



## MEMORANDUM

To: Town of Belmont Zoning Board of Appeals

From: George A. Hall and David B. Lyons

Re: Chapter 40B Safe Harbor Calculation for Belmont // Claims that SHI-eligible parcels comprise more than 1.5% of the Town's total developable land area

Date: January 19, 2020

This memorandum addresses whether the Belmont Zoning Board of Appeals ("ZBA") can defensibly invoke a "safe harbor" in its evaluation of the pending comprehensive permit application for 91 Beatrice Circle. A neighborhood group organized as Build Wise Belmont ("BWB") has provided an analysis showing that Belmont qualifies for the "General Land Area Minimum" ("GLAM") safe harbor, which applies if affordable housing occupies at least 1.5% of the developable land in Town. The applicant has responded with an analysis by Nels Nelson, a Senior Planner at Stantec, claiming that the percentage of the Town's "General Land Area" devoted to affordable housing stands at only 1.08%.

To state the obvious, it is a goal of the Town, shared by the Town's administration and residents alike, to reach safe harbor status under Chapter 40B. This goal will remain important whether or not it has been achieved in time to be relevant to the 91 Beatrice Circle application. But the availability of the defense is not merely exercising an option or requesting a determination from DHCD. The defense requires the Town to *prove* it has reached safe harbor, using the exacting methodology prescribed by DHCD's Guidelines. The Board, if it asserts the defense, must contemporaneously submit "the factual basis for [its] position, including any necessary supportive documentation" (760 CMR 56.03(8)); the requirements for which are set forth in the Guidelines.

To prepare for the possibility that the ZBA might assert the GLAM safe harbor, the Town's Office of Community Development ("OCD") has independently calculated the GLAM after BWB raised this issue on Monday, January 11. OCD's calculations show that, using the data sources it is required to use by the Guidelines, and applying the rules providing that only land "directly associated" with SHI-Eligible housing may be counted, the Town currently falls well short of the GLAM safe harbor even if many of the assumptions in BWB's analysis are accepted.

## **I. Background: How to Assert a Safe Harbor Exemption under Chapter 40B**

### **A. The Benefits of Claiming a Safe Harbor**

Pursuant to M.G.L. c. 40B, certain housing developments that provide sufficient units of affordable housing qualify for expedited local permitting. Under this “comprehensive permit” system, a single board applies regulations and imposes conditions that would ordinarily fall within the jurisdiction of other boards. M.G.L. c. 40B §§ 20–23. The ZBA is the comprehensive permitting authority in Belmont.

Along with a faster process, Chapter 40B also lowers substantive barriers to affordable housing by limiting the powers of comprehensive permitting authorities to apply local regulations in municipalities that provide inadequate affordable housing. If the board either denies a comprehensive permit or imposes conditions that make the project uneconomic, the developer may appeal to the state Housing Appeals Committee (“HAC”). If the HAC determines that the denial or uneconomic conditions are not “consistent with local needs” for affordable housing, it can direct the local board to grant the permit or to lift uneconomic conditions. *Id.* § 23.

Municipalities that satisfy the statute’s criteria for providing affordable housing are protected from adverse decisions by the HAC. In particular, if municipalities qualify for one of three “safe harbors,” the board’s denial of or conditions on a comprehensive permit will be presumed consistent with local needs and upheld. *Id.* §§ 20, 23. For a municipality to qualify for a safe harbor, 1) at least 10% of the housing units in the municipality must be affordable, 2) affordable housing must exist on sites comprising at least 1.5% of “the total land area zoned for residential, commercial or industrial use” in the municipality, or 3) the permit application would result in an exceedance of certain thresholds of affordable housing production in a given year. *Id.* § 20. Only the second safe harbor—the “GLAM” safe harbor—is addressed in this memorandum, as all agree that Belmont does not currently qualify for the first or third safe harbors.

