COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

**In the Matter of**

**NORWOOD ZONING BOARD OF APPEALS**

and

**DAVIS MARCUS PARTNERS**

**No. 2015-06**

# DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR

December 8, 2016

# TABLE OF CONTENTS

I. INTRODUCTION AND PROCEDURAL BACKGROUND.....1

II. GENERAL LAND AREA MINIMUM OF 1.5 PERCENT ..... 2

A. Methodology and Data Sources ..... 3

B. Calculation of the Denominator ..... 6

1. Water Bodies ..... 8

2. Railroad Rights of Way ..... 9

3. Private Roadways ..... 10

4. Denominator Conclusion ..... 11

C. Calculation of the Numerator ..... 11

1. The Board's Determination of Lot Acreage ..... 12

2. SHI Acreage Directly Associated with Affordable Units ..... 13

3. Numerator Conclusion ..... 19

D. Final Calculation of the Percentage of SHI Acreage ..... 20

III. CONCLUSION AND ORDER ..... 21

**Counsel for Norwood Board of Appeals**
Karis L. North, Esq.
Murphy Hesse Toomey & LeHane, LLP
300 Crown Colony Drive
Quincy, MA 02169

**Counsel for Davis Marcus Partners**
Kevin P. O'Flaherty, Esq.
Goulston & Storrs
400 Atlantic Avenue
Boston, MA 02110

**Norwood Board of Appeals' Witness**
Andrew Murphy

**Davis Marcus Partners' Witnesses**
Geoffrey Morrison-Logan
Renee Guo

COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

| | | |
|---|---|---|
| In the Matter of<br><br>NORWOOD ZONING BOARD OF APPEALS,<br><br>and<br><br>DAVIS MARCUS PARTNERS. | ) | No. 2015-06 |

**DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR**

## I. INTRODUCTION AND PROCEDURAL BACKGROUND

This case is an interlocutory appeal brought by the Norwood Zoning Board of Appeals (Board) pursuant to 760 CMR 56.00. Under 760 CMR 56.03(8)(a), a board seeking to rely on one of several enumerated safe harbors precluding Chapter 40B appeals to the Housing Appeals Committee must notify the developer of such safe harbor claim within 15 days of the opening of the board's hearing on a comprehensive permit application. If the developer wishes to challenge the board's assertion of one of these statutory and regulatory protections, it must provide written notice to the Department of Housing and Community Development (DHCD) within 15 days. DHCD "shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials." 760 CMR 56.03(8)(a). Either party may file an interlocutory appeal of an adverse decision by DHCD to the Housing Appeals Committee, but must do so within 20 days of receipt of DHCD's decision. The interlocutory appeal to the Committee is conducted on an expedited basis, as the proceeding before the board is stayed pending the Committee's determination. 760 CMR 56.03(8)(c). The Committee's hearing on the issue, like all of its proceedings, is *de novo.* G.L. c. 40B, § 22. Section 56.03(8)(a) provides that the Board has "the burden of

proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs...."

In accordance with this regulatory scheme, after Davis Marcus Partners (Davis) filed its application for a comprehensive permit with the Board, the Board notified the developer that it invoked a safe harbor provision: that in the Town of Norwood, "low or moderate income exists ... on sites comprising one and one half percent or more of the total land area zoned for residential, commercial or industrial use...." G.L. c. 40B, § 20. See 760 CMR 56.03(3)(b). Davis notified the Board and DHCD of its objection to the Board's assertion. DHCD issued a letter stating that the Board was not entitled to the safe harbor, and the Board filed this interlocutory appeal to the Committee.[1]

Following a conference of counsel, the Presiding Officer scheduled a hearing and conducted oral testimony on March 9 and 11, 2016, as well as a view of a number of sites agreed upon by the parties. The parties filed post-hearing memoranda on May 16, 2016. The Board requested a proposed decision in accordance with 760 CMR 56.06(7)(e)(9). See G.L. c. 30A, § 11(7). The Presiding Officer issued a proposed decision, followed by submission of comments on the proposed decision by both parties.

## II. GENERAL LAND AREA MINIMUM OF 1.5 PERCENT

Under the Comprehensive Permit Law, the decision of a board would be consistent with local needs as a matter of law when the town has low or moderate income housing "on sites comprising one and one half per cent or more of the total land area zoned for residential,

---

1. Since this Interlocutory Decision does not "finally determine the proceedings," the presiding officer may rule on it without consulting with the full Committee. 760 CMR 56.06(7)(e)(2). However, in cases of first impression, like this one, or involving particularly weighty matters, the presiding officer, in his or her discretion, may choose to bring the matter before the full Committee. The general land area minimum is a complex measure, which has not been addressed extensively during the 45-year history of the Comprehensive Permit Law, and has only recently begun to be raised by municipalities. See *In the Matter of Stoneham Board of Appeals and Weiss Farm Apartments, LLC*, No. 14-20 (Mass. Housing Appeals Committee June 26, 2016); *In the Matter of Newton Zoning Board of Appeals and Dinosaur Rowe, LLC*, No. 15-01 (Mass. Housing Appeals Committee June 26, 2015); *In the Matter of Newton Zoning Board of Appeals and Marcus Lang Investments, LLC*, No. 15-02 (Mass. Housing Appeals Committee June 26, 2015). Since a number of the issues presented in this appeal are before the Committee for the first time, the Presiding Officer determined it appropriate to bring this appeal to the full Committee.

