COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

In the Matter of

HINGHAM ZONING BOARD OF APPEALS

and

SEB/HINGHAM, LLC

No. 13-02

INTERLOCUTORY DECISION REGARDING SAFE HARBOR

November 7, 2013

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I. INTRODUCTION AND PROCEDURAL HISTORY

This case raises the same legal question that this Committee decided in the case of *In the Matter of Hingham and AvalonBay Communities, Inc.*, No. 12-03 (Interlocutory Decision Jan. 14, 2013). That is, the central question is whether housing units in a comprehensive permit development approved about ten years ago in Hingham should be counted on the Subsidized Housing Inventory (SHI) in a manner that is analogous to rental units or to ownership units, which in turn determines whether the town has met the 10% housing unit minimum.[1] The resolution of this issue remains of considerable importance to the parties.[2] We have analyzed the facts presented in this case, and find no

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 Chapter 40B, § 20. See 760 CMR 56.03(2); also see Exh. 3-B, 2-F, 2-Q.

2. Pursuant to 760 CMR 56.03(8)(c), the hearing before the Board on the merits of the comprehensive permit application has been stayed, but will resume upon issuance of this decision. Because we uphold the decision made by DHCD, the town remains short of the 10% housing unit minimum, and the Board's decision on the merits—whether it grants the permit with conditions or denies the permit—will be subject to further review by this Committee and the

material differences between this and the earlier case, and for that reason rule in favor of the developer, as we did in that case.

The issue here is raised in an interlocutory appeal 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 February 28, 2013, the developer, SEB/Hingham, LLC, filed an application with the Board for a comprehensive permit to build 20 units of affordable mixed-income ownership housing at 895-901 Main Street, Hingham. Exh. 1. On March 28, the Board opened its hearing on the application, and on April 12, it notified the developer that the town had achieved the safe harbor available to municipalities that have met the "housing unit minimum," that is, towns in which more than 10% of their housing stock is low or moderate income housing as defined in Chapter 40B, § 20 and 760 CMR 56.03(1)(a) and (3)(a). Exh. 2, 3-A. The developer, in turn, challenged that assertion by filing an appeal with the Department of Housing and Community Development (DHCD). DHCD issued a decision dated May 20, 2013 finding in favor of the developer. Exh. 4. On June 12, 2013, the Board appealed to this Committee, which has convened an expedited hearing pursuant to its regulations, 760 CMR 56.03(8)(c).[3] [4]

Like all of the Committee's proceedings, the hearing in this interlocutory appeal is *de novo*. G.L. c. 40B, § 22; also see *In the Matter of Bourne Zoning Board of Appeals and Chase Developers, Inc.*, No. 08-11, slip op. at 2 (Mass. Housing Appeals Committee Jun. 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]." The central question

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courts. If we had found in favor of the Board, the Board would have been entitled to invoke the statutory safe-harbor provision, and its decision on the merits would not have been subject to further review. G.L. c. 40B §§ 20, 23.

3. DHCD was permitted to participate as an interested person pursuant to 760 CMR 56.06(2)(c), but chose not to file a brief.

4. Since this Interlocutory Decision does not "finally determine the proceedings," the presiding officer may rule on it without consulting with the full Committee. 760 CMR 56.06(7)(e)(2). Of course, in cases of first impression, the presiding officer, in his or her discretion, may choose to bring the matter before the full Committee, as was the case in the earlier *AvalonBay Communities* matter. That is unnecessary here since this case raises a nearly identical question of law. See generally *Forestview Estates Assoc., Inc. v. Douglas*, No. 05-23, slip op. at 4 (Mass. Housing Appeals Committee Mar. 5. 2007)(discussing precedents in detail); *In the matter of Bourne and Chase Developers, Inc.*, No. 08-11, slip op. at 3 (Apr. 13, 2009) (Ruling on Motion to Quash Subpoena).

dividing the parties, however, is a question of law, and few if any facts are in dispute. Therefore, the parties have filed cross motions for summary decision pursuant to 760 CMR 56.06(5)(d), and have stipulated to the admission of a number of exhibits. See Conference of Counsel Statement (filed Jul. 1, 2013). I have reviewed the record before me and decided the issues presented, giving due deference to policy articulated by DHCD, the state's primary housing agency.[5]

