DEPARTMENT OF
HOUSING &
COMMUNITY
DEVELOPMENT

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HOUSING APPEALS COMMITTEE
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Shelagh A. Ellman-Pearl, Hearing Officer
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May 8, 2015

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Re: *In the Matter of Stoneham Board of Appeals and Weiss Farm Apartments, LLC*
No. 2014-10

Dear Counsel:

Enclosed please find the Proposed Decision and Report of Hearing Officer on Interlocutory Appeal Regarding Applicability of Safe Harbor. In accordance with 760 CMR 56.06(7)(e)9. and 10., you may file written arguments and objections for the Committee's consideration on or before May 15, 2015.

Yours truly,

Shelagh A. Ellman-Pearl
Presiding Officer

Enclosure

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COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

In the Matter of STONEHAM BOARD OF APPEALS AND WEISS FARM APARTMENTS, LLC Appellee	)	No. 2014-10

PROPOSED DECISION AND REPORT OF HEARING OFFICER ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This case is an interlocutory appeal brought by the Stoneham Board of Appeals (Board) pursuant to 760 CMR 56.00. Under 760 CMR 56.03(8)(a), a board seeking to rely on one of several enumerated safe harbors precluding appeals to the Housing Appeals Committee of adverse decisions under G.L. c. 40B must notify the developer within 15 days of the opening of the board's hearing on the comprehensive permit application. If the developer wishes to challenge the board's assertion of one of these statutory and regulatory protections, it must provide written notice to the Department of Housing and Community Development (DHCD) 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." *Id.* Either party may file an interlocutory appeal of an adverse decision by DHCD to the Housing Appeals Committee, but must do so within 20 days of receipt of DHCD's decision. The interlocutory appeal to DHCD is conducted on an expedited basis, as the proceeding before the board is stayed pending the Committee's determination. 760 CMR 56.03(8)(c).

The Committee's hearing on the issue, like all of its proceedings, is *de novo.* G.L. c. 40B, § 22. Section 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...."

In accordance with this regulatory scheme, after Weiss Farm Apartments, LLC (Weiss) filed its application for a comprehensive permit with the Board, the Board notified Weiss that it invoked two safe harbor provisions: 1) that in the Town of Stoneham, "low or moderate income exists ... on sites comprising one and one half percent or more of the total land area zoned for residential, commercial or industrial use." G.L. c. 40B, § 20. See 760 CMR 56.03(3)(b); and 2) that Weiss had filed a "related application" under 760 CMR 56.03(1)(e) and (7)(a). Weiss notified the Board and DHCD of its objection to the Board's assertion. DHCD issued a letter stating its decision, from which the Board appealed to the Committee.

Following a conference of counsel, the presiding officer scheduled a hearing and conducted oral testimony on December 11, 2014 and January 9, 2015. The parties filed post-hearing memoranda on February 17, 2015.

II. GENERAL LAND AREA MINIMUM OF 1.5 PERCENT

Under the Comprehensive Permit Law, the decision of the Board would be 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 Board believes that the Town of Stoneham satisfies this 1.5% General Land Area Minimum threshold. Weiss challenges the methodology used by the Board used in arriving at its figures.

A. Calculation of the Denominator

Under Chapter 40B, to determine the General Land Area Minimum threshold, the Town must demonstrate the "total land area zoned for residential, commercial or industrial use," G.L. c. 40B, § 20. The Committee's regulations clarify that this land includes un-zoned land in which residential, commercial, or industrial use is permitted; and excludes

water bodies; land owned by the town and other political subdivisions, the United States, the Commonwealth of Massachusetts, and the Department of Conservation and Recreation; and land where all residential, commercial, and industrial uses are prohibited. 760 CMR 56.03(3)(b).

In its interlocutory appeal filed with the Committee, the Board stated that the total land area for the Town of Stoneham is 4,252.35 acres. Board Appeal, p. 2. However at the evidentiary hearing, the Board presented evidence reflecting that the land area from which excluded land should be deducted is 3,929.60 acres. During the hearing, the Board introduced into evidence two sources to demonstrate the total area of Stoneham. The DHCD Stoneham Geography Summary states that Stoneham has a total area of 6.70 square miles and a total land area of 6.14 square miles. Exh. 9. A document entitled Stoneham CDP Quick Facts from the US Census Bureau indicates the land area of Stoneham is 6.02 square miles. Exh. 13. A square mile contains 640 acres. Tr. I, 31. Thus, 6.70 square miles is 4,288 acres and 6.14 square miles is 3,929.60 acres.

