HILL LAW

February 13, 2022

BY ELECTRONIC MAIL: hunterg@manchester.ma.us
AND FIRST CLASS MAIL

Ms. Sarah Mellish, Chair
Manchester Zoning Board of Appeals
Manchester Town Hall
10 Central Street
Manchester-by-the-Sea, MA 01944-1399

Re: Application for Comprehensive Permit – School Street, Manchester

Dear Chair Mellish:

As you know, this firm represents the Manchester Essex Conservation Trust ("MECT"). I am writing to follow up on the issues that were discussed at the Board's February 9, 2022 public hearing session.

1. Test Pits on the Project Site

As early as September, 2020, the Project's site plans have shown test pit locations on the Project Site, labelled "TP – 1" through "TP – 17." At an earlier Zoning Board meeting, the Applicant Geoff Engler denied that any test pit logs existed, but on February 9th he conceded that "informal" soil and groundwater elevation data had been collected, and was included in the geotechnical report that was filed with the Board last month. However, that report does not contain the kind of test pit logs we would expect for the holes dug on the Site. Mr. Engler also stated an earlier Board meeting that test pits were witnessed by "DEP," although no evidence of that has been provided. The Department of Environmental Protection would not be involved in this Project unless and until the Applicant starts the groundwater discharge permitting process. The first step in that process is requesting DEP approval of a scope of work for a hydrogeological study of the Site. Notice of that application must be filed in the Environmental Monitor, a public website.[1] No such notice has been filed.

Mr. Engler stated at the February 9th hearing session that he was instructing his team to do a new round of test pits "next week." Given the shifting explanations and critical importance of this data to the design and feasibility of the Project, we respectfully request that the Board require the Applicant to have any test pits and data collection performed on the Site witnessed by a qualified agent of the Town of Manchester. We recommend that Beals and Thomas witness

[1] https://eeaonline.eea.state.ma.us/EEA/MEPA-eMonitor/home

these test pits, since they will be peer reviewing the engineering components of the Project for the Board.

2. The Dead-End Driveway

The issue of the Project's long, dead-end driveway was discussed at the February 9th hearing session. According to your traffic peer reviewer, Environmental Partners, the driveway is approximately 1,800 feet, from its entrance on School Street to the front door of the apartment building. The driveway has a "boulevard" entrance, which transitions to a single, 24-foot wide road. The elevation at the School Street entrance is 51 feet (above sea level), and rises to 114 feet at the end of the driveway. The maximum grade of the driveway is 8%, on the west side of the building. The driveway is essentially an un-closed loop that snakes around the exterior of the building. For most of the length of the driveway, the outer side of the driveway slopes steeply away from the pavement; the inside of the driveway also features steep slopes at the beginning.

As Environmental Partners correctly noted, the Manchester Zoning Bylaws restricts the length of common driveways to 500 feet. See, ZBL, § 6.9.8. Mr. Engler stated at the February 9th hearing session that he does not need a waiver because he is not proposing a subdivision. However, Section 6.9.8 does not apply to subdivisions, it applies to any "common driveway," which this is. Curiously, Mr. Engler has not requested a waiver from this provision despite the fact that the Project clearly needs one. Even if Section 6.9.8 did not exist, the Board would be justified to consider the road design standards found in the Planning Board's Subdivision Rules and Regulations, which limits dead-end roads to 500 feet.[2]

Coincidentally, the state Housing Appeals Committee has adjudicated several cases involving long, non-conforming dead-end roads and access driveways. As I mentioned at the February 9th hearing session, the seminal case was a project denied by the Waltham Board of Appeals in 2002, which featured a 1,000-foot dead-end access driveway serving a 36-unit project.[3] The access road climbed 75 feet from its intersection on Lexington Street to the entrance of the project's building, on top of a hill. The maximum grade of the driveway was 10%, with steep slopes on both sides. There was testimony that if the access road was blocked, "emergency personnel would be required to climb the access road or adjacent hill by foot, carrying heavy gear, increasing response time by 45 minutes."[4] It was observed that automatic sprinklers inside the building improves fire protection, but are "not a substitute for access to the site for firefighting, and they do not protect against medical emergencies."[5]

As here, the Waltham developer testified that the driveway length and design "are consistent with generally recognized design standards and provide adequate emergency access to

[2] Many municipalities do not allow multiple dwelling units on a single tract of land outside of the subdivision context. As such, they do not have equivalent road design performance standards for non-subdivision multi-family developments. Recognizing this, Chapter 40B regulations specifically authorize zoning boards to review the conformity of Chapter 40B projects with subdivision regulations. See, 760 CMR 56.05(7).
[3] *Lexington Woods, LLC v. Waltham ZBA*, HAC No. 02-36 (Feb. 1, 2005), copy attached as Exhibit A.
[4] Id., at *31.
[5] Id., at *33.

the site and building without need for alternative access."[6] However, the HAC found that the "combination of problematic elements" with the design of the access driveway, including its length and grade, justified the denial by the local zoning board.[7]

A year later, the HAC affirmed the denial of another Chapter 40B permit, this time for a 100-unit condominium project in Braintree that would have been served by two dead-end driveways, one 1,550 feet long, and the other 1,250 feet long.[8] The maximum grade of the road was 8%, and the road was unique in that it featured two, 18-foot-wide travel lanes separated by a 16-foot-wide mountable landscaped island. The HAC commented, as it did in the *Waltham* case, that long dead-end roads without a secondary or alternative access present a public safety concern, "when homes may become isolated from the town's street network because of a single point of entry to the development."[9] The HAC further observed that "[i]t is a concern that increases not only with the length of the cul-de-sac, but also with the number of homes that are located at a distance from the street network." The HAC held that "[e]ach such roadway must be considered on its own merits based upon 'an analysis of all the characteristics of the roadway taken together.'"[10]

In 2011, the HAC rejected a 2,120-foot dead-end access road with a maximum grade of 6% providing access to a 52-unit project in Norwell. The Norwell ZBA had conditioned its approval of the project on the road not exceeding 1,150 feet, which the HAC found reasonable under the "consistent with local needs" balancing test.[11]

Importantly, the HAC has stated that the width of the proposed road "is rarely the most important factor. More typically it is the number of units isolated on the single--access roadway and the length of the roadway, as well as unusual factors specific to the site that are most important."[12] On two occasions, the HAC overturned a local zoning board decision and *allowed* a dead-end road, but both cases are distinguishable from the present situation. In the *Wenham* matter, the access road was only 1,120-feet long and served just 20 units. Similarly, in *Green View Realty, LLC v. Holliston ZBA*, HAC No. 06-16 (Jan. 20, 2009) (Exh. E), the project had two dead-end roads of 600-700 feet in length, serving between 30 and 32 unit. From my survey of the relevant HAC caselaw, this Manchester project has the <u>largest</u> number of housing units served by the dead-end road, and the <u>second longest</u> dead-end road. See, Table 1 below.

---

[6] Ibid.
[7] Id., at *41-42.
[8] *O.I.B Corp. v. Braintree ZBA*, HAC No. 03-15 (Mar. 27, 2006), Exh. B.
[9] Id., at *16.
[10] Ibid., <u>citing</u>, *Lexington Woods, LLC v. Waltham ZBA*, supra.
[11] *Simon Hill, LLC v. Norwell ZBA*, HAC No. 09-07 (Oct. 13, 2011), Exh. C..
[12] *Burley Street, LLC v. Wenham ZBA*, HAC No. 09-12 (Sept. 27, 2010), at **9-10. Exh. D.

Table 1

HAC Case	# Units	Length of Road	Max. Grade	Town Regulation	Decision
Waltham	36	1000 ft.	10%	500 ft.	*denied*
Braintree	100[13]	1550 ft.	8%	400 ft.	*denied*
Norwell	52	2120 ft.	6%	550 ft.[14]	*denied*[15]
Manchester	**108**	**1800 ft.**	**8%**	**500 ft.**	***??***
Wenham	20	1120 ft.	n/a	500 ft.	*allowed*
Holliston	30-32	600-700 ft.	n/a	500 ft.	*allowed*

The HAC decision cited by Attorney Talerman during the February 9th hearing session concerned a 40B project in the town of Sunderland, and is inapplicable.[16] The HAC overturned the local zoning board's denial, which was based on the town's concern with providing fire protection to a 42-foot-tall building without a ladder truck. The case did not concern access roads at all.[17]

3. Fire Flow – Adequacy of the Town's Water System

During the February 9th hearing session, the Fire Chief dismissed comparisons of the 40B Project Site with two recent house fires in town. Specifically, he referenced a fire at 30 University Lane that occurred after a snow storm in 2019, in which fire apparatus could not climb the steep driveway leading up to the house. He noted that the driveway was steeper than what is proposed here. The Chief also referenced a house fire on Old Essex Road last summer, where water pressure in the hydrant was deficient due to the location being at the "dead-end" of a water main. However, that situation is present with the 40B project site as well – there is currently no municipal water service in School Street north of Route 128. The Applicant intends to extend the water main across Route 128; presumably, this would also result in a "dead-end," at the top of Shingle Place Hill.

Protecting the future building and its residents, as well as all of the undeveloped land surrounding Shingle Place Hill, is a "local concern" that outweighs any need to produce more affordable housing. It is therefore imperative that the Applicant demonstrate that sufficient water pressure will be available along the 1,800-foot driveway and at the top of the hill for domestic water and fire suppression purposes. This is ordinarily accomplished through a water capacity study prepared by a water systems engineering, under which existing water pressure during peak

[13] The entire project in *Braintree* had 119 housing units, but only 100 would have been served by the 1,000-foot dead-end road.
[14] In the *Norwell* case, it was noted that the length of a dead-end road could be allowed for up to 1,000 feet by special permit.
[15] The HAC affirmed the ZBA's condition that limited the length of the road to 1,150 ft.
[16] *Sugarbush Meadow, LLC v. Sunderland ZBA*, HAC No. 08-02 (June 21, 2010), Exh. F.
[17] The town's defense was undercut by the fact that its zoning bylaw allowed residential buildings of up to 45 feet, and that the project was located on the Amherst town line, and the Town of Amherst had a ladder truck.

hours is measured, and future water pressure is estimated through hydraulic modeling. The Applicant should be required to prepare and file such a report with the ZBA and the Department of Public Works while this public hearing is still open, to enable constructive public review and comment.[18]

Thank you for your attention to these matters.

.

Very truly yours,

/s/ Daniel C. Hill

Daniel C. Hill

Enc.
cc: Clients
Manchester Board of Selectmen
Manchester Department of Public Works
Beals and Thomas

[18] In its "Existing Conditions Narrative" provided in the 40B application, Allen & Major acknowledges that a water main extension will be required, but provides no construction details and provides no data on existing water pressures in the line, or projected future water pressures based on modeling.

EXHIBIT A

2005 MA Housing App. LEXIS 4

February 1, 2005

No. 02-36

MA Housing Appeals Committee

Reporter
2005 MA Housing App. LEXIS 4 *

LEXINGTON WOODS, LLC, AppellantÂ ; v.Â ; WALTHAM ZONING BOARD OF APPEALS, Appellee

Core Terms

roadway, street, grade, foot, has, site, drive, traffic, speed, distance, was, curve, sight, driveway, intersection, access road, width, slip opinion, mph, snow, residential, travel, driver, steep, slope, storm water, sidewalk, secondary, project engineer, indian

Panel: Werner Lohe, Chairman; Joseph P. Henefield; Marion V. McEttrick; Shelagh A. Ellman-Pearl, Esq., Hearing Officer

Opinion

DECISION

This is an appeal pursuant to G.L. c. 40B, Â§Â§ 20-23, and 760 CMR Â§Â§ 30.00 and 31.00, brought by Lexington Woods, LLC (Lexington Woods), from a decision of the Waltham Zoning Board of Appeals, denying a comprehensive permit with respect to property located on the westerly side of Lexington Street in the City of Waltham. For the reasons set forth below, the decision of the Board is affirmed.

I. PROCEDURAL HISTORY

On or about October 14, 2001, Lexington Woods submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, Â§Â§ 20-23, for a 40-unit residential condominium development (reduced during the hearing to 36 units) on 6.6 acres of land in Waltham, Massachusetts. Of the 36 units proposed, 9 would be offered as affordable. The housing is to be subsidized by Salem Five Cents Savings Bank through the New England Fund (NEF) Program of the Federal Home Loan Bank of Boston.

The public **[*2]** hearing began on September 20, 2001, and continued on October 9, November 20 and December 18, 2001, and on February 12, March 12, April 23, June 4, June 18, August 20 and October 15, 2002. The hearing was closed on October 15, 2002. The Board denied the comprehensive permit on November 7, 2002 and filed its decision with the Waltham City Clerk on November 13, 2002.

On November 26, 2002, Lexington Woods filed its appeal with the Housing Appeals Committee. The Committee held a Conference of Counsel on December 10, 2002. The hearing commenced with a hearing and site visit in

Waltham on March 13, 2003, and continued over four additional days between April 2003 and June 2004. The parties submitted post-hearing memoranda on August 16 and 17, 2004.

II. JURISDICTION

A. Limited Dividend Organization

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee, three jurisdictional requirements must be met. See 760 CMR 31.01(1)(a)-(c). The parties have stipulated that Lexington Woods is a limited liability company duly organized under Massachusetts law and is a limited dividend organization as required **[*3]** by 760 CMR 31.01(1)(a). Pre-Hearing Order, Â§ I.4.