II. CHRONOLOGY

In November 2000, Erikson Retirement Communities, LLC applied to the Board for a comprehensive permit to build a continuing care retirement community (CCRC) containing 1,750 independent-living housing units, of which 27.7% would be affordable to low or moderate income households. Exh. 2-J. CCRCs are a relatively new housing model, providing senior citizens with housing, health care, and various ancillary services on a single "campus."[6] The Erickson proposal, which later became known as Linden Ponds, was the first—and, as of 2005, remained the only—such proposal in Massachusetts to include low or moderate income housing. Exh. 2-L, p. 2. The housing subsidy program establishing jurisdiction under the Comprehensive Permit Law was the New England Fund of the Federal Home Loan Bank of Boston (FHLBB). Exh. 2-D; 2-J, p. 5; also see, generally, *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01 (Mass. Housing Appeals Committee Mar. 5, 1999 and *Middleborough v. Housing Appeals Committee*, 449 Mass. 514 (2007).

While the comprehensive permit application was under consideration, presumably because the Board was aware of the significant advantage within the statutory scheme of the Comprehensive Permit Law 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

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5. See *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. 06-11, slip op. at 3 (Mass. Housing Appeals Committee (Jan. 22, 2008); also see n.10, below.

6. The development also provides for over 500 additional residents in assisted living and skilled-nursing-care facilities.

[would] be counted in the town's subsidized housing inventory." Exh. 2-H. This letter, written March 19, 2001, described the Linden Ponds proposal and posed four specific questions. (See section III, below.) On June 14, 2001, DHCD replied to each of those questions. Exh. 2-I.

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 town officials on October 14, 2005. These discussions were confirmed in a letter from the Director dated November 16, 2005. Exh. 2-L. In the meantime, construction began, with the first building permit being issued on October 1, 2005. Exh. 2-K; 2-L, p. 1.

As noted above, in 2013, SEB/Hingham, LLC filed an application to construct an affordable housing development unrelated to Linden Ponds, and it is from that application that the current appeal arises.

III. DISCUSSION

A. Evolution of DHCD Policy

As noted in our Interlocutory Decision in the *AvalonBay Communities* case, it was over thirty years ago that this Committee first addressed the public policy question of how housing units should be counted on the Subsidized Housing Inventory (SHI) to determine whether a community has achieved its housing unit minimum. That is, through the 1970s and 1980s, our 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) (Jun. 3, 1974); 760 CMR 31.04(1) (Jan. 1, 1978 and Dec. 31, 1986) (see Appendix, below). But in 1981,

we overturned a provision in our own regulations, and held that all housing units in a rental affordable housing development—both affordable and market-rate units—should be counted. *Cedar Street Assoc. v. Wellesley*, No. 79-05, slip op. at 23-24 (Mass. Housing Appeals Committee Mar. 4, 1981), *aff'd*, 385 Mass. 651 (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. Our 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 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 affordable, and not market-rate units were to be counted in the SHI toward the housing unit minimum. 760 CMR 37.10 (Sep. 1, 1989); 760 CMR 45.06(3) (Jan. 19, 1990). And, in 1992 in a second case arising in Wellesley, we indicated that we would accept the guidance provided by this state policy. *Capital Site Management Assoc. Ltd. Partners v. Wellesley*, No. 89-15, slip op. at 15-19 (Mass. Housing Appeals Committee Sep. 24, 1992), *aff'd* No. 96-P-1839 (Mass. App. Ct. Feb. 18, 1998).

This policy of counting only affordable units in ownership developments but all units in rental developments has remained in force until the present. But exactly how that policy has been articulated has evolved slightly. The instruction in the Committee's regulations that we should be guided by any intent expressed in subsidy program guidelines remained in place until 2008. But in 2001, 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 Notes to Accompany DHCD's Chapter 40B Subsidized Housing Inventory. Exh. 2-F, § 5-B.

In 2008, the policy with regard to counting of rental and ownership units remained the same, but several other changes were made. First, our regulations were amended to remove the instruction that we be guided by subsidy-program regulations. 760 CMR 56.03(3)(a) (Feb. 22, 2008). Instead, the current procedure for a preliminary review by DHCD of any claim of safe harbor was instituted. 760 CMR 56.03(3)(a), 760 CMR 56.03(8). And, the policy with regard to counting, which had been in the SHI "Notes..." in 2001, was placed in the new 2008 Comprehensive Permit Guidelines. Exh. 3-C, § II-A(2). And finally, the 2008 guidelines for the first time explicitly stated that only affordable units in CCRCs would count in the SHI.[7] *Id.* All of these provisions remained in effect at the time of SEB/Hingham's application in 2013, and are currently in effect.

