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Carolyn M. Murray
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July 8, 2019

BY HAND and by
BY FIRST CLASS MAIL

Shelagh Ellman-Pearl, Clerk
Department of Housing and Community Development
Housing Appeals Committee
100 Cambridge Street, 3rd Floor
Boston, MA 02114

Re: Braintree Zoning Board of Appeals v. 383 Washington Street, LLC
Housing Appeals Committee, Docket No. 17-05

Dear Ms. Ellman-Pearl:

Enclosed for filing in the above-referenced matter, please find Braintree Zoning Board of Appeals' Motion for Reconsideration and to Re-open the Committee Hearing and to Stay Proceedings before the Zoning Board of Appeals, and a Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Thank you for your attention to this matter.

Very truly yours,

Carolyn M. Murray

CMM/dmm
Enc.
cc: Ms. Melissa SantucciRozzi
Town Solicitor
Peter L. Freeman, Esq.
Kevin T. Smith, Esq.

672371/BRTR/0103

CERTIFICATE OF SERVICE

I, Carolyn M. Murray, hereby certify that on the below date, I served a copy of the foregoing Braintree Zoning Board of Appeals' Motion for Reconsideration and to Re-open the Committee Hearing and to Stay Proceedings before the Zoning Board of Appeals, by first-class mail, postage prepaid, to the following counsel of record:

Peter L. Freeman, Esq.
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Dated: 7/8/19

672371/BRTR/0103

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
HOUSING APPEALS COMMITTEE
Docket No. 17-05

IN THE MATTER OF:

BRAINTREE ZONING BOARD OF APPEALS,

and

383 WASHINGTON STREET, LLC,

BRAINTREE ZONING BOARD OF APPEALS' MOTION FOR RECONSIDERATION AND TO RE-OPEN THE COMMITTEE HEARING AND TO STAY PROCEEDINGS BEFORE THE ZONING BOARD OF APPEALS

Now comes the Braintree Zoning Board of Appeals (the "Board") and respectfully moves, pursuant to Mass. R. Civ. P. 60 and 760 CMR 56.06(11)(b)and (c), for reconsideration of the Housing Appeals Committee's (the "Committee") Decision on Interlocutory Appeal Regarding Applicability of Safe Harbor dated June 27, 2019 (the "Decision") in the above-referenced matter and further moves the Committee to re-open the public hearing to allow the Board to provide new information, in response to specific conclusions reached by the Committee in its Decision. Specifically, where the Committee indicated that the Board would have been entitled to a credit of additional land area toward the numerator in support of its asserted 1.5% general land area minimum safe harbor but for the fact that the Board had not provided a calculation of certain limited areas because the Board argued that a more expansive area should be included and the Committee was unable to extrapolate the calculation of these more limited areas. If allowed to submit this new information, the Board will be able to demonstrate that the

Town of Braintree (the "Town") has satisfied the 1.5% general land area minimum threshold, pursuant to 760 CMR 56.03(3)(b). As further grounds for this Motion, the Board offers the following.

Mass.R.Civ.P. 60(b) allows for the limited review of a judgement, order, or proceeding based upon "... (2) newly discovered evidence that could not have been discovered in time to move for new trial or ... (6) any other reason justifying relief from the judgment." When filing a motion for reconsideration, the applicant should specify changed circumstances such as newly discovered evidence or information. Audubon Hill South Condominium Ass'n v. Community Ass'n Underwriters of America, Inc., 82 Mass. App. Ct. 461, 470 (2012); Peterson v. Hopson, 306 Mass. 597, 600 (1940); Barbosa v. Hopper Feeds, Inc., 404 Mass. 610, 622 (1989). The judge has the discretion to rule on the motion for reconsideration and in exercising that discretion, the motion judge may see other grounds for reception and decision of the motion. Audubon Hill, 82 Mass. App. Ct. at 47, n. 16. "In considering a motion under rule 60(b)(6), a judge may consider whether the moving party has a meritorious claim or defense, whether extraordinary circumstances warrant relief, and 'whether the substantial rights of the parties in the matter in controversy' will be affected by granting the motion." Parrell v. Keenan, 389 Mass. 309, 315 (1983) (internal citations omitted).

