C O M M O N W E A L T H   O F   M A S S A C H U S E T T S

H O U S I N G   A P P E A L S   C O M M I T T E E

In the Matter of

WESTON ZONING BOARD OF APPEALS

and

518 SOUTH AVENUE, LLC

No. 2019-12

DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR

March 15, 2021

TABLE OF CONTENTS

I. INTRODUCTION AND PROCEDURAL BACKGROUND 1

II. GENERAL LAND AREA MINIMUM 4

- A. Comprehensive Permit Law and Regulations 4
- B. DHCD Guidelines 5
- C. Burden of Proof 7
- D. Methodology 7
- E. The Denominator 8
  - 1. The Board's Calculation 9
  - 2. Challenges to Board Denominator Exclusions 9
  - 3. The Board's Denominator Calculation Using the GLAM Guidelines 12
  - 4. 518 South Avenue's Denominator Calculation 13
  - 5. Denominator Conclusion 13
- F. The Numerator 14
  - 1. Acreage is Proportional to Percentage of SHI Units 16
  - 2. The Board's Calculation of the Numerator 17
  - 3. Challenges to Witness Testimony 20
  - 4. Developments with Disputed Acreage 22
- G. Numerator Conclusion 28
- H. Final Calculation of the Percentage of SHI Acreage 29
- I. 518 South Avenue Motion for Directed Decision 30

III. CONCLUSION AND ORDER 32

Board's Counsel
Jonathan D. Witten, Esq.
KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

Developer's Counsel
James G. Ward, Esq.
Sarah A. Turano-Flores, Esq.
Valerie A. Moore, Esq.
Nutter, McClennen & Fish LLP
155 Seaport Boulevard
Boston, MA 02210

Board's Witness
Imaikalini Aiu

Developer's Witness
Nels Nelson

C O M M O N W E A L T H   O F   M A S S A C H U S E T T S

H O U S I N G   A P P E A L S   C O M M I T T E E

In the Matter of WESTON ZONING BOARD OF APPEALS and 518 SOUTH AVENUE LLC	No. 2019-12

DECISION ON INTERLOCUTORY APPEAL
REGARDING APPLICABILITY OF SAFE HARBOR

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an interlocutory appeal to the Housing Appeals Committee brought by the Weston Zoning Board of Appeals (Board), pursuant to 760 CMR 56.03(8), appealing a determination by the Department of Housing and Community Development (DHCD) that the Town of Weston (Town) has not met the general land area minimum, one of three statutory safe harbors precluding the Housing Appeals Committee's overturning or modification a zoning board's decision under the Comprehensive Permit Law, G.L. c. 40B, §§ 20–23. Under the comprehensive permit regulations, 760 CMR 56.00, *et seq.*, any decision by a board to deny a comprehensive permit or grant a permit with conditions shall be upheld if the municipality has achieved one of these safe harbors. G.L. c. 40B, § 20; 760 CMR 56.03(1)(a). The general land area minimum safe harbor is met if low or moderate income housing exists on sites comprising 1.5 percent or more of all land zoned for residential, commercial, or industrial use in a municipality. G.L. c. 40B, § 20; 760 CMR 56.03(3)(b).

Pursuant to 760 CMR 56.03(8)(a), a board seeking to rely on a safe harbor must notify the developer and DHCD of its safe harbor claim within fifteen days of the opening of the board's hearing on the comprehensive permit application. If the developer wishes to challenge the board's claim, it must provide written notice to DHCD and the Board within fifteen days, and

DHCD "shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials." 760 CMR 56.03(8)(a).

Either party may file an interlocutory appeal of an adverse decision by DHCD to the Committee, but must do so within 20 days of receipt of DHCD's decision. The interlocutory appeal to the Committee is conducted on an expedited basis, as the proceeding before the board is stayed pending our determination. 760 CMR 56.03(8)(c). The Committee's hearing on the issue, like all of our proceedings, is *de novo*. G.L. c. 40B, § 22. Section 56.03(8)(a) provides that the Board has "the burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs...."

As alleged in the Board's initial pleading for interlocutory appeal, the developer, 518 South Avenue LLC (South Avenue) filed a comprehensive permit application with the Board on July 2, 2019 for the development of 200 rental units on approximately 9.5 acres of land located off of South Avenue, (Route 30), in Weston. The Board opened a public hearing on the application on August 19, 2019 and, on the that date, determined that a denial of the requested comprehensive permit was consistent with local needs as a matter of law because housing eligible under DHCD's Subsidized Housing Inventory (SHI) exists on sites comprising 1.5 percent or more of the total land area in Weston zoned for residential, commercial, or industrial use. On August 27, 2019, the Board notified South Ave and DHCD that it invoked the general land area minimum safe harbor. A developer wishing to challenge a board's safe harbor claim must provide written notice to DHCD and the board within fifteen days of receipt of the board's determination, and South Avenue did so on September 10, 2019

DHCD issued a letter dated October 9, 2019 stating the Board was not entitled to the safe harbor, and it issued a second letter dated October 24, 2019, retracting certain statements made in the October 9 letter regarding the timeliness of the Board's assertion of safe harbor and confirming that the Board complied with the required timeframes set forth in 760 CMR 56.03(8). DHCD's initial determination that the Board was not entitled to safe harbor remained unchanged

by the October 24 letter.[1] The Board filed this interlocutory appeal to the Committee on October 25, 2019.[2]

A conference of counsel was held on November 29, 2019, at which Lisa Revers filed in hand a Motion to Participate as an Interested Person, in which she would serve as a representative of owners of land abutting the project site. By order dated February 13, 2020, the presiding officer granted Ms. Revers' motion in part, allowing her to receive all notices pursuant to 760 CMR 56.06(7)(b) and all other documents pursuant to 760 CMR 56.06(6), but denying her any further level of participation.

At the conference of counsel, the Board raised the possibility of seeking testimony from Philip DeMartino, an employee of DHCD. Following a subsequent telephone conference call with counsel, the presiding officer directed the Board to file either a copy of a subpoena served on Mr. DeMartino for his appearance and testimony at the evidentiary hearing to be scheduled, or a motion for the issuance of such a subpoena by the presiding officer, in accordance with the procedures available to the Board pursuant to 760 CMR 56.06(8)(d). Thereafter, the Board filed a copy of a subpoena duces tecum issued to Mr. DeMartino compelling him to appear and testify at a hearing before the Committee. South Avenue and DHCD filed a joint motion to quash the subpoena. By order dated February 13, 2020, the presiding officer granted the motion to quash and vacated the subpoena.

South Avenue moved for a directed decision on January 31, 2020. Because briefing deadlines extended beyond the scheduled date of the hearing, the motion was still under advisement during the hearing. South Avenue renewed its motion for directed decision during closing arguments at the hearing. Tr. 186.

---

[1] The presiding officer has taken official notice of DHCD's decision, provided in the October 9 and October 24 letters, pursuant to 760 CMR 56.08(b). The purpose of the official notice is to include the letter in the hearing record to establish the content of DHCD's decision. We do not rely on any substantive findings and conclusions reached by DHCD in our decision, as this proceeding is *de novo*.

[2] Since this interlocutory decision does not "finally determine the proceedings" the presiding officer may rule on it without consulting the full Committee. 760 CMR 56.06(7)(e)(2). In cases of first impression or those involving particularly weighty matters, however, the presiding officer, in their discretion, may choose to bring the matter before the full Committee.

The Board and South Avenue subsequently submitted pre-filed witness testimony and exhibits. An evidentiary hearing was held on March 5, 2018. The parties thereafter filed post-briefing memoranda.

II. GENERAL LAND AREA MINIMUM

A. Comprehensive Permit Law and Regulations

We consider whether a town has met the safe harbor under the provisions of G.L. c. 40B, § 20 and 760 CMR 56.03(3). G.L. c. 40B, § 20 provides that:

> Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists ... on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial, or industrial use ... provided, however, that land area owned by the United States, the commonwealth or any political subdivision thereof, or any public authority shall be excluded from the total land area referred to above when making such determination of consistency with local needs.

Thus, the general land area minimum is met if the land area in the municipality dedicated for use as housing for low or moderate income households is 1.5 percent or more of all land zoned for residential, commercial, or industrial use, subject to certain exclusions. G. L. c. 40B, § 20. *See* 760 CMR 56.03(3)(b) (General Land Area Minimum). In a municipality that has met the safe harbor, the zoning board's denial of a comprehensive permit or grant of a permit with conditions will be conclusively deemed "consistent with local needs" and the board's decision will be upheld by the Committee. G. L. c. 40B, § 20; 760 CMR 56.03(1)(a).

