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

OXFORD ZONING BOARD OF APEALS

and

722 MAIN STREET, LLC

No. 2021-11

SUMMARY DECISION

November 16, 2022

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SUMMARY DECISION

I. PROCEDURAL BACKGROUND

This is an interlocutory appeal to the Housing Appeals Committee (Committee) brought by the Oxford Zoning Board of Appeals (Board), pursuant to 760 CMR 56.03(8)(c). The Board has appealed a determination by the Department of Housing and Community Development (DHCD) that the Town of Oxford (Town) has not met the general land area minimum, one of three statutory safe harbors that establishes that requirements and regulations imposed by a zoning board's decision, after hearing, are consistent with local needs under the Comprehensive Permit Law, G.L. c. 40B, § 20. The comprehensive permit regulations, 760 CMR 56.00, *et seq.*, also make clear that any decision by a board to deny a comprehensive permit or grant a permit with conditions will be deemed consistent with local needs if the municipality has achieved one of these safe harbors. G.L. c. 40B, § 20; 760 CMR 56.03(1)(a). The general land area minimum safe harbor is met if low- or moderate-income housing exists on sites comprising 1.5 percent or more of all land zoned for residential, commercial, or industrial use in a municipality. G.L. c. 40B, § 20; 760 CMR 56.03(3)(b).

On September 10, 2021, 722 Main Street, LLC (Developer) filed an application for a comprehensive permit with the Board for a 144-unit rental development on property located at 722 Main Street in Oxford. The hearing on the application opened on October 7, 2021, and the

Board orally informed the Developer that, pursuant to 760 CMR 56.03(b), it intended to assert the statutory 1.5 percent general land area minimum safe harbor. Pursuant to 760 CMR 56.03(8)(a), the Board notified the Developer and DHCD in writing by letter dated October 20, 2021 that it invoked the general land area minimum safe harbor. The Developer challenged the Board's safe harbor assertion on October 27, 2021.

On November 19, 2021, DHCD issued its determination that the Board had not met its burden of proving sufficient grounds for asserting the general land area minimum safe harbor as defined under 760 CMR 56.03(3)(b). The Board appealed DHCD's decision to the Committee on December 6, 2021. On February 28, 2022, following an initial conference of counsel and a pre-hearing conference, the Developer filed a motion for summary decision. It argues that the Board did not properly calculate the Town's general land area minimum and therefore has not met the statutory minima. The Board filed an opposition to the Developer's motion on March 30, 2022. The Board argues that it has met the 1.5 percent general land area minimum threshold and, alternatively, claims there are significant factual disputes regarding the Board's inclusion of certain areas in its calculation that may only be resolved through an adjudicatory hearing. For the reasons discussed below, the Developer's motion for summary decision is granted.

II. STANDARD OF REVIEW AND DISCUSSION

Like all appeals to the Committee, this interlocutory appeal is *de novo*. G. L. c. 40B, § 22; *Matter of Pembroke and River Marsh LLC*, No. 2019-04, slip op. at 2 (Mass. Housing Appeals Comm. Summary Decision July 20, 2020), citing *Matter of Waltham and Alliance Realty Partners*, No. 2016-01, slip op. at 5 (Mass. Housing Appeals Comm. Interlocutory Decision Feb. 13, 2018*); Matter of Hingham and River Stone, LLC*, No. 2016-05, slip op. at 2 n.2 (Mass. Housing Appeals Comm. Interlocutory Decision Oct. 31, 2017); *see also Hanover v. Housing Appeals Committee*, 363 Mass. 339, 368-371 (1973). This appeal is not limited to evidence submitted to DHCD, nor will DHCD's decision carry any evidentiary weight. *Pembroke*, No. 2019-04, slip op. at 3, citing *Kirkwood v. Board of Appeals of Rockport*, 17 Mass. App. Ct. 423, 426-427 (1984).

At hearing, 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 Matter of Braintree and 383 Washington Street, LLC*, No. 2017-05, slip op. at 32 (Mass. Housing Appeals Comm. June 27, 2019); *Matter of Norwood and Davis Marcus Partners*, No. 2015-06, slip op. at 19 (Mass. Housing Appeals Comm. Dec. 8, 2016). The Developer 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.

