**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**

**WALPOLE ZONING BOARD OF APPEALS**

**and**

**WALL STREET DEVELOPMENT CORP.**

(Darwin Commons)

No. 2022-08

---

**In the Matter of**

**WALPOLE ZONING BOARD OF APPEALS**

**and**

**WALL STREET DEVELOPMENT CORP.**

(Pinnacle Point)

No. 2022-09

# SUMMARY DECISION

May 11, 2023

**TABLE OF CONTENTS**

I. INTRODUCTION AND PROCEDURAL HISTORY ........ 1

II. STANDARD OF REVIEW ........ 3

III. UNDISPUTED FACTS ........ 4

IV. DISCUSSION ........ 5

A. DHCD Has Authority Under the Comprehensive Permit Regulations to Suspend a Certified Housing Production Plan ........ 7

B. The Time During Which a Comprehensive Permit is Under Appeal Does Not Change the Timing for Adding and Removing Units from the SHI ........ 13

V. CONCLUSION ........ 15

**Counsel for Walpole Zoning Bd. of Appeals**
George X. Pucci, Esq.
Devin C. Braun, Esq.
KP Law
101 Arch Street, Suite 1200
Boston, MA 02110

**Counsel for Wall Street Development Corp.**
Jason R. Talerman, Esq.
Mead, Talerman & Costa LLC
730 Main Street, Suite 1F
Millis, MA 02054

COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

| | |
|---|---|
| In the Matter of<br><br>WALPOLE ZONING BOARD OF APPEALS,<br>Appellant,<br><br>v.<br><br>WALL STREET DEVELOPMENT CORP.,<br>Appellee, | No. 2022-08<br>(Darwin Commons) |
| In the Matter of<br><br>WALPOLE ZONING BOARD OF APPEALS,<br>Appellant,<br><br>v.<br><br>WALL STREET DEVELOPMENT CORP.,<br>Appellee, | No. 2022-09<br>(Pinnacle Point) |

## SUMMARY DECISION

### I. INTRODUCTION AND PROCEDURAL HISTORY

These cases are interlocutory appeals brought by the Town of Walpole Zoning Board of Appeals (Board) pursuant to 760 CMR 56.03(8)(c). The Board appeals the determination by the Department of Housing and Community Development (DHCD), dated July 7, 2022, that the Board had not established a safe harbor under 760 CMR 56.03(1) with respect to applications for comprehensive permits by Wall Street Development Corporation (developer) for two separate developments in Walpole, the Residence at Darwin Commons (Darwin Commons), and the Residences at Pinnacle Point (Pinnacle Point).

On April 28, 2022, the developer filed an application for a comprehensive permit with the Board for the development of Darwin Commons. On May 4, 2022, the developer filed an application for the development of Pinnacle Point. The Board opened public hearings on the applications on May 25, 2022 and June 1, 2022, respectively. By letters dated June 2, 2022 for both projects, the Board notified the developer and DHCD pursuant to 760 CMR 56.03(8)(a) that it considered a denial of the requested permits or the imposition of conditions or requirements would be consistent with local needs pursuant to 760 CMR 56.03(1)(b) and 56.03(4). As grounds therefor, it relied on DHCD's certification of approval of the Town's compliance with its Housing Production Plan (HPP).

The developer notified DHCD on June 13, 2022, of its challenge to the Board's assertion of the regulatory safe harbor in both cases. On July 7, 2022, DHCD issued its determination that the Board had not established a safe harbor under 760 CMR 56.03(1). Thereafter the Board filed separate appeals to the Housing Appeals Committee in both cases on July 26, 2022. Separate conferences of counsel were originally scheduled but, with the agreement of the parties, the two matters were consolidated for purposes of the initial conference, held on August 12, 2022. 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). *See* Post-Conference of Counsel Order, August 19, 2022.[1]

The Board moved for summary decision on September 26, 2022. The developer filed its opposition and cross-motion for summary decision on October 24, 2022, and the Board filed its reply on November 2, 2022. For the reasons discussed below, the Board's motion for summary decision is denied, and the developer's cross-motion for summary decision is granted.