The comprehensive permit regulations provide clarification and further detail regarding how this determination is to be made. For calculation of the "total land area zoned for residential, commercial, or industrial use," 760 CMR 56.03(3)(b) and subsections 1 through 7 identify those areas that are included in or excluded from that area. For calculation of the area where low or moderate income housing exists, 760 CMR 56.03(3)(b) states that:

> Only sites of SHI Eligible Housing units inventoried by [DHCD] or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, shall be included toward the 1.5% 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).

760 CMR 56.03(3)(d) provides further that "[e]vidence regarding Statutory *Minima* submitted under 760 CMR 56.03(3) shall comply with any guidelines issued by [DHCD]." Regulations have the force of law and generally, an agency must comply with its own regulations. *Royce v. Commissioner of Correction*, 390 Mass. 425, 427 (1983).

B. DHCD Guidelines

DHCD has issued two sets of guidance that address methods for evaluating whether the Town has met the general land area minimum: 1) the Guidelines for Calculating General Land Area Minimum, dated January 17, 2018, revised January 31, 2020 (GLAM Guidelines, *see* Exh. 7B); and 2) the Guidelines G.L. c. 40B Comprehensive Permit Projects Subsidized Housing Inventory updated December 2014 (40B Guidelines, *see* Exh. 7B). In an order issued on December 16, 2019, the presiding officer noted her intention to take official notice of both the GLAM Guidelines and the 40B Guidelines, and directed the parties to submit objections, if any, in writing on or before January 6, 2020. The Board filed an objection to the taking of official notice of the GLAM Guidelines only on January 6, 2020, to which South Avenue filed a response on January 27, 2020.[3] The presiding officer denied the Board's motion objecting to the taking of official notice of the Guidelines in an order dated February 21, 2020.[4]

The GLAM Guidelines were adopted in response to the Committee's encouragement to DHCD to "establish a methodology that provides clear guidance to municipalities and developers and promotes certainty and consistency" and, specifically with respect to the numerator, "to develop guidance with clear standards for reviewing the extent of impervious and landscaped areas 'directly associated' with SHI units." *Matter of Norwood and Davis Marcus Partners*, No. 2015-06, slip op. at 6, n.6; 19, n.12 (Mass. Housing Appeals Comm. Dec. 8, 2016). The 40B Guidelines address the eligibility for units to be listed on the SHI. Exh. 7B, 40B Guidelines, § II.A.2.A.2. Thus, these guidelines appropriately filled in a gap in both the statute and the

[3] The Board did not object to the taking of official notice of the 40B Guidelines or of DHCD's October 8, 2019 decision on the Town's safe harbor claim.

[4] Taking official notice of the GLAM Guidelines and 40B Guidelines does not determine that we adopt them for the purposes of our consideration of this case. Official notice allows the admission of the documents in the record of the hearing. *See* 760 CMR 56.06(8)(b).

regulations by providing such a methodology. *See Boston Retirement Bd. v. Contributory Retirement Appeal Bd*., 441 Mass. 78, 83-84 (2004) (memorandum issued to clarify definition of "earned income" was not a regulation and did not require formal rulemaking procedures); *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 759, n.17 (2010) (administrative agency may adopt policies through adjudication as well as through rulemaking).

Moreover, the Committee has reviewed and interpreted Chapter 40B regulations or guidelines put in place by DHCD to ensure they are consistent with the statute. *See, e.g., Matter of Hingham and River Stone, LLC,* No. 2016-05, slip op. at 4 (Mass. Housing Appeals Comm. Interlocutory Decision Oct. 31, 2017), and cases cited. The Committee has often recognized that, while it is appropriate to give deference to a policy articulated by DHCD, the Committee would not be bound by such a policy if it were in violation of statutory provisions or statutory intent. *Id.,* slip op. at 7, n.9, and cases cited. As the Committee may adopt policies through adjudication, policies adopted through interpretation of the Guidelines are likewise subject to refinement through the Committee's adjudicatory process.

Guidelines, however, as the Committee has stated many times over the years, do not have the force of law. *See, e.g., Matter of Arlington and Arlington Land Realty, LLC,* No. 2016-18, slip op. at 6 (Mass. Housing Appeals Comm. Oct 15, 2019), citing *Matter of Braintree and 383 Washington Street,* 2017-05, slip op. at 5 (Mass. Housing Appeals Comm. June 27, 2019); *Matter of Waltham and Alliance Realty Partners*, No. 2016-01, slip op. at 22, n.22 (Mass. Housing Appeals Comm. Interlocutory Decision Feb. 13, 2018); s*ee Town of Northbridge v. Town of Natick*, 394 Mass. 70, 76 (1985) (agency's guidance documents are policy statements without force of law). However, "[g]enerally, in considering statutory and regulatory provisions, [the Committee gives] deference to policy statements issued by DCHD, the state's lead housing agency." *Arlington, supra,* No. 2016-18, slip op. at 6, citing *Braintree, supra,* No. 2017-05, slip op. at 5; *Davis Marcus, supra,* No. 2015-06, slip op. at 4, and cases cited. Moreover, as noted above, 760 CMR 56.03(3)(d) provides that "[e]vidence regarding Statutory *Minima* submitted under 760 CMR 56.03(3) shall comply with any guidelines issued by [DHCD]." Indeed, with regard to DHCD guidelines specifically, both the Supreme Judicial Court and the Committee have observed that the guidelines are to be considered with the Committee's regulations. *See Lunenburg*, 464 Mass. 38, 47 and n.12 (DHCD guidelines are directly relevant to understanding DHCD's regulations, because subsidizing agencies have responsibility to enforce compliance

with provisions of 760 CMR 56.00 and applicable DHCD guidelines). *See* 760 CMR 56.02: *Subsidizing Agency*.

"[A]n administrative agency may use sub-regulatory guidance to 'fill in the details or clear up an ambiguity of an established policy' without resort to formal rulemaking as long as it does not contradict its enabling statute or preexisting regulations." *Genworth Life Ins. Co. v. Commissioner of Ins*., 95 Mass. App. Ct. 392, 396 (2019) (quoting *Massachusetts Gen. Hosp. v. Rate Setting Comm'n*, 371 Mass. 705, 707 (1977)); *accord Boston Retirement Bd. v. Contributory Retirement Appeal Bd*., 441 Mass. 78, 83-84 (2004); *Arthurs v. Board of Registration in Med*., 383 Mass. 299, 313 n.26 (1981) ("Agencies 'intending to fill in the details or clear up an ambiguity of an established policy' may issue interpretation or informational pronouncements without going through the procedures required for the promulgation of a regulation."), quoting *Massachusetts Gen. Hosp*., 371 Mass. 705, 707.

C. Burden of Proof

The Committee's hearing on this issue, like all Committee proceedings, is *de novo*. G. L. c. 40B, § 22; *Waltham, supra,* No. 2016-01, slip op. at 5. The Board carries the "burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs[.]" 760 CMR 56.03(8)(a). It must affirmatively prove that it has satisfied the statutory minimum based on reliable supporting evidence. *Brewster Commons, LLC v. Duxbury*, No. 2010-08, slip op. at 6 (Mass. Housing Appeals Comm. Ruling and Order Extending Comprehensive Permit Dec. 12, 2011); *see Braintree, supra*, No. 2017-05, slip op. at 32; *Davis Marcus, supra*, No. 2015-06, slip op. at 19. South Avenue may introduce evidence to counter the Board's evidence, or it may simply challenge the sufficiently of the Board's case without providing its own contrary evidence. *Waltham*, *supra,* No. 2016-01, slip op. at 5.

D. Methodology

Under the Comprehensive Permit Law, the decision of a board is consistent with local needs as a matter of law when the town has low or moderate income housing on sites comprising 1.5 percent or more of the total land area zoned for residential, commercial, or industrial use...G.L. c. 40B, § 20. *See* 760 CMR 56.03(3). The 1.5 percent threshold, known as the general land area minimum percent, is calculated by dividing the area of sites of affordable housing that are eligible to be inventoried on the SHI (the numerator) by the total land area in the municipality that is zoned for the residential, commercial, or industrial use (the denominator).

760 CMR 56.03(3)(b); *Waltham, supra*, No. 2016-01, slip op. at 4-5; *Davis Marcus, supra*, No. 2015-06, slip op. at 2-3.

In this case, the Board contends the Town satisfies the 1.5 percent general land area minimum threshold, and argues, based on its calculations, that Weston has achieved a general land area percent of 1.637%. *See* Board brief p. 2; Board Initial Pleading, Exh. 1. South Avenue argues the Board's methodology and calculations are flawed and therefore the Town has not met the statutory minimum.

Although the parties' experts both used maps and data drawn from MassGIS, they based their calculations on different methodologies. The Board submitted two alternate calculations based on different methodologies. For the denominator, the Board's expert, Town Planner Imaikalini Aiu, proffered two calculations: one using a methodology based on his interpretation of G.L. c. 40B, § 20 and 760 CMR 56.03(3)(b) (Calculation 1, *see* Exh. 5; 5A; and one using the GLAM Guidelines (Calculation 2). *See* Exh. 5; 5B. For the numerator, Mr. Aiu also presented a Calculation 1 based on his interpretation of the statute and regulation, and a Calculation 2 based on his interpretation of the GLAM Guidelines. The Board contends Calculation 1 is the correct calculation.

