by evidence of actual ownership. Contrary to the Board's argument, the use of these parcels by a public entity, if that is the case, does not make them government owned, and does not support their exclusion from the denominator pursuant to 760 CMR 56.03(3)(b)3. We find that the seven parcels are privately owned and rule they must be included in the denominator.

Neither party has identified the total acreage of the seven disputed parcels. In his pre-filed rebuttal testimony, Mr. Nelson stated that the total acreage of the seven parcels, as well as the two charitable parcels the Board returned to the denominator, is 10.089 acres, leading him to add 10.089 to Ms. McKnight's denominator of 5,955.172 acres identified in her earlier rebuttal testimony. *See* Exhs. 14, ¶¶ 4-5; 13-6, p. 113. Ms. McKnight's final 5,954.113-acre denominator in her sur-rebuttal testimony is lower than her earlier figure, based upon adjustments specifically including the addition of the two charitable properties to the denominator, among others. *See* Exhs. 16, ¶¶ 3, 6, 9; 16-1. She did not identify the specific acreage for the two charitable properties, nor has she shown the acreage representing the seven disputed properties that she removed from the denominator. Consistent with our precedents, we find this omission undercuts the credibility of the Board's final denominator, resulting in a failure to establish its denominator. *See, e.g., Stoneham, supra*, No. 2014-10, slip op. at 5-6 (where board did not adequately explain difference between total area in town and its "total land area" figure, it "failed to provide sufficient evidence from which a finding of the General Land Area Minimum may be made"); *Waltham, supra*, No. 2016-01, slip op. at 13-14 (board's obligation to prove elements of land area minimum safe harbor includes "presenting sufficient comprehensible and credible evidence from which a persuasive calculation of land area may be made"); *Norwood, supra,* No. 2015-06, slip op. at 9 (argument, with no evidence to support methodology, is inadequate to sustain burden); *see also Braintree, supra,* No. 2017-05, slip op. at 21-23. However, for the purposes of our analysis, we will add 10.089 to the Board's final denominator since the Board has not met its burden to prove a figure lower than 10.089 representing only the seven properties that must be included. Adding 10.089 to Ms. McKnight's final, and lower, total denominator of

5,954.113 acres would result in 5,964.202 acres. *See* Exhs. 16, ¶ 9; 16-1. We will use this total denominator for the purposes of our calculation.

E. The Numerator

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

> 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. The starting point for calculating the area of SHI Eligible Housing is determining the acreage of the SHI eligible housing units and impervious and landscaped areas directly associated with these units, and excluding areas not directly associated with the SHI eligible housing units. The GLAM Guidelines, through the definitions of "Actively Maintained" and Directly Associated Area," provide additional guidance in determining the directly associated impervious and landscaped areas. *See* Exhs. 8, § V, p. 3; 9-1, § V, p. 3.

To calculate the final acreage of SHI eligible housing, the countable units on the SHI must be identified, and then the percentage of units that are SHI eligible in each multi-unit development must be determined. 760 CMR 56.03(3)(b); *Waltham*, *supra*, No. 2016-01, slip op. at 27. The GLAM Guidelines describe the process of prorating the SHI eligible acreage for developments with less than 100 percent of the units on the SHI. Exhs. 8, § VI.3.3, p. 9; 8, App. A, § 3.4, p. 12; 9-1, § VI.3.3, p. 9.

For rental housing developments with at least 25 percent of the units reserved for low or moderate income housing, DHCD counts all units within the development on the SHI for the municipality. Exh. 7, 40B Guidelines, II.A.2.b.1; *see Braintree, supra*, No. 2017-05, slip op. at 10-11, citing *Norwood*, *supra,* No. 2015-06, slip op. at 11-12; *Stoneham, supra*, No. 2014-10, slip op. at 7, citing *Arbor Hill Holdings Ltd. P'ship v. Weymouth,* No. 2002-09, slip op. at 5 n.7 (Mass. Housing Appeals Comm. Order of Dismissal Sept. 24, 2003). Thus, all such units count as SHI eligible housing units for the purposes of determining land occupied

by the buildings and impervious and landscaped areas directly associated with the SHI eligible units.

For homeownership projects, and rental projects with less than 25 percent of the units reserved for low or moderate income housing, DHCD counts only the low or moderate income units on the municipality's SHI. Exh. 7, 40B Guidelines, II.A.2.b.1; II.A.2.c. For these two categories of development, where affordable units are interspersed among market rate units, the area directly associated with those units can be calculated for the entire development, and then "prorated" corresponding to the percentage of units in the development that are SHI eligible units.[13] *See* Exh. 8, App. A, § 3.4, p. 12; *Braintree, supra*, No. 2017-05, slip op. at 11, n.10 and cases cited. Finally, after a proration determination is made and any required adjustment performed, the GLAM Guidelines require comparison of the total acreage of SHI units and directly associated area to the minimum lot area required by zoning for an equivalent number of units. The guidelines then require that "the lower number—either the prorated area or the required lot area—is included towards the SHI Area calculation." [14] Exh. 8, App. B, Fig. 20, p. 14.

