COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.

TOWN OF STONEHAM ZONING BOARD OF APPEALS, Plaintiff, v. THE HOUSING APPEALS COMMITTEE, THE MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, and WEISS FARM APARTMENTS, LLC Defendants	)

COMPLAINT FOR REVIEW OF ADMINISTRATIVE DECISION AND FOR DECLARATORY JUDGMENT AND REVIEW OF REGULATIONS

Introduction

This complaint is brought pursuant to G.L. c.30A, s.14 and G.L. c.40B, s.22 (review of administrative decision) and pursuant to G.L. c. 231A and G.L. c. 30A, s. 7 (declaratory judgment and judicial review of regulations). The Town of Stoneham Zoning Board of Appeals ("Board") seeks judicial review of a Decision of the Housing Appeals Committee ("HAC"), dated June 26, 2015. The HAC is an administrative agency within the Massachusetts Department of Housing and Community Development ("Department"). The Department promulgated 760 CMR 56.00 et seq., governing HAC proceedings. The Decision finds that the Board did not demonstrate "consistency with

local needs" or "safe harbor" under 760 CMR 56.00 et seq. by establishing either 1) that low or moderate income exists on sites comprising one and one half percent or more of the Town's total land area zoned for residential, commercial or industrial use ("1.5% land area minimum," see G.L. c. 40B, s. 20); or 2) that Weiss Farm Apartments, LLC ("Weiss Farm" or "developer") had submitted a "related application" fewer than twelve months prior to submitting a comprehensive permit application for a 264-unit project on Franklin Street in Stoneham (see 760 CMR 56.03(7)). The Decision also rejects (or fails to address, thus rejecting) the Board's challenges to several regulations as ultra vires and inconsistent with G.L. c. 40B, s. 20-23. A copy of the Decision is attached to this Complaint as Exhibit 1.

In finding that the Board did not establish "safe harbor" either through demonstrating the 1.5% land area minimum, or through demonstrating that Weiss Farm had submitted a "related application," the HAC acted arbitrarily, capriciously, against substantial evidence in the record, and otherwise not accordance with law. In failing to invalidate the challenged regulations, the agency acted in violation of constitutional provision(s); in excess of the agency's statutory authority and jurisdiction; pursuant to unlawful procedures; and otherwise not in accordance with law.

Pursuant to G.L. c. 231A and G.L. c. 30A, s. 7, the Plaintiff respectfully requests that the Court 1) declare that the HAC Decision is a final agency decision subject to judicial review under G.L. .c. 30A; and 2) invalidate the challenged regulations as ultra vires, beyond the authority of DHCD**,** inconsistent with G.L. c. 40B, s. 20-23; and in violation of due process under federal and state constitutions. Pursuant to G.L. c.30A, s.14 (7), Plaintiff respectfully requests that the Court vacate the HAC's Decision; find

that the Board established safe harbor pursuant to the 1.5% land area minimum and pursuant to demonstrating a "related application" as that term is used in 760 CMR 56.03(1)(c) and 7(a); and accordingly that a decision denying a permit or granting it with conditions "shall be upheld." 760 CMR 56.03(1)(e).

PARTIES

1. The Plaintiff, the Zoning Board of Appeals of the Town of Stoneham, is a lawfully constituted municipal board and has its principal place of business at 35 Central Street, Stoneham, Massachusetts, 02180.

2. The Plaintiff is a "party" to this proceeding pursuant to G.L. c.30A, s.1.

3. The Plaintiff is aggrieved by the Decision in that it will be significantly and adversely affected by the Decision.

4. The Plaintiff is aggrieved within the meaning of G.L. c.30A, s.1 and s.14.

5. The Plaintiff is entitled to bring this action for declaratory relief pursuant to G.L. c. 231A and G.L. c. 30A, s. 7.

6. The Defendant Department of Housing and Community Development is a duly organized agency within the Executive Office of Housing and Economic Development, with a principal place of business at 100 Cambridge Street, Suite 300, Boston, Massachusetts, 02114.

7. The Defendant Housing Appeals Committee is a duly organized administrative agency, established by G.L. c. 23B, s.5, within the Commonwealth's Department of Housing and Community Development, and having a principal place of business at 100 Cambridge Street, Suite 300, Boston, Massachusetts, 02114.

8. The Defendant Weiss Farm Apartments, LLC is a Massachusetts company having a principal place of business at 100 Grandview Road, Suite 207, Braintree, Massachusetts, 02184.

JURISDICTION

9. The Plaintiff repeats, re-alleges, and incorporates fully herein the allegations contained in Paragraphs 1 through 8 of the Complaint.

