COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

In the Matter of

HINGHAM ZONING BOARD OF APPEALS

and

RIVER STONE, LLC

No. 2016-05

INTERLOCUTORY DECISION REGARDING SAFE HARBOR

October 31, 2017

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In the Matter of HINGHAM ZONING BOARD OF APPEALS and RIVER STONE, LLC	)	No. 2016-05

INTERLOCUTORY DECISION REGARDING SAFE HARBOR

I. INTRODUCTION AND PROCEDURAL HISTORY

This is an interlocutory appeal by the Hingham Zoning Board of Appeals pursuant to 760 CMR 56.03(8)(c) challenging the assertion of a "safe harbor" under the Comprehensive Permit Law, G.L. c. 40B, §§ 20-23. On March 29, 2016, the developer, River Stone, LLC, filed an application with the Board for a comprehensive permit to build 36 condominium units to be located off Ward Street, Hingham, Massachusetts. Exh. 1. On April 27, 2016, the Board opened its hearing on the application. On May 12, 2016, it notified the developer and the Department of Housing and Community Development (DHCD) that it considered that the town had achieved the safe harbor available to municipalities that have met the housing unit minimum on the ground that more than 10% of the housing stock in the municipality is low or moderate income housing as defined in G.L. c. 40B, § 20 and 760 CMR 56.03(1) and 56.03(3)(a). Exh. 2. On May 20, 2106, River Stone challenged that assertion by filing a notice with DHCD, copied to the Board. Exh. 3. DHCD thereafter issued a decision dated June 16, 2016, finding the Board had not demonstrated it had achieved the safe harbor. Exh. 4. On July 6, 2016, the Board appealed to this Committee. The parties have filed cross motions for summary decision pursuant to 760 CMR 56.06(5)(d), and have submitted joint

exhibits. The central question dividing the parties is a question of law and the material facts are not in dispute. Summary decision is therefore appropriate.

This case raises the same legal question that the Housing Appeals Committee decided in two previous decisions: whether housing units in a continuing care retirement community development granted a comprehensive permit over 15 years ago in Hingham should be counted on the Subsidized Housing Inventory (SHI) in a manner that is analogous to rental units.[1] *In the Matter of Hingham and AvalonBay Communities, Inc.*, No. 2012-03 (Interlocutory Decision Jan. 14, 2013); *In the Matter of Hingham and SEB/Hingham, LLC*, No. 2013-02 (Interlocutory Decision Nov. 7, 2013). With respect to this appeal, the answer determines whether the town has met the 10% housing minimum safe harbor. The facts presented in this third appeal offer no material differences between this and the earlier cases, and therefore, consistent with the Committee's decision and analysis in *AvalonBay,* summary decision is granted in favor of the developer.[2]

II. FACTUAL BACKGROUND

In November 2000, Erikson Retirement Communities, LLC applied to the Board for a comprehensive permit to build a continuing care retirement community (CCRC) pursuant to G.L. c. 93, § 76, to include 1,750 independent-living housing units, of which 27.7% would be affordable to low or moderate income households. Exh. 2-J. CCRCs provide senior citizens

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1. The SHI is the database maintained by DHCD for all Massachusetts communities to record their progress toward the 10% goal that allows them to assert the safe harbor defined in G.L. c. 40B, § 20. *See* 760 CMR 56.03(2); see also Exhs. 2-A, 2-B, 2-C, 2-F, 2-R, 3-E.

2. Like all of the Committee's proceedings, the hearing in this interlocutory appeal is *de novo*. G.L. c. 40B, § 22. See *In the Matter of Bourne Zoning Board of Appeals and Chase Developers, Inc.*, No. 2008-11, slip op. at 2 (Mass. Housing Appeals Committee June 8, 2009). Further, pursuant to 760 CMR 56.03(8)(a), the Board has "the burden of proving satisfaction of the grounds for asserting [the safe harbor]." Since this interlocutory decision does not "finally determine the proceedings," the presiding officer may decide the matter or bring it before the full Committee. 760 CMR 56.06(7)(e)2. The first time this issue arose, in *AvalonBay,* the presiding officer chose to bring the matter before the full Committee. However, as in *SEB/Hingham,* it is appropriate here for me to decide the matter guided by *AvalonBay*, as essentially the identical question of law is raised again. *See generally Forestview Estates Assoc., Inc. v. Douglas,* No. 2005-23, slip op. at 3-4 (Mass. Housing Appeals Committee Mar. 5, 2007) and cases cited; *In the Matter of Bourne Zoning Board of Appeals and Chase Developers, Inc.*, No. 2008-11, slip op. at 3 (Mass. Housing Appeals Committee Apr. 13, 2009 Ruling on Motion to Quash Subpoena).