1. The Board's Calculation of the Numerator

Relying on testimony and exhibits of Ms. McKnight and calculations of Bret Whiteley, Senior GIS Analyst at CAI Technologies, the Board argues that the SHI eligible area is 35.58 acres. Board brief, p. 10, citing Exhs. 13, ¶¶ 7-8; 13-6.

The Board began with the acreage of buildings, and impervious and landscaped areas directly associated with SHI eligible housing units. It argues that the GLAM Guidelines

[13] Unless the SHI eligible units are easily distinguished from the remaining units for calculation of directly associated area, land area is measured as a percentage of the directly associated area of the entire site equal to the percentage of all units in the development that are SHI eligible units. *See* Exh. 8, App. A, § 3.4, p. 12; *see also Braintree, supra,* No. 2017-05, slip op. at 11; *Weymouth*, *supra,* No. 2002-00, slip op. at 5 n.7; *Cloverleaf Apartments, LLC v. Natick*, No. 2001-21, slip op. at 3-5 (Mass. Housing Appeals Comm. Mar. 4, 2002).

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

provision that excludes "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," means it can include zoning-required setbacks even if they are not within 50 feet of a building. Board brief, p. 15, citing Exh. 8, p. 3. It also argues that it appropriately included, as directly associated area, the off-site wastewater treatment and leach fields located on lots adjacent to the SHI parcels they serve—100 Lowell Road and 0 Peabody Court. *Id.*, p. 13, citing Exh. 13, ¶ 5. It also asserts it properly applied the 2018 GLAM guidelines for calculating group home acreage by including the entire group home parcels rather than just the calculated area directly associated with the SHI units. *Id.*, p. 11.

Ms. McKnight filed three sets of pre-filed testimony, each with a different total calculation of acreage for the numerator, and she stated on cross-examination that she relies on her calculations in her pre-filed Sur Rebuttal Testimony, Exhibit 16. Tr. 42-43. We therefore consider her opinion regarding the numerator acreage set out in her final pre-filed testimony. NY Ventures submitted the pre-filed direct and rebuttal testimony of Mr. Nelson, who disputed her calculation of all of these features. He described the specific exclusions he identified for each of the disputed properties. Exhs. 11, ¶¶ 24-46; 11-2; 14, ¶¶ 6-9; 14-A; 14-B. The developer's brief specifies its dispute with the Board's calculation for specific properties. NY Ventures brief, pp. 4-9.

2. Non-Actively Maintained Wooded and Vegetated Areas

DHCD promulgated the comprehensive permit regulations to interpret G.L. c. 40B, § 20. The provision relevant to calculation of the numerator for the general land area minimum states that "that proportion of the site area shall count that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units)." 760 CMR 56.03(3)(b). The GLAM Guidelines provide that:

> Features that generally will not be considered Directly Associated include: (a) ballfields, (b) wetlands, (c) 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, any Excluded Areas, and not limiting the foregoing, lot area in excess of what would be required under the zoning ordinance or bylaw provisions generally applicable in the zoning district, including any applicable zoning overlay district provisions….

Exhs. 8, § V, p. 3; 9-1, § V, p. 3.

The Board refers to Ms. McKnight's testimony that the use of the word "and" must mean "both." Board brief, p. 15, citing Tr. 48-49. She stated, "I thought it was a double negative where it will not be included if it's a vegetated area that's not within those setbacks or 50 feet of the footprint, meaning that it would be included if it was." *Id.* For this reason, for multiple sites of SHI eligible housing, she included acreage attributed to required setbacks, even when her calculation included portions of the parcel well beyond 50 feet from building footprints, and remote from the affordable housing. As the developer notes, we have already addressed this issue definitively in another Committee decision, *Braintree, supra,* No. 2017-05, slip op. at 15-16. 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). *See Commonwealth v. Aponte*, 71 Mass. App. Ct. 758, 761 (2008). We are also mindful that we should construe provisions of 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 GLAM 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. 8, App. B, 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…." Exhs. 8, § V,

p. 3; 9-1, § V, p. 3. Remote, non-actively maintained areas, as shown in the Board's aerial photographs with setbacks, 50-foot perimeters and lot boundaries, are not landscaping principally for the benefit of the development's residents.

The Board has presented no valid argument to abandon our interpretation of the GLAM Guidelines to be consistent with 760 CMR 56.03(3)(b)'s requirement to include only "impervious and landscaped areas directly associated with [SHI eligible] units." Accordingly, as we have previously ruled, we will only include non-actively maintained wooded or vegetated areas as SHI eligible areas if they meet local yard dimensions and are within 50 feet of SHI building footprints.

