COMMONWEALTH OF MASSACHUSETTS HOUSING APPEALS COMMITTEE

In the Matter of

WALTHAM ZONING BOARD OF APPEALS and ALLIANCE REALTY PARTNERS

No. 2016-01

DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR

February 13, 2018

TABLE OF CONTENTS

I. INTRODUCTION AND PROCEDURAL BACKGROUND	1
A. Introduction	1
B. Procedural Background	2
II. GENERAL LAND AREA MINIMUM OF 1.5 PERCENT	4
A. Burden of Proof	5
B. The Denominator	
1. Undisputed Land Area Classifications	6
2. Government-owned Land Area Exclusion	
3. Other Land Area Exclusions Sought by Board	16
4. Overall Validity of Board's Denominator Calculation	25
C. The Numerator	26
1. Presumption for SHI Eligible Properties	27
2. The Board's Calculation of the Numerator	28
3. Rental Projects with 25% or More SHI Eligible Units	33
4. Group Homes	34
5. Overall Validity of Board's Numerator Calculation	36
III. FINAL LAND AREA MINIMUM	37
IV. CONCLUSION AND ORDER	38

Counsel for Waltham Zoning Board of Appeals

Michelle L. Learned, Esq. **Assistant City Solicitor** City of Waltham City Solicitor's Office 11 School Street Waltham, Massachusetts 02451

Patricia A. Azadi, Esq. First Assistant City Solicitor City of Waltham City Solicitor's Office 11 School Street Waltham, Massachusetts 02451

Witnesses for Waltham Board of **Appeals**

Joseph R. Goode Amanda Mason Eric Rizzo Kim Clougherty Victor Hernandez

Counsel for Alliance Realty Partners

Peter L. Freeman, Esq. Freeman Law Group, LLC 86 Willow Street, Unit 6 Yarmouthport, Massachusetts 02675

Kevin T. Smith, Esq. Law Office of Kevin T. Smith, LLC 100 Main Street, Suite 410 Concord, Massachusetts 01742

James G. Ward, Esq. Matthew H, Snell, Esq. Nutter, McClennan & Fish Seaport West 155 Seaport Boulevard Boston, Massachusetts 02210

Witness for Alliance Realty Partners

Amy Haas

COMMONWEALTH OF MASSACHUSETTS HOUSING APPEALS COMMITTEE

In	the	matter	۸f
		ппапет	431

WALTHAM ZONING BOARD OF APPEALS,

and

ALLIANCE REALTY PARTNERS.

No. 2016-01

DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR

I. INTRODUCTION AND PROCEDURAL BACKGROUND

A. Introduction

The Waltham Zoning Board of Appeals (Board), pursuant to 760 CMR 56.03(8), appeals a determination by the Department of Housing and Community Development (DHCD) that the City of Waltham has not met the general land area minimum, one of the three enumerated safe harbors precluding the Housing Appeals Committee's (Committee) overturning or modifying a board's decision under G.L. c. 40B, § 21.

The general land area minimum is met if land area in the municipality dedicated for use as housing for low or moderate income households is 1.5% or more of all land zoned for residential, commercial, or industrial use. G.L. c. 40B, § 20; 760 CMR 56.03(3)(b). It is one of three statutory minima under Chapter 40B that provide a safe harbor, because requirements or regulations imposed by a municipality that preclude or condition a

comprehensive permit shall be consistent with local needs if the municipality has achieved one of these statutory minima. G.L. c. 40B, § 20. Thus, any decision of a board to deny a permit or grant a permit with conditions "shall be upheld" if the municipality has achieved one of these statutory minima. 760 CMR 56.03(1)(a).

Under 760 CMR 56.03(8)(a), a board seeking to rely on one of several enumerated safe harbors must notify the developer and DHCD of such safe harbor claim within 15 days of the opening of the board's hearing on a comprehensive permit application. If the developer wishes to challenge the board's assertion of one of these statutory and regulatory safe harbor protections, it must provide written notice to DHCD and the board within 15 days. DHCD "shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials." 760 CMR 56.03(8)(a). Either party may file an interlocutory appeal of an adverse decision by DHCD to the Committee, but the party must do so within 20 days of receipt of DHCD's decision. The Committee's hearing on the issue, like all of its proceedings, is *de novo*. G.L. c. 40B, § 22. The Committee's regulation, 760 CMR 56.03(8)(a), provides that the Board has "the burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs[.]"

B. Procedural Background

Alliance Realty Partners (Alliance) filed an application with the Board on November 20, 2015 seeking a comprehensive permit to build a 195-unit rental project at 341 Second Avenue in Waltham. The hearing on the comprehensive permit application commenced on December 22, 2015. On that date, the Board provided DHCD and Alliance with formal notice that it invoked the general land area minimum safe harbor on the ground that Waltham had reached the 1.5% land area minimum under G.L. c. 40B, § 20 and 760 CMR 56.03(3)(b).

Alliance notified the Board and DHCD of its objection to the Board's position. On February 11, 2016, DHCD issued a determination that the Board had not met its burden to prove that Waltham had achieved the 1.5% land area threshold. The Board then filed this interlocutory appeal with the Committee on February 24, 2016. See 760 CMR 56.03(8)(c).

At the conference of counsel for this appeal in April 2016, Board counsel stated that the Board was attempting to obtain the confidential addresses of residential properties in

Waltham that are licensed or operated by the Department of Developmental Services (DDS) and the Department of Mental Health (DMH), according to DHCD Chapter 40B guidelines, but that efforts thus far had been unsuccessful. Group homes are eligible to be listed on DHCD's inventory of a municipality's low or moderate income housing, known as the Subsidized Housing Inventory (SHI). Guidelines, G.L. c. 40B Comprehensive Permit Projects, Subsidized Housing Inventory (Dec. 2014) (Guidelines). §§ I.A, II.A.2.e. See 760 CMR 56.03(2)(a) (defining SHI eligible housing).

The Board issued subpoenas to DHCD, DDS, and DMH (collectively, the state agencies), requesting group home identification data. The state agencies refused to release identifying information citing privacy law protections for the residents. The Board then filed an enforcement action in Superior Court, *Zoning Bd. of Appeals of the City of Waltham*, Middlesex Super. Ct., No. 1681CV01177 (2016).

The presiding officer scheduled and held an evidentiary hearing on all matters, with the exception of group home land area, on July 27 and 28, 2016 and conducted a view of six SHI properties on August 2, 2016. The evidence closed following the July hearing for all matters except group homes.

The Board reported on July 25, 2017 that the Superior Court had ordered mediation, which thereafter resulted in an agreement whereby the state agencies agreed that DMH and DDS would provide affidavits to the parties and the Committee. The affidavits did not identify DMH and DDS group homes by address but instead provided land area totals for each agency's group homes calculated by DMH and DDS personnel. The affidavits stated that no agency personnel would be available for cross-examination. Alliance objected to the admission of these affidavits without the opportunity for cross-examination. The presiding officer asked the Board to file a motion in limine requesting admission of its group home

¹ Their objection was that the release of group home addresses would reveal information about the health status of group home residents, violating their statutory privacy interests. See *Hardiman v. Massachusetts Dept. of Devl. Servs.*, Suffolk Super. Ct., No. 1484CV01561, slip op. at 2-3 (Mar. 3, 2016).

land area information received from DMH and DDS.² On October 19, 2016, the Committee issued an order on the motion in limine, allowing admission of DMH and DDS's calculations of land area for Waltham's group homes only if the affiants were available for cross-examination. In light of the Committee's ruling, the presiding officer allowed the Board time to seek a final judgment in its enforcement action in Superior Court. The parties also were ordered to file post-hearing briefs on all issues exclusive of the group home land area.

The Superior Court entered final judgment in the enforcement case on February 14, 2017, ordering the state agencies to provide group home addresses and the DMH and DDS land area calculations to all parties, subject to a protective order. The Board thereafter filed supplemental pre-filed testimony regarding group homes. Alliance chose not to file supplemental pre-filed testimony, and waived its right of cross-examination of the Board's witnesses regarding group home land area. The parties submitted stipulations, dated March 27, 2017, in which both agreed to admit into evidence the pre-filed testimony of Kim Clougherty of DMH and Victor Hernandez of DDS and Alliance waived its right to cross-examine Ms. Clougherty and Mr. Hernandez. No supplemental hearing was therefore necessary. The parties then filed supplemental briefs and reply briefs. Both parties timely requested a proposed decision. The presiding officer issued a proposed decision and requested the parties to submit any objections and comments with respect thereto. Both parties submitted responses. Alliance reported that it had no suggested changes to the proposed decision. The Board submitted general and specific objections to the proposed decision and suggested modifications, some of which we incorporate into this decision.

II. GENERAL LAND AREA MINIMUM OF 1.5 PERCENT

For the general land area minimum, the decision of a board denying a comprehensive permit is consistent with local needs, as a matter of law, when the town has low or moderate income housing "on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial, or industrial use...." G.L. c. 40B, § 20. The general land

² While motions in limine are motions requesting the exclusion of evidence from a hearing or trial, there was no prejudice in asking that the Board file the motion and Alliance file an opposition, with the Board allowed to file a reply to Alliance's opposition.

area minimum percent is calculated by dividing the area of sites of affordable housing that are eligible to be inventoried on the DHCD SHI by the total land area zoned for residential, commercial, or industrial use, with certain exceptions identified in the statute and regulation. G.L. c. 40B, § 20; 760 CMR 56.03(3)(b). The Board asserts that Waltham has met this 1.5% general land area minimum threshold. Alliance argues that the Board has not shown that data support its purported percent, and the City has not met the statutory minimum.

