COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

IN THE MATTER OF STONEHAM BOARD OF APPEALS AND

WEISS FARM APARTMENTS, LLC, NO. 2014-10

POST-HEARING BRIEF OF THE STONEHAM BOARD OF APPEALS

Introduction

Where the Stoneham Board of Appeals (Board) established unequivocally at hearing that it 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," see id., the Housing Appeals Committee (Committee) should reverse the decision of the Department of Housing and Community Development (DHCD) incorrectly finding otherwise. The Board respectfully requests that the Committee find that the Town of Stoneham has achieved the 1.5% threshold under G.L. c 40B, s. 20 and 760 CMR 56.03, and accordingly that the Town' requirements and regulations - including any decision by the Board on the application of Weiss Farm Apartments, LLC (Weiss Farm) - are "consistent with local needs." The Board further requests that the Committee find that the Weiss Farm application for a comprehensive permit was a "related application" as that term is used in 760 CMR 56.03(1)(e) and (7)(a), and accordingly that a decision denying a permit or granting it with conditions must be upheld.

Procedural History

1. 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. Prehearing Order (PHO) at p. 2.

2. On December 24, 2013, the plan approving the above-noted land division was recorded at the Middlesex Registry of Deeds at Plan Book 1031 of 2013. PHO at p. 2.

3. One of the two parcels created by the above subdivision is a 25.657-acre lot with an address of 170 Franklin Street in Stoneham (locus). PHO at p.2.

4. On or about June 30 2014, Weiss Farm filed a comprehensive permit application with the Town of Stoneham Board of Appeals for the development of 264 rental units on locus. PHO at p. 1.

5. The Board timely opened public hearing on Weiss Farm's application for a comprehensive permit.

6. On July 24, 2014, the Board timely informed Weiss Farm in writing, with copy to DHCD, that the Town was "consistent with local needs" pursuant to G.L. 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," see id., 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). The Board also asserted that Weiss Farm's application for a comprehensive permit was a "related application" as that term is used in 760 CMR 56.03(7)(a). The Board's notice to Weiss Farm and DHCD was within 15 days of opening public hearing on the application and was otherwise compliant with 760 CMR 56.03(8). See Board's letter dated July 24, 2014.

7. Weiss Farm challenged the Board's assertion of the 1.5% land area "consistency with local needs" 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 "consistency with local needs."

8. By letter dated September 2, 2014 (distributed to the parties by electronic mail on September 5, 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. " On September 18, 2014, pursuant to 760 CMR 56.03(8), the Board filed its interlocutory appeal of DHCD's finding with the Committee.

9. By letter to counsel dated September 26, 2014, the Presiding Officer directed the parties to pursue the possibility of "stipulated facts and agreed-upon exhibits" as the basis for hearing. The Presiding Officer further directed that should this approach "prove impractical", "counsel for the parties shall appear at the Conference of Counsel with all exhibits that they intend to introduce into evidence and a list of any witnesses they intend to produce on the day of hearing." See letter dated September 26th, 2014 from Presiding Officer .

10. A Conference of Counsel was scheduled for October 9, 2014 and continued by agreement to October 17, 2014.

11. The Board's counsel, pursuant to the Presiding Officer's instructions, brought exhibits intended for introduction at hearing, and a list of witnesses, to the Conference of Counsel on October 17, 2014. The Applicant's counsel brought no exhibits, nor identified any witnesses for hearing.

12. Counsel for the Board and for the Applicant executed a Prehearing Order dated October 14, 2014, containing several stipulated facts and addressing other matters for hearing. The Board's witnesses were identified. The Applicant identified no witnesses and stated its intent to rely on cross-examination of the Board's witnesses.

13. Hearing commenced before the Presiding Officer on December 11, 2014. The Board put on its witnesses, commencing with Cheryl Noble, the Town Building Inspector.[1] Inspector Noble was examined directly by counsel for the Board and cross-examined by counsel for the Applicant. Counsel for the Board then examined directly Brian MacDonald, the Town's Director of Assessing.[2] Exhibits previously identified by the Board to the Applicant were submitted through the Board's witnesses, without objection.

14. At the close of the Board's case, the Applicant'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. Applicant's counsel stated that he needed time to respond to this figure. Over the objection of Board's counsel, and to the prejudice of the Board, the Presiding Officer granted a continuance. See Tr.Vol. I at p. 56-70. The continuance was approximately one month, until January 9, 2015.

15. The Board filed a Motion in Limine to exclude the introduction of exhibits or witness testimony not identified at the Conference of Counsel or PHO. Hearing resumed on January 9, 2015. The Motion in Limine was initially denied, but after the applicant indicated that it would not be introducing exhibits or witness testimony, the Board withdrew the Motion. Tr. Vol. II at p. 4-5 and 63.

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[1] Ms. Noble has been the Town of Stoneham's Building Commissioner for twelve years; she has a bachelor's degree in civil engineering. Tr. Vol. I at p. 9.

