

**COMMONWEALTH OF MASSACHUSETTS  
HOUSING APPEALS COMMITTEE  
IN THE MATTER OF NORTH READING ZONING BOARD OF APPEALS  
AND  
NY VENTURES, LLC<sup>1</sup>**

**INTERLOCUTORY APPEAL OF THE NORTH READING BOARD OF APPEALS**

**INTRODUCTION**

Pursuant to the provisions of 760 CMR 56.03(8)(a), by letter dated August 22, 2019, the North Reading Zoning Board of Appeals (“Board”) provided notice to the Department of Housing and Community Development (“DHCD”), with a copy of the same to NY Ventures, LLC (“NY Ventures, LLC” or “applicant”), of the Board’s position that the Town of North Reading is consistent with local needs, as that term is found at G.L. c.40B, s.20 and 760 CMR 56.00 et seq., pursuant to 1) the statute’s 1.5% General Land Area Minimum; and 2) the statute’s 10% Housing Unit Minimum. The August 22, 2019 notice further noted that certain units eligible for inclusion on the Town’s Subsidized Housing Inventory (SHI) (rent-controlled mobile homes and confidential Group Home units) are not, but should be included by DHCD on the Town’s SHI. The Board included documentation with its notice. NY Ventures, LLC submitted a “Notice of Objection” to DHCD dated September 6, 2019, disputing the Board’s claims of “safe harbor.”

On October 4, 2019, DHCD denied the Board’s claims of consistency with local needs, finding that the Board had not carried its burden of establishing either the 1.5% General Land Area Minimum or the 10% Housing Unit Minimum. DHCD further found that the Board had

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<sup>1</sup>Housing Appeals Committee “Standing Order” 10-01 states, in relevant part, “DHCD shall not be named a party to the appeal”. Notwithstanding the caption of the current appeal—prepared so as to comply with “Standing Order” 10-01—the Board reserves all rights to call as a witness any DHCD employee who participated in above noted October 4, 2019 decision and subpoena any relevant document in this matter.

failed to provide supporting materials “in specified electronic formats” and to meet other technical requirements under DHCD’s “GLAM Guidelines,” so-called. DHCD’s October 4, 2019 letter is attached as Exhibit 1. As grounds for this appeal, the Board states that DHCD wrongly concluded that the Town of North Reading is not "consistent with local needs" pursuant to the 1.5% General Land Area Minimum and/or the 10% Housing Unit Minimum, with regard to the application for a comprehensive permit filed by NY Ventures, LLC.

### **FACTS AND PRESUMPTIONS**

1. On or about July 9, 2019, NY Ventures, LLC filed a comprehensive permit application with the North Reading Zoning Board of Appeals for the development of 200 dwelling units (rental) on approximately 12.8 buildable acres of an approximately 19-acre parcel on Elm Street, designated as 20 Elm Street.
2. The Board opened public hearing on the application on August 8, 2019, in compliance with G.L. c. 40B, s. 21 and 760 CMR 56.05(3).
3. On August 22, 2019, the Board voted to determine, pursuant to G.L. c. 40B, s. 20 and 760 CMR 56.03(8)(a), that the Board considered that a denial of the requested comprehensive permit or the imposition of conditions or requirements would be consistent with local needs, on the following statutory grounds: 1) 1.5% General Land Area Minimum; and 2) 10% Housing Unit Minimum. These assertions of “safe harbor” were timely under G.L. c. 40B, s. 20 and under 760 CMR 56.03(8)(a).
4. The Board submitted written notice of “safe harbor” to the applicant and to DHCD by letter, with documentation, dated August 22, 2019. A copy of this notice is attached as Ex. 2.
5. At that time, according to DHCD, North Reading’s Subsidized Housing Inventory (“SHI”) included 538 units, with a percent subsidized of 9.61%. See Ex. 2, pp. 4 and 7. As the Board noted, however, this SHI did not include 42 rent-controlled mobile home housing units which should be listed on the SHI, nor did it include additional confidential group home units not currently counted by DHCD and unknown to the Town. The Board noted that with the inclusion of the 42 mobile home units, the Town’s SHI percentage is 10.36 %, over the 10% Housing Unit Minimum. See Ex. 2, pp. 3-4, 12.
6. The Board further noted its entitlement to additional group home information from the Department of Mental Health and the Department of Developmental Services,

associated with the group home acreage of 59.14 acres supplied by DHCD pursuant to a request by the Town for a Group Home Acreage Calculation. Ex. 2, p. 4