In the context of a comprehensive permit application, the Committee has suggested that where new information is provided to the Committee after an Interlocutory Decision on the safe harbor provisions, reconsideration of the issue may be justified. See Hanover Woods, LLC, Appellant v. Hanover Zoning Board of Appeals, Appellee, Housing Appeals Committee No. 11-04, *14 (February 10, 2014), (The Board argues that the Committee should revisit its Interlocutory Decision Regarding Safe Harbor, after a finding that the safe harbor provisions did

not apply, yet Committee was not provided with any new information on the issue, therefore the Committee declined to revisit its Interlocutory Decision.) Further, the regulations at 760 CMR 56.06(11)(c) specifically contemplate and allow for the reopening of a hearing based upon newly discovered information, among other reasons. It is the Presiding Officer's discretion to reopen the hearing where necessary "for the purpose of receiving new evidence, oral argument, memoranda, briefs or motions to acting prior to the rendering of a decision, [which would otherwise] result in an undue hardship to the parties and be inconsistent with the purposes of G.L. c. 40B, §§ 20 through 23, which provide for a decision by the Housing Appeals Committee." Delphic Associates, LLC, Appellant v. Duxbury Zoning Board of Appeals, Appellee, Housing Appeals Committee No. 03-08, *3 (September 14, 2010). It is consistent with the inherent administrative authority to reconsider *sua sponte* a ruling or order issued by the Committee. Id. (Presiding Officer reconsidered the prior Ruling and Order Extending Comprehensive Permit because prior ruling did not allow parties an opportunity present arguments to the full Committee where Motions for Summary Judgment were filed on applicability of regulations.) Citing Samuel Moe v. Sex Offender Registry Bd., 444 Mass. 1009 (2005) (absent "statutory limitations, administrative agencies generally retain inherent authority to reconsider their decisions").

Further, the Board respectfully requests that the proceedings before the Board be stayed pending a further decision from the Committee while this Motion for Reconsideration and to Re-Open the Committee Hearing is pending.

ARGUMENT

I. Extraordinary Circumstances Warrant Relief Because Substantial Rights of the Town Will Be Affected.

This interlocutory appeal is based on whether the Town has 1.5% of its general land area dedicated to affordable housing in order to invoke a safe harbor pursuant to 760 CMR 56.03(3)(b), which, if met, would empower the Board to deny or grant the comprehensive permit application filed by 383 Washington Street, LLC (Washington) with conditions without risk of its decision being overturned per 760 CMR 56.03(1). This is one of the few rights and leverage afforded to a municipality in the context of deciding upon a comprehensive permit application. In the Decision, the Committee found that the Board had not met its burden of proof to establish that the Town had satisfied the 1.5% general land area safe harbor, pursuant to 760 CMR 56.03(3)(b). Instead, the Committee found that the Town had 1.396% of its general land area dedicated to affordable housing – a modest difference of 0.11%. More remarkable is that the Committee conceded in several instances that it would have credited the Town with more land area that would have increased this percentage, albeit not to the full extent that the Board had argued, if the Committee could have extrapolated the lesser area or if the Board had provided a calculation for the lesser areas. The Board did not provide a calculations for these lesser areas because the Board argued that a greater area should have been included as directly associated area. As further explained herein, the Board had no way of predicting that the Committee would include only portions of areas as directly associated area. Principles of equity compel the Committee to allow the Board to present those calculations now, as these adjustments could prove that the Town has met the 1.5% general land area minimum, thereby reversing this Decision and substantially altering the Board's rights with respect to Washington's pending application.

Procedurally, this hearing was unusual in that Washington initially relied upon draft guidelines issued by the Department of Housing and Community Development (DHCD) and was allowed to do so, notwithstanding the fact that these were draft guidelines, which clearly have no force of law. Subsequent to the first day of hearing, on January 17, 2018, as the parties were preparing their post-hearing briefs, DHCD issued "Guidelines for Calculating General Land Area Minimum" (2018 Guidelines). Since Washington had relied so heavily upon the draft guidelines the Board requested, and the Committee allowed, the hearing to be re-opened so the parties could submit new evidence based on the now final guidelines.