[2] Mr. MacDonald has been the Town of Stoneham's Assessor for over seven years and is a licensed real estate appraiser. Tr. Vol. I p. at p. 30-31. His testimony was based on review of property record cards and, with respect to some parcels, Mass. GIS. Tr. Vol. II at p. 9-10; 15, 17. Mr. MacDonald's testimony regarding SHI-eligible housing was based on personal knowledge of the properties as well as discussion with previous Town Assessors and Housing Authority employees. Tr. Vol. II at p. 38-39.

16. Hearing concluded on January 9, 2015 following the cross-examination of the Board's witness Mr. MacDonald.

Argument

I. DHCD's finding should be reversed, where the Board established at hearing that Stoneham has achieved the statutory 1.5% land area threshold

DHCD incorrectly found that the Town of Stoneham has not achieved the statutory 1.5% criterion, one means of establishing consistency with local needs under G.L. c. 40B, s. 20. See DHCD letter dated September 2, 2015 and G.L. c. 40B, s. 20. The Board established at hearing that the Town is in fact "consistent with local needs," where it 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." See G.L. c 40B, s. 20 and 760 CMR 56.03(3) and (8). Accordingly DHCD's finding must be reversed and the Town found to have achieved "consistency with local needs" pursuant to the statutory 1.5% criterion.

Standard of Review and Burden of Proof

"Like all of the Committee's proceedings, the hearing in this interlocutory appeal is de novo." In the Matter of Hingham Zoning Board of Appeals and Avalonbay Communities, Inc., 2013 WL 298115, Housing Appeals Committee No. 12-03 (Jan. 13, 2013) ("Interlocutory Decision Regarding Safe Harbor") at p. 1.

The Board has the burden of proving satisfaction of the 1.5% statutory criterion. See 760 CMR 56.03(8)(a).

A. Consistency with Local Needs under G.L. c. 40B, s. 20

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

> "Consistent with local needs", requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city

> or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. *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* which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or *on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use* or (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year; provided, however, that land area owned by the United States, the commonwealth or any political subdivision thereof, or any public authority shall be excluded from the total land area referred to above when making such determination of consistency with local needs.

G.L. c. 40B, s. 20, "Definitions" (emphasis supplied). The Board in this case has asserted that the Town is consistent with local needs in that "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." G.L. c. 40B, s. 20.

1. The Starting Point - Total Land Area Zoned for Residential, Commercial or Industrial Use

The DHCD regulation providing guidance on the calculation of statutory minima restates the formula contained in G.L. c 40B, s. 20:

> "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[.]

760 CMR 56.03(3)(b)(1). Under both G.L. c. 40B, s. 20 and 760 CMR 56.03, therefore, 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 under 760 CMR 56.03(3)(b). The starting point for the denominator is *not* the total area of the municipality, nor is it the total land area of the municipality.[3] Rather, the starting point is a *subset* of the municipality's total area, containing exclusively land zoned to allow the enumerated uses. See G.L. c. 40B, s. 20 and 760 CMR 56.03(3)(b)(1).

This is a significant point. The Legislature *could have,* but *did not* craft the statute to provide that the denominator (the 100%) is a municipality's total area or total land area; these are more expansive and would thus provide a larger area against which the numerator (the 1.5%) would be measured. A statute is presumed to mean what it says. See Commonwealth v. Williamson, 462 Mass. 676, 679 (2012) Commonwealth v. Young, 453 Mass. 707, 713, (2009); Collatos v. Boston Retirement Bd., 396 Mass. 684, 687 (1986) ("We presume, as we must, that the Legislature intended what the words of the statute say"). Section 20 of G.L. c 40B *could have*, but *was not* written to provide that consistency with local needs is established where "low or moderate income housing exists . . . on sites comprising one and one half per cent or more of the total land area" of the city or town. Rather, the Legislature included additional language to provide that the denominator is "the total land area *zoned for residential, commercial*

[3] For this reason, any analysis that takes as its starting point the *total area* of the Town of Stoneham is fundamentally flawed. Beginning the analysis with the *total area* of the Town of Stoneham, as oppose to the *"total land area zoned for residential, commercial or industrial use,"* inflates the denominator beyond the value dictated by both statute and regulations. The result is a grossly incorrect denominator, to the Town's disadvantage. As discussed infra, the methodology employed by the statute (and to a lesser extent, the regulations) was clearly designed to provide municipalities containing sizeable tracts of land prohibiting residential, commercial, or industrial development (for example, state parks) to nevertheless reach the 1.5% threshold. In Stoneham, 1,400 plus acres are owned by the Commonwealth; none of this property is zoned for residential, commercial or industrial development. If the denominator were to include the total area of a municipality - as it is anticipated that Weiss Farm will argue - it would be nearly impossible for a municipality with large tracts of land not open to development to achieve the 1.5% threshold. Presumably the Commonwealth's intent is to encourage the production of affordable housing by providing cities and towns with *achievable* goals, not illusory ones.

or industrial use." G.L. c. 20 (emphasis supplied). Each word of the statute must be given effect. Ropes and Gray LLP v. Jalbert, 454 Mass. 407, 412 (2009). See also Wolfe v. Gormally, 440 Mass. 699, 704 (2004) ("A statute should be construed so as to give effect to each word, and no word shall be regarded as surplusage"); Bankers Life & Cas. Co. v. Commissioner of Ins., 427 Mass. 136, 140 (1998).

