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September 6, 2019

VIA E-MAIL & FIRST-CLASS MAIL
Commonwealth of Massachusetts
Department of Housing and Community Development
Attn: Janelle Chan, Undersecretary
100 Cambridge Street, Suite 300
Boston, MA 02114

Re: Notice of Objection to Safe Harbor Assertion (760 CMR 56.03(8)(a))
M.G.L. c. 40B Comprehensive Permit Application of NY Ventures, LLC
Elm Street Apartments, 20 Elm Street, North Reading, MA

Dear Undersecretary Chan:

This office is legal counsel to NY Ventures, LLC ("Applicant"), the applicant with respect to the above-noted application for a Comprehensive Permit pursuant to M.G.L. c. 40B and the regulations thereunder ("Application") for the property located at 20 Elm Street in North Reading ("Property"). We write in response to the August 22, 2019 notice issued by the Town of North Reading ("Town") Zoning Board of Appeals ("Board") to the Applicant and to the Department of Housing and Community Development ("Department") that the Board had voted to evoke so-called "safe harbor" pursuant to 760 CMR 56.03(8) ("Safe Harbor Notice").[1]

The Applicant hereby disputes the Board's purported assertion of safe harbor. For the reasons discussed below, the Board has not met its burden of proof needed to sustain its assertion of safe harbor. 760 CMR 56.03(8)(a) ("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 . . . .").

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[1] The Safe Harbor Notice was provided to the Applicant and its counsel by the North Reading Town Planner, Danielle McKnight, via e-mail on August 22, 2019. It consisted – in its entirety – of an electronic copy (PDF format) of a two-page letter dated August 22, 2019 from the Chair of the Board to the Applicant's undersigned counsel with three exhibits: a copy of the Town's Subsidized Housing Inventory, a copy of correspondence from the Department to the Town with a Group Homes Acreage Calculation, and 17 pages of other supporting documentation. *See* Exhibit 1. The Town Planner's e-mail also attached a PDF copy of a letter of even date from the Chair of the Board to the Department enclosing the Department's copy of the Safe Harbor Notice.

SECTION I:

THE TOWN IS NOT ELIGIBLE FOR SAFE HARBOR BASED ON A HOUSING UNIT MINIMUM OF 10% PURSUANT TO 760 CMR 56.03(3)(a)

In their Safe Harbor Letter, the Board specifically acknowledges that according to the most recent Subsidized Housing Inventory ("SHI") issued by the Department with respect to the Town, the percentage of SHI-eligible housing units in North Reading is 9.61% – below the statutory minimum of 10% needed to claim safe harbor under 760 CMR 56.03(3)(a). Despite this acknowledgement, the Board states, without providing any supporting evidence, that:

> it is likely that additional confidential group home units exist in Town. Additionally, two rent-controlled mobile home parks, consisting of 42 units were not included on the current SHI inventory from the [Department]. The addition [of] 42 units plus the likely increase in confidential group home units will demonstrate that the Subsidized Housing Inventory eligible housing exists in the Town at an amount over 10.00% . . . .

On the basis of this speculative assertion, the Safe Harbor Notice purports to reserve the right to present additional evidence to support a "finding that the Town has reached the 10% housing unit minimum." It is unclear whether this was intended by the Board to serve as an assertion of safe harbor pursuant to 760 CMR 56.03(3)(a). To the extent that it was so intended, it is clear that the Town has not met its burden as to this issue.

A. THE TOWN HAS NOT SATISFIED ITS BURDEN OF PROOF TO REBUT THE ACCURACY OF THE SHI

The "operative date" with respect to a determination of whether the 10% housing unit minimum has been satisfied is the date the Application was filed – here, July 10, 2019. *River Stone LLC v. Hingham Zoning Bd. of Appeals*, 12 MHACR 45 (2017). With respect to this determination, 760 CMR 56.03(3)(a) provides that "there shall be a presumption that the latest SHI contains an accurate count of SHI Eligible Housing and total housing units." Any party wishing to rebut this presumption must introduce evidence to support such a claim. *Id.*[2]

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[2] Critically, the holding of *River Stone* entails that the Department's review of the accuracy of the SHI is limited to an assessment of whether a unit that was already SHI-eligible as of the date of the Application was somehow erroneously excluded from the SHI. If, on the other hand, a housing unit were to become SHI-eligible *after* the date of the Application, that unit would not be relevant.

In other words, to the extent the Board believes that there were additional SHI-eligible housing units in the Town that were not inventoried on the Town's SHI as of the date of the Application, the Board bears the burden of proof as to that question. *River Stone*, 12 MHACR 45.

Yet, as noted, ***the Safe Harbor Notice provides no proof whatsoever to rebut the presumption of the accuracy of the SHI***. Specifically, the Board provides no evidence – just mere speculation – that there are additional SHI-eligible confidential group homes in the Town. The Board's suggestion that the vast discrepancy between the Town's estimated Group Homes Acreage Calculation and the Department's indicates that there are additional group homes in the Town, even if true, would not prove that those additional group homes are SHI-eligible.[3]

Similarly, ***the Safe Harbor Notice includes no proof with respect to alleged "rent-controlled" mobile home parks*** in the Town. Indeed, the Safe Harbor notice provides no information about them whatsoever other than their addresses. The Board provides no documentary proof that these units are, in fact, "rent-controlled" – or even what is meant by that phrase, since rent control laws were abolished in the Commonwealth by ballot initiative in 1994 (Question 9). Even if these units were somehow "rent controlled", the Board fails to provide proof (such as deed restrictions and/or regulatory agreements) establishing that these units qualified for inclusion on the Town's SHI in accordance with Chapter 40B requirements.[4]

In sum, the Board has not met its burden of proving that the Town qualifies for safe harbor based on the percentage of affordable housing units in accordance with 760 CMR 56.03(3)(a). Accordingly, to the extent that the Board's Safe Harbor Notice can be interpreted as purporting to assert safe harbor under this provision, such assertion should be denied.

