COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
HOUSING APPEALS COMMITTEE

NO. 2016-08

ARLINGTON BOARD OF APPEALS,

Appellant

v.

ARLINGTON LAND REALTY, LLC,

Appellee

OBJECTIONS OF THE ARLINGTON BOARD OF APPEALS TO PROPOSED DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICABILITY OF SAFE HARBOR

Pursuant to 760 CMR 56.06(7)(e)(9), the Arlington Board of Appeals ("Board") respectfully submits the following objections to the Proposed Decision on Interlocutory Appeal Regarding Applicability of Safe Harbor, dated July 31, 2019 ("Proposed Decision"). The Proposed Decision misconstrues the definitions and requirements of G.L. c. 40B, s. 20; erroneously applies regulations of the Department of Housing and Community Development (DHCD) that violate G.L. 40B; unlawfully applies DHCD's "Guidelines for Calculating General Land Area Minimum" ("Guidelines" – the chief purpose of which is clearly to deter and/or thwart any municipal claim to achievement of the 1.5% threshold); insults and dismisses the credible, knowledgeable and detailed testimony of the Town's witness, while inexplicably crediting the testimony of the developer's witness – *who relied solely upon the Town witness's data* – and in so doing makes painfully arbitrary findings that cannot possibly withstand judicial review. In short, the Proposed Decision is legally flawed and should not be approved by the Committee. The Board objects to the Proposed Decision as arbitrary, capricious, premised on legal errors, and in violation

of the Board's due process rights. The Board discusses below some of the more egregious errors.

I. The Board's evidence is found lacking, while simultaneously providing the basis for ALR testimony credited in the Proposed Decision

The Proposed Decision, which slavishly adopts Arlington Land Realty, LLC's ("ALR") criticism of the Board's calculations under c. 40B, erroneously calls into question the data relied upon by the Board, and repeatedly calls for the Board to provide more (undefined) "evidence." The Proposed Decision fails to recognize that it was the Board that provided ALR with thorough and complete data concerning land in Arlington in Excel spreadsheet format through the Town Geographic Information System (GIS). The Proposed Decision neither specifies exactly what "evidence" is required for the Board to prove that the figures it relied upon are accurate, nor does it point to any regulations or evidentiary rules that require the Board to provide complete data sets to the Housing Appeals Committee. Indeed, the data relied upon by ALR, and adopted by the Housing Appeals Committee via the Proposed Decision, was data that was originally collected and shared by the Board itself. *See, e.g.*, *Proposed Decision*, p. 9.

II. The GLAM Guidelines are unlawfully applied

The Proposed Decision improperly relies on the GLAM Guidelines, and prejudices the Board by evaluating its submissions through the retroactive application of the GLAM Guidelines. The Housing Appeals Committee should not be relying on the GLAM guidelines, for the reasons set forth in the Board's Post-Hearing Reply Brief, dated February 4, 2019. Namely, they were not promulgated under the Administrative Procedures Act.

The Proposed Decision feigns acknowledgment that, in a legal sense, the Committee cannot rely on the GLAM Guidelines. *Proposed Decision*, p. 5. However, the Proposed Decision then goes on to repeatedly cite the GLAM Guidelines, and to call for information to be

presented as directed in the GLAM Guidelines. *See, e.g., Proposed Decision,* p. 9, n. 8; p. 13, n. 14.

Accordingly, despite conceding that the Committee should not rely on the GLAM Guidelines, the Proposed Decision clearly uses them as an improper standard.

III. Calculation of the Denominator: Illogical, Inaccurate, and Outcome-Driven

In its discussion of the Denominator, the Proposed Decision randomly calls for more "evidence" regarding the Board's calculations at various points, while ignoring the fact that the Board assembled and provided the detailed GIS dataset and raw data to ALR, and that the Proposed Decision relies heavily on the data that was originally collected and shared by the Board. *See, e.g.*, *Proposed Decision*, p. 9. The Proposed Decision states that ALR and its expert, Mr. Curnan, relied on the Arlington GIS dataset, meaning that ALR had in its possession the detailed granular backup evidence for the Board's calculations – including information that the Proposed Decision incorrectly states was never provided. The Proposed Decision is thus at once both illogical *and* inaccurate.

To distract from these defects, the Proposed Decision strives for an appearance of rigor in its analysis. It does not succeed. After providing pages of painstaking criticism, and fastidiously comparing the Board's calculations of total zoned land in Arlington to the calculations of ALR, the Proposed Decision reveals that ALR's final figure was 2,558.63 acres, as compared to the Board's figure of 2,556.59 acres – a difference of 2.04 acres, or approximately .0008 %. *Proposed Decision*, p. 8. This extended discussion cannot obscure the Proposed Decision's flaws, which include transparently outcome-determinative interpretations to benefit the developer and prevent the Board from establishing the 1.5% land area minimum.

