MHACR Commentary—Developer Counsel 2020-2021 Review

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16 Stearns Road, LLC v. *Wellesley Zoning Board of Appeals*

In *16 Stearns Road, LLC* v. *Wellesley Zoning Board of Appeals* 16 MHACR 66 (2021), the developer appealed a series of conditions relating to construction management for a 24-unit development on a one-acre site in Wellesley. The conditions purported to prohibit all construction workers from parking on the development site during construction.

This issue, notably, arose based upon the developer's voluntary filing of a construction management plan (CMP), which provided a proposed parking arrangement whereby construction supervisors would be permitted to park on site, all other workers would park at pre-arranged off-site locations, and no on-street parking would be allowed. The developer's good deed of voluntarily filing a CMP and agreeing to comply with the parking management plan set forth in the CMP did not go unpunished; rather, the board took the opportunity to impose a series of conditions requiring all parking take place off-site at pre-arranged locations with a shuttle service to and from the site. The developer objected to these conditions on the basis that "Local Requirements and Regulations have not been applied as equally as possible to subsidized and unsubsidized housing."

As to this question, the Committee admitted evidence of prior decisions of the local board approving several market-rate developments without similar conditions prohibiting all on-site parking. In annulling these conditions, the Committee noted that no expert evidence was provided by the board to prove that a safety concern justified these conditions. Instead, only lay testimony of the board's chair and an abutter was provided. These concerns were not found to be speculative, not based on hard evidence. As noted by the Committee, "any construction site, whether in a residential area or a commercial area, results in increased traffic and some risk to pedestrians." In this regard, the Committee noted that it was relevant that the municipality had the power to implement temporary protections to improve off-site safety, yet had failed to do so. As such, the conditions were struck.

The issue of note for practitioners in *16 Stearns Road* is a practical consideration as much as it is a legal question. In modern Chapter 40B hearings, local zoning boards now frequently request CMPs outlining all aspects of construction, including staging, parking, storage, excavation, and other construction impacts. One practical challenge associated with this is that CMPs are typically prepared by construction management companies, who may not yet have been hired by the developer at such an early stage in the construction process. Construction means and methods may differ, so one company's procedures may vary from another's, creating practical difficulties when it comes time to build the project, particularly if an approval is conditioned upon compliance with another company's CMP.

Legally, the Committee emphatically confirmed that the filing of a CMP is not required during the comprehensive permitting process, since pursuant to Chapter 40B and the regulations thereunder, "the developer is required to provide only preliminary plans." The challenge for developers is deciding whether to voluntarily fulfil such requests as an accommodation to the municipality to earn support, or whether to decline to do so in order to avoid the risk that the municipality will find something it does not like in the CMP and take the opportunity to mine the CMP for conditions that otherwise might not have been proposed.

Of note, other regulations—such as local stormwater management bylaws enacted in accordance with municipalities' obligations under their federal National Pollutant Discharge Elimination System (NPDES) permits—frequently require the filing of a CMP at some stage in the permitting process. As long as such (unwaived) requirements do not constitute an improper condition subsequent that reserves post-permit opportunities for the board to review and approve matters that should be resolved during the comprehensive permit process, requirements to file such post-permit CMPs may be valid. However, it is a red herring to conflate the authority provided by such regulations for requiring a CMP independently of the comprehensive permit process with the local zoning board's authority to require a CMP *during the comprehensive permit process*.

680 Worcester Road, LLC v. *Wellesley Zoning Board of Appeals*

680 Worcester Road, LLC v. *Wellesley* 16 MHACR 70 (2021) is an appeal from a conditioned approval of an eighteen-unit development, which, as proposed by the developer, was to contain twenty units, including five affordable units. The proposed building was to be four stories in an otherwise single-family neighborhood. In an effort to mitigate the appearance of building mass, the developer had agreed to modify the building to provide "stepped back" third and fourth floors. In its decision, however, the board went further—not only explicitly reducing the unit count from twenty to eighteen, but also requiring an architectural step back that exceeded what was agreed-to by the developer, and which necessitated a reduction both in the building size and unit count.