In providing his calculation of applicable land area, Mr. MacDonald, the Town's Assessor, testified that he started with the 6.14 square miles. From the 6.14 square miles, or 3,929.60 acres, he subtracted recreational land, public roads,[1] land owned by the Town of Stoneham, and land owned by the Town of Wakefield within Stoneham to arrive at what he considered to be the balance of land zoned for residential, commercial and industrial use. The exclusions included recreational land totaling 1,492.26 acres: Department of Conservation and Recreation (DCR) land (1,408.47 acres, including designated water bodies within the DCR land totaling totaled 381.09 acres) Exh. 3; other recreational land (83.79 acres) Exhs. 2, 12; public roads (480.16 acres) Exhs. 4, 5; and land owned by the Town of Stoneham (349.29 acres) Exh. 7, Tr. I, 43-44, and the Town of Wakefield (26.46 acres) Exh. 7. See Exh. 15. These exclusions reduced the applicable land area to 1,581.43 acres. Exh. 15.

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1. Although roads are not specifically identified in G.L. c. 40B or 760 CMR 56.03(b) as excludable, these were identified as public roads, and not disputed by Weiss. See *Arbor Hill Holdings Limited Partnership v. Weymouth,* No. 09-02, slip op. at 2-3 (Mass. Housing Appeals Committee Sept. 24, 2003 Order of Dismissal).

Mr. McDonald then included back into the land area sites owned by the Stoneham Housing Authority with Subsidized Housing Inventory (SHI) housing (16.55 acres).[2] Exh. 6. The resulting figure of 1,597.98 acres is the denominator proffered by the Board. Exh. 15.

Weiss does not dispute the mathematical calculations; rather it disagrees with the starting point Mr. McDonald used, and the resulting denominator. Weiss argues that the Board should have used the total area figure of 6.70 square miles or it should have acknowledged that the 6.14 square miles had already excluded water bodies. By ignoring this, it argues that the Board twice excluded the area represented by water bodies, 381.09 acres. Exh. 3. The Board argues that "[b]eginning the analysis with the *total area* of the Town of Stoneham, as oppose [sic] to the "*total land area zoned for residential, commercial or industrial use,*" inflates the denominator beyond the value dictated by both statute and regulations. [Emphasis in original]. Board brief, p. 7 n.3. The Board's reasoning is incorrect.

As the developer points out, the Board's analysis ignores the discrepancy between the total or "gross" area in Stoneham and the total land area. The Board ignored the area which makes up this difference. Yet its witness, Mr. McDonald, acknowledged on cross-examination that the difference was likely the result of excluding water bodies in the Town. Tr. II, 30. If this is the case, Mr. McDonald's exclusion of the entirety of DCR land, which includes 381.09 acres of water bodies within the DCR land amounted to double counting. The Board had used the total area before, including in its interlocutory appeal, but did not provide adequate explanation for changing its starting point. Its argument fails to address the nature of the difference between the 6.70 and 6.14 land areas. See *Arbor Hill Holdings Ltd Partnership v. Weymouth,* No. 02-09, slip op. at 2-3 (Mass. Housing Appeals Committee Order of Dismissal Sept. 24, 2003), which applied the exclusions to the "gross" land area of the town. For this reason, the Board's resulting figure cannot be accepted. As Weiss points out, an addition to the Board's denominator is required. Weiss suggests that adding in the

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2. The Board has objected that the inclusion of this land, required in 760 CMR 56.03(b)(3), as contrary to G.L. c. 40B, § 20. The Stoneham Housing Authority land, 16.55 acres, is also included in the numerator for the calculation of the 1.5%. Exhs. 11A-11J. As this land is used for the purpose of SHI housing, it is proper that it be included in the denominator as well. 760 CMR 56.03(b)3. See *Weymouth, supra,* slip op. at 3 n.3 (not deducting South Weymouth Naval Air Station land, "because, even though it may have been owned by the United States, it is available for development").

381.09 acres representing the water bodies is required. That addition would bring the denominator to 1,979.09 acres. Alternatively, the acreage difference between 6.70 and 6.14 square miles is 358.4 acres, which would bring the denominator to 1,956.38 acres. Yet, the evidence does not support selecting one of these alternatives over the other. Accordingly, the Board has failed to provide sufficient evidence from which a finding of the General Land Area Minimum may be made.

B. Calculation of the Numerator

To calculate the land area of low or moderate income housing, 760 CMR 56.03(3)(b)[3] provides:

> Only sites of SHI Eligible Housing units inventoried by the Department or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, 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.).