commercial, or industrial use...." G.L. c. 40B, § 20. The general land area minimum percentage is calculated by dividing the area of sites of affordable housing that are eligible to be inventoried on the DHCD Subsidized Housing Inventory (SHI) by the total land area zoned for residential, commercial, or industrial use. 760 CMR 56.03(3)(b). The Board believes that the Town of Norwood satisfies this 1.5% general land area minimum threshold. Davis argues that the methodology used by the Board in arriving at its figures is flawed, and the Town has not met the statutory minimum.

**A. Methodology and Data Sources**

Both parties presented calculations for the general land area analysis, but used different methodologies. The Board used a combination of several data sources to calculate acreage for different types of land in the Town to derive at the general land area minimum and the acreage for SHI eligible housing. For the gross land area in the Town of Norwood, the Board's figure of 6,752 acres comes from DHCD's Community Profile figure. Exhs. 67, 86. For government owned sites, it used assessor's data. At the same time, the Board employed Mass GIS-based (Geographic Information Systems) data and other resources, for railroad rights-of-way, road rights-of-way, and water bodies within the Town.

The Board takes the position that it chose the best data for each category and argues that its figures are superior to those Davis used. See Exh. 86. Its expert witness, Mr. Andrew C. Murphy, a professional land surveyor, is Norwood's Assistant Town Engineer. Tr. I, 9-11. He testified that the Town's assessor's data is preferred because it is derived from metes and bounds descriptions in "legal deeds" and the area is calculated from a "legal description of a property." Tr. I, 25. The Board argues that this source provides more exact results than GIS data. It also relies in part on DHCD "Guidance for Interpreting 760 CMR 31.04(2) Computation of Statutory Minima pursuant to MGL c. 40B General Land Area Minimum" (DHCD Guidance), Exh. 84.

Davis used only MassGIS data to allow for consistency. It points out that DHCD Guidance states that GIS data is the preferred approach for measuring land area for this analysis.[2] Exhs. 84, 85, 101; Tr. II, 130-131.

Davis's experts questioned the Board's use of different sources of data for different components of land area to calculate the denominator, arguing that the choice of data source was outcome driven. Davis's expert, Renee Guo, testified that mixing data sources derived from different methodologies raises the likelihood of distortions.[3] Tr. II, 130. The Board asserts that GIS based data contain their own distortions, are for planning purposes only, and should not be used for legal boundary definitions and parcel level analysis. See Exh. 85, pp. 9-10; Tr. I, 24-25.

The DHCD Guidance does not have the force of law because it was not promulgated as a regulation. See *Town of Northbridge v. Town of Natick,* 394 Mass. 70, 76 (1985) (agency's guidance documents are policy statements without force of law). However "[g]enerally, in considering statutory and regulatory provisions, [the Committee gives] deference to policy statements issued by DCHD, the state's lead housing agency." *In the Matter of Newton and Dinosaur Rowe, LLC,* No. 15-01, slip op. at 3 n.5 (Mass. Housing Appeals Committee June 26, 2015); *In the Matter of Newton and Marcus Lang Investments, LLC*, No. 15-02, slip op. at 3 n.5 (Mass. Housing Appeals Committee June 26, 2015), citing *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at 9 n.6 (Mass. Housing Appeals Committee Mar. 5, 1999); *Whitcomb Ridge, LLC v. Boxborough*, No. 06-11, slip op. at 3 (Mass. Housing Appeals Committee (Jan. 22, 2008).

---

2. Davis also argues that evidence showing the Town was interested in increasing its SHI land area to reach the statutory minimum drove its analysis of the calculation. Although evidence in the record shows Town officials and staff set up a committee to discuss how to achieve the land area statutory minimum, this evidence is not germane to whether the Town currently meets the statutory standard. Discrepancies in measurements of types of land area that are not adequately explained, however, are relevant to whether the Board has demonstrated the validity of its land area calculations.