B. THERE IS NO PROOF THAT THE GROUP HOME UNITS ON THE TOWN'S SHI ARE SHI-ELIGIBLE

As discussed above, while there is a presumption under 760 CMR 56.03(3)(a) "that the latest SHI contains an accurate count of SHI Eligible Housing", that presumption may be rebutted. Upon the Applicant's review of the properties on the Town's SHI, the Applicant has serious doubts regarding the SHI-eligibility of the 49 DDS group homes that comprise DHCD Project ID 9764. There is simply a lack of evidence that these units satisfy the regulatory standard for inclusion on the Town's SHI.

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[3] It is the Applicant's understanding that group home units are periodically reported to the Department by DDS and DMH, and that the most recent update occurred during the summer of 2019, which apparently resulted in the reduction of DDS group home units from 51 to 49. This further undermines the Town's suggestion that there are more SHI-eligible group homes in the Town, since those would have been reported to the Department.

[4] The Applicant's 40B/fiscal consultant, Lynne D. Sweet of LDS Consulting, performed research in the Middlesex County (South) Registry of Deeds, but was unable to locate any recorded affordability deed restrictions or regulatory agreements for the properties identified by the Board as "potential SHI sites".

In accordance with HAC precedent, Department of Developmental Services ("DDS") and Department of Mental Health ("DMH") group homes are eligible for inclusion on the Town's SHI only if such units comply with the eligibility requirements set forth in 760 CMR 56.03(2)(a). *383 Washington St., LLC v. Braintree Zoning Bd. of Appeals*, 14 MHACR 9 (2019). In order to ascertain whether these group homes are compliance with the regulations (and indeed how the regulations apply to these group home units), it is necessary for the Applicant to obtain the information needed to do so – to wit, all information regarding when the units were added to the Town's SHI and all information relevant to these units that would tend to establish (or disprove) their present eligibility for inclusion on the SHI, including the recorded deed restrictions and/or regulatory agreements ensuring their long-term affordability.

To that end, on August 9, 2019, this office issued formal, written requests for information pursuant to the Public Records Law to the Town, the Department, DDS, and DMH for all information relevant to the group homes calculation for North Reading. To date, all have either declined to provide the requested information on the basis of confidentiality, failed to respond completely to these requests for information, or advised that no such records exist.

The inability to obtain this information – even in a redacted form – prejudices the Applicant, because without it the Applicant cannot possibly meet its burden of proof with respect to whether the DDS group home units are, in fact, eligible for inclusion on the Town's SHI. This represents a fundamental due process violation, as the Department has imposed a burden of proof upon the Applicant, yet makes it impossible to provide the information needed to meet that burden. Accordingly, the Applicant hereby reserves all rights and claims with respect to this issue.

SECTION II:

THE TOWN IS NOT ELIGIBLE FOR SAFE HARBOR BASED ON GENERAL LAND AREA MINIMUM PURSUANT TO 760 CMR 56.03(3)(b)

The majority of the Town's Safe Harbor Notice – and all of the supporting documentation attached to it – pertain to the Town's claim that it has satisfied the General Land Area Minimum (GLAM) of providing "SHI Eligible Housing . . . comprising more than 1 1/2% of the total land area zoned for residential, commercial, or industrial use . . . ." 760 CMR 56.03(3)(b). Here, too, the Town has failed to carry its burden of establishing its eligibility for this safe harbor. Moreover, even setting aside the many evidentiary and procedural deficiencies with the Town's filing, the Town's safe harbor claim is based on a number of material errors and inaccuracies, which, when corrected, make clear that the Town is well below the 1.5% needed to claim this safe harbor.

A. THE SAFE HARBOR NOTICE IS PROCEDURALLY DEFECTIVE

Before turning to the substantive deficiencies in the Town's Safe Harbor Notice, it is important to note that it also suffers from a great deal of procedural and evidentiary defects. The Department's *Guidelines for Calculating General Land Area Minimum* dated January 17, 2018 ("*Guidelines*") set forth specific filing requirements for municipalities seeking to claim safe harbor on the basis of GLAM, which requirements specify the extent of supporting documentation that the Town was required to file with the Department ***and the Applicant*** in order to support its claim. It is critical that these filing requirements be followed precisely not only because the Town bears the burden of proof with respect to its claim of safe harbor, but also in order to provide notice to the Applicant of the basis of the Town's claim. The Town's Safe Harbor Notice falls well short of these requirements.

With respect to safe harbor claims, 760 CMR 56.03(8)(a) provides that "[w]ithin 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***." 760 CMR 56.03(8)(a) (emphasis added). The *Guidelines* provide further specificity with respect to the supporting documentation that is required:

> DHCD requires 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. . . . Submittals that do not include documentation evidencing that the updated digital parcel data is compliant with the Level 3 standard as determined through MassGIS' quality assurance program . . . will be considered incomplete. The Board must also provide accompanying tables with details on each SHI Site, including Directly Associated Areas. This data, along with maps and calculations, must be provided to the Applicant and DHCD within fifteen (15) days of the Board opening a hearing regarding the Comprehensive Permit filed by the Applicant.

Guidelines, § VI, p. 6 (footnotes omitted).[5] Appendix A of the *Guidelines* further specifies that "[e]ach submittal must include the following documents":

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[5] The Town, in its Safe Harbor Notice, did not indicate that it believes it is necessary to supplement GIS calculations with any survey information, and no such information was included with the Safe Harbor Notice. Any claim that GIS mapping is inaccurate should therefore be deemed waived by the Town with respect to this procedure and any appeal thereof.

- Spatial data files corresponding to the following feature classes (to the extent applicable): SHI sites, parcels, water bodies, public land, rights of way, land exclusions, total land area, Previously Registered Inland Wetlands, and underlying zoning requirements;

- Tabular data files corresponding to the above-noted feature classes (to the extent applicable), but at minimum: SHI sites, public land, rights of way, zoning, and Previously Registered Inland Wetlands;

- Map images of each of the above-noted feature classes;

- "[A] map showing the results of each step of the Total Land Area calculation, a map of the final results, and maps with aerial imagery showing each SHI Site and a delineation of the Eligible Area."

- "Document[ation] [of] each step of the acreage calculation"[6]; and,

- "[D]igital copies of the relevant sections of local regulations".

