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

PEMBROKE ZONING BOARD OF APPEALS

and

RIVER MARSH, LLC

No. 2019-04

SUMMARY DECISION

July 20, 2020

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In the Matter of	)	
TOWN OF PEMBROKE ZONING BOARD OF APPEALS, Appellant,	)	
and	)	No. 2019-04
RIVER MARSH LLC, Appellee.	)	

SUMMARY DECISION

I. PROCEDURAL HISTORY

This is an interlocutory appeal, pursuant to 760 CMR 56.03(8)(c), by the Pembroke Zoning Board of Appeals asserting a "safe harbor" under the Comprehensive Permit Law, G.L. c. 40B, §§ 20-23. On November 27, 2018, River Marsh, LLC filed an application for a comprehensive permit with the Board for a 56-unit condominium development near Water Street in Pembroke. The hearing on the application opened on February 13, 2019. Pursuant to 760 CMR 56.03(8)(a), the Board notified the developer and the Department of Housing and Community Development (DHCD) that it considered that the town had achieved the safe harbor, or statutory minimum, available to a municipality that has met the housing unit minimum by having low or moderate income housing comprise more than 10% of its total housing stock as defined in G.L. c. 40B, § 20 and 760 CMR 56.03(1) and 56.03(3)(a). River Marsh filed an objection with DHCD challenging the Board's claim to safe harbor.

On March 28, 2019, DHCD issued a decision finding that the Board had not met its burden of proving it had sufficient affordable housing so as to achieve the 10% housing unit minimum, and that at the time of the comprehensive permit application, Pembroke's

low or moderate income housing was 9.51% of total housing, as indicated on the January 31, 2019 DHCD Subsidized Housing Inventory (SHI).

On April 18, 2019, the Board appealed DHCD's decision to this Committee. On June 5, 2019, following an initial conference of counsel, River Marsh filed a Motion for Summary Decision. The Board filed an opposition, and River Marsh filed a reply.[1] River Marsh contends the Board has presented no evidence to show that Pembroke has achieved the housing unit minimum, and that its interlocutory appeal should be denied as a matter of law. The Board argues that it has met the minimum and claims, alternatively, that there are uncertainties concerning the counting of group homes toward the 10% minimum, and that it should be permitted to investigate these further. For the reasons set out below, River Marsh is entitled to summary decision.

II. STANDARD OF REVIEW AND DISCUSSION

River Marsh argues that in the review before DHCD pursuant to 760 CMR §56.03(8)(a), the Board failed to satisfy its burden of proving attainment of the statutory minimum. However, like all appeals to the Committee this interlocutory appeal is *de novo*. *Matter of Waltham and Alliance Realty Partners*, No. 16-01, slip op. at 5 (Mass. Housing Appeals Comm., 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). Thus, the appeal will not be restricted to evidence submitted to DHCD, nor will DHCD's decision carry any evidentiary weight. *See, e.g., Kirkwood v. Board of Appeals of Rockport*, 17 Mass. App. Ct. 423, 426-427 (1984).

Summary decision is appropriate if "the record before the Committee, together with the affidavits (if any) shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 56.06(5)(d). *See 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;

[1] All of the documents referred to in this ruling are unnumbered exhibits filed with the Committee by the parties either with the Initial Pleading or with pleadings related to the Motion for Summary Decision. Neither party marked them clearly, and therefore they will be referred to by name rather than exhibit number.

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 on this motion for summary decision is whether on the record currently before us there is sufficient undisputed evidence to establish that on the date of the comprehensive permit application, Pembroke had not achieved the 10% statutory minimum as a matter of law. *See 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).

The presumptive evidence of whether or not a town has achieved the housing unit minimum is the DHCD Subsidized Housing Inventory (SHI), which is "the list compiled by DHCD containing the count of low or moderate income housing units by city or town." 760 CMR 56.02: *Subsidized Housing Inventory (SHI)*; *see also* 760 CMR 56.03(2). "For purposes of calculating whether the city or town's SHI Eligible Housing units exceed 10%..., there shall be a presumption that the latest SHI contains an accurate count of SHI Eligible Housing and total housing units. …[But] a party may introduce evidence to rebut this presumption…." 760 CMR 56.03(3)(a). *See Alliance Realty Partners*, *supra,* No. 2016-01, slip op. at 28. The Board, in challenging the accuracy of the SHI, bears the burden of demonstrating that properties are missing from the DHCD SHI. *Matter of Braintree and 383 Washington Street*, No. 2017-05, slip op. at 28 (Mass. Housing Appeals Comm. June 27, 2019), citing *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 34 (2006) (presumption destroyed upon offer of evidence warranting finding contrary to presumed fact). In *Braintree*, *supra,* slip op. at 28-30, we ruled against both the board and the developer with regard to their attempts to rebut the SHI's presumption of accuracy. We found the developer failed to provide evidence to establish that group home units listed on the SHI did not qualify and should be removed, and that the board failed to provide evidence to show that Habitat for Humanity units met relevant requirements for affordable housing use restrictions and should be added to the SHI. *See also AvalonBay*, *supra,* No. 2012-03, slip op. at 6 (board failed to demonstrate that continuing care retirement community units qualified as rental units, thus failing to rebut presumption of SHI unit count).