3. Ms. Guo is an American Institute of Certified Planners (AICP) certified planner and studied GIS as an undergraduate. Tr. II, 115-118. She holds two masters degrees in urban geography and land management and urban and environmental planning policy. *Id.*

The comprehensive permit regulations, 760 CMR 56.03(3)(d), state that "Evidence regarding Statutory Minima submitted under 760 CMR 56.03(3) shall comply with any guidelines issued by the Department." The Presiding Officer notified counsel that the Committee would take official notice of the Comprehensive Permit Guidelines. Those Guidelines, "Guidelines, G.L. c. 40B Comprehensive Permit Projects, Subsidized Housing Inventory," (DHCD, updated December 2014) (Comprehensive Permit Guidelines), are identified on the DHCD website.[4] They are required to be taken into consideration for the purposes of evaluating the safe harbor appeal.[5] The Board stated that its calculations are based on the Comprehensive Permit Guidelines. The Committee hereby takes official administrative notice of the Comprehensive Permit Guidelines. The Board objected to official notice being taken of the DHCD Guidance, a document that predated the current comprehensive permit regulations. Since the parties agreed that this document would be admitted into evidence, the Board has waived its objection. However, arguments about the pertinency of the DHCD Guidance to the Committee's application of the statute and the regulations to the evidence in the matter are appropriate.

The DHCD Guidance predates the current comprehensive permit regulations, 760 CMR 56.00; it addressed the former DHCD regulations. Certain provisions, but not all, within the DHCD Guidance were incorporated into 760 CMR 56.00 in 2008, when the latter regulations were promulgated. The comprehensive permit regulation provisions regarding general land area minimum, 760 CMR 56.03(3)(b), take no position on the data sources to use to compute land area, and therefore do not contradict the DHCD Guidance in this regard. That Guidance states:

> Total land area may be evidenced by the following (developed in accordance with industry standards):
>
> - GIS Map
> - Buildout Analysis

---

4 See http://www.mass.gov/hed/docs/dhcd/legal/comprehensivepermitguidelines.pdf .

5. In particular, the Comprehensive Permit Guidelines provide that DMH and DDS group homes are eligible for inclusion on the Subsidized Housing Inventory (SHI). See Comprehensive Permit Guidelines, § II.A.2.e. (Long Term Subsidized Housing for Individuals with Developmental or Mental Health Disabilities).

- Assessor Map and Parcel Databases
- Aerial Photography

Total land area should be estimated to the nearest 1/10th of an acre.

***

Since communities have difference resources available to them which would enable them to calculate land area within the community, DHCD has identified four methods of calculating land area: Geographic Information Systems map, Buildout analysis, local assessor's map and parcel databases, and aerial photography. These four methods are listed in order of preference and precision. Any such calculation must be conducted within industry standards.

Exh. 84, pp. 2-3, 7.

Both parties have been able to argue defects in the approach of the other. For the purposes of this decision, we have examined the Board's figures primarily, since the Board bears the burden of proof. Keeping in mind that other municipalities are considering raising this statutory minimum safe harbor, we note that deciding what techniques are best to calculate land area for the purposes of the safe harbor would require a more developed record than is present here, including evidence from experts knowledgeable about industry standards. As the discussion below demonstrates, however, it is not necessary for this appeal to determine which methodology provides a more accurate result.[6]

**B. Calculation of the Denominator**

Under Chapter 40B, to determine the general land area minimum threshold, the Town must demonstrate the "total land area zoned for residential, commercial or industrial use." G.L. c. 40B, § 20. The Committee's regulations clarify that total land area includes "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 by law;" and "all un-zoned land in which any residential, commercial, or industrial use is permitted." 760 CMR 56.03(3)(b)1-2. Total land area excludes:

- land owned by the United States, the Commonwealth or any political subdivision thereof, the Department of Conservation and Recreation or

6. We encourage DHCD to establish a methodology that provides clear guidance to municipalities and developers and promotes certainty and consistency.

any state public authority, but it shall include any land owned by a housing authority and containing SHI Eligible Housing;

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

760 CMR 56.03(3)(b)3-6. To demonstrate the total, or gross, area of the Town of Norwood, the Board introduced into evidence the DHCD Community Profile for Norwood, which includes a Geography Summary that states that Norwood's total area is 10.55 square miles or 6,752 acres. Exhs. 67, 86. In providing his calculation of applicable land area, Mr. Murphy testified that he made the following exclusions from this gross land area:

| Category | Area in Acres |
|---|---|
| **Gross Land area** | **6752** |
| Norwood Municipal Airport | 443.23 |
| Town of Norwood | 1284.71 |
| United States | 1.01 |
| City of Boston | 3.3 |
| Railroad Rights of Way | 71.06 |
| Road Rights of Way | 832.11 |
| Water Bodies | 42.65 |
| Perennial Rivers & Streams | 7.31 |
| Total excluded | 2685.38 |
| **Gross Land Less Exclusions** | **4066.62** |

Exh. 86. Based on this calculation Mr. Murphy excluded 2,685.38 acres, to arrive at 4,066.62 acres for the balance of land zoned for residential, commercial and industrial use (Developable Land), the proffered denominator. Of the above categories of excluded land area, Davis challenges the Board's methodology for calculating the open water bodies, perennial rivers and streams, private railroad right of way acreage and private roadway acreage, as well as the principle of excluding private railroad and roadway rights of way.

