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

WAKEFIELD ZONING BOARD OF APPEALS

and

THE RESIDENCES AT NAHANT, LLC

No. 2023-11

In the Matter of

WAKEFIELD ZONING BOARD OF APPEALS

and

32 NAHANT STREET, LLC.

No. 2024-02

SUMMARY DECISION ON INTERLOCUTORY APPEALS

May 28, 2024

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In the Matter of WAKEFIELD ZONING BOARD OF APPEALS, Appellant, and THE RESIDENCES AT NAHANT, LLC, Appellee.	)	No. 2023-11

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SUMMARY DECISION ON INTERLOCUTORY APPEALS

I. INTRODUCTION AND PROCEDURAL HISTORY

These cases are interlocutory appeals brought by the Town of Wakefield Zoning Board of Appeals (Board) pursuant to 760 CMR 56.03(8)(c). The Board appeals the determinations by the Executive Office of Housing and Livable Communities (EOHLC), dated December 11, 2023 (The Residences at Nahant, LLC) and January 11, 2024 (32 Nahant Street, LLC), that the Board had not established a safe harbor under 760 CMR 56.03(5) with respect to applications for comprehensive permits by each developer for two separate, unrelated, developments in Wakefield, The Residence at Nahant (Residences), and 32 Nahant Street (32 Nahant).

Because these cases involve common questions of law and fact, and with the joint agreement of the parties, they were consolidated for all purposes, pursuant to 760 CMR 56.06(10)(a). In addition, the parties' joint motions to waive the automatic stay provisions of 760

CMR 56.03(8)(c) were granted, allowing the Board's hearings in both matters to proceed during the pendency of both appeals in accordance with the applicable provisions of 760 CMR 56.05 and the timelines prescribed in 760 CMR 56.05(3).

The Board moved for summary decision on February 16, 2024, and filed an Agreed Statement of Facts, with attached exhibits (Joint Exhibits). Each developer filed an opposition and cross-motion for summary decision on March 25, 2024. The Board did not file any reply. For the reasons discussed below, the Board's motion for summary decision is denied, and the developers' cross-motions for summary decision are granted.

II. UNDISPUTED FACTS

On September 25, 2023, the developer for the Residences filed an application for a comprehensive permit with the Board for the development of the Residences project. The Board opened its public hearing on the Residences project on October 18, 2023. On October 31, 2023, the Board gave notice to the Residences that the Board believed that a safe harbor applied because the Town of Wakefield (Town) had made recent progress toward its housing unit minimum as set forth in 760 CMR 56.03(1)(c) and 56.03(5). On November 12, 2023, the Residences filed with EOHLC a notice of challenge to the Board's safe harbor claim.[1] On December 11, 2023, EOHLC issued a determination denying the safe harbor claim of the Board with respect to the Residences. Thereafter, the Board appealed the decision of EOHLC to the Housing Appeals Committee on December 29, 2023.

On October 23, 2023, the developer for 32 Nahant filed an application for the development of the 32 Nahant project. The Board opened its public hearing on 32 Nahant's project on November 15, 2023 and on November 28, 2023, the Board gave notice to 32 Nahant that it believed a safe harbor applied because the Town had made recent progress toward its housing unit minimum as set forth in 760 CMR 56.03(1)(c) and 56.03(5).[2] On December 12,

[1] On November 13, 2023, the Residences filed an appeal with the Housing Appeals Committee, alleging a constructive grant of its application. See The Residences at Nahant, LLC v. Wakefield, No. 2023-07. The parties have agreed to stay that matter pending the outcome of the public hearing before the Board on the Residences project.

[2] On December 11, 2023, 32 Nahant filed an appeal with the Housing Appeals Committee, alleging a constructive grant of its application. *See 32 Nahant Street, LLC v. Wakefield*, No. 2023-09 (Mass. Housing Appeals Comm.). The parties have agreed to stay that matter pending the outcome of the public hearing before the Board on the 32 Nahant project.