Here, the most basic facts are undisputed. Pembroke has 6,477 total units of housing.[2] DHCD SHI, p. 2. In addition, the parties both acknowledge the existence of 616 units of SHI-eligible housing, which appear on the DHCD SHI and constitute 9.51% of the housing in Pembroke. *Id.*

The Board, however, argues that there are an additional 35 units that are eligible affordable housing and should count toward the housing unit minimum. It has listed these on the Board's Version of the SHI, and a simple calculation shows that if these units are in fact eligible, the town would have 651 units of affordable housing, exceeding the minimum at 10.05%.

River Marsh contests most of the 35 additional units, but for the purposes of this motion, we need only consider the most relevant.

Sealund Development. First, among the units that the Board would add to the SHI are those from the Sealund development at 204 Center Street in Pembroke. *See* Board's Version of the SHI, p. 2. This is a mixed-use homeownership development with two commercial office buildings and seven buildings containing 15 two-bedroom residential condominium units. *See* Decision of Zoning Board of Appeals on the Petition of Robert F. DeMarzo (variance June 7, 2005), p. 3.[3] The Board claims that three of the units are SHI-eligible. To be eligible, they must be subject to a use restriction in the form of an affordable housing deed restriction and satisfy the requirements of guidelines issued by DHCD. *See* 760 CMR 56.03(2)(a)[4] and 56.02: *Use Restriction*. The evidence in the record consists of the deeds for all 15 of the Sealund units. None of the 15 deeds includes a deed restriction. *See* Unit Deed,

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[2] The record contains two very similar documents. They each are in table form, and bear the heading "Department of Housing and Community Development Ch. 40B Subsidized Housing Inventory – Pembroke." The one dated "1/31/2019" is the official DHCD SHI. The other, dated "12/14/2018," was prepared by the Town of Pembroke, and includes additional units that the Board argues should be included on the DHCD SHI. Although it bears the same heading suggesting it is an official DHCD document, it is not. This second document will be referred to as the Board's Version of the SHI.

[3] The decision granting a variance to the Sealund development is attached to River Marsh's Initial Pleading (filed April 18, 2019). That decision refers to the premises at 204 Center Street, which is the Sealund development.

[4] 760 CMR 56.03(2)(a) states: "The Department [DHCD] shall maintain the SHI to measure a municipality's stock of SHI Eligible Housing. The SHI is not limited to housing units developed through issuance of a Comprehensive Permit; it may also include SHI Eligible Housing units developed under M.G.L. chs. 40A, c. 40R, and other statutes, regulations, and programs, so long as such units are subject to a Use Restriction and an Affirmative Fair Marketing Plan, and they satisfy the requirements of guidelines issued by the Department."

Pembroke Village Condominium, Units C/1, C/2, C/3, D/4, D/5, E/6, E/7, F/8, F/9, G/10, G/11, H/12, H/13, I/14, and I/15.[5] This fact is undisputed. Not only has the Board not filed documentation to challenge it, but neither does the Board mention Sealund anywhere in its opposition.[6] Thus, the three Sealund units that appear on the Board's Version of the SHI will not be counted toward Pembroke's housing unit minimum.

Veteran Housing. Second, the Board would count six units designated "Veteran Housing." Four of these are at 410 Center Street, one at 9-B Newport Avenue, and one at 11-B Newport Avenue. *See* Board's Version of SHI, p. 2. None of the deeds for these properties show any sort of affordable housing deed restriction. *See* Massachusetts Quitclaim Deed, Muise to Muise as trustee (410 Center Street); Quitclaim Deed, Tero to Tero as trustee (9-A and 9-B Newport Avenue) Massachusetts Quitclaim Deed, Juffre to Baird (11 Newport Avenue).[7] This fact, too, is undisputed since the Board filed no documentation to challenge it, and, in fact, submitted no evidence regarding the Veteran Housing units, nor does it discuss it in its opposition.[8] Thus, these Veteran Housing units will not be counted toward Pembroke's housing unit minimum.