[1] The Board and developer filed two copies of their motions for summary decision and opposition in each case; the briefings are virtually identical in terms of argument and substance, with the only differences being specific dates and project-specific details. Citations to briefs or exhibits therefore are made collectively, rather than to both identical filings, except where specifically noted herein.

## II. STANDARD OF REVIEW

Either party may file an interlocutory appeal of an adverse decision by DHCD to the Committee. The Board 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, the certified HPP safe harbor. *See* 760 CMR 56.03(8)(a). Like all appeals to the Committee, an interlocutory appeal is *de novo*. *See 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 DHCD and DHCD's decision carries no evidentiary weight. *Id*., citing *Kirkwood v. Board of Appeals of Rockport*, 17 Mass. App. Ct. 423, 426-427 (1984).

Summary decision is appropriate if "the record before the Committee, together with the affidavits (if any) shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 56.06(5)(d); *see also River Marsh*, *supra*, No. 2019-04, slip op. at 2; *Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992); *Warren Place, LLC v. Quincy*, No. 2017-10, slip op. at 4 (Mass. Housing Appeals Comm. Aug. 17, 2018), *aff'd sub nom Haugh v. Housing Appeals Comm*., Norfolk Super. Ct. No. 1882CV01167, Aug. 7, 2019; *Delphic Assocs., LLC v. Duxbury*, No. 2003-08, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 14, 2010); *Grandview Realty, Inc. v. Lexington*, No. 2005-11, slip op. at 4 (Mass. Housing Appeals Comm. July 10, 2006). 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*, 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).

## III. UNDISPUTED FACTS

The Town of Walpole had an approved Housing Production Plan (HPP), deemed effective on April 23, 2019, the date that DHCD received the complete plan submission, for a five-year term expiring on April 22, 2024. *See* Memorandum of Law in Support of Walpole Zoning Board of Appeals Motion for Summary Decision (Board Memorandum) Exh. 5, p.3.

On April 27, 2021, the Town approved a comprehensive permit for the Cedar Crossing project, which included 226 units eligible to be included on the DHCD Subsidizing Housing Inventory (SHI). Based upon this approval, on August 26, 2021, the Town requested certification of compliance with its HPP. On September 10, 2021, DHCD issued a certification of compliance with the previously approved HPP for the two-year period from April 27, 2021 to April 26, 2023. Because the Town exceeded the 1.0% unit increase for the applicable calendar year (which required in this instance the creation of at least 90 SHI eligible units), pursuant to 760 CMR 56.03(4)(f), DHCD's letter approved a two-year certification period from April 27, 2021 to April 26, 2023. *See* Board Memorandum, p. 7; *id.,* Exh. 1. DHCD further stated in its certification that "…all units must retain eligibility for the SHI for the entire certification period. If units are no longer eligible for inclusion on the SHI, they will be removed and will no longer be eligible for certification. This action may affect the term of [this] certification." *See* Board Memorandum, Exh. 1.

Following the Board's approval, the Cedar Crossing comprehensive permit was appealed twice. The first appeal, by the developer of that project to the Committee, was resolved with a revised comprehensive permit agreed to by the Board and the Cedar Crossing developer that was incorporated into a stipulation of dismissal and entry of judgment issued by the Committee on August 20, 2021. The revised comprehensive permit was then appealed in Superior Court by abutters to the project, and a final judgment dismissing their claims in favor of the developer, the Board, and the Committee was entered on January 27, 2022. *See* Board Memorandum, pp. 3-4.

On April 28, 2022, the developer filed an application for a comprehensive permit with the Board for the development of Darwin Commons. On May 4, 2022, the developer filed an application for the development of Pinnacle Point. Board Memorandum, p. 4.

DHCD emailed the Town on May 24, 2022 requesting building permit issuance information for the Cedar Crossing units but received no response. Because DHCD had no

record of building permits, it removed the Cedar Crossing units from the SHI and informed the Town by letter dated June 22, 2022. *Id*. This June 22 letter also informed the Town that since DHCD determined building permits for Cedar Crossing's units had not been issued within one year of the date of issuance of the original comprehensive permit on April 27, 2021, those units became ineligible for inclusion of the SHI on April 26, 2022 and were no longer eligible to count toward HPP certification.[2] Board Memorandum, Exh. 5, p. 4.