See G.L. c. 40B, § 20. Mr. McDonald identified the following properties listed on the DHCD SHI for rental and ownership units in Stoneham, and provided the acreage for the developments:

DHCD ID No.	Address	Acreage
3041, 9648	Calthea/Washington St.	4.95
3042-3045	Prospect St., Washington Ave., Parker Chase Rd,	8.77
3046	Duncklee Ave.	2.83
3049	Mountain View Drive	8.17
9094	Christopher St.	1.017
4469	Department of Developmental Services (DDS) Group Homes - 14 units – address unknown	
	Total (excluding DDS Group Homes)	**25.74**

3. The Board argues that 760 CMR 56.03(3)(b) improperly requires the Town to achieve "*more than* 1.5%" of the total land area, inconsistent with G.L. c. 40B, § 20. Although this issue is not squarely presented in this instance, since the Town has not attained 1.5%, the statutory provision affording the safe harbor once a municipality has achieved the 1.5% General Land Area Minimum, would govern.

Tr. I, 47-52; Exhs. 10, 11A-11J. The properties with acreage listed, except for Christopher Street, are rental properties; the Board included the total acreage of each of these project sites.

Weiss points out that for the home ownership property, only 25% of the units (2 of the 8 units) of the Christopher Street property are low or moderate income; therefore the acreage for that site should be limited to 25% of the project site. It argues that Mr. McDonald acknowledged he had not reduced the 1.017 acreage for Christopher Street by 75%. Tr. II, 46. The Board suggests that c. 40B, § 20, which refers to "sites" should be interpreted to require inclusion of the entire lot on which affordable housing is located. That interpretation is not persuasive. 760 CMR 56.03(3)(b). See *Cloverleaf Apartments, LLC v. Natick,* No. 01-21 slip op. at 4 (Mass. Housing Appeals Committee Order Mar. 4, 2002); *Arbor Hill Holdings Limited Partnership v. Weymouth,* No. 09-02, slip op. at 5 and n.7. The Christopher Street property consists of 8 home ownership units, of which 2 are on the SHI. Therefore, only 25% of the acreage of the site, or .25 acres, should be included.

Weiss also suggests that the Board failed to calculate the specific acreage associated with housing units, impervious surface and landscaping. It argues that since the Board has the burden to demonstrate that the entire sites should be included and failed to do so, there is no competent testimony to permit a finding of the actual acreage attributable to SHI housing. As noted below, even including the entire lots for the rental projects, and 25% of the acreage of the ownership project, will not bring the numerator to 1.5% of the denominator; therefore the Committee need not reach this issue. 760 CMR 56.03(3)(b).

Substituting .25 acres for the 1.017 acres listed for Christopher Street in the table above results in a figure of 24.97 acres of SHI housing in Stoneham. No acreage for the 14 units of DDS group homes has been included in the record. Even if one of the alternate denominator figures described above were applicable, applying this numerator to the lower of those two denominators, 1,956.38 acres, demonstrates that 24.97 acres would represent only 1.3% of the general land area. Therefore, the Board has failed to show it is entitled to the safe harbor for the General Land Area Minimum.

C. DDS Group Homes

The Board did not introduce evidence of the acreage of the 14 units of DDS group homes that are included on the Town's SHI. See Exhs. 10, 11H. In its brief, it states that "[a]lthough these group homes are listed by DHCD on the Town's SHI, the location and land area associated with these group homes are unknown to the Town, *save one*," [emphasis added]. Board brief, p. 13, citing Exh. 10; Tr. I, 11, 14-15, 51; II, 41-43. The Board has not indicated whether the acreage of this "one" group home is already included in the identified SHI housing acreage described above.

Mr. McDonald testified that the Town does not possess knowledge of the addresses of the 14 DDS units. Included in the record is a letter from the presiding officer on behalf of all counsel to the DHCD Associate Director for the Division of Community Services requesting information regarding the land area or addresses for the DDS units. His response indicated DHCD did not have this information. Further correspondence between the Board's counsel and counsel at DHCD resulted in DHCD counsel's statement that DHCD did not maintain this information and her suggestion that the Board seek the information from DDS. See Letters of Presiding Officer Shelagh A. Ellman-Pearl (October 23, 2014); Leverett Wing, DHCD Associate Director (October 29, 2014); Jonathan D. Witten, Board counsel (November 24, 2014) and Margaux LeClair, DHCD Counsel (December 8, 2014). Tr. I, 24, II, 58-61.

The Board's counsel stated at the hearing that the Board did not pursue obtaining the addresses directly from DDS because it believed that option would be unavailing. Counsel stated at the hearing that in a case pending in Superior Court, *Hardiman v. Department of Developmental Services*, Suffolk Superior Ct. No. SUCV201401561, the court had denied a request to allow that plaintiff access to group home information under a protective order, where a public records request to DHCD for the identification of the group homes in Norwood, had been denied by both DHCD and the Secretary of State. Tr. II, 58-61. He stated he therefore believe it was unnecessary to pursue this issue while the issue was pending in the Superior Court.

