

**TOWN OF BELMONT**  
**ZONING BOARD OF APPEALS**  
**MEETING MINUTES**  
**January 21, 2021**

**RECEIVED**  
**TOWN CLERK**  
**BELMONT, MA**

DATE: October 7, 2021  
TIME: 3:01 PM

Present: Nick Iannuzzi, Chair; James Zarkadas, Vice Chair; Andrew Kelley; Teresa MacNutt; Casey Williams; William Fick; Elliot Daniels

Staff: Ara Yogurtian, Assistant Director, Community Development  
Glenn Clancy, Director of Community Development

**1. CALL TO ORDER 7:00 PM (MEETING WAS HELD VIA VIDEO CONFERENCE)**

Mr. Iannuzzi called the meeting to order and introduced the Zoning Board of Appeal's members. He noted the order of the meeting and explained the video conference process. He mentioned that they would not hear public comment at this meeting. He explained that the purpose of the meeting was to vote in favor or not in favor of moving forward with the assertion to establish safe harbor with the Massachusetts Department of Housing and Community Development.

**2. MGL CHAPTER 40B, GENERAL LAND AREA MINIMUM, SAFE HARBOR**

**The Board of Appeals to determine, if the Town meets or exceeds the Statutory Minimum for General Land Area Minimum Safe Harbor requirements for M.G.L. Chapter 40B developments (low- and moderate-income housing), in accordance with the 760 CMR section 56.03 (3) (b). The determination will apply to current, and future cases, including the Comprehensive Permit application for 91 Beatrice Circle 40 B project.**

George Hall, Counsel for Town of Belmont, noted that the meeting purpose was to address whether the Town had met the minimum to make it possible to deny a 40B application, this argument was that 1.5 percent of the developable land had already been devoted to affordable housing. The Town must assert the defense in accordance with the rules of the DHCD by January 26, 2021. The question was, had the Town met the standard and did they have the ability to prove this to the DHCD.

Mr. Dan Hill, Attorney, representing Build Wise Belmont, noted that his calculations established that the Town was over 1.5%. He described the DHCD guidelines for finding the numerator and denominator. He noted that there were ongoing debates as to whether the guidelines were viable. He explained that this area of law had not been decided and

there was an open question as to whether the guidelines are valid. He described the controversial regulations as:

1. The numerator could only count the buildings and driveways towards the numerator and could not count woods.
2. The provisions of the regulations say that a town cannot exclude from the denominator land that was subject to a conservation restriction and cannot be changed without 2/3 vote of the legislature.

He noted that these legal arguments had some risk, but they were solid arguments and the Town ought to invoke the 1.5%. He added that there were four other Towns bringing these arguments to the DHCD.

The abutter's count included the entire 13-acre parcel Royal Belmont Chapter 40B project. There was 6-7 acres of woods that were subject to an open space management plan. With these adjustments they believe that they were at 1.5 percent if including the conservation land plus 13-acres of the royal Belmont, plus the Belmont housing authority parking lot. He explained some of the inclusions and exclusions and with those adjustments they were at 1.5 percent. He noted that the Town would have nothing to lose by submitting a safe harbor assertion because the worst-case scenario was that the case comes back to the ZBA for a hearing and must be completed in 6 months from that point. He agreed that there would be lawyer fees and consultant fees and it would be money well spent in order to keep the future 40B projects in line. He added that the 40B project will generate many expenses for the Town. He asked the ZBA to invoke the safe harbor before the deadline.

A rebuttal memo was filed on January 21, 2021 and sent via email to Ara Yogurtian.

Mr. Schomer, Attorney representing the applicant, noted that the dispute of the GLAM guidelines were invalid. He noted that these arguments were copied and pasted from previous hearings and this has been rejected by the DHCD. There has not been a judicial ruling on the questions, however the DHCD's ruling is controlling. He added that the Town could lose "as much as six figures" if they were to invoke safe harbor, in the end you many do not prevail. He asked the ZBA to decline the invitation to invoke the safe harbor in this instance.