A. Burden of Proof

This appeal is de novo, and the Board has the burden of proof in this appeal. In the Matter of Newton and Dinosaur Rowe, LLC, No. 2015-01, slip op. at 2 (Mass. Housing Appeals Comm. Interlocutory Decision Regarding Safe Harbor June 26, 2015) (Dinosaur Rowe); In the Matter of Newton and Marcus Lang Invs., LLC, No. 2015-02, slip op. at 2 (Mass. Housing Appeals Comm. Interlocutory Decision Regarding Safe Harbor June 26, 2015) (Marcus Lang).3 The Board must first affirmatively prove that it has satisfied the statutory minimum based on reliable supporting evidence. Brewster Commons, LLC v. Duxbury, No. 2010-08, slip op. at 6 (Mass. Housing Appeals Comm. Ruling and Order Extending Comprehensive Permit Dec. 12, 2011) (Duxbury). "[T]he assertion of achieving a statutory minimum has always been in the nature of an affirmative defense, and revision of [the Committee's] regulations in 2008 has made it even clearer that the 'Board shall have the burden of proving satisfaction of the grounds [.]" Id., quoting 760 CMR 56.03(8). Specifically, the Board must demonstrate, through sufficient credible evidence, that it has achieved the statutory minimum. The developer may introduce evidence to counter the Board's evidence or it may simply raise issues challenging the sufficiency of the Board's case without providing its own contrary evidence.

B. The Denominator

The Board must prove that 1.5% of "total land area zoned for residential, commercial, or industrial use" in Waltham is used for SHI eligible housing. G.L. c. 40B, § 20. Thus, in

³ Dinosaur Rowe and Marcus Lang were decided together in separate appeals. The decisions are essentially the same, with the exception of facts specific to the project that was the subject of the comprehensive permit in each case. All citations to Dinosaur Rowe are interchangeable with those to Marcus Lang.

this ratio, the denominator is the total land area of "all districts in which any residential, commercial, or industrial use is permitted, regardless of how such district is designated by name in the [municipality's] zoning by law" and "all unzoned land in which any residential, commercial, or industrial use is permitted" with express exclusion of land area for certain classifications of land. 760 CMR 56.03(3)(b)1. and 2. Excluded classifications of land are defined in 760 CMR 56.03(3)(b)3. – 6. as follows:

- (1) land owned by state or federal governmental entities, including state public authorities, except land containing SHI eligible housing (government-owned land);⁴
- (2) land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the Department of Environmental Protection pursuant to the Wetlands Protection Act, G.L. c. 131, § 40A (DEP wetlands);
- (3) any water body; and
- (4) any (a) flood plain zone, (b) conservation zone, or (c) open space zone if the zone prohibits residential, commercial, and industrial use, or (d) any similar zones where residential, commercial, or industrial uses are prohibited.

The denominator is calculated by subtracting the land area of the above excluded land categories from Waltham's total land area.

1. Undisputed Land Area Classifications

Waltham's total land area is 8,808.067 acres, according to the Board. Alliance did not dispute this figure. The Board's calculations for DEP wetlands and water bodies, classifications of land excluded from the denominator under 760 CMR 56.03(3)(b)4. and 5., were undisputed by Alliance: DEP wetlands totaling 22.757 acres, and water bodies totaling 665.580 acres. Exh. 7A.

⁴ SHI eligible housing is included in both the numerator, as SHI eligible housing, and the denominator, by not being excluded as government-owned land. See 760 CMR 56.03(3)(b)3. See also In the Matter of Stoneham and Weiss Farm Apts., LLC, No. 2014-10, slip op. at 4 n.3 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal Regarding Applicability of Safe Harbor June 26, 2015).

2. Government-owned Land Area Exclusion

The denominator "shall exclude land owned by the United States, the Commonwealth or any political subdivision thereof, the Department of Conservation and Recreation [DCR] or any state public authority, but it shall include any land owned by a housing authority and containing SHI Eligible Housing." 760 CMR 56.03(3)(b)3. The Board broke out government-owned land in Waltham into sub-classifications and calculated land area for each sub-classification. Those sub-classifications found on the Board's summary chart are as follows: railroad, highway, public streets, and other publicly owned land (exclusive of highway, railroads, and public streets). Exh. 7A.

a. Undisputed Government-Owned Land Area: Railroads, Highways, and Public Streets

Railroad land, according to the Board's witness Eric Rizzo, Waltham's GIS (Global Information System) Administrator, consists of Massachusetts Bay Transportation Authority (MBTA) owned railroad rights-of way, but excludes "tax parcels owned by the MBTA." Exh. 11, p. 8. Highways are reported to be state-owned "highway land" in Waltham. Exh. 5, p. 9. The parameters for the definition of public streets were not expressly defined by the Board's witnesses. See Exhs. 5, pp. 8-9, 11. The unchallenged acreage for each subclassification calculated by the Board is: railroad, 66.910 acres; highway, 126.445 acres; and public streets, 679.370 acres. Exh. 7A. Alliance did not provide evidence challenging area totals for Waltham's railroad, highways, and public streets.

Denominator Catculation with Unchallenged Land Area Exclusions (in acres)						
Waltham's Total Land Area			8808.067			
Excluded Land Area: DEP Wetlands Water Bodies		22.757 665.580				
Railroad Highway Public Streets Undisputed Government-Owned Land	66.910 126.445 679.370 872.725	872.725				
Total Unchallenged Acreage	•	1561.062	(1561.062)			
Provisional Denominator			7247.005			

b. Other Public Land

Other public land, which the Board called "publicly owned land," is its subclassification for all land that is government-owned but not classified as railroad, highway, or
public streets. This sub-classification does not include government-owned land used for SHI
eligible housing, which must be included in the denominator. See note 4, *supra*. Other public
land in Waltham includes land held by the U.S. Government, the Commonwealth of
Massachusetts, the MBTA, the City of Waltham, and the City of Cambridge.⁵ Many of
Waltham's other public land properties house government buildings, such as public schools,
municipal offices, and buildings used as recreational facilities. Other uses include parks,
limited access highway clover leaf areas and medians, recreational areas, mental health
facilities, parking lots, and vacant (or undeveloped) land. Cambridge owns two reservoirs in
Waltham that include surrounding uplands as well as the water bodies themselves. The Board
classified the uplands of these reservoirs as other public land. The Board asserts that the total
land area for this sub-classification is 1,818.116 acres. Alliance argues that the total area for
other public land is 1,748.718 acres, at most, based on the Board's evidence.

The Board relies primarily on the testimony two witnesses: Amanda Mason and Mr. Rizzo.⁶ Ms. Mason is a former Waltham Assistant City Planner who gathered the data and calculated the total figures for the land area classifications necessary to determine the general land area percent.⁷ Mr. Rizzo checked Ms. Mason's calculations using GIS tools based on the data she provided. Although he did not make an independent calculation of Waltham's

⁵ The Board's list of other public land properties shows two properties owned by Middlesex County. Middlesex County was abolished in 1997 and its real property interests were transferred to the Commonwealth of Massachusetts. G.L. c. 34B, §§ 2, 6.

⁶ Ms. Mason and Mr. Rizzo's testimony included a number of legal conclusions that were outside the expertise of either witness. Thus, they are precluded from giving an opinion that involves a conclusion of law or mixed questions of law and fact, and any legal conclusions they made are disregarded. See *Mattoon v. City of Pittsfield*, 56 Mass. App. Ct. 124, 137 (2002).

⁷ Ms. Mason testified as a summary witness regarding calculations she made based on evidence in the record, which was voluminous.

entire general land area percent, he independently calculated land areas for railroad, DEP wetlands, and water bodies and their uplands. Exh. 11, p. 2; Tr. I, 88.

In the course of preparing its case, the Board submitted different calculations for the components of the numerator and denominator, including various totals for the other public land area category:

- 1. 1,849.825 acres (December 2015 submission to DHCD). Exh. 1.a.2, p. 10. See Binder 1, Exh. 1.
- 1,845.174 acres (March 2016 submission, responding to Alliance's Notice of Opposition filed with DHCD). Exh. 2A, p. 8. See Binder 2, Exh. 2.
- 3. 1,916.013 acres (May 2016 corrected submission based on Mr. Rizzo's measurements). Exh. 3A, p. 4. See Binder 3, Exh. 3.
- 4. 1,820.183 acres (Mason Pre-filed Testimony). Exhs. 5, p. 8; 5A; 7A.

At the July 2016 hearing Ms. Mason testified that land area excluded from the denominator for other public land was 1,820.183 acres. She explained that some of the assessor's database figures used to calculate land area were inaccurate, and she had made corrections based on Mr. Rizzo's GIS measurements. She also noted that over time the Board acquired data it had requested from DCR and the MBTA. Tr. I, 35. Exhs. 1.a.2., 2A, 3A.

Alliance argues that the Board's calculation of the denominator can be neither determined credible nor accurate because it is based on Ms. Mason's summary calculations, about which she testified without any citations to the documents that support her calculations. Alliance brief, pp. 12-13. It argues that, at best, the Board has only shown its other public land area to be 1,748.718 acres. It bases this argument on its cross-examination of Ms. Mason which led her through a series of additions to and subtractions from the March

⁸ For her final calculation submitted in March 2017, Ms. Mason reduced the other public land total area from 1,820.183 acres to 1,818.116 acres, a decrease of 2.067 acres. She testified that the Board's group home data revealed that a property classified as other public land in July 2016 contained SHI eligible housing and thus should not have been excluded from the denominator land area total. Mason Supplemental Pre-Filed Testimony, p. 4 and Exh. B. However, as discussed in Section II.C.4., below, because the Board has not adequately demonstrated that this property is an eligible DMH SHI property, it is not included in the numerator and therefore should remain as part of other public land.