In its brief, NY Ventures argues that the Board's calculations for certain SHI properties discussed below must be disregarded because they improperly included unmaintained wooded or vegetated areas that fail to meet both required yard dimensions and the 50-foot distance from SHI building footprints. *See* NY Ventures brief, pp. 4-9. Mr. Nelson criticized Ms. McKnight for including aerial maps of sites that show no numerical calculation of the areas the Board considers "GLAM Eligible Areas" under the 2018 Guidelines. He stated that the PDF images do not reflect an analysis of applicable zoning setbacks and that, for some sites, unmaintained wooded areas within either 50 feet of buildings or within required setbacks, but not both, are included. *See* Exhs. 11, ¶¶ 36-37, 39; 10-A. Mr. Nelson provided calculations for the following SHI sites that excluded what he stated were unmaintained wooded or vegetated areas not both within 50 feet of a building footprint and within a required setback.[15]

The Board did not address specific properties in its argument on this issue. Relying on its argument that eligible area should include all required yard setbacks in addition to area within 50 feet of buildings, the Board's final calculations included these areas, even though it did not provide evidence that areas that failed to meet both yard setbacks and the 50-foot boundary were actively maintained. *See* Exh. 16, ¶¶ 15-16. Since the Board did not address

[15] Although Mr. Nelson identified five specific properties for which the Board improperly counted unmaintained wooded or vegetated area not meeting distance criteria, *see* Exhs. 11, ¶ 37; 14, ¶ 9, his aerial photographs show that the Board's calculations for other properties also include setbacks outside the distance criteria. *See* Exh. 14-B.

these properties specifically in its briefs, it has waived arguments relating to specific property disputes unrelated to its general disagreement with the Committee's ruling requiring that unmaintained areas must be within both required yard area and the 50-foot boundary.[16] Moreover, it has waived argument regarding features Ms. McKnight testified to that might have been included if the Board had provided adequate supporting evidence of the acreage specifically for those features. Below are the final calculations provided by the parties:

53 Swan Pond (DHCD 2261). Mr. Nelson calculated 0.808 acres of SHI eligible acreage. Exh. 14-B. The Board's witnesses calculated 1.589 acres including the contested unmaintained wooded areas within setbacks beyond the 50-foot boundary, which the Board did not demonstrate was actively maintained. Exhs. 14-B; 16, ¶ 16; 16-1; 13-1F; 16-5. We find Mr. Nelson's acreage calculation to be more credible and therefore accept it.

Fairview Terrace (DHCD 2262). This SHI development consists of three separate sites with the same DHCD identification number. For the first of the three properties, Fairway Terrace Estates, 5 Fairway Road, Mr. Nelson calculated 0.349 acres of directly associated area, excluding a wooded area that the Board included. Exhs. 14-A; 14-B. The Board's witnesses calculated 0.386 acres for 5 Fairview Road. Exhs. 16, ¶ 16; 16-1; 13-1B; 16-5. The aerial photographs supplied by the witnesses show that the area Mr. Nelson excluded is wooded, and the Board has not shown that this specific area is actively maintained. Accordingly, we find Mr. Nelson's calculation is more credible and accept it.

For the second site, 9 Pluff Road, the parties agreed that the site has 0.25 acres of directly associated area. Exhs. 14-B; 16-1.

For the third site, 17 Algonquin Road, Mr. Nelson calculated 0.208 acres as directly associated. Exh. 14-B. The Board's witnesses calculated 0.386 acres, including a disputed wooded setback area beyond the 50-foot boundary. Exhs. 14-B; 16, ¶ 16; 16-1; 13-1B; 16-5.[17] We find Mr. Nelson's calculation more credible as the Board has not shown the disputed wooded area is actively maintained.

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[16] *See* note 6, above.

[17] In his total numerator calculation, Mr. Nelson included only his acreage of 0.349 acres for 5 Fairway Road, apparently inadvertently omitting the acreage for the two other properties, although his aerial photographs provided the specific figures directly associated acreage for those two properties. *See* note 25, below.

333 Park Street (DHCD 2263). Mr. Nelson calculated 0.806 acres of SHI eligible acreage. Exh. 14-B. The Board's witnesses calculated 1,346 acres including the contested wooded area, which the Board has not shown to be actively maintained. Exhs. 16, ¶ 16; 16-1; 16-5. We find Mr. Nelson's calculation is more credible, and we accept it.

193 Elm Street (DHCD 7165). Ms. McKnight identified this property as having 28 ownership units, of which 7, or 25 percent, are SHI eligible. Exh. 16-1. Ms. Sweet testified that only 25 percent of the ownership units are SHI eligible. Exh. 12, ¶¶ 43-44; 15, ¶ 8. Mr. Nelson calculated 4.083 acres of SHI eligible acreage. Exh. 14-B. He testified that the prorated acreage is 1.033 acres, although 25 percent of 4.083 is calculated to be 1.02 acres. Exh. 11, ¶ 39. The Board's witnesses calculated 1.401 acres including the contested wooded area, which the Board has not shown to be actively maintained. Exhs. 16, ¶ 16; 16-1; 16-5. We find Mr. Nelson's calculation is more credible, and we accept it.