### 1. Water Bodies

Davis criticized the Board for not using the figure of 44.8 acres for water bodies derived from the DHCD Community Profile, on the ground that consistency would require using the same source that the Board used for the total land area of the town. Instead, the Board calculated a total of 49.96 acres, using GIS data for calculation of open water bodies, and engineering department calculations of rivers and streams. Exhs, 67, 86, p. 2. Davis argues consistency requires use of the Community Profile figure for water bodies, and that the Board has not supported the reason for changing its data source. The Board's analysis of its calculation stated that "Area for water bodies was calculated using the MassGIS water body data layer. Since areas can only be excluded once, only water bodies that are outside of previously exempt areas and roads can be counted." Exh. 86, p. 2. Although we share Davis's concern regarding the use of the Community Profile figure for overall land area, but not for water bodies, on the record before us, the Board's approach is an acceptable method to address double counting of water bodies in land areas excludable on other grounds. Tr. II, 74-75. Therefore, we find the Board's figure of 42.65 acres for open water bodies to be credible on this record.

Davis also suggests that the Board's method of calculating the 7.31 acres for perennial rivers and streams is problematic. These rivers and streams appear only as lines on the GIS Maps. Tr. I, 45-46. Therefore under the GIS analysis, which is preferred by the DHCD Guidance, no acreage would be allocated to these bodies. Mr. Murphy used Norwood planimetrics maps based on aerial surveys to calculate the area of seven narrow rivers and streams. He stated he only included areas on either side of roadways, to avoid double counting. He testified that he also conducted field verification to make sure he had captured from the edge of the water and not bank to bank, stating that he verified the calculations at certain points along the rivers and streams and found all the points matched up. Tr. I, 47-51; II, 75-79; Exhs. 13-19. Davis's expert, Ms. Guo, stated she questioned the Board's methodology of mixing the "Norwood 1999 planimetrics map, field observation and field measurements of each narrow river or stream 'at several points,'" because of its subjectivity, reliance on estimates, spot measurements and extrapolations from spot measurements. Exh.

101, p. 3. However, she acknowledged that she ultimately gave the Board credit for the 7.31 acres. Tr. II, 134-135.

It is a question of first impression how these rivers and streams should be treated. We note that the DHCD Guidance suggests reliance for the most part on GIS data, which would not capture water bodies that appear as lines on such maps. Also, the Board introduced no evidence to show that its methodology was consistent with industry standards. Ordinarily we would expect that the Board's analysis include a demonstration that the methodology is consistent with industry standards. However, since here the developer's expert testified that she accepted this figure, we will consider it stipulated for the purposes of this proceeding and allow its exclusion from the denominator.

**2. Railroad Rights of Way**

There are two concerns with the Board's calculation of railroad rights of way (ROW) First, Davis argues that the Board improperly deducted from the gross land area 5.25 acres of private right of way land (including acreage for railroad rights of way owned by the New York Central Lines, and the Penn Central Railroad). Tr. II, 133; Exhs. 12, 85, 86, p. 2, 69, p. 3. It acknowledges that MBTA-owned railroad rights of way acreage should be excluded as government-owned land, but argues that the other railroad acreage is on private land, and therefore does not fall within one of the exclusions in the regulation. As it points out, the Board has not demonstrated that the land cannot be developed for industrial, residential or commercial use. See 760 CMR 56.03(3)(b)1. The Board's argument in its brief without support in the record that the rail lines are on un-zoned areas which are not suitable for residential, commercial or industrial development is inadequate. Therefore the 5.25 acres may not be deducted from the denominator.

The Board's figure for railroad right of way raises another concern. Mr. Murphy stated that the total acreage for railroad right of way land is 71.06 acres. Subtracting the private railroad right of way land, would reduce that figure to 65.81 acres solely for the MBTA right of way. However, this figure has also not been adequately established by the Board. As Davis pointed out, several reports prepared by the Board's witness cited 30.75 acres as the total of MBTA acreage, including Exhibits 68-70, 74-75, 77, 79 and 82. For

example, in a December 29, 2014 memorandum enclosing a presentation he had made to the Norwood Town 1.5% Task Force, Mr. Murphy indicated the total acreage for the MBTA land was 30.75 acres. Exh. 74, p. 3; Tr. I, 133. At the hearing, Mr. Murphy attributed the difference to the failure to identify all of Norwood's railroad rights-of-way in 2014, stating that "[t]hey weren't all counted at the time." Tr. I, 136. However, he did not explain what had not been previously captured. This explanation is inadequate to justify increasing the MBTA acreage. It was incumbent on the Board to explain the large discrepancy in these figures. Therefore, the Board's testimony regarding the 71.06 figure is not credible. We will accept Mr. Murphy's earlier adopted figure based on assessor's data of 30.75 acres. The Board's arguments do not adequately explain the discrepancy, and in any event, argument by counsel does not constitute evidence.