2016 figure for other public land. On cross-examination, counsel for Alliance asked Ms. Mason to calculate her result of 1,820.183 acres based on the items she identified as important in considering the other public land figure. Tr. I, 42-44; see Exh. 5, pp. 7-8. However, the developer's alternate figure is not a credible representation of the evidence regarding the treatment of those adjustments, as Alliance's counsel asked Ms. Mason to add or subtract items that had already been incorporated into the March 2016 figure. See Exhs. 1.a., 2A, 3A.

The Board argues that Ms. Mason's memoranda explaining the March and May calculations clearly state any and all corrections made by the Board to other public land. ¹⁰ Board brief, p. 9. See Exhs. 2A; 3A. We do not agree. These memoranda contain insufficient information to permit verification of the changes, as several items include no acreage input, contradict other evidence in the record, or contain mathematical errors. For example, Ms. Mason's May 13, 2016 memorandum stated that the difference between March and May figures for other public land area (1,845.174 and 1,919.013 acres, respectively) was attributed to the decrease in acreage for DCR properties, and the inclusion of the acreage attributed to interstate clover leaf and median sections. The figures Ms. Mason used for these adjustments were unstated in her memorandum, making verification difficult. However, she stated that the reduction for the DCR acreage was 53.822 acres. Tr. I, 43. Mr. Rizzo testified that the clover leaf and median areas totaled 41.51 acres. Exh. 11, p. 7. Subtraction of 53.822 from 1,845.174, and addition of 41.51 results in 1,832.862, not 1,919.013, as Ms. Mason's memoranda stated. See Exhs. 2, p. 18; 2A, p. 2; 3A. In addition,

⁹ On redirect, Ms. Mason noted only one error in the cross-examination, that Alliance's counsel had asked her to compute an item that was not an adjustment, but only a confirmation of the correctness of the previous figure. However, Ms. Mason offered no further explanation for the discrepancy, but instead merely stated that she stood by her original calculation of 1,820.183 acres. Tr. I, 69, 72-73. Ms. Mason also agreed on cross examination to assumptions and corrections that were not consistent with the record, including the starting point for the calculations and the necessity of making the adjustments to that figure.

¹⁰ Ms. Mason revised her pre-filed testimony calculation for the evidentiary hearing, changing her calculation of total area for SHI eligible land. She retained all other calculations, including the total of 1,820.183 acres for other public land. See Exhs. 5A and 7A.

the May 2016 memorandum did not provide figures for certain identified changes, such as the addition of the land area of interstate clover leaf and median sections and the possible subtraction of acreage for the water body area of the Cambridge Reservoir, retaining land area for the uplands. Exh. 3A, p. 1; see Tr. I, 41-42.¹¹ Ms. Mason was unable to demonstrate her result of 1,820.183 acres. Thus, the memoranda do not establish every correction and change from one calculation to the next.

The Board argues that the Committee should examine the underlying documentation upon which Ms. Mason based her summary results. It argues that the Committee is authorized to avail itself of the evidence submitted to determine the credibility and accuracy of Ms. Mason's calculations, implying that we should add the land areas for each property in the other public land sub-classification to determine the accuracy of the 1,820.183 figure. See Board reply brief, p. 5, citing G.L. c. 30A, § 11(4).

However, examination of the underlying evidence does not always provide the needed clarification. Review of the Board's supporting data for other public land in Exh.

1.a.2 reveals other discrepancies for which the record lacks a noted correction or sufficient explanation that supports its inclusion as other public land:

Nine assessor's parcels of land totaling 5.083 acres are identified as owned by the MBTA. Exh. 1.a.2., pp. 150, 209-211, 221, 246-248, and 268. Mr. Rizzo's GIS-based measurement of railroad rights of way was based on data from Mass GIS, the Central Transportation Planning Staff of the U.S. Geological Survey, and the Middlesex Southern District of the Registry of Deeds,, but other than a general statement that he "excluded tax parcels," there is no specific evidence that he accounted for these MBTA parcels in the other public land area and excluded that land from the railroad land area generated using GIS tools. Exh. 11, pp. 4, 8. Therefore, the Board failed to sufficiently prove that these properties were not double-counted. See *In the Matter of Norwood Zoning Bd. of Appeals and Davis Marcus Partners*, No. 2015-06, slip op. at 10 (Mass. Housing Appeals Comm. Decision on

¹¹ The record is not clear, whether she ever included the Cambridge reservoir water bodies in the other public land category. See Exh. 1.a.; Tr. I, 41-42.

¹² The Board submitted assessor's cards for specific properties categorized as other public land. See Exh. 1.a.2.

Interlocutory Appeal Regarding Applicability of Safe Harbor Dec. 8, 2016) (*Norwood*), (finding general statement about including later discovered railroad right-of-way area without identifying land added was insufficient to support total land area for railroads). Additionally, Ms. Mason's March 23, 2016 memorandum noted that several government-owned properties had water bodies that had been double counted, and that the error had been corrected and was reflected in the denominator. Exh. 2A, pp. 2-3. As supporting evidence, Ms. Mason referred to Attachment G, which contains several maps. Exh. 2.a.7. She provided no itemization of the acreage for each property that was removed, nor did she state whether the adjustment was made to the water body or other public land category.¹³

Although it is evident that other public land represents a significant amount of acreage, particularly in relation to other classifications excludable from the denominator, Ms. Mason's testimony has left us unable to confirm her calculation of the ultimate figure of 1,820.183 acres for other public land reported in the July 2016 summary chart. Exh. 7A. While the memoranda provided some explanations and detail some calculations, the omission of detail regarding how Ms. Mason allocated specific properties and the acreages added or deducted as a result, along with past computational errors and modifications to measured land area for properties as a result of consulting with Mr. Rizzo, raises questions about the credibility of her conclusion. The Board should have provided a clear summary of the voluminous data with citations to the specific evidentiary sources in the record. ¹⁴ Where

¹³ Additionally, review of the property cards indicates properties inappropriately included as other public land: (1) The property card for 9 Newton Street, identified as Assessor's parcel no. R061 013 0002, with 0.132 acres, shows the owner as a private party, RCDL, LLC. Exh. 1.a.2., p. 223; and (2) 51 Lake Street, identified as Assessor's parcel no. R023 007 0010, with 1.370 acres, is owned by the City of Waltham, contains SHI eligible housing and is included in the list of SHI eligible housing used to calculate the numerator. Exh. 1.a.2, p. 81.

¹⁴ The Board attempted to introduce a summary chart of a list of other public land properties and their respective measured land areas used to calculate the July 2016 total of 1,820.183 acres after the close of evidence in an attachment to its post-hearing brief, labelled Exhibit A. In a ruling dated October 5, 2017, the presiding officer allowed Alliance's motion to strike Exhibit A, because it was untimely, included new evidence, and would have been prejudicial to Alliance. The new evidence consisted of additional other public land properties with their respective land areas not previously entered into the record and modified measured land areas for some other public land properties already in evidence. The Board attached the same summary chart as Exhibit A to its written argument and objections to the proposed decision. In a letter dated December 11, 2017, Alliance objected to the inclusion of this

the Board presented multiple iterations of its calculations, the changes should have been identified by a detailed description of the land, including parcel identification if necessary, and for each change, the specific calculations that were made to correct the earlier error or lack of complete information. See *Norwood*, slip op. at 10. Ms. Mason's testimony does not support the 1,820.183 figure.

The Board also provided the testimony of Mr. Rizzo, who agreed with Ms. Mason that the area for all other public land in Waltham was 1,820.183 acres. The Board argues in its objection to the proposed decision that, regardless of errors or gaps in Ms. Mason's calculations, Mr. Rizzo's testimony supported the final calculation for other public land. Relying on land identified and classified by Ms. Mason, he testified that he prepared his map of government owned land, excluding highways, railroads and public streets, by "linking the city's Level 3 parcel polygon layer ... to a selection of records from the Assessor's CAMA database listing properties owned by the City of Waltham, MBTA, Massachusetts DCR, City of Cambridge and the United States of America stored in tabular form...." He stated that "[i]n addition to the parcel data, publicly owned land not having a Parcel ID and not included in other data layers or maps (Railroads, Streets) that occupied cloverleaf areas, median strips and areas within and along the edge of Route 95 were also digitized...." Exh.11, p. 7. See Tr. I, 88-89; Mr. Rizzo testified that when he verified Ms. Mason's calculations, he forwarded to her land area adjustments based on his comparison of GIS area calculations and the assessor's database that Ms. Mason had used. Ms. Mason testified that she calculated her land area totals with the help of Mr. Rizzo. Tr. I. 35, 98-99. Exhs. 5, p. 9; 11, p. 7. Mr. Rizzo's testimony does not sufficiently remedy the deficiency of Ms. Mason's testimony. Without documentation to show each property's land area used for the other public land area total, it remains unclear that Mr. Rizzo's application of assessor's data was free of the errors in Ms. Mason's data or that he independently verified her selection of properties for the calculation of 1,820.183 acres. Mr. Rizzo also calculated water bodies and uplands for the two Cambridge reservoirs located in Waltham, as well as land area for highway cloverleaf

summary chart in the record. Exhibit A is hereby struck from the record. The Board's effort to introduce new evidence after the record has closed, and without opportunity for cross-examination, is meritless.

and median areas, which he stated totaled 41.51 acres. Exh. 11, p. 7. While we accept Mr. Rizzo's GIS calculations for certain categories, the Board did not demonstrate that he addressed the errors in allocation of assessor's parcels to other public lands. Mr. Rizzo's calculation, therefore, is not a completely independent verification of Ms. Mason's land area calculation for other public land.