In this instance, ***the Town's Safe Harbor Notice fails to comply with these submission requirements in almost every respect.*** Indeed, the only supporting documentation of any kind that was submitted in support of the Safe Harbor Notice was the following:

- A single PDF-format map image of public land and water bodies without supporting spatial data files or tabular data files (*see* Safe Harbor Notice, Ex. C, p. 2);

- A PDF-format spreadsheet appearing to list publicly-owned parcels and water bodies (*see* Safe Harbor Notice, Ex. C, pp. 7-17);

- A map image of SHI sites (as well as so-called "Potential SHI Sites") without any supporting spatial data files or tabular data files of any kind (*see* Safe Harbor Notice, Ex. C, p. 4).

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[6] More specifically: "[t]he Board must be able to demonstrate with map images, spatial data, and tabular data, that: 1) any land area included in the numerator (SHI-Eligible Area) is also included in the denominator (Total Land Area), and any land area that is excluded from the denominator is excluded from the numerator; 2) no Excluded Area is counted more than once; 3) land area is properly prorated for SHI Sites where all units on the site are not SHI Eligible Housing units (but not the maps since this cannot be depicted geographically); 4) only the land area Directly Associated with the development is included in the numerator; and 5) the Group Homes acreage is included in the numerator calculation, if applicable."

The Town's filing, for example, provides no basis whatsoever to ascertain the manner by which the Town determined the "directly associated" area of each SHI site,[7] the pro-rated SHI-eligible portion of each SHI site, the underlying zoning for each SHI site, no double-counting of SHI sites or area exclusions, etc. Rather, the Safe Harbor Notice is effectively a bald assertion of safe harbor without most of the supporting documentation needed in order to confirm that the Town's calculation of GLAM was correct. The Town's purported reservation of its rights to supplement the record is thus of no effect because the time for it to file such documents has passed.

In sum, based on the many material deficiencies with respect to the supporting documentation filed by the Town, it is impossible for the Department to confirm the accuracy of the Town's safe harbor claim. Moreover, the failure of the Town to file this documentation with the Applicant has deprived the Applicant of due and proper notice of the Town's safe harbor claim and an opportunity to review said claim to assess its merits.[8] As the Town bears the burden of proof in this regard, its failure to properly and timely file the documentation needed to substantiate its claim should, on its own, result in the denial of the Town's safe harbor claim.

B. THE TOWN'S CALCULATION OF THE GENERAL LAND AREA MINIMUM DENOMINATOR IS WRONG

In addition to the above-discussed procedural and substantive defects in the Town's claim of safe harbor on the basis of GLAM, it appears that the Town materially underestimated the total land area of the Town that is zoned for residential, commercial, or industrial use ("Total Land "Area") – a calculation that is commonly referred to as the "denominator" in a GLAM calculation.

Total Land Area, and what is properly included in and excluded from it, is defined in 760 CMR 56.03(3)(b). In brief, Total Land Area includes all land where any residential, commercial, or industrial uses are permitted, but excludes certain government-owned land, registered inland wetlands, and open water bodies. These categories are further defined and specified in Section 5 of the *Guidelines*.

In the Town's Safe Harbor Notice, the Town calculated its Total Land Area as follows:

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[7] With respect to directly associated area of SHI sites, the Town's filing contains no maps whatsoever of the individual SHI sites, as is required. *Guidelines*, App'x B, Figs. 9-19. Indeed, the only glimpse into how the Town calculated directly associated area that the Applicant was able to obtain was based on documents obtained by means of a public record request, which are discussed below.

[8] The Applicant has no reason to believe that the Town filed additional supporting documentation with the Department that it did not also file with the Applicant. If this occurred, however, that alone would necessitate denial of the Town's safe harbor claim on the basis of noncompliance with the filing requirements of 760 CMR 56.03(8)(a), which requires all supporting documentation to be filed both with the Department and with the Applicant.

Denominator Categories	Acreage
Gross Total Land Area (2.1)	8,639
Land Area Removed	
Water Bodies (2.2)	221
Public Streets (2.8)	537
Gov't Land (2.9)	1,957
Total Land Removed	2,715
Net Total Land Area	5,924

This calculation of Total Land Area is wrong. This is principally because the Town's calculation improperly classifies over 227 acres of land as government-owned land and excludes this land on that basis. *See* 760 CMR 56.03(3)(b)(3).[9] The spreadsheet attached as Exhibit 2 details 151 parcels that were improperly excluded by the Town in their calculation of Total Land Area.[10] *See* Safe Harbor Notice, Exhibit C (spreadsheet of properties improperly excluded as government-owned land). These 151 parcels add up to 227.44 acres of improperly-excluded land. They fall into five distinct categories as to why they were improperly excluded.

The first category of improperly excluded parcels (3 lots marked in yellow on Exhibit 2) are properties that are on the Town's SHI and contain SHI-eligible units. Two of these (53 Swan Pond Road (DHCD ID 2261) and Peabody Court (DHCD ID 2260)) are North Reading Housing Authority properties with SHI-eligible units, which cannot be excluded from Total Land Area. *See* Safe Harbor Notice, Exhibit C, p. 1; 760 CMR 56.03(3)(b)(3); *Guidelines*, § 5: Definitions ("Political Subdivision"). The third (McLaughlin House (DHCD ID 2263)) is privately owned, and thus not eligible for exclusion as government-owned land. *Id.* Thus, all three of these lots must be included in Total Land Area.

The second category of improperly excluded parcels (15 lots marked in blue on Exhibit 2) represent properties that are owned by religious institutions – not government entities. Most of these parcels correspond to churches, cemeteries, and other uses, as confirmed by their ownership and state land use codes. *See* Exhibit 2. None are owned by any entity meeting the requirements

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[9] 760 CMR 56.03(3)(b)(3) provides that "[t]otal 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". The *Guidelines* at § 5: Definitions further specifies that "Political Subdivisions are defined as the United States, the Commonwealth of Massachusetts, any State public authority, a municipality, or any other government entity. Land 'owned by a political subdivision' includes publicly-owned tax exempt fee parcels (but not tax title properties) and publicly-owned rights-of-way, but for the purposes of the General Land Area Minimum calculation, does not include SHI-Eligible Area on housing authority-owned land."