In this Decision, the Committee conceded that these 2018 Guidelines do not have the force of law because they were not enacted as regulations. Town of Northbridge v. Town of Natick, 394 Mass. 70, 76 (1985). Regardless, the Committee defers to policy statements of DHCD and points to the provision in the DHCD regulations requiring that evidence regarding satisfaction of a safe harbor must comply with DHCD guidelines. 760 CMR 56.03(3)(d). The Board asserts that its calculations do comply with DHCD guidelines and that the Committee has misinterpreted or misapplied those guidelines in certain instances germane to this interlocutory appeal. The Board further asserts that it can, and should be allowed to in light of the Committee's Decision, present additional evidence to substantiate that the Town has met the 1.5% safe harbor at this stage in the proceedings. To deny this motion and require the parties to go through a full public hearing on the merits of Washington's application will cause the parties to incur additional expense and loss of time, only to end up precisely where we are now arguing the merits of the safe harbor. Moreover, the ability to invoke a safe harbor is one of the few tools that Board has in deciding whether to deny or to shape the project through a conditional approval. If the safe harbor is met, it significantly alters the posture of the parties in negotiating

and deciding these applications. Therefore, the Board should not be denied its right to prove eligibility for a safe harbor at this stage of the proceedings. To do so, would deny the Town its rights afforded under G.L. c. 40B and deprive the Board of its ability to effectively decide Washington's application.

II. Reconsideration Is Appropriate When There Is Newly Discovered Evidence that Could Not Have Been Discovered at the Time of Hearing.

A. The Board Should Be Allowed To Introduce Calculations of Portions of Stormwater Management Facilities That The Committee Admits Should Be Included As Directly Associated Area.

As stated above, the 2018 Guidelines were issued in the midst of this hearing, and upon information and belief, this is the first Committee decision issued on the 1.5% general land area calculation under those guidelines. There were changes between the draft guidelines and the 2018 Guidelines; therefore, this appeal may have presented novel issues, if not issues of first impression with respect to the expanded definition of "directly associated area." Both the draft and final Guidelines' definition of "directly associated area" included "stormwater management facilities as defined in the MassDEP Massachusetts Stormwater Handbook including both conventional and low-impact BMPs (Best Management Practices)." See Ex. 71 at §V. [1] What was not clear was how a wetland altered and incorporated into a site's stormwater management system should be treated, even though minimizing the disturbance of natural features and incorporating such features into stormwater management is a Best Management Practice (BMP) recognized in the MassDEP Stormwater Management Handbook.[2] Further, the Decision seems

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[1] In the Decision, the Committee criticizes the parties for not entering the MassDEP Massachusetts Stormwater Handbook as an exhibit in the record. The Board argues that the Committee can take official notice of the MassDEP Handbook, Moreover, omission of this document in the record should not be fatal or necessary, where the DHCD 2018 Guidelines specifically refer to and incorporate the MassDEP Handbook. In any event, this omission can be cured, if necessary, through the re-opening of this hearing to allow additional evidence to be submitted.

[2] See Massachusetts Stormwater Handbook, Volume 1, Chapter 1, Stormwater Standard 3, states that "Loss of annual recharge to groundwater shall be eliminated or minimized through the use of infiltration measures including environmentally sensitive site design, low impact development techniques, stormwater best management practices,

to conflate structures or features associated with a vegetated BMP as part of a stormwater management system as also having to be either impervious surface or an actively maintained landscaped area, which is contrary to MassDEP's examples of BMPs in its Stormwater Handbook.[3] Indeed, for a BMP incorporating a site's natural features, revegetation of the area is encouraged, if not required; the vegetation is not to be mowed or actively maintained as a landscaped are would be.