2023, 32 Nahant filed with EOHLC a notice of challenge to the Board's safe harbor claim. On January 11, 2024, EOHLC issued a determination denying the Board's safe harbor claim with respect to 32 Nahant. Thereafter, the Board appealed the decision of EOHLC to the Housing Appeals Committee on January 30, 2024.

The parties agree that, in order to make a showing of recent progress, the Board has the burden of proving the creation of 226 eligible housing units in 12 months prior to the filings, respectively, of the Residences' application on September 25, 2023, and 32 Nahant's application on October 23, 2023. Board Motion, pp. 8, 10; Residences Opposition, pp. 14-15; 32 Nahant Opposition, p. 9. The parties agree that the Town created 50 affordable units in the 12 months prior to the submittal of the Residences comprehensive permit, while other new units are in dispute. Board Motion, p. 8; Residences Opposition, pp. 5, 22.[3]

The Board's disputed safe harbor claims are founded upon the following developments:

Tarrant Lane, 89-95 Hopkins Street: The comprehensive permit for this 173-unit project was filed with the Town Clerk on October 21, 2019. Joint Exhibits, pp. 17-54; Residences Opposition, Exh. B.

200-400 Quannapowitt Avenue: The Board's special permit and site plan decision for this project, which added 79 units to the Town's Subsidized Housing Inventory (SHI),[4] was filed with the Town Clerk on August 12, 2022. Joint Exhibits, pp. 327-343.

62 and 76 Foundry Street: The special permit, variance, and site plan approval decisions for this multifamily development, which added 10 affordable units to the Town's SHI, were filed with the Town Clerk on November 30, 2021. Joint Exhibits, pp. 85-115.

184 Water Street and 198 Albion Street: The decisions approving these multifamily apartment buildings, each of which includes one affordable unit, were filed with the Town Clerk on January 6, 2023 (184 Water Street) and January 4, 2023 (198 Albion Street). Joint Exhibits, pp. 187-222, 223-266. While the special permits for both require the recording of regulatory agreements and evidence that the projects will count toward the Town's SHI, the Board does not

[3] The 50 agreed-upon units are comprised of 36 units at 572-596 North Avenue; eight units at 27-37 Water Street; three units at 259 Water Street; and three units at 581-583 Salem Street. Residences Opposition, Exh. B.

[4] The SHI is the list compiled by EOHLC containing the count of low or moderate income housing units by city or town. *See* 760 CMR 56.02(2).

dispute that no such regulatory agreements had been executed or recorded, nor had Local Action Unit (LAU) approval been obtained as of the date of the respective applications. Residences Opposition, p. 20 and Exh. B; 32 Nahant Opposition, p. 9.

III. STANDARD OF REVIEW

When the Board files an interlocutory appeal of an adverse decision of EOHLC to the Committee, it carries the burden of proving satisfaction of the grounds for asserting that a denial of a comprehensive permit is consistent with local needs, in this case, recent progress toward its housing minimum. *See* 760 CMR 56.03(5). Like all appeals to the Committee, an interlocutory appeal is de novo. G. L. c. 40B, § 22; *Board of Appeals of Hanover v. Housing Appeals Comm*., 363 Mass. 339, 369-371 (1973); *Matter of Pembroke and River Marsh LLC*, No. 2019-04, slip op. at 2 (Mass. Housing Appeals Comm. Summary Decision July 20, 2020) and cases cited. The appeal is not restricted to evidence submitted to EOHLC and EOHLC's decision carries no evidentiary weight. *Id.*, citing *Kirkwood v. Board of Appeals of Rockport*, 17 Mass. App. Ct. 423, 426-427 (1984).

Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee 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 sub nom. Haugh v. Housing Appeals Comm*., Norfolk Super. Ct. No. 1882CV01167, Aug. 7, 2019; *Delphic Assocs., LLC v. Duxbury,* No. 2003-08, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 14, 2010); *Grandview Realty, Inc. v. Lexington,* No. 2005-11, slip op. at 4 (Mass. Housing Appeals Comm. July 10, 2006). For a determination on summary decision, the Committee must "examine whether the undisputed evidence, when considered in the light most favorable to the nonmoving party … is legally sufficient to support a decision in favor of the movant." *Matter of Oxford and 722 Main Street,* No. 2021-11, slip op. at 3 (Mass. Housing Appeals Comm. Nov. 16, 2022), citing *Warren Place, supra*, No. 2017-10, slip op. at 12; *Litchfield Heights, LLC v. Peabody*, No. 2004-20, slip op. at 4 (Mass. Housing Appeals Committee Jan. 23, 2006). *See Commercial Wharf East Condominium Assoc. v. Department of Environmental Protection*, 93 Mass. App. Ct. 425, 427 n.2 (2018), citing *Zoning Bd. of Appeals of Amesbury*

v. Housing Appeals Comm., 457 Mass. 748, 763 (2010) (motion for summary decision "is the administrative equivalent of a motion for summary judgment"). "Summary decision may be made against the moving party, if appropriate." 760 CMR 56.06(5)(d); *Delphic Assocs., LLC v. Duxbury*, No. 2003-08, slip op. at 11, n.7 (Mass. Housing Appeals Comm. Ruling and Order Extending Comprehensive Permit Jan. 12, 2010); *Taylor Cove Dev., LLC v. Andover*, No. 2009-01, slip op. at 1, n.1 (Mass. Housing Appeals Comm. Ruling on Motion for Summary Decision July 7, 2009).

A review of the papers submitted by the parties in support of their motion and cross motions for summary decision demonstrates that no genuine issue exists regarding the facts that are material to the issues raised. No affidavits or documents attesting to a factual dispute were filed. Thus, the material facts presented for summary decision are undisputed.

IV. DISCUSSION

The question before us is whether the undisputed evidence establishes that, as of the dates of each developers' comprehensive permit applications, the Board had achieved recent progress toward its housing unit minimum, and thereby was eligible for the safe harbor. *See* 760 CMR 56.03(5). Pursuant to G. L. c. 40B, § 20 and 760 CMR 56.03(1)(a), a comprehensive permit decision of a board of appeals is deemed consistent with local needs as a matter of law, if, within the last 12 months, the community has made sufficient progress toward its housing unit minimum, pursuant to 760 CMR 56.03(5), which states:

> Recent progress toward a municipality's *Statutory Minima* shall mean that the number of SHI Eligible Housing units that have been created within the municipality during the 12 months prior to the date of the Comprehensive Permit application, evidenced by being inventoried by the Department 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, is equal to or greater than 2% of the municipality's total housing units, as determined in accordance with 760 CMR 56.03(3)(a).

A. When Do Units Count Toward Recent Progress?

The parties dispute how the comprehensive permit regulation should be applied when a building permit fails to issue during the 12 months following the filing of a comprehensive permit with the town clerk. More particularly, they disagree about whether those units may be counted toward recent progress a second time for an additional 12-month period, if and when the building permit issues at a later time. The parties further disagree about whether and to

what extent the Committee's decision in *114 Sylvan Street, LLC v. Danvers*, No. 2002-04, slip op. (Mass. Housing Appeals Comm. Ruling on Motion for Summary Decision Feb. 28, 2003), *aff'd sub nom, 114 Sylvan Street, LLC v. Housing Appeals Comm., et al.,* Essex Super. Ct. No. 03-0152-A Sept. 19, 2003, answers this question.

In *Danvers*, within the 12 months prior to the developer's comprehensive permit application, the Danvers board had issued a comprehensive permit for another development, consisting of 258 Chapter 40B units, for which no building permits had yet been issued. The developer conceded that those units counted toward the town's housing unit minimum when the comprehensive permit became final but argued that "there was a separate requirement that the housing units be *created*." *Danvers, supra*, No. 2002-04, slip op. at 3. The issue resolved in *Danvers* was "whether the housing units … were 'created' under the regulation when the comprehensive permit was issued, or whether the town must wait until they have actually been constructed to receive credit for 'recent progress' toward" the town's minimum. *Id*. In ruling that the units met the "recent progress" requirement and upholding the board's decision as consistent with local needs, the Committee determined that "created" does not necessarily mean "constructed." *Id.* "In the context of the Comprehensive Permit Law, we believe that 'created' was intended to convey the idea of being made possible or finally approved within the process—that is, permitted." *Id*. at 5.