**3. Private Roadways**

The Board argues that private roads should be excluded from the land area along with public roadways on the ground that they are un-zoned land on which no development is allowed. Although the Board suggests that "there is no practical or legal distinction in the Norwood Zoning bylaws between public and private ways, once such private ways are accepted by the Norwood Planning Board," Board brief, pp. 15-16, the Board has not introduced the bylaws, nor has it introduced any evidence that these private ways are in un-zoned land, that they had been accepted by the Planning Board, or that any "residential, commercial, or industrial use" is precluded on these areas under 760 CMR 56.03(3)(b)2. The cases cited by the Board do not address the regulatory requirements for determining included and excluded land areas. See 760 CMR 56.03(3)(b)1-6. Mr. Murphy acknowledged that his figure of 832.11 acres of road right of way includes private roadways. Tr. II, 14-16. Although the Board introduced no evidence specifically identifying the specific acreage of public roadways, Davis's witness, Ms. Guo, testified that the developer calculated a total of 824.67 acres for public ways, which would leave 7.44 acres of private roadway. Tr. II, 135-136. We accept her figure of 824.67 as the acreage for public roadways. The Board has not justified the exclusion of the private roadway acreage; therefore 7.44 acres must be included in the denominator.

### 4. Denominator Conclusion

The Board's calculation of the denominator, as adjusted by our substitution of Davis's figure for the roadway rights of way is below.

| Category | Board | Davis Calculation Applied | Calculation Accepted By Committee |
|---|---|---|---|
| **Gross Land area** | **6752** | | **6752** |
| Norwood Municipal Airport | 443.23 | | 443.23 |
| Town of Norwood | 1284.71 | | 1284.71 |
| United States | 1.01 | | 1.01 |
| City of Boston | 3.3 | | 3.3 |
| Public RR Right of Way | 71.06 | | 30.75 |
| Road Right of Way | 832.11 | 824.67 | 824.67 |
| Open water bodies | 42.65 | | 42.65 |
| Rivers & Streams | 7.31 | | 7.31 |
| **Total excluded** | **2685.38** | | **2637.63** |
| **Gross Land Less Exclusions** | **4066.62** | | **4114.37** |

Based on the evidence, we calculate and find the denominator to be 4,114.37 acres.

## C. Calculation of the Numerator

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

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

See G.L. c. 40B, § 20.

The starting point for calculating the area of SHI eligible housing is determination of countable units on the SHI. For rental housing projects with at least 25% of the units reserved for low or moderate income housing, DHCD counts all units within the project on the DHCD Subsidized Housing Inventory (SHI) for the town. Comprehensive Permit Guidelines

§ II.A.2.b.1. See *Weiss Farm Apartments, supra,* No. 14-10 at 7. For home ownership projects, DHCD counts only low or moderate income units in the municipality's SHI inventory. *Id.* For the purposes of the land area minimum, the starting point is 100 percent of the project site for rental developments meeting the 25% affordability standard; for all others, it is the proportion of the site occupied by affordable units. See *Cloverleaf Apartments, LLC v. Natick,* No. 01-21 slip op. at 3-5 (Mass. Housing Appeals Committee Order Mar. 4, 2002); *Arbor Hill Holdings Limited Partnership v. Weymouth,* No. 09-02, slip op. at 5 and n.7 (Mass. Housing Appeals Committee Order of Dismissal Sept. 24, 2003). From there a determination is made regarding the acreage of the buildings, and impervious and landscaped areas directly associated with the SHI eligible housing units. 760 CMR 56.03(3)(b). The parties dispute the application of the provision concerning impervious and landscaped areas directly associated with affordable units.

**1. The Board's Determination of Lot Acreage**

The Town's witness, Mr. Murphy testified that he reviewed assessor's data for each parcel in Norwood inventoried on the SHI to determine the total site area for each site. He relied on visits to each site and aerial photographs to determine buildout, and adjusted area to determine countable area under the regulation. Tr. I, 54-56. For eleven sites with rental units, he began with 100 percent of the land area of the site. He testified that 58.32 acres should be included as SHI land area. Exh. 86. See Tr. I, 85-86.

For three sites with home ownership units, he arrived at a total of 0.43 acres of SHI land area. Exh. 86. This figure is uncontested by Davis. The last relevant category of SHI eligible housing includes properties that are long-term subsidized housing for individuals with developmental or mental health disabilities. Comprehensive Permit Guidelines, § II.A.2.e. These homes fall under the jurisdiction of the Department of Mental Health (DMH) or the Department of Developmental Services (DDS).

The addresses of the DDS properties are subject to the privacy protections of state and federal law, such as the Massachusetts Fair Information Practices Act, G.L. c. 66A, and the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104–191, 110 Stat. 1936, enacted August 21, 1996. See *Dinosaur Rowe, supra*, No. 15-01,

slip op. at 7-8; *Marcus Lang, supra*, No. 15-02, slip op. at 8. We order that all confidential information in the record of this proceeding that identifies the addresses or locations of these group homes, including the exhibits identified as confidential, and any other documents identifying the addresses or locations of the group homes, shall remain protected from disclosure to the public. All confidential exhibits received by one party from the other in the course of this proceeding shall remain confidential, and shall not be disclosed by that party except in the course of these proceedings, or appeals therefrom, and subject to this protective order.