The Decision reflects a fundamental lack of understanding as to what a stormwater management facility is and what the MassDEP Handbook considers to be a stormwater management facility. The 2018 Guidelines include stormwater management facilities "as defined in the MassDEP Massachusetts Stormwater Handbook." That Handbook recognizes the following types of low-impact BMPs for the removal of sediment and treatment of stormwater: bioretentation areas, such as rain gardens, constructed stormwater wetlands and gravel wetlands. MassDEP Stormwater Handbook, Standard 4 at p. 11. When a project is proposed to be

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and good operation and maintenance. At a minimum, the annual recharge from the post-development site shall approximate the annual recharge from pre-development conditions based on soil type. In general, the Stormwater Management Standards address water quality (pollutants) and water quantity (flooding, low base flow and recharge) by establishing standards that require the implementation of a wide variety of stormwater management strategies. These strategies include environmentally sensitive site design and LID techniques to minimize impervious surface and land disturbance, source control and pollution prevention, structural BMPs, construction period erosion and sedimentation control, and the long-term operation and maintenance of stormwater management systems. See also, Low-Impact Site Design Credit 1, Massachusetts Stormwater Handbook, Volume 3, Chapter 1. See also, 310 CMR 10.05(6)(o), "Project proponents seeking to demonstrate compliance with some of all of the Stormwater Management Standards to the maximum extent practicable shall demonstrate that: ... 2. They have made a complete evaluation of possible stormwater management measures including environmentally sensitive site design and low impact development techniques that minimize land disturbance and impervious surfaces, structural stormwater best management practices, pollution prevention, erosion and sedimentation control and proper operation and maintenance of stormwater best management practices; ..."

[3] 310 CMR 10.04, "Environmentally Sensitive Site Design means design that incorporates low impact development techniques to prevent the generation of stormwater and non-point source pollution by reducing impervious surfaces, disconnecting stormwater sheet flow paths and treating stormwater at its source, maximizing open space, minimizing disturbance, protecting natural features and processes, and/or enhancing wildlife habitat. .. Low Impact Development Techniques mean innovative stormwater management systems that are modeled after natural hydrologic features. Low impact development techniques manage rainfall at the source using uniformly distributed decentralized micro-scale controls. Low impact development techniques use small cost-effective landscape features located at the lot level."

developed, the project must prove that post-development run-off rates do not exceed pre-development rates. To accomplish this, engineers must design systems intended to store, detain and infiltrate the volume of stormwater, which in turn controls the run-off rate. Engineers must also provide a Stormwater Report that includes drainage calculations demonstrating the site's existing rate of flow and how the designed system will ensure that the post-development run-off rate will not exceed the pre-development rate. The calculations are based on how the entire system – not discreet components - handles the volume and controls the rate. If an engineer chose to incorporate a natural feature, such as an existing wetland, into the stormwater management facility, that wetland is an integral part of the system in the same way that a man-made feature is. Therefore, the entire system, including those natural features should count as directly associated area.

In this Decision, the Committee includes the entire area of a man-made feature, such as a forebay at The Ridge at Blue Hills, as the stormwater management system, but when an existing wetland is altered, graded and incorporated into the system, the Committee abruptly ends the area of the system at the pipes. The stormwater system does not end at the pipe, regardless of whether that pipe connects to a man-made structure or an engineered natural feature. The Committee's conclusion that certain components of a stormwater management system do not count as directly associated area ignores the 2018 Guidelines and the MassDEP Handbook and penalizes the Board for forward-thinking planning practices. The Board maintains its argument that the entire area of the drainage pipes, along with the entire area of the basins, swales, forebays, etc. into which those pipes enter and exit collectively comprise the stormwater management systems; therefore, the Board stands by its calculations of directly associated area related to stormwater management systems.

The Board could not have known at the time of the hearing that the Committee would arbitrarily truncate certain stormwater management systems to the area occupied by the pipes, disregard the area into which the pipes connect or not give full consideration to what MassDEP considers a stormwater management low-impact BMP. Accordingly, the Board's calculations for these stormwater facilities included the entire system and did not provide alternate calculations including only limited components of that system.

