



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

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

October 4, 2019

Mr. James Demetri, Chairperson
North Reading Zoning Board of Appeals
235 North Street
North Reading, MA 01864

Re: 20 Elm Street, North Reading, Notification of General Land Area Minimum as Defined under 760 CMR 56.03(3)(b) and Notification of Housing Unit Minimum (10% of Total Housing Units) as defined under 760 CMR 56.03 (a)

Dear Mr. Demetri:

The Department of Housing and Community Development (DHCD) is in receipt of the Town of North Reading's August 22, 2019, letter to Theodore C. Regnante, Esq. Attorney Regnante represents NY Ventures, LLC, (Applicant), regarding its application for a Comprehensive Permit for 20 Elm Street, North Reading. The Town's August 22, 2019, letter sought to provide notice pursuant to 760 CMR 56.03(8) that the Town of North Reading Zoning Board of Appeals (Board) considers the denial of the Applicant's application for a Comprehensive Permit to be consistent with local needs.

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

The Board also indicated that the Town's current SHI count may be in excess of the 10% housing unit minimum pursuant to 760 CMR 56.03 (3) (a). Although the Board acknowledges that the Town's SHI percentage listed by DHCD is 9.61% (Exhibit A in Board's documentation), the Board believes that with inclusion of 42 "rent-controlled mobile home park" units, the Town SHI percentage is 10.36%.

Procedural Background

Pursuant to 760 CMR 56.03(8), the Board shall have the burden of proving satisfaction of the ground(s) for asserting that a denial of a permit would be consistent with local needs in accordance with 760 CMR 56.03(1); furthermore, the Board is to provide any necessary supportive documentation regarding the grounds it believes it has met within 15 days of the opening of the local hearing for the Comprehensive Permit. The Applicant has 15 days to challenge the Board assertion. DHCD has 30 days to issue a Decision.

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Regulatory background the on the Notification of Housing Unit Minimum (10% of Total Housing Units) as defined under 760 CMR 56.03 (a):

For purposes of calculating whether the city or town's SHI Eligible Housing units exceed 10% of its total housing units, pursuant to M.G.L. c. 40B, § 20 and 760 CMR 56.00, there shall be a presumption that the latest SHI contains an accurate count of SHI Eligible Housing and total housing units. In the course of a review procedure pursuant to 760 CMR 56.03(8), a party may introduce evidence to rebut this presumption, which the Department shall review on a case-by-case basis, applying the standards of eligibility for the SHI set forth in 760 CMR 56.03(2). The total number of housing units shall be that total number of year-round units enumerated for the city or town in the latest available United States Census.

For further clarification, unlike group homes, which are subject to SHI unit eligibility criteria under section II.A.2.e of DHCD's c. 40B Guidelines¹, and are defined under the General Land Area Minimum Guidelines (revised 4/20/18) (the "GLAM Guidelines"),² other housing, including without limitation units in manufactured housing communities, must meet SHI project eligibility criteria for Low or Moderate Income Housing under section II.A.1. Such project eligibility criteria including the following: 1) eligible Subsidy program (i.e., through a Subsidizing Agency and as provided under the 40B Guidelines) 2) affordability (household income and, as applicable, asset limits); 3) housing costs; 4) a long-term Use Restriction; and 5) Affirmative Fair Housing Marketing and Resident Selection Plan.

Regulatory Background on 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;*

¹ Available at <https://www.mass.gov/files/documents/2017/10/10/guidecomprehensivepermit.pdf> .

² Available at <https://www.mass.gov/files/documents/2018/05/07/guidelinescalculatinglanduse.pdf>.

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. c. 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. If a municipality believes that digital parcel boundaries and/or resulting calculated area are incorrect, it may use surveyed boundaries to update the digital parcels, so long as it also provides the same for all adjacent parcels. 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 and that the surveyed boundaries were surveyor stamped within the last year 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. The technical instructions and specifications (Appendix A of the GLAM Guidelines) reference Esri ArcGIS mapping software. Submittals must be Esri-compatible. Details regarding what must be included in the submittal are included in Appendix A.

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 and DHCD within 15 days of opening up the local hearing and 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 states that the basis for its safe harbor assertion is that it has achieved the 1.5% General Land Area Minimum because it claims that there is SHI Eligible Housing existing in the Town on sites comprising one and one-half or more (1.55%) of the total land area zoned for residential, commercial, or industrial use, although notes that the calculation is preliminary.
- The Board claims that the total acreage attributable to the denominator of its calculation is 5,924, and that the total acreage attributable to the numerator of its calculation of 1.55% is 91.721 acres (noting an additional "potential" acreage of 6.56 for the "rent-controlled mobile home park" units).
- The Group Homes Acreage Calculation ("GHAC") requested of DHCD under the GLAM Guidelines is 59.14 acres, accounts for almost 65% of the numerator.³
- The Board, although acknowledging that the SHI percentage listed by DHCD is 9.61%, also claims that it has subsidized housing in excess of 10% based on its assertion that the SHI should include 42 units across two "rent-controlled mobile home parks," and based on its assumption that it has more group home units than the 49 units listed on the SHI due to the large acreage identified through the GHAC.