[10] Exhibit 2 was prepared by the Applicant's GIS consultant, Nels Nelson of Stantec, Inc., working with the undersigned. It compiles MassGIS public information with respect to the parcels itemized therein.

for exclusion on the basis of public ownership. 760 CMR 56.03(3)(b)(3); *Guidelines*, § 5: Definitions ("Political Subdivision"). Thus, all fifteen of these lots must be included in Total Land Area.

The third category of improperly excluded properties (6 lots marked in orange on Exhibit 2) are classified under land use codes corresponding to various tax-exempt properties, but are privately owned, and thus not eligible for exclusion. *See* Exhibit 2; 760 CMR 56.03(3)(b)(3); *Guidelines*, § 5: Definitions ("Political Subdivision"). Accordingly, all six of these lots must be included in Total Land Area.

The fourth category of improperly excluded properties (1 lot marked in green on Exhibit 2) corresponds to single unit owned by the North Reading Housing Authority in a private 150-unit condominium.[11] Critically, MassGIS records erroneously state that the acreage of this unit is 6.88 acres, but that is actually the acreage of the entire parcel. The single unit owned by the North Reading Housing Authority represents just a 0.6322% interest in the condominium, which translates to 0.0435 acres. *See* Exhibit 2. The excludable acreage of this lot should be accordingly reduced to .0435 acres.

The fifth category of improperly excluded properties (126 lots marked in grey on Exhibit 2) correspond to properties that are classified, according to MassGIS records, as tax title properties. Pursuant to Section 5 of the *Guidelines*, tax title properties are specifically deemed not excludable pursuant to 760 CMR 56.03(3)(b)(3). *Guidelines*, § 5: Definitions ("Political Subdivision") ("Land 'owned by a political subdivision' includes publicly-owned tax exempt fee parcels (but not tax title properties) . . . ."). Accordingly, all 126 of these lots must be included in Total Land Area.

Based on the foregoing, the Town's Total Land Area (denominator) is materially incorrect and must be adjusted to add 227.39 acres of land to Total Land Area, as demonstrated by Exhibit 2, which would increase the Total Land Area of North Reading from the Town's calculation of 5,924 acres to 6,151.44 acres. *See* Exhibit 2. This corrected Total Land Area alone brings the Town's GLAM percentage down to 1.49% – below the required 1.5% needed to claim this safe harbor. As discussed below, this percentage will be seen to further decrease when the GLAM numerator is corrected.

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[11] For the details of this condominium and unit, which are public records, *see* Middlesex South Registry of Deeds, Book 37563, Page 196 (North Reading Housing Authority unit deed); Book 14349, Page 163 (Master Deed, Park Colony Condominium); Plan Book 1981 Plan 753 (Condominium Plan).

C. THE TOWN'S CALCULATION OF THE GENERAL LAND AREA MINIMUM NUMERATOR IS WRONG

In addition to overinflating the acreage of excludable land from Total Land Area (the GLAM denominator), the Town also overestimated the countable acreage of SHI-eligible properties in North Reading ("SHI Sites"). This figure is known as the "numerator" in a GLAM calculation.

Pursuant to 760 CMR 56.03(3)(b), the countable acreage of SHI Sites ("Affordable Land Area") is defined as follows:

> 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 1 1/2% 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).

The phrase "directly associated" area is further defined in Section 5 of the *Guidelines*. In brief, Directly Associated Area includes the land area (not floor area) of buildings, as well as "[l]andscaping maintained principally for the benefit of the residents of a development containing SHI Eligible Housing and impervious surfaces adjacent to such a development . . . ." Specifically excluded from Directly Associated Area are things such as:

> (a) ballfields, (b) wetlands, (c) non-Actively Maintained wooded or vegetated areas that are not within required side, front, or rear yard dimensional requirements and not within 50 feet of a building footprint, any Excluded Areas, and not limiting the foregoing, lot area in excess of what would be required under the zoning ordinance or bylaw provisions generally applicable in the zoning district, including any applicable zoning overlay district provisions . . . .

Guidelines, § 5. Step 3.1 of the *Guidelines* further clarifies that any land area of SHI Sites that is not properly classified as Directly Associated Area must be excluded in calculating the GLAM numerator.

In addition to removing non-Directly Associated Area, Step 3.3 of the *Guidelines* further specifies that the Directly Associated Area of SHI Sites must be pro-rated based on the proportion of SHI-eligible units on the site to the total number of units on the site (both SHI-eligible and market rate units). This prorated figure must then be capped based on the minimum land area under the local zoning bylaw.

In the Town's Safe Harbor Notice, the Town calculated that its Affordable Land Area is 91.721 acres based on 13 SHI Sites. As noted above, no documentation was included in the Safe Harbor Notice to document how the Town calculated this total, how it calculated Directly Associated Area, whether that area was properly pro-rated based on the proportion of SHI-eligible units on each SHI Site, and whether it was capped based on local zoning.

By means of a public records request to the Town, the Applicant was able to obtain certain documents that shed some light into how the Town calculated its Affordable Land area. The Applicant's GIS consultant, Nels Nelson of Stantec, Inc., has analyzed these documents and has determined that the Town's calculation of Affordable Land Area is materially incorrect based on incorrect measurement of Directly Associated Area and/or incorrect for at least five of the SHI Sites. As shown on the following table, this miscalculation resulted in an overinflation of Affordable Land Area by the Town of over three acres of land:

Project Name	Town Affordable Land Area	Correct Affordable Land Area
Fairview Terrace Estates (DHCD ID 2262)	0.38 acres	0.31 acres
Rowe Farm (DHCD ID 7165)	1.9 acres	1.033 acres
Edgewater Place (DHCD ID 7894)	0.675 acres	0.435 acres
Residences at Martin Brook (Edgewood Apartments) (DHCD ID 9060)	21.801 acres	20.362 acres
Bradford Pond Estates (DHCD ID 9764)	0.97 acres	0.51 acres
Total:	25.73 acres	**22.65 acres**
Difference:		**-3.08 acres**

Exhibit 3 demonstrates how Mr. Nelson calculated the Affordable Land Area for these five SHI Sites.[12] An explanation of each of these sites follows:

[12] Exhibit 3 contains a spreadsheet prepared by Mr. Nelson and the undersigned, which compares the Town's calculation of Affordable Land Area to Mr. Nelson's calculation for these sites (as based on MassGIS public data), as well as 5 GIS map images generated by Mr. Nelson to compare how the Town appears to have calculated Directly Associated Area (dashed green line on map images) to how Mr. Nelson correctly calculated Directly Associated Area in accordance with 760 CMR 56.03(3)(b) and the *Guidelines* (red line). The map images also indicate the envelope around buildings of fifty feet (dashed grey line) and required zoning setbacks/yards (dashed yellow line).