The Board argues that *Danvers* did not reach the question before us here: if units are considered to have been "created" when a comprehensive permit is issued but no building permit is issued during the 12 months thereafter, may those units be counted toward recent progress for an additional 12-month period once the building permit does issue. The Board argues that units, once added again to the SHI upon issuance of building permits must count again for another 12-month period as recent progress. In support, it relies on changes in the comprehensive permit regulations since those in effect when *Danvers* was decided. Board Motion, p. 3. It argues that "the lynchpin of the decision [in *Danvers*] was the syllogism that recent progress should be measured in the same way that compliance with the 10% minimum was measured [under 760 CMR 31.04(1)(a)]," quoting the Committee's statement that, "[i]t would be anomalous to measure interim, 'recent' progress by a different standard." Board Motion, p. 3. We, however, read the Committee's statement in *Danvers* to refer specifically to the narrow issue of whether actual construction must occur for a unit to be deemed "created"

and not for the broader proposition, urged by the Board, that recent progress should be equated with overall progress in all respects.[5]

Thus, *Danvers* states that, under the regulation, recent progress requires units to be "created" by the filing of the comprehensive permit decision approving those units with the municipal clerk no earlier than 12 months before the date of the comprehensive permit application for which a safe harbor is sought. Such "recent progress" occurs only for the 12-month period following the "creation" of those units. It would be not only anomalous but inconsistent with the regulation for the late issuance of building permits for a development that did not promptly obtain building permits to serve as an additional act of "recent progress" by a municipality. Since the purpose of the recent progress provision is to encourage municipalities to facilitate the increased production of affordable housing, we rule that effort can only count at the time of the initial creation of the units. Otherwise, there would be no distinction between recent progress and overall progress as measured by the SHI as contemplated by the regulations.

Danvers is the only case in which the Committee has considered the recent progress safe harbor provision. Because *Danvers* was decided based upon an earlier version of the comprehensive permit regulations in effect at that time, the Board also makes an elaborate argument based on a comparison of the current comprehensive permit regulations to the prior regulation quoted in *Danvers* to argue that the changes in the regulations support its application of *Danvers* to the facts here. It argues that the current regulations regarding time lapse include a new category of lapse that permits multiple one-year safe harbor periods based on a single approval for one project. Board Motion, p. 4. First, the Board cites the prior time lapse provision of 760 CMR 31.04(1)(a)[6] for overall progress toward 10 percent that was in effect during the *Danvers* case, which stated:

> Housing units shall be counted if they are subject to building permits, available for occupancy, or occupied. In addition, housing units authorized by a comprehensive permit shall be counted when the comprehensive permit becomes final (760 CMR 31.08(4)), provided that any housing units, for which building

[5] In *Danvers,* the Committee stated: "The policy stated is that progress is to be measured prior to actual construction. It would be anomalous to measure interim, "recent" progress by a different standard." *Id.* at 4-5.

[6] Pursuant to 760 CMR 56.06(8)(b), the presiding officer notified the parties that the Committee intended to take official notice of 760 CMR 31.00; no objections were filed.

> permits have not been issued within one year of the date when the comprehensive permit becomes final, shall no longer be counted until building permits have been issued. No housing unit shall be counted more than once for any reason.

