

Flushing Out the Safe Harbor: “General Land Area Minimum” Offers Newton No 40B Shelter

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Municipalities long unable to achieve ten percent affordable housing are now turning more frequently to a different **Safe Harbor** to block development of low and moderate income housing – compliance with the “*General Land Area Minimum*” of Chapter 40B’s affordable housing regulations. In its first detailed ruling on the topic, the **Housing Appeals Committee (HAC)** expanded the denominator (municipality’s total land area) and shrank the numerator (total land area occupied by eligible affordable sites) leaving the City of Newton floating outside of this 40B Safe Harbor and facing a Comprehensive Permit application for a 135-unit affordable housing project. As demonstrated in ***In the Matter of Newton Zoning Board of Appeals and Dinosaur Rowe, LLC***, HAC No. 15-01, with the burden of proof squarely on municipalities to prove compliance with the “General Land Area Minimum,” cities and towns face significant challenges qualifying for this Safe Harbor.

In the Matter of Newton Zoning Board of Appeals and Dinosaur Rowe, LLC, Housing Appeals Committee (HAC), No. 15-01, concerns an affordable mixed-income rental project on a 2.5-acre lot proposed by Dinosaur Rowe, LLC. After the developer filed its application on November 5, 2014, and the Board opened the public hearing, the Board notified the Dinosaur Rowe on December 18, 2014, that the City had achieved the Safe Harbor available to municipalities that have met the general land area minimum. That is, Newton claimed that eligible low or moderate income housing now existed on sites “comprising more than 1½% of the total land area zoned for residential, commercial, or industrial use....” The developer appealed to the Department of Housing and Community Development (DHCD), which issued a decision on January 23, 2015 finding in favor of the Developer. On February 12, 2015, the Board appealed to HAC which issued its “Interlocutory Decision Regarding Safe Harbor” a little over four months later on June 26, 2015.

The Expanding Denominator

In municipalities where the 1.5 percent threshold has been met, any decision, including the denial of an affordable housing project, made by the local board of appeals is “consistent with local needs and thus unassailable as a matter of law.” The 1.5 percent General Land Area Minimum is calculated by dividing the area of affordable housing sites that are eligible to be inventoried on the Subsidized Housing Inventory (SHI) of the DHCD (the numerator) by the total land area in the city that is zoned

for residential, commercial, or industrial use (the denominator).

The Comprehensive Permit regulations specify what land is to be included and excluded from the denominator. Here, the parties largely agreed upon the total area calculated by the City (7,901.3 acres). From this number, Government-owned land (55.0 acres), wetlands on which development has been prohibited by restrictive order of the MassDEP pursuant to G.L. c. 131, § 40A (83.5 acres), water bodies (238.1 acres), and land in a “flood plain [zone], conservation zone or open space zone, if said zone completely prohibits residential, commercial [and] industrial use” (352.4 acres) were excluded without objection by Dinosaur Rowe. An additional 2.6 acres was added, not subtracted, by agreement due to certain duplications.

The parties were divided, however, over the Board's attempt to exclude 539.8 acres of land on three private golf clubs. Although zoned single-family residential, the Board justified the exclusion of the land on the grounds that it had “been classified by the Board of Assessors of the City of Newton as open space and recreation land” under Massachusetts General Laws Chapter 61B. HAC rejected the attempt to exclude so-called “Chapter Lands” – lands under recorded restrictions devoted to agricultural, conservation, open space or recreational purposes in exchange for tax breaks – from the total land area denominator notwithstanding DHCD's interpretation to the contrary. HAC concluded that even though “this land will be used for quite some time for golf... the owners ... could develop it for housing at any time” by paying a roll-back taxes and allowing the municipality to exercise its statutory right of first refusal to purchase. Newton's total land area denominator of 6,609.2 acres was increased by HAC by 539.8 acres to 7,149 acres.