South Avenue's expert, Nels Nelson, provided one set of calculations, which he stated was based upon the GLAM Guidelines' prescribed methodology.

E. The Denominator

The comprehensive permit regulations provide that the denominator in our calculation is the "total land area," inclusive and exclusive of certain categories of land. 760 CMR 56.03(3)(b). Total land area includes: "all district in which any residential, commercial, or industrial use is permitted, regardless of how such district is designated by name in the [municipality's] zoning bylaw," and "all unzoned land in which any residential, commercial, or industrial use is permitted." 760 CMR 56.03(3)(b)1–2. Total land area excludes the following: (1) land owned by the United States, the Commonwealth of Massachusetts or any political subdivisions, and the Department of Conservation and Recreation;[5] (2) any land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the

[5] The denominator, however, "shall include any land owned by a housing authority and containing SHI Eligible Housing." 760 CMR 560(3)(b)3.

Department of Environmental Protection (DEP) pursuant to G.L. c. 131, § 40A; (3) any water bodies; and (4) 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 se are completely prohibited. 760 CMR 56.03(3)(b)3-6.

1. The Board's Calculation

The Board submitted its calculation of the denominator through the testimony of the Weston Town Planner Mr. Aiu. Exhs. 5, 6. In both of his calculations, Mr. Aiu determined that the "total zoned land area" is 11,092 acres. Tr. 40; Exhs. 5, ¶ 22; 5-1A.[6]

Mr. Aiu testified he then made the following adjustments pursuant 760 CMR 56.03(3)(b), using the Town's Geographic Information System (GIS). Exh. 5, ¶ 23; Tr. 22. Using Calculation 1, Mr. Aiu determined that 4,202.56 acres should be excluded pursuant to the exclusions provided in 760 CMR 56.03(3)(b)(3). Exh. 5, ¶ 23. He excluded "water bodies, municipal or state-owned land including land owned by the City of Cambridge, and public rights of way," as well as land owned by the West Forest and Trail Association and 115.41 acres of private rights of way. Tr. 22; Exh. 6, ¶ 4. The exclusions he applied totaled 4,202.56 acres.[7] His subtraction of "excluded land" totaling 4,202.56 from his 11,092 acres of total zoned land area resulted in what he characterized as "developable or general land area" totaling 6,889.44 acres. Exhs. 5, ¶ 24; 6, ¶ 18; Tr. 39-42. This figure he used as the denominator.

2. Challenges to Board Denominator Exclusions

South Avenue challenges both the methodology used by Mr. Aiu that did not adhere to the GLAM Guidelines and his resulting denominator. Mr. Nelson reviewed Mr. Aiu's testimony and exhibits, and offered a separate calculation of the general land area minimum in accordance with the GLAM Guidelines.

South Avenue also argues Mr. Aiu's calculations lacked factual support by not providing detailed information about what is and is not included in the denominator calculations, nor did they reference the electronic GIS files required under the GLAM Guidelines. South Avenue also argues that Mr. Aiu improperly excluded both private roadways and land owned by a private

---

[6] South Avenue's expert witness, Nels Nelson, agreed with Mr. Aiu that the total land area in Weston, before making any exclusions, is 11,092 acres. Tr. 40; Exh. 7, ¶ 17.

[7] Although he stated in his pre-filed direct that he had not excluded acreage for private rights of way, in his pre-filed rebuttal testimony he acknowledged that that acreage had been removed.

nonprofit from the denominator. *See* South Avenue Motion for Directed Decision, pp. 5-6; Exh. 7, ¶¶ 13-16.

a. Weston Forest and Trail Association Land

Mr. Aiu excluded parcels of conservation land owned by the Weston Forest and Trail Association (WFTA), each parcel deed-restricted for conservation purposes in perpetuity. Tr. 156-157. He concluded those parcels should be excluded pursuant to 760 CMR 56.03(3)(b)(6), which provides that "[t]otal 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." He stated that he excluded these parcels because, based on his understanding of G. L. c. 40B, land that is "basically unbuildable," or reserved for no building, can be excluded. Tr. 23. While the prohibition on development of the WFTA parcels is imposed through a deed restriction, and not through the Town's zoning bylaw, the Board argues the restriction imposes stronger prohibitions than zoning regulations. It argues the deed restrictions render residential, commercial, or industrial use impermissible in perpetuity, while zoning regulations could be amended in the future and allow for such uses. It further argues the deed restrictions are not subject to variances, which are expressly provided for in the zoning bylaw. The Board therefore argues the WFTA parcels should be treated in the same manner as parcels subject to zoning restrictions that completely prohibit on residential, commercial, or industrial use.[8] Board brief, p. 7.

While Mr. Aiu did not provide a specific acreage amount for the WFTA parcels, he provided maps of Weston showing certain categories of excluded parcels as exhibits to his pre-filed testimony. Exh. 5-1. Mr. Nelson testified that, based on a review of page 3 of Exhibit 1A to Mr. Aiu's testimony, showing "Private Parcels Exclusion," he determined that Mr. Aiu excluded a total of 175.9 acres of land owned by the WFTA. Exh. 7, ¶ 14.[9] Mr. Nelson therefore added 175.9 acres to the denominator, reflecting those WFTA parcels. Exh. 7C.

---

[8] The Board attached to its post hearing brief six documents that are copies of individual conservation restrictions entered into by the Weston Forest and Trail Association. These are not part of the evidentiary record.

[9] Mr. Aiu disagreed with Mr. Nelson's assertion that he did not provide "detailed information" supporting his specific exclusions from the denominator calculation," *see* Exh. 7, ¶ 11, and stated that he provided maps as recommended by DHCD with sufficient detail for Mr. Nelson to conduct analysis and reach conclusions regarding his calculations. Exh. 6, ¶ 3.

However, the Weston Forest and Trails Association is not a public body. Exh. 7, ¶ 14. It is a private non-profit organization that is staffed and aided by the Town. Tr. 23; Exh. 7, ¶ 14. When the WFTA parcels are added to the denominator, it equals 7,032 acres. Exh. 7, ¶ 18. The Board has not introduced evidence to establish that these parcels are a "land area all residential, commercial, and industrial development have been completely prohibited … pursuant to M.G.L. c.131, § 40A. 760 CMR 56.03(3)(b)4. We have previously ruled that parcels subject to private conservation restrictions similar to the WFTA deed restrictions, are not excluded from the denominator. *See Arlington*, *supra,* No. 2016-08, slip op. at 16, citing *Braintree*, *supra*, No. 2017-05, slip op. at 9-10. *Matter of Newton and Dinosaur Rowe, LLC*, No. 2015-01, slip op. at 2 (Mass. Housing Appeals Comm. Interlocutory Decision Regarding Safe Harbor June 26, 2015); *Matter of Newton and Marcus Lang Investments LLC*, No. 2015-02, slip op. at 4 (Mass. Housing Appeals Comm. Interlocutory Decision Regarding Safe Harbor June 26, 2015). Nor has the Board demonstrated that the parcel is in an open space or similar zone that completely prohibits residential, commercial or industrial use. 760 CMR 56.03(3)(b)6. Both *Dinosaur Rowe* and *Marcus Lang* involved land restricted under G.L. c. 61B for open space and recreational land, which we found was *not* to be excluded from the denominator calculation, noting that the "[t]he focus of the general land area minimum is not on the power to override zoning, but rather on zones in which development is completely prohibited." *Dinosaur Rowe*, slip op. at 4; *Marcus Lang*, slip op. at 4. In *Braintree*, we ruled that land subjected to a recorded deed restriction restricting commercial, residential, or industrial use should not be excluded from the denominator because "it was not an open space zone where residential, commercial, and industrial uses are completely prohibited. *See Braintree*, No. 2017-05, *supra*, slip op. at 9, citing 650 CMR 56.03(3)(b)6. Exclusions of restricted land from the denominator are applicable only to land restricted pursuant to G.L. c. 131, § 40A. The GLAM Guidelines confirm our interpretation of the regulations. They "make clear that '[n]on-zoning restrictions such as conservation restrictions, easements, Chapter 61 land, or *deed restrictions* do not qualify as an eligible rationale for exclusion' from the denominator." *Braintree*, slip op. at 10, citing GLAM Guidelines (2018), App. A, § 2.4 (italics added).