Summary decision, however, 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 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*, *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*, No. 2005-11, slip op. at 4 (Mass. Housing Appeals Comm. July 10, 2006). Thus, the question here is whether on the record currently before the Committee there is sufficient undisputed evidence to establish that on the date of the comprehensive permit application, the Town had not met the general land area minimum as a matter of law. *Pembroke*, No. 2019-04, slip op. at 3, citing *Matter of Hingham and AvalonBay Communities, Inc*., No. 2012-03, slip op. at 6, n.8 (Mass. Housing Appeals Comm. Interlocutory Decision Jan.14, 2013).

More particularly, at this stage we examine whether the undisputed evidence, when considered in the light most favorable to the nonmoving party (here, the Board), is legally sufficient to support a decision in favor of the movant. *See Warren Place, supra,* 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). "The mere existence of a scintilla of evidence" to support the nonmoving party's position is insufficient. *Donaldson, supra* at 96, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "[T]he evidence must contain facts from which reasonable inferences based on probabilities rather than possibilities may be drawn …. And the evidence must be sufficiently concrete to remove any inference which the [fact

finder] might draw from it from the realm of mere speculation and conjecture." *Litchfield Heights, supra,* No. 2004-20, slip op. at 4, quoting *Alholm v. Wareham,* 371 Mass. 621, 627 (1976) (citations omitted). The motion should be denied "[i]f, upon any reasonable view of the evidence, there is found a combination of facts from which a rational inference may be drawn in favor of the [nonmoving party]." *Litchfield Heights*, *supra* at 5*, quoting Chase v. Roy*, 363 Mass. 402, 404 (1973).

III. ISSUES FOR SUMMARY DECISION

A. Statutory and Regulatory Framework

General Laws, chapter 40B, section 20 provides that:

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

Thus, the general land area minimum is met if the land area in the municipality dedicated for use as housing for low or moderate income households is 1.5 percent or more of all land zoned for residential, commercial, or industrial use, subject to certain exclusions. G. L. c. 40B, § 20. *See also* 760 CMR 56.03(3)(b) (general land area minimum).

The comprehensive permit regulations state that in a municipality that has met the safe harbor, the zoning board's denial of a comprehensive permit or grant of a permit with conditions will be upheld by the Committee. 760 CMR 56.03(1)(a). The regulations provide clarification and further detail regarding how this determination is to be made. 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, 760 CMR 56.03(3)(b) states that:

> Only sites of SHI Eligible Housing units inventoried by [DHCD] or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the

> Applicant's initial submission to the Board, shall be included toward the 1.5% minimum. For such sites, that proportion of the site area shall count that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units).

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

DHCD has also issued two sets of guidance that address methods for evaluating whether the Town has met the general land area minimum: 1) the Guidelines for Calculating General Land Area Minimum, dated January 17, 2018, revised January 31, 2020 (GLAM Guidelines), *see* Exh. 3); and 2) the Guidelines, G.L. c. 40B Comprehensive Permit Projects Subsidized Housing Inventory, updated December 2014 (40B Guidelines).[1]

B. The Developer's Argument in Support of Summary Decision

One particular development, New Orchard Hill Estates (Orchard Hill) is the primary focus of both parties in their disputed general land area minimum calculations. The Developer argues the Town cannot meet the 1.5% general land area minimum, based on the Board's own evidence, and therefore the Developer is entitled to summary decision in its favor. Developer's Motion for Summary Decision, p.5. The Developer argues that the Town improperly included as directly associated area portions of Robinson Pond the Board claims are owned by Orchard Hill, in contravention of the comprehensive permit regulations and the 40B Guidelines. The Developer asserts the Robinson Pond acreage should be excluded from the Board's general land area minimum calculation, in accordance with 760 CMR 56.03(b)(5), which states "[t]otal land area shall exclude any water bodies[.]" Developer's Reply, p. 4. The Developer argues the exclusion of the Robinson Pond acreage alone is enough to bring the Town below the 1.5% general land area minimum and is a sufficient basis for granting summary decision in its favor.