### **B. The Process for Claiming and Appealing GLAM Exemptions**

DHCD regulations and Guidelines specify the process for claiming the GLAM safe harbor. The ZBA must notify both the applicant and DHCD within 15 days after the opening of the hearing for the comprehensive permit. 760 CMR § 56.03(8)(a). The applicant then has 15 days to file objections to the municipality’s claim, and DHCD has another 30 days to issue a decision. *Ibid.* DHCD’s failure to issue a timely decision is deemed to favor the municipality’s position; however, the municipality has the burden of proof in establishing its entitlement to the safe harbor. *Ibid.* Either the municipality or the applicant may appeal DHCD’s decision to the HAC on an interlocutory basis within 20 days of DHCD’s decision. *Id.* at § 56.03(8)(c). Once the HAC has ruled on the applicability of the safe harbor, the issue may not be appealed to court until after the ZBA has concluded its hearing on the comprehensive permit and issued a decision. *Ibid.*

Both DHCD’s initial review of the applicability of the safe harbor and an interlocutory appeal to the HAC can extend the timeline for resolving a comprehensive permit, although the delay from appealing to the HAC is more significant. If DHCD is called on to evaluate a ZBA’s claim for a

safe harbor, the 180-day deadline to close the comprehensive hearing permit is tolled. *Id.* at § 56.03(8)(a). Appeals to HAC, by contrast, stay the permitting proceedings before the ZBA. *Id.* at § 56.03(8)(c). Practically speaking, if the safe harbor issue only advances as far as DHCD, it is likely to delay the comprehensive permit process by about 2 months; however, reported cases of interlocutory appeals to HAC have taken 2-3 years to resolve.

Abutters lack the right to either claim that a municipality qualifies for a safe harbor in the first instance, to appeal DHCD's decision to HAC, or to immediately appeal an interlocutory HAC decision to court. However, once the comprehensive hearing has closed and the ZBA has issued a decision, abutters may challenge any permit that is issued in Superior Court. M.G.L. c. 40B, § 22. Presumably, if a town asserted a safe harbor but was denied by DHCD and HAC, the issue would be preserved for a later appeal by either the town or abutters after a comprehensive permit has issued.

### C. Calculating the General Land Area Minimum

The 40B statute and the Guidelines also describe the required calculation in detail. There is a numerator—the area of sites with affordable housing—and a denominator—the “total land area zoned for residential, commercial, or industrial use.” To satisfy DHCD's technical criteria for GLAM submissions, these calculations must be performed by municipal personnel or a consultant with expertise using GIS mapping software.

1. **The Numerator:** The only parcels that may be counted as satisfying a municipality's affordable housing needs include “sites of SHI Eligible Housing units inventoried by [DHCD]” and sites eligible for the SHI because they are “occupied, available for occupancy, or under permit” at the time of a comprehensive permit application.” 760 CMR 56.03(3)(b). Many such sites will include both market-rate and affordable units, so only “that proportion of the site area...occupied by SHI Eligible Housing units” qualifies for inclusion in the numerator. *Ibid.* Impervious and landscaped areas of a site may count towards the numerator, but only to the extent they are “directly associated” with affordable housing units. *Ibid.* For example, if a large, multi-unit, mixed-income development is sited on a large parcel of land with wetlands or areas subject to conservation restrictions, far less than the total parcel acreage will count towards the numerator.

2. **The Denominator:** Calculating the denominator begins with determining the total land area in the municipality. Then, various categories of undevelopable parcels—especially water bodies and publicly owned land—are excluded. Public ownership is critical—public roads are excludable; private ways are not. Further, any zoning districts where “residential, commercial, or industrial use is prohibited” are excluded, but this exclusion is not as far reaching as it first appears. The zone must plainly prohibit *all* such uses, so that, for example, a floodplain district that allows uses, even if only by special permit, would nonetheless be included in the denominator. Further, non-zoning restrictions like conservation restrictions do not remove land from the denominator.