Similarly, while the parcels owned by the Weston Forest and Trail Association may be restricted by deed, neither G.L. c. 40B nor 760 CMR 56.00 suggest they should be excluded from the total land area. The Board failed to introduce sufficient evidence to support its claim

that this acreage should be excluded from the denominator. Accordingly, we find the 175.9 parcels of WFTA property should be included in the denominator calculation and not deducted.

b. Private Rights of Way

As noted above, Mr. Aiu excluded 115.41 acres of private rights of way from the denominator. Exh. 6, ¶ 4.[10] Mr. Nelson criticized this exclusion, stating G.L. c. 40B, § 20, 760 CMR 56.00, and the GLAM Guidelines do not support the exclusion of private rights of way from the denominator. Exh. 7, ¶ 15. Using MassGIS, he calculated there are 112.7337 acres of private rights of way in the Town that must be added back to the denominator. *Id*., Exh. 7D.

The Board has not produced any Town bylaws, nor has it introduced any evidence that the 115.41 acres of private rights of way are in unzoned land; that they have been accepted by the Planning Board as public ways, or that any "residential, commercial, or industrial use" is prohibited on those areas under 760 CMR 56.03(3)(b)2. Because the Board has not justified the exclusion of any private rights of way acreage, the 115.41 acres it removed must be included in the denominator.[11] *See Davis Marcus,* No. 2015-06, *supra*, slip op. at 9.

3. The Board's Denominator Calculation Using the GLAM Guidelines

Mr. Aiu's Calculation 2 followed the methodology provided in the GLAM Guidelines. Exh. 5, ¶ 32. When following the GLAM Guidelines, Mr. Aiu determined that the denominator totaled 6,905.80 acres. Exh. 5, 5B. This is approximately 125 acres less than Mr. Nelson's denominator calculation using the GLAM Guidelines. Mr. Aiu stated that his exclusion of the WFTA parcels from the denominator accounts for the only difference between his Calculation 2 denominator and that of Mr. Nelson. Tr. 44. Based on this calculation, Mr. Aiu stated that the Town has low or moderate income housing on 0.46 percent of the land zoned for residential,

---

[10] At the hearing, Mr. Aiu corrected his pre-filed rebuttal testimony, by striking Exh. A attached to his testimony, and the third sentence of paragraph 4. Tr. 11-14. He also inserted the word "not" into the second sentence of paragraph 4 of his rebuttal testimony, so that the sentence now reads: "115.41 acres of private rights of way were *not* included in the denominator." *See* Exh. 6 (italics added).

[11] Mr. Nelson also challenged the inclusion of certain parcels owned by the Town or by a state agency. Exh. 7, ¶ 16. He identified 3 parcels owned by the Town that appeared to have been included from the denominator: 2 parcels at 0 Ash Street and one parcel at 0 Boston Post Road. Exh. 7, ¶ 16. He also stated that a parcel owned by the Massachusetts Water Resource Authority at 0 Loring Road was improperly included. *Id*. However, Mr. Aiu clarified these were erroneously left on the maps attached to his pre-filed testimony, and were correctly excluded from the denominator. Exh. 6, ¶ 17. Accordingly, there does not appear to be any dispute over these four publicly-owned parcels.

commercial, or industrial use, acknowledging that when the GLAM Guidelines are applied, the Town does not meet the 1.5 percent safe harbor threshold requirement. Exh. 5, ¶ 33; Tr. 38, 53.

4. 518 South Avenue's Denominator Calculation

Mr. Nelson calculated the denominator from a total land area starting point of 11,092 acres (specifically, 11.091.56 acres). Exh. 7, ¶ 18. He excluded a total of 4,059.79 acres, representing water bodies, public rights of way, and publicly-owned land without SHI parcels, in accordance with G.L. c. 40B, 760 CMR 56.00, and the GLAM Guidelines.

Water Bodies	353.66 acres
Public Rights of Way	926.28 acres
Publicly-Owned Land without SHI Parcels	3,315.05 acres

Exh. 7, ¶ 18.[12] His calculations resulted in a denominator of 7,031.77 acres. *Id.*; South Avenue brief, pp. 3-4.

5. Denominator Conclusion

The Committee's calculation of the denominator, as determined by the acreage amounts and exclusions we accept, is below. Asterisks denote the exclusions that are contested between the parties.

[12] Mr. Nelson noted that he excluded those categories of parcels from the total land area using the "Merge" feature in GIS, which resulted in a total amount that is slightly less than if each category were deducted individually (an estimated 4,622.71 acres), because it automatically adjusts for any overlapping areas. Exh. 7, ¶ 18.

Category	Board Calculation	Board Calculation using GLAM Guidelines	South Avenue Calculation	Accepted by Committee
Total Land Area Subject to Exclusions	**11,092**		**11,091.56**	**11,092**
Excluded Categories	**11,092**		**11,091.56**	**11,092**
Public Rights of Way	926.28		926.28	926.28
*Private Rights of Way	112.73		0	0
*WFTA Parcels	175.9		0	0
Water Bodies	353.66		353.56	353.66
Publicly-Owned Land without SHI Parcels	3,315.05		3,315.05	3,315.05
Merged Total of Exclusions[13]	4202.56		4059.79	4059.79
Denominator	**6,208**	**6905.8**	**7031.77**	**7031.77**

Exhs. 7, ¶ 18; 5, ¶¶ 19-31. We therefore determine the denominator to be a total of 7,031.77 acres.

F. The Numerator

To determine the numerator, that portion of the municipality where low or moderate income housing exists, 760 CMR 56.03(3)(b) states:

> Only sites of SHI Eligible Housing units inventoried by [DHCD] or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, shall be included toward the [1.5] % 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).

See G.L. c. 40B, § 20. The starting point for calculating the area of SHI Eligible Housing is a determination of the acreage of the buildings, and impervious and landscaped areas directly associated with the SHI eligible housing units. The next step is to determine the composition of each multi-unit development. *See Waltham*, *supra*, No. 2016-01, slip op. at 27.

---

[13] The merged total eliminates duplications in the categories.

To calculate the area of SHI eligible housing, the countable units on the SHI must be identified before calculating the acreage for the proportion of the site area that is occupied by SHI eligible housing units, including impervious and landscaped areas directly associated with those units. 760 CMR 56.03(3)(b). The GLAM Guidelines, through the definitions of "Actively Maintained" and "Directly Associated Area," provide guidance in determining the directly associated impervious and landscaped areas. Exh. 7B, p. 3.

The countable units are determined based on the composition of the housing development. For rental housing developments with at least 25% of the units reserved for low or moderate income housing, DHCD counts all units within the development on the SHI for the city or town. Exh. 7B, 40B Guidelines, II.A.2.b.1; *see Braintree*, No. 2017-05, slip op. at 11, citing *Davis Marcus*, *supra,* No. 2015-06, slip op. at 11-12; *Matter of Stoneham and Weiss Farm Apartments, LLC*, No. 2014-10, slip op. at 7 (Mass Housing Appeals Comm. June 26, 2015); *Arbor Hill Holdings Ltd. P'ship v. Weymouth,* No. 2009-02, slip op. at 5, and n.7 (Mass. Housing Appeals Comm. Order of Dismissal Sept. 24, 2003). Thus, for purposes of the land area minimum, all such units count as SHI Eligible Housing units for the purposes of determining land occupied by the buildings and impervious and landscaped areas directly associated with the SHI eligible units.

For homeownership projects, and rental projects with less than 25 percent of the units reserved for low or moderate income housing, DHCD counts only the low or moderate income units on the municipality's SHI. Exh. 7B, 40B Guidelines, II.A.2.a.2.c. Consequently, for these two categories of development, land area is measured as a percentage of the directly associated area of the property equal to the percentage of all units in the development that are SHI eligible units. *See* Exh. 7B, App. A, § 3.4, p. 12; *see also Braintree, supra,* No. 2017-05, slip op. at 11; *Arbor Hill*, *supra,* No. 2009-02, slip op. at 5 and n.7; *Cloverleaf Apartments, LLC v. Natick*, No. 2001-21, slip op. at 3-5 (Mass. Housing Appeals Comm. Mar. 4, 2002).[14] For a mixed-used development including residential and commercial uses, SHI land area is subject to an additional rule. It is the product of SHI eligible housing land area and the percent of residential use, based on the ratio of floor space dedicated to residential use to total floor space of the project's

[14] Where affordable units are interspersed among market rate units, the directly associated area can be calculated for the entire development, and then prorated corresponding to the percentage of units in the development that are SHI eligible units. *See* Exh. 7B, App. A, § 3.4; *Braintree*, No. 2017-05, slip op. at 11, n.10 and cases cited.

buildings. *Braintree, supra,* No. 2017-05, slip op. at 11; *Waltham*, *supra*, No. 2016-01, slip op. at 27; *Dinosaur Rowe*, supra, No. 2015-02, slip op. at 6. The parties dispute, among other things, the application of the provisions concerning landscaped areas directly associated with affordable units and parcels with ownership developments with at least 25 percent of affordable units.