The first step in an appeal from an approval with conditions is for the developer to meet its burden of proof that the conditions imposed by the board rendered the project uneconomic. This is assessed using the Return on Total Costs (ROTC) method, whereby the ROTC of the project, as approved, is compared to the eco-

nomic threshold, which is calculated by adding 450 basis points to the applicable yield of the 10-year Treasury rate—here, 6.06%. If the ROTC falls below the economic threshold, the conditions are deemed to render the project uneconomic. Where, as here, the project is "uneconomic as proposed", i.e., the ROTC of the project as proposed is already below this threshold, the developer must also prove that the ROTC of the project as conditioned would be significantly more uneconomic than the ROTC of the project as proposed.

In this case, the Committee determined that the ROTC of the project as conditioned (2.8%) as compared to the ROTS of the project as proposed (3.36%)—a reduction of .5%—was significantly more uneconomic. Thus, the developer's burden was met.

The Committee turned next to the board's burden of proving that the conditions rendering the project uneconomic were justified by valid local concerns that were not outweighed by the regional need for affordable housing. Notable points here include the following:

- One condition imposed by the board required that the top floor of the building be set back 65 feet from the property line. Noting that the proposed building was only five feet taller than was allowed under local zoning, and acknowledging the board's own architectural peer review consultant's testimony that the design proposed by the developer was "the most successful approach", the Committee struck this condition requiring an additional setback.

- Another set of conditions, which is discussed more fully in regards to a companion case to this one (*16 Stearns Road* v. *Wellesley Zoning Board of Appeals*, which dealt with another nearby development proposed by a related developer), purported to forbid all on-site parking by construction workers. As in *16 Stearns Road*, these conditions were struck for the same reasons.

- The Committee struck several conditions pertaining to the use of a state highway under the control of MassDOT. One condition not only required a MassDOT highway access permit prior to construction (which was deemed acceptable), but also sought to "reserve for [the board] the right to veto action by MassDOT if the state agency requires a change in design." Here, the Committee noted that "only one authority can have final say over the design of the curb cut, and that is clearly MassDOT." Similarly, the Committee struck a condition purporting to regulate the use of the state highway, since the terms of such use would be prescribed in the highway access permit.

- The Committee struck a condition requiring the developer to install, at its cost, a new sewer main as the improper imposition of off-site infrastructure costs, where such costs are not typically imposed on non-subsidized developments, were not supported by unwaived local bylaws, and were not directly attributable to a condition that would be caused by the project. Further, there was evidence that the existing sewer main had adequate capacity and was well within its useful lifespan. A neighbor's testimony regarding sewer problems was dismissed as speculative, since there was no proof that her issues were caused by inadequate capacity of the sewer main as opposed to defects in the later sewer line connecting to her home.

This case, and all others issued in this volume, illustrate that municipalities, and municipal counsel, will have a tough row to hoe in defending the imposition of conditions and waiver denials where the evidence—often in the form of the municipality's own peer review consultants—does not support it. The message to local authorities is clear: you may be entitled to your own opinions but you aren't entitled to your own facts—and it is facts that must always be at the foundation of Chapter 40B decisions. The challenge for developers in Chapter 40B proceedings—as it always has been—is to help local zoning board members navigate the peculiarities of the comprehensive permit process and to convince the members (who may not be well-versed in Committee precedents) to recognize that their authority to impose conditions is not unlimited and that their decisions must be made based on the actual facts and evidence, rather than on the impassioned, and often entirely opinion-based, opposition by neighbors.

Way Finders, Inc. and Fuller Future, LLC* v. *Town of Ludlow Zoning Board of Appeals

Way Finders, Inc. v. *Town of Ludlow Zoning Board of Appeals* 16 MHACR 1 (2021) illustrates the continuing resistance on the part of local zoning authorities to embrace the twin concepts that (1) the "board must review the proposal submitted to it, and may not redesign the project from scratch", and (2) the board may not impose improper conditions subsequent, which "reserve for subsequent review matters that should have been resolved by the Board during the comprehensive permit proceeding."