Because the burden of proof is on the municipality to establish the GLAM safe harbor, failure to follow DHCD's regulations and detailed guidance for calculating the GLAM severely

prejudices municipalities at the DHCD and HAC. While the agency was a bit more forgiving of the use of non-compliant data sources in cases that were submitted before the effective date of the Guidelines (see, e.g., *Matter of Waltham and Alliance Realty Partners*), more recent decisions (notably, Arlington and Braintree decisions issued in 2019) suggest that the agency will be much more aggressive in discounting any data not calculated and submitted in strict compliance with the Guidelines. OCD has worked hard to ensure that the data available for submission to DHCD complies with the Guidelines. This required some recalculation and adjustment in the figures used by BWB. A copy of the resulting spreadsheet showing the differences between BWB's numbers and those calculated by CD, is submitted with this memo.

## **II. Assessing the Competing Calculations of BWB and the Applicant**

The Belmont ZBA opened the public hearing on the 91 Beatrice Circle comprehensive permit application on January 11, 2020. The same day, BWB submitted a letter to the ZBA asserting that Belmont meets the threshold for the GLAM safe harbor, and that the ZBA should assert it. BWB sent a second letter with updated GLAM calculations on January 13. Meeting a deadline set by the ZBA at the January 11 hearing, on January 15, the applicant submitted a letter from its counsel and a consultant with its own GLAM calculation showing that Belmont falls short of the 1.5% threshold.

CD independently undertook its own calculation after the public hearing opened, including scrutiny of the accuracy of the underlying data. In particular, CD's analysis indicated significant adjustments to the BWB calculation from the rule that only the portions of lots with SHI units that are "directly associated" with SHI Eligible Housing Units may be counted in the Numerator. The result is a ratio below 1.5%, even without eliminating the Bradford or making other Denominator adjustments the applicant contends are required.

### **A. Numerator Adjustments**

1. **Belmont Uplands/The Royal Belmont:** This development, situated next to Route 2 on the Belmont/Cambridge line, is one of the largest housing developments in Belmont. The applicant's memorandum correctly states that only a portion of the 13+ acre site can be attributed to the numerator of the GLAM calculation. (See 760 CMR 56.03(3)(c)). Portions of the site consist of wetlands and wooded areas that are not actively maintained for the use or benefit of residents of the development, meaning those portions must be deducted from the numerator. The Applicant contends that only 6.563 acres of the 13+ acres should be included as land "directly associated" with the SHI Eligible housing on the site. OCD calculates that figure to be 313,600 square feet (about 7.2 acres). The eligible area is therefore approximately 6.5 to 7.2 acres, not the 13+ acres used by BWB. The Uplands Numerator adjustment by itself makes the safe harbor unattainable even if BWB's other assumptions are accepted.

2. **Outstanding SHI Inventory – The Bradford and the DeStefano developments:** The Bradford, a new mixed-use, mixed-income development in Cushing Square, includes some housing units that are eligible to be included on the SHI. BWB's "most conservative" estimate disregards the Bradford; the Applicant contends that none of the

Bradford can be counted towards the numerator anyway because the affordable units were not already listed on the SHI before the comprehensive permit was initially submitted to the ZBA. This may go too far. Eligible sites include primarily those with units inventoried on the SHI, but they may also include those units “established...as occupied, available for occupancy, or under permit.” 760 C.M.R. § 56.03(3)(b). The area of the Bradford, if included, must be pro-rated because the affordable units comprise only about 10% of the total units in the development. This reduction in the potentially eligible land area results in a value that it is inconsequential to the bottom line percentage. OCD calculates the area that may be included for the Bradford at 0.212 acres. Including the DeStefano development at 493 and 495 Trapelo Road and pro-rating it appropriately for its three affordable units would contribute only 0.29 acres to the numerator.

3. **59 Pearson Road:** The spreadsheet used by BWB included this 31,082 square foot parcel, where the Belmont Housing Authority offices are located. While the offices are adjacent to the Belmont Village housing development, that particular parcel does not have any SHI Eligible Units on it and cannot likely be counted. It does not meet the definition of “directly associated” land, and in any event is not on the same parcel as the SHI housing. This adjustment removes about 0.71 acres from the Numerator.