The Legislature's clear intent in G.L. c. 40B, s. 20 was that the area dedicated to affordable housing (the 1.5%) would be measured not against the city or town's *total* area, but rather against a subset of that area: *developable* land. [4] The denominator in the 1.5% calculation is thus unambiguously defined as the "total land area zoned for residential, commercial or industrial use." G.L. 40B and 760 CMR 56.03(3)(b)(1). "Where the language of a statute is unambiguous, it is conclusive of the Legislature's purpose." Ropes and Gray LLP v. Jalbert, 454 Mass. 407, 412 (2009); Pyle v. School Comm. of S. Hadley, 423 Mass. 283, 285–286 (1996).

The "total land area zoned for residential, commercial or industrial use" in Stoneham is 2,437.34 acres. Tr. Vol. I at p. 41; Exhibit 15, line 7. This figure is derived by subtracting all land *not zoned for residential, commercial or industrial use* from the total land area of the Town.

[4] This Legislative choice makes sense when it is considered that the Commonwealth's cities and towns vary greatly in composition with respect to water bodies; federal, state, and local parks, forests, and other natural areas; and areas otherwise not available for development. A law that did not take such factors into consideration would produce inconsistent and inequitable results. Providing that the baseline in all cities and towns is *developable* area - that is, the area within the municipality upon which something might actually be built - was the Legislature's rational and sensible means of placing all cities and towns on equal footing. See Goodridge v. Department of Public Health, 440 Mass. 309 , 385-86 (2003)(discussing "rational basis of fact that can be reasonably conceived" to support a legislative finding; noting that "Legislature may be supposed to have known relevant facts").

The total land area of the Town is 6.14 square miles or 3,929.60 acres[5]. See Ex. 9; Tr. Vol. I at p. 32-33.[6]

Land *not zoned for residential, commercial, or industrial* use in Stoneham includes: land held by the Department of Conservation and Recreation (1,408.47 acres; see Ex. 3; Ex 15, line 2; and Tr. Vol. I at p. 35). The DCR land is zoned Recreation Open Space. Tr. Vol. I at p. 34-35. Residential, commercial, and industrial uses are not permitted in Recreation Open Space. Tr. Vol. I at p. 11.

Land *not zoned for residential, commercial, or industrial* also includes the Bear Hill Golf Course (55.48 acres, zoned Recreation Open Space; see Ex. 12; Ex. 15, line 3 and Tr. Vol. I at p. 36-37); the Railroad Right of Way (8.81 acres, zoned Recreation Open Space; see Ex. 2; Ex. 15,

[5] Mr. MacDonald also testified that the United States Census Bureau identifies the total land area of the Town of Stoneham as 6.02 square miles or 3,852.80 acres. As the Town is consistent with local needs using the total land area determined by DHCD (e.g. 6.14 square miles), it is not necessary to calculate the Town's status using the United States Census Bureau's lower land area total. See Tr. Vol I at p.33-34; Ex. 13.

[6] For this reason, it would be wrong to suggest - as the Board anticipates Weiss Farm may - that the Town has "double counted" excluded areas. Such "double counting" is precluded by 760 CMR 56.03(3)(b)(7). The anticipated argument is that the Town is "double counting" (or "double excluding") the 381 acres of water contained within the DCR land. Such argument would be that by beginning the analysis with "total land area," as opposed to "total area", water bodies are being excluded twice. Yet as the analysis above makes clear, the starting point designated by both statute and regulation is neither the Town's "total area" nor its "total land area." Rather, the starting point is the *total land area zoned for residential, commercial or industrial use.* See G.L. c. 40B, s. 20 and 760 CMR 56.03(3)(b)(1). The entire DCR reservation - including the 381 acres of water contained within it - is zoned Recreation Open Space, in which residential, commercial and industrial uses are prohibited. See Exhibits 1 and 2 (Zoning Bylaw and Map); Tr. Vol. I, p. 11; 34-35. Accordingly, the 381 acres of water within the DCR reservation *form no part of the denominator* as established by the statute and regulation: "total land area zoned for residential, commercial or industrial use." See G.L. c. 40B, s. 20 and 760 CMR 56.03(3)(b)(1). There is no "double counting" or "double excluding" of water bodies within the DCR land, where such water and land - not being zoned residential, commercial or industrial - formed no part of the denominator in the first place. As the water bodies were never included in the denominator, they could not be (and were not) subtracted from the denominator in subsequent calculations.

line 4; and Tr. 38-39); and the St. Patrick's Cemetery (19.5 acres, zoned Recreation Open Space; see Ex. 2; Ex. 15, line 5 and Tr. Vol. I at p. 39).