63 Central Street (DHCD 7893). Ms. McKnight identified this property as having 26 ownership units, of which 7, or 26.9 percent, are SHI eligible. Exh. 16-1. Mr. Nelson calculated 2.798 acres of directly associated area. Exh. 14-B. Mr. Nelson's directly associated acreage when prorated is 0.753.[18] The Board's witnesses calculated 0.980 acres as prorated, including the contested wooded area, which the Board has not shown to be actively maintained. Exhs. 16, ¶ 16; 16-1; 16-5. We find the developer's evidence more credible and include 1.02 acres as SHI eligible area for this property.

1-8 Pilgrim Road (DHCD 7894). Ms. McKnight identified this property as having 14 ownership units, of which 4, or 28.6 percent, are SHI eligible. Exh. 16-1. Mr. Nelson calculated 1.738 acres of directly associated acreage based on two adjustments. In addition to excluding unmaintained wooded areas not meeting distance criteria, he excluded a portion of a neighboring property's pool and yard that had been included as directly associated by the Board. After prorating the acreage, his calculation resulted in 0.497 acres. Exhs. 11, ¶ 39; 14-B; 16-5.

The Board's witnesses calculated 0.672 acres including all wooded contested areas and the off-site pool area. Exhs. 16, ¶ 16; 16-1; 16-5. As an explanation for including the

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[18] NY Ventures argues the resulting acreage should be 0.755 acres. NY Ventures brief, p. 6.

neighboring pool area, Ms. McKnight testified that the Board's GIS consultant, Breton James Whitely, had explained that:

> [t]he obvious spatial shift of the pool and parcel lines from abutting property … is a result of a misalignment of the compilation of property line data when overlaid on the aerial orthophotograph … [and that] it is assumed that the parcel lines are representatively accurate for GIS analysis purposes, and as such, no further adjustment of the lines is deemed necessary.

Exh. 16, ¶ 16.g. *See* Exhs. 16-1; 16-4E; 16-5; Tr. 45-47, 58, 61. While Ms. McKnight's account of Mr. Whitely's calculation may be correct, the aerial photograph clearly shows inclusion of a portion of the abutter's pool area, which the Board has not shown to be directly associated with the SHI units; therefore, it has not credibly established a basis for its inclusion. Since the Board has not demonstrated that the disputed wooded area is actively maintained, we find the more credible calculation of the SHI eligible area for this property is Mr. Nelson's calculation of 0.497 acres.

50 Mt. Vernon Street. Ms. McKnight identified this property as having 36 ownership units, of which 9, or 25 percent, are SHI eligible. Exh. 16-1. Mr. Nelson calculated 6.388 acres of directly associated area. The parties prorated the eligible acreage to include 25 percent of such acreage. The developer's calculation resulted in 1.597 SHI eligible acres. Exh. 14-B; NY Ventures' brief, p. 7. The Board's witnesses calculated 1.998 acres including the contested wooded area, which the Board did not show was actively maintained. Exhs. 16, ¶ 16; 16-1; 16-5; 16-6. We find Mr. Nelson's acreage calculation to be more credible and accept it.

153 Marblehead Street (DHCD 9764). Mr. Nelson calculated 0.57 acres of SHI eligible acreage. Exh. 14-B. The Board's witnesses calculated 1.477 acres including the contested wooded areas. Exhs. 16, ¶ 16; 16-5. The Board did not demonstrate that these contested areas were actively maintained; therefore, we find Mr. Nelson's calculation to be more credible and accept it.

100 Lowell Road (DHCD 9060). Mr. Nelson calculated 20.089 acres of SHI eligible acreage for this site. His calculation also excluded an offsite leaching field.[19] The Board's witnesses calculated 24.334 acres including the offsite leaching field and disputed wooded

[19] *See* discussion in § II.E.3 below.

area, which the Board did not demonstrate is actively maintained. Exhs. 16, ¶ 16; 16-1; 16-5. We find Mr. Nelson's calculation to be more credible and accept it, as we discuss further below.

As discussed above, we find the developer's calculations for the above sites to be more credible than those of the Board. *See* Exhs. 10-A; 11, ¶ 36; 13, ¶ 4; 13-1A-1J; 16-5; Tr. 48-50. Therefore, we accept the developer's calculations and include them in our calculation of the numerator.

3. Off-Site Features

The Board included as areas directly associated with SHI eligible units the wastewater treatment and leach fields located on lots adjacent to two SHI parcels, 0 Peabody Court and 100 Lowell Street. Exh. 13, ¶ 5; 13-6. NY Ventures challenges the inclusion of these off-site features in SHI eligible area, arguing that there is no basis under the GLAM Guidelines to include an offsite leaching field that is not subject to an exclusive easement.