10. This Court has jurisdiction to hear the Plaintiff's appeal of the HAC Decision pursuant to G.L. c. 30A, s. 14.

11. This Court has jurisdiction to hear the Plaintiff's request for invalidation of the DHCD regulations pursuant to G.L. .c. 30A, s. 7 and G.L. c. 231A.

12. This Court has jurisdiction to hear the Plaintiff's claims for further declaratory relief pursuant to G.L. c. 231A.

FACTS

13. The Plaintiff repeats, re-alleges, and incorporates fully herein the allegations contained in Paragraphs 1 through 12 of the Complaint.

Procedural History

14. On or about December 4, 2013, at the request of Weiss Farm, Inc., the Stoneham Planning Board voted to approve the endorsement of an ANR plan dividing a 26.834+- acre parcel off Franklin Street in Stoneham, Massachusetts into two lots.

15. One of the two parcels created by the above subdivision is a 25.657-acre lot with an address of 170 Franklin Street, Stoneham, Massachusetts (locus).

16. On or about June 30, 2014, Weiss Farm Apartments LLC filed a comprehensive permit application with the Stoneham Zoning Board of Appeals for a development of 264 rental units on locus. The Board timely opened public hearing.

17. On July 24, 2014, the Board timely informed Weiss Farm in writing, with a copy to DHCD, that the Town was "consistent with local needs," having "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," and that accordingly a decision to grant a permit with conditions or to deny a permit would likewise be "consistent with local needs." See G.L. c. 40B, s. 20 and 760 CMR 56.03(3) and (8).

18. The Board also asserted the Weiss Farm's application for a comprehensive permit was a "related application" as that term is used in 760 CMR 56.03(7)(a).

19. The Board's notice to Weiss Farm and DHCD was within fifteen (15) days of opening public hearing and was otherwise compliant with 760 CMR 56.03(8).

20. Weiss Farm challenged the Board's assertion off the 1.5% land area minimum by letter to DHCD. Pursuant to 760 CMR 56.03(8), the Board provided documentation to DHCD supporting its assertion of the 1.5% land area minimum.

21. By letter dated September 2, 2014, DHCD informed the Town of Stoneham that "the Board has not met the burden of proof in its assertion that a denial with conditions [sic] would be consistent with local needs."

22. On September 18, 2014, the Board filed its appeal of DHCD's ruling to the HAC.

23. The Presiding Officer directed the parties to appear at a conference of counsel with all intended exhibits and list of witnesses. At the conference of counsel held

October 17, 2014, the Board's counsel brought exhibits and a witness list. Counsel for the developer brought no exhibits nor identified witnesses for hearing.

24. A Prehearing Order was prepared containing stipulated facts and identifying the Board's witnesses. The developer identified no witnesses.

25. Hearing commenced before the Presiding Officer on December 11, 2014. The Board put on its witnesses, who were cross-examined by developer's counsel. Exhibits previously identified by the Board were submitted through the Board's witnesses.

26. At the close of the Board's case, developer's counsel moved for a continuance on the grounds that one figure testified to by the Board's witnesses differed from that stated in the Board's initial pleading. Over the objection of the Board's counsel, the Presiding Officer granted a continuance of approximately one month, until January 9, 2015.

27. The Board filed a Motion in Limine to exclude the introduction of exhibits or witness testimony not identified at the conference of counsel or in the Prehearing Order.

28. Hearing resumed and concluded on January 9, 2015. The Motion in Limine was initially denied but after the developer indicated it would not be introducing witness testimony or exhibits, the Board withdrew the Motion.

29. Weiss Farm introduced no evidence nor called any witnesses at the hearing held; the Board's evidence was unrebutted.

30. The parties submitted Post-hearing briefs. The Board requested oral argument.

31. The Presiding Officer issued a Proposed Decision dated May 8, 2014, finding that the Board had failed to establish safe harbor by virtue of the 1.5% land area minimum, or by virtue of the developer having filed a "related application" under 760 CMR

56.03(1)(c) and 7(a). The Proposed Decision rejected the Board's challenges to DHCD regulations.

32. The Board submitted Objections to the Proposed Decision ("Objections"), noting the Proposed Decision's errors in calculating both the numerator and denominator comprising the 1.5% land area minimum; the Decision's errors concerning "related applications"; and the Decision's errors in failing to invalidate the challenged regulations.

33. The HAC did not allow oral argument and on June 26, 2015 issued a Decision purporting to be a "Decision on Interlocutory Appeal Regarding Applicability of Safe Harbor." It was signed by four members of the HAC and the Presiding Officer.

34. The Decision found that the Board had not established "consistency with local needs" or safe harbor either by demonstrating the 1.5% land area minimum, or by demonstrating that a "related application" had been filed with respect to locus fewer than twelve months prior to the comprehensive permit application. The Decision declined to invalidate or address the Board's challenges the regulations..