## IV. DISCUSSION

The question on this motion for summary decision is whether, on the record before the Committee, there is sufficient undisputed evidence to establish that, as of the dates of the developer's comprehensive permit applications, the Board had maintained its Housing Production Plan certification, and thereby was eligible for the safe harbor. *See* 760 CMR 56.03(1)(b). Pursuant to 760 CMR 56.03(8)(a), the Board has the burden of "proving satisfaction of the grounds for asserting that a denial … [of a comprehensive permit] would be consistent with local needs…."

The Board argues that once DHCD determines a municipality is in compliance with its HPP, the certification is deemed effective for either one or two years, whichever term is applicable, pursuant to 760 CMR 56.03(4)(f), and it cannot be revoked by DHCD before the expiration of that term. *See* Board Memorandum, pp. 7-8. The Board also argues that, to the extent DHCD relies on its guidelines regarding Housing Production Plans and Chapter 40B, generally, as support for the authority to revoke or suspend a HPP certification, the

[2] On February 21, 2023, the developer moved to supplement the summary decision record with correspondence between the developer and the Walpole Building Commissioner: 1) a January 31, 2023 email from the developer to the building commissioner requesting whether any building permit applications had been filed or if any building permits had been issued for the Cedar Crossing project; and 2) the building commissioner's email response dated February 6, 2023 that no building permit applications had been filed. The Board filed no opposition and developer's unopposed motion is granted; however, this additional information is not material to the motion for summary decision because the relevant dates for determining whether the HPP certification was in effect are the dates on which the respective comprehensive permit applications for Darwin Commons and Pinnacle Point were filed. Additionally, on May 3, 2023, the developer filed a supplemental memorandum in further opposition to the Board's motion for summary decision and in further support of its cross-motion for summary decision. Because the developer did not seek leave from the Committee to file supplemental memoranda, we do not consider this briefing for purposes of this decision.

guidelines have no force of law and their application by DHCD is unreasonable, arbitrary, and capricious. *See* Board Memorandum, pp. 11-13.

Alternatively, the Board argues that even if DHCD has the authority to revoke a HPP certification, DHCD failed to account for the time during which the Cedar Crossing comprehensive permit was under appeal. The Board claims building permits for Cedar Crossing could not be issued during this time, and therefore the Town should be credited for such time when calculating any retroactive suspension date. *See* Board Memorandum, p. 13. The Board argues the first date on which building permits for Cedar Crossing could issue was January 28, 2022, after resolution of the final appeal. *See* Board Memorandum, p.14. One year from that date, after which the Cedar Crossing units would be ineligible for the SHI if building permits had still not issued, was approximately January 28, 2023. Because January 28, 2023 was well after the dates on which the developer applied for comprehensive permits for Darwin Commons and Pinnacle Point, the Board argues the Town could still properly invoke the HPP safe harbor provision in response to those applications. *See* Board Memorandum, pp. 13-15.

The developer counters that Cedar Crossing failed to secure necessary building permits within one year of the issuance of its comprehensive permit as required by 760 CMR 56.03(2)(c). Therefore, it argues, DHCD properly removed those units from the SHI effective before the date of the comprehensive permit applications for Darwin Commons and Pinnacle Point. It argues further that the regulations expressly provide that proposed units may be considered eligible for the SHI only for certain time periods and subject to specific conditions. *See* Developer Opposition, pp. 8-9. The HPP certification safe harbor, in developer's view, relies on the units meeting the criteria for SHI Eligibility. *Id*. at 9. While the developer argues a plain reading of the regulations alone requires denial of a safe harbor, it also argues that reliance on guidelines, if necessary, would still be reasonable and should be given deference. *See* Developer Opposition, pp. 14-15.[3] Finally, the developer argues the one-year time lapse provision of § 56.03(2)(c) is not tolled or extended. *Id.,* pp. 17-20.