0 Peabody Court (DHCD 2260). The SHI property at 0 Peabody Court is served by an offsite leaching field. The Board argues that the acreage it assigned to the offsite leaching field should be included as directly associated because the GLAM Guidelines state that "… examples of such associated area include "community facilities … exclusively or principally intended for use by residents of the development containing SHI Eligible Housing units." Board brief, p. 13, citing 2018 GLAM Guidelines, Exh. 8, § V, p. 3. Ms. McKnight submitted evidence that the total calculated directly associated area for this property was 3.656547 acres. Exh. 16, ¶ 9; 16-1. The Board contends that this area must be included because the housing development could not exist without the leaching field.

NY Ventures argues this standard does not exist in the regulations or guidelines. It also argues that the off-site leaching field is not subject to an exclusive easement for the benefit of the SHI development. Mr. Nelson agreed with the Board that the entire Peabody Court parcel is countable as SHI eligible area in the amount of 3.026 acres but disagreed that the acreage of the offsite leaching field was eligible. He stated that the offsite area where the leaching field was located is used by an adjacent school for parking, bleachers and equipment associated with its ballfield. Exhs. 14-A; 14- B; 14-C; 14, ¶ 7. NY Ventures' witness, Lynne Sweet, testified that the grant of easement from the Town of North Reading

to the North Reading Housing Authority, allowing the housing authority to construct a sewage disposal leaching field for the Peabody Court housing development, does not state the easement is exclusive. Exh. 15, ¶ 5. Ms. McKnight acknowledged that the easement does not state that it is exclusive, and she agreed that the field has been used for equipment related to the sports field for North Reading High School. Tr. 34-35. She testified that "[t]he easement area is on the northeast corner of a baseball field for North Reading High School" and "has at times contained temporary equipment storage and a small spectator stand." Exh. 16, ¶ 2. While she agreed the leach field was not the exclusive use for the area, she stated she believed it was the primary use, and without the leach field, the housing development could not exist because no municipal sewer is available in the area. *Id*. She stated the eligible acreage for this property was 3.657 acres. Exh. 16-1.

100 Lowell Road (DHCD 9060). The SHI property at 100 Lowell Road is also served by offsite wastewater facilities. Board brief, p. 14; Tr. 75-76. *See* Exhs. 15, ¶¶ 3, 5; 15-A, 15-B; 16, ¶ 1; 16-5H; Tr. 75-76. As with Peabody Court, the Board argues that the acreage it assigned to that area should be included as directly associated. Board brief, p. 13, citing 2018 GLAM Guidelines, Exh. 8, § V, p. 3. Since the parties' disputes regarding 100 Lowell Road relate to more than the leaching field, the record does not indicate the acreage the Board attributes specifically to the leaching field. The Board's total calculated acreage for 100 Lowell Road is 24.333719 acres. Exh. 16-1. Mr. Nelson testified that his calculation of directly associated area for 100 Lowell Road, exclusive of wetlands, areas not within 50 feet of a building footprint and not within a required setback, and the offsite leaching field, is 20.089 acres. Exh. 11, ¶ 39. Ms. Sweet testified that the easement granted by the Commonwealth grants easements for wastewater disposal fields on the Commonwealth's property to both the Town and Lincoln North Reading, LLC, that are non-exclusive. She stated that the easement expressly reserved to the grantor the right to use the portion of the property on which the leaching field is located for purposes such as paved surface parking, drive lanes and associated landscaping. Exh. 15, ¶ 3. The developer argues that the grantor has reserved the right to support other development; thus, the affordable housing development does not have exclusive use, nor on this record has the Board demonstrated that the use is primarily for the residents of the affordable housing. NY Ventures brief, pp. 16-

17. Ms. McKnight agreed that the easement was not exclusive, Tr. 35, since "the Town could choose to pursue some other use in the future, in addition to the leach field that exists," she stated that she believed the leach field was the principal use and the area was not currently used for any other purpose. Exh. 16, ¶ 1.

We have previously considered whether off-site features should be included in SHI eligible area in *Norwood, supra,* No. 2015-06. That decision was rendered before any GLAM Guidelines had been issued by DHCD. In *Norwood,* the Committee allowed the inclusion of 0.4 acre offsite containing a portion of a detention basin constructed for the project that lay partially on and partially outside the project parcel. The detention basin was to receive stormwater runoff from impervious parking areas and from piping from the parking area. Other than collecting rainwater, the basin only served the development, which was required to maintain it. Noting that the off-site acreage was in common ownership with the project parcel, we treated it as a landscaped area that was integral to the site and included it in SHI eligible area. *Id.* at 15-16.

The GLAM Guidelines make clear that the calculation of directly associated area refers to area on project parcels. The GLAM Guidelines and instructions provide that SHI eligible area is located on SHI sites, defined as "[t]he parcels or portions thereof containing SHI Eligible Housing units." Exh. 8, p. 5. The steps required for calculating acreage involve identifying the relevant parcels. *See* Exh. 8, App. B, Fig. 14, p. 11; Fig. 18, p. 13 (referring to review of parcel area). For each of the above SHI sites, other than Fairview Terrace, Ms. McKnight's table of calculations refers to the existence of only one parcel. Exh. 16-1.