with housing, health care, and various ancillary services, frequently on a single "campus."[3] See G.L. c. 93, § 76.

As of 2005, the Erickson proposal, which later became known as Linden Ponds, was the only CCRC in Massachusetts to be permitted under G.L. 40B to include low or moderate income housing. Exh. 2-L, p. 2. It was subsidized by the New England Fund of the Federal Home Loan Bank of Boston (FHLBB). Exh. 2-D; 2-J, p. 5.

As the Committee noted in *AvalonBay,* while the comprehensive permit application was under consideration, presumably because the Board was aware of the significant advantage within the statutory scheme of Chapter 40B that Hingham might realize depending on how the Linden Ponds units were counted, it engaged a consultant, who wrote to DHCD for "clarification concerning whether and how a proposed comprehensive permit project [would] be counted in the town's subsidized housing inventory." Exh. 2-H. This letter, dated March 19, 2001, described the Linden Ponds proposal and posed four specific questions, including whether the development would be considered rental. On June 14, 2001, DHCD replied to each of those questions. Exh. 2-I. (See Section III.B. below).

On September 11, 2001, the Board granted a comprehensive permit for the Linden Ponds development. Exh. 2-J. The development was to be built in phases over an eight-year period. Exh. 2-P, p. 1. On September 15, 2003, the Hingham Board of Selectmen, the developer, and the FHLBB member bank entered into a regulatory agreement to formalize affordability requirements and other requirements relating to the development. Exh. 2-K.

Because the issue of how the units were to be counted in the SHI had not been resolved to the satisfaction of all parties, the Director of DHCD met with Erikson Retirement Communities on September 20, 2005, and DHCD staff met with a town official on October 14, 2005. These discussions were confirmed in a letter from the Director dated November 16, 2005. Exh. 2-L. The Linden Ponds project has been constructed. See Exhs. 2-K; 2-L, p. 1, 2-N, 2-O. See *AvalonBay, supra,* slip op. at 3-4.

As noted above, in March 2016, River Stone, LLC filed an application for a comprehensive permit to construct an affordable housing development unrelated to Linden Ponds, and it is from that application that the current appeal arises.

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3. The development also provides for over 500 additional residents in assisted living and skilled-nursing-care facilities. Exh. 2-J.

III. DISCUSSION

A. Evolution of DHCD Policy

As discussed in *AvalonBay, supra,* it was over thirty years ago that this Committee first addressed the public policy question of how housing units should be counted in the SHI to determine whether a community has achieved its housing unit minimum. Through the 1970s and 1980s, the Committee's regulations made no distinction between rental and ownership units, and the number of units shown in the SHI was deemed to be "conclusive." See Rules and Regulations of the Housing Appeals Committee, § 18.01(a) (June 3, 1974); 760 CMR 31.04(1)(a) (Jan. 1, 1978 and Dec. 31, 1986) (see Appendix, below). However, in 1981, the Committee overturned a provision in its own regulations, and held that all housing units – both affordable and market-rate units – in an eligible rental affordable housing development should be counted in the SHI. *AvalonBay, supra,* slip op. at 4, citing *Cedar Street Assoc. v. Wellesley*, No. 1979-05, slip op. at 23-24 (Mass. Housing Appeals Committee Mar. 4, 1981), *aff'd Zoning Bd. of Appeals of Wellesley v. Housing Appeals Committee,* 385 Mass. 651, 658 and n.7 (1982).