The Developer also argues that the Town has improperly included the majority of Orchard Hill's wooded areas as "actively maintained." *See* Motion, pp. 5-7; Reply, pp. 2-4.

[1] Neither party attached the 40B Guidelines as an exhibit.

C. The Board's Argument

The Board's primary argument involves the GLAM Guidelines: it argues that DHCD's application of the GLAM Guidelines to the Town's assertion of safe harbor was unlawful, because they have no binding authority or force of law. *See* Board's Opposition to Respondent's Motion for Summary Decision, pp. 5-7. Because the GLAM Guidelines were not promulgated as a regulation, the Board asserts, they cannot operate to legally bind the Town or preclude it from its safe harbor calculations, nor be used as evidence that the Town has not adequately met its burden of proof under the statute and regulations. *Id.*, p.8. Alternatively, the Board argues, should the GLAM Guidelines validly apply, disputed material facts are present which prevent a summary decision. *Id*., p. 12. Specifically, the Board states that whether the portion of Robinson Pond owned by Orchard Hill constitutes "directly associated area" for purposes of a GLAM calculation is the first of two fact intensive inquiries that must be evaluated at a *de novo* adjudicatory hearing. *Id*. The second alleged factual dispute involves the wooded areas on the Orchard Hill site, and whether trails within them are actively maintained and therefore qualify as directly associated areas. *Id*., pp. 15-17.

D. Summary Decision Factual Record

The Board identifies as a factual issue whether the Town lawfully included certain acreage as directly associated area in its numerator calculation. Opposition, p. 12. Regarding Robinson Pond, the Board states it expects to present testimony from individuals with first-hand knowledge of the use of the pond by the Orchard Hill site, and the inclusion of the pond in its advertising, to demonstrate that the pond acreage constitutes Directly Associated Area. Opposition, p. 14. For example, the Board points to language included in Orchard Hill's development profile on the MassAccess Accessible Housing Registry, *see* Motion, Exh. 1, which refers to Orchard Hill's "beautifully landscaped property" where one can find a "crystal-clear beautiful pond on [the] property." *Id.* The Board claims that this excerpt demonstrates the pond is considered a part of the property's recreational facilities. Opposition, p. 14. The Board also provided photographs as part of its Opposition memorandum, and as part of its written notice of safe harbor, depicting what it claims are Orchard Hill residents using the pond for fishing, swimming, and kayaking, and frequently using the trails. The Board further attached correspondence from Trinity Financial, Inc., the owner of Orchard Hill through a subsidiary, as

Exhibit A to its Opposition, to provide additional information on the site's recreational amenities. This letter explains that a portion of Robinson Pond is located on the property and provides direct access to residents for kayaking, swimming, and fishing. Opposition, Exh. A. Because the Board characterizes the question of whether the residents' use of the pond for recreational purposes is sufficient to include portions of the pond as directly associated area as a factual dispute, it argues is inappropriate to enter summary decision in the Developer's favor, and the Board is entitled to resolution of this dispute at a hearing. Opposition, p. 15.

The Board makes similar assertions regarding the use of the wooded areas on the Orchard Hill property. The Board states it will present aerial photographs and testimony during the *de novo* hearing to support a finding that the acreage claimed as directly associated was appropriately included. Opposition, p. 15. It argues that a "significant" factual dispute exists between the Board and the Developer regarding whether, and how much of, the wooded areas and trails are actively maintained, and the Board is entitled to the opportunity to present evidence and testimony bolstering its claims. Opposition, p. 17.

The Developer, on the other hand, argues there are no material facts in dispute, and that it is not sufficient for the Board to claim it will provide supporting evidence at some time during a future adjudicatory hearing. Reply, p. 4. The Developer argues it has submitted "uncontroverted" evidence that the wooded areas claimed by the Board as SHI eligible area are not actively maintained and therefore must be excluded. Reply, p. 4. The Developer attached several exhibits to its motion for summary decision, including 1) the Board's written notice of safe harbor; 2) the Developer's letter to DHCD opposing the Board's assertion of safe harbor; 3) the GLAM Guidelines; 4) an affidavit from Peter Engle, its consultant; 5) the technical review completed by Tighe & Bond for DHCD; and 6) DHCD's safe harbor determination.