B. Fundability

The Board argues that Lexington Woods has failed to sustain its burden under 760 CMR 31.01(b) of proving that it qualifies for NEF financing. It claims that the financing expired on March 31, 2004, and no evidence was presented indicating that it is eligible for reinstatement. Exh. 14. The Committee has previously determined that the expiration period in a financing letter is tolled if a developer has acted promptly in bringing its comprehensive permit application before a board and filing an appeal from a board's decision, and the project has not been modified significantly. *An-Co, Inc. v. Haverhill,* No. 90-11, slip op. at 6-8 (Mass. Housing Appeals Committee Order June 28, 1994). In this case, the developer applied for a comprehensive permit from the Board on August 30, 2001. Exh. 1. It received its NEF funding letter from the Federal Home Loan Bank Board on September 25, 2002. Exh. 9. The Board filed its decision in the City Clerk's office on November 13, 2002. Lexington Woods filed its appeal to the Committee on November **[*4]** 26, 2002. Hearings took place on five days between March 2003 and June 2004. The length of time that has passed during the appeal period did not occur as a result of undue delay caused by Lexington Woods. It has acted promptly in pursuing its comprehensive permit. Therefore, in this case, the expiration period in the NEF funding letter is tolled.

C. Site Control

The Pre-Hearing Order states that Lexington Woods is called upon to prove that it has met the requirement that it control the site. Pre-Hearing Order, Â§ II. Appellant/Applicant's Case (1). However, neither party has raised this issue in its brief. Testimony from the legal agent for Lexington Woods, as well as a certification authorizing him to act for Lexington Woods, a purchase and sale agreement for the property, an assignment and designation of grantee, and a deed for the property, all demonstrate that Lexington Woods controls the site. 760 CMR 31.01(3). Tr. I, 13, 15, 19-21; Exhs. 11-13.

III. FACTUAL BACKGROUND

Lexington Woods proposes to develop a parcel of land consisting of approximately 6.6 acres, located at 640 Lexington Street in a well-developed section of Waltham, **[*5]** Massachusetts zoned as a Residence A2 Zoning District (single-family zoning). A single-family residence currently occupies the property. Lexington Woods contemplates building 36 residential condominium townhouse units including 9 to be restricted as low and moderate income units. The project contemplates extensive re-grading and landscaping. Tr. I, 21-26; V, 10; Exhs. 1, 3, 6.

The parcel is located on the westerly side of Lexington Street, a public way opposite the entrance driveway to the 75-acre public school campus of the Waltham High School and the Kennedy Middle School (the school complex). Tr. IV, 106, 113. The development would be located on the top of a hill on the property at a location approximately 75 feet above Lexington Street. Tr. III, 76. Access to the development consists of one roadway, approximately 1,000 feet in length. It winds upward from Lexington Street increasing in grade to 10% as it approaches the top of the hill and the area of parking spaces for the proposed buildings on the site. The road also narrows to 20 feet wide at this point. A sidewalk is proposed to follow the access drive on the right hand side (in the inbound direction). Steep ledge borders portions **[*6]** of the proposed drive on both sides. Tr. I, 83-84; II, 112-113; III, 18, 38-40; V, 27; Exh. 7.

Lexington Street is a major thoroughfare in Waltham. Tr. V, 17. It is a two-way, four lane roadway connecting downtown Waltham and Lexington center. A cross walk is located at the intersection of the school complex and Lexington Street. The intersection currently has traffic lights controlling Lexington Street and the entrance to the school complex. Tr. V, 8, 34. The proposed access drive opens on Lexington Street about 40 feet north of the entrance to the school complex. Tr. III, 15. Lexington Woods has proposed improvements to the traffic signals to include the access driveway.

North of the entry to the access drive on Lexington Street, a curve in Lexington Street and a rock outcropping on the property reduce the line of sight of the proposed access drive and the sidewalk for motorists traveling in a southerly direction. Tr. V, 32-34. Lexington Woods proposes to remove a portion of ledge from the site to improve vehicle sight distances. Lexington Woods also proposes to direct storm water from the development under Lexington Street into Chester Brook on the school department property. The **[*7]** proposed water access to the site consists of a single pipe leading along the access drive. The developer has offered to loop the pipe providing access to the water main from Lexington Street in two locations.

IV. MOTION TO REMAND

Before the evidentiary portion of the hearing, the Board had moved pursuant to 760 CMR 31.02 and 31.03 to remand this matter to the Board for review of Lexington Woods' post-decision modification of the project as detailed in the six-page site plan. Exh. 7. The Board argues that the changes proposed were substantial and Lexington Woods did not have good cause for not having originally presented these details to the Board. Although the presiding officer admitted the plan of the proposal into evidence and permitted testimony regarding the plan, he invited the Board to raise the issue while giving a preliminary view that the changes were not substantial. Tr. I, 10; Exh. 7.

In its brief, the Board alleges generally that the post-decision site plan contains substantial changes to the project, that Lexington Woods failed to provide good cause for not originally presenting its modified project to the Board, and that **[*8]** this matter should be remanded to the Board for failure to exhaust administrative remedies. See 760 CMR 31.03(1). However, the Board's brief identifies neither the alleged substantial changes nor the reasons why any modifications are substantial. Lexington Woods' brief at p. 2 points out that:

> The Appellant has also agreed to widen a major portion of the driveway to 24 feet. In response to comments from the Waltham Traffic Director, the Appellant agreed to add an entrance-right turn lane on the westerly side of Lexington Street in front of the site, but the lane was removed from the plan when others objected to it. The plans [Exhibits 7 and 7A] before the Committee do not contain that lane, but do show the removal of significant ledge and other visual obstructions at the front of the site that improve the site [sic] distance beyond that required by governmental guidelines.

These are not substantial changes within the meaning of 760 CMR 31.03. They represent an attempt by Lexington Woods to address concerns raised by the Board. The right turn lane was not part of the original proposal to the **[*9]** Board, but offered by Hayes Engineering, Inc., while the Board proceeding was underway, also to address City concerns. There is no evidence that it was formalized as a change to the proposal. See Exh. 32. To the extent that the Board has other issues it considers to be substantial changes, it has not developed a record in this proceeding on which a decision can be made. Accordingly, the motion to remand is denied. See *Transformations, Inc. v. Townsend,* No. 02-14, slip op. at 5-6 (Mass. Housing Appeals Committee Jan. 26, 2004); also see *Zoning Board of Appeals of Wellesley v. Housing Appeals Comm., 385 Mass. 651, 656-57, 433 N.E.2d 873 (1982)*.

V. MOTION TO DISMISS

The Board moved to dismiss the proceeding on the ground that Lexington Woods failed to comply with 760 CMR 30.06(9) and 31.08(3) concerning the Massachusetts Environmental Policy Act (MEPA). It asserts that because the property is located within 200 feet of Chester Brook, a wetland resource subject to the Rivers Protection Act, a determination from EOEA is required. It contends that the developer merely filed a statement of **[*10]** a hired consultant that MEPA was inapplicable to this development, rather than obtaining the required EOEA determination. The project engineer submitted a letter to DHCD that the project does not meet any thresholds requiring the filing of

an Environmental Notification Form or Environmental Impact Report (EIR) under 301 CMR 11.00. Exhs. 27, 28. The developer intends to apply for an order of conditions under the Massachusetts Wetlands Protection Act with respect to a portion of a riverfront area that extends onto the property. Tr. I, 102-03.

Lexington Woods argues that it has met its burden to establish a *prima facie* case by showing that its proposal complies with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). Even if an EIR were required, the Committee may delay its decision or render its decision subject to the condition that any comprehensive permit not be implemented until the Committee has complied with MEPA. 760 CMR 31.08(3)(c)1. and 2. Therefore the lack of an EOEA determination does not require dismissal and **[*11]** the Board's motion on this basis is denied. In any event, in this instance, where the Committee is upholding the Board's denial of a request for a comprehensive permit, the question of compliance with the MEPA process requirements is moot.

VI. ISSUES ON THE MERITS

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, to make a *prima facie* case before the Committee in this matter, the developer must show, with respect to the aspects of the proposed development that are in dispute, that its proposal complies with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern which supports the denial, and second, that such concern outweighs the regional need for low and moderate income housing. G.L. c. 40B, Â§Â§ 20, 23; 760 CMR 31.06(6) **[*12]** . See *Hilltop Preserve LTD Partnership v. Walpole,* No. 00-11, slip op. at 4 (Mass. Housing Appeals Committee Apr. 10, 2002). As explained below, our analysis of the local concerns raised by the Board leads us to affirm the Board's denial of the comprehensive permit sought by Lexington Woods.

A. Statutory *Minima*

The parties stipulated that 1) low and moderate income housing units in Waltham comprise less than 10 percent of its total housing units, as determined pursuant to G.L. c. 40B Â§Â§ 20, *et seq.* and 760 CMR 31.00, *et seq.;* and 2) low and moderate income housing does not exist in Waltham on sites comprising 1.5 percent or more of the total land area zoned for residential, commercial, or industrial use as determined pursuant to G.L. c. 40B Â§Â§ 20, *et seq.* and 760 CMR 31.00, *et seq.* Pre-Hearing Order, Â§ I.2-I.3. The parties disagree about who has the burden of proof regarding whether the project as proposed by Lexington Woods would result in the commencement of construction of low or moderate income housing on sites in Waltham **[*13]** comprising more than 0.3 of 1 percent of the total land area in Waltham zoned for residential, commercial or industrial use or 10 acres, whichever is larger, in any one calendar year. See 760 CMR 31.04(3) and 31.06(5). Neither party introduced evidence in this regard. 760 CMR 31.06(5) provides:

> In any case, the Board may show conclusively that its decision was consistent with local needs by proving that one of the statutory minima described in 760 CMR 31.04 has been satisfied. The Board shall have the burden of proving satisfaction of such statutory *minima.*

Although the Board reserved the right to contest this issue in the Pre-Hearing Order, it never submitted evidence in this regard. The Board's failure to develop the record during the course of the current proceedings leaves the Committee without any form of substantial evidence that could support a conclusion that Waltham has met the requirement of 760 CMR 31.06(5). See *Zoning Board of Appeals of Wellesley, 385 Mass. at 656-57, 433 N.E.2d 873*. **[*14]** Accordingly, the Board has conceded this issue. See *Hilltop Preserve,* No. 00-11, slip op. at 2 n.1; also see *Cameron v. Carelli, 39 Mass. App. Ct. 81, 85-86, 653 N.E. 2d 595 (1995)*.

B. Compliance with state and federal laws or generally accepted design standards

To support its burden of proof, Lexington Woods refers to testimony of its project engineer that the development will comply with state and federal laws. It also points to testimony and documentary evidence of the Board's expert, a civil engineer, that the project complies with drainage and wetland requirements. Tr. I, 78-80, 92, 102; II, 37, 40; Exhs. 7, 7A, 27, 28.

The developer further argues that the project is consistent with other generally recognized design standards, relying on testimony of its experts, a traffic consultant and a registered professional engineer specializing in traffic operations and roadway design, as well as the testimony and documentary evidence provided by traffic experts originally engaged by the City of Waltham. Lexington Woods has submitted sufficient evidence of compliance with state and federal laws or general accepted design standards **[*15]** with respect to the contested issues.

C. Health, safety, environmental, design, open space or other local concerns

The substantive issues raised by the Board relate to 1) the safety of the access to the site, including both the safety of the roadway itself and the lack of secondary access to the site; 2) traffic safety at the intersection of the access drive and Lexington Street and on Lexington Street near the site; 3) storm water management; and 4) the water system for the site. The Board argues that the different aspects of the development must be considered in the aggregate to evaluate the safety of the development. Lexington Woods argues that if each of the Board's claims is inadequate, then the whole of the Board's claim is inadequate.

1. Safety of Roadway Access to the Proposed Development

The Board has cited fourteen different provisions of the *Land Rules and Regulations of the Waltham Board of Survey and Planning,* which it says the project contravenes. Â [1] See Exh. 4. The Board's expert **[*16]** road design

---

[1] The Board cites the following aspects of noncompliance with City provisions:

1) Section 4.2.1 requires a design speed for residential roads of 30 mph. The access road has a design speed between 10 and 15 mph. Tr. II, 124; III, 14.

2) Section 4.2.2.5.1 requires the avoidance of street jogs with centerline offsets of less than 125 feet. The access road is 40 feet from the school complex intersection with Lexington Street. Tr. III, 15-16.

3) Section 4.2.2.5.2 requires residential roadways to have minimum centerline radii of 350 feet. The access road has a centerline radius of 75 feet. Tr. III, 16.

4) Section 4.2.2.5.3 requires a tangent of at least 100 feet between curves unless the radius of both curves exceeds 700 feet. The access road has no tangent between reverse curves. Tr. I, 127.

5) Section 4.2.2.8.1 limits dead-end or single access roads to a maximum length of 500 feet. The access road is an approximately 1,000-foot dead end road. Tr. III, 18.

6) Section 4.2.3 requires a minimum width for residential streets of 50 feet. The paved access drive is 20 to 24 feet wide. A sidewalk of unknown width is planned for one side of the roadway. Tr. III, 19, 98-99.

7) Section 4.2.4.1 requires a maximum centerline grade of 7% for residential streets. The access road has a centerline grade of up to 10%. Tr. III, 18, 38-40.