By the beginning of the 1990s, affordable housing production had been extended beyond rental housing to ownership housing, and the regulatory approach to counting units had been refined. The comprehensive permit regulations had been changed so that the SHI was only presumptively accurate, and this Committee was specifically empowered to review the figures on a "case-by-case basis." 760 CMR 31.04(1)(a) (Jan. 4, 1991) (see Appendix below). Further, the regulations provided that "[i]n examining particular housing developments or units, [the Committee] shall first be guided by the intent expressed in the regulations governing the program under which the housing is financed (*e.g.*, 760 CMR 45.06 for the Local Initiative Program [LIP] and 760 CMR 37.10 for the HOP program)," and then by state policy expressed in a "Listing of Chapter 40B Low or Moderate Income Housing Programs." *Id.* Regulations for HOP (Homeownership Opportunity Program) and LIP – the two state ownership programs in existence at that time – stated that only low and moderate income, and not market-rate units were to be counted in the SHI toward the housing unit minimum. 760 CMR 37.10 (Sept. 1, 1989); 760 CMR 45.06(3) (Jan. 19,

1990).[4] In 1992 in a second case arising in Wellesley, the Committee indicated that it would accept the guidance provided by this state policy. *Capital Site Management Assoc. Ltd. Partners v. Wellesley*, No. 1989-15, slip op. at 16-19 (Mass. Housing Appeals Committee Sept. 24, 1992), *aff'd, Zoning Bd. of Appeals of Wellesley v. Housing Appeals Committee,* No. 96-P-1839, 44 Mass. App. Ct. 1114 (1998) (Rule 1.28 decision). See *AvalonBay, supra,* slip op. at 4-5.

As *AvalonBay* notes, the policy of counting only affordable units in ownership developments while counting all units in eligible[5] rental developments has remained in force until the present time. Exactly how that policy has been articulated has evolved slightly. The instruction in the comprehensive permit regulations to follow any intent expressed in subsidy program guidelines remained in place until 2008. In 2001, however, when the Linden Ponds application was proposed under the FHLBB New England Fund, that program had no regulations, much less regulations expressing an intent as to how units should be counted. Instead, in 2001, the policy – of counting all rental units, of counting only affordable ownership units, and of silence with regard to CCRCs – was stated in the Chapter 40B Subsidized Housing Inventory 2001, Notes to Accompany DHCD's Chapter 40B Subsidized Housing Inventory (2001 Guidelines). Exh. 2-F, § 5-B. See *AvalonBay, supra,* slip op. at 5.

In 2008, the policy with regard to counting rental and ownership units remained the same, but several other changes were made. First, the comprehensive permit regulations were amended to remove the reference to guidance from subsidy-program regulations. 760 CMR 56.03(3)(a) (Feb. 22, 2008). Also, the current procedure for a preliminary review by DHCD of any claim of safe harbor was instituted. See 760 CMR 56.03(3)(a), 56.03(8). The policy with regard to counting units, which had been in the 2001 Guidelines, was placed in the new 2008 Comprehensive Permit Guidelines (2008 Guidelines), which also for the first time explicitly stated that only affordable units in CCRCs would count in the SHI. See *AvalonBay, supra,* slip op. at 5-6. This requirement was continued in the "Guidelines, G.L. c. 40B, Comprehensive Permit Projects, Subsidized Housing Inventory," updated December

4. The LIP regulation identified an exception to the rule that explicitly applied only to LIP program units and projects. 760 CMR 45.06(3) (Jan. 19, 1990).

5. See Guidelines, G.L. c. 40B, Comprehensive Permit Projects, Subsidized Housing Inventory, updated December 2014 (2014 Guidelines), § II.A.2(b)1.