1. Acreage is Proportional to Percentage of SHI Units

Our longstanding interpretation of the statute and regulations, consistent with the 40B Guidelines and the GLAM Guidelines, is that for home ownership projects, DHCD counts only low or moderate income units in the municipality's SHI inventory. Thus, the numerator consists only of land directly associated with those units, as specified in 760 CMR 56.03(3)(b) ("[f]or 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")). *Davis Marcus, supra*, No. 2015-06, slip op. at 11-12.

It is an accepted principle that an administrative agency "may adopt policies through adjudication as well as through rulemaking" and that "[p]olicies announced in adjudicatory proceedings may serve as precedents for future cases." *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 760 n.17 (2010), quoting from *Arthurs v. Board of Registration in Med.*, 383 Mass. 299, 312–313 (1981). The 40B Guidelines provide that in rental developments, if 25 percent or more units are designated as low and moderate income housing units, then all of the units in the development are included on the SHI; if fewer than 25 percent, then only the units that meet requirements under Chapter 40B and the 40B Guidelines are included. Exh. B. to Exh. 7, § A.2.b. In decisions regarding general land area safe harbor appeals, we have applied and interpreted Chapter 40B and the comprehensive permit regulations regarding the treatment of categories of land area with respect to both the numerator and the denominator. On occasion we must address issues not expressly covered by statute or regulation. *See Davis Marcus, supra*, No. 2015-06, slip op. at 9-10 (discussing requested exclusions of land area excluded for railroad rights of way and private roadways).

These precedents and the 40B Guidelines make clear that the only SHI eligible units in ownership developments are the affordable units. Exh. B to Exh. 7, at § II.A.2.c. Therefore, consistent with 760 CMR 56.03(3)(b), the site area directly associated with the SHI eligible units alone is countable as SHI eligible area.

2. The Board's Calculation of the Numerator

The Board submitted a figure calculating the total acreage of all parcels containing Weston's SHI Eligible Housing properties. It argues that under the statute and regulations, the numerator used to determine whether the Town has achieved the 1.5 percent statutory minimum is the "total acreage of sites containing SHI Eligible housing units," meaning the entire parcels on which the developments are located. Board brief p. 8, citing G.L. c. 40B, § 20 and 760 CMR 56.03(3)(b). Mr. Aiu used the Town's GIS to inventory the acreage on which qualifying affordable housing exists to derive a total acreage of 113.2 acres. Exhs. 6, ¶ 27; 6A; 6B; 7, ¶ 20. His numerator includes the developments with disputed acreage listed below. The numerator calculated by Mr. Aiu divided by his denominator (113.2 acres divided by 6,889.44 acres) resulted in 1.64 percent of developable or general land area in Weston that is acreage upon which qualifying affordable housing exists. Mr. Aiu again performed two calculations, using a different methodology for each one, including one in which he did not follow the GLAM Guidelines. His first calculation (Calculation 1) did not take into account the areas of a parcel that constitute directly associated area, instead including the entirety of some parcels as directly associated without making proportional adjustments. Tr. 34-35, 46-53. He also did not proportionally adjust his numerator calculations to reflect the percentage of affordable units for ownership projects and for rental projects having less than 25 percent affordable units, where applicable. Tr. 18, 32, 34-45.

South Avenue argues the Board included excess SHI acreage for portions of sites that contained undisturbed and naturally vegetated areas. Because the regulations do not define the term "landscaped area," the Committee has adopted a "plain language" interpretation of the term. *See Davis Marcus, supra*, No. 2015-06, slip op. at 14. Looking to a dictionary definition, the Committee determined that the term "landscaped" suggests:

> landscaped areas associated with SHI units are altered areas, including gardens, lawns, and other areas that have been improved or are maintained specifically for the benefit of the residents of the affordable units. Unaltered wooded areas do not fall within the portion of the site to be designated as SHI area, unless the tree canopy is above an area shown to be used by the residents.

Davis Marcus, supra, No. 2015-06, slip op. at 14. Additionally, the GLAM Guidelines specifically address the term "Directly Associated Area," defining it 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 that may be included in the SHI-Eligible Area." Exh. B to Exh. 7, p. 3. The GLAM Guidelines also state that "[f]eatures that generally will not be considered Directly Associated include: … 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…." *Id*. Remote, non-actively maintained areas are not landscaping principally for the benefit of the development's residents. Based on our consideration of the regulation and the GLAM Guidelines, we only include non-actively maintained wooded or vegetated areas as SHI eligible area if they meet local yard dimensions and are within 50 feet of building footprints. *Braintree*, *supra,* No. 2017-05, slip op. at 16.

The Board argues the Committee's definition of "landscaped area" is unduly narrow and that G.L. c. 40B requires a more expansive understanding of the term. It argues that the term should include natural features that are part of a project's site design and function and that enhance the site. It points to the testimony of its expert, Mr. Aiu, who stated that wooded areas provide buffers and screening from roadways, other properties, and integrate projects into Weston's town character. Exh. 6, ¶ 6; Tr. 32. The Board suggests that because "better site design and building design in relation to the surroundings, or [preservation of] open spaces," are expressly referenced in the definition of "consistent with local concerns," *see* G.L. c. 40B, § 20, a broader interpretation of landscaped areas is warranted to reflect that sign and building design are "prime concerns" of the statute. Board brief p. 11. Specifically, the Board states that "[s]ite and building design entails the use of existing features of the site, including natural features, as *part of* the project design. The preservation of natural features that enhance the project and provide benefits to its residents are as integral to the design – including the landscape design – as any areas in which the 'plant cover' has been altered." Board brief p. 12. Accordingly, in the Board's view, Mr. Aiu properly included in his numerator calculation the unmaintained wooded areas of certain parcels, because such areas should be considered part of the landscaping and essential to the development. Tr. 44-47.

Similarly, the Board argues that wetlands serve an important ecological function to residential developments by filtering and absorbing storm water and maintaining water quality, and are an integral component of non-actively maintained wooded areas. Exh. 6, ¶ 7. Mr. Aiu testified that wetlands serve integral ecological, scenic, and aesthetic functions for residential developments, providing passive recreation opportunities and visual barriers. He also stated

wetlands maintain community character. Exh. 6, ¶ 7, Tr. 51. The Board argues that by excluding wetlands and other natural areas from the numerator under 760 CMR 56.03(7) creates an "incentive to spread out development over a parcel, clear-cut, and add a few plantings, so that the entirety of the lot would count as 'directly associated area.'"

The Board further argues that the inclusion of wetlands and natural areas into the calculation of the numerator promotes "equity" in affordable housing development, in that the benefits of "sensible ecological design" would not be reserved only for market rate housing developments that could afford to implement larger lots. Exh. 6, ¶ 7; Tr. 51; Board brief, p. 12. Mr. Aiu testified that by excluding wetlands from directly associated areas that may be included in the numerator, 760 CMR 56.03 allows a development that proposes to clear cut a lot entirely to "get 'credit' as 'directly associated' land but a proposed development that attempts to cluster or otherwise preserve land abutting wetland resources would not be so 'credited.'" Exh. 6, ¶ 7.

South Avenue argues that the value of the unmaintained wooded areas and wetlands that Mr. Aiu included in his calculations is irrelevant to whether such areas are to be included as land occupied by SHI Eligible housing, for purposes of determining whether a denial of a low or moderate income housing development is "consistent with local needs." South Avenue brief p. 15.

We agree with South Avenue that the comprehensive permit regulations and the GLAM Guidelines dictate the necessary adjustments for impervious and landscaped areas directly associated with SHI Eligible Housing units. As we noted above, wetlands are specifically excluded from the denominator, therefore they must also be excluded from the numerator, which represents a subset of the denominator The Board's argument also presumes that developers design developments to maximize the land area that would be counted as directly associated area. The comprehensive permit law makes clear that these issues are separate. While G.L. c. 40B, § 20 does refer to better site and building design, and preservation of open space, these are references to local concerns that are to be balanced against the need for low and moderate income housing, not to the general land area minimum that is described in the next sentence of the statute. G.L. c. 40B, § 20. The language in 760 CMR 56.03(3)(b) regarding areas directly associated with SHI eligible units does not prevent or discourage developers from including wooded areas and natural features in affordable housing developments. The Board's

interpretation of directly associated area, as applied by Mr. Aiu to the nine developments in this matter with disputed acreage, is addressed in further detail below.

3. Challenges to Witness Testimony

Each party challenges the sufficiency and credibility of the other's witness. Mr. Nelson, expert witness for the developer, testified that Mr. Aiu, the Board's expert witness, failed to properly apply the "Directly Associated Area" provisions of the GLAM Guidelines, and of the Housing Appeals Committee's past decisions. Mr. Nelson reviewed satellite imaging in MassGIS of each SHI property in Weston in order to determine which portions of each property constituted Directly Associated Areas. He also reviewed the Town Zoning Bylaw and public records, including assessors' records and Registry of Deeds records. Mr. Nelson prepared graphics of the adjustments he made to these nine properties using aerial images from the search engine Bing through MassGIS (Exh. 7, ¶ 25).