DDS and DMH Units. The Board would also count 17 confidential units listed on its Version of the SHI that includes 10 units listed as Department of Developmental Services (DDS) units and seven units listed as Department of Mental Health (DMH) units that are not

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[5] These deeds are also attached to River Marsh's Initial Pleading, and refer to the "Pembroke Village Condominium," but the address is that of the Sealund development, 204 Center Street.

[6] The Board's opposition to the motion for summary decision primarily discusses group home units and nine units at the Copperwood development.

[7] These deeds are also attached to River Marsh's Initial Pleading.

[8] The Town's establishment of veterans' housing, even if not accompanied by affordability restrictions, may serve important governmental interests in assisting veterans to achieve housing stability through home ownership. This goal, while beneficial, would not, by itself, further the purposes of Chapter 40B, which was intended to "ensur[e] that every city and town in the Commonwealth has available a certain minimum amount of affordable housing stock." *Hollis Hills, LLC v. Lunenburg,* No. 2007-13, slip op. at 11 (Mass. Housing Appeals Comm. Dec. 4, 2009), quoting *Board of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership,* 436 Mass. 811, 822 (2002). In *Hollis Hills,* we explained the role and importance of use restrictions to serve the legislative purpose of Chapter 40B, *id.* at 9-15, noting that "[t]he requirement for use restrictions in 760 CMR 56.03(2) specifically furthers the legislative goal of Chapter 40B to create a 'long-term solution to the shortage of affordable housing throughout the Commonwealth.'" *Id.* at 11, quoting *Ardemore, supra,* 436 Mass. 811, 814. *See also Hanover, supra,* 363 Mass. 339, 355; *Sugarbush Meadow, LLC v. Sunderland,* No. 2008-02, slip op. at 6-8 (Mass. Housing Appeals Comm. June 21, 2010).

on the DHD SHI. The Board provided no information to support the inclusion of these units. Therefore, it has not established that any additional confidential units are entitled to count toward Pembroke's housing unit minimum.

Copperwood Development. The Board would count nine units from this development, although the applicable regulatory agreement refers to only eight units. Additionally, the record only shows evidence of a deed restriction for only three Copperwood units. [9]

Based on the foregoing evidence, it is undisputed that three units at the Sealund development and six "Veteran Housing" units that the Board claims should be counted as eligible low or moderate income housing are not, in fact, eligible. Even assuming for purposes of this summary decision that the three Copperwood units with deed restrictions, and, indeed, all of the other units claimed by the Board are eligible, when these nine ineligible units are subtracted from the Board's total of 651 units, the result is 642 units. This is 9.91% of Pembroke's 6,477 total housing units. We conclude that Pembroke has not achieved the 10% housing unit minimum.

III. OTHER CLAIMS BY THE BOARD

The Board argues there are at least three, and perhaps as many as nine, units at the Copperwood development that are subject to a recorded affordable housing deed rider and therefore are eligible to be counted on the SHI, but do not appear on the DHCD SHI. It suggests that this reflects "a lack of credibility" with regard to the SHI, and that therefore "the Town should be afforded the ability to present further evidence to ensure all qualified units are listed." Opposition, p. 4. It argues further that since "group homes and other subsidized units may be counted as low or moderate income housing…, the Town should be able to subpoena DHCD and the Secretary of Health and Human Services... to obtain documents and/or data evidencing all Pembroke addresses being subsidized… by DDS and DMH and the number of units." *Id.*

These arguments are not convincing. Even assuming that these three Copperwood units, and indeed, all nine Copperwood units are eligible to be counted toward the housing unit minimum, the Board's argument that this reflects on the credibility of the SHI is

[9] The Board included deed restrictions for three of the Copperwood units with its opposition. *See* Quitclaim Deed to Hall, July 27, 2018; Quitclaim Deed to Connall, May 4, 2018; Quitclaim Deed to Riccio, undated.

unpersuasive. First, the Board has not demonstrated that it had sought DHCD's inclusion of those units on the SHI. Second, an omission of this type of unit does not suggest, without more, that the SHI is otherwise inaccurate.

Additionally, although it is possible that the SHI may not be perfectly accurate, as we noted above, there is a legal presumption that it is correct—a presumption that the Board is entitled to rebut. *See* discussion, *supra*. On this motion for summary decision, the Board was entitled to file opposing affidavits and documents. 760 CMR 56.06(5)(d). It chose to submit its Version of the SHI and documents relating to the Copperwood development, but did not provide documents evidencing the eligibility of its other purportedly eligible units.