2014 (2014 Guidelines), which are the current comprehensive permit guidelines. It remained in effect at the time of River Stone's application in 2016, and is currently in effect.[6]

B. Application of DHCD Policy

The current dispute arises because ever since the permitting of the Linden Ponds CCRC in 2001, the Town of Hingham and DHCD have been in disagreement as to how CCRC units should be counted. See generally Exh. 2. The most significant point of contention is the Board's claim that the policy with regard to rental developments in effect in 2001, when Linden Ponds was approved, should be applied to River Stone's appeal rather than current DHCD policy with regard to CCRCs. Consistent with *AvalonBay, supra*, I conclude that current policy applies in all respects, and that only affordable units should count in the SHI. See also *SEB/Hingham, supra.*

1. Under current policy, Hingham has not achieved the 10% housing unit minimum

The question before the Committee is whether the Town of Hingham had achieved the statutory housing unit minimum as of the date of River Stone's application for a comprehensive permit in 2016. 760 CMR 56.03(1).[7] For this purpose, "there shall be a presumption that the latest SHI contains an accurate count." 760 CMR 56.03(3). The SHI indicates that the percentage of low or moderate income housing units in Hingham was 6.3% as of December 5, 2014.[8] Exh. 3-B. When, as here, the Board invokes the procedure to challenge the SHI figure, it bears the burden of "introduc[ing] evidence to rebut this presumption" and the burden of proof. 760 CMR 56.03(3), 56.03(8).

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6. I have taken official notice of both the 2014 Guidelines and Exhibit 8 in the proceedings of the *AvalonBay* case, which contains the 2008 Guidelines as of July 30, 2008. The 2008 Guidelines were published February 22, 2008, and revised July 30, 2008, when the definition of CCRC was added. The substantive provision concerning CCRC units' "inclusion in the SHI" appears to have been part of the February 2008 guidelines. See *AvalonBay* Exh. 8, § I.A. (Definitions); § II.A(2); *AvalonBay, supra,* slip op. at 6, n.7. See also 2014 Guidelines, §§ II.A.1.d(4); II.A.2.d.

7. That the application date is the operative date was established by a regulatory change promulgated February 22, 2008, overturning a rule that had been established in *Casaletto Estates, LLC v. Georgetown*, No. 01-12 (Mass. Housing Appeals Committee May 19, 2003) and codified by the July 2, 2004 amendment of 760 CMR 31.04(1)(a). See 760 CMR 56.03.

8. This included 246 units at Linden Pond. Exh. 2-A, p. 2.

Based upon the 6.3% figure in the SHI and application of current DHCD policy described in Section III.A., above – counting only affordable units in Linden Ponds, as prescribed by the 2014 Guidelines – it is clear that as of the date of River Stone's application, the Town of Hingham had not achieved the housing unit minimum.[9]

2. Principles of retroactivity do not bar application of current policy

The Board argues that rules disfavoring retroactive application of the law require the Committee to apply the counting policy in effect in 2001. *AvalonBay* made clear that the Committee questioned "whether this is truly a case of retroactive application of the counting policy to which simple retroactivity principles should be applied." *AvalonBay, supra,* slip op. at 7. The Committee also determined that the Board's "argument fail[ed], however, both because the situation before us is not a simple case of applying axiomatic law regarding retroactivity, and also based upon general principles concerning retroactivity." *Id.*

As discussed at length in *AvalonBay,* the long history of the dispute between Hingham and DHCD highlights the reality that counting of housing units is an ongoing, dynamic process, and not one subject to a simple analysis with regard to retroactivity. Housing units are permitted and constructed at various times and often with various delays. Units move on and off the SHI based upon complicated time-sensitive rules. See, *e.g.,* 760 CMR 56.03(2)(a) through 56.03(2)(d), 56.03(4)(f), 56.03(5).

Further, it is not inherent in the process that it should be dynamic. DHCD could, by regulation, establish that the unit count would be performed when a permit is issued for an affordable housing development or when construction is complete or at some other time, and that this count would be controlling in perpetuity, based upon policy in effect at that time. But it has not done so. Rather, 760 CMR 56.03(2)(b) indicates *when* units are first eligible to be counted, but it cannot fairly be read to imply that if they are once counted in a particular