The Board argues first that Mr. Nelson's knowledge of the properties was limited to what he observed from the street from his car; and secondly, that he had no knowledge of when the aerial satellite photographs were taken. It argues the photographs were not properly authenticated and, because he had no knowledge of the dates or timeframe, they did not provide a sufficient foundation for him on which to base his opinion. Board brief, pp. 21-22.

The Board argues Mr. Nelson never visited the following properties: 680 South Avenue (project site); 15 Jones Road; 126 Viles; 45 Church Street; and 23 Vines Street. Those properties he did visit (on the day before the hearing) he viewed only from his car. Because he did not know the dates of the photographs on which his pre-filed testimony was based, and because he did not personally visit some sites until after submission of his pre-filed testimony, the Board argues he was unable to credibly testify whether the features of the parcel may have changed over time, and his testimony lacks evidentiary value. Additionally, the Board argues he provided no quantitative evidence for his acreage calculations. Board brief, pp. 24-25. The Board cites two cases as part of its challenge to the foundation of Mr. Nelson's testimony. Both cases deal with a layperson testifying as to the value of their personal property, with their testimony being challenged and ruled inadmissible for lacking proper foundation. Board brief, p. 24. South Avenue argues that Mr. Nelson's testimony and calculations complied with the statute, regulations, and GLAM Guidelines. South Avenue reply, p. 8. It alleges his work strictly complies with the GLAM Guidelines, which allow for a calculation to be performed using GIS,

without site visits or personal interviews. *Id*. South Avenue also asserts that Mr. Aiu's testimony suffers from many of the same deficiencies that the Board alleges exist in Mr. Nelson's testimony. For example, South Avenue argues that Mr. Aiu also did not provide evidence on the extent of his visits, if any, to the properties in dispute, and also used aerial images for portions of testimony. *Id*. An expert witness does not need to have inspected a physical location after an event in order to render an opinion at trial. *Melvin v. H.J. Nassar Motor Co.*, 355 Mass. 692, 693 (1969) (expert testimony on condition of car he viewed 18 months after purchase was admitted at judge's discretion, *citing Commonwealth v. Bellino*, 320 Mass. 635, 638; *Commonwealth v. Greineder*, 464 Mass. 580, 584 (2013) (expert can have no personal knowledge of case and obtain facts in connection with matter from parties involved; this can be explored by opposing party on cross-examination). If this is challenged as an issue, it goes to the weight the trier of fact gives to the testimony and not its admissibility. *Wilson v. Boston Redev. Auth.,* 371 Mass. 841, 843 (1977) (fact that expert witness saw premises three months after accident and expressed opinion based on those observations, goes to weight, not admissibility, of testimony); *Commonwealth v. Siano*, 4 Mass. App. Ct. 245, 249 (1976). South Avenue established the proper foundation for Mr. Nelson's expert testimony. The Board had the opportunity to challenge the credibility and sufficiency of his testimony on cross examination. Both parties' witnesses appear not to have visually inspected the wooded areas on the SHI Eligible Housing sites in any detail. We note, further, that the Board has the burden of proof in this matter, and provided no information on whether Mr. Aiu personally visited the sites in dispute in order to calculate his adjustments to the acreage he included in his analysis. Accordingly, we afford the witnesses' testimony the weight we deem appropriate.[15]

The Board also argued the aerial photographs on which Mr. Nelson relied were not properly authenticated, because he could not provide the date on which they were taken. Board brief, pp. 21-22. However, Mr. Nelson testified that he reviewed the satellite imaging of the properties using MassGIS, in accordance with the statute, regulations, and GLAM Guidelines. Exh. 7, ¶ 21. The GLAM Guidelines require submittals calculating the general land area minimum to use parcel and assessor data consistent with MassGIS standards. Exh 7B, at App. A.

---

[15] *See, e.g., Aiello v. Harnais,* 2015 WL 4070385, at *n.22, Mass. Land Ct. (*rev'd on other grounds*), in which a party challenged testimony of expert witness who did not personally walk the property site at issue, but viewed it from a car, as lacking adequate personal knowledge. The trial court denied the motion to strike, stating it would give the testimony the weight it deemed appropriate.

Indeed, courts have generally taken judicial notice of facts gleaned from internet mapping tools such as Google Maps. *See Commonwealth v. Warren*, 87 Mass. App. Ct. 476, n.9 (2015) (remanded on other grounds). Accordingly, we find no error in Mr. Nelson's reliance on aerial satellite photographs when performing his calculations.

4. Developments with Disputed Acreage

Twelve properties are listed on the SHI detail list for the Town of Weston. Exh. 1. Mr. Nelson noted he and Mr. Aiu agree on the directly associated acreage under the regulations and the GLAM Guidelines for three properties: 126 Viles Street (0.221); 680 South Avenue (0.69); and Jones Road (0.281), totaling 1.192 acres. Exh. 6, Att. B; Exh. 7, ¶ 22; Tr. 60-62. The remaining nine contested properties are: Brooks School Apartments; Dickson Meadow; Winter Gardens; Merriam Village; 809-811 Boston Post Road; Church Street; Highland Meadow; Pine Street; and Warren Avenue. Exh. 6, ¶¶ 8-16. Mr. Aiu performed his calculations in accordance with his interpretation of the statute and regulations. Mr. Nelson performed his calculation adhering to the procedure outlined in the GLAM Guidelines and using MassGIS.

Brooks School Apartments. Brooks School Apartments is a 75-unit rental development, of which 51 units are SHI eligible. Exh B. to Exh. 5.The Board argues that the SHI area for Brooks School Apartments to be included in the numerator is 16.55 acres. *See* Exh. 5. Att. B. Mr. Aiu testified that the regulatory wetlands and unmaintained wooded areas on the northeastern portion of the site provide a visual and sound buffer from Route 20, a thoroughfare through the Town, and the wooded areas along the eastern edges of the side provide a visual and nighttime glare buffer to the adjacent residences. Exh. 6, ¶ 8; Tr. 47-48. He testified that the unmaintained wooded areas also provide protection to a stream flowing through the area, providing a storm water buffer. Tr. 47. He considered the wooded area as mitigating the "nuisance qualities of the roadway" and "mitigat[ing] the storm water runoff." Tr. 47. He testified that the soccer fields "provid[e] a shared spaced for the project to integrate with the community at large" and should not be excluded from the calculation of the numerator. Exh. 6, ¶ 8. Accordingly, he did not make adjustments to the total area of the site, resulting in a calculation of 16.55 acres. Exh. 6, ¶ 8.[16] When purporting to follow the GLAM Guidelines, Mr. Aiu determined the SHI area of Brook

[16] Mr. Aiu does not state the total acreage of the Brooks School Apartments site, but counts 16.55 acres of it in his calculations Exh. 5, ¶ Exh 6,

School Apartments to be 4.08. Exh. 5, Att. B. However, his testimony does not describe how or if he made any adjustments under the GLAM Guidelines.

Mr. Nelson testified that the SHI area eligible for inclusion in the numerator for Brook School Apartments was 5.080 acres, out of a total of 16.91782 acres. Exh. 7, ¶ 23, Exh. F. He excluded the wetlands and non-actively maintained wooded areas along the northeastern, western, and eastern edges of the site, together with a soccer field. Exh. 7, ¶ 25; Tr. 120-121. He testified that, applying the GLAM Guidelines, he prepared graphics of the adjustments he made to the site, showing the Directly Associated Area of the site. *Id.*; Att. F. to Exh. 7. Although Mr. Aiu stated he followed the GLAM Guidelines when performing his second calculation of the numerator, his determination that 4.08 acres were eligible was unsupported by evidence or detail on how he reached that number and any requisite adjustments he made. Accordingly, the Board has failed to prove that 4.08 acres are eligible for inclusion. The developer has agreed to the amount of 5.080 acres, so we accept 5.080 acres of Brook School Apartments as eligible for inclusion in the numerator.

Dickson Meadows. Dickson Meadows is an ownership project. Mr. Aiu testified that the unmaintained wooded areas along the perimeter provide an appropriate edge landscape and buffer to adjacent properties, the trail easement along Highland Meadows, and to Highland Road, and that the interior wooded areas provide landscaping and a buffer that adheres to the character of the Town. Exh. 6, ¶ 9; Tr. 50. He stated he included these areas because they represent effective planning and site design, consistent with his interpretation of the statute and regulations. He also stated that Livermore Lane, a private road, should be included as it was included in the denominator. He also made no adjustments to reduce the acreage included to reflect the corresponding percentage of affordable units. Exh. 6, ¶ 9; Tr. 50; Board brief, p. 15. Mr. Nelson excluded wooded areas that he stated were not actively maintained and also proportionately reduced the directly associated area based on the percentage of affordable units. Exh. 7, ¶ 26.