The Shrinking Numerator

The numerator of the percentage calculation consists of inventoried and un-inventoried sites. The former are sites on DHCD's SHI. The latter is made up of sites “established according to [the Comprehensive Permit regulations] as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board.” The Board offered proof that slightly over 100 acres should be counted in the numerator and the developer challenged a number of the sites. The Board provided a spreadsheet of DHCD-Inventoried Sites of nearly 100 housing developments resulting in 93.4 total countable acres. The developer challenged two, both successfully. HAC reduced the land area associated with a mixed use development with an affordable rental component. Where 28 single-room-occupancy apartments represented less than 11 percent of the gross building area on a roughly 6-acre site, HAC reduced the inventoried area by 5.4 acres from 6.1 to 0.7 acres. HAC also shrank the inventoried land area for at an affordable rental housing site that included facilities for Massachusetts Bay Transit Authority (MBTA) commuters. Since the developer controlled approximately 3.9 acres of the 6.9 site under a long term lease, the 3 acres controlled by the MBTA were eliminated from the numerator. Together, this reduced the countable inventory sites from the Board's 93.4 acres to a more modest 85 acres.

Next, the Board sought to include several un-inventoried sites in the numerator totaling 11.5 acres. The parties did agree to include 0.3 acres for a 9-unit project, but were divided over several other sites. First, HAC agreed with the developer to discount a 3.9-acre project. HAC rejected inclusion of this land area because at the time the Dinosaur Rowe's Comprehensive Permit application was filed (November, 2014), that project was not eligible to be counted towards the SHI since more than one year had elapsed since the issuance of the project's special permit without the issuance of the building permit. It was irrelevant that that building permit later issued in February, 2015 and was in effect at the time of the HAC appeal: The 40B regulations look to the date of application to determine inventory-eligible projects.

Second, the Board also argued that un-inventoried sites should include 7.3 acres representing 39 group homes for people with disabilities and deed-restricted units rehabilitated under the HOME Investment Partnerships Program or administered by the Newton Community Development Authority. The developer specifically challenged four projects. First, with regard to a five-unit group home, Dinosaur Rowe argued that its 0.3 acres should be deducted since it lacks evidence of an affordable housing deed rider or fair housing marketing plan. The Board's response – the group home serves individuals with special needs, is a non-profit, tax exempt organization created as part of a settlement – was deemed insufficient by HAC and the 0.3 acres was subtracted. Second, the developer made the same argument regarding another group home on a 0.3-acre site. Again, the Board's response – the facility operates as a group home for disabled individuals – was insufficient to meet its burden of proof and the 0.3 acres was deducted. Third, HAC eliminated another 1.4 acres for a project allowed by special permit from the Newton Board of Appeals. Despite the fact that the permit was conditioned on the "dedicat[ion of] at least ten units... for low income persons as defined by HUD income standards and at least ten units with services for moderate income persons," HAC found the City failed to meet its burden of proof where, among other things, no state or federal subsidy program was identified and there was no proof the City had qualified the units as Local Initiative Units. Finally, where the Board offered a deed rider for one project when challenged, HAC allowed its 0.2 acres to remain included in the Board's figure. In total, HAC reduced Newton's total un-inventoried sites by 5.9 acres from 11.05 to 5.6 acres.

Faced with the burden of proof, the Board failed to convince HAC on several scores. In total, HAC (1) shrank Newton's proposed numerator by roughly 13 percent or 13.85 acres from 104.45 to 90.46 acres and (2) increased Newton's proposed denominator by approximately 8 percent or 539.8 acres from 6,609.2 to 7,149 acres. Rather than exceeding the General Land Area Minimum of 1.5 percent, Newton's calculation of 1.58 percent was ratcheted back to 1.26 percent by HAC leaving the Board to consider the 135-unit 40B project on the merits or further appeal the matter to the courts. Although the "General Land Area Minimum" Safe Harbor is at the disposal of cities and towns, their burden of proof to demonstrate compliance with each and every component of the numerator and denominator and meet the 1.5 percent threshold ensures that it will not be easily met.

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