4. **Group Home Adjustment:** Using Assessors’ parcel size data, and accounting for 40 of the 43 Group Home Units counted (but not specifically identified) on the SHI, OCD can substantiate only 1.38 acres associated with group homes to be included in the Numerator. The 3-unit difference is likely due to a discrepancy between the Town’s and DHCD’s records regarding the number of units present at one or more of these properties, not due to a missing property; if that’s the case, finding the missing units would not increase the land area included in this calculation.

5. **Corrections regarding the Waverly Woods and Oakley Neighborhood Properties:** The parcel size attributed to the Waverly Woods units at 2-12 Olmsted Drive in BWB’s analysis overstates the area determined through the Assessor’s database by 14,779 square feet. Likewise, the calculation for the Oakley Neighborhood units (6-8-10 Oakley Road) misidentified the parcels where the SHI units are located, and overstated the area by 35,753 square feet. These corrections reduced the Numerator by 51,000+ square feet (approx. 1.17 acres).

### **Summary of the Effect of Numerator Adjustments**

Small changes to the Numerator have a big impact on the ratio; the adjusted acreage for the Royal Belmont site, along with the other reductions described above, takes the percentage of the Town’s total land area devoted to affordable housing well below 1.5% even if BWB’s analysis of the Denominator is accepted.

## **B. The Denominator**

As noted above, the DHCD regulations permit certain categories of land to be deducted from a municipality’s total land area before applying the formula, including all publicly owned land,

land occupied by public rights-of-way, railroad rights-of-way, the area of water bodies, and land zoned in a manner that prohibits any residential, commercial or industrial use. The more land that that can be included in these categories (and thus *excluded* from the total land area calculation), the higher the resulting percentage. However, it takes much larger adjustments to the Denominator to move the percentage significantly.

OCD's analysis reduces, by a relatively small amount, the total land area included in BWB's analysis. The more significant differences between BWB's analysis and Mr. Nelson's are due to what they treat as excludable in the first place.

**1. Total Land Area, Public Properties, Public Rights of Way and Water Bodies:**

CD has recalculated these areas as required by the technical standards in the Guidelines. The results lower the Town's gross total land area slightly and also reduce the publicly owned property and public (including railroad) rights of way by about 25 acres and 35 acres, respectively. There was a *de minimis* change to the area of water bodies.

**2. McLean Hospital:** BWB excludes two sub-zones from the McLean Hospital property (totaling over 57 acres) from the denominator in arriving at its "most conservative" estimate. As Mr. Nelson's memo indicates, these zones do not prohibit *all* residential, commercial, and industrial uses. We do not see the exclusion of these areas as "conservative;" in fact, we are not aware of any case law or HAC decision that suggests that R&D or private medical facilities would not be treated as commercial uses. While it may be a novel argument, it is not one we see as likely to succeed.

**3. Private Land Subject to Conservation Restrictions:** BWB appears to acknowledge that excluding privately-owned land that is subject to statutory conservation restrictions would be an aggressive interpretation of the regulations. The HAC has rejected similar arguments in the recent Arlington and Braintree decisions (see footnote 2, above). As Chapter 40B itself speaks only of excluding land "zoned" to prohibit any residential, commercial and industrial use, there does not appear to be a reasonable basis to suggest the Arlington or Braintree decisions are based on a misinterpretation of the statute.

**Summary:** Even without the changes to the Numerator discussed above, BWB's analysis would fall just short of the 1.5% threshold either by virtue of OCD's land area corrections for public properties and public rights of way, or without excluding the McLean zoning districts.

### **III. Conclusion**

We are acutely aware that the failure to assert the safe harbor defense by January 26 (15 days after the commencement of the hearing) will result in its waiver. The Board should not waive this claim lightly. Unfortunately, the OCD analysis yields a ratio no higher than 1.25%. This conclusion is based on the best available data.

A claim that Belmont has met the 1.5% threshold would require *both* the use of the data proffered by BWB, some of which cannot be supported by data sourced in compliance with the Guidelines, *and* reliance on legal theories such as (1) challenging the exclusion of land not “directly associated” with SHI-Eligible housing (as defined by DHCD) from the Numerator, and (2) excluding the McLean zoning districts or land subject to private conservation restrictions from the Denominator. We see reliance on that combination of arguments as having no realistic prospect of success.