35. The Decision purported to dismiss the Board's appeal and remand the matter to the Board for further proceedings.

36. The Board timely files this appeal pursuant to G.L. c. 30A, s. 14, within thirty (30) days after receipt of notice of the Decision.

The 1.5% Land Area Minimum under G.L. c. 40B, s. 20 and 760 CMR 56.03(3)

37. G.L. c. 40B, s. 20, in defining the term "consistent with local needs," provides that "[r]equirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) 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. . . ."

38. 760 CMR 56.03(3)(b)(1), the DHCD regulation providing guidance on the calculation of statutory minima provides:

> "General Land Area Minimum. For the purposes of calculating whether SHI Eligible Housing exists in the city or town on sites comprising more than 1-1/2% of the total land area zoned for residential, commercial, or industrial use, pursuant to M.G.L. c. 40B, § 20:
>
> 1. Total land area shall include all districts in which any residential, commercial, or industrial use is permitted, regardless of how such district is designated by name in the city or town's zoning bylaw[.]

39. Under statute and regulation, the "numerator" (the 1.5% target) is land area containing SHI-eligible housing; the "denominator" (100%) is the total land area zoned for residential, commercial or industrial use," subject to certain adjustments.

40. The denominator is not the municipality's total area nor its total land area. Rather, the denominator is a subset of total area containing exclusively land zoned to allow residential, commercial or industrial use. See G.L. c. 40B, s. 20.

41. The "total land area zoned for residential, commercial, or industrial use" in the Town of Stoneham is 2,437.34 acres.

42. The denominator is subject to adjustments specified in 760 CMR 56.03(3)(b).

43. First, 760 CMR 56.03(3)(b)(3) provides for the exclusion of "land owned by the United States, the Commonwealth or any other political division thereof, the Department of Conservation and Recreation or any state public authority." Land in the Town of Stoneham subject to the exclusion of 760 CMR 56.03(3)(b) totals 855.91 acres.

44. The subtraction of the area excluded under 760 CMR 56.03(3)(b)(3), 855.91 acres, from the denominator (the "total land area zoned for residential, commercial or industrial use," 2,437.34 acres) yields an adjusted denominator of 1,581.43 acres.

45. 760 CMR 56.03(3)(b)(3) provides for a further adjustment to the denominator. In violation of G.L. c. 40B s. 20, this regulation provides for the inclusion, or adding back in of "any land owned by a housing authority and containing SHI Eligible Housing."

46. In the Town of Stoneham, land owned by the Stoneham Housing Authority containing SHI housing comprises 16.55 acres.

47. (Unlawfully) adding the Stoneham Housing Authority area back into the adjusted denominator of 1,581.43 acres yields a final adjusted denominator of 1,597.98 acres.

48. The 1.5% target - the acreage that must be equaled or exceeded for the Town to be deemed "consistent with local needs" pursuant to the 1.5% land area minimum - is determined by multiplying the final adjusted denominator by 1.5. Multiplication of the final adjusted denominator of 1,597.98 acres by 1.5 yields a 1.5% target of 23.97 acres.

49. The numerator in the 1.5% calculation is the area of "sites" on which exists "low or moderate income housing," see G.L. c. 40A, s. 20, or "SHI Eligible Housing," see 760 CMR 56.03(3)(b).

50. Fourteen group homes are located within the Town of Stoneham and are included on the Town's SHI. Although these group homes are listed by DHCD on the Town's SHI, the location and land area of these group homes are unknown to the Town.

51. The Department of Developmental Services has refused to provide information on the location of the group homes. DHCD does not possess records of the location of these group homes and units, although DHCD is charged with maintaining the SHI.

52. Land in the Town of Stoneham on which SHI housing exists, not including the land area of fourteen group homes known to exist in Stoneham, totals 24.98 acres.

53. The total area on which SHI-eligible housing exists in Stoneham (excluding group homes), 24.98 acres, exceeds 1.5% of the Town's "total land area zoned for residential, commercial or industrial use" as adjusted pursuant to 760 CMR 56.03(3)(b), 23.97 acres.

54. Where the total area on which SHI-eligible housing exists exceeds 1.5% of the total land area zoned for residential, commercial or industrial use (as adjusted), the Town is "consistent with local needs" pursuant to G.L. c. 40B, s. 20 and 760 CMR 56.03(3)(b), and any decision by the Board granting a comprehensive permit with conditions, or denying a permit, is "consistent with local needs."

"Related Application" under 760 CMR 56.03(1) and (7)

55. 760 CMR 56.03(1) provides that a board's decision to deny a permit (or grant with conditions) "shall be upheld if . . . a related application has previously been received, as set forth in 760 CMR 56.03(7)." See 760 CMR 56.03(1)(c).

56. The referenced section, 760 CMR 56.03 provides:

(7) Related Applications. 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 such an application.