To calculate Directly Associated area, Mr. Nelson excluded unmaintained wooded areas based upon his review of multiple satellite images captured at different times of the year (including different seasons). He then created a data layer for required yards based upon the dimensional zoning requirements applicable to each specific parcel, per the applicable zoning district, which was provided to him by the undersigned. Mr. Nelson then used MassGIS's Structures layer to offset a 50-foot buffer from buildings within the SHI sites. He then located the intersection between required yards, areas within 50 feet of buildings, and unmaintained wooded areas, to determine Directly Associated area. For comparison purposes, Mr. Nelson added the Town's Directly Associated linework onto the map, based upon GIS data files obtained from the Town pursuant to a public records request.

- Fairview Terrace Estates: The Town's calculation of Directly Associated Area is overinflated because it includes non-actively maintained wooded land that is not within fifty feet of buildings and within required zoning setbacks/yards. *See* Exhibit 3; *Guidelines*, § 5: Definitions ("Directly Associated Area").[13] As a result, the Town's calculation of the Affordable Land Area of this site must be reduced by 0.07 acres.

- Rowe Farm: Here, the Town's calculation of Directly Associated Area appears to double-count the area of buildings.[14] Mr. Nelson's calculation of Directly Associated Area corrects this error.[15] *See* Exhibit 3. As a result, the Town's calculation of the Affordable Land Area of this site must be reduced by 0.867 acres.

- Edgewater Place: Here, the Town incorrectly included the land area of a street located outside of the property lines of this site in its calculation of Directly Associated Area. In accordance with 760 CMR 56.03(3)(b), only "sites of SHI Eligible Housing units" can be included in the calculation of Directly Associated Area. There is no basis in this regulation or in the *Guidelines* to count off-site area in this figure. Additionally, the Town's calculation improperly includes non-actively maintained wooded land that is not within fifty feet of buildings and within required zoning setbacks/yards. *See* Exhibit 3; *Guidelines*, § 5: Definitions ("Directly Associated Area").[16] In sum, the Town's calculation of the Affordable Land Area of this site must be reduced by 0.24 acres.[17]

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[13] "[T]he yard dimension and the 50-foot perimeter requirement must be seen as a combined requirement for the inclusion of non-actively maintained wooded and vegetated areas as directly associated areas. The conjunction 'and' should be treated as joining the two phrases as one requirement." *383 Washington St.*, 14 MHACR 9.

[14] A document obtained by the Applicant by means of its public records request to the Town indicates that the source of the Town's error here may be the fact that the Town's GIS department apparently divided the ***floor area*** of SHI-Eligible units by the total ***ground coverage*** of this development to come up with a SHI-unit ratio of 0.52. This apples-to-oranges comparison resulted in an overinflation of the proportion of SHI-Eligible units to market-rate units and is inconsistent with the *Guidelines*. The correct ratio is 0.25 – i.e., 7 affordable units divided by 28 total units.

[15] Mr. Nelson's analysis also includes some land that appears to be actively maintained (a possible stormwater management basin) but was excluded by the Town in its calculation.

[16] In fact, when the pro-ration factor of 25% is backed out of the Town's calculation of Affordable Land Area for this site (0.675 acres), the resulting Directly Associated Area of this site (2.7 acres) would actually come out as greater than its total land area (2.18 acres), which is, of course, impossible.

[17] Public records on file with the local registry of deeds suggest that the total number of units at this site may actually be 14 – not 16, which would result in a slightly higher total Affordable Land Area (0.069 acres) for this site due to a higher ratio of proration (29% rather than 25%). Lacking confirmation of this information, the Applicant has used the lower ratio claimed by the Town.

- Residences at Martin Brook (Edgewood Apartments): Here, the Town again incorrectly included the land area of easement areas located outside of the property lines of this site in its calculation of Directly Associated Area, which, as noted, is inconsistent with 760 CMR 56.03(3)(b) and the *Guidelines*. *See* Exhibit 3. Additionally, the Town again improperly included non-actively maintained land that is not within fifty feet of buildings and within required zoning setbacks/yards. *See* Exhibit 3; *Guidelines*, § 5: Definitions ("Directly Associated Area").[18] In sum, the Town's calculation of the Affordable Land Area of this site must be reduced by 1.439 acres.

- Bradford Pond Estates: Here, the Town again improperly included non-actively maintained land that is not within fifty feet of buildings and within required zoning setbacks/yards. *See* Exhibit 3; *Guidelines*, § 5: Definitions ("Directly Associated Area"). As a result, the Town's calculation of the Affordable Land Area of this site must be reduced by 0.46 acres.

Based on the foregoing, the Town's Affordable Land Area (numerator) is materially incorrect and must be adjusted to subtract 3.08 acres of land, as demonstrated by Exhibit 3, resulting in a numerator of 88.644 acres of Affordable Land Area (before adjustments to Group Homes Acreage, discussed below). This reduction in the numerator, together with the above-outlined correction of the denominator (from 5,924 acres to 6,151.44 acres, *see* Exhibit 2) further brings the Town's GLAM percentage down to 1.44% – well below the required 1.5% needed to claim this safe harbor. As discussed below, this percentage will be seen to further decrease when the Group Homes Acreage Calculation is corrected.