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9. Additionally, consistent with *AvalonBay* and *SEB/Hingham,* it is appropriate in this matter to give deference to policy articulated by DHCD, the state's primary housing agency. *Stuborn Ltd. Partnership v. Barnstable,* No. 98-01, at 9, n.6 (Mass. Housing Appeals Committee Mar. 5, 1999; *Whitcomb Ridge, LLC v. Boxborough,* No. 2006-11, slip op. at 3 (Mass. Housing Appeals Committee (Jan. 22, 2008); *See Capital Site Management, supra,* slip op. at 16-19; *See generally Board of Appeals of Hanover v. Housing Appeals Committee,* 363 Mass 339, 368 n.20 (1973), quoting *Cleary v. Cardullo's, Inc.*, 347 Mass. 337, 344 (1964). *See also Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 782 (1980). Of course, the Committee would not be bound to do so if it were in violation of statutory provisions or statutory intent.

manner, they must *always* be counted in that way. In fact, the overall scheme and the language in the regulations indicate the opposite. 760 CMR 56.03(2)(c) to 56.03(2)(d). In describing how the SHI is to be "maintained," the regulations says that the SHI may include units "*so long as* such units are subject to a Use Restriction and an Affirmative Fair Marketing Plan, and they satisfy requirements of guidelines issued by the Department." 760 CMR 56.03(2)(a) (emphasis added). Since the words "so long as" are used rather than "if," the clear implication is that units may be removed from the SHI.

Further, "[a] community may request [new] units be included in the SHI at any time...." 2014 Guidelines, § II.A.4. However, eligibility of units already in the SHI is reviewed periodically using a different procedure: at least every two years, local officials must certify to DHCD which units are eligible and DHCD verifies the data and removes those units that are no longer eligible. See 760 CMR 56.03(2)(d) to 56.03(2)(f); Exh. 3-E, § II.A(2); 2014 Guidelines, § II.A.5.

As determined in *AvalonBay,* in such a changing environment, application of current policy in this circumstance is not retroactive application of policy. When the Linden Ponds development was first approved, and even as units in it began to be counted in the SHI, the significance of the count was only theoretical. It was for this reason, that the Supreme Judicial Court found that "the town's declaratory [judgment] action [was] premature." *Town of Hingham v. Department of Housing and Community Development*, 451 Mass. 501, 506 (2008) (dismissing challenge to DHCD's counting of Linden Ponds units in SHI). See *AvalonBay, supra*, slip op. at 8.

Finally, to the extent that application of the regulation is truly retroactive, then such application is appropriate based upon the intent expressed in the regulatory language, which provides that it is the "latest" SHI that is to be consulted in determining whether a town has achieved the housing unit minimum, and DHCD "shall review" current data on a case-by-case basis. 760 CMR 56.03(3)(a). Thus, application of the regulation retroactively is proper since the intent of the regulation is that current policy be applied. See *Nantucket Conservation Foundation, Inc. v. Russell Management, Inc.*, 380 Mass. 212, 214 (1980) (retrospective application of statute affecting property rights); see also *Biogen IDEC MA, Inc. v. Treasurer and Receiver Gen.*, 454 Mass. 174, 190 (2009).

3. Board's argument that all Linden Ponds units should count because it relied upon actions of DHCD lacks merit[10]

The Board argues that its invocation of the safe harbor is consistent with DHCD's June 14, 2001 letter and other communications, which, it argues applied the 2001 Guidelines and determined that all of the Linden Pond units were rental.

In *AvalonBay,* the Committee disagreed that the 2001 letter can fairly be read as applying the 2001 Guidelines. As noted above, the Town of Hingham and DHCD had been in disagreement since 2001 as to how CCRC units should be counted. It is clear that before it issued the Linden Ponds comprehensive permit, the Board both believed that the units should be treated as rental units, and it was unsure of state policy, and therefore chose to inquire of DHCD with regard to that policy.[11] See Exh. 2-H. It is also clear from DHCD's response that there was no specific policy with regard to CCRCs, and that DHCH was not indicating definitively how it would – in the future – interpret an existing policy with regard to rental, ownership and CCRC units.[12] Exh. 2-I. DHCD noted initially, "The Department has had very little experience with such proposals...." Exh. 2-I, p. 1. It went on to answer the Board's questions in highly qualified and contingent terms, using phrases such as "[it] is unlikely that the Department would include units in the state's Subsidized Housing Inventory if the units carry entrance fees which effectively may prevent low and/or moderate income renters from qualifying," "[t]o determine ...[the units'] eligibility for inclusion in the [SHI] – the Department will evaluate," and "it is not clear that the project would meet the state's

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10. This issue is closely related to retroactivity. See *Attorney Gen. v. Commissioner of Ins.*, 370 Mass. 791, 826 (1976) (retroactivity usually "comes down to" question of reliance).