The Board's written notice of safe harbor included the Board's calculation that the Town had a general land area minimum of 1.67%. The Board also included a Subsidized Housing Inventory (SHI) spreadsheet and list identifying the SHI parcels, and three aerial photographs of SHI properties, with the associated area acreage marked. The Board included several maps of the Town, with shaded areas indicating different categories of land, such as public lands, rights of way, water bodies, and wetlands, but did not provide specific calculations or data in support of the Board's final result.

E. Methodology

Under the Comprehensive Permit Law, the decision of a board is consistent with local needs as a matter of law when the town has low or moderate income housing on sites comprising 1.5 percent or more of the total land area zoned for residential, commercial, or industrial use. G.L. c. 40B, § 20; *see* 760 CMR 56.03(3). The 1.5 percent threshold, known as the general land area minimum, 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 the residential, commercial, or industrial use (the denominator). 760 CMR 56.03(3)(b); *Waltham, supra*, No. 2016-01, slip op. at 4-5; *Norwood*, *supra,* No. 2015-06, slip op. at 2-3.

In this case, the Board contends Oxford satisfies the 1.5 percent general land area minimum threshold and argues, based on its calculations, that Oxford has achieved a general land area percent of 1.67%. *See* Opposition, p. 3, ¶ 8; Board Initial Pleading, p. 2. The Developer argues the Board's methodology and calculations are flawed and therefore the Town has not met the statutory minimum.

F. Calculation of the Denominator

To determine the denominator, the Town must calculate the total land area zoned for residential, commercial, or industrial use. G.L. c. 40B, § 20. The comprehensive permit 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 [municipality's] zoning bylaw," and "all unzoned land in which any residential, commercial, or industrial use is permitted." 760 CMR 56.03(3)(b)1–2. Total land area excludes the following: (1) land owned by the United States, the Commonwealth of Massachusetts or any political subdivisions, and the Department of Conservation and Recreation; (2) any land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the Department of Environmental Protection (DEP) pursuant to G.L. c. 131, § 40A; (3) *any water bodies*; and (4) any flood plain, conservation or open space zone if said zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial, or industrial use are completely prohibited. 760 CMR 56.03(3)(b)3–6 (emphasis added).

The Developer also argues that the Board did not provide sufficient information or specific details to support the exclusion of 3,856 acres from its calculation of the total land area, making it impossible to determine whether any excluded acreage was counted more than once, in violation of 760 CMR 56.03(3)(b)7. *See* Exh. 4 to Motion, Engle Affidavit, ¶¶ 14-15. The Board has not shown the methodology of its calculation of the total land area. In its notice of safe harbor submitted to DHCD, the Town attached what it categorized as "Final Calculation Documents and Maps," which included maps of the Town purporting to show the excluded areas. Motion, Exh. 1. The maps included a scale but did not provide specific acreage. Therefore, due to the lack of detail provided, the Board has not shown that its calculation of the total land area adheres to the exclusions and calculation provided under 760 CMR 56.03(3)(b). Such issues, while important at the evidentiary hearing stage, need not preclude using the Board's total land area figure in consideration of the motion for summary decision, since the Developer asserts that the Board still falls short of the 1.5% general land area minimum due to errors in its SHI eligible land area total (the numerator) even if the Board's total land area calculation (the denominator) is correct, as discussed further below.

For the purposes of analyzing the motion for summary decision, we accept the Board's evidence and view it with all inferences in the light most favorable to the Board. Thus, for the purposes of this motion only we accept the Board's total land area of 13,763.25 acres and disregard contrary facts presented by the Developer. *See* Opposition, p. 3, ¶ 6; Motion, Exh. 1.

G. Calculation of the Numerator

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

> Only sites of SHI Eligible Housing units inventoried by [DHCD] or established according to 760 CMR 56.03(3)(a) … shall be included toward the [1.5] % minimum. For such sites, that proportion of the site area shall count that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units).