In this case, the developer sought a comprehensive permit to build 43 rental units—all affordable—on a 5.3-acre site. This project was approved subject to an extensive list of conditions, which the developer appealed, claiming that the objected-to conditions would render the project uneconomic, were not based on valid local concerns, were not validly imposed in accordance with the authority of local boards pursuant to applicable local bylaws, and improperly imposed requirements on the project that were not typically imposed upon non-affordable development.

The conditions in question, among other things, limited the project to 38 units, subject to a provision under which the developer could potentially "add back" three additional units as an insubstantial change of the comprehensive permit but only if (1) no new waivers of local bylaws would be required and (2) the ZBA's peer reviewer concluded that the plans did not present any "significant additional site engineering concerns". Other notable conditions purported to require that a limited dividend entity (LDE) own the project in perpetuity (effectively thwarting the developer's intention to change its corporate status from a LDE to a non-profit for tax credit purposes), reduced the number of permitted buildings and bedrooms, required the construction of a play area for children (supposedly to discourage children from accessing an off-site playground due to alleged safety concerns), denied waivers for local permit/inspection fees and a local stormwater management permit, required post-permit payments for peer review services, required post-permit Board of Health approval of dumpster locations, required installation of certain berms and fencing, required the installation of a sidewalk connecting the project to public streets, required 24-hour video monitoring and property management, required fencing around stormwater basins, and required the developer to place permanent monuments to demarcate a wetlands buffer zone.

In all cases where a developer challenges conditions on the basis that they are not consistent with local needs, the developer bears an initial burden of proof that "the conditions and requirements

in the aggregate make construction or operation of the housing uneconomic." If this threshold is met, the burden of proof then shifts to the ZBA to "prove, with respect to those conditions and requirements challenged on economic grounds, first, that there is a valid health, safety, environmental, design, open space or other local concern that supports each of the conditions and requirements imposed, and then, that such concern outweighs the regional need for low and moderate income housing."

As to the developer's burden to demonstrate that the objected-to conditions would render the project uneconomic, the Committee applied the familiar standard established by DHCD Guidelines of comparing the Return on Total Costs (ROTC) of the project as proposed with the ROTC of the project as conditioned and determining whether the conditions in question would reduce the project's ROTC to below the minimum reasonable return (i.e., the economic threshold)—which is was calculated by adding 450 basis points to the yield on the 10-year Treasury note as if the date of the application for project eligibility. Here, the economic threshold was determined to be 6.13%.

Because 100% of the proposed units were to be affordable, the Way Finders project was projected by the developer to have a ROTC of only 0.462%. Thus, this represented an instance where the project, as proposed, would result in a ROTC below the economic threshold—a situation described as "uneconomic as proposed". In such situations, the developer must not only demonstrate that the project would be uneconomic as conditioned but also "that the Board's conditions render the project significantly more uneconomic than the proposed project." On this point, the Committee accepted the developer's evidence that the ZBA's conditions would result in the ROTC of the project being reduced from 0.462% to only 0.025%—a reduction that the Committee deemed to be significantly more uneconomic. This reduction was caused by, among other things, additional construction and permitting costs and the unavailability of tax credits that would have been available to the developer but for the ZBA's condition that effectively forbade it from changing from a LDE to a non-profit. These changes, the developer successfully argued, would create a significant funding gap and render the project unfundable. In view of this evidence, the Committee determined that the developer had met its burden of proof on the question of economics.

The Committee then turned to the ZBA's burden to demonstrate that the conditions were supported by valid local concerns that outweighed the regional need for affordable housing. Here, the Committee noted that "it is incumbent on [the] zoning board to identify a local interest protected by bylaw that is stricter than state requirements and demonstrate that such interest outweighs regional need for low and moderate income housing." Further, the Committee cautioned municipalities that "the local zoning board's power to impose conditions is not all encompassing but is limited to the types of conditions that the various local boards in whose stead the local zoning board acts might impose, such as those concerning matters of building construction and design, siting, zoning, health, safety, environment, and the like." Ultimately, the Committee struck or modified most of the conditions purportedly imposed by the ZBA. The Committee's discussion yielded a number of noteworthy points:

- The condition purportedly allowing the developer to "add back" three additional units was not taken into consideration for purposes of assessing whether the ZBA's conditions would render the project uneconomic because additional post-permit review/approval was required in order to build these units.