The GLAM Guidelines provide instructions for calculation of acreage are based on determining directly associated area which is generally defined as "[l]andscaping maintained principally for the benefit of the residents of a development containing SHI Eligible Housing and impervious surfaces adjacent to such a development that may be included in the SHI-Eligible Area." Exhs. 8, § V, p. 3; 9-1, § V, p. 3. To be directly associated, areas beyond the 50-foot boundary must be either "exclusively or principally intended for use by residents of the development containing SHI eligible units." Exhs. 8, § V, p. 3; 9-1, § V, p. 3. This provision refers only to areas on the identified SHI parcels. The question of what offsite services should count as part of the SHI site need not be decided here, since in any case, a

board must demonstrate that the offsite land area is exclusively for the use of the SHI development, with any other use only incidental, such as treatment of rainwater than happens to enter a detention basin, as was the case in *Norwell*.

The fact that the use of the wastewater system leaching fields themselves is exclusively for the two respective SHI sites does not resolve the issue, because the respective easements are not exclusive and allow other uses of the property. The 0 Peabody Court field is actively used by the Town for its high school. The 100 Lowell Road field is subject to other governmental use. Accordingly, we find that neither leaching field should count as directly associated area. We find more credible Mr. Nelson's calculation of acreage for these two properties and accept his calculations: for 0 Peabody Court, we will include 3.026 acres and for 100 Lowell Road, we will include 20.089 acres.

4. DDS Group Homes (DHCD 4399)

Under the 40B Guidelines, SHI eligible housing includes properties of group homes operated by DDS and DMH. Exh. 7, § II.A.2.e. The calculation of group home acreage has been challenging in all instances in which it has been at issue. In early proceedings, to obtain the acreage of group homes, parties resorted to actions in court to obtain DDS or DMH group home addresses, subject to a protective order, which led to substantial delay. *See, e.g., Waltham, supra*, No. 2016-01; *Arlington, supra,* No. 2016-18; *Stoneham, supra,* No. 2014-10. The GLAM Guidelines, in addition to addressing details of calculation of aspects of the denominator as well as the numerator generally, are intended to address the difficulties of determining eligible area of confidential group home addresses. Under the GLAM Guidelines, MassGIS could obtain the confidential group home addresses from DDS and DMH to calculate the acreage of those addresses.[20] The 2018 GLAM Guidelines provide that for group homes the acreage of the entire parcel would be presumed to be directly associated:

[20] The 2018 GLAM Guidelines state, "DHCD has established a process through which addresses may be furnished by DDS and DMH to MassGIS on a confidential basis so that the acreage occupied by these homes can be calculated by MassGIS and provided to a municipality that has indicated its intent to invoke the General Land Area Minimum Safe Harbor in response to a Comprehensive Permit application pursuant to 760 CMR 56.03." Exh. 8, p. 2.

Michael Trust, Senior GIS Coordinator and Database Administrator for EOTTS, stated in his affidavit that he administers the MassGIS warehouse of geographic information. He stated that 2017 MassGIS has been engaged in an interdepartmental service agreement (ISA) with DHCD, DMH and DDS, whereby "MassGIS provides acreage calculations for properties maintained by DMH and DDS

> Due to the privacy-related limitations on sharing of Group Home acreage, DHCD has determined as a matter of policy that supportive documentation of Directly Associated Areas with respect to Group Homes will not be required and Directly Associated Areas will be presumed to be included in the Group Homes Acreage Calculation.

Exh. 8, § V, p. 3. The GLAM Guidelines were revised in 2020 to state:

> Due to the privacy-related limitations on sharing of Group Home acreage, DHCD has determined as a matter of policy that supportive documentation of Directly Associated Areas with respect to Group Homes will not be required. Instead, the calculation of Directly Associated Areas for Group Homes will be performed by MassGIS as part of the Group Homes Acreage Calculation.

Exh. 9-1, § V, p. 3.

The Board contends that the 2018 GLAM Guidelines, not the 2020 GLAM Guidelines, are applicable as they were in effect on the date of the developer's comprehensive permit application, stating the presiding officer had noted that the 2018 GLAM Guidelines were in effect on that date and that the 2020 GLAM Guidelines had "changes not material to the current appeal." *Ruling on Motion to Join [DHCD] as an Intervener or Interested Person …,* August 28, 2020.

The developer's expert, Mr. Nelson, testified that based on his determinations of what the group home sites were and his calculation of SHI eligible area, the eligible acreage for group homes was 9.191 acres. Exh. 11, ¶ 60. Ms. McKnight testified that before this appeal was brought, she undertook several efforts to determine the Town's percentage of SHI eligible housing. Both her own "rough" estimate, and a calculation made with the Town's GIS coordinator, using the 2018 GLAM Guidelines, she stated, resulted in SHI eligible area of less than 1.5 percent. Exh. 10, ¶¶ 3-5, 7-16. Included in this work, the GIS coordinator calculated a group home eligible acreage of 13.1261 acres.[21] *Id.,* ¶ 13. During this time, the Town also requested that MassGIS calculate group home acreage. *Id.,* ¶¶ 6-11. Thereafter,

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for purposes of Chapter 40B and its regulations without necessitating public disclosure of confidential group homes. Exh. 9, ¶¶ 4-5.