The total land *not zoned for residential, commercial or industrial use,* determined by adding the above four properties, is 1,492.26 acres. See Tr. Vol. I at p. 39-40; Ex. 15, line 6. Subtracting the total *land not zoned for residential, commercial or industrial use* (1,492.26 acres) from the Town's total land area (3,929.60 acres) provides the "total land area zoned for residential, commercial or industrial use": 2,437.34 acres. See Tr. Vol. I at p. 41; Exhibits 2, 3, 9, 12, and Ex. 15, line 7.

2. Adjustments to the denominator pursuant to 760 CMR 56.03(3)

This figure - the statutory and regulatory "denominator" - is subject to several adjustments specified in 760 CMR 56.03(3)(b). First, certain categories are excluded from the denominator. That is, the area of such parcels are *subtracted* from the denominator - which, as discussed above, is the "total land area zoned for residential, commercial, or industrial use," or 2,437.34 acres in this case. 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 conforming to this exclusion in Stoneham includes public roads (480.16 acres; see Tr. Vol. I at p. 41-42; Ex. 4 and 5; Ex. 15, line 8); land owned by the Town of Stoneham (349.29 acres; see Tr. Vol. I at p. 43-44; Ex. 7; Ex. 15, line 9); and land owned by the Town of Wakefield within Stoneham (26.46 acres; see Tr. Vol. I at p. 43-44; Ex. 7; Ex. 15, line 10). [7]

[7] Note that the acreage in Stoneham owned by the Department of Conservation and Recreation is *not* claimed by the Board as excludable under this provision. This is because the DCR-owned acreage was never included in the denominator in the first place, as such land is not zoned for residential, commercial, or industrial use. See discussion in Section 1 and note 6, supra.

The total land subject to the exclusion of 760 CMR 56.03(3)(b)(3), computed by adding the above three figures, is 855.91 acres. See Tr. Vol. I at p. 44; Exhibits 4, 5; 7 and Ex. 15, line 11. The subtraction of this excluded area (855.91 acres) from the denominator (the "total land area zoned for residential, commercial, or industrial use," 2,437.34 acres in this case) yields an adjusted denominator of 1,581.43 acres. Tr. Vol. I at p. 44; Ex. 15, line 12.

760 CMR 56.03(3)(b)(3) provides for a further adjustment to the denominator. In particular - and contrary to G.L. c. 40B, s. 20 - this regulation provides for the *inclusion* - that is, the *adding back in* of "any land owned by a housing authority and containing SHI Eligible Housing."[8] In Stoneham, land owned by the Stoneham Housing Authority containing SHI housing comprises 16.55 acres. Tr. Vol. I at p. 44-45; Ex. 6; Ex. 15, line 13. The addition of this area (6.55 acres) back into the adjusted denominator of 1,581.43 acres (see preceding paragraph) yields a figure of 1,597.98 acres.[9]

3. Calculation of the 1.5% "target"

The denominator has been calculated by determining the "total land area zoned for residential, commercial, or industrial use" and making the adjustments specified by G.L. c. 40B, s. 20 and 760 CMR 56.03(3)(b). See sections 1 and 2 above The 1.5% "target" - that is, the acreage that must be equaled or exceeded for the Town to be deemed "consistent with local needs" pursuant to the 1.5% statutory minimum - is next determined by multiplying the

[8] See discussion in Section III below. The Board objects to this adjustment and reserves its rights to challenge the same.

[9] Note that Line 14 in Exhibit 15 *should have*, but *did not* contain the sum of lines 12 and 13. As corrected, Line 14 should state 1,597.98 acre (1,581.43 acres plus 16.55 acres).

denominator (1,597.98 acres) by 1.5. That 1.5% target is 23.97 acres. See Tr. Vol. I at p. 45; 54; Tr. Vol. II at p. 14; Ex. 15, line 15.[10]

4. Calculation of the numerator

Having determined the denominator, and from it, the 1.5% target (23.97 acres), the final step in determining whether the Town has achieved this statutory minimum is a calculation of the numerator: the area of "sites" containing SHI-eligible housing units. See G.L. c. 40B, s. 20. See also 760 CMR 56.03(3)(b) ("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").[11]

Land on which SHI Housing exists, *not* including the land area of fourteen group homes known to exist in Stoneham, totals 24.98 acres.[12] Tr. Vol. I at p. 46; 53; Ex. 10; Ex. 11A-J; Ex. 15, line 16. This includes a parcel at Washington Street and Washington Avenue, DHCD

[10] Note that Line 15 in Exhibit 15 *should have*, but *did not* multiply 1.5% by corrected line 14 (1,597.98 acres). As corrected, Line 15 should state 23.97 acres. This is the same result as included in Exhibit 15, Line 15.