7. Excluding “land to be removed” in calculating the General Land Area Minimum the Board calculated a denominator of 5,924 acres See Ex. 2 at p. 12-14.
8. Including *known* SHI acreage, the Board calculated a numerator of 91.721 acres, for a Land Area Minimum of 1.548%. Including *known* and *potential* SHI acreage, the Board calculated a numerator of 96.691 acres, for a Land Area Minimum of 1.632%. See Ex. 2 at pp.12-17. Both calculations exceed the 1.5% General Land Area Minimum.
9. Including known and potential SHI units, the Board calculated an SHI percentage of 10.36%. See Ex. 2, pp. 4 and 12.
10. The Board expressly reserved its rights to present additional evidence, testimony, argument, analysis, exhibits, calculations, and other information. Ex. 2, p. 4
11. The Board further noted that it had voted to proceed with hearing on the application of NY Ventures, LLC, even though it had asserted safe harbor. Ex. 2, p. 5. The Applicant elected to challenge the Board’s assertion of safe harbor, rather than presenting its project and working with the Board to fashion a housing development of benefit to all parties.
12. In its “Notice of Objection” challenging the Board’s assertion of safe harbor, the applicant appears to have improperly mapped and identified the location and configuration (e.g., number of bedrooms) of DMH and DDS group home units, in express violation of procedures protecting the privacy of residents. It further appears that the applicant communicated directly with DHCD regarding confidential group home units, further violating these protections. See Ex. 3
13. By letter dated September 19, 2019, the Board responded to certain inaccuracies in the applicant’s Notice of Objection, and noted the applicant’s improper activity with respect to confidential group home information. See Ex. 4.

## **CLAIMS OF ERROR**

### **Count I**

#### **The Town is Consistent with Local Needs Pursuant to the 1.5% General Land Area Minimum and the 10% Housing Unit Minimum of G.L. c. 40B, s. 20**

14. The Board repeats, re-alleges, and incorporates fully herein the allegations contained in paragraphs 1-13, above.

15. DHCD erroneously concluded, based on nonsubstantive grounds, that the Town of North Reading "has failed to meet its burden to demonstrate that it has achieved the 1.5% General Land Area Minimum." DHCD's conclusion was "[b]ased on the inadequacy of the Board's submission alone." Ex.1, p. 4.
16. DHCD erroneously concluded that the Town's submission with respect to the 1.5% General Land Area Minimum was "fundamentally inadequate" because the relevant information was not "submitted in specific electronic formats" as provided in the GLAM Guidelines, and otherwise did not provide documentation consistent with the GLAM Guidelines. Ex. 1, p. 3.
17. DHCD erroneously relied on the GLAM Guidelines to deny the Town's claims of consistency with local needs. Neither the statute nor DHCD regulations require, for the purpose of asserting safe harbor, submission of information in "digital files with parcel data compliant with the state's Level 3 Digital Parcel Standard," nor the other complicated and technical "requirements" provided in the GLAM Guidelines. The GLAM Guidelines are not unlawfully applied, as they constitute an end-run around lawful administrative procedures for adopting agency regulations.
18. Application of the GLAM Guidelines, including its burdensome technical requirements, is ultra vires, arbitrary, and a violation of due process. Such Guidelines were crafted and are applied for the express purpose of denying the claims of North Reading, and of any municipality, of consistency with local needs.
19. While refusing to credit or even analyze calculations of the denominator submitted by the Board, because not submitted in the proper format, and while stating that it "cannot analyze the discrepancies between the Board's and Applicant's calculations" because of the Board's "fundamentally inadequate submission," DHCD *credits the Applicants addition of 227.39 acres to the denominator - likewise not submitted in the proper format*. This is arbitrary, capricious, a violation of due process, and transparently outcome-driven. It finds no support in the statute or regulations. Ex. 1, p. 6.
20. Likewise, while refusing to credit or even analyze calculations of the numerator submitted by the Board, because not submitted in the proper format, DHCD *credits the Applicant's deduction of 3.08 acres from the numerator - likewise not submitted in the proper format*. This is likewise arbitrary, capricious, a violation of due process, and transparently outcome-driven. It finds no support in the statute or regulations. Ex. 1, p. 6.
21. DHCD's findings and conclusions with respect to the Board's inclusion of non-Actively Maintained wooded or vegetated areas, and with respect to "Directly Associated Areas" as that term is defined in the GLAM Guidelines, are unsupported by fact and are contrary to the statute. Through the GLAM Guidelines, DHCD has

unlawfully purported to define out of eligibility acreage permitted by the statute to be counted in the numerator.