The Board suggests that the Committee should calculate a land area total for other public land by adding the land area figures on the assessor's cards. Exh. 1.a.2. Whether it is practical for the Committee to make our own calculation of land area based on supporting documentation in the record depends on the clarity and volume of raw data supplied. In any event, we do not consider the Board to be relieved of its obligation to prove the elements of the land area minimum safe harbor, which includes presenting sufficient comprehensible and credible evidence from which a persuasive calculation of land area may be made. With the volume of the record before us in this case, it was incumbent on the Board to provide the accurate detailed calculations and supporting data.

Additionally, we cannot accurately calculate the other public land area total based on the supporting documentation provided. As described above, the evidence shows that Board found that some of the acreage based on the assessor's database inaccurate, and it made corrections based on Mr. Rizzo's GIS measurements. Tr. I, 35, 98-99. There is no evidence regarding the extent of the inaccuracies in the assessor's land area measurements found through GIS analysis. Since there is inadequate evidence explaining corrections and modification, made from the December 2015 figures to those produced in July 2016, the Board has discredited its own evidence to an unexplained extent, leaving the Committee without sufficient evidence to allow us to make our own calculation using the most accurate land area measurements.¹⁵

¹⁵ In this case, the Committee undertook to add the acreage figures on the assessor's cards and determined a total of 1,481.53 acres. The calculation included ascertainable corrections based on Ms. Mason's memoranda and testimony, and elimination of properties for which there was doubt as to the area's veracity or the possibility of double counting. Even this calculation is questionable, because, as noted above, it does not address Mr. Rizzo's GIS-based adjustments for land area. Exh. 1.a.2. Tr. I, 100. Mr. Rizzo's figures for uplands for the Cambridge Reservoir (181.738 acres) and the Stony Brook Reservoir (17.702 acres), if added to this figure, would result in 1,680.969 acres. We did not

In the future, parties should not expect the Committee to conduct its own arithmetic calculations based on numerous documents containing individual property acreages, particularly where the accuracy of the raw data is in question. Rather, the Board is expected to marshal the raw data into an analysis that explains in sufficient detail its method of calculating each land area category, and of preventing double counting, so that the calculations can be evaluated and duplicated.

The Board's July 2016 total of 1,820.183 acres for other public land cannot be verified through the evidence in the record, including witness testimony, raw data and the three summary memoranda, and therefore the Board has failed to demonstrate that this acreage should be excluded from the denominator. For illustrative purposes, we have applied a hypothetical denominator calculation based on our review of the data, as explained in note 17, *supra*.

	Board's Denominator Calculation		Hypothetical Denominator Calculation		alculation	
Waltham's Total Land Area			8808.067			8808.067
Excluded Land Area:						
DEP Wetlands Water Bodies		22.757 65.580			22.757 665.580	
Railroads Highways Public Streets Other Public Land Government-Owned	66.910 126.445 679.370 1820.183		_	66.910 126.445 679.370 1680.969		
Land Total Excluded	2692.90826	92.908		2553.694	2553.694	
Acreage	33	81.245	(3381.245)		3242.031	-3242.031
Provisional Denominator			5426.822			5566.036

include Mr. Rizzo's figure for highway cloverleaf and median areas (41.51 acres) because of the lack of clarity regarding the differing approaches by Mr. Rizzo and Ms. Mason in calculating highway area. See Exhs. 5, p. 9; 11, p. 3. Although we cannot accept this total, based on the evidence criticizing the accuracy of the assessor's data, the table below shows a hypothetical denominator calculation using these figures.

3. Other Land Area Exclusions Sought by Board

Chapter 40B identifies one type of property to be specifically excluded from the denominator: government-owned land. G.L. c. 40B, § 20. The Board subtracted from the denominator three classifications of land that are not expressly identified in G.L. c 40B, § 20 or 760 CMR 56.03(3)(b) as classifications to be excluded from the denominator: (1) land restricted to uses with educational purposes; (2) private ways or roads; and (3) permanent easements held by governmental entities. See Exh. 7A; Mason Supplemental Pre-Filed Testimony, Exh. B. The Committee has not yet had the occasion to address these categories directly. With respect to all three categories, the Board raises a common argument, that the permitted use of the property should determine its eligibility for exclusion from the denominator.

a. Zoning Determines Exclusions from Denominator

The Board claims that *In the Matter of Stoneham and Weiss Farm Apts.*, *LLC*, No. 2014-10 slip op. at 3 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal Regarding Applicability of Safe Harbor June 26, 2015) (*Stoneham*), created a rule that excludes the area of "land where all residential, commercial, and industrial uses are prohibited" from the denominator. Board brief, pp. 3-4. It argues that this rule is applicable to land in which development or construction for residential, commercial, or industrial uses is restricted, whether based on publicly held easement rights, private restrictive covenants (negative easements), or local zoning by-laws. Alliance argues that the Board seeks to expand the categories of land to be excluded from the denominator for the three identified classifications of land.

The Board's reliance on *Stoneham* is misplaced. The *Stoneham* decision did not create a rule excluding land where development or construction for residential, commercial, and industrial uses is prohibited. The language cited by the Board is *dicta* taken out of context. It is found in a discussion of regulatory requisites for the calculation of the denominator. This specific phrase in *Stoneham* summarized the land area exclusion in 760

CMR 56.03(3)(b)6., 16 but did not modify the rules set by the statute and regulation for the calculation of the denominator.

The denominator is the total land area *zoned* for residential, commercial, or industrial use with limited exceptions. G.L. c. 40B, § 20; 760 CMR 56.03(3)(b). In *Dinosaur Rowe*, slip op. at 4, we noted that "[t]he focus of the general land area minimum is not on the power to override zoning, but rather on *zones* in which development is completely prohibited." (Emphasis added). Therefore, the exclusion of land area from the denominator based on land use zones is consistent with the statute and regulation. *Stoneham's* language did not contemplate an exclusion based on prohibited uses on individual lots of land.¹⁷

The Board's effort to establish such a rule based on its reading of *Stoneham* is contrary to G.L. c. 40B, § 20 and 760 CMR 56.03(3)(b). The regulation identifies only one land exclusion based on the restricted use of a particular piece of land: the exclusion of land under a restrictive order of DEP issued pursuant to the Wetlands Protection Act, G.L. c. 131, § 40A, that prohibits residential, commercial, and industrial development. Nowhere else in the statue or regulation is there an exclusion of land from the denominator based on use restrictions specific to a particular piece of land.

Consistent with its role as the agency charged with setting state housing policy, DHCD has promulgated regulations that are more detailed than the statute and are tailored to more specific situations encountered through the administration of its responsibilities than the legislation contemplates. See *Goldberg v. Board of Health of Granby*, 444 Mass. 627, 633-34 (2005). As a result, the regulation more specifically delineates land types excluded from the denominator: water bodies and land encumbered by a restrictive order of DEP under

¹⁶ 760 CMR 56.03(3)(b) reads in pertinent part: "6. Total land area shall exclude any flood plain, conservation or open space zone if said zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial or industrial use are completely prohibited."

¹⁷ The term "lot" is used throughout this decision to mean land under a single ownership with defined boundaries.

G.L. c. 131, § 40A that prohibits residential, commercial, and industrial uses. 760 CMR 56.03(3)(b)4. and 5.18

It is an accepted "principle that an administrative agency 'may adopt policies through adjudication as well as through rulemaking' [and that] '[p]olicies announced in adjudicatory proceedings may serve as precedents for future cases." Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm., 457 Mass. 748, 760 n.17 (2010), quoting from Arthurs v. Board of Registration in Med., 383 Mass. 299, 312-313 (1981). In decisions regarding general land area safe harbor appeals, we have applied and interpreted Chapter 40B and our regulation regarding the treatment of categories of land area with respect to both the numerator and the denominator. On occasion we must address issues not expressly covered by statute or regulation. See Norwood, slip op. at 9-10 (discussing requested exclusions of land area excluded for railroad rights-of-way and private roadways); Cloverleaf Apartments, LLC v. Natick, No. 2001-21, slip op. at 5 (Mass. Housing Appeals Comm. Order Mar. 4, 2002) (Natick), citing Robinwood Inc., v. Rockland, No. 72-03, slip op. at 8-9 (Mass. Housing Appeals Comm. Dec. 3, 1975); Arbor Hill Holdings Limited Partnership v. Weymouth, No. 09-02, slip op. at 3-4 (Mass. Housing Appeals Comm. Order of Dismissal Sept. 24, 2003) (Weymouth) (allowing area of roads be excluded from denominator under predecessor regulations and guidance). See also Alexander Estates, LLC v. Billerica, No. 2005-14, slip op. at 2-3 (Mass. Housing Appeals Comm. Ruling on Motion to Dismiss Mar. 27, 2005) (explaining Committee provides forum for determining whether regulatory definitions have been met).

In *Dinosaur Rowe*, the Committee rejected an analogous request to exclude 539.8 acres of golf course land area from the denominator based on statutory restrictions placed on particular pieces of land. The Newton Zoning Board of Appeals argued that the land area of certain golf courses that had been classified as recreational land by the Newton assessor under G.L. c. 61B should be excluded from the denominator. *The Dinosaur Rowe* decision pointed out that a piece of land subject to a use restriction that is not residential, commercial,

¹⁸ The regulation also clarifies that government-owned land with SHI eligible housing is included in the denominator. 760 CMR 56.03(3)(b)3.

or industrial use is not an "open space zone [that] completely prohibits residential, commercial, and industrial uses," which is expressly excluded from the denominator. *Dinosaur Rowe*, slip op. at 4, quoting 760 CMR 56.03(3)(b)6. Moreover, the exclusion of the golf course land was determined by the zone in which the golf courses were located. Additionally, the difficulty in converting recreational land to residential, commercial, and industrial uses does not prohibit future residential, commercial, and industrial uses. *Id.*

Therefore, lots of land in which all residential, commercial, and industrial uses may be prohibited or hindered will not be excluded, unless they are within any of the excluded land use zones or fall within the other expressed exclusions found in G.L. c. 40B, § 20 and 760 CMR 56.03(3)(b).

b. Educational Use Restricted Land

The Board excluded 39.717 acres of land from its denominator for the New Jewish High School, Bentley College, and Brandeis University, which it asserts are encumbered by a recorded educational use restriction.¹⁹ Relying again on its misinterpretation of *Stoneham* to argue that parcels on which use is restricted must be excluded from the denominator, the Board alleges that land restricted to educational purposes is "legally unavailable for the development of SHI property." Board brief, p. 13. Alliance argues that the Board failed to prove that the educational purpose restriction prohibits development, as Ms. Mason conceded in her cross-examination at the evidentiary hearing. Alliance brief, pp. 21-22, citing Tr. I, 56.