57. On or about December 4, 2013, Weiss Farm obtained the Stoneham Planning Board's endorsement of an ANR plan dividing a 26.834+- acre parcel off Franklin Street into two lots, one of which is the project locus. The project locus contains 25.657 acres..

58. Weiss Farm's application for ANR plan endorsement was "a prior application for . . .[a]n approval related to construction on the same land . . . for a prior project. . . principally residential in use. . . not includ[ing] at least 10% SHI eligible Housing units." 760 CMR 56.03(7)(a).

59. Where "[l]ess than twelve months . . lapsed between the date of [Weiss Farm's] application for a Comprehensive Permit" and the Planning Board's endorsement of Weiss Farm's ANR plan - that "date of final disposition of [the subdivision] application" - Weiss Farm's comprehensive permit application was a "related application".

60. In addition, where less than twelve months lapsed between the date of the comprehensive permit application and the "date of filing of a prior application" - the ANR plan - the comprehensive permit application was a "related application" pursuant to 760 CMR 56.03(7)(a). The same is true regarding "any date during which [a prior] application was pending before a local permit granting authority. " 760 CMR 56.03(7)(b).

61. Where the Weiss Farm comprehensive permit application was a "related application" pursuant to 760 CMR 56.03(1)(e) and 7(c), (b), and (a), any Decision by the Board to deny the permit, or to grant it with conditions, "shall be upheld."

Invalidity of Regulations

62. 760 CMR 56.03(3)(b) is inconsistent with G.L. c. 40B, s. 20 with respect to calculation of the "denominator" of the 1.5% land area statutory minimum.

63. G.L. c. 40B, s. 20 provides that certain land areas are excluded from the "total land area zoned for residential, commercial or industrial use." The statute excludes land "owned by the United States, the commonwealth or any political subdivision thereof, or any public authority."

64. 760 CMR 56.03(3)(b)(3) contains certain language consistent with G.L. c. 40B, s. 20 concerning land area to be excluded. But inconsistent with G.L. c. 40B, s. 20, 760 CMR 56.03(3)(b)(3) provides for "any land owned by a housing authority and containing SHI-Eligible Housing" - that is, land that should be *excluded* under G.L. c. 40B, s. 20 because owned by a public authority - to be *included* (added back into) the denominator.

65. That portion of 760 CMR 56.03(3)(b)(3) requiring the inclusion or "adding back" of housing authority land into the denominator is contrary to G.L. c. 40B, s. 20, ultra vires, and must be declared invalid.

66. G.L. c. 40B, s. 20 provides that the land area minimum is satisfied where "one half per cent or more" of the total land area zoned for residential, commercial, or industrial use contains low or moderate income housing.

67. 760 CMR 56.03(3)(b) requires "*more than* 1-1/2 percent of the total land area zoned for residential, commercial or industrial use" to satisfy the statutory land area minimum (emphasis supplied). The regulation's requirement of "*more than*" 1-1/2 percent" unlawfully increases the threshold for achieving the land area minimum.

68. That portion of 760 CMR 56.03(3)(b) requiring "*more than*" one and one half percent of the total land area zoned for residential, commercial or industrial use to satisfy the land area minimum established by G.L. c. 40B, s. 20, is ultra vires, and must be declared invalid..

69. G.L. 40B, s. 20 provides that consistency with local needs is achieved where "low or moderate income exists . . . on sites comprising one and one half per cent or more of the total area zoned for residential, commercial or industrial use. . . ."

70. In contradiction of G.L. c. 40B, s. 20, 760 CMR 56.03(3)(b) provides for counting only a *portion* of sites containing low or moderate income housing, stating that "[f]or such sites, *that proportion of the site area* shall count *that is occupied by SHI Eligible Housing units*" (emphasis supplied).

71. That portion of 760 CMR 56.03(3)(b) requiring that only a portion of sites containing SHI housing, not the sites in their entirety as provided under G.L c. 40B, s. 20, is ultra vires, and must be declared invalid.

72. G.L. c. 40B, s. 20 provides in relevant part:

> "Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals *after comprehensive hearing* in a city or town where (1) 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 supplied)

73. G.L. c. 40B, s. 20 thus provides that review of a municipality's claim to satisfaction of the 1.5% land area minimum occurs *after* the board conducts hearing on a comprehensive permit application.