22. DHCD's finding that the Board "failed to adequately support its exclusion of land from the denominator" is in error, where the Board's exclusions are based on G.L. c. 40B, s. 20, and where neither the statute nor the regulations require the "support" suggested by DHCD. Likewise, DHCD's finding that the Board "fail[ed] to adequately support its inclusion of land in the numerator," is in error, where the Board's inclusions are based on the statute.
23. DHCD erroneously and surprisingly states that "the Applicant has made a compelling case to overcome the presumption of validity of the GHAC figure provided by DHCD" – i.e., *provided by itself* – "and to demonstrate that the entire GHAC acreage should not be credited to the numerator." Where DHCD questions the validity of *its own data*, based not on inspection analysis of the data, but simply based on the Applicant's assertions, the agency acts arbitrarily, without evidentiary basis, and in violation of the due process rights of the Board.
24. DHCD erroneously rejects the Town's inclusion of 42 rent-controlled mobile home housing units in calculating its SHI, on the grounds of inadequate documentation. Upon information and belief, these units are eligible for inclusion on the Town's SHI and DHCD calculation of the Town's SHI should include them.
25. With respect to the Town of North Reading's consistency with local needs, DHCD's decision that the Town does not meet either the 1.5% General Land Area Minimum, or the 10% Housing Unit Minimum, is arbitrary, capricious, whimsical, unsupported by evidence and based on errors of law, including the violation of the Board's due process rights

## Count II

### **The Regulations Governing "Methods to Measure Progress Towards Affordable Housing Goals are Contrary to statute, ultra vires and invalid**

26. The Board repeats, re-alleges, and incorporates fully herein the allegations contained in paragraphs 1-25, above.
27. DHCD regulations pertaining to "Methods to Measure Progress Towards Affordable Housing Goals," conflict with G.L. c. 40B, s. 20, and are ultra vires, void, and unenforceable.
28. In particular, those portions of 760 CMR 56.03(3)(b) providing instructions on calculating a municipality's "General Land Area Minimum" (1.5%) conflict with G.L. c. 40B, s. 20 and accordingly are ultra vires, void, and unenforceable.

29. In particular, those portions of 760 CMR 56.03(8) shifting the burden of proof of determination of consistency with local needs onto the municipality conflict with G.L. c. 40B, s. 20 and accordingly are ultra vires, void, and unenforceable.
30. In particular, that portion of 760 CMR 56.03(8) requiring a Board to assert safe harbor within 15 days of opening public hearing, is in conflict with G.L. c. 40B, and accordingly is ultra vires, void and unenforceable.
31. Such regulations must be invalidated and the Board so requests.

### **Count III**

#### **The “GLAM Guidelines” are ultra vires, invalid, and unlawfully applied to reject the Town’s claims of consistency with local needs**

32. The Board repeats, re-alleges, and incorporates fully herein the allegations contained in paragraphs 1-31, above.
33. The GLAM Guidelines were promulgated by DHCD in 2018. Both DHCD and the Housing Appeals Committee purport to impose the Guidelines as if they have the force of law. In this case, DHCD rejected the Town’s assertions of safe harbor on the grounds that the Town’s submissions did not meet the complex and technical standards of the Guidelines. This was in error, where the Guidelines do not have the force of law.
34. If the agencies wish the Guidelines to have the force of law, they must be adopted as regulations pursuant to lawful administrative procedures. Promulgation and application of the Guidelines is an ultra vires end-run around these statutory rule-making requirements.
35. The Guidelines alter the substantive and procedural law of G.L. c. 40B and 760 CMR 56.00 et seq., to the detriment of municipalities claiming safe harbor pursuant to statutory provisions for consistency with local needs. Application of the Guidelines to the Town’s assertions of safe harbor violates due process of law.
36. The Guidelines contain unreasonable time limits and technical requirements, designed and imposed to thwart any municipal assertion of consistency with local needs.
37. Such Guidelines must be invalidated and/or declared inapplicable unless adopted in compliance with proper (statutory) rulemaking procedures and unless consistent with G.L. c. 40B, ss. 20-23.

WHEREFORE, the North Reading Zoning Board of Appeals requests that the Housing Appeals Committee:

- 1) reverse the decision of DHCD in this matter, finding that the Town of North Reading is "consistent with local needs" based on satisfaction of the 1.5% General Land Area Minimum pursuant to G.L. c.40B, s.20 and 760 CMR 56.00 et seq.;
- 2) reverse the decision of DHCD in this matter, finding that the Town of North Reading is "consistent with local needs" based on satisfaction of the 10% Housing Unit Minimum pursuant to G.L. c.40B, s.20 and 760 CMR 56.00 et seq.;
- 3) invalidate those portions of 760 CMR 56.03 that are inconsistent with the statute; and
- 4) declare the GLAM Guidelines inapplicable to proceedings before DHCD and the Housing Appeals Committee unless adopted in compliance with proper (statutory) rulemaking procedures and unless consistent with G.L. c. 40B, ss. 20-23.

TOWN OF NORTH READING

By its attorneys

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Dated: October \_\_\_\_, 2019

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CERTIFICATE OF SERVICE

I, Barbara Huggins Carboni, hereby certify that on the below date, I served a copy of the foregoing Interlocutory Appeal of the North Reading Board of Appeals, by first class mail, postage prepaid, to the following:

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Dated: October \_\_, 2019

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Barbara Huggins Carboni