As noted above, we count only low or moderate income units for the Town's SHI. *Braintree, supra*, No. 2017-05, slip op. at 13. Therefore, we include in the numerator only the acreage directly associated with those units, as specified in 760 CMR 56.03(3)(b). *Braintree, slip op. at 13*, citing *Davis Marcus*, supra, No. 2015-06, slip op. at 11-12. Although Mr. Aiu asserted that he followed the GLAM Guidelines for his Calculation 2 regarding the numerator, his

determination that 3.40 acres were eligible was unsupported by evidence or detail on how he reached that number and any requisite adjustments he made. His testimony did not provide a clear analysis or describe the steps involved in calculating his adjustments.

The Board has failed to prove that 3.40 acres are eligible for inclusion. Mr. Nelson has agreed to the amount of 2.801 acres, so we will accept 2.801 as acres eligible for inclusion in the numerator.

Winter Gardens. Winter Gardens is an ownership project. Mr. Aiu calculated that 9.27 acres were SHI eligible for inclusion in the numerator when following his interpretation of the statute and regulations. Exhs. 5, Att. 1A; 6, ¶ 10. He included unmaintained wooded areas that he deemed were part of "appropriate landscape screening" and buffering. Exh. 6, ¶ 10. When purporting to following the GLAM Guidelines, he determined that 0.76 acres were eligible for inclusion in the numerator. Exh. B to Exh. 5. However his testimony does not explain how or if he made any adjustments, including whether he made the proportional adjustment based on the percentage of affordable units.

Mr. Nelson calculated 1.099 acres were eligible for inclusion. Exh. 7, ¶ 23. He excluded non-actively maintained wooded areas and reduced the directly associated area in proportion to the percentage of affordable units on the site. Exh. 7, ¶ 27. As with Dickson Meadows, we agree with Mr. Nelson that the eligible area must be reduced proportionally and that non-actively maintained wooded areas are not directly associated areas. The Board has failed to prove that 9.27 acres are eligible for inclusion. Mr. Nelson agreed that 1.099 acres are eligible, so we accept 1.099 as acres eligible for inclusion in the numerator.

Merriam Village. Merriam Village is a rental project, in which all 62 units are low or moderate income housing units. Mr. Aiu included the entirety of this parcel, or 15.56 acres, in the numerator because he believed the wooded areas provided buffer areas and a landscape edge for the property. Exh. B to Exh. 5; Exh. 6, ¶ 11. He also determined that town trails running through the site provide passive recreation and connectivity to community gardens, supporting his determination that the entire site is eligible for inclusion. *Id*. Based on his calculation in accordance with the GLAM Guidelines, he determined that 7.69 acres were eligible for inclusion. Exh. B to Exh. 5. However, he did not provide further testimony on what, if any, adjustments he made under the GLAM Guidelines.

Mr. Nelson excluded wooded areas that are not actively maintained when making his calculations, in accordance with the GLAM Guidelines. Exh. 7, ¶ 23. Mr. Aiu did not provide sufficient testimony on his calculations, under both his methodology and under the GLAM Guidelines. He improperly included town trails as directly associated land, but provided no evidence demonstrating that the trails primarily serve the residents of the Merriam Village property. He included wooded areas and a landscaped edge around the property as directly associated area without providing sufficient evidence and support that those areas are actively maintained. The Board has failed to prove that either 15.56 acres, or 7.69 acres, depending on the methodology used, are eligible for inclusion. Mr. Nelson has agreed to the amount of 5.757 acres, so we accept 5.757 as acres eligible for inclusion in the numerator.

809-811 Boston Post Road. 809-811 Boston Post Road is an ownership project. Mr. Aiu, for his first calculation based on interpretation of Chapter 40B and the regulations, included the interior portion of the site between the structures, as well as portions to the north of the structures as part of the landscaped area, deeming it appropriate to the Town character. He also included regulatory wetlands restricted by a conservation restriction as part of the project's special permit. When performing his calculation in accordance with the GLAM Guidelines, Mr. Aiu determined that 0.68 acres were eligible for inclusion. Exhs. 5, 5B; 6, ¶ 12. He did not specify what, if any, adjustments he made, and it is unclear if he made proportional adjustments for the percentage of affordable units.

Mr. Nelson calculated the SHI area eligible for inclusion in the numerator to be 0.287 acres. He excluded the wetlands and non-actively maintained wooded areas, and also proportionately reduced the directly associated area based on the number of units. Exh. 7, ¶ 29. Mr. Aiu did not provide sufficient testimony on his calculation under the GLAM Guidelines. He improperly included regulatory wetlands and unmaintained wooded areas as directly associated areas, contravening 760 CMR 56.03(3)(b)4, and did not adjust his calculation based on the percentage of affordable units at the property. Accordingly, the Board has failed to prove that 0.68 acres are eligible for inclusion. Developer has agreed to amount of 0.27 acres, so we accept 0.27 as acres eligible for inclusion in the numerator.

Church Street. Church Street is a rental project consisting of one low or moderate income housing unit. For Mr. Aiu's Calculation 1, based on his interpretation of the statute and regulations, he included the non-actively maintained wooded areas along the northeast and

southwest of the property, regulatory wetlands, wood areas at the rear of the property, on the basis that they buffer the adjacent residence, and provided passive recreational opportunities and connection to a larger trail network nearby. Exh. 6, ¶ 13. He determined that these inclusions are required because "consistency with local needs" mandates that subsidized and unsubsidized housing be subject to the same standards, and the recreational opportunities and connection to trails are common amenities in market rate projects. *Id.*; Board brief, p. 17. He calculated that 1.07 acres were eligible for inclusion. Exh. B. to Exh. 5. When purporting to follow the GLAM Guidelines, Mr. Aiu determined that 0.41 acres were eligible for inclusion in the numerator. Exh. B to Exh. 5.

Mr. Nelson determined the area eligible for inclusion in the numerator to be 0.288 acres. Consistent with 760 CMR 56.03(3)(b)4, he excluded wetlands. He also stated he excluded wooded areas that are not actively maintained, located to the southeast and west of the structure *Id.*; Exhs. 7, ¶ 23; 7F.

Mr. Aiu did not provide sufficient testimony on his calculation under the GLAM Guidelines. He improperly included wooded areas and landscaped areas as directly associated area without providing sufficient evidence and support that those areas are actively maintained. The Board has failed to prove that either 1.07 or 0.41 acres are eligible for inclusion. Mr. Nelson agrees at least 0.288 acres are eligible for inclusion, so we accept 0 0.288 acres to be included in the numerator.

Highland Meadows. Highland Meadows is an ownership project. Mr. Aiu included unmaintained wooded areas along the site's perimeter because they contain trail easements that were required by the special permit authorizing the project, as "essential buffering" for the surrounding residences. He also included an actively maintained meadow, and wooded areas within the interior areas of the site that are maintained as part of the landscaping. Because all units are entitled to use the common facilities, such as the trails, interior roadways, clubhouse, and tennis courts, he stated that the affordable units benefit from the entirety of the same and therefore all 44.00 acres should be included in the SHI. Exhs. 5; 5B; 6, ¶ 14. He did not appear to make any proportional adjustment for the percentage of affordable units. When calculating according to the GLAM Guidelines, Mr. Aiu determined that 9.06 acres were eligible for inclusion in the numerator. Exh. B to Exh. 5.

Mr. Nelson determined 2.223 acres were eligible for inclusion in the numerator. He excluded the non-actively maintained wooded areas and adjusted the directly associated area calculation in proportion to the percentage of affordable units at the property. Exh. 7, ¶¶ 23, 31.

Mr. Aiu did not provide sufficient testimony on his calculation under the GLAM Guidelines. He improperly included unmaintained wooded areas along the site's perimeter as directly associated land based on trail easements encumbering those areas, but provided no evidence demonstrating that the trails primarily serve the residents of the Highland Meadows property or sufficient evidence and support that those areas are actively maintained. The Board has failed to prove that either 44 acres or 9.06 are eligible for inclusion. Mr. Nelson has agreed that no more than 2.223 acres are eligible, so we accept 2.223 acres to be included in the numerator.

Pine Street. Pine Street is a rental project, in which all 7 units are low or moderate income housing units. When performing the calculation according to his interpretation of the statute and regulations, Mr. Aiu determined that the entirety of the site was directly associated Area. Exh. 6, ¶ 15. He stated the landscaping was appropriate for the character of the Town, representing effective site planning design, particularly along Pine Street where it acted as a buffer from the street, and preserved the streetscape along a designated Scenic Route. *Id*. When purporting to perform a calculation in accordance with the GLAM Guidelines, Mr. Aiu determined that 1.48 acres were eligible for inclusion. Exh. 5B. However, he did not provide further testimony on what, if any, adjustments he made under the GLAM Guidelines.