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 the SEB/Hingham's appeal rather than current DHCD policy with regard to CCRCs. We disagree, and conclude that current policy applies in all respects, and that only affordable units should count in the SHI.

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

The question before us is whether the town of Hingham had achieved the statutory housing unit minimum "as of the date of [SEB/Hingham, LLC's] application" in

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7. The new guidelines were published February 22, 2008. See *In the Matter of Hingham and AvalonBay Communities, Inc.*, No. 12-03, slip op. at 6, n.7 (Interlocutory Decision Jan. 14, 2013).. But the definition of CCRC was added July 30, 2008. *Id.* The substantive provision concerning CCRC units' "inclusion in the SHI" appears to have been part of the February 2008 guidelines (and no party has argued to the contrary). See Exh. 3-C, § II-A(2).

2012. 760 CMR 56.03(1).[8] For this purpose, "there shall be a presumption that the latest SHI [Subsidized Housing Inventory] 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%.[9] 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).

Based upon the 6% figure in the SHI and straightforward application of current DHCD policy described in section III-A, above—counting only affordable units in Linden Ponds, as prescribed by the Comprehensive Permit Guidelines—it is clear that as of the date of SEB/Hingham's application, the town of Hingham had not achieved the housing unit minimum.[10]

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

The Board argues that rules disfavoring retroactive application of the law require us to apply the counting policy in effect in 2001. See Board's Brief, pp. 30-35. This argument fails, 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.

First, we question whether this is truly a case of retroactive application of the counting policy to which simple retroactivity principles should be applied. 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

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8. 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).

9. This included 216 units at Linden Ponds. This appears to reflect the fact that as of that date only a total of 864 units at Linden Ponds were completed or under building permit. Exh. 2-A, p. 2.

10. Since DHCD is the administrative body charged with setting state housing policy, we generally follow its guidance. See *Capital Site Management Assoc. Ltd. Partners v. Wellesley*, No. 89-15, slip op. at 15-19 (Mass. Housing Appeals Committee Sep. 24, 1992), *aff'd* No. 96-P-1839 (Mass. App. Ct. Feb. 18, 1998); also see generally *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 782 (1980);*Cleary v. Cardullo's, Inc.*, 347 Mass. 337, 344 (1964). Of course, we would not be bound to do so if it were in violation of statutory provisions or statutory intent.

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)(b), 56.03(2)(c), 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 manner, they must *always* be counted in that way. In fact, the overall scheme and the language in the regulations indicate the opposite. That is, 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…." Exh. 3-C, § II-A(2) ("Application to Include…"). But eligibility of units already in the SHI is reviewed periodically using a different procedure. That is, at least every two years local officials must certify to DHCD which units are eligible and DHCD verifies this data and removes those that are no longer eligible. See 760 CMR 56.03(2)(d) to 56.03(2)(f); Exh. 2-B, pp. 2-3; Exh. 3-C, § II-A(2) ("Expiration").

In such a dynamic environment, application of current policy in this case is not retroactive application of policy. When the Linden Ponds development was approved in 2001 or even as units in it began to be counted in the SHI in 2005 and later in 2008, the significance of the count was only theoretical. It was for this reason, after all, 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). It is only in the case that is now before us that the issue is ripe, and it is appropriate for us to apply current policy.

Finally, to the extent that our application of the regulation *is* truly retroactive, then, in our view, such application is appropriate based upon the intent expressed in the regulatory language. That is, the regulation says 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" that 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)(statute providing that property owners who have "existing" rights of ingress and egress "shall have" certain new rights); also see *Biogen IDEC MA, Inc. v. Treasurer and Receiver Gen.*, 454 Mass. 174, 190 (2009).

3. The Board's argument that all of the Linden Ponds units should count because it relied upon communications received from DHCD lacks merit.[11]

The Board argues that its decision is consistent with DHCD's June 14, 2001 letter and other communications, which, it argues applied the 2001 DHCD guidelines and determined that all of the Linden Pond units were rental. Board's Brief, pp. 9-11. Board's Reply Brief, pp. 14-15.