With respect to Reservoir Crossing, the Committee agreed with the Board that it "would be entitled to include the area for drainage pipes that are part of actively maintained stormwater management facilities" but was unable to extrapolate a calculation for the area to include it as directly associated area. Decision at p. 21. Similarly, at Sunset Lake, the Committee found "acreage for an actively maintained drainage outlet that is part of a stormwater management system would be included as directly associated area, if the Board had provided a calculation of that acreage." Decision at p. 22. Further analyzing the sloped structure into which the drainage pipe drains at Sunset Lake, the Committee did not include the sloped area itself because the Board did not show that it was impervious or an actively maintained landscaped area. Decision at p. 23. In other words, if a low-impact BMP incorporating natural vegetation or a site's existing topography, such as a sloped basin, was used, the Committee required proof that the slope was either impervious surface or an actively maintained landscaped area. Id. There is no support for the Committee's conclusion in the 2018 Guidelines. Instead, the 2108 Guidelines call for stormwater management facilities to be included as directly associated area, not just the impervious, man-made structures and not just actively maintained vegetated basins and swales.

Further, the Decision is inherently contradictory in its treatment man-made forebays. A single forebay and drainage swale – structures that both parties testified can comprise stormwater

management facilities – were not included in the directly associated area for The Ridge at Blue Hills because the Committee rejected the larger area that the Board claimed was all part of the stormwater management system, and the Committee could not extrapolate the more limited acreage from the larger area. Decision at pp. 18-19. However, the Committee credited the Board's acreage for Forebays 2A and 2B at The Ridge at Blue Hills, located under a portion of the parking lot. Decision at p. 18.

The Board could not have known that the Committee would only attribute portions of a stormwater management system to directly associated area or require proof that portions of these facilities otherwise qualify as directly associated area, either as impervious surfaces or as actively maintained landscape area. Without waiving its position that its more inclusive calculation of the entirety of each stormwater management systems is more accurate and consistent with the 2018 Guidelines, the Board should at least be afforded the opportunity to introduce calculations for those areas that the Committee admits should have and would have been included as directly associated area.

B. The Board Should Be Permitted To Introduce Calculations of Other Areas That The Committee Admitted Should Have Been Included As Directly Associated Area.

In addition to the stormwater management facilities discussed above, the Committee acknowledged several other parcels of land that it would have included as directly associated area, if the Board had either provided an alternative calculation for the area at issue or if the Committee had been able to extrapolate the area from the evidence presented. Specifically, the Committee conceded that the Town would have been credited with the following areas:

1. Reservoir Crossing: The Committee conceded that water or sewer easements associated with Logan Park should be included as directly associated area, yet easements associated with Reservoir Crossing were excluded due to an incorrect assumption that these easements did not principally serve the Reservoir Crossing Development.

Decision at pp. 21-22. In fact, Ms. SantucciRozzi testified that the easement served multiple purposes, but this should not have been construed as meaning it served no purpose to the comprehensive permit development.

2. Sunset Lake: The Committee conceded that water or sewer easements associated with Logan Park should be included as directly associated area, yet a sewer easement associated with Sunset Lake was excluded due to an incorrect assumption that this easement did not principally serve the development or was not actively maintained. Moreover, the Committee imputed a requirement that easements must be actively maintained – a requirement with no support in the 2018 Guidelines, DHCD regulations or G.L.c 40B. Decision at pp. 22-23. Putting aside this lack of basis within the Chapter 40B framework, all water and sewer easements must be maintained in order to continue to serve their intended purpose of providing water or sewer services to and from a site, but the easements are maintained by the easement holder, and in most instances, this is the Town of Braintree. The fact that grass growing atop an easement may not be mowed is irrelevant and should not be a factor in determining whether it is included as directly associated area.