The Board claims that requiring it to bear the burden of proving the acreage of the sites is a violation of constitutional due process under the United States Constitution and the Massachusetts Declaration of Rights as well as G.L. c. 40B, §§ 20-23. In support it argues that DHCD maintains the SHI and DHCD's regulations state that the SHI is presumptively accurate, thereby placing the responsibility for obtaining this information on the keeper of the list, DHCD.

In this instance, the Board did not explain how it had knowledge of the address of one of the DDS units, if indeed, that is what the Board intended by its reference to "save one" in its brief. Nevertheless, the Board bears the burden of proof on establishing its entitlement to one of the safe harbors. The lack of information about the 14 DDS units cannot be the basis to grant the Town a safe harbor it has not demonstrated that it has achieved.

III. RELATED APPLICATION

The Committee's regulations establish a twelve-month protective period for zoning boards when a comprehensive permit developer has had a related application pending on the same property site. The developer is not prohibited from filing a comprehensive permit application within the same period. However, any decision issued by the zoning board must be upheld as a matter of law if a related application has previously been received, as set forth in 760 CMR 56.03(7). This provision states:

> For the purposes of 760 CMR 56.03(7), a related application shall mean that less than 12 months has elapsed between the date of an application for a Comprehensive Permit and any of the following:
>
> (a) the date of filing of a prior application for a variance, special permit, subdivision or other approval related to construction on the same land, if that application was for a prior project that was principally non-residential in use, or if the prior project was principally residential in use, if it did not include at least 10% SHI Eligible Housing units;
>
> (b) any date during which such an application was pending before a local permit granting authority,
>
> (c) the date of final disposition of such an application (including all appeals); or
>
> (d) the date of withdrawal of an application.

> An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.

Attached to the Board's appeal is a copy of a December 2, 2013 cover letter and an "Application for Endorsement of Planning Board Believed not to require approval." The ANR allowed the division of the parcel at 170 Franklin Street, Stoneham, MA into two separate lots. As stipulated by the parties, on or about December 4, 2013, the Stoneham Planning Board voted to approve Weiss' request for approval of endorsement of a plan to divide a 26.834 acre parcel into two lots. Prehearing Order p. 2. See G.L. c. 41, § 81-P. On December 24, 2013, the plan approving the land division was recorded at the Middlesex Registry of Deeds. On or about June 30, 2014, Weiss filed a comprehensive permit application for 264 rental units on a 25.657 acre parcel located at 170 Franklin Street, Stoneham, Massachusetts, one of the two lots created by this land division. Prehearing Order, p. 1.

DHCD, in its letter denying the safe harbor on this ground, stated that the ANR did not relate to construction on the land. Indeed, the ANR served only to separate the parcel into two lots, one of which became available for the comprehensive permit application. Although there is no direct evidence that the comprehensive permit application was the reason for the ANR application, there is no evidence of an attempt to obtain approval to construct another project on the site before Weiss submitted its comprehensive permit application. Therefore Board has not submitted any evidence to show that the ANR application related to construction or was for a prior project that was "principally non-residential in use" or a residential project that "did not include at least 10% SHI Eligible Housing units." 760 CMR 56.03(7).

Accordingly, the Board has not demonstrated that a related application was made by the developer and has not shown that it is entitled to a safe harbor under the related application provision.

IV. CONCLUSION AND ORDER

The Board's claims that the Town is entitled to a safe harbor under either the General Land Area Minimum threshold or the Related Application provision are denied. Accordingly this appeal is dismissed and the matter remanded to the Board for further proceedings.[4]

Housing Appeals Committee

Dated: May 8, 2015

Shelagh A. Ellman-Pearl
Presiding Officer

4. The Board also argues that the interlocutory appeal procedure, with the 15-day deadline in local proceedings to assert consistency with local needs, and the scheme of DHCD review of this issue, is *ultra vires* and invalid. See 760 CMR 56.03(8)(a). It argues that the requirement is not found in Chapter 40B, and is therefore beyond DHCD's authority to impose. This issue has been inadequately briefed by the parties for consideration in this appeal.

Certificate of Service

I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Proposed Decision and Report of Hearing Officer on the Interlocutory Appeal Regarding Applicability of Safe Harbor in the case of In The Matter of Stoneham Board of Appeals and Weiss Farm Apartments, LLC, No. 201410, to:

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Dated: 05/08/15

Lorraine Nessar

Lorraine Nessar, Clerk
Housing Appeals Committee