A. Total Acreage Calculation

The Board's calculations of total zoned land in Arlington, as contained in Mr. Kurowski's testimony, was based on the GIS data. The specific acreages of each class of land and further detailed information are contained in the Excel spreadsheets that the Board provided to ALR. The Proposed Decision does not explain what sort of "evidence" the Housing Appeals Committee requires to believe the Board's figures, and it does not cite any regulation or evidentiary rule that requires the Board to provide this additional, undefined "evidence." *Proposed Decision*, p. 8 ("[Mr. Kurowski] did not provide evidence supporting his totals for acreage in each of the identified zoning districts"). Again, the data relied upon by ALR, and adopted by the Housing Appeals Committee via the Proposed Decision, was data that was originally collected and shared by the Board itself.

In addition to being well-supported by data, the testimony of Mr. Kurowski was detailed, knowledgeable, and credible. Mr. Kurowski - Director of GIS and Systems Analyst for the Town of Arlington - is an experienced professional who provided reasoned analysis of the data under applicable provisions of the statute and regulation. The Proposed Decision offers no explanation as to why it found Mr. Kurowski's testimony "unsupported" and thus not credible, while ALR's testimony – premised on the same data – was credible. The Board is denied due process of law where such determinations are arbitrarily made.

B. Calculating Water Bodies, Tax Title Land, Protected Open Spaces, and Wetlands

The Board provided ALR with detailed information about excluded land, including water bodies, "tax title" parcels(land excluded from the total land calculation because the Town has taken possession), and open space and wetlands. This information includes, for example, the

addresses of excluded parcels. ALR received all of this information, and ALR is mistaken if it claims that backup data was not provided.

The Proposed Decision is wrong when it states that the Board did not provide such data or that Mr. Kurowski's summary relied on improper evidence. For example, the Board provided ALR with identifying addresses and owner information concerning excluded parcels, but the Proposed Decision adopts ALR's erroneous claim that this information was not provided. *Proposed Decision*, p. 9.

The Proposed Decision revisits the calculations of the total area covered by water bodies in excruciating detail, only to reveal that the Board and ALR arrived at nearly identical totals, with ALR's total actually slightly more favorable to the Board's position in this case. *Proposed Decision*, p. 11 (detailing calculation "errors" such as the improper inclusion of .09 acres of Lower Mystic Lake as excluded land, and revealing that the Board calculated 236.130 acres covered by water, compared to ALR's total of 234.176). The Proposed Decision conspicuously omits the fact that the Board, through Mr. Kurowski, corrected the three (extremely minor) issues concerning water body calculations in a revised statement.

The Proposed Decision also calls for additional evidence that is not required under the regulations. For example, the Proposed Decision cites ALR's criticism of the Board for not providing a map of protected open spaces. *Proposed Decision*, p. 12. However, the Board provided all of the required data concerning its calculations, and there is no requirement that the Board also generate a map for ease of use by ALR.

C. Subtracting Water Bodies from Denominator

The Proposed Decision also adopts ALR's interpretation of the regulations regarding whether water bodies may be subtracted from the overall zoned land figure. *Proposed Decision*,

pp. 15-16. For the reasons set forth in previous filings, the Board asserts that the plain language of G.L. c. 40B provides that the total acreage of water bodies be subtracted from the overall total of zoned land in the Town.

Under the statute and regulations, the starting point for the calculation of the denominator is "the total land area zoned for residential, commercial, or industrial use." G.L. c. 40B, § 20; 760 CMR 56.03(3)(b)(1) (stating that starting point for denominator is the total amount of land zoned to permit residential, commercial, or industrial use). By refusing to follow this formula, the Proposed Decision creates an inflated denominator, which skews the calculation against the Board. This is error, and should be corrected in the final decision.

IV. Calculation of the Numerator

The Proposed Decision calls into question the Board's numerator calculation – the total SHI eligible housing – before conceding that ALR did not even contest the Board's numerator calculation, and therefore the issue was not before the Committee. *Proposed Decision*, p.7. Because it was not contested, the Board's numerator calculation should be considered an undisputed fact. Additionally, as discussed further below, 760 CMR 56.03(3)(b)(3), which concerns the exclusion of land owned by a housing authority, is inconsistent with c. 40B and is therefore invalid.

V. Invalidity of Regulations

The Board further states that the following regulations are invalid because they are inconsistent with the related underlying statutes:

- 760 CMR 56.03(3)(b) is inconsistent with G.L. c. 40B, § 20 with respect to the calculation of the "denominator" of the 1.5% land area statutory minimum.

- G.L. c. 40B, § 20 provides that certain land areas are excluded from the "total land area zoned for residential, commercial, or industrial use." The statute excludes land "owned by the United States, the commonwealth or any political subdivision thereof, or any public authority." Inconsistent with this statutory scheme, 760 CMR 56.03(3)(b)(3) provides for "any land owned by a housing authority ***and*** containing SHI-eligible housing." (emphasis added). That is, land that should be excluded under c. 40B is instead added back into the denominator.