George Hall, Counsel for Town of Belmont, noted that a lot of work went into the spreadsheet to where it could be submitted to the DHCD and to make a case for safe harbor. The numbers that they have if they apply the DHDC guidelines leave them noticeably short of the DHDC's 1.5 percent. He described the trial type process and the timing of the hearings if the ZBA were to claim safe harbor. The DHDC would likely reject the claim based on the numbers and the Housing Appeals Committee would uphold that determination. Do we have a reasonable case to make that the DHDC guidelines were "off the field" and he noted that the reality was that an agency who was charged

with administering a statute gets a lot of deference from the courts about what the statute means and how to apply it and how to interpret it. Unless the guidelines are obviously inconsistent with the statute there was not an argument to be made especially in regards with the conservation lands and limiting the land area counting toward the SHI housing to the directly associated land was inconsistent to with the statute, the statute says "sites". In order to make this case they would have to prevail on several untested theories and invest a significant amount of money. He did not think it was in the Town's best interest to advance this claim.

Mr. Iannuzzi opened the meeting to the Board Members for questions. He asked Attorney Hill to explain the calculations in his analysis.

Attorney Hill reviewed his process for how they came up with their numbers, he noted that they had to make some adjustments.

Max Colice, Belmont Build Wise, abutter's group, mentioned that their final calculation was at 1.524 percent. He used mostly information from MassDOT to do the calculations and he was not a GIS user.

Mr. Kelley asked Mr. Hill if he agreed that unless there was an adjustment to the numerator, it would be impossible for safe harbor to be achieved.

Mr. Hill agreed that this was the linchpin if they apply the DHCD guidelines strictly and if they do not, they would rely on an aggressive legal argument. The open space management plan was approved by the ZBA and it should be counted towards the numerator. There was only one challenge and it was on the 13-acre conservation land.

Ms. Williams asked Mr. Clancy, to explain how he calculated the public ROWS and how it differs from Mr. Hill and Mr. Nelson's spreadsheet.

Mr. Clancy walked the Zoning Board through the process for his calculations.

Ms. Williams asked Mr. Clancy how he had interpreted and applied the guidelines for the Royal Belmont site.

Mr. Clancy noted that the DHDC guidelines were truly clear and the developed area on the Royal Belmont site was not included in his calculations and was not going to get them to the 1.5%. He noted that the assessor's database was updated annually.

Mr. Colice noted that the land was not to be included in any sort of density calculations for purposes like this according to the Select Board and the Commonwealth that the restricted parcels were to be excluded from density calculations like these.

Attorney Fallon commented that he echoed the expressions as made by Attorney Hill.

Mr. Hill described the management plan at the Royal Belmont, the open space was actively maintained by TetraTech as per the DHCD General Land Area Minimum guidelines.

Mr. Clancy noted that the definition of Directly Associated Area according to the conservation restriction made it clear that the area was for the general public's use and that this property was protected this way and that was why he settled on his decision.

Mr. Hall noted that the word "maintenance" was taken out of context and not in the manner that was consistent with the obvious purpose of the regulation. He explained the regulations for Directly Associated Area and noted that the maintenance was not to be determined as a landscaped area.

Mr. Kelly asked if any of the pending cases dealt with these issues of the Directly Associated Area. Mr. Hall noted that the guidelines were adopted in 2018 and they counted parcel by parcel.

Mr. Zarkadas noted that there was a lot of gray area here and Mr. Iannuzzi agreed with that. Mr. Zarkadas expressed that as a town there needed to be more due diligence work to find out what was and what was not, and he did not think it was going to cost \$1M. He wanted to see the answers more clearly answered.

Mr. Fick noted that it was mixed issue of law and fact whether the safe harbor could be properly invoked. He felt it would be irresponsible to ignore Mr. Clancy and Mr. Hall's advice.

Ms. Williams asked Mr. Clancy if he needed additional information to put together the application that would be needed to meet the Zoning Board's requirements for the submission of safe harbor to the DHDC.

Mr. Clancy noted that they may not have the necessary staff to work with GIS at that level. Mr. Hall noted that it was an overly complicated process, and the regulations say that it is the Board that decides whether to assert the defense. The Board would need back up from the Town and the necessary documentation for this assertion. The Belmont Offices of Community Development would need to put together the supporting notice and documentation, and if they use their own analysis, they are not proving what they are asserting, in fact asserting the opposite as the General Land Area Minimum determination was well under 1.5%.