- Numerous conditions were stricken or modified on the basis that they would constitute improper conditions subsequent, which would "reserve for subsequent review matters that should have been resolved by the Board during the comprehensive permit proceeding." Here, the Committee noted that "[c]onditions requiring new submissions for peer review and those which may lead to disapproval of an aspect of the development are improper conditions subsequent." In other words, "it is not the role of the Board to oversee construction". The Committee distinguished such improper conditions subsequent from the kinds of proper conditions that are allowed under 760 CMR 56.05(10)(b), which allows post-permit review by technical authorities with the necessary expertise, such as code compliance review. On this basis, the Committee struck or modified conditions providing for, among other things, the above-discussed "add back" procedure, requiring the construction of a playground (subject to Board approval), requiring submission of materials for future peer review comment/approval, requiring Board of Health approval for dumpster locations, requiring fire department approval of the project site's fire access, requiring Department of Public Works (DPW) approval of curb cuts and offsite infrastructure upgrades, requiring various permits for an office trailer, and requiring a local stormwater management permit. Others, such as a condition requiring future water and drainage utilities to be reviewed by DPW for compliance with local requirements, were upheld.

- The Committee emphasized that "[i]f one of the local concerns put forth by the Board to justify a condition is based on the inadequacy of existing municipal services or infrastructure, it not only has the burden of proving that inadequacy of services or infrastructure is a valid local concern that outweighs the regional need for affordable housing, but it also must prove that the installation of adequate services is not technically or financially feasible." Thus, the Committee struck or modified conditions requiring the developer to, among other things, install off-site pedestrian traffic signals and sidewalks, particularly where there was evidence of an existing traffic concern, but no evidence that it presented an issue of pedestrian safety.

- The Committee struck or modified various conditions deemed to improperly regulate issues relating to regulatory matters within the jurisdiction of the subsidizing agency, including conditions mandating the LDE form of ownership for the developer, imposing conditions on the number of affordable units and the duration of the affordability restrictions, specifying local preference selection procedures, imposing requirements regarding the execution and recording of the project's regulatory agreement, and imposing requirements for a property management plan.

- The Committee emphasized that improper conditions can be stricken irrespective of whether they were "initially proposed by the developer".

- The Committee noted that developers can be required to deposit funds for post-permit outside consultant reviews only if a local bylaw or regulation authorizes same.

- The Committee noted that pursuant to MGL c. 40B, §20, "local rules and regulations cannot be deemed 'consistent with local needs' unless they are 'applied as equally as possible to both subsidized and unsubsidized housing.' [The developer] carries the burden of proving such unequal treatment. 760 CMR 56.07(2)(a)4 . There is no shifting of burden on this issue; the developer has the burden of proof and

> the Board may attempt to rebut the developer's proof. [ ] One of the clearest examples of unequal application of local requirements is if a condition is not based upon some local legislative or regulatory requirement, but rather is based on concerns not previously regulated." Based on this, the Committee upheld a condition requiring copies of federal, state, and local permit approvals to be provided to the local building inspector but struck a condition requiring "as built" plans to be filed with the building inspector prior to issuance of certificates of occupancy.

Weiss Farm Apartments, LLC* v. *Town of Stoneham Zoning Board of Appeals

The timeline for approving affordable housing by means of a comprehensive permit, as outlined in Sections 21 and 22 of Chapter 40B, is such that this process should in theory take just under eleven months to complete—even if it includes an appeal to the Committee. In a nod to this intent, the Committee in *Weiss Farm Apartments, LLC* v. *Town of Stoneham Zoning Board of Appeals* 16 MHACR 26 (2021), noted that "a fundamental purpose of G. L. c. 40B, §§ 20-23, is to 'expedite action on such applications where previously a builder might have suffered delays or months and even years in negotiating approvals from various boards'" and that the "legislative intent of Chapter 40B is to 'promote affordable housing by minimizing lengthy and expensive delays occasioned by court battles commenced by those seeking to exclude affordable housing from their own neighborhoods'."