The parties agreed to establish a key and use aliases to designate the specific sites for the group homes. They established a list of 20 group homes with the aliases of "DDS1" through "DDS20." Exh 101. For DDS Group home units, Mr. Murphy testified that the SHI land area totaled 3.04 acres.[7] Exh. 86.

For SHI Eligible Housing units, Mr. Murphy testified that the total land area is 61.79 acres. By dividing his denominator figure of 4,066.62 acres into this numerator of 61.79 acres, Mr. Murphy arrived at 1.52%, over the 1.5 percent statutory minimum.[8] Exh. 86. Davis challenges the Board's inclusion of off-site property and the Board's calculation of certain portions of sites with respect to impervious and landscaped areas directly associated with the affordable housing units under 760 CMR 56.03(3)(b).

**2. SHI Acreage Directly Associated with Affordable Units**

The Board and Davis disputed the acreage for various SHI sites particularly with respect to how much of the tree cover should be excluded. Ms. Guo testified that her delineation included landscaped areas, but excluded from the countable SHI area those portions of the sites that the Board included that were wooded, pervious and undisturbed areas. Tr. II, 138-163. Davis argues the Board included excess SHI acreage for portions of sites that contained undisturbed and naturally vegetated areas. Both parties' experts provided

---

7. Exhibit 97, submitted by Davis, states that the Board's total figure for DDS sites, when corrected for computational errors is 3.68 acres.

8. Davis and the Board both acknowledge in their briefs that, correcting for computational errors, the Board's calculated SHI eligible acreage would be 1.53%. See Exh. 97.

aerial photographs and field verified their line delineations of the area to be excluded from the eligible site area. These sites were visited during the view conducted by the Presiding Officer. Photographs of the areas of the sites that are in dispute are included in the record.

The regulations specify that the portion of the site to be included is the buildings (building footprint) and landscaped and impervious areas associated with the SHI eligible housing units. To comply with the regulations the parties went to significant effort to determine what portion of the sites were covered by buildings, impervious areas and landscaped areas directly associated with the SHI units. The first rule of interpretation of any regulation is to look at the plain language of the document. See *Water Dept. of Fairhaven v. Department of Environmental Protection*, 455 Mass. 740, 744-745 (2010) (statute). When interpreting the language of a statute, a court looks at the instrument as a whole to give meaning to all of its provisions. *Wolfe v. Gormally*, 440 Mass. 699, 704 (2004) (noting statute's language interpreted in context of whole statute). "While a general term in a statute may not be construed differently from its plain meaning, 'especially in the absence of any evidence of legislative or administrative intent so to construe it,' the same principle of statutory construction may also be applied to the construction of a general term in an agency rule or regulation." A. J. Cella, 39 Mass. Practice, Administrative Law & Practice § 748 (1986 and 2016 Supp.). (Footnote omitted.)

"Landscaped" means "to modify or ornament (a natural landscape) by altering the plant cover." *Webster's Ninth New Collegiate Dictionary*, Merriam-Webster, Inc., 1989. This definition suggests that in the context of the affordable housing sites, landscaped areas associated with SHI units are altered areas, including gardens, lawns, and other areas that have been improved or are maintained specifically for the benefit of the residents of the affordable units. Unaltered wooded areas do not fall within the portion of the site to be designated as SHI area, unless the tree canopy is above an area shown to be used by the residents. Based on the aerial photographs and witness testimony we find the following regarding impervious and landscaped areas directly associated with each of the following properties:

**Upland Woods.** The parties differ in the acreage calculation for Upland Woods, a Chapter 40B project which had received its comprehensive permit but was unfinished as of the date of Davis's application for a comprehensive permit, September 8, 2015.[9] The Board calculated a total of 15.0 SHI eligible acres for Upland Woods. Davis disputed inclusion of three areas toward the SHI acreage for Upland Woods, and argues that the permitted total should be 13.60 acres. Exh. 97.

Stormwater Detention Basin. For Upland Woods, the Board included 0.4 acres located on part of an abutting parcel. Exh. 29; Tr. I 68. The issue raised here, which is one of first impression, is whether acreage on another parcel of land can be included as part of the "site" under G.L. c. 40B, § 20 and 760 CMR 56.03(3)(b). The land in question consists of 0.4 acres on an abutting parcel that contains a portion of a detention basin that lies partially on and off the project parcel. In support of including a portion of an abutting parcel, Mr. Murphy testified that the detention basin serves for stormwater runoff from the impervious parking areas located on the Upland Woods parcel, and that piping from the Upland Woods parking area delivers stormwater to the detention basin. Tr. I, 68, II, 48-49. At present, other than collecting rainwater, the basin only serves the Upland Woods development. Upland Woods must maintain the basin so that trees will not grow in it. Tr. II, 47-49, 63-64.