11. Although the Board states it sought clarification of the existing policy, its request might equally well be characterized as a request to expand the exception – made for rental developments only – to the original policy of counting only affordable units. DHCD's response can be read as hesitation, at least, if not unwillingness to expand the exception. Exhs. 2-H, 2-I.

12. Even in 2005, DHCD was still "in the process of clarifying... how CCRC units will count in the SHI." Exh. 2-L, p. 2. At that point, however, it did clearly state its continuing concerns about affordability of Linden Ponds units and explained how it was applying and intended to apply existing policy to Linden Ponds. "DHCD made the determination to count...up to 25% of the units...." *Id.*

40B requirements."[13] Exh. 2-I, pp. 1-2. Read as a whole, the letter is not an application by DHCD of the 2001 Guidelines to Linden Ponds.

Nor can the Board argue successfully that the use of the word "rental" with regard to Linden Ponds in various other contexts is definitive. The FHLBB site approval letter under the New England Fund program referred to the development as rental. Exh. 2-D. Also, the regulatory agreement provides both for an "entrance fee" or "entrance deposit" as well as monthly rents. Exh. 2-K, §§ 1, 2, 13. Furthermore, the June 14, 2001 DHCD letter refers in several places to "renters" and "rental project." Exh. 2-I. At that time, DHCD was working with a policy with only two categories: rental and ownership. In the letter, DHCD was searching for a framework within which to address the Board's questions. Although it might have been wiser for DHCD to have given either a definitive answer or no answer at all rather than an ambiguous response, I concur with the Committee's determination in *AvalonBay* and do not believe that these references can fairly be read as a formal determination by DHCD that Linden Ponds was a rental development.[14] Finally, to the extent the Board suggests it has relied on the 2001 Guidelines and any communications by DHCD, it has not shown that it has done so.[15]

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13. With regard to the substantive question of how units should be counted, DHCD's response to the Board's inquiry was far from its requested affirmation that all units would count. These statements in 2001 show neither -- only that DHCD was still undecided or neutral with regard to whether Linden Ponds should be deemed rental or ownership, and they suggest that DHCD was so focused on concerns about affordability that it had not even given serious consideration to whether the development was rental or ownership, or whether it would be necessary to create a third category.

14. In addition, it appears that before the creation of the CCRC category in the SHI, Linden Ponds was listed there as rental. See Exh. 2-R. No significance may be ascribed to any of these references or to the Supreme Judicial Court's reference in passing to the units as "rental apartments" in *Town of Hingham v. Department of Housing and Community Development*, 451 Mass. 501, 504 (2008). See *AvalonBay, supra,* slip op. at 10, n.15.

15. Perhaps a theoretical argument could be made that even while the town was below the 10% minimum, the Board, in determining whether an application was consistent with local needs, might balance the regional need for affordable housing against local concerns slightly differently depending on whether all or only some Linden Pond units had been counted, but that argument would not weigh here. The Board states in its brief that it has continued to approve Chapter 40B projects despite its consistent assertion that the town has exceeded the 10% threshold. Board brief, p. 13. Moreover, even after a municipality has passed the 10% threshold, Chapter 40B requires the Board to continue to give fair consideration to all applications. See *Town of Wrentham v. Wrentham Village, LLC*, 451 Mass. 511, 514, n.7 (2008), citing *Boothroyd v. Zoning Board of Appeals of Amherst*, 449 Mass. 333, 340 (2007).

Accordingly, for the foregoing reasons, the Board's argument that all of the units in the Linden Ponds development should count on this SHI fails and summary decision is granted in favor of River Stone.