This statement—although of course true—takes on a distinct note of irony given that it occurs sixty-eight pages into this colossal 96-page decision issued nearly seven years after the developer filed its comprehensive permit application.

At issue in *Weiss Farms* was a 259-unit rental project on over ten acres in Stoneham. In conditionally approving this project, the local zoning board approved only 124 units and subjected the project to numerous conditions and waiver denials. The litany of conditions and waiver denials—which pertained to all aspects of the project, including density, height, massing, traffic/parking, access/layout, stormwater management, wetlands/engineering, construction, and site operations/management—are too numerous to fully describe here.

After discussing the costs that these various conditions and waiver denials would cause the developer to incur, the Committee turned to the developer's burden of proving that the conditions and waiver denials would render the project uneconomic. Here, the Committee employed the familiar methodology of comparing the Return on Total Costs (ROTC) for the project both as proposed and as approved to the minimum economic threshold, which in this instance was determined to be 6.97%. After considering the parties' arguments and expert testimony, the Committee determined that the conditions and waiver refusals reduced the project's ROTC from 5.54% to 4.02%. This reduction of 1.43%, the Committee held, rendered the project not only uneconomic but also significantly more uneconomic than the project as proposed—a secondary finding that was required because the project, as presented, was "uneconomic as proposed" since its proposed ROTC was already below the minimum economic threshold.

Having determined that the developer had met its burden of proof regarding economics, the Committee then turned to the board's burden of proving that its myriad conditions and waiver denials were supported by valid local concerns (protected by local bylaws) that outweighed the regional need for affordable housing. Here, however, rather than citing specific local bylaws and regulations supporting the board's alleged local concerns, the board apparently instead referred to local bylaws only generally, with little or no explanation, and with little argument that the interests safeguarded by local standards that are stricter than applicable state or federal protections outweighed the need for affordable housing. This "strategy" was rejected almost in all instances by the Committee, which reminded municipalities that "a board must show that the local concern set out in local bylaws or regulations applies to the proposed development, and that the specific interests identified in the local regulation are important at the site."

The Board's conditions and waiver denials unmistakably reveal that the Board was unwilling to take action on the project as presented. Instead, the Board, through myriad conditions and waiver refusals, attempted instead to "redesign the project from scratch" subject to numerous provisions purporting to reserve for the Board an opportunity for further post-permit review and approval of matters that should have been resolved during the comprehensive permit process. This all-too-common tactic was again roundly rejected by the Committee, as it has been in all previous instances in which it has been attempted. The message to local zoning boards and their advisors should by now be crystal clear: in instances where a board is unwilling to approve, with or without conditions, the project that is actually before it, the proper course is an outright denial.

For the most part, the Committee's lengthy discussion of specific conditions and waiver refusals resulted in few points of interest to practitioners. Most were annulled based on the unremarkable fact that the municipality apparently presented scant evidence to support their imposition and little in the way of convincing legal argument to demonstrate that the numerous black letter points of Committee precedent that the board's decision flouted were somehow distinguishable. Some notable points include the following:

- The Committee struck several conditions requiring offsite traffic infrastructure improvements where the evidence established that the improvements were ultimately not necessary for safety reasons even though their installation was justified by applicable engineering standards and they would improve traffic convenience.
- The Committee struck a condition requiring secondary access in the absence of evidence that it was needed for safety.
- The Committee struck a waiver denial that would have imposed the zoning bylaw's standard parking ratio where the board's own expert witness testified that the proposed ratio was adequate.
- The Committee struck a condition giving the Board a post-permit opportunity to designate trees that must be preserved.
- The Committee struck various conditions requiring study of offsite municipal drainage infrastructure where the maintenance and repair of this infrastructure was the responsibility of municipality and in any event the project demonstrated a reduced impact from runoff.