74. 760 CMR 56.03(8) purports to impose on the board the following "procedures" *prior* to hearing the comprehensive permit application, should the board claim that it has satisfied the 1.5% land area minimum (or other "safe harbor" provided by the statute):

> (a) If a Board considers that, in connection with an Application, a denial of the permit or the imposition of conditions or requirements would be consistent with local needs on the grounds that the Statutory Minima defined at 760 CMR 56.03(3)(b) or (c) have been satisfied or that one or more of the grounds set forth in 760 CMR 56.03(1) have been met, it must do so according to the following procedures. *Within 15 days of the opening of the local hearing for the*

> *Comprehensive Permit, the Board shall provide written notice to the Applicant, with a copy to the Department [of Housing and Community Development], that it considers that a denial of the permit or the imposition of conditions or requirements would be consistent with local needs, the grounds that it believes have been met, and the factual basis for that position, including any necessary supportive documentation*. (emphasis supplied).

75. The requirement of 760 CMR 56.03(8)(a) that a board asserting "consistency with local needs" pursuant to one of the statutory minima must do so within fifteen days of opening public hearing is inconsistent with G.L. c. 40B s. 20.

76. In fact, G.L. c. 40B, s. 20 contains no requirement that the board make any assertion regarding compliance with statutory minima or "consistency with local needs" until *after hearing* on the comprehensive permit application. See G.L. c. 40B, s. 20.

77. That provision of 760 CMR 56.03(8)(a) requiring a board claiming "consistency with local needs" pursuant to any of the statutory minima to do so within fifteen days of opening public hearing, contrary to G.L. c. 40B, s. 20, is ultra vires, beyond the authority of DHCD, and must be invalidated.

78. 760 CMR 56.03(8)(a) purports to impose the following additional "procedures" prior to the Board's hearing of a comprehensive permit application:

> "If the Applicant wishes to challenge the Board's assertion, it must do so by providing written notice to the Department, with a copy to the Board, within 15 days of its receipt of the Board's notice, including any documentation to support its position. The Department shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials. The Board shall have the burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs, provided, however, that any failure of the Department to issue a timely decision shall be deemed a determination in favor of the municipality. This procedure shall toll the requirement to terminate the hearing within 180 days."

79. 760 CMR 56.03(8)(c) purports to impose the following additional "procedures" prior to the Board's hearing of a comprehensive permit application:

> "If either the Board or the Applicant wishes to appeal a decision issued by the Department pursuant to 760 CMR 56.03(8)(a), including one resulting from failure of the Department to issue a timely decision, that party shall file an interlocutory appeal with the Committee on an expedited basis, pursuant to 760 CMR 56.05(9)(c) and 56.06(7)(e) 11., within 20 days of its receipt of the decision, with a copy to the other party and to the Department. The Board's hearing of the Project shall thereupon be stayed until the conclusion of the appeal, at which time the Board's hearing shall proceed in accordance with 760 CMR 56.05. Any appeal to the courts of the Committee's ruling shall not be taken until after the Board has completed its hearing and the Committee has rendered a decision on any subsequent appeal."

80. The entire scheme contained in 760 CMR 56.03(8)(a)-(c), providing for DHCD "review" of a Board's assertion of consistency with local needs is contrary to G.L. c. 40B, s. 20, ultra vires and must be invalidated..

81. Such scheme contained in 760 CMR 56.03(8) providing for "review" of a board's claim to consistency with local needs pursuant to one of the statutory minima of G.L. c. 40B, s. 20 *prior to* full hearing on the comprehensive permit application is inconsistent with the statute, ultra vires, in excess of DHCD's authority, and must be invalidated.

82. Such scheme contained in 760 CMR 56.03(8) providing for an "interlocutory appeal" of DHCD's decision to the HAC is inconsistent with the statute, ultra vires, and must be invalidated.

83. Such scheme contained in 760 CMR 56.03(8) providing for a "stay" of the board's hearing of the comprehensive permit application pending a decision by the HAC is inconsistent with the statute, ultra vires, and must be invalidated.

84. Such scheme contained in 760 CMR 56.03(8) providing that "[a]ny appeal to the courts of the Committee's ruling shall not be taken until after the Board has completed its hearing and the Committee has rendered a decision on any subsequent appeal" is inconsistent with the statute; and ultra vires. It must be invalidated.

85. Where there may be no "subsequent appeal" by the applicant following further proceedings before the board, and thus no further decision by the HAC, the board may be deprived of any opportunity for judicial review of the HAC's decision on the board's claim to consistency with local needs pursuant to the 1.5% land area or other grounds.

86. Where the board may have no opportunity for judicial review of the HAC's decision regarding the board's claim to consistency with local needs, 760 CMR 56.03(8) deprives the board of due process of law under the federal Constitution and the Commonwealth's Declaration of Rights.

Incorporation of all arguments in post-hearing brief

87. The Plaintiff incorporates herein all arguments made in its Post-Hearing Brief submitted below, as well as, to the extent relevant, all arguments made in its Objections to Proposed Decision. Such arguments are hereby incorporated as if set out in full.

The HAC Decision

88. The HAC decision incorrectly states the law regarding calculation of the denominator under G.L. c. 40B, s. 20 and 760 CMR 56.03(3)(b).