See G.L. c. 40B, § 20. The starting point for calculating the area of SHI Eligible Housing is a determination of the acreage of the buildings, and impervious and landscaped areas directly associated with the SHI eligible housing units. The next step is to determine the composition of each multi-unit development. *See Waltham*, *supra*, No. 2016-01, slip op. at 27.

To calculate the area of SHI eligible housing, the countable units on the SHI must be identified before calculating the acreage for the proportion of the site area that is occupied by SHI eligible housing units, including impervious and landscaped areas directly associated with those units. 760 CMR 56.03(3)(b). Additionally, the GLAM Guidelines, through the definitions of "Actively Maintained" and "Directly Associated Area," provide guidance in determining the directly associated impervious and landscaped areas. Exh. 7B, p. 3. In this matter, the parties dispute, among other things, whether certain categories of acreage were properly included pursuant to the comprehensive permit regulations, specifically 760 CMR 56.03(3)(b)1–2, and as "Directly Associated" areas pursuant to the 40B Guidelines.

1. **The Board's Calculation of the Numerator**

The Board calculated the total acreage of all parcels containing the Town's SHI properties as 229.4 acres. *See* Initial Pleading, ¶¶ 7,13; Opposition, p.3; Motion, Exh. 1. Orchard Hill, which makes up the majority of this acreage, is the primary focus of both parties for purposes of this motion. According to the Board's calculation, Orchard Hill comprises 215.48892 acres. Motion, Exh. 1.[2] As noted by the Developer, using the Board's total land area of 13,763.25 acres, the Town would need to have at least approximately 206.449 acres of SHI eligible area to meet the general land area minimum of 1.5%. *See* Motion, p. 7.

The Developer argues that, in this scenario, the Board's general land area minimum percent still falls well short of 1.5% because the Board calculated the SHI eligible area incorrectly. *See* Motion, p.7; Motion, Exh. 2, p. 2. The Developer asserts that even if the disputed water body and wooded area acreage is included, as discussed below, the Town still fails to meet the general land area minimum, and the SHI eligible area would total 86.8 acres. Motion, p.7; Motion, Exh. 4, ¶¶ 27-28.

[2] The Developer states the Board claims a SHI eligible area of 217.4 acres for Orchard Hill. Motion, p.3, ¶ 13. This may be a typographical error, as the acreage provided by the Board in its written notice of safe harbor for the three Orchard Hill parcels equals 215.4 (rounded to the nearest tenth). *See* Motion, Exh. 1 (listing the individual acreages for Orchard Hill as 14.20285, 19.09797, and 182.1881). Further, the Developer argues the Orchard Hill parcel is only 179 acres according to the MassGIS mapping system, with the remaining acreage in two other parcels owned by a related entity. Motion, p. 3, ¶ 13; Motion, Exh. 2; Exh. 4, ¶ 17.

2. **Robinson Pond**

As shown on an assessor's map overlay and an aerial photograph, *see* Motion, Exh. 1; Opposition, p. 13, Robinson Pond lies adjacent to Orchard Hill. The Board argues the owner of Orchard Hill owns a significant portion of the pond and has included 32.45 acres of the pond as SHI Eligible acreage. Motion, Exh. 1. The Board notes that while the original deed for Orchard Hill refers to Robinson Pond as a "great pond," the Massachusetts Great Ponds List, maintained by the Department of Environmental Protection and updated in September 2017, does not list it as a great pond in Oxford. Opposition, p. 14. Therefore, the Board argues the owner of Orchard Hill has a claim of proprietary right for part of the pond. For purposes of this summary decision, we accept that Orchard Hill owns or has a proprietary right to the acreage of Robinson Pond it has included in its calculations.