[21] On cross-examination, Ms. McKnight testified that she no longer agreed with that calculation and now relies on the calculations presented in her sur-rebuttal testimony. Tr. 42-43; Exh. 16, ¶¶ 3-4, 6, 14-15, 17.

the Town received an "email from the state indicating the group home acreage as calculated by Mass GIS was 59.14." *Id.* ¶ 18.

In response to a subpoena issued for his appearance at the hearing, Michael Trust, Senior GIS Coordinator and Database Administrator for the Executive Office of Technology Services and Security (EOTSS), submitted an affidavit. After receiving the affidavit, the parties ultimately waived cross-examination of Mr. Trust. *See Scheduling Order,* January 20, 2022; Tr., *passim*. In his affidavit, Mr. Trust stated that the total unadjusted acreage of all group homes identified by DDS to MassGIS was 59.14 acres. Exh. 9 (Trust Affidavit), Questions 2-4, p. 3. He also performed a calculation of the SHI eligible area for these group homes under the current version of the interagency agreement and stated it would include subtracting 51.91 acres of non-directly associated area from the 59.14 acres to get a final group home acreage of 7.23 acres. *Id.*, Questions 5-6, pp. 3-4.

The Board included 59.14 acres for group homes based on the 2018 GLAM Guidelines, which state that directly associated area will be "presumed to be included in the group homes acreage calculation." Exh. 8, § V, p. 3. It argues that the Committee must apply the 2018 GLAM Guidelines as the applicable guidelines in effect at the time of the developer's application and the Board's decision, citing *Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 54 (2013); *Town of Middleborough v. Housing Appeals Comm*., 449 Mass 514, 517 n.8 (2007); *Zoning Bd. of Appeals of Mansfield v. Housing Appeals Comm.*, 74 Mass. App. Ct. 1117, n.2 (2009). Board brief, p. 12.

Under the 2018 GLAM Guidelines, the Board argues, supportive documentation of group homes was not required. Rather, DHCD provided the total group home acreage for the Town to include in its calculation. Board brief, p. 12. The Board argues that there was no directive to MassGIS to calculate directly associated area and MassGIS did not have any of the zoning data to do so; therefore, the Board correctly used the MassGIS total site acreage figure 59.14 acres. *Id.,* pp. 12-13. In addition, the Board argues that Mr. Trust stated that: "The previous version of the [interagency agreement between DHCD and EOTSS], which governed the MassGIS process at the time of this calculation, did not include a directive to account for land cover and non-Directly Associated Area." Exh. 9, Question 3.

NY Ventures argues that the Board's reliance solely on the presumption in the 2018 GLAM Guidelines ignores subsequent amendments in the 2020 Guidelines that make clear that the 2018 Guidelines always required the group home calculation should reflect only directly associated areas and required proration based on percentage of SHI eligible units. NY Ventures brief, p. 12. The developer further argues that Mr. Trust's testimony shows that the 59.14 acreage calculation provided in 2019 was unadjusted for directly associated area only because EOTSS was not directed to perform the adjustment, and when the 2020 GLAM Guidelines are followed, and MassGIS could address directly associated area, the correct calculation is 7.23 acres. NY Ventures reply brief, p. 3. Alternatively, the developer argues, even if the Board's argument regarding the guidelines is valid, the guidelines cannot override 760 CMR 56.03(3)(b), which requires inclusion only of areas directly associated with SHI units. *Id.,* pp. 3-4.

Whether we apply the 2018 or the 2020 GLAM Guidelines, the result is the same. First, all the 2018 GLAM Guidelines provide is that the MassGIS calculation is presumed to address directly associated area. Exh. 8, § V, p. 3. However, Mr. Trust's affidavit attesting to the calculated area that is directly associated with the group home units rebuts that presumption with direct evidence.[22] Mr. Trust made clear that the original calculation was not adjusted for directly associated area, and when the adjustment was made, the resulting figure

[22] In the context of determining what units are eligible for determining SHI eligible area, we have previously stated that even though 760 CMR 56.00 provides 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. Similarly, the review procedure available before DHCD under § 56.03(8) applies to de novo proceedings before the Committee. Finally, we rule that the presumption stated in the 2018 GLAM Guidelines is a rebuttable presumption. A review of 760 CMR 56. 07(3)(a) demonstrates DHCD has specifically stated when a presumption is irrebuttable. A ruling that a presumption is irrebuttable, barring parties from introducing relevant evidence, should not be made lightly.