[3] On February 21, 2023, the presiding officer notified the parties of her intention to take official notice of the guidelines referenced in their briefings, the "G.L. c. 40B Comprehensive Permit Project Subsidized Housing Inventory Guidelines, Updated December 2024" and "Housing Production Plan Section II.B of G.L. c. 40B Comprehensive Permit Projects Subsidized Housing Inventory

### A. DHCD Has Authority Under the Comprehensive Permit Regulations to Suspend a Certified Housing Production Plan

Whether the Board may rely on the regulatory safe harbor provided by certification of an HPP is determined by the relevant provisions of the comprehensive permit regulations, 760 CMR 56.00. *See Matter of Dighton and Stoney Ridge Estates, LLC*, No. 2010-01, slip op. at 5 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal, June 21, 2010) (stating assertion of HPP certification safe harbor rests on relevant provisions of 760 CMR 56.00 using well-established principles of construction); *Matter of Bourne and Chase Developers, Inc.*, No. 2008-11, slip op. at 6 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal, June 8, 2009) (interpretation of safe harbor regulatory provisions require they be read in same manner as statute). Regulatory interpretation relies on "principles of construction that are well established by the courts." *Dighton, supra*, slip op. at 5. A regulation should be "read in the same manner as a statute" with words given "their plain and ordinary meaning." *Id.*, citing *Ingalls v. Board of Registration in Medicine*, 445 Mass. 291, 294 (2005). Additionally, a regulation should be interpreted to "give effect to all of its provisions." *Dighton*, *supra,* slip op. at 5, citing *Bottomley v. Division of Admin. Law Appeals*, 22 Mass. App. Ct. 652, 657 (1986).

"A decision by a Board to deny a Comprehensive Permit … shall be upheld if … [DHCD] has certified the municipality's compliance with the goals of its approved Housing Production Plan, in accordance with 760 CMR 56.03(4)." 760 CMR 56.03(1)(b). For our analysis, the three pertinent provisions, 760 CMR 56.03(4)(a)-(f), 760 CMR 56.03(1)(b) and 760 CMR 56.03(2), must be read together. Sections 56.03(4)(a)-(f) provide the necessary steps for the development, implementation, approval, and certification of an HPP. Section 56.03(1)(b) establishes a safe harbor for municipalities that are certified as in compliance with an approved HPP. And § 56.03(2) outlines when units are eligible to be counted on the SHI, and how the elapse of certain time periods following the issuance of the comprehensive permit affects SHI eligibility.

The Board argues that the DHCD certification provided a mandatory two-year period during which DHCD has no authority or discretion to revoke or suspend an HPP

---

Guidelines, Updated October 2020," and offered them the opportunity to contest the taking of official notice pursuant to 760 CMR 56.06(8)(b)1. Neither party contested.

certification. It relies on 760 CMR 56.03(4)(f), which states: "…[i]f [DHCD] finds that the municipality has increased its number of SHI Eligible Housing units in a calendar year by at least 1.0% of its total housing units, *the certification shall be in effect for two years from its effective date*."[4] *Id.* (emphasis added). *See* Board Memorandum, pp. 7-9; Board Reply, pp. 2-3.

Because the regulations state the certification "*shall* be in effect for two years," the Board argues this two-year term is mandatory, and DHCD has no authority or discretion to circumvent this time period. *See* Board Memorandum, pp. 7-8 (emphasis added). It argues the regulations must be read in the same manner as a statute and therefore words must be given their plain and ordinary meaning. *Id*., citing *Ingalls*, *supra*, 445 Mass. 291, 294. The Board further asserts that use of the word "shall" indicates a mandatory requirement, as opposed to the use of "may," which implies discretion. Board Memorandum, p. 8, citing *Kingdomware Techs., Inc., v. United States*, 579 U.S. 162, 171-172 (2016); *City of Quincy v. Massachusetts Water Res. Auth.*, 421 Mass. 463, 468 (1995).

The Board acknowledges the time lapse provisions of § 56.03(2)(c) but argues the criteria for SHI eligibility only apply at the time of the initial request for certification, and that once DHCD has granted a certification of a Town's HPP, no further assessment of continued eligibility of units on the SHI should be made. *See* Board Reply, pp. 2-3. It claims that applying § 56.03(2) is in direct conflict with the plain language meaning of the specific mandate of § 56.03(4)(f): that once compliance has been certified, such certification "shall" be in effect for two years. *See* Board Reply, p. 2.