The Board's argument regarding Robinson Pond focuses primarily on the 40B Guidelines.[3] The Board argues the pond is a recreational facility for the SHI Eligible units at the Orchard Hill property, and therefore portions of the pond constitute "directly associated area." Opposition, p. 13. The Board claims this area of Robinson Pond is principally intended for use by Orchard Hill residents, pointing to the property's development profile created by Trinity Management Company, which refers to the "crystal clear beautiful pond on [the] property." *See* Opposition, p. 14; Exh. 1 to Motion. Trinity further describes the pond as "providing [Orchard Hill] residents with direct access to and unique opportunities for water-based recreational activities such as kayaking, swimming, and fishing." *See* Opposition, Exh. A. The Board also

[3] The Board's first argument in its opposition is that the GLAM Guidelines do not have the force of law and cannot be applied to the evidence in this matter. *See* Opposition, p. 5. Alternatively, because the GLAM Guidelines expressly include swimming pools and recreational facilities as directly associated area, the Board argues that Robinson Pond acreage has been properly included in its calculation of SHI eligible area as an analogous feature, pursuant to the GLAM Guidelines. Opposition, p. 13. Our determination on summary decision is based on the comprehensive permit regulations, and we need not reach the parties' arguments regarding application of the GLAM Guidelines. We have previously noted that the GLAM Guidelines are a guidance document without the force of law but serve as agency policy to which we give deference. *See, e.g., Matter of Arlington and Arlington Land Realty, LLC,* No. 2016-18, slip op. at 6 (Mass. Housing Appeals Comm. Oct 15, 2019), citing *Braintree supra*, slip op. at 5 (Committee gives deference to policy statements of the state's lead housing agency); *Waltham, supra*, No. 2016-01, slip op. at 22, n. 22; *Town of Northbridge v. Town of Natick*, 394 Mass. 70, 76 (1985) (agency's guidance documents are policy statements without force of law); *Norwood, supra,* No. 2015-06, slip op. at 4.

provided photographs alleged to show the use of Robinson Pond for fishing and kayaking by Orchard Hill residents. Motion, Exh. 1.

The Developer asserts that, regardless of whether the pond raises any issues of fact regarding its use by Orchard Hill residents, pond acreage cannot be counted in the numerator as a matter of law, pointing to 760 CMR 56.03(b)(5). Reply, pp. 4-5. This provision of the regulations states the "[t]otal land area shall exclude any water bodies…." Accordingly, the Developer argues any water body acreage must be excluded from the denominator as a matter of law and may not be included as directly associated area in the numerator. *See* Reply, pp. 4-5. It argues that removing the 32.45 acres of Robinson Pond from the Board's calculation of the numerator reduces the Town's SHI Eligible Area to approximately 196 acres. Since this is below the 206 acres needed to reach the 1.5% general land area minimum, using the Board's Total Land Area calculation of 13,763.25, the Developer argues the removal of the pond acreage alone is enough to defeat the Board's safe harbor claim.[4]

The question of whether the Board properly included acres of Robinson Pond as SHI eligible acreage is not a factual question but rather a legal one. We disagree with the Board that the use of Robinson Pond by Orchard Hill residents presents disputed material factual issues preventing the issuance of a summary decision. A party cannot defeat a motion for summary decision merely by asserting that some facts are disputed. *See* Mass. R. Civ. P. 56(e) (rule of civil procedure for motions of summary judgment); *Ng Bros. Constr. Inc. v. Cranney,* 436 Mass. 638, 648 (2002) (conclusory factual assertions insufficient to defeat summary judgment); *LaLonde v. Eissner*, 405 Mass. 207, 209 (1989). We could accept the Board's assertions that Orchard Hill residents use certain portions of the pond exclusively for their own recreational use, but legally, these facts are not relevant to our determination, as they do not constitute material facts that must be adjudicated.

Even if we accept the Board's assertions as true, that residents of Orchard Hill use the pond for kayaking, fishing, and swimming as fact, and that Orchard Hill's ownership of the property includes the 32.5 acres of Robinson Pond, the same issue remains: whether a water body should be included as SHI eligible acreage when it is excluded from the total land area, in

[4] The Developer also argues that the Board included a total of 40.9 acres of wetlands and water bodies as SHI eligible acreage, including the 32.5 acres of Robinson Pond, and that the Board has not addressed the erroneous inclusion of these additional acres of excluded categories. Motion, p. 8; Motion, Exh. 4, ¶ 20.