Mr. Murphy stated the basin should be included because it serves the project, even though it is not part of the Upland Woods property. Tr. I, 68-70, II, 46-50. He took the position that the detention basin was a "landscaped area that is in a detention basin that is integral to the site" Tr. II, 50.[10] In this circumstance, the abutting property is in common ownership with the Upland Woods parcel. The titleholder was only identified by the Board as "Campanelli." Tr. I, 68-69; Exh. 29.

---

9. See 760 CMR 56.03(3)(b) ("Only sites of SHI eligible housing units inventoried by the Department or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, shall be included toward the 1½% minimum").

10. He also stated that off-site electric, gas and water lines, if located on a landscaped area, should be included in the SHI site area. Tr. II, 51.

The record shows that over the course of the town discussions of the 1.5 percent land area minimum, Mr. Murphy took different positions regarding whether this acreage should be included. His opinion now is that any landscaped[11] area off site, even "a mile away" would be included in a site if it was "just for the service of the Upland Woods project." Tr. II, 51-52. See Exh. 102. Davis introduced no evidence contradicting Mr. Murphy's testimony.

In this instance, the detention basin was constructed as part of the Chapter 40B project that is listed on the SHI and is on land in common ownership with the Upland Woods parcel. Therefore, we find that the 0.4 acres should be included for the purposes of counting the numerator. We do not need to reach questions not before us concerning whether and to what extent land on other parcels in another case may be included in the land area count in other cases.

Emergency Access in No Touch Area. The developer also challenges the inclusion of 0.48 acres designated as within a "No Touch Zone" on which is located an "Existing Emergency Access Gravel Drive & Pedestrian Way." Exhs. 100, 95, 95A. The Overall Layout Plan for the project includes a note that "[t]he delineated No Touch Zone shall remain in its natural state except for the area marked 'emergency access and pedestrian way' which shall be improved within the demarcated area." Exh. 100.

The gravel path is largely within an area that appears similar to and was characterized as a "dog leg" at the hearing. Tr. II, 27. Davis challenged the inclusion of this land partly because of the "No Touch" restriction, but also on the theory that the access area is undisturbed. The existing emergency access gravel drive and pedestrian way is bordered by a tree line on either side, which Mr. Murphy agreed was to be undisturbed. Tr. II, 57-58. Although it existed before the Upland Woods development and was not specifically created for the site, it serves as access for the benefit of the residents and therefore should be included in the site area for Upland Woods. Also, the area was observed to be maintained. The expert witnesses for each party identified certain areas within the No Touch Zone related to the access. Ms. Guo marked the dog leg area in yellow on the Overall Layout Plan and testified that this area was 0.48 acres. Mr. Murphy marked an area in blue on the same plan

11. We are not persuaded by Davis's suggestion that the detention basin was not "landscaped."

which he testified should be included in the area for Upland Woods, but he provided no specific acreage attributable to this area. Exhs. 29, 100; Tr. II, 32, 58-59, 157-159. No evidence in the record indicates the acreage of the emergency access and pedestrian way. Although we find that the emergency access and pedestrian way is eligible to be included in the site area, the remainder of the No Touch Zone must be excluded. Therefore on the record before the Committee, the Board has not demonstrated the acreage to be included in the site for the emergency access and pedestrian way, and no acreage will be included for it. Since Ms. Guo testified that the area of the dog leg is 0.48 acres, we will require the Board's acreage for Upland Woods to be reduced by this amount. See 760 CMR 56.03(8)(a); *Weiss Farm Apartments, supra,* No 14-20 at 9.

Dog Run. Finally, Davis contests the extent of the area at Upland Woods designated by the Board as the dog run. Mr. Murphy estimated his calculation based on plans, since Upland Woods, and this area in particular, was not completed. Although Mr. Murphy agreed on cross-examination that only the open area cleared of trees should be included, he acknowledged that he had included area behind the tree line. Tr. 37-38, 60; Exhs. 29, 100. Davis recommended a reduction of 0.2 acres for the wooded area. Based on the evidence, we find that Davis's recommended delineation is more accurate, and the Board's acreage for the dog run is reduced by 0.2 acres.

**Brookview Village.** Davis disputes 0.81 acres. Based on the evidence we find that the delineation by the Board is consistent with the requirements of 760 CMR 56.03(3)(b). The area represented by tree canopy extends into the landscaped area underneath and should not be excluded. Exhs. 20, 90, 96A, 97; Tr. I, 60-62, II, 139-141.

**Washington Heights.** Davis disputes 0.97 acres. The delineation by the Board is consistent with the requirements of 760 CMR 56.03(3)(b). The area is more settled and the tree cover is not a natural wooded area that should be excluded. See Exhs. 21, 91, 97; Tr. I, 63, II, 145-147.

**Nahatan Village.** Davis disputes 0.46 acres. The delineation by the Board is consistent with the requirements of 760 CMR 56.03(3)(b). The area with trees includes a dumpster and a grassed area with seating. Exhs. 23, 92, 97; Tr. I, 64-65, II, 148-149.