[11] To the extent 760 CMR 56.03(3)(b) requires "*more than* 1-1/2% of the total land area zoned for residential, commercial, or industrial use" for achievement of the statutory minimum, it is inconsistent with G.L c. 40B, s. 20, which provides for that achievement at "*one half per cent or more."*

[12] This total of 24.98 acres includes only 0.26 of the Christopher Street project's 1.02 acres. Two of this development's eight units are included on the Town's SHI; pursuant to 760 CMR 56.03(3)(b), the total "qualifying" area for this parcel is 0.26 acres; this is a "proportion" (25%) of the development's acreage (1.02). Allowing "qualification" of only a portion of the development site is inconsistent with the statute, which calls for determining whether low or moderate-income housing exists "on *sites* comprising more than 1-1/2 percent of the total land area zoned for residential, commercial, or industrial use." G.L. c. 40B, s. 20.

The value of 1.017 acres was stated for this parcel at hearing by Mr. MacDonald, and based on that value, the total acreage of SHI-eligible housing was stated at hearing as 25.74 acres. See Tr. Vol. I at p. 52-53; Tr. Vol. II at p. 44-46. Exhibit. 15, Line 16 (total acreage of SHI-eligible housing) also reflected a value of 1.017 acres. As adjusted to reflect a value of 0.26 acres for this parcel, the total acreage of SHI-eligible housing is 24.98 acres.

identification number 9648, containing 4.95 acres. Tr. Vol. I at p. 47, 52; Ex. 10, 11A, 11J. This parcel is built out. Tr. Vol. I at p. 47.

This further includes a parcel on Prospect Street, DHCD identification numbers 3042, 3043, 3044 and 3045, containing 8.77 acres. Tr. Vol. I at p. 47-50; Ex. 10 and 11B-11E. This parcel is "developed to its current capacity" with road access. residential structures, parking lots, and open space insufficient to support further development. Tr. Vol. I at p. 49.

This further includes a parcel on Duncklee Avenue, DHCD identification number 3046, containing 2.83 acres and one hundred units. Tr. Vol. I at p. 50; Ex. 10 and 11F.

This further includes a parcel on Mountain View Terrace, DHCD identification number 3049, containing 8.17 acres and one hundred and ninety-four units. Tr. Vol. I at p. 51; Ex. 10 and 11G.

This further includes a parcel on Christopher Street, DHCD identification number 9094, containing 1.017 (1.02) acres, only 0.26 of which are counted for purposes of this calculation. Tr. Vol. I at p. 52; Ex 10 and 11I.

Group Homes

Fourteen group homes are located within the Town of Stoneham and are included on the Town's SHI.[13] See Ex. 10. Although 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. See Ex. 10; see also Tr. Vol. I, p. 11, 14-15; 51; Tr. Vol. II at p. 41-43. This is because,

[13] According to DHCD's "Comprehensive Permit Guidelines,"a "Group Home" is:

> "A residence licensed by or operated by the Department of Mental Health or the Department of Mental Retardation for adult individuals who are capable, both mentally and physically, to take action to preserve one's own life as defined by the Massachusetts State Building Code, and that, pursuant to the Massachusetts State Building Code, is treated as a single-family residential building for building code purposes."

despite the fact that DHCD is charged with maintaining the SHI, that agency does not possess records of the location of these units. The Department of Developmental Services has refused to provide information regarding the location of the group homes.[14] The Town is thus prevented by two agencies of the Commonwealth from obtaining information relevant to its burden of proof in this appeal: establishing the area of "sites" on which SHI-eligible housing exists. This is a violation of due process under the United States Constitution and the Commonwealth's Declaration of Rights. It is particularly egregious where DHCD has 1) promulgated regulations assigning itself "keeper of the list" and providing that the SHI is presumptively accurate, see 760 CMR 56.03(2) and (3); 2) placed the burden on the municipality to establish that sufficient SHI housing exists to satisfy the statutory minima, see 760 CMR 56.03(8); and then 3) refused to provide the municipality with the information necessary to satisfy that burden. Notwithstanding the fact that the Board has established that the land area on which SHI housing exists, *not* including the land area of the group homes, exceeds the 1.5% statutory and regulatory threshold, the Board preserves this issue for any appeal.

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,

[14] See Tr. Vol. I at p. 24 (noting correspondence from DHCD officials stating that agency does not know location of group homes and that DDS will not release information); Tr. Vol. II at p. 59-61 (noting same). The Board diligently pursued this issue through inquiry to both DHCD and DDS, but was stymied by the agencies' unambiguous refusal to disclose the location of group homes within Stoneham or the land area associated with them. Further inquiry would quite obviously be futile. In fact, in separate litigation, DDS has sought and obtained a protective order from the Suffolk Superior Court rather than disclose - even under a protective order - information regarding the location of group homes in the Town of Norwood (SUCV2014-01561). See Tr. Vol. II at p. 59-60. The Plaintiff in that case, after public records requests for identification of group homes were denied by DHCD and the Secretary of State, had filed an action for declaratory judgment. With a judicial ruling that the location of group homes are not discoverable, as well as DDS, DHCD, and the Secretary of State refusing to provide the information, it would be a waste of the Town's time, effort and resources to pursue this issue any further.

commercial, or industrial use," as adjusted pursuant to 760 CMR 56.03(3)(b), 23.97 acres. Tr. Vol. I at p. 54. The Town is thus "consistent with local needs" pursuant to G.L c. 40B, s. 20 and 760 CMR 56.03(3)(b).