As supporting documentation for its submission, the Board provided, solely in hard copy (paper and scanned) the following: Department of Housing and Community Development CH40B Subsidized Housing Inventory, dated 7/15/2019; email correspondence with DHCD by which the GHAC was provided; a single-page document "Town of North Reading General Land Area Minimum calculation – August 22, 2019" with tables related to calculation of the numerator; a map titled "Land Excluded from Total Town Acreage"; a "GLAM Denominator" table; an "SHI Sites" map; two additional "North Reading GLAM Calculation" tables; and an untitled table by "LOC_ID" with parcel ID, address, acreage and owner information for parcels that are almost entirely shown as owned by the Town of North Reading.

The Applicant's Submission

- The Applicant argues that the Board's submission is defective as a procedural matter since it was not submitted, *inter alia*, as digital files with parcel data compliant with the state's Level 3 Digital Parcel Standard as provided in the GLAM Guidelines, and as an evidentiary matter since the Board did not adequately establish the factual bases for arriving at its calculation or provide the necessary supportive documentation.
- The Applicant claims the Town has not achieved the 1.5% General Land Area Minimum safe harbor and is at most at 1.44% (assuming *arguendo* that the GHAC contributing to the numerator of the percentage is accurate, which the Applicant disputes), and with adjustments to the GHAC, is between 0.66% and 0.73%.⁴
- The Applicant claims that the total acreage attributable to the denominator is 6,151.44 acres, and that the total acreage attributable to the numerator is between 51.53 and 68.84 acres.

³ Section 1.3 of the GLAM Guidelines provide that if a Board wishes to proceed with the GHAC, 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, and that 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. Additionally, 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.

⁴ The Applicant also argues that the Board's request for the GHAC was procedurally defective since it did not properly request the GHAC within the timeframe provided under the GLAM Guidelines (the Board did not make its initial GHAC request until July 10, 2019, the date the Applicant filed its Application with the Board, and did not provide the SHI Sites Submission List with its request until August 13, 2019),

- The Applicant argues that the Board's denominator calculation must be increased by 227.39 acres since the Board improperly excluded: 1) three parcels with properties listed on the SHI, including two properties owned by the North Reading Housing Authority and one property that is privately owned; 2) parcels owned by religious institutions; 3) tax-exempt properties that are privately owned; 4) the entire parcel for which the North Reading Housing Authority only retains a partial ownership interest (a single unit out of 150-unit condominium); and 5) tax title properties.
- The Applicant argues that the Board failed to establish the land area it claims for the five non-group home properties listed on the SHI since it provided inadequate supporting documentation as to how it arrived at its calculation generally, or specifically with respect to Directly Associated Areas (including the removal of area in excess of the minimum lot area required under applicable local zoning) and prorated area (corresponding to the proportion of housing units that are SHI Eligible).
- The Applicant asserts that based on its own calculations, the numerator must be reduced by 3.08 acres since the Board improperly included as Directly Associated Areas: 1) non-actively maintained wooded land that is not within fifty feet of buildings and within required dimensional requirements (four properties); 2) a duplicate count of the area of a building, possibly due to incorrect proration (one property); and 3) incorrect inclusion of land outside of the property lines (two properties).⁵
- The Applicant additionally asserts that the Board's numerator calculation must be reduced by 44.47-48.13 acres to exclude non-Directly Associated Areas from the GHAC (the first figure appears to represent acreage in excess of the minimum lot area required under local zoning for the zoning districts where the group homes are located, as deduced by the applicant, and the second figure appears to include added area that is not Directly Associated).⁶
- The Applicant also refutes the Board's assertion that it has SHI Eligible Housing in excess of 10% based on the Board's acknowledgment that the SHI provided by DHCD at the time of the Applicant's Application lists the Town at 9.61%, and that the Board has failed to provide any supportive documentation to rebut the accuracy of the SHI.
- The Applicant submitted the following documentation with its response to the Board's safe harbor assertion: a table identifying parcels that the Applicant claims were improperly excluded in the Board's denominator calculation; a table comparing the Board's numerator calculation to the Applicant's consultant's calculation by SHI listing; maps showing SHI parcel and Directly Associated area boundaries; and redacted information relating to group homes.