8) Section 4.2.4.2 states that where curves and grades combine to create a potentially dangerous driving condition, the Board may require a suitable amount of super elevation of the curves or other protection.

9) Section 4.2.4.4. limits the grade of subdivision streets to a maximum of 2% for a distance of 100 feet from the nearest exterior line of the intersecting street. The access drive has a grade of 3% for 100 feet from the intersection with Lexington Street. Tr. I, 83.

10) Section 4.3.3 requires access easements and right of ways to park and conservation land or for use by emergency vehicles to be secured for the benefit of the City and to be 25 feet in width. No emergency access is provided for this project, and the sole access is 20 to 24 feet wide, except at its entrance. Tr. III, 19.

11) Section 5.4.5 requires a minimum 30-foot pavement width for residential streets. The access drive has 20 to 24 feet pavement width, except at its entrance. Tr. III, 19, 98.

12) Section 5.6.1 requires a sidewalk area 10 feet wide on each side of all streets. The development has a sidewalk of unknown width planned only on one side of the access drive. Tr. III, 98-99.

13) Section 5.8 requires vertical granite curbing on both sides of all roadways. The access drive is proposed to have asphalt berm. Tr. III, 102.

and traffic engineer testified that these regulations are well thought-out and apply industry standards for safety; thus a road constructed in accordance with the City requirements is presumed to be safe. Tr. III, 12-13. The Board suggests, conversely, that because the roadway does not comply with these requirements, it fails to meet generally accepted engineering standards. Although it acknowledges that its design does not meet all the City's requirements, Lexington Woods argues that its design meets generally accepted design standards and therefore is safe.

In evaluating the safety of the roadway's design it is important to look at all the factors involved, including the nature of the roadway. It is intended as a private way serving the residents of the proposed development. Section 4.1.3 of the Waltham regulations defines a "residential street" as "[a] street which generally serves only those residents living on that street and which can be considered to permanently serve the exclusive function of being a residential street." The Board's expert considered the proposed access roadway to be most similar to a residential street. Tr. III, 13. The developer's expert testified **[*17]** that the access drive should be evaluated as a private driveway, rather than a through roadway under requirements established by the American Association of State Highway and Transportation Officials (AASHTO) or the City of Waltham, since they are geared toward streets and roadways that are primarily throughways. Tr. II, 153-154.

The safety of the road design must be considered in light of the traffic it will serve. Although a private drive, the roadway would serve 36 households and visitors. However, it would not be a throughway serving traffic unrelated to the development. Therefore, the City requirements are not the sole standard for determining the safety of the roadway, but rather may be considered along with other design standards and circumstances. Certain provisions address safety concerns that are more relevant than others to the design and planned use of the access roadway.

a) Grade of the Access Drive

Waltham regulations establish 7% as the maximum allowed grade for a residential roadway and 2% as the maximum grade for the first 100 feet at intersecting internal streets. Exh. 4. The proposed access drive is approximately 1,000 feet in length. It slopes for the first **[*18]** 100 feet from Lexington Street at a 3% grade, curving to the left. The grade increases gradually to 8% and then to 10%, curving to the right and achieving a 10% grade somewhere in the range of 350 to 500 feet from the entrance, according to various experts. It runs at 10% for much of the roadway and then declines to approximately a 5% grade. It reaches a height of 75 feet above Lexington Street. It terminates with a turnaround so vehicles can leave the site without having to stop. Tr. I, 83-84, 130-131; II, 112-113; III, 38-39, 76. Exh. 7, p. 4. The section of the driveway that has the 10% grade mainly runs parallel to Lexington Street. Tr. V, 95.

The project engineer testified that the access drive grade meets AASHTO standards, which set 15% as a maximum grade for local streets. He also stated that it is acceptable from an engineering perspective and should function adequately. Tr. I, 98-100; Exh. 37, p. 1. The developer's traffic consultant testified that the proposed driveway grades and geometry would not be unsafe. He believed a 3% approach grade at Lexington Street was reasonable. Tr. II, 28; Exh. 37, p. 2. Waltham's transportation director agreed that AASHTO set a 15% maximum **[*19]** grade standards for local streets and that the leveling area of the driveway near Lexington Street is satisfactory. Â [2] Tr. V, 5, 88, 92.

---

14) Section 5.9.1 requires the area in back of the sidewalk to be sloped at the maximum rate of three horizontal to one vertical (3:1). The access drive has a side slope of 1:1. Tr. III, 19.

[2] When the developer's counsel read to the deputy fire chief a portion of the National Fire Protection Association (NFPA) guidelines, which state that grade shall not be more than 10 percent, the witness acknowledged that the access road grade was equal to the maximum under the NEPA guidelines. The Waltham fire department relies on these guidelines for fire prevention and safety. Tr. IV, 67, 89-90.

Other roadways in Waltham have grades equal to or greater than 10%. College Farm Road exceeds a 10% grade and has no leveling area at the entrance to Lexington Street. Tr. II, 28; Exh. 40. Â [3] The access driveway to the City YMCA, a curving roadway with a higher traffic volume than the site access drive, exceeds a 14% grade at some points. Tr. II, 28; III, 137; Exhs. 37, p. 2, 41. There was unrebutted testimony that approximately 8 to 15 other driveways on Lexington Street equal or exceed the slope of the existing site driveway on Lexington Street, which has a steeper slope than the proposed access drive. Tr. I, 50. The Waltham director of public works **[*20]** Â [4] testified that Stearns Hill Road, an access road into a multi-unit apartment complex, Windsor Village, was extremely steep, with some areas exceeding the grades on the access drive. Tr. III, 119. He agreed that the road could have a grade as high as 20%, and that Prentiss Street, Sherborn Place and Hillcrest Road all may have grades in excess of 10%. Tr. III, 134, 137. He also testified that a roadway in the Villages at Bear Hill has a grade of 12%. Tr. III, 136. Other towns, including Newton and Lynn, allow road grades of 10% or more. Tr. I, 40-41; III, 59. The police chief and deputy fire chief believed the grade of the access drive would adversely affect emergency access. Tr. IV, 12, 15-17, 67-68, 70-74. In making his assessment, the police chief considered the grades and configuration of the existing gravel driveway as well as Stearns Hill Road, both of which have steeper grades than the access roadway. Tr. IV, 39.

The record is unclear regarding when the other steep roadways in Waltham were built. Evidence in the **[*21]** record indicates that a grade of 10%, though at or near the limit of what is generally considered acceptable, is not necessarily unsafe and can be consistent with generally accepted design standards under some circumstances. However, an assessment of the safety of the grade must take into consideration the other elements of the road layout and design, including secondary access, roadway width, reverse curves, sight distance and snow storage issues and well as the purpose of the roadway, as discussed below.

b) Road Construction and Layout

The access drive does not meet the Waltham requirements for the extent and layout of sidewalks, granite curbing, roadway width, length and construction, and side slope. Waltham requires residential roads to be 50 feet wide, with 30 feet of pavement and 10 feet on both sides for sidewalks. At the intersection of the driveway with Lexington Street, the access drive would be 30 feet wide, with an entrance lane 14 feet wide and an exit lane 16 feet wide separated by a median. According to various experts, the roadway tapers to 24 feet to approximately the end of the 8% grade. From the beginning of the 10% grade, either approaching or where the housing **[*22]** access area begins, it is about 20 feet wide. Tr. I, 130-131; II, 112-113; III, 38-39; Exh. 7. The City also requires a width of 25 feet width for emergency secondary access. Tr. III, 110-111.

Focusing on the portion of the access drive that has a grade of 10%, the Board argues that the grade and the reverse curves Â [5] make the access drive unsafe because there is no "tangent" or straight area in the road between the curves to allow a motorist to recover control of the vehicle between curves. Tr. III, 17. At this location, the roadway is 20 feet wide and the development would have cars pulling in and out of the access drive, exacerbating the situation. Tr. III, 39-40.

The developer's project engineer testified that the width of the driveway conforms to acceptable engineering standards and the width and configuration of the driveway, turnaround and interior parking layout are adequate for emergency vehicle access and everyday usage and emergency vehicle turnaround. Tr. I, 93; Exh. 7. He also stated that **[*23]** the "cross slopes are typical of any roadway. The horizontal curvature is not out of the realm of the ordinary and I wouldn't expect there to be a problem. And that was the basis for the design." Tr. I, 114.

---

[3] The intersection of College Farm Road and Lexington Street has experienced a relatively low number of traffic accidents, even though it is a through road with heavy traffic and has no leveling of the grade at the Lexington Street intersection. Tr. II, 34-35; Exh. 37, p. 2.

[4] The director of public works is also the City engineer and the clerk of the board of survey and planning. Tr. III, 86.

[5] A reverse curve is a turn of the road in one direction immediately followed by a turn in the other. Tr. III, 17.

The site plan shows no designated area along the access road for the storage of snow plowed off the access road or single sidewalk. The City director of public works acknowledged that there is some area for snow disposal, but he expressed uncertainty about its adequacy. He noted that grass strips should be part of a sidewalk layout for snow storage off roadways. The access roadway design, including only one sidewalk, does not meet the City requirements for residential sidewalks. Tr. III, 91, 92, 98-99, 101, 121-22, 140. The roadway has a side slope of 1:1 compared to the 3:1 required by the City. Instead of granite curbing as required by the City, for most of the roadway, Lexington Woods proposed to use asphalt berm. The Board argues that granite curbing is important to create a barrier between the roadway and the sidewalk, to improve pedestrian safety, and to direct storm water into the storm water system. Tr. III, 19, 102-06.

The project engineer testified that snow would be **[*24]** pushed off on either side of the roadway, and that the slope on the southern side is not too steep to pile snow. He believed the piling of snow on either side would not reduce the width of the paved roadway. Tr. I, 134-135. Lexington Woods also suggested that snowplowing would be under the control of the condominium association, and that the Committee could impose a condition requiring the establishment of a snow removal plan to be followed by the development's snow contractors, to ensure that snow is removed from driveway. It points out that the Committee has previously commented that addressing snow removal is a typical problem in New England, and "presumably a snow removal contractor to be engaged by the management will have the skill and equipment to be equal to the task." *Capital Site Management Assoc. Ltd. Partnership v. Wellesley,* No. 89-15, slip op. at 35 (Massachusetts Housing Appeals Committee Sept. 24, 1992), *aff'd,* No. 96-P-1839 (Mass. App. Ct. Feb. 18, 1998). In that case, the Committee approved a project with a serpentine road less than 200 feet in length, 24 feet wide with a grade of 8 or 9%. *Id.* at 25, 31-32.

We share the concern of the Waltham public works **[*25]** director that granite curbing would necessary for this type of roadway because it assists snowplow operators in defining roadways, particularly narrow roads. He testified that asphalt berms are inadequate for this function because either snowplow operators either plow up against asphalt berms, damaging them, or stay a bit away from the berm resulting in the snow bank creeping into the roadway with successive snowfalls. Tr. III, 102-106. He also testified that granite curbing was especially important for steep roadways, both for channeling storm water and for snowplowing purposes. Â [6] Tr. III, 109. The Board's traffic expert testified that the safety of a 25-foot wide roadway with a 10% grade, compared to the average width of a passenger car of 6-8 feet, would be compromised if snow removal were not complete. Tr. V, 57-59. Reducing the width of the roadway through inadequate snow storage would reduce the available paved space for typical traffic or emergency vehicles and could eliminate pedestrian use of **[*26]** the sidewalk. Tr. III, 101-111. It would also increase the slipperiness of the roadway. All of these conditions would increase the likelihood of accidents. Â [7]

c) Design speed of the access road

The developer's traffic consultant defined design speed as the speed at which people will drive in a roadway based on the layout. With low volume roadways, streets or driveways, he stated that the design speed is not specifically chosen. Tr. II, 64-65. The developer's road design expert did not believe there was a specific design speed selected and carried out; rather the topography and existing site conditions led to the layout that resulted in a design speed of about 10 to 15 mph. Tr. II, 124-125. The factors that resulted in the design speed include grade, vertical and horizontal curves, rate of bend in the road, degree of cross slope, banking, and width. Tr. II, 124; Tr. III, 20-25. The weight of the testimony supports the conclusion that the design speed of the access drive is in the range of 10 to 15

---

[6] Lexington Woods argues that Waltham approved the Indian Ridge Project, a Chapter 40B project, allowing "Cape Cod" or asphalt berms on part of the access roadway to that site. The Indian Ridge project, approved in about 2002, was proposed for 264 units on an access roadway over 2,000 feet in length. Tr. III, 129-130; IV, 91. The record does not contain all relevant information about the approval of the Indian Ridge project.

[7] Because the Committee is affirming the Board's denial of the comprehensive permit, it is not necessary to reach the issue of whether conditions, such as a requirement of granite curbing along the entire access drive, would be appropriate.

mph, **[*27]** rather than the design speed of 30 mph for residential roads set out in the City regulations. Â [8] Tr. I, 110; II, 124; III, 14, 20; V, 37; Exh. 4.

The Board's road design expert stated, "...lower volume roadways again have less risk associated with them. Higher volume roadways have more risk. So you design them more conservatively." Tr. III, 71. He acknowledged that AASHTO imposes lower standards for lower volume roads. He stated that, based on AASHTO requirements the road as designed is safe only up to approximately 15 mph but it would be unsafe for vehicles traveling faster. Tr. III, 21-25, 55. The developer's project engineer testified that he does not expect people to travel faster on the down slope of the drive because they would be familiar with the roadway and know the approach of the Lexington Street intersection. Tr. I, 118-119.