SECTION III:

THE GROUP HOMES ACREAGE CALCULATION ISSUED BY THE DEPARTMENT APPEARS TO BE INCORRECT AND SHOULD BE DISREGARDED

Aside from the other procedural and substantive defects with respect to the Town's calculation of the GLAM numerator, discussed above, it is clear that the Group Homes Acreage Calculation ("GHAC") issued in this instance is defective – both procedurally and substantively. As a result, the Applicant urges the Department not to take the GHAC into consideration in weighing the Town's safe harbor claim.

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[18] Notably, in some locations on this site, Mr. Nelson's calculation of Directly Associated Area was actually more conservative than the Town's – in particular at the front of the site, where the Town excluded woodland located within fifty feet of buildings and within the required front yard setback. *See* Exhibit 3.

A. THE TOWN'S REQUEST FOR A GROUP HOMES ACREAGE CALCULATION WAS PROCEDURALLY DEFECTIVE

In addition to the Town's failure to comply with the filing and evidentiary requirements of the *Guidelines*, discussed above, the Town also failed to comply with the Department's procedure, as outlines in the *Guidelines*, with respect to requests for a confidential GHAC.

Because DDS and DMH have taken the position that the release of information pertaining to group homes raises issues of confidentiality, the *Guidelines* sets forth a specific procedure by which the Department can obtain from DDS and DMH, working with MassGIS, the acreage of DDS and DMH group homes (as defined in Section V of the *Guidelines*) without disclosing confidential information.

Section VI, Step 1.3 of the *Guidelines* provides this procedure, as follows:

> If the Board wishes to proceed with the Group Homes Acreage Calculation, the Board ***must*** provide a preliminary request/notice of interest of such calculation to DHCD, DMH and DDS within 21 days from receipt of a copy of the PEL application . . . . This notice ***must*** also include the SHI Sites Submission List to ensure adequate time for the Group Home Area Acreage Calculation to be performed prior to the Board's invocation of the General Land Area Minimum Safe Harbor. Within 7 days of the Comprehensive Permit application, the Board ***must*** submit notice to DHCD, DMH and DDS requesting the Group Homes Acreage Calculation together with the SHI Sites Submission List.

Guidelines, Section VI, Step 1.3.[19] The purpose of this procedure is to ensure adequate time for the complex, multi-step procedure by which group home information is shared between and processed by DDS, DMH, MassGIS, and the Department, and eventually provided to the municipality.

In view of the fact that this appears to be the first instance in which a GHAC was made in accordance with the *Guidelines*, as recently promulgated, as well as the fact that the Department's procedure for doing so effectively creates a "black box" around the information needed to confirm the accuracy of this calculation, it is critical that the procedure for obtaining this calculation be followed precisely. Otherwise, the procedure could be rushed, leading to a lack of confidence in the end result.

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[19] Under standard rules of statutory construction, statutory and regulatory obligations expressed with imperative language, such as "must" or "shall", are mandatory. This contrasts with more permissive language, such as "may", which is not. *See RCA Dev., Inc. v. Zoning Bd. of Appeals of Brockton*, 482 Mass. 156, 161 (2019).

Unfortunately, this a failure to comply with the Department's procedures was exactly what happened here. Indeed, in this case, ***the Town failed to comply with the Department's procedure for obtaining a Group Homes Acreage Calculation in almost every conceivable respect.*** As a result, a lack of confidence in the GHAC is exactly what has occurred.

The Applicant filed its PEL application with MassHousing (with a copy to the Town) on December 3, 2018. Thus, in accordance with the *Guidelines*, the Town was required to file a preliminary request for the GHAC (with a copy of the SHI Site Submission List) by December 24, 2018. This did not occur. Rather, the Town did not contact the Department, MassGIS, DDS, or DMH at all about a GHAC until July 10, 2019, the same date that the Applicant, having already received a PEL for this Project, filed the Application with the Board. This GHAC request – filed more than 6 months late – did not include the SHI Site Submission List, as required.

As of the date of the Board's initial hearing on this Application held on August 8, 2019, the Town had still not yet filed a complete request for a GHAC. Nonetheless, the Board continued that hearing for a period of 2 weeks to try to obtain more information as to the Town's eligibility for safe harbor under 760 CMR 56.03(8)(a), thus preserving the Board's ability to invoke safe harbor within the required 15-day period.

On August 13, 2019, the Town – for the first time – filed a complete request for a GHAC with the required SHI Site Submission List. This request was filed a mere 10 days prior to the deadline to invoke safe harbor. Given the complicated procedure outlined above, the critical importance of getting the GHAC right, and the need for lead time for the Town and the Applicant to confirm the accuracy of the GHAC, 10 days is simply not enough time.

As of August 22, 2019, the Town had obtained an internal estimate that DDS group homes in North Reading comprised approximately 13 acres of land before adjustment for non-Directly Associated Area. This estimate was apparently based on information obtained from the North Reading Tax Assessor's office. At about 2:00 P.M. on August 22nd – less than five hours before the Board's hearing on the issue of safe harbor – the Department provided a GHAC to the Town, which indicated DDS group home acreage of 59.14 acres. *See* Safe Harbor Notice (Exhibit 2).

For a number of reasons discussed below, there is ample cause for concern that this calculation is incorrect. Indeed, even the North Reading Town Planner acknowledged in her presentation of this information to the Board that the calculation raised "additional questions". Nonetheless, without taking the opportunity to vet or confirm this information (and despite the Applicant's written offer to extend the Board's deadline to invoke this safe harbor to give the parties time to do so), the Board opted to proceed with a vote to invoke safe harbor. The Applicant respectfully submits that this action was rash, unconsidered, and ill-advised.

Quite simply, there is now a lack of confidence on both sides as to the accuracy of the GHAC. This lack of confidence is directly attributable to the Town's failure to comply with the

procedures outlined in the *Guidelines*, which has prejudiced the Applicant both in terms of time delays and monetary costs incurred to defend against the Town's meritless safe harbor claim. Accordingly, the Applicant respectfully urges the Department to bar evidence of group homes acreage from consideration with respect to the Board's safe harbor claim based on land area minimum.