accordance with our regulations. The answer to this question is clear: 760 CMR 56.03((b)(5) expressly states that the calculation of the total land area must exclude any water bodies. We have reiterated this in our decisions. *See, e.g., Waltham*, *supra*, No. 2016-01, slip op. at 16 (stating our regulations specifically delineate water bodies as excluded from denominator); *Stoneham*, *supra*, slip op. at 2 (stating regulations exclude water bodies from the calculation of the total land area). Acreage that is specifically excluded from the denominator must also be excluded from the numerator. *Weston*, *supra*, No. 2019-12, slip op. at 18. Acreage from Robinson Pond, as a water body, cannot be included in the total land area denominator, nor included in the numerator as SHI eligible acreage. Accordingly, we will deduct the 32.5 acres of Robinson Pond that the Board added to its calculation of SHI eligible area. Therefore, if, for purposes of this motion, we take the Board's calculation of 229.4 acres as the starting point for the numerator, the exclusion of the 32.5 acres of Robinson Pond included by the Board in its calculation reduces the SHI eligible area to approximately 196.9 acres. This is below the 206 acres needed to reach the general land area minimum. The calculation of the general land area minimum, using a numerator of 196.6 and the accepted denominator of 13,763,25, is 1.43%.

Therefore, pursuant to the comprehensive permit regulations, Robinson Pond must be excluded from both the denominator and the numerator. However, the Developer and the Board also addressed a second question of law: whether a natural pond is a feature or facility that constitutes "directly associated area" as defined in the GLAM Guidelines. Although arguing the GLAM Guidelines should not apply at all, the Board argues alternatively that the GLAM Guidelines may be reasonably interpreted as including Robinson Pond as directly associated area. It argues the portion of Robinson Pond owned by Orchard Hill and used by its residents should be included because it is analogous to a swimming pool or a recreational facility, which are expressly provided for in the GLAM Guidelines. Opposition, pp. 13-14. The Developer counters that this finding would constitute an unjustified expansion of the GLAM Guidelines. Reply, p. 4. Ultimately, it is unnecessary for us to reach this issue since the regulation explicitly excludes water bodies; any contrary interpretation based on the GLAM Guidelines does not supersede that determination.

While we have previously included facilities in the calculation of SHI eligible area that were not explicitly identified as directly associated by the GLAM Guidelines, *see Braintree*,

supra, No. 2017-05, slip op. at 24,[5] we need not address whether, the GLAM Guidelines would consider acreage of a pond to count as directly associated area. The regulations preclude the inclusion of any water bodies in the calculation of the total land area and SHI eligible area.[6]

3. **Wooded Areas**

The Board also included Orchard Hill's wooded areas in its SHI eligible area calculation. It appears to include almost the entirety of the Orchard Hill site. *See* Motion, Exh. 1, Town of Oxford General Land Area Minimum GLAM SHI Site: New Orchard Hill LTD Orchard Hill Drive. This aerial photograph depicts the entire Orchard Hill site and a significant portion of Robinson Pond outlined in green, indicating that it has been designated as directly associated for purposes of the Board's calculation. The Board argues this wooded area includes walking trails used principally for recreational purposes by Orchard Hill residents and that both the trails and associated wooded areas of the entire parcel are used and actively maintained for the exclusive recreational enjoyment of Orchard Hill residents. Opposition, pp. 15-16.

The Developer counters that the Board has improperly counted nearly all of the wooded area depicted at Orchard Hill as directly associated. Motion, pp. 5-6. Pursuant to 760 CMR 56.03(3)(b), only the proportion of the site area that is occupied by SHI eligible housing, including impervious and landscaped areas directly associated with those units, is to be included. As noted above, the GLAM Guidelines further define directly associated areas as landscaping maintained principally for the benefit of the residents of a development containing SHI eligible housing and impervious surfaces adjacent to such a development. Exh. 3, p. 3. The Developer argues the Committee has further clarified that "landscaped areas associated with SHI units are altered areas, included gardens, lawns, and other areas that have been improved or are maintained specifically for the benefit of the residents of the affordable units." Motion, p. 6, citing *Norwood*, *supra,* No. 2015-06, slip op. at 13; *Waltham*, *supra*, No. 2016-01, slip op. at 36; *Braintree supra*, No. 2017-05, slip op. at 16. Remote, non-actively maintained areas are not

[5] In *Braintree*, two separate easements, one for drainage and one for sewer, were located on the development. *Id*. We noted that although wastewater treatment facilities were not explicitly identified in the GLAM Guidelines as directly associated area, we ruled they should be included as directly associated. *See Braintree*, *supra*, No. 2017-05, slip op. at 25.