---

[4] 760 CMR 56.03(4)(f) provides in full:

Certification of Municipal Compliance. A municipality may request that [DHCD] certify its compliance with an approved HPP if it has increased its number of SHI Eligible Housing units in an amount equal to or greater than its 0.50% production goal for that calendar year. SHI Eligible Housing units shall be counted for the purpose of certification in accordance with the provisions for counting units under the SHI set forth in 760 CMR 56.03(2). Requests for certification may be submitted at any time, and [DHCD] shall determine whether a municipality is in compliance within 30 days of receipt of the municipality's request. If [DHCD] determines the municipality is in compliance with its HPP, the certification shall be deemed effective on the date upon which the municipality achieved its numerical target for the calendar year in question, in accordance with the rules for counting units on the SHI set forth in 760 CMR 56.03(2). A certification shall be in effect for a period of one year from its effective date. If [DHCD] finds that the municipality has increased its number of SHI Eligible Housing units in a calendar year by at least 1.0% of its total housing units, the certification shall be in effect for two years from its effective date.

The Board's reliance on the latter use of "shall" in § 56.03(4)(f) does not support this result, however. The Board's analysis of the language of § 56.03(4)(f) ignores the use of "shall" elsewhere in that subsection. The subsection also states that certification is dependent upon the counting of units under the criteria for SHI eligibility provided in § 56.03(2): "SHI Eligible Housing units *shall be counted for the purpose of certification in accordance with the provisions for counting units under the SHI set forth in 760 CMR 56.03(2)*." 760 CMR 56.04(4)(f) (emphasis added).

Section 56.03(2)(b) introduces another use of the word "shall," stating, in relevant part:

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

*Id*. The Board's argument would require us to ignore these other mandatory provisions, contravening our duty to interpret a regulation giving "effect to all of its provisions." *See Dighton*, *supra,* No. 2010-01, slip op. at 5.

We must read all applicable regulatory provisions in a way that gives meaning and purpose to each, as is the case in interpreting the language of a statute, where a court looks at the instrument as a whole to give meaning to all of its provisions. *See Matter of Norwood and Davis Marcus Partners*, No. 2015-06, slip op. at 13 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal Dec. 8, 2016), citing *Wolfe v. Gormally*, 440 Mass. 699, 704 (2004).[5] 760 CMR 56.03(4)(f) states that "SHI Eligible Housing units shall be counted for the purpose of certification in accordance with the provisions for counting units under the SHI set forth in 760 CMR 56.03(2)." 760 CMR 56.03(2)(c) states that "[i]f more than one

[5] *See also Wilson v. Commissioner of Transitional Assistance*, 441 Mass. 846, 852-853 (2004) (construing use of "shall" as permissive in order to give meaning to all statutory provisions).

year elapses between the date of issuance of the [comprehensive permit]…and issuance of the building permit, the units will become ineligible for the SHI….”

Here, both provisions contain mandatory language. *Matthews v. Rakiey*, 38 Mass. App. Ct. 490, 495 (1995), citing *Hewitt v. Helms*, 459 U.S. 460, 471 (1983) (describing words “shall” and “will” as “unmistakably mandatory” language). One provision, § 56.03(4)(f), addresses how SHI eligible units are to be counted for purposes of HPP certification, while two other provisions, §§ 56.03(2)(b) and (c), provide the circumstances in which units lose SHI eligibility. Section 56.03(4)(f) states an HPP certification “shall be in effect” for two years, providing another example of the use of seemingly mandatory language. The Supreme Judicial Court has stated that “shall” and “will” can be construed as directive rather than mandatory provisions. *See Wilson, supra*, 441 Mass. at 852-853, citing *Swift v. Registrars of Voters of Quincy,* 281 Mass. 271, 276 (1932) (stating although “shall” commonly means mandatory, it is flexible and can be interpreted as permissive or directory in order to effectuate legislative purposes). Therefore, the provisions of 760 CMR 56.03(2) and 56.03(4) should be read together, as § 56.03(4)(f) incorporates by reference the SHI eligibility and time lapse provisions of 760 CMR 56.03(2): “SHI Eligible Housing units shall be counted for the purpose of certification *in accordance with the provisions for counting units under the SHI set forth in 760 CMR 56.03(2)*.” *See* 760 CMR 56.03(2) (emphasis added). This language refers to the entirety of 760 CMR 56.03(2), not further subsections; the Board is subject not only to § 56.03(2)(b), providing when units may be counted on the SHI, but also to § 56.03(2)(c), providing when those units may be removed. If the intent of the regulation was to apply only subparts of 760 CMR 56.03(2), those would have been explicitly listed.