5. The evidence established by the Board was undisputed

Weiss Farm introduced no relevant evidence nor called any witnesses. See Tr. Vol. II at p. 62. Where the developer placed no evidence in the record, the Town's evidence is unrefuted. The Committee will therefore look in vain for record evidence upon which it could make findings contrary to the Board's evidence.

The undisputed evidence is summarized as follows:

1. Total Land Area	**6.14 square miles or 3,929.60 acres**	**Source: Exhibit 9[15]**
2. Land Area NOT Zoned Residential, Commercial or Industrial	**1,408.47/DCR Land**	**Source: Exhibit 3**
3.	**55.48 ac./Bear Hill Golf Course**	**Source: Exhibit 12**
4.	**8.81 ac./Railroad Right of Way**	**Source: Exhibit 2**
5.	**19.5 ac./St. Patrick's Cemetery**	**Source: Exhibit 2**
6. Total Land Area NOT Zoned Residential, Commercial or Industrial	**1,492.26 acres**	**Source: Addition of Lines 2 through 5**
7. Total Land Area Zoned Residential, Commercial or Industrial	**2,437.34 acres**	**Source: Subtraction of Line 6 from Line 1**
8. Public Roads in Stoneham	**480.16 acres**	**Source: Exhibits 4 and 5**
9. Land Owned by the Town of Stoneham	**349.29 acres**	**Source: Exhibit 7**

[15] Exhibit 13 (United States Census Bureau) identifies the total land area for the Town of Stoneham as 6.02 square miles or 3,852.80 acres. The calculations summarized above are based upon the larger land area, that is, that the Town of Stoneham land area consists of 6.14 square miles or 3,929.60 acres. See Tr. Vol. II at p. 52.

10. Land Owned by the Town of Wakefield within Stoneham	**26.46 acres**	**Source: Exhibit 7**
11. Total Land Area of Roads, Stoneham and Wakefield-owned land.	**855.91 acres**	**Source: Addition of Lines 8-11**
12. Total Land Area Zoned Residential, Commercial or Industrial less Land Area of Roads, Stoneham and Wakefield-owned land.	**1,581.43 acres**	**Source: Subtraction of Line 11 from Line 7**
13. Land owned by the Stoneham Housing Authority with SHI Housing	**16.55 acres**	**Source: Exhibit 6**
14. Land owned by the Stoneham Housing Authority with SHI Housing added to Total Land Area Zoned Residential, Commercial or Industrial less Land Area of Roads, Stoneham and Wakefield-owned land.	**1,597.98 acres**	**Source: Addition of Lines 12 and 13**
15. 1.5% of 1,597.98 acres	**23.97 acres**	**Source: Line 14 multiplied by 1.5%**
16. Land Area on Which SHI Housing Exists, Not Including Land Area of 14 Group Homes	**24.98 acres**[16]	**Source: Exhibits 10 and 11A-11J**

II. Weiss Farm's application for a comprehensive permit was a "related application" as that term is used in 760 CMR 56.03(1)(e) and (7)(a)

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

[16] Line 16 includes 0.26 acres for the Christopher Street condominium project whereas the locus contains 1.017 acres. Tr. Vol. I at p. 51-52. This project contains 8 dwelling units, 2 of which are included on the SHI. Ex. 10, Ex. 11I. According to the regulations (760 CMR 56.03(3)(b)), the total qualifying area for this parcel should be 0.26 acres. Requiring that only a proportion of the land area count toward qualifying SHI housing—e.g. in this case, 25% of the land area—is inconsistent with the statute which states, in relevant part, "or 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, s.20 (emphasis added). In any event, the Town of Stoneham has achieved the 1.5% threshold even with compliance with the above-noted regulation, and without inclusion of the acreage attributable to group homes.

in 760 CMR 56.03(7)." 760 CMR 56.03(1)(e). The referenced section 760 CMR 56.03(7) 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.
>
> An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land."

760 CMR 56.03(7).

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 and has an address of 170 Franklin Street. PHO at p. 2. Prehearing Order (PHO) at p. 2. This plan was recorded at the Middlesex Registry of Deeds, at Plan Book 1031 of 2013, on December 24, 2013. PHO at p. 2.

On or about June 30, 2014, Weiss Farm filed a comprehensive permit application with the Board of Appeals for the development of 264 rental units on locus. PHO at p. 1. December 4, 2013, was approximately seven months prior to June 30, 2014.