A number of witnesses, however, including the Board's roadway design expert and the developer's traffic consultant, testified that vehicles would likely travel faster than **[*28]** the design speed, possibly as fast as 20 or 25 mph. The Board's road design expert believed drivers would want to travel out of the access roadway as fast as they could. He also stated the combination of the grade and geometry would cause vehicles to tend to slide to the outside curve on the tight curves of the roadway, and ice and snow in winter would make the road even more potentially dangerous. Tr. III, 25-26, 64; II, 72.

The parties' experts also used stopping distances to analyze the safety of the roadway. An increase in grade increases the distance required for stopping, under either a breaking distance or a stopping sight distance assessment. Â [9] Tr. V, 95-99; III, 27; Exh. 34. The breaking distance (the distance it takes to stop once breaks are applied at a given speed) on a 10% grade is 3 feet more than that on a 7% grade at 15 mph, and 7 feet more at 20 mph, on wet pavement. Tr. V, 98-99; II, 27; Exh. 34, p. 5. The Board argues that because of the tight curves in the road, vehicles traveling **[*29]** at 25 mph would not see obstructions in the roadway in time to stop. A vehicle traveling 25 mph on a 9% downgrade (compared to the 10% grade on the access drive) would require 173 feet to stop. However, the line of sight at the 10% grade portion of the access drive is 100 to 150 feet. Tr. V, 55-56; I, 119.

Although reverse curves are problematic on roadways with high speeds, their existence on a private drive does not automatically determine the drive to be unsafe. Lexington Woods argues that the safety concerns with reverse curves do not apply to the access drive because it is low-volume and low-speed. The Board's road design expert testified that the City's 350-foot radius requirement is consistent with the 30-mph design speed under the regulations. Tr. III, 16. He also stated that if a driveway "had curves [drivers] would slow down with the curves." Tr. III, 64. The City transportation director believed that the road conditions would cause drivers to slow down, with speeds closer to 10 to 15 mph due to the horizontal and vertical alignments of the roadway. He also testified that curves are used as a traffic calming technique, to reduce the speed of traffic on a specific roadway. **[*30]** Tr. V, 37, 92-93.

The access drive is a lower volume roadway as defined by AASHTO policies. The developer's roadway design expert testified that when dealing with a low-volume street or local street, such as the access roadway, one should not try to design for a high speed. Â [10] Tr. II, 154. Although several witnesses testified about the likelihood of

---

[8] The Board suggests that the roadway is unsafe because it was designed based on topography, rather than on a predetermined design speed. Tr. II, 148. The Board makes much of testimony of the developer's project engineer, that he did not know the design speed but thought it was 20 mph, and testified that he deferred the decision of the proper design speed to the developer's traffic engineer, who testified that he did not recommend a design speed to the project engineer. Tr. I, 110-113; II, 62. While the fact that the project engineer was not certain of the design speed of the roadway is of some concern, the evaluation of the safety of the roadway is based on its actual design, not the manner in which it was planned.

[9] During the hearing witnesses used several measures of stopping distance: breaking distance, stopping sight distance, and in the context of student drivers at Lexington Road, decision sight distance. In this matter, the choice of the more appropriate method is inconsequential to the decision.

[10] Although Lexington Woods preferred to retain the curves and grade to keep the design speed low, rather than adding super elevation to the curves as suggested by the Board's expert, it suggested that super elevation could be provided if the Committee deemed it an appropriate condition. Tr. III, 61, 79.

drivers exceeding the design speed, for many drivers roadway layout could encourage drivers to slow down, limiting the sight distance necessary. Some drivers may speed out of impatience, but residents who are familiar with the topography of the roadway, the steep slope, tight curves and narrow width would know to drive carefully on the curves, which are likely to serve as a traffic-calming feature. See *Cirsan Realty Trust v. Woburn,* No. 01-22, slip op. at 9 (Mass. Housing Appeals Committee June 11, 2003). Thus, we find that the 15 mph design speed is on the margin of safety, but must be considered with the other characteristics of the roadway and development **[*31]** design.

d) Lack of secondary access

The project has only one proposed access road, an approximately 1,000-foot dead end road. Waltham's local rules prohibit dead end roads in excess of 500 feet. Municipal regulations limiting the length of dead-end roads seek to minimize the number of users, thereby limiting the risk associated with the single point of entry. Tr. III, 41.

The fire department tries to keep its response times to emergency and fire calls to 3-4 minutes, and dispatches fire engines from two different stations via different routes to eliminate delay in response. Tr. IV, 19, 62, 69-70. The deputy fire chief testified that a car blocking the access road could not easily be pushed out of the way because of the steep grade and riprap on either side of the paved roadway, although generally if a fire vehicle is blocked on a roadway, the fire department just pushes the obstructing vehicle aside. Tr. IV, 93-94. He stated that if the access road were blocked, emergency personnel would be required to climb the access road or adjacent hill by foot carrying all their heavy gear. If fire engines were not able to travel up the access road, response time would be increased by 45 **[*32]** minutes. He stated that secondary access would make the development safer. Tr. IV, 65-66, 67-74, 84-85.

The police chief shared the concerns that the single access, particularly with the steepness of the grade, and the potential for obstructions in the roadway during slippery, icy or snowy conditions, was unsafe both for crime prevention and emergency response. Tr. IV, 12, 14-17. He testified that he had experienced difficulty responding at Windsor Village, where a steep single access was blocked during blizzards, when police and fire officers had to leave the ambulance, police cars and fire trucks and traverse through steep grades to get equipment where it was needed, delaying response time. Tr. IV, 15-17. He expressed particular concern about the effect of such delays on life threatening emergencies, such as heart attacks, shocks, or choking. Tr. IV, 18-19. For this reason, be believed that "it's a mistake to have anything in the city that doesn't have multiple access points," particularly if access is a steep roadway. Tr. IV, 16. The police chief also stated an accident or blockage in the access drive could cause backup traffic to spill out onto Lexington Street, which experiences **[*33]** congested and speeding traffic, and limited sight distances. Tr. IV, 13, 28-29.

The developer's roadway design expert stated there are numerous examples throughout the state of roadways of this length, and the concern really becomes one of emergency accessibility. He gave his opinion that the road length was appropriate in light of the number of units served by the roadway, and because the units would have sprinklers. Tr. II, 116-117; I, 23-24. This Committee has noted that sprinklers can improve fire protection for residents. *Hilltop Preserve,* No, 00-11, slip op. at 21. See also *Capital Site Management,* No. 89-15, slip op. at 28. However, as noted by the deputy fire chief, sprinklers are not a substitute for access to the site for firefighting, and they do not protect against medical emergencies. Tr. IV, 81.

The developer's project engineer and roadway design expert testified that the driveway length and design are consistent with generally recognized design standards and provide adequate emergency access to the site and buildings without need for an alternative access. Tr. I, 93-94; V, 138. The Board's road design expert agreed that the fact that the access drive is a sole **[*34]** dead end access does not make it unsafe *per se,* noting as well that other municipalities allow dead-end roadways of lengths greater than the project's driveway length. Tr. III, 60. Lexington Woods submitted evidence that North Reading, Tewksbury, Boxford, Stow, and Billerica all allow such length dead-end roads. Tr. I, 100. It contends that if there were inherent safety problems with such dead-end road lengths, no municipalities would allow them. The Board's road design expert agreed that of the seven municipalities that he checked, two allow dead-end road lengths of 1,000 feet or more. Tr. III, 74. The Waltham transportation director agreed that safety precepts are universal and not dependent on the municipality. Tr. V, 93-94.

Lexington Woods argues, citing *Hilltop Preserve,* No. 00-11, slip op. at 23, that the Board has relied on hypothetical examples and improbable scenarios to suggest the seriousness of the risk that the access drive would be blocked to emergency vehicles, citing the police chief's reference to intentional blockages. Tr. IV, 25. Its project engineer testified he has not known of an instance when the lack of a secondary access caused a problem of access, **[*35]** and he believed blockage of the driveway at this site was improbable. Tr. I, 129-130. The deputy fire chief also acknowledged that although during the Blizzard of 1978 the fire department had to walk through snow to reach a development due to stranded cars all over the access roadway, Route 128 was also impassable in that blizzard. Tr. IV, 74-75, 90. Lexington Woods suggests that his testimony is not credible because in earlier correspondence to the Board in this matter he stated the developer had satisfied his concerns. Exh. 20. Â [11] *Hilltop Preserve* is not directly applicable. There, the Committee found loss of site access resulting from blockage of a major highway during sporting events to be extremely improbable. *Id.* at 22.

Lexington Woods argues that its project has been treated differently than other developments and that the access drive is being held to standards not required of other roadways in the City, even though it meets generally accepted engineering standards. It refers to two **[*36]** other single access ways in Waltham -- the YMCA access drive and the Indian Ridge development. Indian Ridge, a Chapter 40B plan, with 264 proposed units on a single access road of more than 2,000 feet, was apparently approved in about 2002. Â [12] Tr. III, 79-82, 86, 130; IV, 37, 91, 92, 95; Exh. 42. The Board's expert distinguished the Indian Ridge development, stating:

> For example, this road, although it appears as a mirror image configuration of the Lexington Woods plan, it has 20-foot wide pavement. Â [13] It is about 7 percent grade. It is super elevated three to 4 percent. It has a minimum radius of 100 foot, and it has no reverse curves. It is consistent with a 20 miles an hour design speed in all elements.
>
> So although the road looks similar, I did review this road with respect to its design speed and though that **[*37]** this was an appropriately responsible design, including the critical elements of design that seem to be missing from this plan, the Lexington plan.

Tr. III, 84. Regarding the YMCA single access drive on a 14% slope, Lexington Woods suggests that safe access may be even more crucial considering that the YMCA has a childcare facility. Tr. IV, 91. The chief of the Waltham police department testified that he was unaware of any problems experienced with access for response to the YMCA. Tr. IV, 4, 57. A childcare facility, and indeed, the entire YMCA, however, can and most likely would close in severe weather, whereas a residential development must be accessible at all times. It is not comparable to a Chapter 40B residential development. Although the Indian Ridge project is comparable in some ways, the access roadway has several distinguishing features, including a grade that meets the City requirements.

This is not the first time the Committee has been asked to evaluate safety concerns involving a steep, winding roadway into a development. In *Cirsan Realty Trust,* No. 01-22, slip op. at 8, this Committee noted regarding the safety of steep serpentine roadways, "each such design must **[*38]** be considered on its own merits. *Id.* at 10. In *Cirsan,* the maximum grade on the main roadway was 8%, with curves ranging from 40 to 60 feet in radius. During the hearing process the roadway was widened from 26 feet to 28 feet, the curves were modified, and a five-foot level shoulder added, making the roadway safe for a design speed of 15 mph. The secondary emergency access had a 14% grade. There, the Committee considered the board had not proved the design of the main and secondary roadways raised sufficient local concerns. *Id.* at 10, 11.

---

[11] Although the circumstances of the deputy fire chief's one-sentence letter to the Board stating he was satisfied are unknown, we find his testimony at this proceeding to be credible. See Tr. IV, 94-96.

[12] The deputy fire chief testified that he recommended approval of the Indian Ridge project because he was given plans for secondary police and fire department access. However, when asked on cross-examination whether the Board approved the plans with a single access, he replied, "I'm not aware of that yet. But if you say so, it must be so." Tr. IV, 92.

[13] A review of the Indian Ridge Plan shows that the width of the roadway is approximately 30 feet. The reference to 20 feet here appears to be a stenographic error. Exh. 42.

The Committee also considered similar access way arguments in *Capital Site Management,* No. 89-15, slip op. at 24-35. Although the board argued that the combination of the length, width and slope of the serpentine access road (less than 200 feet, with an 8 or 9% grade) was unsafe, especially during hazardous winter snow and ice conditions, the Committee found that "the provisions for pedestrian access and passage by trucks and other vehicles are adequately met and that no defect or hazard exists of gravity to outweigh the housing need." The Committee also noted "for these concerns to be considered as defect in this proposal, it must **[*39]** be specifically proved that there is something about this proposal, or this site, that renders it particularly susceptible to one or more of these specific problems." *Id.* at 38, 31.

The Committee has also previously approved roadways with less than 30 feet paved width. See *Delphic Associates, LLC v. Middleborough,* No. 00-13, slip op. at 12-14 (Mass. Housing Appeals Committee July 17, 2002) (20-foot wide roadway); *Woodridge Realty Trust v. Ipswich,* No. 00-04, slip op. at 17, 24 (Mass. Housing Appeals Committee June 28, 2001) (project approved off 18-foot wide roadway). As with the question of slope, the safety of the roadway cannot be assessed solely on the basis of its width, but must be evaluated in light of all of its characteristics.