Mr. Nelson determined 0.688 acres were eligible for inclusion in the numerator. Exh. 7, ¶ 23. He excluded wooded areas that were not actively maintained, in accordance with the GLAM Guidelines. *Id*., ¶ 32.

Mr. Aiu did not provide sufficient testimony on his calculation under the GLAM Guidelines. The Board has failed to prove that either 1.48 acres, or the entire site, are eligible for inclusion. Mr. Nelson agrees to the amount of 0.688 acres, so we accept 0.688 acres to be included in the numerator.

Warren Avenue. Warren Avenue is a rental project, in which all 2 units are low or moderate income housing units. Mr. Aiu concluded the entirety of this parcel, or 8.88 acres, was eligible for inclusion in the numerator because the wooded areas and wetlands provided a natural stormwater buffer and mitigated runoff. Exh. B to Exh. 5; Exh. 6, ¶ 16. He also determined that

the driveway on the eastern side of Warren Avenue is private, and therefore should count as serving the unit, as well Gun Club Lane, which serves the northern cluster of units. *Id*. When performing his calculation in accordance with the GLAM Guidelines, he determined that 3.06 acres were eligible for inclusion. Exh. B to Exh. 5. However, he did not provide further testimony on what, if any, adjustments he made under the GLAM Guidelines.

Mr. Nelson excluded wooded areas that are not actively maintained beyond the maintained areas adjacent to the structures, when making his calculations, as well as regulatory wetlands, in accordance with the GLAM Guidelines. Exh. 7, ¶ 23; Exh. F to Exh 7. Mr. Aiu did not provide sufficient testimony on his calculation under the GLAM Guidelines. He included regulatory wetlands as directly associated areas, in contravention of 760 CMR 56.03(3)(b)4, and also included unmaintained wooded areas as directly associated. The Board therefore has failed to prove that either 8.88 acres are eligible for inclusion. Mr. Nelson has agreed that1.293 acres can be included, so we accept 1.293 acres to be included in the numerator.

G. Numerator Conclusion

Based on his analysis of directly associated area under the comprehensive permit regulation and the GLAM Guidelines, Mr. Nelson found a total of 20.704 acres of SHI eligible area, resulting in a final calculation that the Town has low or moderate income housing on sites comprising 0.29 percent of the total land area zoned for residential, commercial, or industrial use. Exh. 7, ¶ 35. Using the methodology provided by the GLAM Guidelines, Mr. Aiu found a total of 31.80 acres of SHI eligible area, resulting in a final calculation of 0.46 percent. Below is the calculation of acreage for each disputed development:

Numerator Disputed Properties	Board Acreage	Board Acreage Using GLAM Guidelines	South Avenue Acreage	Acreage Accepted by Committee
Brooks School Apartments	16.55	4.08	5.080	5.080
Dickson Meadows	9.69	3.40	2.801	2.801
Winter Gardens	9.27	0.76	1.099	1.099
Merriam Village	15.56	7.69	5.757	5.757
809-811 Boston Post Road	3.06	0.68	0.287	0.287
Church Street	1.07	0.41	0.288	0.288
Highland Meadow	44.00	9.06	2.223	2.223
Pine Street	1.88	1.48	0.688	0.688
Warren Avenue	8.88	3.06	1.293	1.293

Exhs. 5, ¶¶ 27-28, 33; 5A, 5B; 7, ¶¶ 22-23. The totals asserted by the Board and South Avenue, respectively, are below:

Totals	Board Acreage	Board Acreage Using GLAM Guidelines	South Avenue Acreage	Acreage Accepted by Committee
Total SHI Eligible Acreage	**113.2**	**31.8**	**20.704**	**20.704**
Percentage	**1.64%**	**0.46%**	**0.29%**	**0.29%**

The total acreage accepted by the Committee for using the GLAM Guidelines is 20.704 acres or 0.29 percent, well below the general land area minimum of 1.5%.

H. Final Calculation of the Percentage of SHI Acreage

Based on the credible evidence submitted by the Board and the acknowledgment by Mr. Aiu that when he performed his Calculation 2 in accordance with the GLAM Guidelines, the resulting percent representing the acreage for SHI Eligible units is 0.46 percent (31.08 acres of SHI Eligible Housing divided by a total land area of 6,905.8 acres), below the safe harbor of 1.5 percent.

Mr. Aiu, under his interpretation of Chapter 40B and the comprehensive permit regulations (Calculation 1), derived a total of 113.2 acres of SHI eligible area, resulting in a final calculation that the Town has low or moderate income housing on sites comprising 1.64 percent of the total land area. Exh. 5, ¶¶ 27-28. However, under the regulations and our precedents, the acreage for the properties would necessarily be reduced further 1) to comply with the exclusions in 760 CMR 65.03(3)(B), including areas that are not directly associated; and 2) to allow proportional acreage for properties on which not all units are SHI eligible. This Calculation 1

did not address these requirements, and therefore, in this calculation, the Board has failed to prove a credible numerator. Therefore, on both bases, the Board has failed to meet its burden of proof that the Town of Weston has met the statutory general land area minimum of 1.5 percent. G. L. c. 40B, § 20.

I. 518 South Avenue Motion for Directed Decision

As noted above, South Avenue moved for a directed decision pursuant to 760 CMR 56.06(5)(e); it renewed the motion at the end of the hearing. The Board filed an opposition and South Avenue filed a reply. The comprehensive permit regulation, 760 CMR 56.06(5)(e), states that "upon a party's submission of pre-filed testimony, any opposing party may move for a directed decision in its favor on the ground that upon the facts of the law the original party has failed to prove a material element of its case or defense." We examine "whether the evidence contained in pre-filed testimony and exhibits, when considered in the light most favorable to the nonmoving party, is legally sufficient to support a decision in its favor." *Matter of Quincy and Warren Place, LLC,* No. 2017-10, slip op. at 10 (Mass. Housing Appeals Comm. Aug. 17, 2018).

The Board has the burden of demonstrating it has achieved one of the statutory safe harbors. *See Braintree,* No. 2015-07, *supra*, slip op. at 32; *Waltham, supra*, No. 2016-01, slip op. at 4, and cases cited. As the foregoing analysis shows, the Board failed to prove that it has achieved the general land area minimum set forth in G.L. c. 40B, § 20 on the evidentiary record as a whole.

Mr. Aiu provided two separate general land area minimum calculations, both of which are unsupported by sufficient evidence to establish the Town has met the general land area minimum. Moreover, both fail to comply with the GLAM Guidelines. South Avenue argues Mr. Aiu's calculations do not reference the electronic GIS files as required by the GLAM Guidelines, and do not contain details about what is included and excluded from the numerator and denominator. *Id*. Mr. Aiu's Calculation 1, performed, as he stated, "pursuant to G.L. c. 40B, § 20 and 760 CMR 56.00, resulted in a general land area minimum of 1.64%. *See* Exh. 5, ¶¶ 19–31. While that evidence suggests the Town has met the land area minimum, Mr. Aiu's testimony was flawed in including improper categories in the numerator and excluding improper areas from the denominator. Mr. Aiu failed to proportionally adjust the ownership and rental projects containing less than 25 percent of affordable units by the corresponding percentage. With regard to the

denominator, Mr. Aiu improperly excluded certain private rights of way and land owned by a private nonprofit organization from his calculation of the denominator

Mr. Aiu's Calculation 2 resulted in a general land area minimum of 0.46 percent. He stated that he followed the methodology provided in the GLAM Guidelines for this calculation, and provided maps attached to his testimony. Exh. 5, ¶¶ 32-33; Exh B. Mr. Aiu explicitly testified that the calculation of the general land area minimum he conducted in accordance with the GLAM Guidelines resulted in a calculation of 0.46 percent. *See* Exh. 5, ¶ 33. This is significantly less than the 1.5 percent threshold required to meet the statutory safe harbor.

Accordingly, the evidence submitted by the Town as part of its pre-filed testimony and exhibits, even when considered in the light most favorable to the Board, is legally insufficient to support a decision in the Board's favor. Therefore, the developer is entitled to a directed decision in its favor pursuant to 760 CMR 56.06(5)(e), and for this reason as well, the Board has failed to prove its entitlement to a safe harbor.

III. CONCLUSION AND ORDER

The Board's claim that the Town is entitled to a safe harbor under the general land area minimum threshold is denied. Accordingly, this appeal is dismissed and the matter remanded to the Board for further proceedings.

Housing Appeals Committee

March 15, 2021

Shelagh A. Ellman-Pearl, Chair

Marc. L. Laplante

Rosemary Connelly Smedile

James G. Stockard, Jr._

Caitlin E. Loftus, Counsel