[6] Without deciding, we note that the Board's argument comparing a swimming pool to a natural pond appears unpersuasive.

considered landscaping principally for the benefit of the development's residents. *Braintree*, No. 2017-05, slip op. at 16.

The Developer argues that even if Orchard Hill contains trails that are actively maintained, only the areas of the trails or pathways may count as directly associated area. Motion, p. 6. Instead, the Board here counts the entirety of the Orchard Hill site as directly associated, with no breakdown between undisturbed woods and any actively maintained areas. Reply, p. 1. Mr. Engle, the Developer's engineer, stated that the Board improperly included 145.5 acres of unaltered wooded area. Exh. 4 to Motion, ¶ 23. Tighe & Bond, in its technical review, also determined that non-actively maintained wooded areas had been included in the Board's calculation. Exh. 5 to Motion. The aerial photograph of Orchard Hill provided as part of the Board's written notice of safe harbor shows only a small portion containing trails, with much of the remainder depicting tree cover. The Developer identified two existing trails on the Orchard Hill site. Motion, p. 3, ¶ 20; Motion, Exh. 4, ¶ 24. The first trail is located within an existing sewer easement, and the Developer did not exclude that acreage, as the trail may have originally been created for the development's on-site sewage disposal system and, if so, would have been created for the benefit of Orchard Hill residents. Motion, Exh. 4, ¶ 24. Therefore, Mr. Engle did not exclude this acreage from his calculation. The second trail is a 33-foot wide gas easement benefitting the Standard Oil Company. Motion, p. 4, ¶ 21. Because he determined this easement was not for the exclusive benefit of Orchard Hill's residents, Mr. Engle did exclude its acreage – a total of 1 acre – from the numerator. The Developer argues the Committee also has an established precedent that remote, wooded areas that are not actively maintained be excluded from the calculation of SHI Eligible Area. Reply, pp. 5, 6.

Because the Board did not provide a breakdown of every acreage category claimed as SHI eligible area, allowing for verification of its data, the total acreage of non-actively maintained wooded areas it included in its final calculation is unclear. Regarding the extent, if any, to which all or part of the wooded areas claimed by Orchard Hill should count in the numerator, the Board has raised legitimate factual issues. Although a party generally cannot defeat a motion for summary decision merely by asserting that facts are disputed, here there is a statement of fact that walking trails are used by the residents. This would be a factual issue precluding summary decision, in part, if we had not otherwise determined that the exclusion of Robinson Pond alone is sufficient for ruling that the Board has not met the general land area

minimum. Thus, a finding on the proper eligible acreage from the wooded areas is unnecessary and affords us no basis to deny summary decision.

Accordingly, we rule that the 32.5 acres of Robinson Pond, a water body, which the Board counted in the numerator, must be excluded from the SHI eligible area calculation. There are no material facts in dispute precluding the issuance of a summary decision in favor of the Developer that the Board cannot meet its burden of proof establishing it has met the 1.5 percent general land area minimum. We make no finding or determination regarding the acreage of wooded areas included by the Board as "actively maintained," as the total acreage claimed, and their use, remains factually disputed.

IV. CONCLUSION AND ORDER

Accordingly, for the reasons provided above, the Developer's motion for summary decision is granted. This matter is remanded to the Board to resume the comprehensive permit hearing on the Developer's application.

HOUSING APPEALS COMMITTEE

November 16, 2022

Shelagh A. Ellman-Pearl, Chair

Joseph P. Henefield

Rosemary Connelly Smedile

James G. Stockard, Jr.

Caitlin E. Loftus, Presiding Officer