**18 Clapboardtree Street.** Davis disputes 0.27 acres. The delineation by the Board fails to exclude a portion of the un-landscaped wooded tree buffer area as required by 760 CMR 56.03(3)(b). The Board argues in comments on the proposed decision that Davis' GIS methodology inflated the land area, thereby distorting the amount of reduction required. Based on the evidence, however, the Board has not demonstrated that its recommended delineation is more accurate. Exhs. 26, 93, 97; Tr. I, 66, II, 149. Therefore, the Board's area for 18 Clapboardtree Street will be reduced by 0.27 acres.

**Olde Derby Village.** Davis disputes 0.9 acres. The delineation by the Board fails to exclude a portion of the un-landscaped wooded area as required by 760 CMR 56.03(3)(b). Ms. Guo testified that the area excluded by Davis includes a large stone ledge area that is fenced, and therefore is not landscaped or associated with the SHI units. This is a substantial portion of the disputed area. The Board has not shown that its proposed acreage for landscaped and impervious areas is accurate. On the record before us, we find that Davis's recommended delineation is more accurate and will reduce the Board's area by 0.9 acres. Exhs. 27, 94, 97; Tr. I, 66, II, 154-155.

The required adjustments for the rental developments based on these findings are the following:

| Contested Project | Board's Acreage | Davis's Acreage | Committee's Finding | Deduction from Board's Acreage |
|---|---|---|---|---|
| Upland Woods | 15 | 13.6 | 14.32 | 0.68 |
| Brookview Village | 7.5 | 6.69 | 7.5 | 0 |
| Washington Heights | 12.66 | 11.69 | 12.66 | 0 |
| Nahatan Village | 7.4 | 6.94 | 7.4 | 0 |
| 18 Clapboardtree St | 1.1 | 0.83 | 0.83 | 0.27 |
| Olde Derby Village | 8.3 | 7.4 | 7.4 | 0.9 |
| **Total** | 51.96 | 47.15 | 50.11 | 1.85 |

**Department of Developmental Disability Units.** The last category of SHI eligible housing are the DDS group homes. The parties are close to agreement on the land area figures for most of the group home properties. Davis disputed the Board's calculation of acreage for only two of the sites.

DDS 3. Davis disputes 0.27 acres. The delineation by the Board is consistent with the requirements of 760 CMR 56.03(3)(b). The area with trees is in a well-established neighborhood with trees that are not a naturally wooded area. Exh. 36 (confidential), 97; Tr. I, 74.

DDS 9. Davis disputes 0.05 acres. The two disputed areas appear to be very close in size. One portion of the treed area is adjacent to the parking lot. The other disputed wooded area is in the part of the parcel jutting away from the buildings. On this record, these very small areas appear not to be a wooded area that should be excluded. We also note that the area disputed here is minimal due to the small proportion of SHI units on the site. Exhs. 42, 88 (confidential), 97; Tr. I, 76.[12] See760 CMR 56.03(3)(b).

### 3. Numerator Conclusion

Based on our findings, 1.37 acres should be removed from the Board's calculation of 58.32 for rental units, and no adjustment is required for ownership units or DDS units, as follows:

| Category | Board's Acreage | Davis's Acreage | Committee's Finding | Deduction from Board's Acreage |
|---|---|---|---|---|
| Total Rental Units | 58.32 | 53.47 | 56.47 | 1.85 |
| Total Ownership Units | 0.43 | 0.43 | 0.43 | 0 |
| Total DDS Units | 3.68 | 3.3 | 3.68 | 0 |
| **Total SHI Acreage** | **62.43** | **57.2** | **60.58** | **1.85** |

Therefore, we calculate and find the numerator to be 60.58 acres.

---

12. As shown by our discussion, the regulations required substantial effort by the parties and the Committee to examine in great detail the landscaping and features of the sites for SHI housing. Since the purpose of the Chapter 40B is to promote expedited review of appeals before the Housing Appeals Committee, we strongly encourage DHCD to develop guidance with clear standards for reviewing the extent of impervious and landscaped areas "directly associated" with SHI units.

### D. Final Calculation of the Percentage of SHI Acreage

Based on the credible evidence submitted by the Board, it has demonstrated a denominator of 4,114.37 acres and a numerator of 60.58 acres. Thus, the percentage representing the acreage for SHI eligible units is 1.472%, below the safe harbor of 1.5%. Using the Board's methodology, and adjusting for its improper exclusions of denominator acreage and improper inclusions of numerator acreage, the Board has failed to meet its burden of proof that Norwood has met the statutory general land area minimum of 1.5 percent. G.L. c. 40B, § 20.

## III. CONCLUSION AND ORDER

The Board's claim that the Town is entitled to a safe harbor under the General Land Area Minimum threshold is denied. Accordingly this appeal is dismissed and the matter remanded to the Board for further proceedings.

**Housing Appeals Committee**

Issued: December 8, 2016

Shelagh A. Ellman-Pearl, Chair

Joseph P. Henefield

Constance Kruger

Marc LaPlante

James G. Stockard, Jr.

John M. Donnelly, Jr., Hearing Officer