Discussion and Findings

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

The Applicant and Board disagree on North Reading's total area zoned for residential, commercial, or industrial use (the denominator), as well as the portion of such land that is comprised of SHI Eligible Housing (the numerator). As a general matter, DHCD cannot analyze the discrepancies between the Board's and Applicant's calculations of the denominator and the numerator because of the Board's fundamentally inadequate submission with respect to documenting the factual bases for its calculations and providing supportive documentation consistent with the GLAM

⁵ The Applicant states that it attempted to ascertain how the Board arrived at its calculation of the numerator through a public records request to the Town, and then used its own consultant to analyze the records that were produced along with MassGIS public data.

⁶ The Applicant indicates that it was able to ascertain the group home locations based on its public records request to the Town and the Applicant's own public records research and analysis of MassGIS data. The Applicant noted that it redacted information to the extent it deemed necessary to avoid any possible disclosure of sensitive/confidential information relating to confidential DDS/DMH group homes.

Guidelines. Based on the inadequacy of the Board's submission alone, DHCD finds that the Board has failed to meet its burden of proof in asserting the 1.5% GLAM safe harbor. DHCD also notes some additional bases as to why the 1.5% GLAM safe harbor has not been met below.

The Denominator

The regulations and GLAM Guidelines are clear that 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. The Applicant details how the Board's denominator calculation improperly classifies and excludes over 227 acres of land as government-owned, including land owned by the North Reading Housing Authority containing SHI Eligible Housing, privately owned land, and tax title land.⁷ Since the Board has failed to meet its burden in supporting how it arrived at its denominator calculation generally, and in identifying the particular bases (consistent with the regulations and GLAM Guidelines) for excluding units by parcel, DHCD credits the Applicant's addition of 227.39 acres to the denominator.

The Numerator

Even if the Board's calculation for the denominator of 5,924 acres were correct, the Town still would need a numerator of 89 acres in order to meet the 1.5% safe harbor. A reduction of merely 3 acres from the numerator would cause the Town to fall below 1.5%. The Applicant argues that 3.08 acres should be deducted from the numerator and provided the bases for this deduction. The primary basis provided is the Board's inclusion of non-Actively Maintained wooded or vegetated areas not within required side, front, or rear yard dimensional requirements *and* not within 50 feet of a building footprint. DHCD agrees that such areas are explicitly excluded under the definition of Directly Associated Areas in the GLAM Guidelines. Since the Board has failed to meet its burden in supporting how it arrived at its numerator calculation generally, and specifically as to Directly Associated area and prorated area, DHCD credits the Applicant's 3.08 acreage deduction from the numerator.

For the foregoing reasons, DHCD finds that the Board has failed to meet its burden to demonstrate that it has achieved the 1.5% General Land Area Minimum.

DHCD also notes that the Applicant has made a compelling case to overcome the presumption of validity of the GHAC figure provided by DHCD and to demonstrate that the entire GHAC acreage should not be credited to the numerator. However, since the Board has failed in meeting its burden for the other reasons discussed above, DHCD need not address the merits of the Applicant's rebuttal or the GHAC here.

Housing Unit Minimum (in Excess of 10% of Total Housing Units) as Defined under 760 CMR 56.03(a):

DHCD finds that the Town's SHI count as of the date of Application (July 10, 2019) filing was 9.61%. The Board did not provide supportive documentation with its August 22, 2019 submittal to rebut the accuracy of the SHI, including any documentation as to the purported SHI eligibility of 42 "rent controlled mobile home parks" units. There was not even mention of the eligible Subsidy program pertaining to such units, which is a fundamental requirement for SHI inclusion under the c. 40B statute, regulations, and guidelines. Consequently, the Board has not

⁷ Section V of the GLAM Guidelines provide that "land owned by a political subdivision" does not include tax title properties.

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met its burden under 760 CMR 56.03(8) as to the Housing Unit Minimum safe harbor as defined under 760 CMR 56.03(a).

Conclusion

DHCD finds that the Board has not met its burden of proof concerning the General Land Area Minimum as Defined under 760 CMR 56.03(3)(b) because the Applicant's August 22, 2019 submission was wholly inadequate. The Board did not submit data in specified electronic formats that would enable reviewers (including the Applicant) to validate the results. Additionally, the Board's submission included other significant deficiencies or errors discussed above, including without limitation, the Board's failure to adequately support its exclusion of land from the denominator and apparent improper exclusion of non-government owned and housing authority owned land from the denominator, as well as the Board's failure to adequately support its inclusion of land in the numerator and apparent improper inclusion of non-Directly Associated Areas in the numerator.

DHCD also finds that the Board has not met its burden of proof concerning the Housing Unit Minimum (SHI Eligible Housing units in excess of 10% of total housing units) as defined under 760 CMR 56.03 (a) as it did not rebut the accuracy of the SHI.

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

cc Michael P. Gilleberto, Town Administrator, North Reading
Theodore C. Regnante, Esq, Regnante Sterio, LLP