Moreover, the purpose of the HPP safe harbor provided under 760 CMR 56.03(1)(b) is to give a municipality an incentive to plan for and construct affordable housing. *Alexander Estates LLC v. Billerica*, No. 2005-14, slip op. at 2 (Mass. Housing Appeals Comm. Ruling on Motion to Dismiss Mar. 27, 2006). The certification of the HPP reflects a municipality’s progress by increasing the number of affordable units in the community by the prescribed percentage once a comprehensive permit approval is filed. However, that addition of units to the SHI is specifically limited to one year unless building permits are issued, reflecting that the SHI is intended to represent actual affordable housing. Thus, the municipality enjoys the

provisional benefit of units counting as eligible for the SHI for up to a year before building permits issue, but at that point the construction process must begin in order to retain eligibility.

Accordingly, the language in § 56.03(4)(f) that a certification "shall be deemed effective" for one or two years, must be considered with the restrictions for SHI eligibility in § 56.03(2). It does not, as the Board argues, mean that the certification remains effective despite any changes to the units underlying that certification. If units become ineligible, the condition precedent underlying the HPP certification no longer exists. Interpreting the use of "shall" in § 56.03(4)(f) as mandating an HPP certification to remain in place regardless of any subsequent changes affecting SHI eligibility would require certain provisions of 760 CMR 56.03(2) to be disregarded, specifically the time lapse provision of § 56.03(2)(c). Rather, the use of "shall" for the nominal term of the certification is directive and must be consistent with the other provisions. *See Wolfe v. Gormally, supra,* 440 Mass. 699, 704; *Bankers Life & Cas. Co. v. Commissioner of Ins.*, 427 Mass. 136, 140 (1998). Accordingly, the regulation, read reasonably as a whole, provides that certification is effective subject to the requirements of 760 CMR 56.03(2).

In this case, the Cedar Crossing units first became SHI eligible under § 56.03(2)(b)(1)a upon the filing of the comprehensive permit with the municipal clerk. *See* Board Memorandum, Exh. 1. This subsection further prescribes that the eligibility of those units is "subject to the time limit for counting such units set forth at 760 CMR 56.03(2)(c)." 760 CMR 56.03(2)(b)(1)a. Section 56.03(2)(c) in turn states, "[i]f more than one year elapses between the date of issuance of the Comprehensive Permit…, as that date is defined in 760 CMR 56.03(2)(b)1, and issuance of the building permit, the units will become ineligible for the SHI until the date that the building permit is issued." We conclude that the Cedar Crossing units counted toward certification only for so long as they complied with § 56.03(2). This is consistent with our past decisions. *See 28 Clay Street Middleborough, LLC v. Middleborough*, No. 2008-06, slip op at 4-5 and n.5 (Mass. Housing Appeals Comm. Sept. 28, 2009) (reaffirming presiding officer's summary decision ruling that Board was not entitled to HPP safe harbor because of suspension of HPP certification at time of developer's application for comprehensive permit). *See also Bourne*, *supra*, No. 2008-11, slip op. at 9

(suggesting, while not reaching the question, an HPP certification period may lapse if units lose eligibility for the SHI from non-issuance of building permits).

The September 10, 2021 certification approval issued by DHCD is consistent with this interpretation. It stated the 226 units in Cedar Crossing "must retain eligibility for the SHI for the entire certification period. If units are no longer eligible for inclusion on the SHI, they will be removed and will no longer be eligible for certification. This action may affect the term of your certification." Board Memorandum, Exh. 1. As noted in § III, *supra*, both parties acknowledge that DHCD had removed the 226 Cedar Crossing units from the SHI as of the date of the developer's comprehensive permit applications for Darwin Commons and Pinnacle Point. The Board, however, disagrees that the removal of these units has any effect an HPP certification approval issued by DHCD.