C. THE GROUP HOMES ACREAGE CALCULATION ISSUED BY THE DEPARTMENT APPEARS TO BE INCORRECT

Setting aside the glaring procedural defects in the Town's request for the GHAC, the results of the calculation, as noted, are plainly – and obviously – wrong for several reasons. As noted, the North Reading Town Planner has described the surprisingly high GHAC issued by the Department – mere hours before the Board's safe harbor hearing, and on only 10 days' notice – as raising "additional questions". The Applicant agrees wholeheartedly with this assessment.

As an initial matter, there is the incredible size of the GHAC number and its utter lack of proportionality to the remainder of the SHI-eligible units on the Town's SHI. Notably, the Department's calculation of group home acreage came out to over four times the Town's own internal estimate. And, despite the fact that the 49 DDS group homes represent less than 10% of the 538 units inventoried on the Town's SHI, the 59.14 acres attributed to those 49 units accounts for roughly two-thirds of the 91.7 acres claimed by the Town to be SHI-eligible.

Moreover, due to the nature of group homes and the practical considerations pertaining to how they are maintained and operated, group homes frequently contain multiple units in a single residence/property, which would mean that the 49 DDS group home *units* are most likely located on a much smaller number of *properties*. This makes sense intuitively because, otherwise, the GHAC of over 59 acres for 49 group home units would suggest that each of these units sits on over an acre of land. This not only strains credulity, but, more importantly, it runs afoul of the requirement of the *Guidelines* to cap Affordable Land Area based on the required land area under local zoning, as discussed below.[20]

More importantly, however, the Applicant has reason to believe that the GHAC was performed in a manner that was inconsistent with the Guidelines for several reasons.

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[20] Further to the discussion above of the questionability of including group home units in the calculation of total affordable housing units (based on the lack of documentation that these units are actually restricted as affordable), the Applicant also questions the relevancy of the acreage of group homes to the issue of GLAM at all. In addition to their questionable eligibility, these units often represent portable housing assistance vouchers that are tied to the resident – not to the municipality or site. Thus, the mere fact that a resident with a portable housing assistance voucher happens to apply that voucher towards their rent on an apartment in one municipality rather than another says absolutely nothing regarding local actions (by either municipality) to create long-term affordable housing, which is the entire purpose of providing the possibility of safe harbor in the first place.

Following the Board's filing of its Safe Harbor Notice, the Applicant's team analyzed the supporting documentation filed by the Board, and conducted additional public records research and analysis of MassGIS data and records. Based on this information obtained in the course of this research, the Applicant has identified what it believes – with virtual certainty – to be the [redacted] specific properties that were included in the GHAC.[21] The area of these [redacted] properties adds up to 59.18 acres, which is virtually identical – to a level of 99.93% accuracy – to the GHAC provided by the Department in this instance. These [redacted] parcels are identified in Exhibits 4 and 5.[22]

[redacted]

[redacted]

[21] The undersigned, working with the Applicant's GIS consultant, Nels Nelson of Stantec, Inc., and 40B/fiscal consultant, Lynne D. Sweet of LDS Consulting Group, identified the [redacted] parcels included in the GHAC based on analysis of the supporting documentation filed by the Town in the Safe Harbor Notice, as well as independent research into public tax assessor's records on file with the Town of North Reading and MassGIS public information. None of this information was provided to the Applicant by the Department, DDS, DMH, MassGIS, or the Town. Rather, the Applicant's team was able to ascertain these locations simply based on research into public records (as the Town claimed to have done prior to its filing of the Safe Harbor Notice), without any improper disclosure of confidential information by any state department or the Town.

[22] These exhibits have been redacted in the public-facing filing by the Applicant to avoid the disclosure of sensitive information. Unredacted copies have been filed under seal in accordance with Department protocols.

[23] In order to determine the number of bedrooms for group home properties, Ms. Sweet researched these addresses in the Massachusetts Multiple Listing Services ("MLS") database, the North Reading Tax Assessor's records, and performed the Middlesex (South) Registry of Deeds. This information provided, for most addresses, bedroom counts, and in some cases, unit counts.

Upon the Applicant's review of these properties, it immediately became apparent that one or more necessary steps in the calculation of the countable Affordable Land Area of these units may not have been conducted in this instance.

1. THE GROUP HOMES ACREAGE CALCULATION WAS NOT CAPPED BASED ON THE AREA REQUIREMENTS OF LOCAL ZONING

The first step that does not appear to have been taken here with respect to the GHAC is the application of the land area cap based on required land area under local zoning. This requirement is set forth in Steps 3.3 and 3.4 of the *Guidelines*, which provide that "the Analyst must check to ensure the prorated area is not larger than the lot area that would be required by zoning for an equivalent number of units. If the prorated area exceeds this required lot area, the excess acreage is not Directly Associated with SHI Eligible Housing units and will not count toward the SHI-Eligible Area." This is a required step that applies to all SHI units, irrespective of whether they are group homes or not. *See Guidelines*, App'x B, Fig. 20 ("Step 3.4 requires the prorated acreage to be calculated for each SHI Site. Additionally, the minimum required lot area under local zoning must be calculated.").

Of the [redacted] properties identified by the Applicant as the location of all 49 group home units on the Town's SHI, [redacted] located in the [redacted] zoning district, which has a required land area of [redacted] per dwelling unit. [redacted] located in the [redacted] zoning district, which has a required land area of [redacted] per dwelling unit. Based on this, the maximum possible countable acreage of the 49 group homes [redacted] is only 44.54 acres.

With respect to [redacted], the information obtained by the Applicant indicates that there are [redacted] group home units [redacted], which would result in the maximum countable acreage [redacted] being capped at 4.59 acres [redacted]. Thus, even before applying the zoning cap to the other [redacted] parcels on this list, the countable area of the group home properties would be reduced to only 14.67 acres – just slightly higher than the acreage projected by the Town.

Based on the foregoing, it is apparent that the required step of capping the countable acreage of the group home parcels was not performed in this instance. Once that step is properly performed, as required by the *Guidelines*, it is clear that the GHAC must be significantly reduced – ***by as much as 44.5 acres***, and possibly more. If reduced in this amount, the Town's Affordable Land Area would be reduced to 44.2 acres, which translates to a GLAM percentage of only 0.72% – less than half of the required 1.5%. *See* Exhibit 4.