- The Committee struck a condition purporting to require compliance with MassHousing's Sustainable Development Principles on the basis that these advisory considerations are neither local rules nor state requirements.
- The Committee struck a condition requiring that the affordable units in the project be subject to an affordable housing restriction that would be both enforceable by the municipality and also subject to Board approval.
- The Committee struck various conditions that were duplicative of provisions of MassHousing's Regulatory and Use Agreement.
- The Committee struck a condition purporting to give the Board authority to disapprove the project's affirmative fair housing marketing plan.
- The Committee allowed a condition requiring current contact information for site management to be provided to the Board and local police department.
- The Committee struck or limited numerous conditions relating to post-permit review of plans to provide that such review was limited to review by appropriate authorities with technical expertise for consistency with the comprehensive permit and applicable regulations.
- The Committee struck or modified numerous conditions requiring approval of additional filings, finalization of technical details, and additional testing as improper conditions subsequent pertaining to matters that should have been determined by the Board during the public hearing.
- The Committee struck a condition requiring compliance with a zoning bylaw provision that was not yet in effect as of the date of the comprehensive permit application.
- The Committee struck various conditions requiring sureties, bonds, guarantees, deposits of funds, and indemnities except to the extent permitted by applicable regulations.
- The Committee struck a condition requiring an environmental impact report pursuant to the Board's local Chapter 40B rules and regulations on the basis that it was not applied equally to unsubsidized developments.

Additionally in *Weiss Farm*, the Board had sought an order directing the developer to pay certain peer review fees for services rendered during the public hearing—some of which pertained to the comprehensive permit process and some pertained to other, related permitting processes. Here, the Committee declined to order the developer to pay peer review fees for matters outside of the Board's jurisdiction, noting that applicants can be required to "pay only those fees on the submission by the Board's witness that explicitly reference work relating to peer review for the comprehensive permit or a specific fee established by local rule related to the comprehensive permit application."

For good measure, *Weiss Farm* also included some procedural discussion of the municipality's attempt to claim a General Land Area Minimum (GLAM) "safe harbor" claim, which was rejected after multiple attempts to raise it, and which included a failed attempt to obtain confidential information relating to "group home" units in Superior Court and then conceal that information from the developer. In the end, the Committee's discovery of this brazen stunt resulted in the immediate dismissal of that claim. Also rejected was the municipality's attempt to "work the ref" by challenging DHCD's safe harbor guidelines, which have now been upheld by the Committee on multiple occasions.

In sum, *Weiss Farm*—which, as of August of 2021, is now under appeal by the Town of Stoneham in Superior Court—effectively serves as a roadmap for municipalities to make it all but cost-prohibitive to build affordable housing. Even if these efforts are ultimately unsuccessful, this case serves as a warning that communities who are motivated and willing to expend taxpayer funds fighting against affordable housing have at their disposal numerous tools to delay and render development cost-prohibitive for all but the most well-funded developers with the funds, skill of counsel, and willingness to wait for the appeal process to play out. If there is any doubt as to whether there is a need for the current regulatory scheme for handling Chapter 40B appeals to be reformed in order to meet the affordable housing crisis in the Commonwealth, *Weiss Farm* should put it firmly to rest.

Weston Zoning Board of Appeals and 518 South Avenue LLC

In the Matter of Weston Zoning Board of Appeals and 518 South Avenue LLC 16 MHACR 81 (2021) pertains to an interlocutory appeal by the board from a denial by DHCD of its invocation of the General Land Area Minimum (GLAM) "safe harbor". Although the Town's claim ultimately proved unsuccessful, it did succeed to the extent that it achieved the aim of delaying the construction of the affordable housing proposed by this project—in this instance, to the tune of 20+ months.

GLAM safe harbor appeals deal with the question of whether a municipality may refuse (or approve with conditions) a comprehensive permit application on the basis that it is consistent with local needs due to the fact that "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." The burden of proof in GLAM appeals is entirely upon the municipality to prove that its invocation of safe harbor was consistent with local needs. Review in GLAM appeals is de novo—a regulatory peculiarity in view of the fact that such appeals are intended to be "expedited", 760 CMR 56.03(8)(c), and thus should be resolved in less time than the fifty days contemplated by MGL c. 40B, § 22 for full, substantive appeals to be decided. For anyone keeping score, this expedited interlocutory appeal took over 500 days to resolve.