As land available for new housing becomes more limited in Massachusetts, more developers are proposing projects on parcels that present topographical challenges. It is important that legitimate local concerns be respected, mindful of the balance against the regional need for affordable housing. Whether this roadway presents too great a safety risk is essentially an analysis of all the characteristics of the roadway taken together. The roadway **[*40]** will be steep, winding and narrow, with tight curves and steep slopes on either side. There is little room for vehicles to pull off on the side. If a vehicle breaks down in the roadway, it will be difficult for emergency vehicles to pass by. If a large vehicle breaks down, even cars would be trapped at the development. On this record, we cannot determine why the Board approved the Indian Ridge project, another Chapter 40B development, despite the fire department's recommendation that the plan go forward with two means of access. The complete record there is not before us and we do not know what site specific facts may have led the Board to waive local requirements. We also note that the grade of the access drive in that site is within City requirements. See *Capital Site Management,* No. 89-15, slip op. at 34. Â [14]

Although Waltham rules do not specifically mandate a secondary access, the requirements as a whole demonstrate a plan to secure emergency access. Exh. 4. In this matter, the lack of a secondary **[*41]** access to the development, combined with the extreme grade, and narrow serpentine roadway, gives rise to a valid local concern that residents of the development may lose access to or from the site. The Committee's decision in *Methuen Housing Authority v. Methuen,* No. 84-02, slip op. at 5-6, 8 (Mass. Housing Appeals Committee July 22, 1985) does not require a different result. There the Committee approved 42 units on an 820-foot single access road. However, the record shows no indication that that roadway possessed all the characteristics which cause serious concerns with the roadway in the Lexington Woods project.

The Board has presented sufficient evidence of local concerns regarding health and safety with respect to access to the site. The combination of the extreme steepness of the grade, the reverse curves, the narrow width of the roadway at the same portion of the road as the 10% grade, together with the lack of any other vehicular access to the development raise serious health and safety concerns, both in terms of roadway safety and emergency access. We are persuaded that the issues raised by the police chief and the deputy fire chief about the effect on emergency response **[*42]** times in the event of road blockage from an accident or snow, are sufficiently serious for a development of 36 homes. Although the Committee has approved narrow roads, or serpentine roads, or steep roads or even single access roads before, we find that the combination of these problematic elements leads to a health and safety concern that outweighs the regional need for affordable housing. Accordingly, on this basis, we affirm the Board's denial of the comprehensive permit.

---

[14] Since that project involved a comprehensive permit, no issue of unequal application of local requirements under G.L. c. 40B, Â§ 20 arises.

The Board has raised additional bases for denying the comprehensive permit. Although we do not need to reach these issues, we shall address them briefly. We find that none of them are sufficiently serious to stand as a basis for denial of the permit.

2. Safety of Intersection with Lexington Road and Traffic Impact

The Board raised several issues affecting Lexington Road as a basis for denying the comprehensive permit: road capacity and levels of service, sight distances and traffic speed, busing of schoolchildren and inexperienced student drivers traveling in the area.

a) Road Capacity and Levels of Service

The access driveway for 36 residences is anticipated to generate 275 vehicle trips per day, an increase **[*43]** from the use generated by the existing single-family residence located at the site. Tr. II, 77. The Board contends that the design of the access roadway, including the offset of the access drive from the intersection of the school complex with Lexington Street, and the increased traffic from the development near the school complex, will jeopardize the safety of student drivers and pedestrians in the area, including schoolchildren. However, expert witnesses for the Board and the developer agreed that the development will not have a significantly adverse effect on the levels of service in the area and that Lexington Street has the capacity to handle the traffic from the site with the developer's proposed modifications. Tr. II, 8, 29; V, 78-79; Exhs. 34, 36, p. 5. Also the developer's traffic consultant testified that the outbound lane of the driveway would line up with the inbound driveway to the school complex. Tr. II, 103.

The Waltham transportation director agreed with the Board's peer review traffic consultant that the increase in traffic volume would not adversely affect the operations of the roads under a Level of Service (LOS) analysis. **[*44]** Â [15] Tr. V, 20-21; II, 14-15. Although he testified that the peer review consultant did not take into account specific characteristics that affect the traffic safety of the location, including secondary access, pedestrians, horizontal alignment and grades, obstructions limiting of sight distances, school buses, and inexperienced drivers traveling to and from the school complex, in an area with a high incidence of speeding, the transportation director did not testify that it is dangerous or unacceptable. Tr. V, 20-26. Thus road capacity presents no local concern here.

b) Sight Distances and Traffic Speed

The authorized speed limit for Lexington Street near the intersection with the access drive is 30 mph. Tr. II, 25; IV, 29, 38. There is a high incidence of speeding vehicles in the vicinity of the entrance to the development. Â [16] Tr. **[*45]** IV, 29; V, 13-15, 86. The proposed access road intersection would be just south of a horizontal curve on Lexington Street. A rock outcropping on the property currently limits sight distances for travelers southbound on Lexington Street. The City's transportation director testified that the line of sight at the intersection is between 240 feet and 400 feet depending on which southbound lane a motorist is traveling in and where an obstruction in the road is located. Tr. V, 32-35. See Tr. I, 138. He testified that the rock outcropping affected the safety of sight distance at the intersection with the school complex. Tr. V, 11-12.

The witnesses for both parties disagreed about whether stopping sight distance or decision sight distance should be used to determine how great a distance is necessary for southbound travelers approaching the intersection with the school complex. The Waltham transportation director noted that because a large number of inexperienced student drivers drive near the school complex, decision sight distances, rather than stopping site distances, should be used because under AASHTO standards, stopping sight distances "are often inadequate when drivers must make complex **[*46]** or instantaneous decisions, when information is difficult to perceive or when unexpected or unusual maneuvers are required." Exh. 48; Tr. V, 50-51. The Board argues that even under the stopping sight distance

---

[15] The peer review consultant stated that the developer's data relating to the project and its impact on Lexington Street addressed its original concerns. Exh. 38.

[16] The evidence regarding traffic accidents near this intersection is mixed. Although the Board's experts testified to the high incidence of accidents, Waltham's transportation director testified before the Board that there is not a high accident history at this location. Tr. V, 86-87.

standard, a vehicle traveling at 75 mph would require 820 feet of sight distance. The developer argues that under AASHTO standards, the stopping sight distance for a vehicle traveling south on Lexington Street at 30 mph is 200 feet and the respective stopping sight distances at 40 and 45 mph are 305 feet and 360 feet. Exh. 47.

The developer's traffic consultant agreed that the current sight distance along Lexington Street is insufficient to accommodate travel speeds on that road. Tr. II, 105; Exh. 34, pp. 2, 6. To address sight distances, he recommended signalizing the intersection or removing the rock outcropping obstructing the view. While he noted that the rock outcropping could be cut back to improve visibility out the driveway looking up Lexington Street, he preferred signalizing the access drive intersection as a more practical approach. Tr. II, 25, 74, 106; Exh. 34, p. 6.

Removal of ledge and vegetation in the area of the outcropping on the property would improve sight **[*47]** distances from 240 to 400 feet. Tr. I, 75-76; II, 100; V, 134; Exh. 7, p. 1. Moreover, as Lexington Woods notes, it is not the developer's responsibility to remedy existing traffic problems on Lexington Street even if they are in the area where the proposed development is located. *Hilltop Preserve,* No. 00-11, slip op. at 30. Nor can it use this condition as a basis to deny a comprehensive permit. *Sheridan Development Co. v. Tewksbury,* No. 89-46, slip op. at 6 (Mass. Housing Appeals Committee Jan. 16, 1991) (existing off-site traffic hazard which will not be exacerbated in any significant way by proposed project is not legitimate local concern).

The Board's argument that current inadequate sight distances represent a valid local concern is without merit. Its argument is based in part on assumptions of drivers traveling 45 mph in excess of the speed limit. Moreover, its analysis omits consideration of the developer's proposed removal of a portion of the rock outcropping that limits visibility. Finally, as Lexington Woods points out, the sight distance limitations, and inexperienced student drivers, are existing conditions. The record does not indicate that the development would **[*48]** exacerbate the situation in any material way. On the contrary, the improvements proposed by the developer would alleviate many of the issues raised by the Board's witnesses. Thus, these issues afford no basis to deny a comprehensive permit.

c) Traffic Signalization

The current traffic signal at the intersection of Lexington Street and the school complex controls the north-south traffic flow on Lexington Street and traffic turning east into the one-way inbound entrance into the school property. There is also a pedestrian actuated signal across the southerly part of the intersection. The current driveway on the site is not controlled by the traffic light, Tr. II, 17. In addition to removal of obstructions including ledge and vegetation at the front of the site to enhance sight distance for vehicles leaving the site and for southbound traffic on Lexington Street, the developer proposes to install signal heads facing the site driveway so it would be controlled by the traffic light; install handicapped ramps on the crosswalks; cut the median across Lexington Street south of the intersection to make crosswalks across Lexington Street compatible with the Americans with Disabilities Act; **[*49]** revise the signal timing to incorporate the new driveway and include loop detector sensors in the pavement to accommodate and adjust for traffic flows; and provide a "No Turn on Red" sign leaving the site driveway. Tr. II, 18-19, 103-104; Exh. 36, p. 5. Lexington Woods also asserts in its brief that it would install an additional signal to enhance the visibility of the signal for southbound traffic on Lexington Street.

These proposals to improve the intersection would enhance the safety of the intersection for residents of the development. They should also improve the traffic concerns regarding drivers, pedestrians and visitors to the school complex. The Board cannot rely on the bad traffic situation in the vicinity of the site as a basis for denying the comprehensive permit. *Sheridan Development Co.,* No. 89-46, slip op. at 6.

d) Pick up and drop off of Schoolchildren

The business manager of the Waltham schools testified regarding school busing issues. Because pick up of children inside the proposed development is impractical in poor weather, and for route timing purposes, he recommended the developer obtain a right of way over an access driveway that exists to College Farm **[*50]** Road that would take the students and the bus off Lexington Street, or build a turnaround at the base of the roadway so the bus could turn off Lexington Street for loading and unloading children from the development. Tr. IV, 103-106, 121-126, 129-131; Exh. 46. Because of traffic hazards, the school department permits bus stops on Lexington Street in limited circumstances, where Lexington Street is straight with good sight lines and only one or two

students involved, to minimize stopping time. Tr. IV, 123-124, 126-129, 132-136, 139. According to DHCD numbers, five school-age children are projected to reside in the development. Tr. I, 33. Middle and high school students could walk to the school complex.

Lexington Woods argues that the issues involving school children walking to school, school bus stops and student drivers are existing conditions relating to Lexington Street. It argues that the development would not significantly exacerbate traffic, especially since its proposal includes safety improvements to the line of sight, traffic signalization, and pedestrian crosswalks. Tr. II, 20-21. Schoolchildren in neighboring homes already can reach the school complex without traveling in **[*51]** front of the site. Tr. II, 20. Middle and high school students can walk to school using the roadway sidewalks, at least in good weather. The developer argues that for the few other schoolchildren who would ride a school bus, the buses can safely use the driveway and enter the site or can stop on Lexington Street. Tr. IV, 127-128. It also argues that the development will generate only a few vehicle trips during the peak school arrival and departure times. Exhs. 34, 36. See *Sheridan Development Co.,* No. 89-46, slip op. at 6.

Given the small number of students projected to live at the proposed development, the number who likely would actually use a bus is small enough that stopping on Lexington Street for drop off or pick up, particularly with sight lines improved by the developer, would be consistent with the City's current practice. We note that placement of a median might alleviate the Board's concern about opposite direction traffic not stopping for school buses. Accordingly the issues regarding safe transport of schoolchildren are existing conditions, situations that would improve under the developer's proposal, or circumstances that could be addressed. They afford no basis **[*52]** to deny a comprehensive permit.

3. Storm water management system

Chester Brook and its related wetlands are located on the easterly side of Lexington Street. Currently, rainwater drains down from the site untreated onto Lexington Street, washing gravel from the driveway out into Lexington Street. From the site the water runs into catch basins or sheets across Lexington Street to enter Chester Brook. Tr. I, 86-89; II, 53-54; III, 138; Exh. 6.

Currently, the Lexington Street system has a pair of catch basins with a connection that comes out to Chester Brook in several places, as well as a storm drain further down Lexington Street. The City director of public works stated that the catch basins gather storm water in Lexington Street and solely serve the public way. Connections to the catch basins are not permitted. The developer proposes to put three 18-inch pipes across Lexington Street to bring the storm water from the site across Lexington Street over to the school department property, but not connect to the City pipes. Tr. III, 123-124. The proposal plans storm water collection and treatment to provide over 80% removal of total suspended solids resulting from site improvements. **[*53]** Exh. 10. The Board's original engineering consultant testified that the project would meet applicable state Department of Environmental Protection (DEP) and City storm water standards as well as generally acceptable engineering standards. He stated there would be no increase in the post-development rate of run off from the site and the quality of the water would be cleaner from post-site development. He acknowledged that the system meets DEP standards, but agreed with the Board's counsel that it could have been designed so that there was no increased volume of discharge into Chester Brook. Tr. II, 40, 54, 57.

Waltham's director of public works acknowledged that the drainage system as designed for this project may alleviate some of the current drainage problems if it were built as designed and then maintained. He stated that the catch basins would need to be cleaned four times a year, which is what the developer's proposed operations and maintenance plan specifies. Tr. I, 105-106; III, 130-131, 139, 151; see Exh. 10. The developer's project engineer testified that the proposed storm water management plan would improve the existing conditions, which currently do not meet DEP standards. **[*54]** Tr. I, 89-90.