IV. CONCLUSION

For the reasons stated above, Hingham had not achieved the 10% housing unit minimum at the time of River Stone's application, and therefore the Board has not met the burden of proof that Hingham has achieved a safe harbor. See 760 CMR 56.03(1)(a). The Board's Motion for Summary Decision is denied; River Stone's Motion for Summary Decision is granted.

This matter is hereby remanded to the Board pursuant to 760 CMR 56.03(8)(c) for further proceedings in accordance with 760 CMR 56.05.

Housing Appeals Committee

October 31, 2017

Shelagh A. Ellman-Pearl, Chair
Presiding Officer

APPENDIX

Housing Appeals Committee Rules and Regulations, § 18.01(a), as promulgated 6/3/74:

18.01—Housing Unit Minimum. For purposes of calculating whether the city or town's low and moderate income housing units exceed ten percent of its total housing units, pursuant to M.G.L. c. 40B, § 20:
(a) The number of low and moderate income housing units shall be the number of units, as defined in Section 1(i) of these regulations, most recently inventoried by the Department as occupied or available for occupancy or under permit in the city or town prior to the applicant's initial submission to the local Board; provided that evidence that net additional units have been occupied or have become available for occupancy between the date of the most recent inventory and the date of initial application, shall be considered. The Departmental inventory shall be conclusive of the number of units up to the time of the most recent inventory prior to initial application.

760 CMR 31.04(1)(a), as promulgated 1/1/78:

(1) Housing Unit Minimum. For purposes of calculating whether the city or town's low and moderate income housing units exceed ten percent of its total housing units, pursuant to M.G.L. c. 40B, § 20:
(a) The number of low and moderate income housing units shall be the number of units, as defined in 760 CMR 30.02(i), most recently inventoried by the Department as occupied or available for occupancy or under permit in the city or town prior to the applicant's initial submission to the local Board; provided that evidence that net additional units have been occupied or have become available for occupancy between the date of the most recent inventory and the date of initial application, shall be considered. The Departmental inventory shall be conclusive of the number of units up to the time of the most recent inventory prior to initial application.

760 CMR 31.04(1)(a), as promulgated 12/31/86 (identical to 1/1/78):

(1) Housing Unit Minimum. For purposes of calculating whether the city or town's low and moderate income housing units exceed ten percent of its total housing units, pursuant to M.G.L. c. 40B, § 20:
(a) The number of low and moderate income housing units shall be the number of units, as defined in 760 CMR 30.02(i), most recently inventoried by the Department as occupied or available for occupancy or under permit in the city or town prior to the applicant's initial submission to the local Board; provided that evidence that net additional units have been occupied or have become available for occupancy between the date of the most recent inventory and the date of initial application, shall be considered. The Departmental inventory shall be conclusive of the number of units up to the time of the most recent inventory prior to initial application.

760 CMR 31.04(1)(a), as promulgated 1/4/91:

(1) Housing Unit Minimum. For purposes of calculating whether the city or town's low and moderate income housing units exceed ten percent of its total housing units, pursuant to M.G.L. c. 40B, § 20:
(a) There shall be a presumption that the latest Executive Office of Communities and Development Subsidized Housing Inventory contains an accurate count of low and moderate income housing. If a party introduces evidence to rebut this presumption, the Board or Committee shall on a case by case basis determine what housing or units of housing are low or moderate income housing. In examining particular housing developments or units, it shall first be guided by the intent expressed in the regulations governing the program under which the housing is financed (e.g., 760 CMR 45.06 for the Local Initiative Program and 760 CMR 37.10 for the HOP program). It shall also be guided by the latest Executive Office of Communities and Development Listing of Chapter 40B Low or Moderate Income Housing Programs. Only units occupied, available for occupancy, or under building permit shall be counted and no unit shall be counted more than once because it is the subject of subsidies from two or more programs.

Certificate of Service

I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Interlocutory Decision Regarding Safe Harbor in the case of In the Matter of Hingham Zoning Board of Appeals and River Stone, LLC, No. 2016-05, to:

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Dated: 10/31/17

Lorraine Nessar

Lorraine Nessar, Clerk
Housing Appeals Committee