Max Colice, mentioned that if the Board took the position that they are not going to count the 13-acres for the Royal Belmont, it would be hard to recover, the next 40B development that comes along will use that argument against the Board.

Mr. Iannuzzi asked Mr. Clancy if he would be willing to add the 13-acres (plus make other adjustments as per the abutter's request) to his work in order to prove the 1.5% GLAM to the DHCD.

Mr. Clancy noted that he was not interested in modifying his work to include the changes based on the speculative interpretations of the regulations. He noted that his work was accurate, and he would not change it because he could not present information that he did not come to the conclusion of and could not defend it if it were changed.

Mr. Hall noted that even if the 13-acres were to be included, they still do not hit 1.5% unless they make a combination of other arguments that are also a stretch.

Mr. Zarkadas asked if this was in the best interest of the Town to remove the gray and have it in black and white so that the next case does not have these same issues.

Mr. Hall noted that they would not waive their right to make a safe harbor assertion in the future.

Mr. Iannuzzi mentioned that they would not have the support to put forward opposition before the DHCD while they may have a feeling that if they come to a vote or ignore it, people's credibility is on the line and the Town has made a decision, but the ZBA does not have the support that they would need to state the case.

Ms. MacNutt noted that she agreed with Mr. Clancy's work and she respected his numbers. She added that his numbers were more accurate than GIS.

Mr. Fick noted that the evidence cannot be compiled to put together asserting this defense by next Tuesday, he feels the GLAM analysis should be analyzed on an annual basis.

Mr. Iannuzzi noted that this was a one-time - at the beginning of the application period to claim safe harbor, otherwise the abutters can appeal to the Superior Court. He added that he did not hear anyone with any numbers that put them at 1.5% over or under with any real certainty.

Mr. Hall described the process and options for filing the information.

Mr. Zarkadas noted that this was the time to hire an outside expert for help to do the due diligence and to get rid of the gray areas. Ms. MacNutt agreed with the idea of hiring a GIS expert.

Mr. Clancy noted that his work was more accurate than GIS because he was referring directly to Town maps that were spot on with the area. He explained that this was not a question of the accuracy of the data that he used and analyzed, versus the GIS data that someone else may have used and analyzed. This was a question of the interpretation of the meaning of the DHCD guidelines and the regulations. He read the DHCD regulations and guidelines and thought they were clear. He noted that they could hire an expert and that person would come up with the same issues that were discussed in this meeting and they will come up with an opinion and it will be informed by something. He explained that Mr. Hall looked at the legal side and he [Mr. Clancy] had looked at the technical side of it and they both came down on the same side of the interpretation question. The expert would likely do the same thing, and his understanding is that the opinions that have come out of these court cases lean a certain way. He noted that he believed that his results were consistent of what comes out of the adjudicatory process and an expert may or not come down on the other side of the question. They representatives of the neighborhood would tell you that the strategy was to put this at the state level to see whether you can make an argument with this and if you cannot then you always have the adjudicatory

process as a backup. Now the question was, was the expert going to be lose enough with an interpretation to be comfortable in front of the DHCD in the adjudicatory process. It is not GIS vs. Assessors data, he stands by the data that he used, it is more accurate than GIS as he went parcel by parcel. The baseline lot information that all parties were drawing from is essentially the same or close enough. What this issue comes down to is what you think is applicable and what isn't applicable and that was the fundamental difference of opinion that between the work by Mr. Clancy, the work by the abutters and the work of the developer.

Ms. Garvin noted that the opinion of the Town was that they do not meet safe harbor, if the ZBA wishes to take a different position, the Town Counsel will figure out how to go about submitting the claim for safe harbor.

Mr. Hall addressed the credibility issue and noted that this case involved relying on a lot of weak arguments.

Mr. Iannuzzi thanked everyone for all their hard work that they had put in over a short period of time.

**A VOTE WAS TAKEN BY CHAIR IANNUZZI:**

**YES VOTES, position to invoke safe harbor:**

Mr. Iannuzzi

Mr. Zarkadas

**NO VOTES, position not to invoke safe harbor:**

Mr. Kelley

Ms. MacNutt

Ms. Williams

**VOTE: 2-3**

**3. Adjourn at 9:10 PM**