The Board has not provided evidence that supports its premise that educational use restrictions prohibit development of SHI housing, particularly in light of the broad definition of educational purpose recognized by the courts in land use cases. See, e.g., Fitchburg Housing Auth. v. Board of Zoning Appeals of Fitchburg, 380 Mass. 869, 873-875 (1980) (detailing examples of "educational purpose" and applying term to residential facility

¹⁹ The Board did not submit into evidence land acreage for Brandeis University. A property card for Bentley University shows a lot of land containing 22.292 acres. Exh. 3A-5, p. 28. The Board requested leave to submit evidence of land area for Brandeis University and Bentley University in its opposition to Alliance's motion to strike. That request was denied by the presiding officer in a ruling dated October 6, 2017. In its post-hearing brief, the Board provided acreage amounts, which are not in evidence and are disregarded.

housing former institutionalized adults); Gardner-Athol Mental Health Ass'n, Inc. v. Zoning Bd. of Appeals of Gardner, 401 Mass. 12, 13 (1987) (holding DMH financially supported residential care facility for adults would serve educational purpose).

The Board also argues that the Dover Amendment requires the exclusion of education use restricted land area from the denominator. See G.L. c. 40A, § 3.²⁰ It argues that land restricted to educational purposes is not subject to local zoning laws and regulations, and such land is not available for residential, commercial, or industrial use. The Board argues that education use restricted land is unavailable for the development of SHI eligible housing because an educational institution would not be willing to lose financial commitments or suffer adverse tax consequences by constructing a non-educational purposed project. Board brief, p. 16.

The Board's Dover Amendment argument is without citation to the record or support to any legal authorities. See *Duxbury*, slip op. at 6 (rejecting statutory minimum argument noting no citation to record). More importantly, the premise that the Dover Amendment takes land out of local zoning and land use regulation has no basis. As *Regis College v. Town of Weston*, 462 Mass. 280 (2012), illustrates, the Dover Amendment neither entirely exempts education-restricted properties from local zoning law nor prohibits residential, commercial, or industrial uses. In rejecting development of an over-fifty-five residential project on the Regis College campus, the Supreme Judicial Court explained that Dover Amendment protections depend on the primary purpose of a particular construction project. *id.* at 287, noting that only "projects in fact having as their primary and genuine purpose a 'goal that reasonably could be described as educationally significant'" are allowed to bypass local zoning ordinances and regulations. *Id.* at 290, quoting *Whitinsville Retirement Soc., Inc. v. Town of Northbridge,* 394 Mass. 757, 761 n.3 (1985). Moreover, that exemption is limited

²⁰ The Dover Amendment provides in pertinent part: "[N]or shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." G.L. c. 40A, § 3.

and applicable "only where [zoning] laws impede the use of land for educational activities." *Regis College*, 462 Mass. at 291.

The result here is much like the golf course example in *Dinosaur Rowe*, discussed above. Even assuming that the Dover Amendment creates a hindrance to development for residential, commercial, or industrial use, such a hindrance does not justify excluding land area for these properties from the denominator. The Board has not shown that these use restricted properties are in land use zones that prohibit residential, commercial, or industrial uses. The land area for these properties therefore is not excluded from the denominator.

c. Private Roadways

The Board argues that the land area of private roadways should be excluded from the denominator as are public roads and highways, because they are not zoned for industrial, commercial, or residential use. The Board argues that construction is prohibited in private roadways by the Derelict Fee Statute, the state subdivision law, and local zoning ordinances; therefore, the land is "unzoned" because it is not available for residential, commercial, and industrial development.²¹

Ms. Mason testified that she consulted DHCD's former Guidance for Interpreting 760 CMR 31.04(2) Computation of Statutory Minima Pursuant to MGL c. 40B General Land Area Minimum, Exh. 8, to form her decision regarding land that should be excluded from the denominator, particularly with regard to private roadways. Tr. I, 76-77. The Board argues that this guidance supports its exclusion of private ways from the denominator. Board brief, p. 17.

Alliance argues that that the guidance was produced for the predecessor regulation, which was superseded by 760 CMR 56.00 in 2008, and it is therefore irrelevant. Alliance brief, p. 17. Alliance also argues that the Board has failed to support with sufficient evidence its exclusion of private road land area from the denominator as Ms. Mason failed to identify the ordinance that prohibits building on a private street. Alliance further argues that the exclusion of private roads would create a new type of exclusion of land area from the

²¹ The Derelict Fee Statute, G.L. c. 183, § 58, states that land granted abutting a way, whether public or private, shall be construed to include any fee interest that the grantor has in the way.

Denominator for private interests in land, which is contrary to both the language of 760 CMR 56.03(3)(b) and Massachusetts property law. Alliance brief, pp. 16-18.

While the guidance cited by the Board was applicable to an earlier version of the Chapter 40B regulations, we have referred to it in several of our decisions, including, most recently, *Norwood*, where we referred to the guidance in our discussion of acceptable methods of measuring land area for individual lots of land. *Id.* at 3-4. While the Committee gives deference to DHCD policy,²² that policy is not due deference after intervening regulatory changes regarding the categorization of the denominator, differ from that guidance. See *Dinosaur Rowe*, *slip op.* at 3 n.5 (stating former guidance allowing exclusion of land under agriculture or conservation restrictions not valid under 760 CMR 56.03(3)(b)6.).

As explained in Section II.B.3 above, prohibitions on construction or development on individual lots or portions of lots of land for residential, commercial, and industrial uses do not exempt land area from the denominator. The Board's assertion that private roadways and public streets are unzoned land in which residential, commercial, and industrial uses are prohibited is not supported by citation to either the record or legal authorities. Ultimately, construction in a private way is not prohibited *per se* because private roads, by their very nature, as private property, are capable of being discontinued or relocated. See *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. 87, 94 (2004) (authorizing unilateral relocation of easement by servient estate holder).²³

In *Norwood*, slip op. at 10, we rejected the exclusion of land area attributed to private roadways from the denominator in a general land area minimum appeal. The board in *Norwood* argued that private roads were treated the same as public roads, thus warranting the

²² In *Norwood*, slip op. at 4, we noted that while the "DHCD Guidance does not have the force of law because it was not promulgated as a regulation," in considering statutory and regulatory provisions, we generally give "deference to policy statements issued by DCHD, the state's lead housing agency." *Id.*, quoting *Dinosaur Rowe*, slip op. at 3 n.5.

Waltham's ordinances do not expressly prohibit construction in private ways. See Exhs. 7E; 7F; 7G. Instead, the ordinances' definition of buildable area of a lot excludes private roadways. Extending the Board's logic, all land area outside the buildable area, such as land subject to set back requirements, would be excluded from the denominator.

same treatment. However, we found that the board had not introduced any evidence that supported its argument that private roads were treated like public roadways, and therefore did not reach the issue of exclusion of land area for private roadways.

The Board's equation of private roadways with public roads and highways is undermined by the differences between them. Private roadways are private interests in land, laid out, constructed, and maintained by private people for private purposes. Private ways are ways that have never been dedicated or accepted by a public authority for general use by the public, laid out by public authority, or established by prescription. W.D. Cowls, Inc. v. Woicekoski, 7 Mass. App. Ct. 18, 19 (1979). Even if a city or town elects to provide services for private roadway users and owners, these roadways remain private, primarily subject to private interests. Id., at 19-20.

In contrast, land area for public roadways and highways has been excluded from the denominator as government-owned land. *Stoneham*, slip op. at 4 n.2, citing *Weymouth*, slip op. at 2-3. Public roads are a particular type of government acquired use of land that is for the general public. First, ownership of the fee interest in the road does not create a distinction between public and private roads. *Haugh v. Simms*, 64 Mass. App. Ct. 781, 788-89 (2005) (rejecting argument that road owned in fee by the Commonwealth is public due solely to ownership by state). It is the manner in which the road is acquired that determines whether the road is public. *Fenn v. Town of Middleborough*, 7 Mass. App. Ct. 80, 83-84 (1979). Public roads can only be acquired in three ways: (1) the laying out by a public authority according to statute; (2) prescription; and (3) before 1846, unequivocal dedication to permanent public use with acceptance by the public. *Id.* Second, a city or town has a duty to maintain a public road. *Id.* Finally, public roads continue to be public roads until they are statutorily discontinued and cannot be discontinued or lost due to non-use. *Boy Scouts of America, Cape Cod & Islands Council, Inc. v. Town of Yarmouth*, 32 Mass. App. Ct. 713, 718 (1992).

None of the land exclusions expressly identified by G.L. c. 40B, § 20 and 760 CMR 56.03 are based on the interests of private parties, as are private roadways. The Board has not provided any basis to expand the exclusions from the denominator beyond those already

found in 760 CMR 56.03(3)(b) and § 20. Land area of private roadways is thus not excluded from the denominator.

d. Government-held Easements

The Board also sought to exclude lots containing government-held easements from the denominator, on two grounds: 1) that construction for residential, commercial, and industrial use is prohibited on lots with these easements, based on the Board's theory of *Stoneham* discussed in Section II.B.3. above; and 2) that government-held permanent easements should be excluded because they fall under the government-owned land exclusion of G.L. c. 40B, § 20 and 760 CMR 56.03(3)(b)3. Alliance argues that government-held easements are not an expressly excluded category under the regulation, and the record lacks any evidence that the easements identified by the Board were permanent or to the exclusion of the landowner. Tr. I, 53.