The methodology for calculating what land area can be counted towards affordable land area, and what may be excluded from it, is set forth in DHCD's *Guidelines for Calculating General Land Area Minimum*. Rather than directly applying these DHCD *Guidelines* in this case, the Committee—a department within DHCD—instead notified the parties of its intention to "take official notice" of them. Perhaps this stance had to do with the proviso oft-cited by the Committee that agency guidelines "do not have the force of law"—guidance that is straightforwardly relevant to judicial review of DHCD decisions, though not as obviously so in the case of DHCD's application of its own regulations. In any event, the board objected even to this limited use of the *Guidelines*, to no avail. The board tilted at this windmill because, its own witnesses acknowledged, if the Guidelines were applied, the Town was less

than 1/3 of the way to meeting the 1.5% GLAM needed to claim this safe harbor.

As explained in the Guidelines, the calculation of GLAM is performed by dividing the qualifying affordable land area of the municipality (numerator) by the total land area of the municipality that is zoned for residential, commercial, or industrial use subject to certain specific exclusions (denominator). If the result is 1.5% or above, the safe harbor claim is successful. Despite the emerging popularity of attempts to secure a GLAM safe harbor, this author is not aware of a single instance of a successful GLAM safe harbor claim to date.

With respect to the denominator, the Committee sided with the developer's expert GIS witness over the testimony of the local town planner. In doing so, among other things, the Committee rejected the board's claimed exclusion of privately-owned land subject to a private conservation restriction and that of unaccepted, private rights of way—both of which exclusions flew in the face of extensive Committee precedent denying prior attempts to do so.

With respect to the numerator, much of the dispute pertained to the calculation of "directly associated" land area, as it does in many cases. Calculating this requires taking a quite granular approach to SHI sites and assessing how much area outside of buildings should be counted towards the numerator. This is typically done with GIS data. Examples of eligible, directly associated land include landscaped areas around buildings, driveways and parking areas, etc. Ineligible land includes things like unmaintained forest, wetlands, and land area in excess of the minimum land area per residential unit under local zoning.

Notably, the primary reason for the board's unsuccessful attack on the validity of the *Guidelines* was because the municipality wanted to claim the entire acreage of every SHI site irrespective of whether that acreage was actually developed with affordable housing. It does not require a vivid imagination to see how such a rule could be employed to manufacture a GLAM safe harbor while actually creating very little affordable housing.

Notable points here include the following:

- The Committee rejected the board's argument that unmaintained wooded "buffer" areas, wetlands and wetlands buffer zones, a soccer field, unmaintained "passive recreation" areas, and other open areas claimed by the board to be "appropriate to the Town character" could be counted as directly associated area.

- The Committee rejected the board's attempt to include trails as directly associated land where there was no evidence that they primarily served the residents of a SHI-site.

- The Committee reminded municipalities that the directly associated area of a SHI site, once calculated, must be prorated based on the percentage of SHI-eligible units on the site as compared to non-SHI-eligible units.

- The Committee rejected the board's attacks on the credibility of the developer's expert witness, who relied primarily on GIS data and MassGIS satellite imaging—both of which are data sources specifically identified in the *Guidelines* as the proper source of most information in GLAM appeals.

In the end, when applying the *Guidelines*, both sides agreed that the municipality was far short of 1.5% GLAM. The Committee ultimately sided with the developer's expert and determined that the GLAM percentage here was only 0.29%.

The outcome of this case was of course correct but it was still far less than ideal, given the extensive delay that the board's GLAM safe harbor claim generated. The case demonstrates that even when a GLAM safe harbor claim treads upon the knife edge of frivolity, because unsuccessful claimants are not required to post any kind of security in order to file the appeal nor are they subject to any kind of sanction in the event of such failure, this tactic can be used strategically to block affordable housing through extensive delays and litigation costs. The proliferation of unsuccessful GLAM claims in recent years, and the emerging trend of private parties opposed to affordable housing advocating for local zoning boards to claim GLAM safe harbors, suggests that this issue is ripe for reform at the regulatory level—to streamline and simplify the process—and perhaps also at the statutory level—to eliminate the basis for this safe harbor entirely. ■