2. THE GROUP HOMES ACREAGE CALCULATION WAS NOT ADJUSTED BASED ON THE REMOVAL OF NON-DIRECTLY ASSOCIATED AREA

In addition to the issue of the land area cap based on local zoning, which does not appear to have been performed here by MassGIS, it also appears that the countable area of the group home parcels was not adjusted to remove non-directly associated land area.

This requirement is discussed further above, and is outlined in Step 3.1 of the *Guidelines*, which is silent as to whether it is or is not applicable to group homes. However, it is the Applicant's understanding that the Department's interpretation of provisions of the *Guidelines* with respect to the calculation of Directly Associated Area is that this step should not be performed in the case of group homes. This interpretation is based on the following comment in the definition of Directly Associated Area:

> Due to the privacy-related limitations on sharing of Group Home acreage, DHCD has determined as a matter of policy that supportive documentation of Directly Associated Areas with respect to Group Homes will not be required and Directly Associated Areas will be presumed to be included in the Group Homes Acreage Calculation.

To the extent that the Department interprets this provision to entail that the calculation of Directly Associated Area should not be performed for group home parcels, the Applicant respectfully disagrees. If this were the correct reading of the *Guidelines*, this interpretation would effectively override a regulatory provision (760 CMR 56.03(3)(b)) by means of an internal Department policy by rendering meaningless the reference in the regulation to Directly Associated Area as applied to group homes sites. The Applicant doubts that this was the Department's intent with respect to this policy, but it appears to be its effect.

Textually and intuitively, the cited provision appears on its face to pertain not to whether or not the Directly Associated Area of group home sites should be analyzed at all, but rather to the issue of whether the "supportive documentation" needed to calculate Directly Associated Area must be provided by the municipality in support of a claim of safe harbor, and whether the Department will disclose how Directly Associated Area was determined when issuing the GHAC.

This reading is supported by Step 1.3 of the *Guidelines*, which clarifies that "[t]his acreage, and this acreage only" will be submitted to the municipality, which implies that the "supporting documentation" needed to calculate Directly Associated Area will not be disclosed. Moreover, the only conceivable privacy concerns here would be based on the ***disclosure of the supporting documentation*** (such as map images containing addresses), which could be used to identify group home sites. These concerns would ***not*** be raised merely by MassGIS ***performing the analysis***.

Further support for this reading is found in the *Guidelines* definition of GHAC, which provides that MassGIS "will address-match those residences and calculate the eligible area of the underlying parcels." Step 1.3 further states that "[s]uch calculation will include proration where the number of Group Home units in a property is less than the total number of units at the property." The phrase "will include proration" implies that there is more to MassGIS's calculation than just proration, and because address-matching is already referenced in the preceding sentence, the only other possible component of this calculation would be adjustment for Directly Associated Area.

Setting aside the text of this provision of the *Guidelines* and the effect that its application would have on the Regulations, as a matter of policy, this interpretative policy can be seen to have unfortunate and unintended consequences – as is amply demonstrated in this instance. As noted above, the vast majority of the 59.14 acres calculated by the Department in the GHAC represents [redacted], the vast majority of which is undeveloped wetlands. The evidence discussed above indicates that only [redacted], and that these [redacted] units – which represent less than [redacted]% of the 538 units on the Town's SHI – account for roughly [redacted]% of the land area claimed by the Town as affordable.

This striking result is clearly not what was intended by the Department's policy. In view of the foregoing, the Applicant respectfully urges the Department to reconsider its policy of not adjusting GHAC based on Directly Associated Land Area. If this step had been performed, per the documents attached as Exhibits 4 and 5, the Directly Associated Area of these parcels would be reduced to only 11.01 acres, which is only slightly lower than to the Town's own internal projection.[24] If done, this would reduce the Affordable Land Area in North Reading to just 40.52 acres – a GLAM percentage of 0.66%.

CONCLUSION

In conclusion, when the above corrections are applied to the Town's GLAM calculation, the correct results are as follows:

[redacted]	Town's Claim	Required Reductions	Corrected Totals
Total Land Area	5,924 acres	227.44 acres	**6,151.44 acres**
Affordable Land Area	91.721 acres	47.55 - 51.2 acres	**40.52 - 44.17 acres**
Group Home Acreage	59.14 acres	44.47 - 48.13 acres	**11.01 - 14.67 acres**
GLAM Percentage	1.55%	0.83% - 0.89%	**0.66%-0.72%**

[24] Exhibit 5 contains map images of the [redacted] group home parcels that were produced by Mr. Nelson in accordance with the same methodology outlined above with respect to his calculation of Directly Associated Area for the other SHI Sites. It has been redacted entirely from the Applicant's public-facing filing and filed only under seal.

Based upon the above discussion, it is clear that the Town has not only failed to meet its burden of proof to establish its eligibility for safe harbor (either based on percentage of housing units or GLAM), it has failed to comply with the procedural and evidentiary filing requirements of the *Guidelines* and Regulations. Further, based on what little supporting documentation that was filed in support of the Town's Safe Harbor Notice, per the above discussion it is clear that the Town, in fact, is below 1.5% GLAM based on calculation errors made by the Town both as to Total Land Area and as to Affordable Land Area. Furthermore, the Group Homes Acreage Calculation has been demonstrated to be unreliable and materially incorrect. This information should not be taken into consideration by the Department not only due to its unreliability, but also because the Town failed to comply with the Department's procedural requirements for obtaining a GHAC, as are clearly outlined in the *Guidelines*.

For all of the foregoing reasons, the Applicant respectfully urges the Department to deny the Town's claim of safe harbor and remand this matter to the Board for the continuation of the public hearing with respect to this Application.

Very truly yours,

REGNANTE STERIO LLP
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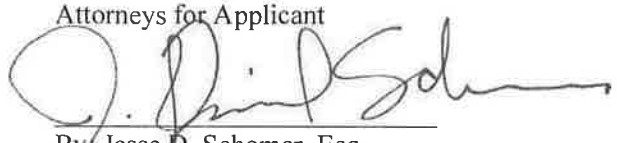

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