Weiss Farm's application for ANR plan endorsement was "a prior application for a . . . [an] approval related to construction on the same land. . .for a prior project . . . principally

residential in use [and] . . . not includ[ing] at least 10% SHI Eligible Housing units." 760 CMR 56.03(7)(a). Where "[l]ess than twelve months . . . lapsed between the date of [Weiss Farm's] application for a Comprehensive Permit" and the Stoneham Planning Board's endorsement of Weiss Farm's ANR plan - the "date of final disposition of [the subdivision] application" - Weiss Farm's comprehensive permit application was a "related application" pursuant to 760 CMR 56.03(1)(e) and (7)(c).[17]

Although an ANR plan does not entail the Planning Board's approval *of a subdivision*, the plan's endorsement by the Planning Board is nevertheless an "approval" as that term is used in 760 CMR 56.03(7)(c). First, the Subdivision Control Law requires submission of an ANR plan consistent with the notice and other procedural requirements of G.L. 41, s. 81T. Second, an affirmative vote by the Planning Board is required for endorsement of the ANR plan, and such endorsement by the Board members is required to file the plan in the Registry of Deeds. See. G.L. c. 41, s. 81P. Further, the Planning Board retains discretion and its endorsement is not a "rubber stamp". A planning board can properly deny an ANR endorsement despite technical compliance with frontage requirements See Gates v. Planning Bd. of Dighton (2000) 48 Mass.App.Ct. 394 (2000), review denied 726 N.E. 2d. 414 (2000).

That ANR plan endorsement is "approval" is further indicated by the fact that it is subject to judicial review. See Lee v. Board of Appeals of Harwich 11 Mass.App.Ct. 148 (1981). Moreover, appeal may be taken from a *denial* of ANR endorsement pursuant to G.L. c. 41, s. 81BB. See Morgan v. Josuz, 67 Mass.App.Ct. 17 (2006). In sum, a discretionary decision, based on plan review, requiring a vote, and subject to judicial review, is an "approval"

[17] The same would be true using instead 760 CMR 56.03(7)(a), "the date of filing of a prior application" or (b) "any date during which such an application was pending before a local permit granting authority."

under any rational assessment. Thus ANR plan approval is an "approval" as that term is used in 760 CMR 56.03(7)(c).

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

The Board requests a finding by the Committee that the Weiss Farm application for a comprehensive permit was a "related application" as that term is used in 760 CMR 56.03(1)(e) and (7)(c), and accordingly that a decision denying a permit or granting it with conditions "shall be upheld." 760 CMR 56.03(1)(e).

III. A portion of 760 CMR 56.03(3)(b) pertaining to calculation of the 1.5% statutory minimum is inconsistent with G.L. c. 40B, s. 20 and therefore invalid

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 which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use or (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year; provided, however, that land area owned by the United States, the commonwealth or any political subdivision thereof, or any public authority shall be excluded from the total land area referred to above when making such determination of consistency with local needs"

G.L. c. 40B, s. 20, "Definitions" "Consistent with Local Needs." As discussed above, the statute provides that in calculating the "denominator" for the 1.5% threshold - that is, the "total land area zoned for residential, commercial or industrial use" - certain land areas are excluded . In particular, G.L. c. 40B, s. 20 specifies that land "owned by the United States, the commonwealth or any political subdivision thereof, or any public authority shall be excluded from the total land

area referred to above when making such determination of consistency with local needs." G.L. c. 40B, s. 20. Consistent with the statute, 760 CMR 56.03(b)(3) similarly provides for the exclusion of "land owned by the United States, the Commonwealth or any political subdivision thereof, the Department of Conservation and Recreation or any state public authority."[18] However, *inconsistent* with G.L. c. 40B, s. 20 , 760 CMR 56.03(b)(3) also requires that "land owned by a housing authority and containing SHI Eligible Housing" be *included* in the denominator:

> "Total land area shall exclude land owned by the United States, the Commonwealth or any political subdivision thereof, the Department of Conservation and Recreation 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(b)(3). In other words, while G.L. c. 40B, s. 20 *excludes from the denominator* land owned by a housing authority and containing SHI units, 760 CMR 56.03(b)(3) requires that such land be *added back into the denominator*. The resulting increase to the denominator "raises the bar" for the municipality, rendering achievement of the 1.5% statutory minimum more difficult. The regulatory provision requiring the "adding back" of housing authority land is contrary to G.L. c. 40B, s. 20 and must be declared invalid. See Telles v. Commissioner of

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[18] 760 CMR 56.03(b) contains additional exclusions that are *consistent* with G.L. c. 40B, s. 20's exclusion of nondevelopable land from the "denominator":

> "4. Total land area shall exclude any land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the Department of Environmental Protection pursuant to M.G.L. c. 131, § 40A. No other swamps, marshes, or other wetlands shall be excluded;
>
> 5. Total land area shall exclude any water bodies;
>
> 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."

Insurance, 410 Mass. 560, 564 (1991)(invalidating regulations in conflict with statute; "commissioner was without power to issue the regulations in question").