Board Motion, p. 3. The Board contends that the "until building permits have been issued" language allowed a project to return to the SHI when the building permit is belatedly issued. Thus, the Board argues, the same project can count a second time toward recent progress where a building permit is issued more than a year after approval. Board Motion, pp. 3-4. The current version of the time lapse provision, the Board argues, only makes its interpretation stronger. It points to 760 CMR 56.03(3)(a), which states:

> For purposes of calculating whether the city or town's SHI Eligible Housing units exceed 10% of its total housing units, pursuant to M.G.L. c. 40B, § 20 and 760 CMR 56.00, there shall be a presumption that the latest SHI contains an accurate count of SHI Eligible Housing and total housing units. In the course of a review procedure pursuant to 760 CMR 56.03(8), a party may introduce evidence to rebut this presumption, which the Department shall review on a case-by-case basis, applying the standards of eligibility for the SHI set forth in 760 CMR 56.03(2).

The Board claims that the final sentence of this provision requires the application of the time lapse provisions, unlike the regulation in effect at the time of the *Danvers* decision. Board Motion, p. 5. It states that this sentence "tells us that in the course of such an assessment, the EOHLC shall 'apply[] the standards of eligibility for the SHI set forth in 760 CMR 56.03(2).'" Board Motion, p. 5 (emphasis omitted). [7] To measure recent progress, the Board contends, the regulations "bid the EOHLC to look at all of the dates made relevant by the time lapse provisions." *Id*. at 6. Thus, the Board asserts, the current regulations (unlike those in effect at the time *Danvers* was decided) direct that the time lapse rules be applied in determining whether a claim of recent progress is supported. *Id.*

The developers respond that the Board's argument "defies logic" and attempts "to manipulate the system to obtain three separate one-year safe harbors from the approval of a single project…." 32 Nahant Opposition, p. 3; Residences Opposition, pp. 11-12. They argue

[7] The Board also points to 760 CMR 56.03(2)(c) which states that "[i]f more than one year elapses between the date of issuance of the Comprehensive Permit or zoning approval . . . and the issuance of the building permit, the units will become ineligible for the SHI until the date that the building permit is issued." Board Motion, p. 4. The earlier regulation, 760 CMR 31.04(1)(a), stated that "any housing units, for which building permits have not been issued within one year of the date when the comprehensive permit becomes final, shall no longer be counted until building permits have been issued." We see no material difference in the two versions of this provision.

that *Danvers* established when a unit is "created" for the purposes of recent progress, and that "creation" occurs only once, when the comprehensive permit is issued. 32 Nahant Opposition, pp. 2-3; Residences Opposition, pp. 6, 8. They also argue that any differences in the current and earlier time lapse provisions are not relevant here, 32 Nahant noting the only substantive difference between the two versions "is the reference to the procedure in 760 CMR 56.03(8), which did not exist at the time of the 114 Sylvan Street decision." 32 Nahant Opposition, p. 5.

We agree with the developers. First, the Board's reliance upon the time lapse provisions concerning overall progress toward 10 percent is misplaced; rather, the focus should be on the language of the current recent progress provision, 760 CMR 56.03(5). Further, there is no relevant difference between the current version and its predecessor applicable at the time of *Danvers*, 760 CMR 31.07(1)(d).[8] As the developers point out, once the comprehensive permit is filed with the municipality, the approved units are "created" within the context of "recent progress." They cannot be "created" again if the units, within the context of overall progress, first lose SHI eligibility for lack of building permit issuance within 12 months and they regain SHI eligibility upon issuance of such permits *See* 32 Nahant Opposition, p. 2; Residences Opposition, p. 11.

There is no material difference between 760 CMR 31.07(1)(d) and 760 CMR 56.03(5) regarding recent progress and its application to the facts here. The comprehensive permit regulations were modified after *Danvers* to more clearly define when units first become eligible to be counted on the SHI, but the recent progress provision remained substantially the same, with the operative word "created" used in both iterations. We agree with the developers that interpreting the term "created" in a manner which allows a board to double and even triple-dip

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[8] In *Danvers*, the "recent progress" provisions in 760 CMR 31.07(1)(d) defined "recent progress" to mean:

> …that the number of housing units that have been created during the twelve months prior to the date of the comprehensive permit application and that count toward the housing unit minimum [described in 760 CMR 31.04(1)] is equal to or greater than 2% of the municipality's total housing units….