Lexington Woods argues that the proposal calls for adherence to applicable storm water standards, the water drainage arrangement is adequate, and the environment is not at risk. It also requests that a comprehensive permit expressly include licenses to install the drainage improvements as proposed. Â [17]

The Board argues that Lexington Woods' proposal is flawed because it requires the grant by the City of Waltham of an easement over a wetlands area in the school complex. It claims that this would require: 1) a declaration of surplus by the school department of land under its care and control pursuant to G.L. c. 41, Â§ I5A; 2) potentially a two-thirds vote of the Massachusetts Legislature authorizing change in use of Article 97 land; 3) a two-thirds vote of the City council and approval of the mayor authorizing conveyance of this interest in land to Lexington Woods pursuant to G.L. c. 41, Â§ I5A; and 4) compliance with the state procurement law, G.L. c. 30B. The Board argues that without the **[*55]** necessary approvals and land interests, Lexington Woods failed to demonstrate that it satisfied state law concerning storm water drainage and that it will not damage Chester Brook.

To support this argument, the Board relied on the views of the City director of public works, who stated that because the project would deposit storm water on school department property, the developer would need an easement from the school department, possibly through City council action, as well as a permit from his department to put in pipes to direct the water flow under Lexington Street. Tr. III, 125-126. At the hearing, Board counsel stated that a comprehensive permit waiver would not be applicable; rather the project would require an easement or authority to enter land. Tr. III, 149. Although the Board submitted this testimony and the Board's counsel's assertion concerning a required easement and necessary action by the City council to allow the use of school department property, it offered no legal expert testimony on this issue.

Lexington Woods has submitted evidence that its proposal complies with state and federal requirements. We find on the record that the proposed storm water drainage system **[*56]** is adequate. See *Franklin Commons Ltd. Partnership v. Franklin,* No. 00-09, slip op. at 6 (Mass. Housing Appeals Committee Sept. 27, 2001). Waltham cannot require the developer to remedy existing infrastructure problems even if they are in the area where the proposed development is located. See *Hilltop Preserve,* No. 00-11, slip op. at 15.

To the extent that the City's approval would be required, the comprehensive permit system is intended to provide one venue for those approvals. Under Chapter 40B, the Board and the Committee have the authority to waive City council votes and take action to obtain local permits and licenses. *Board of Appeals of Maynard v. Housing Appeals Comm., 370 Mass. 64, 68-69, 345 N.E.2d 382 (1976)*. Thus, the lack of these permissions is no basis to deny a comprehensive permit. Had the Committee reversed the Board's denial of this application, a condition requiring obtaining necessary property rights or approvals from state authorities could have been included in a decision. The concerns raised by the Board do not form the basis for the denial of a comprehensive grant.

4. Looping of water system

The Board **[*57]** argues that the lack of a fully looped water system would create a serious threat to the safety and health of the residents of the proposed development. It relies on testimony of the deputy fire chief that the lack of a looped water supply to the development could result in delayed response to fires of approximately 15 minutes because of the need to coordinate relay pumps, and about 1 hour, if the road were also blocked as a result of icing of a broken main. Tr. IV, 97-100.

The water pressure at Lexington Street is adequate. Tr. IV, 100. Lexington Woods suggests that the addition of "gates" or valves on the Lexington Street water main on both sides of the connection to the site water main and then on the site water line at the beginning of the line into the site would address the Board's concern, as installation of these valves would adequately protect against loss of water supply in the event of failure on either side. Tr. III, 132. The Board raises the concern that this would not protect against a break in the water main under the access road, which would interrupt the water supply to residents of the development without a water loop.

---

[17] To address the City Engineer's concern that a drainage maintenance plan be followed, which included periodic cleaning of catch basins, Lexington Woods proposes a requirement that the drainage system operations and maintenance plan be recorded as an exhibit to master deed and imposed as an obligation on the condominium association to run with the land. Tr. III, 151-152.

While not disputing that it would be preferable **[*58]** to have the water line looped on the site itself, Lexington Woods further argues that this requirement was not applied to the Indian Ridge development, a 264-unit complex with a longer dead end water line. Tr. III, 131-132.

The record is not sufficient regarding the nature of the water system at Indian Ridge to permit a comparison of the two sites. Although the Committee is of the view that such looping of water systems is a best practice and should be provided wherever possible, in light of the record before us, we need not decide the appropriateness of a condition requiring looping of the water system if a comprehensive permit had been granted in this matter. In any event, it is not the basis for denying a comprehensive permit.

VII. CONCLUSION

For the foregoing reasons, the valid local health and safety concerns raised by the lack of secondary access to the site, in combination with the grade and design of the single access drive into the proposed development, outweigh the regional need for affordable housing. The measures proposed by Lexington Woods in mitigation do not address these particular local concerns adequately to eliminate or sufficiently lessen the safety concerns **[*59]** presented. Accordingly the Board's decision denying the request for a comprehensive permit is affirmed.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, Â§ 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Date: February 1, 2005

MA Housing Appeals Committee

End of Document

EXHIBIT B

2006 MA Housing App. LEXIS 4

March 27, 2006

No. 03-15

MA Housing Appeals Committee

Reporter
2006 MA Housing App. LEXIS 4 *

O.I.B. CORPORATION, AppellantÂ ; v.Â ; BRAINTREE BOARD OF APPEALS, Appellee

Core Terms

roadway, has, blast, street, site, was, foot, motion to dismiss, stormwater, dividend, presiding officer, local concern, slip opinion, cul-de-sacs, eligibility, entrance, outweigh, regional, conform

Panel: Werner Lohe, Chairman; Joseph P. Henefield; Marion V. McEttrick; Christine Snow Samuelson; James G. Stockard, Jr.

Opinion

DECISION

I. PROCEDURAL HISTORY

In July 2002, O.I.B. Corp. submitted an application to the Braintree Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, Â§Â§ 20-23 to build 118 condominium units of mixed-income affordable housing in duplex buildings on a 19-acre site on Whites Hill, off Liberty Street, in Braintree. Exh. 4-A. The housing is to be financed under the New England Fund of the Federal Home Loan Bank of Boston. Exh. 2, p. 1; 3, third page; 36. After due notice and public hearings, the Board unanimously denied the permit, filing its decision with the Braintree Town Clerk on June 9, 2003. From this decision the developer appealed to the Housing Appeals Committee.

On January 23, 2005, the Board moved to dismiss O.I.B.'s appeal based upon the town allegedly having met the statutory 1.5% general land area minimum. See G.L. c. 40B, P20; 760 CMR 31.04(2). Two evidentiary hearing sessions were held, and on July 13, 2004 **[*2]** the Committee's hearing officer issued a detailed ruling denying the motion and remanding the matter to the Board. Order Denying Board's Motion to Dismiss (Jul. 13, 2004). On remand, the Board again denied the permit by decision filed with the town clerk September 28, 2004, and this appeal was reactivated.

A group of eight Braintree residents had moved to intervene, and the presiding officer permitted several of them to participate solely on issues involving stormwater drainage. Â [1] Ruling on Motion to Intervene (Mar. 18, 2005).

On January 3, 2005, the Board renewed its Motion to Dismiss, and cited additional grounds. The Presiding Officer denied that motion on March 18, 2005. Ruling on Motion to Dismiss (Mar. 18, 2005). At the Board's request, the presiding officer reconsidered that ruling, but reaffirmed the denial on May 13, 2005. Reconsideration and Reaffirmance of March 18, 2005 Ruling on Motion to Dismiss (May 13, 2005). **[*3]** Â [2]

In June 2005, the Board brought an action in Superior Court seeking to enjoin the Committee's proceedings for lack of jurisdiction. The application for preliminary injunction was denied, and the Committee's motion to dismiss the complaint was granted. *Braintree v. O.I.B. Corporation, et al.,* No. CV05-00960 (Norfolk Super. Ct. judgment Oct. 6, 2005).

The Committee then conducted its *de novo* hearing, receiving prefiled testimony from twelve witnesses (mostly expert witnesses), conducting a site visit, and holding two days of hearings in December 2005 to permit cross-examination. Â [3] Following the presentation of evidence, counsel submitted post-hearing briefs.

II. FACTUAL OVERVIEW

The developer proposes to construct 118 three-bedroom, duplex, condominium housing units on Whites Hill in Braintree. The 19-acre site is a nearly land-locked parcel located at the top of a hill. It is surrounded by houses **[*4]** that have frontage on Liberty Street, Linden Street, Pilgrim Road, and Mayflower Road. Exh. 4-A. Access to the site is proposed to be by construction of a roadway from the west off Liberty Street between two existing homes, and there is the possibility of emergency access from the northeast, at the opposite since of the site from Linden Street. Exh. 4-A. The new housing units will be spaced fairly evenly throughout the site along two internal roadways that are roughly in the configuration of the letter "Y." Exh. 4-A, 42, P4.

III. JURISDICTION

The Board put the developer to its proof with regard to two aspects of jurisdiction, namely the closely related requirements that the project be fundable by a subsidizing agency and that the developer be a limited dividend organization. See 760 CMR 31.01(1)(a), 31.01(1)(b).

The developer has introduced into evidence the June 21, 2002 project eligibility letter from the Medford Co-Operative Bank under the New England Fund (NEF) of the Federal Home Loan Bank of Boston (FHLBB). Exh. 3, Section 3. The NEF is a valid federal affordable housing program that establishes eligibility to apply for a comprehensive **[*5]** permit. *Transformations, Inc. v. Townsend,* No. 02-14 (Mass. Housing Appeals Committee Jan. 26, 2004); *Stuborn Ltd. Partnership v. Barnstable,* No. 98-01 (Mass. Housing Appeals Committee Decision on Jurisdiction Mar. 5, 1999). The project eligibility determination from the Medford Co-Operative Bank under the NEF

---

[1] After the ruling on the Motion to Dismiss, the hearing officer left the employ of the Committee, and the Committee's chairman assumed the role of presiding officer.

[2] The Board filed a Renewed Motion to Dismiss for Lack of Jurisdiction with its post-hearing brief. The issues raised there are addressed in the previous rulings of the hearing officer and presiding officer, and also, briefly, in section III, below. As a general matter, such a motion is not timely since these issues are to be addressed prior to the evidentiary portion of the hearing or, in any case, should be included in the Pre-Hearing Order. See Pre-Hearing Order (Sep. 15, 2005), Â§ III.

With its post-hearing brief, the Board also filed a motion for recusal of Committee member James G. Stockard, Jr. In response to the motion and pursuant to the Committee's Standing Order No. 05-02 (Avoidance of Appearance of Improper Influence, May 9, 2005), Mr. Stockard has declined to recuse himself.

[3] The presiding officer issued a joint Pre-Hearing Order, agreed to by the parties. The primary purpose of the order was to clarify the issues in dispute and organize the presentation of evidence. The parties also stipulated, however, that the developer satisfies one of the three jurisdictional requirements found in 760 CMR 31.01(1), namely that the developer controls the site. Pre-Hearing Order (Sep. 15, 2005), Â§ II-3.

establishes a presumption of fundability. Â [4] 760 CMR 31.01(2). This presumption has not been rebutted by the Board.

The requirement in Â§ 31.01(1)(a) that the developer be a limited dividend organization is closely related to fundability because profit limitations are generally inherent in the subsidy program and because the role of the subsidizing agency is to ensure that the developer is a proper limited dividend organization at the time the project receives final subsidy approval. *Crossroads Housing Partnership v. Barnstable,* No. 86-12, slip op. at 9 (Mass. Housing Appeals Committee Mar. 25, 1987). The courts have concurred in our interpretation. **[*6]** *Maynard v. Housing Appeals Committee, 370 Mass. 64, at 67, 345 N.E.2d 382 (1976)*; *Hanover v. Housing Appeals Committee, 363 Mass. 339, 379, 294 N.E.2d 393, 420 (1973)*("...the question of standards for eligibility as a limited dividend organization is properly left to the appropriate State or Federal agency"). In its application for a comprehensive permit the developer stated that it "agrees to conform to the limited dividend requirements of Chapter 40B," and it attached a draft of the NEF regulatory agreement, which contains specific dividend limitation provisions in section 4. Exh. 3, Section 2. This commitment satisfies the limited dividend requirement.

We find that the developer has established jurisdiction under 760 CMR 31.01.

IV. LOCAL CONCERNS

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a *prima facie* case by showing that its proposal complies with state or **[*7]** federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that such concern outweighs the regional need for housing. Â [5] 760 CMR 31.06(6); also see *Hanover v. Housing Appeals Committee, 363 Mass. 339, 365, 294 N.E.2d 393, 413 (1973)*; *Hamilton Housing Authority v. Hamilton,* No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

Three issues of possible local concern are raised in the Pre-Hearing Order--stormwater management, blasting, and issues concerning emergency access and roadway design. Â [6] **[*8]** See Pre-Hearing Order, Â§ IV-3.

A. Stormwater Management

The Board has raised a number of issues regarding the design of the stormwater management system. Â [7] There is concern because the system will discharge into a conservation and recreation area that is subject to flooding. Exh. 51, PP2-5; Tr. IV, 42-45, 47. This concern is understandable since the design is aggressive. For instance, the

---

[4] NEF proposals receiving project eligibility determinations after July 22, 2002 have been required to receive such determinations from a public or quasi-public entity. 760 CMR 31.01(2)(g), 31.10. The determination issued by the FHLBB member bank in this case is adequate, however, since it was issued June 21, 2002. The FHLBB approved the local member bank's request for an advance of funding, and has extended that approval. Exh. 36.

[5] The shift in burden of proof is based upon a presumption created by the town's failure to satisfy one of the statutory minima described in 760 CMR 31.04 (1) and (2). See 760 CMR 31.07(1)(e). Since in the rulings on the motions to dismiss the town was found not to have satisfied the statutory minima, they need not be addressed here.