First, we do not think that the 2001 letter can fairly be read as applying the 2001 DHCD guidelines. As noted above, the town of Hingham and DHCD had been in disagreement since 2001 as to how CCRC units should be counted. Before the Board issued the Linden Ponds comprehensive permit, although it is apparent that it believed that the units should be treated as rental units, it is equally clear that it was unsure of state policy, prompting it to inquire of DHCD with regard to that policy.[12] See Exh. 2-H. And, it is 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 and ownership units.[13] Exh. 2-I. That is, it noted

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11. This issue is closely related to retroactivity. See *Attorney Gen. v. Commissioner of Ins.*, 370 Mass. 791, 826, 826 n.43 (1976)(retroactivity usually "comes down to" a question of reliance).

12. Though the Board characterizes its request as one for clarification of the existing policy, it 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. And DHCD's response can be read as hesitation, at least, if not unwillingness to expand the exception.

13. Even in 2005 DHCD was still "in the process of clarifying… how CCRC units will count in the

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," "the Department will evaluate," and "it is not clear."[14] Exh. 2-I, p 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 several contexts is definitive. Most notable is that the 2001 DHCD letter refers in several places to "renters" and "rental project." But at that time, DHCD was working with a policy with only two categories: rental and ownership. In the letter, DHCD was groping for a framework within which to address the Board's questions. Although it would arguably have been wiser for DHCD to have given either a definitive answer or no answer at all rather than an ambiguous response, we do not believe that these references can fairly be read as a formal determination by DHCD that Linden Ponds was a rental development. Similarly, the FHLBB's project eligibility letter under the New England Fund program referred to the development as rental. See Exh. 2-D. And, the regulatory agreement, in referring to a "rental component," characterizes the development as a rental development. See Exh. 2-K, p. 2. In addition, it appears that prior to the creation of the CCRC category in the SHI, Linden Ponds was listed there as rental. We ascribe no significance to any of these references. Nor do we ascribe significance to the Supreme Judicial Court's reference in

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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.*

14. With regard to the substantive question of how units should be counted, DHCD's response to the Board's inquiry certainly was far from the affirmation that all units would count that it was seeking. Instead, DHCD it stated, "It is unlikely that the Department would include units in the state's Subsidized Housing Inventory if the units carry [high] entrance fees...." Exh. 2-I, p.1. In responding to the specific question of whether "a project with an entrance fee [would] count as a rental project in which all the units would be included in the... Subsidized Housing Inventory," it stated, "Based on the current description of [the project], it is not clear that the project would meet the state's 40B requirements. If a rental project does not meet the state's requirements, none of the units will be included in the Subsidized Housing Inventory." Exh. 2-I, p. 2. The Board would have us interpret some of this language as indicating that DHCD viewed Linden Ponds as rental development; the developer argues the opposite. We think it does neither. In our view, these statements in 2001 show only that DHCD was still undecided or neutral with regard to whether Linden Ponds should be deemed rental or ownership—and also perhaps that it 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.

passing to the units as "rental apartments" in *Town of Hingham v. Department of Housing and Community Development*, 451 Mass. 501, 504 (2008).

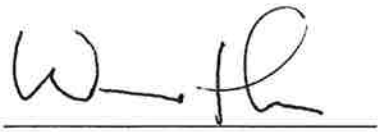
Second, assuming for the sake of argument that DHCD did apply its guidelines in 2001, to the extent that the Board argues that it relied on the figures appearing in the SHI, on the record before us it has not proven that.[15]

IV. CONCLUSION

For the reasons stated above, we conclude that Hingham had not achieved the 10% housing unit minimum at the time of SEB/Hingham, LLC's application, and we affirm DHCD's May 20, 2013 finding that "the Board has not met the burden of proof... that Hingham has achieved a 'safe harbor'...." See 760 CMR 56.03(1)(a).

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



Date: November 7, 2013

Werner Lohe,
Presiding Officer

LPc\h

15. The Board does not appear to make this argument. It states, "Even though [it] has maintained its position that the Town of Hingham has met or exceeded the requisite 10% threshold, the town has continued to move forward with affordable housing projects...." Board's Brief, p. 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. The Board has not made such an argument, however, nor shown specifically that it relied on the 2001 Guidelines. (Note that even after a town has passed the 10% threshold, the law 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 Bd. of Appeals of Amherst*, 449 Mass. 333, 340 (2007).)

(Also note that the Board has not raised the estoppel argument that the Committee addressed very briefly in its *AvalonBay Communities* interlocutory decision. See Board's Opposition, p. 3.)

APPENDIX

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

(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 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 Department 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 Department 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 Department 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 SEB/Hingham, LLC, No. 2013-02, to:

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Dated: 11/07/13

Lorraine Nessar

Lorraine Nessar, Clerk
Housing Appeals Committee