



Commonwealth of Massachusetts
**DEPARTMENT OF HOUSING &
COMMUNITY DEVELOPMENT**

Charles D. Baker, Governor ♦ Karyn E. Polito, Lt. Governor ♦ Janelle Chan, Undersecretary

December 20, 2019

Ms. Melissa SantucciRozzi, Chair
Watertown Zoning Board of Appeals
Administration Building
149 Main Street
Watertown, MA 02472

Re: Watertown Safe Harbor Decision, 19 Coolidge Road, Watertown, Notification of General Land Area Minimum as Defined under 760 CMR 56.03(3)(b).

Dear Ms. SantucciRozzi:

The Department of Housing and Community Development (DHCD) is in receipt of a November 21, 2019 letter from Dennis E. McKenna, Esq., of Riemer Braunstein LLP. Attorney McKenna represents a proposed Chapter 40B project located at 519 Coolidge Road, Watertown (Applicant). According to the November 6, 2019 letter the Town of Watertown (via Carolyn M. Murray., KP LAW), the Town notified the Applicant that the Watertown Zoning Board of Appeals (Board) considers the denial of the Applicant's application for a Comprehensive Permit (Application) to be consistent with local needs.

The Board claims that the Town of Watertown Zoning Board of Appeals denial is consistent with local needs based on the following assertion: Subsidized Housing Inventory (SHI) Eligible Housing units occupy sites in Watertown comprising more than 1.5% of the total land area as defined under 760 CMR 56.03(3)(b).

Procedural Background: 760 CMR 56.03(8)

Pursuant to 760 CMR 56.03(8), if a Board considers that, in connection with an Application, a denial of the permit or the imposition of conditions or requirements would be consistent with local needs on the grounds that the *Statutory Minima* defined at 760 CMR 56.03(3)(b) or (c) have been satisfied or that one or more of the grounds set forth in 760 CMR 56.03(1) have been met, it must do so according to the following procedures. Within 15 days of the opening of the local hearing for the Comprehensive Permit, the Board shall provide written notice to the Applicant, with a copy to the Department, that it considers that a denial of the permit or the imposition of conditions or requirements would be consistent with local needs, the grounds that it believes have been met, and the factual basis for that position, including any necessary supportive documentation. If the Applicant wishes to challenge the Board's assertion, it must do so by providing written notice to the Department, with a copy to the Board, within 15 days of its receipt of the Board's notice, including any documentation to support its position. The Department shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials.

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The Board shall have the burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs, provided, however, that any failure of the Department to issue a timely decision shall be deemed a determination in favor of the municipality. This procedure shall toll the requirement to terminate the hearing within 180 days.

Regulatory background: The General Land Area Minimum as Defined under 760 CMR 56.03(3)(b)

For the purposes of calculating whether SHI Eligible Housing exists in the city or town on sites comprising more than 1½% 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 by law;*
2. *Total land area shall include all un-zoned land in which any residential, commercial, or industrial use is permitted;*
3. *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;*
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.*
7. *No excluded land area shall be counted more than once under the above criteria.*

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).

DHCD issued the GLAM Guidelines to increase fairness, improve the efficiency of the application review process, and to ensure consistency with the intent of the regulations for the purposes of calculating whether SHI Eligible Housing is on sites comprising more than 1.5% of the total land area zoned for residential, commercial, or industrial use, pursuant to M.G.L. ch. 40B, § 20. The GLAM Guidelines require all application materials to be submitted in specified electronic formats that will enable reviewers to validate the results. The Board must submit digital files showing the boundaries of Total Land Area, Excluded Areas, and the SHI-Eligible Area, and the individual components thereof. Submittals must use digital parcel data compliant with the state's Level 3 Digital Parcel Standard.

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Notice Requirements under 760 CMR 56.03(8) and the January 17, 2018 1.5% Guidelines for Calculating the 40B General Land Area Minimum

DHCD finds that the Board submitted notice to the Applicant within 15 days of opening up the local hearing and that the Applicant challenged the Board's assertion within the proper timeframe, 15 days from receipt of the Town's notification.

The Board's Submission

The Board submitted with its Written Notice of Safe Harbor Pursuant to 760 CMR 56.03(3)(b) and 8(a) an electronic ZIP file with digital parcel data using Watertown MassGIS Level 3 parcels.¹ The submission also included non-parcel data documentation, including but not limited to the Town of Watertown Zoning Ordinance (Amended as of December 11, 2018) and documentation under the heading "Supporting Documentation for Projects Not Listed on the SHI."