Danvers, supra, No. 2002-04, slip op at 3. Subsequent to *Danvers*, 760 CMR 56.03(5) was revised to provide that "recent progress" means:

> …that the number of SHI Eligible Housing units that have been created within the municipality during the 12 months prior to the date of the Comprehensive Permit application, evidenced by being inventoried by the Department 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, is equal to or greater than 2% of the municipality's total housing units, as determined in accordance with 760 CMR 56.03(3)(a).

on counting the same units toward multiple safe harbors is not consistent with the concept of rewarding towns for recent progress and thus intent of Chapter 40B and the regulations. We find the Board's argument unpersuasive and will count only the SHI-eligible units that were "created" pursuant to the issuance of a comprehensive permit within the 12-month period prior to each of the developer's applications.

B. SHI Eligible Units

The period considered for calculating the number of units created is the 12 month-period immediately prior to the date on which the developer files its comprehensive permit application. 760 CMR 56.03(5). The parties agree the Board has the burden of proving the creation of 226 eligible housing units[9] in the year prior to the filing of the two applications (on September 25, 2023, and October 23, 2023). Board Motion, p. 8; Residences Opposition, p. 15; 32 Nahant Opposition, p. 9. All of the units in dispute are applicable in both cases, and the same analysis may be used to determine the SHI-eligible units applicable to both projects.

The Board and the developers agree that the Town created 50 affordable units in the twelve months prior to the submittal of each comprehensive permit application. Board Motion, p. 8; Residences Opposition, pp. 5, 22; 32 Nahant Opposition, p. 9.[10] The remainder of the necessary units are in dispute. The Board claims that the total number of SHI-eligible units created in the year prior to the Residences application was 314, more than the 226 required. Board Motion, p. 11. Those 314 are comprised of the 50 agreed-upon units and the following units: Tarrant Lane, 89-95 Hopkins Street (173 units); 200-400 Quannapowitt Avenue (79 units); 62 and 67 Foundry Street (10 units); 184 Water Street (one unit); and 198 Albion Street (one unit).

Tarrant Lane, 89-95 Hopkins Street. The comprehensive permit for this project was filed with the Wakefield Town Clerk on October 21, 2019. Joint Exhibits, pp. 17-54; Residences Opposition, Exh. B. Those 173 units counted toward the Town's recent progress on that date, which is well outside of the 12-month period prior to both comprehensive permit applications.

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[9] According to the October 3, 2023, SHI, Wakefield had a total of 11,261 housing units; two percent of that is 226. Joint Exhibits, pp. 14-15; 760 CMR 56.03(5).

[10] The 50 units are comprised of 36 units at 572-596 North Avenue; eight units at 27-37 Water Street; three units at 259 Water Street; and three units at 581-583 Salem Street. Residences Opposition, Exh. B.

As discussed above, they did not again count toward the Town's recent progress when the building permits issued on October 7, 2022.

With regard to the 32 Nahant application, the Board offers an additional argument that, assuming the date of the Tarrant Lane building permit determines recent progress and, even though that date—October 7, 2022—is not within a year prior to 32 Nahant's application, the Tarrant Lane units should nevertheless count because they were not reflected in the Town's SHI until February 1, 2023. In support they cite the italicized language in 760 CMR 56.03(5):

> Recent progress toward a municipality's Statutory Minima shall mean that the number of SHI Eligible Housing units that have been created within the municipality during the 12 months prior to the date of the Comprehensive Permit application, *evidenced by being inventoried by the Department*…. (emphasis added).

Since the Tarrant Lane development was not "inventoried by the Department" until February 1, 2023—within the 12 months prior to 32 Nahant's application—the Board claims these units should be counted toward the Town's recent progress. Board Motion, pp. 10-11. Because the operative date to determine recent progress is the date of the comprehensive permit, which for the Tarrant Lane development, was October 21, 2019, and not the date of the issuance of the building permit, this argument is unavailing.