89. The HAC decision erroneously commences calculation of the denominator with the Town's *total* area, as opposed to the total land area zoned for residential, commercial or industrial use as required by G.L. c. 40B, s. 20.

90. The HAC decision erroneously rejects the Board's figure of 1,597.98 acres and erroneously holds that the denominator is 1,956.38 acres or 1,979.09 acres.

91. The HAC erroneously adopts the developer's arguments that the Board had "twice excluded the area represented by water bodies"; that the Board had "ignore[d] the

discrepancy between the total or 'gross' area in Stoneham and the total land area"; and that the water bodies within DCR land must be added back into the denominator.

92. The HAC Decision erroneously adopts the developer's argument 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."

93. The HAC Decision erroneously holds that the inclusion of land owned by a housing authority (the Stoneham Housing Authority) is proper under G.L. c. 40B, s 20.

94. The HAC Decision erroneously holds that only a portion of sites containing SHI housing units should be included in calculating the numerator.

95. The HAC erred in failing to invalidate that portion of the regulation inconsistent with G.L. c. 40B, s. 20, which provides for the inclusion of "sites," not portions of sites.

96. The HAC Decision erroneously finds that "the Board has failed to show it is entitled to safe harbor for the General Land Area Minimum," where the Board's evidence established the denominator to be 1,597.98 acres; established that land containing SHI housing exceeds the 1.5% target; and its evidence was unrebutted by the developer.

97. The HAC Decision erroneously finds that 24.97 acres represents only 1.3% of the "general land area," where the agency deliberately and unlawfully inflated the denominator so as to ensure that the Town did not achieve the 1.5% statutory minimum..

98. The HAC Decision errs in failing to find that DHCD unlawfully withheld information regarding the location and acreage of group home, failing its statutory duty and violating the due process rights of the Board under the U.S. Constitution and the Massachusetts Declaration of Rights.

99. The HAC Decision errs in finding that the Board could have or should have sought "testimony from DHCD staff regarding this role," or pursued the matter further with DDS, where DHCD had advised the Presiding Officer and the parties that DDS would not disclose the information.

100. The HAC Decision erroneously failed to conclude that the comprehensive permit application was a "related application" and accordingly that any decision denying a permit or granting it with conditions "shall be upheld." 760 CMR 56.03(1)(e).

101. The HAC Decision erroneously fails to find that an ANR application is an "application for a[n] approval related to construction" on land; erroneously found that the regulation requires evidence that the comprehensive permit application was the reason for the prior application; erroneously found that the Board had not submitted sufficient evidence regarding the existence of a prior application; and erroneously failed to find that the Board had established all elements of a "related application."

102. The HAC Decision errs in failing to address the Board's argument that the continuance granted to the developer for preparation of its cross-examination was unwarranted and prejudicial to the Board, or to address the perception of bias.

103. The HAC Decision errs in failing to find that the continuance granted to the developer for preparation of its cross-examination was in violation of the Board's due process rights under the U.S. Constitution and the Massachusetts Declaration of Rights.

104. The HAC Decision errs in failing to find that the requirement under 760 CMR 56.03(8)(a) that a board assert "consistency with local needs" within fifteen days conflicts with G.L. c. 40B; and in failing to invalidate the regulation as ultra vires.

105. The HAC Decision errs in failing to find that the entire scheme of DHCD review of a board's consistency with local needs is in conflict with G.L. c. 40B and beyond DHCD's authority to impose; and in failing to invalidate such scheme.

106. The HAC Decision errs in failing to address the Boards arguments with respect to 760 CMR 56.08(a) on the premise that the issue "has been inadequately briefed by the parties," where the Board had presented argument with citations to relevant authority.

107. The HAC Decision errs in failing to explain why the agency cannot or will not entertain oral argument.

108. The HAC Decision purports to be "interlocutory" in nature but in fact is a final agency decision subject to judicial review pursuant to G.L. c. 30A.

109. The Board hereby incorporates into this Complaint and this appeal all arguments articulated above, as well as all arguments made before the agency in these proceedings.

CLAIMS OF ERROR

Count I - Appeal Under G.L. c.30A, s.14(7)(a)(b)(c)(d)(e)(f) and (g)

110. Plaintiff repeats, re-alleges, and incorporates fully herein the allegations contained in Paragraphs 1 through 109 of the Complaint.

111. The Board established through unrebutted evidence that the Town is "consistent with local needs" pursuant to G.L. c. 40B, s. 20, having "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." Accordingly, any decision by the Board to deny a comprehensive permit or grant a permit with conditions "shall be upheld." G.L. c. 40B, s. 20. The HAC's finding that the Board did not establish

achievement of the 1.5% land area minimum is arbitrary, capricious, and against substantial evidence in the record.