The comprehensive permit for Cedar Crossing was filed with the Town Clerk on April 27, 2021, and no building permit had issued for the project as of one year later. Developer Opposition, pp. 3-4, 12. The HPP certification issued by DHCD on September 10, 2021 related back to April 27, 2021 and was expressly contingent on the time periods provided in 760 CMR 56.03(2)(b). The undisputed record shows that DHCD removed the 226 Cedar Crossing units from the SHI because it had no record that the Town had issued building permits within one year of April 27, 2021, and DHCD informed the Town its HPP Certification was suspended as of April 26, 2022. *See* Board Memorandum, Exh. 5, p. 4.

Accordingly, because the Town was not certified as being in compliance with its HPP as of April 28 and May 4, 2022, it is precluded from invoking the safe harbor under 760 CMR 56.03(1)(b). *See Middleborough, supra,* slip op. at 4-5.[6]

---

[6] The Board also argues that in the July 7, 2022 safe harbor denial, DHCD impermissibly relied on Section II.B.9 of DHCD's G.L. c. 40B Comprehensive Permit Project Subsidized Housing Inventory Guidelines updated October 2020, because they do not have the force of law and were not promulgated as proper regulations. *See* Board Memorandum, pp. 9-11. However, for this de novo appeal, because the comprehensive permit regulations alone provide the circumstances under which a Housing Production Plan certification may lapse, it is not necessary to reach the parties' arguments regarding applicability of the Guidelines. We note, however, that the Guidelines referenced above are consistent with the comprehensive permit regulations.

### B. The Time During Which a Comprehensive Permit is Under Appeal Does Not Change the Timing for Adding and Removing Units from the SHI

The Board alternatively argues that, even assuming HPP certification was properly suspended, the time during which the Cedar Crossing comprehensive permit was under appeal to the Committee and to the Superior Court was not correctly considered when calculating the retroactive date of the HPP suspension. In its view, during the time the appeals of the Cedar Crossing comprehensive permit were pending, no building permit could issue for the project, because the comprehensive permit does not become final until the date the last appeal is decided pursuant to 760 CMR 56.05(12)(a). Therefore, it claims, the one-year period during which building permits were required to be issued to maintain the certification of the HPP does not apply. *See* Board Memorandum, pp. 13-14.

The Board argues that time during which a comprehensive permit is under appeal freezes the time periods relating to SHI eligibility. Although the Board cites no decisions by the Committee or courts in support of this specific assertion, it argues that the two provisions of § 56.03(2) discussed in § IV.A above—§ 56.03(2)(b)1 and § 760 CMR 56.03(2)(c)—are constrained by 760 CMR 56.05(12)(a), which states that "a comprehensive permit … shall become final on the date the last appeal is decided or otherwise disposed of…." *See* Board Memorandum, p. 14.

Under this theory, the Board argues that, since the time from the April 26, 2021 issuance of the comprehensive permit for Cedar Crossing to the final resolution of all appeals by any party other than the Board on January 27, 2022 was less than one year, as a matter of law, the Cedar Crossing units could not become ineligible for the SHI during this time. Board Memorandum, pp. 13-14. The Board argues the one-year period by which a building permit must be issued under 760 CMR 56.03(2) did not end until January 28, 2023, one year after the permit became final. While the appeals were pending, the Board claims, no building permits could be issued for the project because the comprehensive permit had not yet become final pursuant to § 56.05(12)(a). *Id.,* p. 14. Therefore, since the developer filed its comprehensive permit applications well before January 28, 2023, the Board argues, the Cedar Crossing units were eligible for the SHI as of those dates, and the Town properly invoked the safe harbor provision based on its certified HPP. *See* Board Memorandum, pp. 14-15.