- 760 CMR 56.03(3)(b) requires "more than 1-1/2 percent of the total land area zoned for residential, commercial or industrial use" to satisfy the statutory land area minimum. This conflicts with G.L. c. 40B, § 20, which provides that the land area minimum is satisfied where "one and a half percent or more" of the total zoned land area contains low or moderate income housing.

- G.L. c. 40B, § 20 provides that consistency with local needs is achieved where "low or moderate income exists…on sites comprising one and one half percent or more of the total land area…." In contradiction, 760 CMR 56.03(b) provides for counting only the *portion* of each site that contains low or moderate income housing.

- G.L. c. 40B, §. 20 provides that review of a municipality's claim to satisfaction of the 1.5% land area minimum occurs *after* the board conducts hearing on a comprehensive permit application (""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…."

- In contradiction to G.L. c. 40B, §. 20, 760 CMR 56.03(8) purports to impose on the board the following "procedures" *prior* to hearing the comprehensive permit application,

should the board claim that it has satisfied the 1.5% land area minimum (or other "safe harbor" provided by the statute):

> (a) If a Board considers that, in connection with an Application, a denial of the permit or the imposition of conditions or requirements would be consistent with local needs on the grounds that the Statutory Minima defined at 760 CMR 56.03(3)(b) or (c) have been satisfied or that one or more of the grounds set forth in 760 CMR 56.03(1) have been met, it must do so according to the following procedures. Within 15 days of the opening of the local hearing for the Comprehensive Permit, the Board shall provide written notice to the Applicant, with a copy to the Department [of Housing and Community Development], that it considers that a denial of the permit or the imposition of conditions or requirements would be consistent with local needs, the grounds that it believes have been met, and the factual basis for that position, including any necessary supportive documentation.

- That provision of 760 CMR 56.03(8)(a) requiring a board claiming "consistency with local needs" pursuant to any of the statutory minima to do so within fifteen days of opening public hearing, contrary to G.L. c. 40B, §. 20, is ultra vires, beyond the authority of DHCD, and must be invalidated.

- Additionally, both 760 CMR 56.03(8)(a) and 760 CMR 56.03(8)(c) purport to oblige a municipality to take specific steps relating to any assertion of consistency with local needs, and they provide for the DHCD review of such assertions. The entire scheme contained in 760 CMR 56.03(8)(a)-(c) is contrary to G.L. c. 40B, §. 20, ultra vires, and must be invalidated.

In response to the above, the Proposed Decision adopts the argument of ALR that "the regulations pertaining to G.L. c. 40B have been well-established as furthering the statutory language and intent of the statute, and that the Committee has properly applied and interpreted both the statute and regulations in past decisions." Proposed Decision at p. 16-17. Perhaps ALR, if not the Committee, is new to G.L. c. 40B jurisprudence. See, e.g., Groton Zoning Board of Appeals v. Housing Appeals Committee, 451 Mass. 35 (2008)(Committee exceeded its authority under G.L. c. 40B in ordering Town to convey easement on Town property; "the Act

confers no authority on the committee to order a municipality to convey an easement and, in so doing, the committee contravened State law"); Board of Appeals of Woburn v Housing Appeals Committee, 451 Mass. 581 (2008)(Committee "brushed aside the language of the governing statute and the regulations of the department" and exceeded its authority in revising conditions not found to render project uneconomic; "Committee's authority to alter or set aside conditions imposed by a local board is . . . expressly delineated by statute and it may not be expanded by recasting an approval with conditions as a ["de facto denial]"); Zoning Board of Appeals of Hanover v. Housing Appeals Committee , 90 Mass.App.Ct. 111 (2016)(Committee's decision on safe harbor issue, based on untenable interpretation of DHCD regulation pertaining to filing of application materials, "was arbitrary and inconsistent with DHCD regulations").

Conclusion and Request for Oral Argument

For the forgoing reasons, the Board submits these objections to the Proposed Decision. The Board requests oral argument before the full Committee.

Respectfully submitted,

ARLINGTON BOARD OF APPEALS

By its attorneys,

Jonathan D. Witten (BBO# 636337)
Barbara Huggins Carboni (BBO# 562535)
KP Law, P.C.
Special Town Counsel
101 Arch Street, 12th Floor
Boston, MA 02110-1109
(617) 556-0007
jwitten@k-plaw.com
bhugginscarboni@k-plaw.com

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CERTIFICATE OF SERVICE

I, Barbara Huggins Carboni, hereby certify that on the below date, I served a copy of the foregoing Objections to Proposed Decision, by first class mail, postage prepaid, to the following counsel of record:

Stephanie A. Kiefer, Esq.
Smolak& Vaughan, LLP
21 High Street, Suite 301
N. Andover, MA 01845

Dated: August 14, 2019

Barbara Carboni, Esq.