With regard to group homes, the Board's Version of the SHI lists units of confidential SHI housing that are unsupported by any information identifying the basis on which such units are eligible to count as group homes or otherwise backing up that assertion. Nor did it supply any argument regarding the basis for inclusion of these units. Even if the 17 units were counted, the SHI would not exceed 10%. In such circumstances, when "the moving party shows that there is no issue for trial, the opposing party must respond and allege specific facts…." *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 554 (1976). The evidence that the Board has filed relates only to the Copperwood development. Thus, summary decision is appropriate where the opposing party merely raises vague and general allegations of expected proof. *Id.* at 555-556. The Board's suggestion of possible additional group homes and other affordable housing that might support its case are mere speculation and not sufficient to defeat the motion for summary decision.

The Board's request for more time to build its case does, however, raises the question of how a board should proceed if it believes that the group home count on the SHI is inaccurate. Neither party referred to the applicable guidelines referenced in 760 CMR 56.03(2)(a). The "Guidelines, G.L. c. 40B Comprehensive Permit Projects, Subsidized Housing Inventory" (updated Dec. 2014), set out the eligibility requirements for SHI eligible units, including group homes. *See* Guidelines, § II.A.1-2, pp. II-1-5. Section II.A.2(e) states:

> (e) Long-Term Subsidized Housing for Individuals with Developmental or Mental Health Disabilities
> All Group Home units in each community as reported every two years to the DHCD by the Department of Mental Health (DMH) and the Department of Development Services (DDS) shall be eligible to be included on the SHI. Please note that Group Home units serving clients of the DMH and DDS are subject to privacy restrictions, but the number of such units in each

> community which are eligible will be included on the SHI as provided to DHCD by the respective departments.

The Guidelines also provide that eligibility requirements for inclusion on the SHI are consistent with 760 CMR 56.03(2). Guidelines, §§ II.A.2.e; II.A.1. *See Braintree, supra,* No. 2017-05, slip op. at 28-29. Since the locations of group homes must remain confidential, verifying the information is not easy.[10] For the 10% statutory minimum, however, the DHCD SHI already includes the count of group homes. Here, the Board has not demonstrated a sufficient basis to pursue a challenge to the DHCD SHI. It has not provided any evidence supporting the numbers it has put forth as "group home" or "confidential" units. Its assertion it is "confident that at least seventeen [group-home] units could be counted," when it has not shown these are not among those listed on the DHCD SHI is insufficient. *Id.*

Moreover, as River Marsh argues, the Board was aware when the project eligibility letter was issued for this project, and certainly when the comprehensive permit application was filed with the Board, that its inquiry into additional units eligible for the SHI should commence. It has not shown that it has made any inquiry of the Department of Developmental Services, the Department of Mental Health or DHCD to verify the unit count of group homes. Nor has it indicated that it has taken any other action to develop additional evidence in support of its case. Just as speculation about the existence of facts that might help its case is not sufficient to defeat the motion for summary decision, neither is speculation that a subpoena might be forthcoming adequate reason to delay or deny the motion for summary decision.

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[10] In the context of the 1.5% general land area minimum, DHCD does not maintain acreage for group homes, and does not identify the addresses of confidential units on the SHI. Before DHCD adopted guidelines to establish a process for obtaining the SHI eligible acreage of group homes, some boards obtained the information through the town's own efforts. *See, e.g., Matter of Newton and Dinosaur Rowe, LLC,* No. 2015-01, slip. op. at 8-9, and n. 8, n. 10 (Mass. Housing Appeals Comm. Interlocutory Decision Regarding Safe Harbor June 26, 2015); *Braintree, supra,* No. 2017-05, slip op. at 3, n.3.

In other cases, boards pursued court orders requiring the relevant state agencies to share addresses of group homes. *See, e.g., Alliance Realty Partners, supra,* No. 2016-01, slip op. at 3-4; *Matter of Arlington Board of Appeals and Arlington Land Realty, LLC,* No. 16-08, slip op. at 3 (Mass. Housing Appeals Comm. Interlocutory Decision Regarding Safe Harbor Oct. 15, 2019).

IV. CONCLUSION AND ORDER

The undisputed facts show that the Town of Pembroke has not achieved the statutory 10% housing unit minimum, and therefore the motion for summary decision in favor River Marsh is GRANTED.

This matter is remanded to the Board for further proceedings on River Marsh's comprehensive permit application.

HOUSING APPEALS COMMITTEE

July 20, 2020

Shelagh A. Ellman-Pearl, Chair

Joseph P. Henefield

Marc L. Laplante

James G. Stockard, Jr.