3. Logan Park: The Committee acknowledged that actively maintained landscaped area should be included as directly associated area and does not dispute that such actively maintained area was visible during the site visit along the western property line of this site. Even acknowledging that this area was landscaped, mowed, and therefore actively maintained, the Committee refused to include the entire area along the western property line for inexplicable reasons and because the Committee could not extrapolate the area that it would include as directly associated area, none of this area was included. Decision at pp. 23-24.

4. Skyline Drive: The Committee agreed with the Board that slopes maintained by walls along the site driveway should be included as directly associated area; however, the Committee was not able to extrapolate the acreage to be included and instead chose to rely upon Washington's calculation instead. Decision at p. 26. The Board should be afforded the opportunity to resubmit its own calculation of this area, as the Board and Washington have disparate purposes and have disagreed on calculations throughout these proceedings (i.e., the .67 acres of floodway on The Ridge at Blue Hills).

5. Braintree Village: Although the Committee credited the Board with the sloped area at Skyline Drive as directly associated area, the Committee rejected a similar argument for the slope at Braintree Village ostensibly because the slope is within a side yard setback and is vegetated but not actively maintained. Decision at p. 25. The elevation difference between the rear of the residences along Hillside Avenue to the bottom of the slope at the edge of the parking lot on the westerly side of Braintree Village is 25-30 feet. This area was cut into in order to construct the parking lots associated with this development. The vegetation along this slope is not actively maintained because the vegetation is needed to stabilize the slope, prevent erosion and provide sediment control, much the same way that the wall structures along Skyline Drive maintains

stability along that site's entrance. Therefore, the Board should be afforded the opportunity to provide a calculation for this sloped area.

Because the exclusion of land area that the Committee admits should otherwise be included impacts the Town's general land area percentage, the Board must be permitted to introduce evidence of calculations for this additional area. Indeed, the Decision seems to invite the Board to present further information on certain acreage that it deemed to be directly associated area. This information is readily available through the Board's GIS expert, providing for a situation that warrants reconsideration of the Interlocutory Decision and a reopening of the hearing to present the additional information. Undue hardship on the parties and administrative burdens on the Committee will result if the hearing is not reopened to consider the new information on land area that the Committee concedes should have been included. Further, it would be inconsistent with G.L. c. 40B, §§ 20 through 23 to require the Board to open the public hearing only to down the line revisit the issues left open from the Decision, particularly if the new information substantiates that the Town actually did meet the 1.5% land area under the regulations. The additional evidence regarding land area that can be provided by the Town in response to the Decision provides a change in circumstances justifying a reconsideration of the Decision and the re-opening of the hearing to present such evidence.

C. The Board Disputes The Committee's Interpretation of Directly Associated Areas As Applied to Setbacks/Landscaped Areas.

The 2018 Guidelines' definition of "directly associated area" includes "[l]andscaping maintained principally for the benefit of the residents of a development containing SHI Eligible Housing and impervious surfaces adjacent to such a development that may be included in the SHI-Eligible Area." Ex. 71, §V. The 2018 Guidelines further elaborate: "Features that generally will not be considered Directly Associated include:...non-Actively Maintained wooded or

vegetated areas that are not within required side, front, or rear yard dimensional requirements and not within 50 feet of a building footprint..." Id. After accounting for the triple negative presented by this awkward language, the Board argued that non-actively maintained areas within the front, rear or side yard setbacks required under the Zoning Bylaws as well as areas within 50 feet of the building footprint should be included as directly associated area. Washington argued, and the Committee agreed, that this guideline had to be read as requiring both conditions to be satisfied, meaning only those non-actively maintained vegetated areas that are both within the front, rear and side setbacks and within 50 feet of the building footprint should be included as directly associated area. Decision at p. 15. Following the Committee's interpretation, this guideline provision is reduced to only including non-actively maintained vegetated areas within 50 feet of the building's footprint, thereby rendering the phrase "areas that are not within required side, front, or rear yard dimensional requirements" superfluous, as the non-actively maintained areas need only be within 50 feet of the building. Accordingly, non-actively maintained areas that are within front, side or rear yard setbacks but not within 50 feet of the building footprint are excluded by the Committee. This interpretation is contrary to principles of statutory construction, which require every word is to be given "force and effect." Bartlett v. Greyhound Real Estate Fin. Co., 41 Mass. App. Ct. 282, 289 (1996). Further, courts encourage us to "avoid rendering any portion of the legislation meaningless." Healey v. Commissioner of Public Welfare, 414 Mass. 18, 26 (1992). As stated herein, the Committee's interpretation renders the language regarding front, side and rear yard setbacks meaningless, as those areas are swallowed up as having to be within 50 feet of the building footprint. Had this been the intention within the 2018 Guidelines, they would have stated as such. Accordingly, the Board maintains its interpretation of the 2018 Guidelines, which adheres to the rules of statutory