200-400 Quannapowitt Avenue. The Board's special permit and site plan decision for this project, which added 79 units to the Town's SHI, was filed with the Town Clerk on August 12, 2022.[11] The Board alleges that the decision was modified on April 4, 2023, and the building permit for this development was issued on August 1, 2023.[12] Board Motion, p. 9. Both dates, it argues, are "well within the 12-month period before the application…" and, thus, should be counted toward the eligible units. *Id.* We disagree. The special permit authorizing these units was filed with the Town Clerk on August 12, 2022, beyond the 12-month period prior to the filing of both comprehensive permit applications. Accordingly, we determine that these 79 units cannot be counted toward the Town's recent progress.

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[11] The Board states that the decision was issued on July 13, 2022, but the Town Clerk stamp reflects that it was filed with that office on August 12, 2022. Joint Exhibits, p. 327. The difference in dates is not relevant for the reasons discussed.

[12] The Joint Exhibits do not include evidence of the modification decision and the building permit certificate provided indicates that the building permit was issued on December 19, 2023, not August 1, 2023. Joint Exhibits, pp. 327-343. The discrepancy of these dates is not relevant, for the reasons discussed.

62 and 76 Foundry Street. The Board issued the special permit, site plan and variance decisions for this multifamily development, which added ten affordable units to the Town's SHI, on November 30, 2021. Joint Exhibits, pp. 85-116. These ten units were first eligible for the SHI, and therefore counted toward the Town's recent progress, as of November 30, 2021, well beyond the 12-month period prior to both comprehensive permit applications. They did not again count toward the Town's recent progress when the building permits issued on September 20, 2023.

184 Water Street and 198 Albion Street. The Board issued its decisions approving the 184 Water Street apartment building, which added one affordable unit, on January 6, 2023, and the 198 Albion Street apartment building, which also added one affordable unit, on January 4, 2023. However, while the special permits for both require the recording of regulatory agreements and evidence that the projects will count toward the Town's SHI, the Board does not dispute that no such regulatory agreements had been executed or recorded, nor had Local Action Unit (LAU) approval been obtained as of the date of either of the developers' applications. Residences Opposition, p. 20; Exh. B; 32 Nahant Opposition, p. 9. The Board argues that because the special permits for each development specifically require the recording of a regulatory agreement and evidence that the units will count toward the Town's SHI, they should nevertheless be counted toward the Town's recent progress. Board Motion, pp. 9-10.

We disagree. An essential component of SHI eligibility under G.L. c. 40B, § 20, is the requirement of an eligible state or federal subsidy program. *See Hollis Hills, LLC v. Lunenburg*, No. 2007-13, slip op. at 10-11 (Mass. Housing Appeals Comm. Dec. 4, 2009) (plain text of statute requires Committee to exclude from consideration any affordable housing not subsidized under qualifying government-sponsored program), *aff'd, Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm*., 464 Mass. 38, 45-47 (2013), citing *Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm.*, 385 Mass. 651, 654 (1982). The undisputed evidence shows that these units had not been restricted under a state or federal subsidy program as of the date of either project's application. Accordingly, they were not eligible for inclusion on the SHI, and therefore not created within the 12-month period prior to the date of either comprehensive permit application. They may not be counted toward the Town's recent progress pursuant to 760 CMR 56.03(5).

V. CONCLUSION AND ORDER

Based on the foregoing, the Board is not entitled to a safe harbor under 760 CMR 56.03(5). Accordingly, the Board's motion for summary decision is denied. The developers' cross-motions for summary decision are granted. These matters are remanded to the Board for continuation of proceedings on the respective comprehensive permit applications.

HOUSING APPEALS COMMITTEE

May 28, 2024

Shelagh A. Ellman-Pearl, Chair

Rosemary Connelly Smedile

James G. Stockard, Jr.

Lisa V. Whelan, Presiding Officer