The Applicant's Submission

The Applicant submitted arguments in its Notice of Opposition to Watertown Zoning Board of Appeals Safe Harbor Claim and included as one of its exhibits the document "Watertown Street Directory-Public and Private Ways." The Applicant argued, inter alia, that the Board incorrectly excluded or insufficiently supported excludable area in the denominator, including the Open Space Conservancy District and right-of ways, and improperly included in the numerator certain non-Directly Associated Areas and sites without units included on the SHI.

Findings and Discussion

Due to the technical nature of the GLAM calculations as described above, Tighe & Bond provided a technical review of the Board's submission for DHCD. DHCD has attached Tighe & Bond's technical memorandum, "General Land Use Minimum Safe Harbor Calculation Review – Watertown, Massachusetts" (hereinafter referred to as the Technical Review Memorandum), which contains the results of Tighe & Bond's review and analysis of the Board's submittal. DHCD also provided Tighe & Bond a copy of the Applicant's submission. DHCD notes that changes were made to the numerator and denominator as described in detail in the Technical Review Memorandum. Based on its analysis, including adjustments to the numerator and the denominator of the calculation as described in the Technical Review Memorandum, Tighe & Bond calculated the Watertown GLAM percentage at 1.76%, which is above the 1.5% threshold. After consideration of the Technical Review Memorandum and the Applicant's submission, DHCD finds that the Board has met its burden of proof in asserting the 1.5% GLAM safe harbor.

The Denominator

As more fully discussed in the Technical Review Memorandum, Tighe & Bond notably added land area to the denominator pertaining to: 1) the Open Space Conservancy (OSC) zoning district because the district did not appear to completely prohibit commercial use; and 2) rights-of-way that the Board had not supported as publicly owned was

¹ The Board adjusted two parcel areas with its submission, which Tighe & Bond addresses in the Technical Review Memorandum.

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also added to the denominator.² Tighe & Bond also specified that Watertown parcels missing use codes in Watertown's MassGIS data that do not appear to be public lands are insignificant to the final calculations.

The Numerator

As more fully discussed in the Technical Review Memorandum, Tighe & Bond made notable adjustments to the calculation of Directly Associated Areas for 8 SHI sites, as well to the prorated area for 5 sites, which resulted in reduction of the numerator. It is also important to note that Arsenal Yards (485 Arsenal St), 385 Pleasant Street, and Watermills (330 Pleasant St) sites were removed from the numerator at the request of DHCD. DHCD made such request because the Board failed to establish that the units (which have not been included on the SHI) at the sites were eligible for SHI at the time of the Application, including because the units lack an eligible Subsidy program in accordance with DHCD's c. 40B Guidelines.³ Only sites of SHI Eligible Housing units inventoried by the DHCD or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, shall be included toward the GLAM minimum.

DHCD notes that the additional Beaverbrook STEP sites included by the Board that were questioned in the Technical Review Memorandum do not significantly impact the numerator.

Conclusion

DHCD finds that the Board has met its burden of proof concerning the General Land Area Minimum as defined under 760 CMR 56.03(3)(b) because the Board generally provided data in the specified electronic formats that enabled a reviewer to validate results sufficient to determine that the General Land Area Minimum had been achieved as of the date of the Application.

If either the Board or the Applicant wishes to appeal this decision pursuant to 760 CMR 56.03(8), that party shall file an interlocutory appeal with the HAC on an expedited basis, pursuant to 760 CMR 56.05(9)(c) and 56.06(7)(e)(11), within 20 days of its receipt of the decision, with a copy to the other party and to the Department. If you have further questions, please contact Phillip DeMartino, Technical Assistance Program Coordinator, at (617) 573-1357 or Phillip.DeMartino@mass.gov.

Sincerely,



Louis Martin
Associate Director
Department of Housing and Community Development

² Since the Board did not provide supporting documentation of public ownership, the "Watertown Public Street Directory-Public and Private Ways" document described in and provided with the Applicant's response was used by Tighe & Bond to identify and include private rights-of-way area in the denominator.

³ Available at <https://www.mass.gov/files/documents/2017/10/10/guidecomprehensivepermit.pdf>.

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Cc: Michael J. Driscoll, Town Manager, Watertown
Dennis E. McKenna, Esq., Riemer Braunstein LLP
Carolyn M. Murray, Esq., KP Law

Attachment.