112. The Board established through unrebutted testimony that the Town is "consistent with local needs" where the comprehensive permit application of Weiss Farm was a "related application" as that term is used in 760 CMR 56.03(7)(e), and accordingly that any decision denying a permit or granting it with conditions "shall be upheld." The HAC's Decision finding that the Board did not establish that Weiss Farm's comprehensive permit application was a "related application" is arbitrary, capricious, and against substantial evidence in the record.

113. The HAC Decision's failure to invalidate those portions of 760 CMR 56.03(3) and 760 CMR 56.03(8) challenged by the Board as inconsistent with and/or in violation of G.L. c. 40B, s. 20-23 is arbitrary, capricious, and otherwise not in accordance with law.

114. The Presiding Officer's grant of a continuance to the developer was an unlawful procedure, and the HAC decision's failure to find error therein is arbitrary, capricious, in violation of constitutional due process rights, and not in accordance with the law.

115. The HAC Decision's failure to find that DHCD's withholding of information regarding group home SHI units was a dereliction of the agency's duties, as well as a violation of the Board's due process rights, is arbitrary, capricious, in violation of due process rights, and otherwise not in accordance with the law.

116. The HAC Decision's claim to being an "interlocutory" decision, and its purported remand to the Board for further proceedings, are unlawful procedures, in violation of constitutional due process rights, and otherwise not in accordance with the law, where the Decision is a final agency decision subject to judicial review pursuant to G.L. c. 30A.

Count II: Declaratory Judgment pursuant to G.L. c. 30A, s. 7 and G.L. c. 231A

Invalidity of Regulations

117. Plaintiff repeats, re-alleges, and incorporates fully herein the allegations contained in Paragraphs 1 through 116 of the Complaint.

118. 760 CMR 56.03(3)(b) conflicts with G.L. c. 40B, s. 20 with respect to calculation of the "denominator" of the 1.5% land area statutory minimum.

119. 760 CMR 56.03(3)(b) calls for the inclusion or adding back into the denominator land owned by a housing authority, in conflict with G.L. c. 40B, s. 20, which directs that such land be excluded from the denominator.

120. That portion of 760 CMR 56.03(3)(b)(3) requiring the "adding back" of housing authority land into the denominator is contrary to G.L. c. 40B, s. 20, ultra vires, and must be declared invalid.

121. G.L. c. 40B, s. 20 provides that the land area minimum is satisfied where "one half per cent or more" of the total land area zoned for residential, commercial, or industrial use contains low or moderate income housing.

122. 760 CMR 56.03(3)(b) provides that the land area minimum is satisfied where "*more than* 1-1/2 percent" of such area contains such housing.

123. That portion of 760 CMR 56.03(3)(b) requiring "*more than*" one and one half percent of the total land area zoned for residential, commercial or industrial use to satisfy the land area minimum established by G.L. c. 40B, s. 20, is ultra vires, and must be declared invalid.

124. G.L. 40B, s. 20 provides that consistency with local needs is achieved where "low or moderate income exists . . . on sites comprising one and one half per cent or more of the total area zoned for residential, commercial or industrial use. . . ."

125. Contradicting G.L. c. 40B, s. 20, 760 CMR 56.03(3)(b) provides for counting only a *portion* of sites containing low or moderate income housing, stating that "[f]or such sites, that proportion of the site area shall count that is occupied by SHI Eligible Housing units. . . .".

126. That provision of 760 CMR 56.03(3)(b) requiring that only a portion of sites containing SHI housing, not the sites in their entirety as provided under G.L c. 40B, s. 20, is ultra vires, and must be declared invalid.

127. G.L. c. 40B, s. 20 provides in relevant part:

> "Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals *after comprehensive hearing* in a city or town where (1) 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 supplied)

128. In conflict with G.L. c. 40B, s. 20, 760 CMR 56.03(8) purports to impose on the board certain "procedures" *prior* to hearing the comprehensive permit application, should the board claim that it has satisfied the 1.5% land area minimum or other "safe harbor."

129. The requirement of 760 CMR 56.03(8)(a) that a board asserting "consistency with local needs" pursuant to one of the statutory minima must do so within fifteen days of opening public hearing conflicts with G.L. c. 40B s. 20.

130. G.L. c. 40B, s. 20 contains no requirement that the board make any assertion regarding compliance with statutory minima or "consistency with local needs" until *after hearing* on the comprehensive permit application. See G.L. c. 40B, s. 20.

131. That provision of 760 CMR 56.03(8)(a) requiring a board claiming "consistency with local needs" to do so within fifteen days of opening public hearing is contrary to G.L. c. 40B, s. 20, is ultra vires, beyond the authority of DHCD, and must be invalidated.