showing the actual directly associate acreage was greatly reduced—by 51.91 acres.[23] Second, 760 CMR 56.03(3)(b) requires exclusion of areas that are not directly associated with SHI eligible units. Even though group homes are not specifically referenced in the regulation, § 56.03(3)(b) is clear that all SHI sites shall be adjusted for directly associated area. As we discuss above in § II.B, the courts have made clear that guidelines may fill in the gaps of regulations but may not conflict with them. *See, e.g., Boston Ret. Bd.,* 441 Mass. 78, 83-84; *Massachusetts Gen. Hosp.,* 371 Mass. 705, 707; *Zoning Bd. of Appeals of Amesbury,* 457 Mass. 748, 759, n.17; *Zoning Bd. of Appeals of Milton,* 490 Mass. 257, 265-266. The testimony of Ms. McKnight and Mr. Nelson providing calculations of 9.191 acres and 13.1261 acres, respectively, confirm that the true directly associated acreage for group homes is significantly below the 59.14 acres identified with the presumption in the 2018 GLAM Guidelines. Exhs 11, ¶ 60; 10, ¶ 13. Moreover, acceptance of Mr. Trust's group home acreage counting only directly associated area is consistent with 760 CMR 56.03(3)(b). The 2020 GLAM Guidelines, which establish a mechanism for MassGIS to provide credible evidence of directly associated area, are consistent with § 56.03(3)(b). The calculation by Mr. Trust under the 2020 GLAM Guidelines provided a credible acreage for group home SHI eligible area. Thus, the rationale for the presumption in the 2018 Guidelines no longer exists, and the 2020 GLAM Guidelines, which now require MassGIS' calculation of directly associated area for group homes, confirm that the requirement of § 56.03(3)(b) to do so applies for all SHI eligible sites.[24]

Therefore, we find that the most credible figure for group homes is that reached by the calculation of Mr. Trust based on information from DDS regarding the group home sites in the town. We therefore adopt his group home calculation of 7.23 acres and include that figure in the numerator.

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[23] The substantial difference of almost 52 acres between Mr. Trust's two calculations highlights how reliance on parcel boundaries alone for the calculation can artificially increase SHI eligible area beyond areas directly associated with SHI units.

[24] We also note that the parties' witnesses, Ms. McKnight and Mr. Nelson, both acknowledged that they had expected to adjust for directly associated area for group homes. Exhs. 10, ¶ 11; 11, ¶ 7.

5. Numerator Conclusion

As shown in the table below, based on their calculations of directly associated area, the Board's witnesses identified a total of 97.612 acres of SHI eligible area. *See* Exh. 16, ¶ 17; 16-1. Mr. Nelson testified that he calculated 38.582 acres of SHI eligible area. Exh. 11, ¶¶ 61, 71; 14, ¶¶ 5, 11. However, his individual calculations of SHI eligible area for each SHI site described above, as well as group homes, as entered on the table below, when added together, amount to 39.166 acres of SHI eligible area.[25] Exhs. 14-A, 14-B. Below is the calculation of acreage for the disputed developments:

Contested Projects	Board Acreage	NY Ventures (Nelson) Acreage	Committee (adopting MassGIS acreage)
53 Swan Pond	1.589	0.808	0.808
5 Fairway Road, Fairview Terrace	0.386	0.349	0.349
9 Pluff Ave	0.25	0.25	0.25
17 Algonquin Road	0.384	0.208	0.208
333 Park Street	1.346	0.806	0.806
193 Elm Street	1.401	1.02	1.02
63 Central Street	0.980	0.753	0.753
1-8 Pilgrim Road	0.672	0.497	0.497
50 Mt. Vernon Street	1.998	1.597	1.597
153 Marblehead Street	1.477	0.57	0.57
100 Lowell Street	24.334	20.089	20.089
0 Peabody Court	3.657	3.026	3.026
Total Contested Projects (non-Group Home)	38.472	29.973	29.973
Group Homes on SHI	59.14	9.191	7.23
Total Numerator	**97.612**	**39.164**	**37.203**
Denominator	**5954.113**	**5965.261**	**5964.202**
Percentage	**1.629%**	**0.657%**	**0.657%**

The above eligible acreage for the individual SHI sites found by the Committee totals 37.205 acres.

[25] Mr. Nelson's calculation of 38.582 acres did not include 9 Pluff Avenue and 17 Algonquin Road, part of the Fairview Terrace SHI site. *See* Exh. 11, ¶ 13, 17. Adding these properties to his figure brings the total to 38.708 acres. The discrepancy between this and the total reached through addition of the acreage figures for the specific sites is *de minimis* and has no impact on the outcome.

F. Final Calculation of the Percentage of SHI Acreage

Based on the credible evidence submitted by the parties, we find that the denominator is 5,964.202 acres. The numerator is 37.203 acres. The resulting percentage representing the acreage for SHI eligible units is 0.657%, well below the safe harbor of 1.5%. Therefore, the Board has failed to meet its burden of proof that North Reading 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 is remanded to the Board for further proceedings.

HOUSING APPEALS COMMITTEE

October 10, 2023

Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain

Rosemary Connelly Smedile

James G. Stockard, Jr.