construction and includes all of the non-actively maintained areas within front, rear and side yard setbacks that the Committee excluded because they were more than 50 feet from the building, such as those areas at Skyline Drive, Braintree Village and Reservoir Crossing, should be included.

In addition, the Board contends that the Committee erred by excluding actively maintained vegetated areas that fell within the front, rear and side setbacks required under the Town's Zoning Bylaws. For example, at Logan Park, the Committee excluded the .182 acre portion along the western property line that had been cleared, landscaped and mowed, as observed during the site visit. Decision at p. 23. No evidence was presented to dispute that this area was mowed and maintained. No reason is given for excluding this area, but clearly, it is a side setback and is an actively maintained landscaped area for the benefit of the residents of the development; therefore, it should be included as directly associated area under the 2018 Guidelines. Ex. 71, §V.

D. The Committee Erred in Excluding the Devon Woods Conservation Restriction from the Denominator.

The 2018 Guidelines exclude from total land area any "conservation or open space zone if said zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial or industrial use are completely prohibited." Ex. 71, §II. The Guidelines also similarly exclude any area subject to a restriction imposed by the Department of Environmental Protection ("DEP"), pursuant to G.L. c. 131, §40A. Id. The Board did not argue that the 244 acres subject to a conservation restriction at Devon Woods was a restriction imposed by DEP under G.L. c. 131, although the Board did assert several similarities between a conservation restriction and a DEP restriction that warrant similar consideration under the

Guidelines. Although the Technical Instructions to the 2018 Guidelines prohibit the inclusion of conservation restrictions, we reiterate the Committee's prior statement that these 2018 Guidelines are just that – guidelines having no force of law. Further, it is nonsensical to exclude from the denominator land subject to a DEP restriction under G.L. c. 131 but not extend the same treatment to land subject to a conservation restriction under G.L. c. 184

Notwithstanding that the Board continues to assert that a conservation restriction should be afforded similar treatment as a DEP restriction under the Guidelines, this 244 acres at Devon Woods does comprise a conservation or open space "zone" –a term that is not defined by the DHCD regulations, the 2018 Guidelines, nor G.L. c. 40B, §20. Looking to other sources to define this term, one of the definitions of "zone" found in the Merriam-Webster Dictionary is "a region or area set off as distinct from surrounding or adjoining parts." www.merriam-webster.com/dictionary/zone. Clearly, the conservation restriction on the Devon Woods site does render this land as an open space zone prohibiting all residential, commercial and industrial development, prohibiting all development, and therefore, this area qualifies for exclusion from the denominator pursuant to the 2018 Guidelines. Ex. 71, §II.

CONCLUSION

WHEREFORE, the Board respectfully moves for reconsideration of the Committee's Decision in the above-referenced matter and further moves the Committee to re-open the public hearing to allow the Board to introduce calculations for those directly associated areas that the Committee admits should have been included, which in turn, will demonstrate that the Town has satisfied the 1.5% general land area minimum threshold, pursuant to 760 CMR 56.03(3)(b). MOREOVER, the Board respectfully requests that the Committee stay the proceedings before

the Board until such time as the Committee considers this new evidence and renders a further decision on whether the Town has met the 1.5% general land area safe harbor.

TOWN OF BRAINTREE
ZONING BOARD OF APPEALS

By its attorney,

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Date: July 8, 2019

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