[6] In its brief, the Board raised the question of whether the water main supplying the development should be looped. This was not included in the Pre-Hearing Order, however, and has therefore been waived. Pre-Hearing Order (Sep. 15, 2005), Â§ IV-2, IV-3, IV-6.

[7] We are not concerned, as the Board's expert was, that the drainage basin maps were drawn to an unusual scale. See Exh. 48, P6; 55, P2. Clearly, the expert witnesses presented by both sides of this dispute are well qualified. We have no reason to question the plans drawn by the developer's expert. The Board also questioned his use of a computer program that he designed himself, but in fact this is an indication of the high level of his expertise. See Exh. 55, P5. Instead of a degree in civil engineering, which is more typical of those who design stormwater management systems, the witness is a certified hydrologist and an environmental scientist with separate masters and doctoral degrees in geophysics and geology, respectively. Exh. 43-A; 55, P6.

major stormwater detention basin located behind the existing homes on Mayflower Road is not only large and close to the adjoining properties, but it has ten-foot-high, stepped walls. Exh. 55, P11 and fig. 1; 9, p. 8; Tr. IV, 62-64.

But the developer's expert testified that the design of the system conforms to the Department of Environmental Protection (DEP) Stormwater Management Policy, promulgated under the state Wetlands Protection Act (WPA), and further, when the project reaches the final design and construction phase, the developer is committed to making any modifications that might be necessary to bring the **[*9]** system into full compliance. Exh. 43, P32, Tr. IV, 56. The Board's expert, on the other hand, concluded that the system as currently designed does not meet those standards. Exh. 48, P7. The Board has not gone beyond this, however, and drawn our attention to any local bylaw or other requirement pertaining to stormwater. Therefore, we need not determine which expert is more credible. *Canton Property Holding, LLC v. Canton,* No. 03-17, slip op. at 23 (Mass. Housing Appeals Committee Sep. 20, 2005). In the absence of exceptional circumstances, the Board should not be permitted to place additional restrictions on affordable housing with regard to a matter that has not been regulated locally previously. *9 North Walker Street Development, Inc. v. Rehoboth,* No. 99-03, slip op. at 9-10 (Mass. Housing Appeals Committee Jun. 1, 2003), *remanded on other grounds,* No. CV2003-0767 (Bristol Super. Ct. Dec. 28, 2004). Nor is it the role of either the Board or this Committee to adjudicate compliance with state standards. Â [8] **[*10]** The developer is committed to preparing a final design that meets state stormwater standards, and no local concern has been raised that would outweigh the regional need for housing.

B. Blasting

To construct the roadways on the site, a significant amount of blasting and removal of the granite bedrock (23,600 cubic yards) is required. Exh. 7, pp. 4-5. The Board is concerned that this could damage a 60-to-80-yeqr-old municipal water tower at the top of the hill. Exh. 9, p. 14; 50, P4. The senior engineer for the town water and sewer department testified that "blasting is by its nature somewhat unpredictable," and that "excessive vibration from the blasting could damage the water tower," resulting in disruption of municipal water supply in the surrounding area and possible flooding of nearby homes." Exh. 50, P4. He did not testify in detail with regard to the blasting that is proposed. The Braintree Fire Department has Blasting Permit Requirements that incorporate the state requirements in 527 CMR 13.00 and impose additional requirements. Exh. 39. No discussion of blasting was included in the deputy fire chief's testimony, however. See Exh. 49.

The developer **[*11]** has prepared an extensive Blasting Impact Report, which analyzes the site, evaluates the blasting required, and makes recommendations, including technical specifications, for the blasting operations. Exh. 7, pp. 4-6. The report also establishes two commitments that the developer and its contractors will be held to. First, "the blasting operations… shall conform to the provisions of [G.L., c.] 148 and 527 CMR 13.00, the provisions set by the Braintree Fire Department, and this Blasting Impact Report. In case of a conflict among any of the … requirements, the Blasting Contractor shall comply with the strictest applicable… requirements...." Exh. 7, p. 5. Second, "the Contractor shall obtain written permission and approval of method from local authorities before proceeding with blasting." Exh. 7, p. 7.

No specific evidence has been presented by the Board that the blasting cannot be safely accomplished. Rather, what is left for resolution is only the routine procedures for conducting the blasting operations safely. Since all local

---

[8] Normally, any factual questions with regard to whether the final design or construction actually complies with state law are resolved in the first instance by the local conservation commission, with further review available before the DEP. The case before us, however, is unusual. Because the wetlands are at considerable distance from the site, the proposal does not fall under the jurisdiction of the Wetlands Protection Act. Were we ultimately to rule in favor of the developer in this case, it would be necessary to ensure compliance with the standards that the developer has agreed to conform to. Typically, if we were satisfied that the preliminary plans complied with the requirements contained in Stormwater Management Policy, we would impose our own condition requiring this, and it then would be enforced by the town, following its normal procedures in evaluating final construction plans and monitoring construction. That would normally be done by the building inspector, the town engineer, the conservation agent, or another appropriate town official, and any disputes that might arise would be reviewable first by the Board, then by this Committee, and ultimately by the courts.

requirements will be complied with fully, no local concern has been raised that would outweigh the regional need for housing.

[*12] C. Emergency Access and Roadway Design

The most problematic aspect of the proposed design is emergency access to the development. The design of the development's single access road is constrained by the fact that for its first 200 feet, the developer controls only a 40-foot-wide right of way between two existing houses on Liberty Street. Â [9] Exh. 4-A, sheet 2; 42, P5. The proposed roadway turns off Liberty Street at a right angle, and after about 100 feet, curves to the right. Exh. 4-A. Within the 40-foot right of way, the developer proposes to construct two 14-foot-wide travel lanes separated by a 4-foot-wide mountable paved island, with sidewalks on either side. Â [10] Exh. 42, P5. Beyond the first 200 feet, the right of way becomes 70 feet wide, and the roadways, for their remaining length, have two 18-foot-wide travel **[*13]** ways separated by a 16-foot-wide mountable landscaped island, which complies with the Braintree Subdivision Rules for Type 3 roadways. Exh. 42, P8, 14; Tr. IV, 119. The maximum grade of the roadways is 8%, which is greater than the 6% limit established for Type 3 roadways in the subdivision rules. Exh 42, P11. The roadways are both cul-de-sacs, one 1,550 feet long, and the other 1,250 feet long. Exh. 42, P6.

The developer's expert, a civil engineer, testified unequivocally that in his opinion the "proposed roadway dimensions [near the entrance] present no health or safety issues...," that "the roadway grades… will not impede … safe passage...," and that "the risk that emergency vehicles will be blocked… is negligible." Exh 42, PP5, 11, 14; also see Exh. 54, PP2.

The town planner, on the other hand, testified that because there is an increased risk that the entrance area will be blocked in an emergency by a disabled motor vehicle or a fallen tree, because of the large number of units in the development, and because of the length of the dead-end streets, there is an "unacceptable risk" to public safety. Exh. 47, P6. The Braintree deputy fire chief joined in this opinion. **[*14]** Â [11] Exh. 49, PP4, 6.

As a preliminary matter, it is important to clarify that the proposal before us does not include secondary emergency access from the rear, even though the developer made an offer to provide such access. In prefiled testimony, the developer offered to redesign one of the cul-de-sacs to provide access from the rear by extending a presently unimproved road that services the water tower located at the very top of the hill. Exh. 46, P6. But an offer to provide access is not a plan that shows such access. See 760 CMR 31.02(2)(a). Though the water tower is shown on the plans, the developer provided no plans for the changes in the road. Tr. IV, 87-90, 105; also see e.g., Exh. 4-A, 4-C, 4-D. If the change being proposed were very straightforward, such as simply adding or removing a gate on an already designed emergency access road, under some circumstances we might permit it to be made through testimony, late in the hearing process. But in this case, on this site, **[*15]** provision of emergency access is complicated. The emergency roadway would rise steeply to a point near the top of the hill, go over the crest, and descend steeply to connect with the primary roadway, with both slopes appearing to be about 10%. Exh. 46, P6; 47, P8; cf. Exh. 54, P5 (testimony acknowledging the 10% grade, but opining that access is "entirely feasible"). The deputy fire chief was concerned that the grade of any emergency access that might be designed would too steep. Exh. 49, P5; cf. Tr. IV, 101. No design has been provided that is specific enough for the Board to respond to or for

---

[9] Liberty Street is an undivided, suburban road approximately 25 feet wide. Exh. 42, P5.

[10] It appears that in considering a previously submitted subdivision plan, the town found an entrance roadway with a pavement width of 30 feet to be acceptable. Exh. 46, P5.

[11] The deputy fire chief also testified that the layout of the roadway would require a fire truck turning into the development to swing into the opposing lane of traffic. Exh. 49, P3. This is not disputed by the developer's expert, though his opinion was clearly that this would be a minimal inconvenience. Exh. 54, PP4, 8-9. We agree that this design weakness alone is not a local concern sufficient to outweigh the regional need for housing. See *Cirsan Realty Tr. v. Woburn,* No. 01-22, slip op. at 9 (Mass. Housing Appeals Committee Jun. 11, 2003), *aff'd* No. 03-2872 (Middlesex Super. Ct. Jun. 10, 2004).

us to evaluate in a meaningful way, and thus we conclude that the proposal before us does not include secondary access. Â [12]

Braintree subdivision regulations limit the length of cul-de-sacs to 400 feet. Â 13[1] This evidences a concern **[*16]** about emergency access when homes may become isolated from the town's street network because of a single point of entry to the development, and it is clearly a legitimate concern. It is a concern that increases not only with the length of the cul-de-sac, but also with the number of homes that are located at a distance from the street network. Each such roadway must be considered on its own merits based upon "an analysis of all the characteristics of the roadway taken together." *Lexington Woods, LLC v. Waltham,* No. 02-36, slip op. at 19 (Mass. Housing Appeals Committee Feb. 1, 2005)(upholding denial of comprehensive permit for a steep, winding, 1,000-foot roadway serving 36 townhouse condominium units). In this case, the roadways themselves present no insurmountable design problems other than that they are cul-de-sacs. Â [14] But approximately one hundred units of housing will be located beyond the standard established by the town, some as far as 1,500 feet from Liberty Street. Based upon our evaluation **[*17]** of these facts and of the opinion testimony of the witnesses, we conclude that the concern for emergency access outweighs the regional need for affordable housing.

V. CONCLUSION

For the foregoing reasons, we conclude that the decision of Board denying the request for a comprehensive permit is consistent with local needs, and accordingly it is affirmed.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, Â§ 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Date: March 27, 2006

MA Housing Appeals Committee

End of Document

---

[12] The Board also argues that the Land Court has found that the developer has easement rights only to part of the development parcel. Board's Brief, p. 9; also see *O.I.B. Corp. v. Planning Board of the Town of Braintree,* Nos. 231231, 250766 (Mass. Land Court Jan. 28, 2000)(Exh. 12). The developer's failure to allay these concerns is also an indication that its offer to provide emergency access would need to be developed in much more detail before such access could be considered part of the proposal.

[13] This requirement applies to Type 1 roadways. Exh.47, P6. Emergency access is less of an issue with Type 3 roadways, that is, boulevards. But the developer cannot avail itself of the less stringent requirements for boulevards since the limiting factor in the design here is at the entrance, the "bottleneck," where the roadway does not conform to the Type 3 width requirements. See Exh. 47, P6; 42, P8.

[14] This certainly does not mean, however, that the roadway is well designed. On the contrary, on the one hand, the boulevard design appears excessive, and on the other, the entrance is poorly designed.

EXHIBIT C

2011 MA Housing App. LEXIS 7

October 13, 2011

No. 2009-07

MA Housing Appeals Committee

Reporter
2011 MA Housing App. LEXIS 7 *

SIMON HILL, LLC AppellantÂ ; v.Â ; NORWELL ZONING BOARD OF APPEALS, Appellee

Core Terms

has, wetland, site, local concern, foot, slip opinion, roadway, modify, street, was, cost, neck, zone, affordable housing, groundwater, stormwater, uneconomic, outweigh, mound, intervener, section, subsidize, wastewater, buffer, basin, flood, border, waive, delineate, vegetate

Panel: Werner Lohe; Carol A. Gloff; Joseph P. Henefield; Theodore M. Hess-Mahan; James G. Stockard, Jr.

Opinion

DECISION

This is an appeal pursuant to G.L. c. 40B, Â§Â§ 20-23, and 760 CMR Â§ 56.00, brought by Simon Hill, LLC from a decision of the Norwell Zoning Board of Appeals conditionally granting a comprehensive permit with respect to property located in Norwell, Massachusetts. For the reasons set forth below, the Board's decision is set aside and the comprehensive permit ordered modified to conform to this decision. Specifically, the Appellant has established that the decision renders the project uneconomic. The Board has raised a valid local concern regarding the safety of the single access roadway that outweighs the need for affordable housing to the extent sought by the developer. In most other respects, the Board and Interveners have failed to demonstrate valid local concerns that outweigh the need for affordable housing. G.L. c. 40B, Â§ 23.