132. 760 CMR 56.03(8)(a) purports to impose certain additional "procedures" prior to the Board's hearing of a comprehensive permit application, including an "appeal" to DHCD if the Applicant challenges its assertion of safe harbor, and an "appeal" from DHCD to the HAC by either party.

133. The entire scheme of 760 CMR 56.03(8), providing for DHCD "review" of a Board's assertion of consistency with local needs pursuant a statutory minimum is contrary to G.L. c. 40B, s. 20; in excess of DHCD's authority; and must be invalidated.

134. Such scheme providing for DHCD "review" *prior to* full hearing on the comprehensive permit application; providing for an "interlocutory appeal" of DHCD's decision to the HAC; and providing for a "stay" of the board's hearing of the comprehensive permit application pending a decision by the HAC is inconsistent with the statute, ultra vires, in excess of DHCD's authority, and must be invalidated.

135. That provision of 760 CMR 56.03(8) providing that "[a]ny appeal to the courts of the Committee's ruling shall not be taken until after the Board has completed its hearing and the Committee has rendered a decision on any subsequent appeal" is inconsistent with the statute; and ultra vires. It must be invalidated.

136. Where there may be no "subsequent appeal" by the applicant following further proceedings before the board, and thus no further decision by the HAC, the board may be deprived of any opportunity for judicial review of the HAC's decision regarding the board's claim to consistency with local needs pursuant to the 1.5% land area or other

statutory minima, the Board is deprived of its rights under G.L. c. 30A and its rights to due process of law under the federal Constitution and the Commonwealth's Declaration of Rights.

Count III: Declaratory Judgment pursuant to 231A

Final Agency Decision

137. Plaintiff repeats, re-alleges, and incorporates fully herein the allegations contained in Paragraphs 1 through 136 of the Complaint.

138. 760 CMR 56.03(8) provides that "[a]ny appeal to the courts of the Committee's ruling shall not be taken until after the Board has completed its hearing and the Committee has rendered a decision on any subsequent appeal" is inconsistent with the statute; and ultra vires.

139. The HAC Decision here appealed purports to be an "interlocutory" decision and purports to remand the case to the Board for further proceedings.

140. Where there may be no "subsequent appeal" by the applicant following further proceedings before the board, and thus no further decision by the HAC, the board may be deprived of any opportunity for judicial review of the HAC's decision regarding the board's claim to consistency with local needs pursuant to the 1.5% land area or other statutory minima.

141. The HAC Decision here appealed (and any other HAC decision in a comparable posture) may thus be the agency's final adjudication on the issue of the board's claim to consistency with local needs pursuant to the 1.5% land area or other statutory minima.

142. Where the HAC Decision may be the agency's final adjudication on such issue, the Decision is a final agency decision subject to judicial review under G.L. c. 30A.

143. Absent judicial review under G.L. c. 30A of this final agency decision, the Board is deprived of its rights under G.L. c. 30A and its rights to due process of law under the federal Constitution and the Commonwealth's Declaration of Rights.

Request for Stay

144. Plaintiff repeats, re-alleges, and incorporates fully herein the allegations contained in Paragraphs 1 through 143 of the Complaint.

145. Pursuant to G.L. c. 30A, s. 14(3) or in the alternative, G.L. c. 231A, s.2, the Board respectfully requests a stay of the HAC Decision here appealed.

WHEREFORE, the Plaintiff respectfully prays that this Honorable Court:

> Pursuant to G.L. c. 30A, s. 14, annul the decision of the HAC dated June 26, 2015 here appealed;
>
> Pursuant to G.L. c. 30A, s. 14, find that the Board established safe harbor pursuant to the 1.5% land area minimum and pursuant to demonstrating a "related application" as that term is used in 760 CMR 56.03(1)(c) and 7(a); and accordingly that a decision denying a permit or granting it with conditions "shall be upheld." 760 CMR 56.03(1)(e);
>
> Pursuant to G.L. c. 30A, s. 7 and G.L. c. 231A, declare invalid those portions of 760 CMR 56.03 challenged by the Board as inconsistent with G.L. c. 40B, s. 20-23 and as ultra vires;
>
> Pursuant to G.L. c. 231A, declare that the Decision here appealed is a final agency decision subject to judicial review pursuant to G.L. c. 30A;
>
> Pursuant to G.L. c. 30A, s. 14(3) or G.L. c. 231A, stay the Decision here appealed; and
>
> Grant any and all other relief deemed necessary and proper by the Court.

Respectfully submitted,

The Zoning Board of Appeals of the Town of Stoneham
By its attorneys, acting as special counsel

_____

Jonathan D. Witten
BBO 636337
Barbara Huggins
BBO 562535
HUGGINS AND WITTEN, LLC
156 Duck Hill Road
Duxbury, MA 02332
781-934-0084

DATED: July 21, 2015