The advancement of a claim through an HAC appeal regarding the GLAM safe harbor that the Town is unable to prove would be costly to the Town in financial terms. We think DHCD staff is certain to reject the claim administratively in the 30-day period the regulations allow; to preserve a right to further appeal that decision, the Town would have to seek an immediate adjudicatory hearing before the HAC: a trial-like proceeding with examination and cross-examination of witnesses requiring many hours of attorney and expert witness time.

It would also have a potential cost in terms of loss of the Town’s credibility before the HAC. This credibility may be critical should the Board find itself back in front of the HAC to defend a decision to deny the current application or impose conditions the applicant contends render the project uneconomic. We strongly recommend that the Board take a broader strategic view and not assert the 1.5% GLAM safe harbor defense.

	BWB	OCD Adjustments with McLean Zones Excluded	OCD Adjustments with McLean Zones Included	
	<b>Acres</b>	<b>Acres</b>	<b>Acres</b>	<b>Data Source (per BWB)</b>
<b>Total</b>			0	
MassGIS Town Survey Boundary	3017.347	2978.950	2978.950	MassGIS Town Boundaries from Survey Points
<b>Excluded Areas</b>				
				From Town GIS Data cross-referenced with Use Codes and Owners from
Public Land	499.432	474.591	474.591	Assessor Database
Public Rights of Way (ROW)	503.533	446.845	446.845	From Mass DOT GIS data
Water on Private Land (excludable)	4.553	4.403	4.403	MassDEP Hydrography 1:25,000, water features within Belmont
McLean Subdistrict Zone 4 - R&D Subdistrict	11.580	11.580	0.000	Zoning bylaws and plan 126; land zoned for "office and laboratories for
McLean Subdistrict Zone 5 - McLean Inst. Subdistrict	46.170	46.170	0.000	research and development"
				Zoning bylaws and plan 126; land zoned for "psychiatric hospital use"
<b>Total Excluded Area</b>	<b>1065.267</b>	<b>983.590</b>	<b>925.840</b>	
<b>Total Land Area (denominator)</b>	<b>1952.080</b>	<b>1995.360</b>	<b>2053.110</b>	<b>Land area zoned and available for development</b>
Non-Group Homes without The Bradford	28.335	20.519	20.519	From SHI List from DHCD, Town GIS Data, and Belmont Assessor's database
Non-Group Homes with The Bradford area pro-rated	28.494	20.807	20.807	
Non-Group Homes with The Bradford entire area	30.116	22.498	22.498	
Group Homes	1.479	1.379	1.379	Educated guess based on use codes and ownership in Assessor Database
<b>SHI Eligible Areas (numerator)</b>	29.815	21.898	21.898	(Actual information is confidential and must be requested by the ZBA)
	29.974	22.186	22.186	Total SHI Area without The Bradford
	31.595	23.878	23.878	Total SHI Area with pro-rated area for The Bradford
				Total SHI Area with entire area for The Bradford
<b>Belmont 1.5% GLAM Status</b>	<b>1.527%</b>	<b>1.097%</b>	<b>1.067%</b>	Most conservative estimate (without The Bradford)
Private Land subject to recorded CRs	53.556	53.556	53.556	Determined from recorded Conservation Restrictions (cannot be developed per
Private Land - Mass Audubon	86.725	86.725	86.725	Mass. Gen. Law Ch. 184, sections 131 - 133)
				Mass Audubon Land not subject to recorded Conservation Restrictions
<b>Total Land Area (denominator)</b>	<b>1,811.798</b>	<b>1,855.079</b>	<b>1,912.829</b>	<b>Land area zoned and available for development and excluding private land</b>
				<b>that cannot be developed</b>
<b>Belmont 1.5% GLAM Status excluding Private Land</b>	<b>1.744%</b>	<b>1.287%</b>	<b>1.248%</b>	Least conservative estimate (include entire area of The Bradford and exclude
				private land)