The Board submitted into evidence documents which it alleges support its claim that 6.560 acres should be excluded from the denominator on this basis. However, the evidence introduced by the Board is inadequate to support its calculation. First, the documents the Board introduced include properties with temporary easements, as the Board acknowledges. Board brief pp. 10-11; see Exh. 2.a.2. Also, the evidence submitted does not identify the specific properties the Board sought to count in the 6.560 total; thus the record fails to show whether such temporary easements were included in Ms. Mason's figure for this category. Ms. Mason conceded on cross-examination that she did not provide any evidence that set out the specific easements she excluded from the denominator, with their land area and identification of their temporary or permanent status. Tr. I, 53. The Board sought to remedy this omission after the fact by including a summary chart of government-held permanent easements as an attachment, Exhibit B, to its post-hearing brief. The presiding officer allowed Alliance's motion to strike Exhibit B, as the GIS acreage numbers on the summary were never introduced into the record; nor was the summary chart subject to crossexamination. See ruling discussed in note 15, supra. Therefore, the Board has not demonstrated the acreage attributable to this category. Additionally, the Board failed to adequately brief the definition and nature of permanent easements to permit us to consider this argument, and we need not reach it. See Autumnwood, LLC v. Sandwich, No. 2005-06,

slip op. at 10 n.9 (Mass. Housing Appeals Comm. Decision on Remand March 8, 2010) (noting argument not sufficiently briefed to allow meaningful consideration is deemed waived). Therefore, the Board has not established exclusion of land from the denominator on this basis.

4. Overall Validity of Board's Denominator Calculation

Alliance challenges the overall validity of the Board's data use to support its denominator based on the multiple changes to the Board's calculations. In defense of its denominator, the Board stresses the de novo nature of this appeal, ostensibly arguing that past calculations are irrelevant and should not be taken into consideration. The Board argues that its changing calculations from December 2015 to the close of evidence can be accounted for as corrections of errors or the additions of later acquired data. Certain aspects of the Board's evidence, particularly those developed through the GIS analysis of Mr. Rizzo, were not specifically opposed by Alliance: DEP wetlands, water bodies, highways, railroad, and streets. The primary challenged category was other public land. As discussed above, the calculations summarized in charts created by Ms. Mason are summary evidence, representing voluminous records that cannot be independently examined on this record. As summary evidence, "care must be taken to insure that summaries accurately reflect the contents of the underlying documents and do not ... create the impression that disputed facts have been conclusively established or that inferences have been directly proved." United States v. Drougas, 748 F.2d 8, 25 (1st Cir. 1984) (discussing the admissibility of summary charts); accord Commonwealth v. Carnes, 457 Mass. 812, 825-26 (2010).24 The Board's witnesses indeed may have accounted or corrected for the land areas of these properties for the calculation of land area subtotals, as the Board argues. But there is no evidence in the record to corroborate many corrections, modifications, and additions to the raw data. There are also gaps in Ms. Mason's testimony, including the application of GIS calculations prepared by Mr. Rizzo. Ultimately, Ms. Mason was unable to adequately track changes made from the

²⁴ These criminal cases are cited for the purpose of defining summary evidence, which these cases discuss; this does not suggest that the Board must meet the strenuous burden of proof necessary for a criminal case.

December 2015 calculations to the ultimate figures produced for the evidentiary hearing through her testimony or supporting summary documents.

Based on the above reasons, as shown on the following table, even a hypothetical scenario, giving the Board the benefit of the Committee's mathematical calculation, would achieve 5,566.036 acres of land to be excluded from Waltham's total land area of 8,808.087 acres.

	Board's Denominator		Best Case Hypothetical Denominate			
Waltham's Total Land A	rea		8808.067			8808.067
Excluded Land Area:						
DEP Wetlands		22.757			22.757	
Water Bodies		665.580			665.580	
Railroad	66.910			66.910		
Highway	126.445			126.445		
Public Streets	679.370			679.370		
Other Public Land	1820.183			1680.969		
Gov't-owned Land	2692.908	2692.908	•	2553.694	2553.694	
Gov't-held Easements		6.560				
Education Restrictions		39.717			-	
Private Roadways		180.041			-	
Total Excluded Area	=	3607.563	(3607.563)	=	3242.031	(3242.031)
Denominator		=	5200.504		•	5566.036
SHI Land Area Needed			78.008			83.491

As shown in Section II.C. below, even including either our hypothetical figure or the Board's asserted figure for other public land would not enable the Board to achieve the 1.5% statutory minimum.

C. The Numerator

To calculate the land area of low or moderate income housing, 760 CMR 56.03(3)(b) explains how to determine the numerator, that portion of the municipality where low or moderate income housing exists:

Only sites of SHI Eligible Housing units inventoried by [DHCD] or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, shall be included toward the 1½% minimum. For such sites, that proportion of the site area shall count that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units).

The starting point for calculating the area of SHI eligible housing is a determination of the acreage of the buildings, and impervious and landscaped areas directly associated with the SHI eligible housing units. The next step is to determine the composition of each multiunit development. For rental housing developments with at least 25% of the units reserved for low or moderate income housing, DHCD counts all units within the development on the SHI for the city or town. *Guidelines* § II.A.2.b.1. See *Norwood*, slip op. at 11-12. Thus, for the purposes of the land area minimum, these developments are measured as 100% of the property that consists of land occupied by the buildings and impervious and landscaped areas directly associated with the SHI eligible units. For home ownership projects and rental projects with less than 25% of the units reserved for low or moderate income housing, DHCD counts only the low or moderate income units on the municipality's SHI inventory. *Id.* Consequently, for these two categories of developments, land area is measured as a percentage of the property equal to the percentage of all units represented by SHI eligible units in the development. *Weymouth*, slip op. at 5 and n.7. See *Natick*, slip op. at 3-5 (land area calculation for SHI condominium units).

For a mixed-use development including residential and commercial uses, SHI land area is subject to an additional rule. It. is the product of SHI eligible housing land area and the percent of residential use, based on the ratio of floor space dedicated to residential use to total floor space of the project's buildings. *Dinosaur Rowe*, slip op. at 6.

1. Presumption for SHI Eligible Properties

The Board argues that there is a presumption of evidence that properties listed by DHCD on the city's SHI are eligible to be included on the SHI, because, for land area minimum calculations, 760 CMR 56.03(3)(b) refers to 760 CMR 56.03(3)(a), which states the presumption available for calculating whether a municipality has reached the 10% housing unit statutory minimum. The Board invokes this presumption because Alliance

challenges seven SHI properties, claiming there is either no evidence or insufficient evidence supporting their inclusion as properties with SHI eligible housing.

While there is no stated presumption of evidence for the general land area statutory minimum in 760 CMR 56.03(3)(b), a presumption is implicitly established by 760 CMR 56.03(3)(b)'s reference to "SHI Eligible Housing units inventoried by [DHCD] or established according to 760 CMR 56.03(3)(a)." Section 56.03(3)(a) not only states the "presumption that the latest SHI contains an accurate count of SHI eligible housing and total housing units," it provides a procedure by which a party can challenge this presumption for specific properties. The pertinent language of § 56.03(3)(a) reads, "[i]n the course of a review procedure pursuant to 760 CMR 56.03(8), a party may introduce evidence to rebut [the SHI eligibility presumption], which [DHCD] shall review on a case-by-case basis, applying the standards of eligibility for the SHI set forth in 760 CMR 56.03(2)." This demonstrates that the presumption not only applies to the count of SHI eligible properties, but also to the properties themselves and their eligibility as SHI eligible housing.

With the presumption that the challenged properties are SHI eligible properties, Alliance has the burden of producing evidence that the SHI properties were not qualified to be on the SHI. Since Alliance did not put on any evidence to show that any of the identified properties were not qualified to be included as SHI properties, they remain SHI eligible properties for determination of the numerator. See *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 34 (2006).

2. The Board's Calculation of the Numerator

The Board put forth two calculations of the numerator, one using "total land area" and the other using "proportional" land area. For the Board's total land area calculation, Ms. Mason added the total lot land area for each of its SHI properties. She testified that she did not follow the requirement of 760 CMR 56.03(3)(b) to include only that portion of each SHI property that constitutes the area "occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units)." Nor did she, for her total land area calculation, reduce either the land area for rental projects in which less than 25% of the units are affordable to match the percentage of affordable units in the project, or the land area of mixed-use projects to equal the percentage of residential floor space

compared to total floor space. Tr. I, 61-62. The Board's final calculated acreage for SHI properties exclusive of group home acreage using total land area for SHI sites is 112.446 acres, including Lyman Street, 25 but exclusive of group homes. She proffered an acreage of 47.780 for group homes. Mason Supplemental Pre-Filed Testimony, Exh. B. Exh. 7A.

The Board argues that the calculation of the numerator using total land area is the proper calculation because any reduction of the property's lot land area violates the plain language of G.L. c. 40B, § 20. Specifically, it argues, counting only land area less than the entire lot area violates § 20 because the statute states that the general land area safe harbor is met when "low or moderate income housing exists ... on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use." (Emphasis added.) By reducing lot area, the Board claims, only a portion of a site would be counted and not the "site" area as required by § 20; thus the lot on which SHI eligible housing is located must be the "site" used to calculate the numerator. Board brief, p. 25.