Had the Legislature intended to include housing authority land within the denominator defined in G.L. c. 40B, s. 20, it would have explicitly so stated in the statute. See Roberts v. Enterprise Rent-a-Car, Inc., 438 Mass. 187, 192 (2002)(declining to impose particular notice requirement that Legislature had not included in statute, where "it could have done so easily"); Resendes v. Boston Edison Co., 38 Mass.App.Ct. 344, 354, (1995) (declining to insert language that the Legislature omitted).

In addition, as discussed in footnote 11, 760 CMR 56.03(3)(b) requires "*more than* 1-1/2% of the total land area zoned for residential, commercial, or industrial use" for achievement of the statutory minimum. This requirement is grossly inconsistent with G.L c. 40B, s. 20, which provides for that achievement at "*one half per cent or more."* Such a requirement—increasing the threshold for compliance—is ultra vires and invalid.

IV. The 15-day deadline for assertion of consistency with local needs, as well as the entire scheme of DHCD review, is ultra vires and invalid

760 CMR 56.03(8)(a) imposes a requirement that the Board, in asserting "consistency with local needs" pursuant to one of the statutory minima, do so within fifteen days of opening public hearing on an application. This requirement is found nowhere in G.L. c. 40B, s. 20-23 and is beyond DHCD's authority to impose. "[T]he agency may not exceed those powers and obligations expressly conferred on it by statute or reasonably necessary to carry out the purposes for which the statute was enacted. " Mass. Federation of Teachers, AFT, AFL-CIO v. Board of Education, 436 Mass. 763, 772 (2002); see also Board of Education v. School Committee of Quincy, 415 Mass. 240, 245-246 (1993). The arbitrary fifteen-day deadline created by DHCD in 760 CMR 56.03(8)(a) is clearly designed to obstruct municipal assertion of consistency with

local needs; as such, it is in conflict with the statute and must be invalidated. See Telles v. Commissioner of Insurance, 410 Mass. at 564.

Notwithstanding the fact that the Board satisfied this ultra vires requirement imposed by DHCD regulation, the Board requests a finding that the fifteen-day limit on municipal assertion of consistency with local needs is ultra vires and void.

Further, the entire scheme providing for DHCD "review" of a Board's assertion of consistency with local needs pursuant to achievement of a statutory minimum is ultra vires. Such procedures are nowhere to be found in G.L. c. 40B, s. 20-23, and constitute an assertion of powers by the agency beyond Legislative intent. See Mass. Federation of Teachers, AFT, AFL-CIO v. Board of Education, supra; see also Telles v. Commissioner of Insurance, 410 Mass. at 564 (invalidating ultra vires regulations; agency "has no authority to promulgate rules and regulations which are in conflict with the statutes or exceed [statutory] authority") ; Bureau of Old Age Assistance of Natick v. Commissioner of Public Welfare 326 Mass. 121, 123 (1950)(same).

Conclusion

The Board established that the Town of Stoneham 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." The Committee must make a finding to this effect and must reverse DHCD's decision to the contrary.

Further, Weiss Farm's comprehensive permit application was a "related application" as that term is used in 760 CMR 56.03(1)(e) and (7). Accordingly, any decision by the Board to deny a permit or grant it with conditions "shall be upheld." 760 CMR 56.03(1)(e).

Finally, 760 CMR 56.03(3)(b)(3) is contrary to G.L. c. 40B, s. 20.

First, the regulations purport to require the inclusion of housing authority land in calculating the "denominator" for purposes of the 1.5% statutory minimum. Accordingly that portion of the regulation must be invalidated.

Second, 760 CMR 56.03(8)(a) purports to impose a fifteen-day deadline for municipal assertion of consistency with local needs pursuant to a statutory minimum and is wholly ultra vires. That portion of the regulation must be invalidated.

Third, 760 CMR 56.03(8)(a), providing for DHCD review of a municipality's assertion of consistency with local needs pursuant to achievement of statutory minimum, is wholly ultra vires. That portion of the regulation must be invalidated.

Fourth, the purported requirement of 760 CMR 56.03(3)(b) that consistent with local needs status is obtained only upon a showing of *more than* 1.5% of the statutory minimum is wholly inconsistent with the statute and must be invalidated.

Request for Oral Argument

The Board respectfully requests oral argument before the full Committee.

Request for Proposed Decision

The Board respectfully requests the issuance of a Proposed Decision pursuant to 760 CMR 56.06(7)(e)(9).

Respectfully submitted,

For the Stoneham Board of Appeals,
By its attorneys, acting as special Town Counsel

HUGGINS AND WITTEN, LLC

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DATED: February 13, 2015

CERTIFICATE OF SERVICE

I certify that I sent a true copy of the above noted Post Hearing Memorandum, to Brian Hurley, Esq., counsel for Weiss Farm Apartments, LLC this day by US Mail, postage prepaid.

_____

Jonathan D. Witten

February 13, 2015