This argument is not persuasive. First, § 56.03(2)(b) provides separate, individual bases by which units become eligible for inclusion on the SHI. In this instance, Cedar Crossing units became first eligible on filing of the permit with the municipal clerk.[7] The time lapse grounds for removal from the SHI are addressed separately in § 56.03(2)(c). The relevant basis for removal here is the passage of one year from the date of initial eligibility without the issuance of building permits. 760 CMR 56.03(2)(c). Nor does the fact that the permit was subsequently modified, and a revised permit issued affect the lapse provisions regarding SHI eligibility. *See Matter of Newton and Marcus Lang Investments, LLC,* No. 2015-02, slip op. at 6 (Mass. Housing Appeals Comm. Interlocutory Decision regarding Safe Harbor June 26, 2015) (stating subsequent modifications to the initial special permit for a project did not toll the one-year period after which the units became ineligible for the SHI if no building permits had issued).[8]

Contrary to the Board's argument, § 56.03(2)(c) is not affected by § 56.05(12)(a). Section 56.03 governs "Methods to Measure Progress Toward Local Affordable Housing Goals." By contrast, § 56.05(12)(a) is within § 56.05, a separate section of the regulations governing "Local Hearings." The latter provision specifies when a comprehensive permit becomes final, which affects the date on which the comprehensive permit itself would lapse

---

[7] Section 56.03(2)(b) states:
"Units shall be eligible to be counted on the SHI at the earliest of the following:

1. For units that require a Comprehensive Permit…, the date when:
    a. the permit or approval is filed with the municipal clerk, notwithstanding any appeal by a party other than the Board, but subject to the time limit for counting such units set forth at 760 CMR 56.03(2)(c); or
    b. on the date when the last appeal by the Board is fully resolved;
2. When the building permit for the unit is issued;
3. When the occupancy permit for the unit is issued; or
4. When the unit is occupied by an Income Eligible Household and all the conditions of 760 CMR 56.03(2)(b) have been met…."

[8]Under the comprehensive permit regulation, the fact that the Cedar Crossing comprehensive permit was subject to appeals did not preclude its developer from applying for building permits subject to the risk of an undesired outcome on appeal. *See* 760 CMR 56.05(12)(a) ("…if a Comprehensive Permit is issued by the Board or the Committee and is subsequently subject to legal appeal, an Applicant may elect to proceed at risk with construction of the Project"); *see also Herring Brook Meadow, LLC v. Scituate*, No. 2007-15, slip op. at 4 (Mass. Housing Appeals Comm. Ruling and Order on Motion to Quash Dec. 13, 2010) (stating comprehensive permit regulations allow developers to proceed with projects at their own risk pending appeal).

under 760 CMR 56.05(12)(c) and provides for circumstances that would toll that time period.[9] The finality of the comprehensive permit and the determination of eligibility for the SHI are distinct provisions, addressing different time periods, and the Board's attempt to conflate them is mistaken.

Under 760 CMR 56.03(2)(c), if more than one year elapses between the date of the filing of the comprehensive permit with the municipal clerk and the issuance of a building permit, those units become ineligible for the SHI until the time that the building permit is issued. Section 56.05(12)(a) does not affect that time period. For this reason, the Cedar Crossing units became ineligible for the SHI, and the HPP certification incorporating those units was properly suspended by DHCD, precluding the Board from claiming a safe harbor at the time of the developer's comprehensive permit applications for Darwin Commons and Pinnacle Point.

## V. CONCLUSION

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

---

[9] 760 CMR 56.05(12)(a) provides, "… [a] Comprehensive Permit shall become final on the date that the written decision of the Board is filed in the office of the municipal clerk, if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of, provided however that if a Comprehensive Permit is issued by the Board or the Committee and is subsequently subject to legal appeal, an Applicant may elect to proceed at risk with construction of the Project." Section 56.05(12)(c) provides for the tolling of the three-year period before a comprehensive permit lapses. This provision has no impact on the time required for a project to obtain building permits.

These matters are remanded to the Board for continuation of proceedings on the respective comprehensive permit applications.

**HOUSING APPEALS COMMITTEE**

May 11, 2023

Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain

Rosemary Connelly Smedile

James G. Stockard, Jr.

Caitlin E. Loftus, Presiding Officer