The Board is correct that the intent of the Legislature is first ascertained by the plain language of the statute with all of its words construed by the ordinary and approved usage of the language. *Meikle v. Nurse*, 474 Mass. 207, 210 (2016). The operative word from G.L. c. 40B, § 20 is "sites." While the Board contends that "site" is synonymous with a lot of land under a single ownership with defined boundaries on which a project is located, the meaning of "site" is much narrower according to its definition: (1) "[a] the spatial location of an actual or planned structure or set of structures (as a building, town or monuments) or [b] a space of ground occupied or to be occupied by a building." Webster's Ninth New Collegiate
Dictionary (1989); see also Black's Law Dictionary 5th Edition (1979); G.L. c. 41, § 81L (defining term "lot" for Massachusetts Subdivision Control Law). ²⁶ In spite of the language "that portion of the site" found in 760 CMR 56.03(3)(b), the regulation as employed, limiting

²⁵ The Lyman Street units were not on the SHI, but the Board demonstrated that DHCD has agreed they were eligible to be on the SHI at the time of the developer's application for a comprehensive permit. Therefore, 0.189 acres is attributable to this property.

²⁶ "Site" means "[a] plot of ground suitable or set apart for some specific use" or "[a] seat or plot," but "the term does not itself necessarily mean a place or tract of land fixed by definite boundaries." Black's Law Dictionary, 5th Ed. (1979). "Lot" means an area of land in one ownership, with definite boundaries, used, or available for use, as the site of one or more buildings, G.L. c. 41, § 81L.

countable SHI property land area to land area occupied and associated with the project's affordable units, is consistent with the definition of the word "site." The definition of land area used to calculate the numerator is therefore consistent with the plain language of the statute.

At the same time, the plain language of a word must be considered within the administrative agency's policymaking authority and should not be applied so strictly as to invade that province. *Biogen IDEC MA, Inc. v. Treasurer and Receiver General*, 454 Mass. 174, 186 n.22 (2009). A state agency also has considerable leeway in interpreting a statute that it is charged with enforcing, unless the statute unambiguously bars the agency's approach. *Amesbury*, 457 Mass. at 760 (citations omitted). Therefore, if the statute is capable of more than one rational interpretation, the administrative agency's interpretation must be reasonable and reconciled with the intent of the statute. *Biogen*, 454 Mass. at 187.²⁷

The intent of G.L. c. 40B, §§ 20-23, is to encourage the production of low and moderate income housing. *Amesbury*, 457 Mass. at 760. To effect this purpose, the statute established a single comprehensive permitting process. *Id.* Here, the definition of site land area in 760 CMR 56.03(3)(b), limited to land directly associated with the affordable housing units, can reasonably be determined to encourage the production of low and moderate income housing.²⁸

The Board also calculated an alternative general land area percent that Ms. Mason called a "proportional" calculation, as it reduced land area for rental projects with affordable units representing less than 25% of total units to equal the percentage of affordable units in the project. The proportional calculation reduced land area for mixed-used projects to equal the percentage of square footage attributed to residential use out of the entire square footage

²⁷ Assuming, *arguendo*, that the Board had shown ambiguity in the word "site," the question would be whether the definition of "site" found in the regulation, 760 CMR 56.03(3)(b), is consistent with the intent of the statute. *Biogen*, 454 Mass. at 187.

²⁸ 760 CMR 56.03(3)(b) also addresses a concern raised under the predecessor regulation in *Weymouth*, *supra*. The *Weymouth* decision states that a project with SHI eligible housing covering a significantly small part of a larger lot of land may violate the intent of Chapter 40B by providing a way to circumvent its requirements. Under the current regulation, the definition of "site" found in § 56.03(3)(b) precludes this issue from arising. *Id.*, slip op. at 5 n.6.

of all of the project's buildings. Exh. 5, p. 13. This calculation also did not take into account the requirement to use only the land occupied by the buildings and impervious and landscaped areas directly associated with the affordable units. The Board's alternative proportional figure resulted in an acreage for SHI properties (excluding group homes) of 82.263 acres. See Exh. 7A (lower chart), Exh. B (upper chart). The Board's proportional approach, while not completely in accordance with the regulation, more closely complies than the total land area calculation. We therefore use the Board's "proportional" figures in our analysis.

Through its expert witness, Amy Haas, a geospatial technology specialist, Alliance addressed the requirement to count only land area occupied by the buildings and impervious and landscaped areas associated with SHI eligible housing for land area included in the numerator. Ms. Haas's testimony focused on six of the SHI eligible housing properties in Waltham. For those properties, she gave her opinion of the land area which represented the area occupied by the buildings and impervious and landscaped area associated with the SHI eligible housing units. Those properties are (1) Chesterbrook Gardens, (2) South Street Congregate, (3) Indian Ridge, (4) 218 South Street, (5) The Merc, and (6) Currents on the Charles.

Using aerial imagery and GIS tools, Ms. Hass measured land area for each of the six properties by including only areas that appeared to be impervious or paved, landscaped, or other areas that were "planned, designed and installed as part of the project itself, such as areas used for stormwater management." She excluded wooded and undeveloped areas, and areas designated by MassGIS as wetlands. Ms. Hass then visited each site to verify her measurements of land area. See, e.g. Exh. 9, p. 5. Based on her GIS analysis and site visit observations, Ms. Haas calculated the eligible land area applicable to the numerator for these six projects to be 28.04 acres in total compared to the land area used by the Board of 47.23 acres.

SHI property	Board's Land Area (acres)	Alliance's Land Area (acres)	Difference (acres)
Chesterbrook Gardens	20.80	10.31	(10.49)
South Street	3.01	1.60	(1.41)
Congregate			()
Indian Ridge	21,99	15.26	(6.73)
218 South Street	0.17	0.13	(0.04)
The Merc	0.45	0.44	(0.01)
Currents on the	0.81	0.30	(0.51)
Charles			(4.4.)
Total acreage	47.23	28.04	(19.19)

Mr. Rizzo criticized Ms. Hass's methodology, stating that she did not use leaf-off high resolution (0.5' pixel) orthoimagery, Exh. 12, p. 13. He maintained that a field visit with some kind of GPS or field survey device would have yielded the "most accurate" calculations. Tr. I, 101. However, he did not find any inconsistencies with Ms. Haas's methodology or find inconsistent results. Tr. I, 96-98. We find Ms. Haas's opinion of the acreage for these six properties credible and accept it.²⁹ Accordingly the Board's calculation is inflated by at least 19.19 acres, taking into account the six properties examined by Ms. Haas.³⁰

Based on these six properties alone, the evidence shows that the Board's failure to comply with the requirements of 760 CMR 56.03(3)(b) has improperly inflated the Board's numerator. Furthermore, because the Board failed to provide evidence addressing whether the other SHI properties required acreage reduction to ensure compliance with this requirement, it has failed to meet its burden of proof for those other properties.

²⁹ The Board argues, without citation to the record, that some of the natural elements of the Indian Ridge property should be included in the SHI land area used to calculate the numerator. Board brief, p. 32. Because the Board failed to introduce evidence regarding the deliberate use of natural settings for a property as opposed to landscaping a property, this issue was insufficiently raised for consideration by the Committee. *Duxbury*, slip op. at 5 n.8. See *Norwood*, slip op. at 19 n.12.

 $^{^{30}}$ As with the various denominator calculations, the Board made a number of errors, discovered by Alliance, which raise additional credibility concerns about the Board's calculation: (1) 214 South Street Corp. was doubled counted by 0.149 acres, see Exh. 1.a.2; (2) the Watch Factory Lofts was double counted by 0.854 acres and was reduced by 0.325 acres to reflect correcting an oversight that the project contained non-residential uses, without sufficient explanation of the calculation of the acreage for both properties. Exh. 9, ¶ 19. Ms. Mason also used an incorrect formula to calculate land area for affordable units of condominiums. See Exh. 6, p. 3, ¶ 3.b.

3. Rental Projects with 25% or more SHI Eligible Units

As part of its proportional calculation argument the Board takes the position that for SHI eligible rental projects for which the percentage of affordable rental units is 25% or more, the entire lot area, not just the area of buildings and impervious and landscaped areas directly associated with SHI units, must be counted. It argues that *Dinosaur Rowe* requires this result. However, *Dinosaur Rowe* did not create a rule exempting land area for rental projects with 25% or more affordable units from the requirements found in 760 CMR 56.03(3)(b). That decision contains no discussion of the regulation's required treatment of buildings and impervious and landscaped portions of SHI eligible properties. Rather, the language relied on by the Board is from the discussion of the SHI land area counted for mixed-use projects. In *Dinosaur Rowe*, one of Newton's SHI eligible rental projects had both residential and commercial uses. Responding to the developer's argument that the area for non-residential use should reduce the land area attributed to the numerator, the decision states:

If this were a traditional rental development in which at least 25% of the units were affordable, the entire site would count toward the numerator. But, neither the regulations nor the DHCD guidance address this sort of development. Nevertheless, we agree with the developer that a mixed-use development in which only one tenth of the floor area is dedicated to affordable housing should be treated the same as a homeownership development or a rental development in which fewer than 25% of the units are affordable.

Dinosaur Rowe, slip op. at 6. The decision went on to reduce land area by the percentage of floor area in the building that was not dedicated to residential use. *Id.*

As with all other SHI properties, land area of rental projects with 25% or more affordable units must be limited to the area occupied by the buildings and impervious and landscaped areas directly associated with the affordable units for the calculation of the numerator.

4. Group Homes

Affidavits of DMH and DDS employees attesting to their calculation of group home land area were introduced into evidence.³¹ The figures most favorable to the Board from these affidavits proffered a total of 8.31 acres in total, composed of, respectively, 0.79 acres SHI land area for DMH, and 7.52 acres of SHI land area for DDS. Clougherty Affidavit; Hernandez Affidavit. Ms. Mason and Mr. Rizzo testified that they calculated a total acreage of 10.997 acres for Waltham's group home land area measured by using GIS generated figures. Board supplemental brief, p. 2.

In their testimony, Ms. Mason and Mr. Rizzo noted that they were required to adjust the water body exclusion to account for 2.77 acres of water bodies located on group home properties that DDS did not take into account. Mr. Rizzo also noted there was a "significant difference" of 3.932 acres between the assessor's land area for DDS 13 and DDS 14 (22.840 acres) and the GIS measured land area for these two properties (18.908 acres). He explained that he compared the land area measurement for the two properties against a third land area measurement of 19.376 from a recorded plan derived from a land survey. In Mr. Rizzo's opinion, the area from the plan based on the land survey was the most accurate, but the Board used the GIS figure. Rizzo Supplemental Pre-Filed Testimony, p. 5.

Ms. Mason also testified that, of the four street addresses DMH had provided for its group homes included on Waltham's SHI, she discovered that DMH properties DMH 3 and DMH 4 (collectively DMH 3-4) were located on the same assessor's parcel for the two addresses provided by DMH. Mason Supplemental Pre-Filed Testimony, p. 4. Ms. Mason included a single property card from the Waltham Assessor's Office as supporting evidence of DMH 3-4's land area. Board's Group Home Binder, March 10, 2017, DMH Disclosed

³¹ Group home acreage calculated by DDS and DMH was provided, respectively, by the Affidavit of Victor Hernandez dated September 13, 2016 and the Affidavit of Kim Clougherty, dated September 14, 2016. Both affidavits were made part of the record pursuant to the parties' stipulation of March 27, 2017.

³²The DMH and DDS calculations of group home land area did not reduce land area for their group homes to account for that area occupied by the projects' buildings and impervious and landscaped areas associated with the affordable units. See Clougherty and Hernandez Affidavits.

Parcels, pp. 15-16 (Tab 4 of 7). Ms. Mason did not find DMH 3-4 on the Board's list of SHI eligible properties, but she did find the address on the Board's list of other public land, totaling 2.067 acres. She therefore subtracted 2.067 acres of SHI land area from the July 2016 other public land area total, because as SHI eligible property, its land area is not to be excluded from the denominator as other public land. See Mason Supplemental Pre-Filed Testimony, p. 4.33 See note 4, *supra*.

Alliance questions the sufficiency of the evidence to support the Board's figure of 10.997 acres over the DMH and DDS figure. It argues the evidence shows that the property identified by the Board as DMH 3-4 is not a group home, and its land area should be excluded from the numerator. Alliance points out that the property card included for DMH 3-4 describes the property as having no bedrooms, and claims that without bedrooms, DMH 3-4 is not a home and cannot be a group home as defined in the Guidelines, , § I.A Alliance supplemental brief, pp. 4-5. As a result, it argues that the Board's land area total for group homes should be reduced by 2.066 acres. See Mason Supplemental Pre-Filed Testimony, Exh. A. DMH identified DMH 3 and DMH 4 as separate group homes. The property card for DMH 3-4 shows that it contains two buildings with no bedrooms and one full bath for both buildings. This contradicts the testimony that the buildings on DMH 3-4 are residential properties and therefore group homes. Additionally, contrary to Ms. Mason's testimony, the DMH 3-4 property card lists a single address for the property on a particular street that is different than the addresses for DMH 3 and DMH 4 provided by DMH. Therefore, the Board has failed to show that DMH 3-4 are DMH 3 and DMH 4, or indeed that they are SHI eligible properties. 34 Therefore DMH 3-4 may not be included as SHI eligible housing and their acreage should count as other public land. See note 8, supra.

³³ We also note a discrepancy between Ms. Mason's and Mr. Hernandez's testimony regarding whether DDS 23 was included in DDS's count of group homes.

³⁴ The Affidavit of Joseph Goode, Chairman of Waltham's Board of Assessors, which the Board attached to its response to Alliance's supplemental post-hearing brief, is not part of the evidentiary record as it was submitted during briefing, after the close of the evidence. The Board has not provided good cause why this affidavit should be admitted after the close of the evidence, and without the opportunity for cross-examination.

Alliance also argues the Board's group home acreage of 10.997 acres is 2.68 acres greater than the total of the DMH and DDS acreage of 8.31, but the Board has provided little explanation for the increase. The Board argues that it rejected the DMH and DDS calculations of group home acreage, "because performing such mathematical acreage calculations is not within the scope of the usual job responsibilities" of the affiants, and it is "readily apparent" that the 8.31 acres "is not mathematically correct." Board supplemental brief, p. 9.

The Board ultimately put forth the GIS-generated land area of 10.997 acres for group homes, using its proportional approach, because that total fell between total acres calculated from Assessor's data, 11.158 acres, and land area reported in instruments recorded at the Middlesex Southern District Registry of Deeds, 10.715 acres. Mason Supplemental Pre-filed testimony, p. 9 and Exh. A.

The Board failed to provide a more thorough examination into the difference between the DMH and DDS calculation and the Board's total, comparable to Mr. Rizzo's discussion of DDS 13 and DDS 14. Additionally, the Board again failed to take into consideration the area of the buildings and the impervious and landscaped areas directly associated with the SHI units.

5. Overall Validity of Board's Numerator Calculation

For these reasons, the Board has failed to meet its burden of proof for the numerator. We note, that even adding the Board's group home land area figure of 8.931 (10.997 acres minus 2.066 acres for DMH 3-4), to the Board's other SHI land area of acreage of 63.073 (82.263 minus 19.19 acres based on Ms. Haas's analysis), would achieve a numerator of 72.043 acres. This is calculated based on the following assumptions, which are not necessarily consistent with our regulations or demonstrated by the evidence:

- (1) Using the Board's "proportional" SHI land area exclusive of group home land area;
- (2) Including total lot area for approximately 44 of the 50 SHI properties which were not viewed by Ms. Haas, despite the Board's failure to include only building footprint and impervious and landscaped areas directly associated to SHI eligible housing;
- (3) Subtracting 19.19 acres based on our acceptance of Ms. Haas's analysis of land area totals for the six properties she evaluated;

- (4) Using the Board's group home land area total of 8.931 acres (10.997 minus 2.066 acres for the exclusion of DMH 3-4), and including total lot area for these properties despite the Board's failure to include only building area and impervious and landscaped areas directly associated with SHI eligible housing; and
- (5) Not correcting Ms. Mason's faulty SHI condominium unit and mixed-use land area calculations based on incorrect formulas.

The Board's evidence, however, is not sufficiently credible to support its numerator, as the Board failed to comply with the regulatory requirements for calculation with regard to land associated with SHI eligible housing, or the methodology for condominiums on SHI property.

III. FINAL LAND AREA PERCENTAGE

Applying the Board's hypothetical best case numerator above of 72.043 to the best case hypothetical denominator of 5566.036, would achieve only a general land area percent of 1.29%, which falls below the 1.5% land area minimum. Additionally, even crediting the Board its other public land figure, in place of our calculated hypothetical alternative, would not lead to a percent that meets the land area minimum, as the following table shows.

	Board Ca	alculation	Alliance	Position	Best Case	Hypothetical
Total Land Area		8808.067		8808.067		8808.067
Excluded Land Area:						
DEP Wetlands	22.757		22.757		22.757	
Water Bodies	665.580		665.580		665.580	
Railroad	66.910		66.910		66.910	
Highway	126,445		126.445		126.445	
Public Streets	679.370		679.370		679.370	
Other Public Land	1820.183		1748.718		1680.969	
Total Excluded Area	3381.245	(3381.245)	3309.780	(3309.780)	3242.031	(3242.031)
Denominator		5426.822		5498.287		5566,036
SHI housing		82.263		-		63.073
Group Homes		10.997	_	<u>-</u>		8.970
Numerator		93.260	•	68.310	•	72.043
General Land Area %		1.72%		1.24%		1.29%

The Board has not demonstrated that its land area percent has met the 1.5% minimum, and therefore it has failed to meet its burden to prove that Waltham has met its safe harbor.

IV. CONCLUSION AND ORDER

For the reasons stated above, the Board has not demonstrated that Waltham is entitled to a safe harbor under the general land area minimum of G.L. c. 40B, § 20 and 760 CMR 56.03(3)(b) and its appeal is therefore denied. Accordingly, this matter is remanded to the Board pursuant to 760 CMR 56.03(8)(c) for further proceedings in accordance with 760 CMR 56.05.

Housing Appeals Committee

Issued: Februay 13,2018

Shelagh A. Ellman-Pearl, Chair

Joseph P. Henefield

Maro Laplante

Rosemary Connolly Smedile

James G. Stockard, Jr.

John M. Donnelly, Jr, Presiding Officer

Certificate of Service

I, Tanya J. Reynolds, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Decision on Interlocutory Appeal Regarding Applicability of Safe Harbor in the case of In the Matter of Waltham Zoning Board of Appeals and Alliance Realty Partners, LLC, No. 2016-01, to:

James G. Ward, Esq. Nutter, McClennen & Fish, LLP 155 Seaport Boulevard Boston, MA 02210

Peter L. Freeman, Esq. Freeman Law Group, LLC 86 Willow Street, Unit 6 Yarmouthport, MA 02675

Dated: 02/13/2018

Patricia A. Azadi, Esq. Michelle Learned, Esq. City of Waltham City Solicitor's Office 11 School Street Waltham, MA 02451

Kevin T. Smith, Esq. Law Office of Kevin T. Smith, LLC 100 Main Street, Suite 410 Concord, MA 01742

Tanya J. Reynolds, Clerk

Housing Appeals Committee