I. PROCEDURAL HISTORY

On July 1, 2008, Simon Hill submitted an application to the Board for a comprehensive permit to construct 84 townhouse style condominium units on a parcel consisting of approximately 29 acres off Prospect Street in Norwell. **[*2]** Exhs. 2, 3. Construction of the housing development, to be known as Simon Hill Village, is proposed to be financed under the Housing Starts Program of the Massachusetts Housing Finance Agency (MassHousing) or the New England Fund of the Federal Home Loan Bank of Boston (NEF). Pre-Hearing Order, Â§ 11, P3; Exh. 1. The Board conducted 17 days of hearing between July 22, 2008 and June 29, 2009. During the hearing, Simon Hill voluntarily reduced the number of proposed units from 84 to 80 units, with a total of 213 bedrooms. Simon Hill requested that the Board close the hearing and render a decision on April 1, 2009. Exhs. 2, pp. 1-4; 48(L); Simon Hill brief, p. 5.

On June 29, 2009, the Board closed the hearing and voted to grant Simon Hill a permit subject to numerous conditions and unwaived local regulations. Its decision was filed with the town clerk on the same date. Pre-Hearing Order, Â§ II. P 1; Exhs. 2, pp. 1-4; 48(L). As the developer has noted, although the decision does not explicitly state the number of units permitted to be built, the conditions imposed, including, most notably, a limit on the length of the main internal roadway, affect the number of units permitted to be built. **[*3]**

On July 20, 2009, Simon Hill appealed to the Committee, asserting that certain conditions and refusals to waive local requirements rendered the project uneconomic or were otherwise beyond the Board's authority. The Committee's presiding officer convened a conference of counsel. After initially denying abutters Thomas Graefe and Kimberly Lehman's motion to intervene without prejudice for failure to identify applicable local requirements, injuries relating to the local requirements, and relief sought, the presiding officer granted, in part, their renewed motion to intervene. She also granted the request of Marie C. Molla to participate as an interested person.

Following a pre-hearing conference, and pursuant to *760 CMR 56.06(7)(d)(3)*, the parties negotiated a Pre-Hearing Order, and thereafter submitted pre-filed testimony. The-developer submitted with its prefiled rebuttal testimony a Notice of Project Change modifying the design of Road A, and adding a tennis court and swimming pool. In response the Board filed a motion to remand on the ground that the developer proposed substantial changes to the project. The presiding officer denied the motion, ruling that **[*4]** the Notice of Project Change would be treated as proposed mitigation. Thereafter, on behalf of the Committee, the presiding officer conducted a *de novo* hearing, including prefiled testimony from 16 witnesses, a site visit, four days of evidentiary sessions to permit cross-examination of 11 of those witnesses, and the filing of post-hearing briefs. During the hearing the presiding officer granted the Board's motion to strike a portion of Mr. Sullivan's prefiled testimony. The Board also moved for a directed decision/involuntary dismissal on the issue of site control, as well for dismissal on the ground that Simon Hill failed to meet its initial burden with respect to economics. The motions were taken under advisement. Â [1] The Interveners requested the issuance of a proposed decision pursuant to *760 CMR 56.06(7)(9)*.

II. FACTUAL OVERVIEW

The project site, containing approximately 29 acres in a parcel of land off Prospect Street, is located in Norwell's Residential Zoning **[*5]** District A and Aquifer Protection Overlay District, and a portion of the site is within the Floodplain, Watershed, and Wetlands Protection Overlay District. The project site is bordered by undeveloped land to the north and west, and residential lots on Simon Hill Road to the east, and on Prospect Street to the west. The site consists of approximately 22.6 acres of wooded uplands and 6.1 acres of wetlands. The parties dispute the extent to which a portion of the site is located in a FEMA flood plain. The site is not within a DEP Zone II, but contains bordering vegetated wetlands, local isolated vegetated wetlands, and an intermittent stream. Exhs. 2, p. 1; 3(2), 3(4); 6, Sheet 2; 14; 18; 56(B); 56(D).

Simon Hill received a determination of project eligibility pursuant to *760 CMR 56.04* under the Housing Starts Program of MassHousing and the NEF. Exh. 1; Pre-Hearing Order, Â§ 11, P3. The Town of Norwell has not satisfied any of the statutory minima defined in sentence two of the definition of "consistent with local needs" in G.L. c. 40B, Â§ 20. Pre-Hearing Order, Â§ II, P 2.

Simon Hill proposes to construct 80 home-ownership townhouse style condominium units in **[*6]** a combination of individual and multi-unit buildings. The developer proposes to build units on two sections of the property which are connected to one another by a narrow strip of land between 150 and 225 feet in length, and varying in width from 32 feet to 48 feet, the so-called "neck" of the parcel. Exhs. 2, p. 1; 3(4); 14. Thirteen of the proposed multi-unit buildings (containing 52 of the proposed units) are located on the interior, northeasterly section of the property (the Simon Hill section) beyond the "neck" connecting the two portions of the site, and seven of the proposed buildings, containing 28 units, are located in the southwesterly section (the Prospect Street section), abutting Prospect Street, a two-lane public roadway. Exhs. 3(4); 6 (Sheets 1, 2, 9); 14. The internal roadway for the development consists of the main road, "Road A," which begins at the Prospect Street entrance to the development and runs approximately

---

[1] The Interveners also moved to dismiss on the ground of site control, an issue beyond the scope of their allowed participation under the presiding officer's ruling and pursuant to ***760 CMR 56.04(6)***.

2120 feet in length through the "neck" to the rear of the Simon Hill section, where it ends in a cul-de-sac. Branching from Road A, at a perpendicular angle, Road C, approximately 700 feet in length, serves most of the units in the Prospect Street section. **[*7]** Road D, branching from Road A in the Simon Hill section, serves 4 units and the tennis court and pool. Road A provides the only access into the project site. The Interveners reside on Simon Hill Road in two of the single family homes abutting the project site. Exhs. 6 (Sheets 9-13); 6F-A; 69, P 6; 74.

Simon Hill proposes to install a wastewater treatment facility for which it will obtain a groundwater discharge permit from the Department of Environmental Protection (DEP). It also proposes to construct a stormwater management system to meet applicable DEP stormwater management regulations. Exhs. 53, PP 8, 10, 18; 68, PP 20-24; Simon. Hill brief, pp. 26-27. In its Notice of Project Change, Simon Hill proposes: 1) as mitigation, to change the first 1,100 feet of Road A by constructing a boulevard style two-lane roadway; and 2) to construct a swimming pool and tennis court for the development. Exh. 74.

III. PRELIMINARY ISSUES

A. Site Control

Simon Hill and the Board stipulated in the Pre-Hearing Order that the developer satisfies the project eligibility requirements set forth in 760 CMR Â§ 56.04(1). Pre-Hearing Order, Â§ II, P 4. However, the Board also stated in the Pre-Hearing **[*8]** Order that it reserved the right to raise as a defense, "as permitted by the applicable regulations, the failure to maintain any of the Project Eligibility requirements which may be raised at any time by the Board pursuant to *760 CMR 56.04(5)*-(6) and *760 CMR 56.07(2)(a)*." Pre-Hearing Order, Â§ II, P 5. The Board has since moved for dismissal on the ground that Simon Hill has failed to maintain site control, one of the three project eligibility requirements of *760 CMR 56.04(1)(c)*. Â [2]

Simon Hill's receipt of a determination of project eligibility constitutes conclusive evidence of satisfaction of the site control requirement, shifting to the Board the burden of proof to show that there has been a substantial change affecting site control. *760 CMR 56.04(6)*. See Exh. 1.

The Board argues that the purchase and sale agreement for the project site has expired by its terms. Addendum A to the purchase and **[*9]** sale agreement provides:

> The Buyer agrees to purchase the Property … and to close on the Property [within] 90 days of receiving permits for the project, subject to the terms of this Agreement.

Exh. 3(9). The agreement also specifies that time was of the essence. It is undisputed that the developer had not closed on the property within 90 days of the Board's issuance and filing of the comprehensive permit decision on June 29, 2009. Tr. II, 73.

Although on cross-examination, the developer's principal, Mr. Sullivan, agreed that the purchase and sale agreement required a closing within 90 days of receiving the comprehensive permit, the language of the purchase and sale agreement provides that the 90-day period identified in the purchase and sale agreement commences upon the receipt of unidentified "permits" in the plural; not just the one comprehensive permit. Tr. II, 73; Exh. 3(9).

Simon Hill argues that the purchase and sale agreement has not expired because it does not call for a closing until 90 days after Simon Hill's permit becomes final. The Board's decision states that the comprehensive permit "shall be deemed final after expiration of all applicable periods and after **[*10]** all appeals, if any, have been decided." Exh. 2, Condition 135. Therefore, as Simon Hill argues, since the permit is still under appeal, the closing deadline has not expired, and it has a colorable claim of control required by *760 CMR 56.04(1)(c)*. See *Bay Watch Realty Trust v. Marion*, No. 02-28, slip op. at 5-6 (Mass. Housing Appeals Committee Dec. 5, 2005).

On this record, we find that the comprehensive permit is not final. The Board has not demonstrated that the 90-day period in the purchase and sale agreement commenced with the filing of the Board's comprehensive permit.

---

[2] Although the Interveners raised this issue during the hearing and in their brief, their arguments are beyond the scope of their intervention.

Therefore, the Board has not met its burden to demonstrate that the purchase and sale agreement has expired, and its motion to dismiss is denied. See *Haskins Way, LLC v. Middleborough*, No. 09-08, slip op. at 4 (Mass. Housing Appeals Committee Mar. 28, 2011) (when board has granted comprehensive permit, Committee typically would not expect control of development site to be in question). Â [3]

B. Intervention [*11] by Abutters

The Interveners suggest that the presiding officer improperly limited the scope of their intervention. In a footnote, they renew a request to expand their participation to include particular conditions in the Board's decision on the ground that they are included within the meaning of "local requirements" under Chapter 40B and 760 CMR 56.00. Interveners' brief, pp. 4-5 n.5. Their contention is misplaced. The local concerns that may be considered by the Committee are those that arise from "local requirements and regulations," as defined in *760 CMR 56.02*, that were in effect at the time of the developer's application to the Board for a comprehensive permit. Â [4] *Id*. See *Paragon Residential Properties, LLC v. Brookline*, No. 04-16, slip op. at 45 (Mass. Housing Appeals Committee Mar. 26, 2007), *aff'd in part, Zoning Bd. of Appeals of Brookline v. Housing Appeals Committee, 79 Mass. App. Ct. 1129, 2011 WL 2712960*, **[*12]** July 14, 2011 (Rule 1:28 opinion). Also see *Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 02-21, slip op. at 12 (Mass. Housing Appeals Committee Dec. 12, 2006); *Northern Middlesex Housing Associates v. Billerica*, No. 89-48, slip op. at 11 (Mass. Housing Appeals Committee Dec. 3, 1992).

To the extent the Interveners were aggrieved by the Board's issuance of the comprehensive permit, they had recourse to appeal the decision pursuant to G.L. c. 40A, Â§ 17. G.L. c. 40B, Â§ 21; *Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 26, 28 (2006)*. The Interveners were granted leave to participate with respect to the impact of waivers of local bylaws and regulations which they identified as relevant to the alleged potential effects of 1) groundwater mounding on their properties rendering their septic systems noncompliant with Title 5 and causing flooding in their basements; and 2) effluent breakout from the project's wastewater disposal system onto the ground surface or into the system, resulting in associated hydraulic and public health impacts to the Interveners' basements and septic systems. They were permitted to argue in support of **[*13]** conditions of the decision that were imposed pursuant to those local requirements to protect their property. The presiding officer properly limited the Interveners' participation. Their renewed motion is denied.

Simon Hill has also asked that the motion to intervene be reconsidered on the ground that the Interveners' evidence cannot support their standing. That motion is denied.

IV. ECONOMIC EFFECT OF BOARD'S DECISION

Pursuant to G.L. c. 40B, Â§ 23, "If the committee finds … that the decision of the board [both] makes [the project] uneconomic and is not consistent with local needs, it shall order such board to modify or remove" the offending conditions and requirements. The burdens of proof are set forth in the Committee's regulations. Initially, the developer has the burden of proving that "the conditions and/or requirements considered in aggregate make the building or operation of the Project Uneconomic." *760 CMR 56.07(1)(c)(1)*; 56.07(2)(a)(3). Also see *Walega v. Acushnet*, No. 89-17, slip op. at 8 (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that the conditions imposed make it "impossible to proceed **[*14]** and still realize a reasonable

---

[3] The purpose of the site control project eligibility requirement is to provide boards of appeals, before they invest considerable time in the local hearing and review process, with "protection against the unlikely possibility of frivolous applicants who have no present or potential property interest in the site." *Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339, 378, n.25 (1973)*. Based upon this, the Committee's interpretation of the site control requirement, particularly in its own hearings, has been liberal. *Haskins Way, LLC v. Middleborough*, No. 09-08, slip op. at 4 n.3, citing *Paragon Residential Properties, LLC v. Brookline*, No. 06-14, slip op. at 11 (Mass. Housing Appeals Committee Mar. 26, 2007), *aff'd in part,* ***Zoning Bd. of Appeals of Brookline v. Housing Appeals Committee, 79 Mass. App. Ct. 1129, 2011 WL 2712960***, July 14, 2011 (Rule 1:28 opinion).

[4] Local Requirements and Regulations" are defined as "all local legislative, regulatory, or other actions which are more restrictive than state requirements, if any, including local zoning and wetlands ordinances or by-laws, subdivision and board of health rules, and other local ordinances, by-laws, codes, and regulations, in each case which are in effect on the date of the Project's application to the Board." 760 CIVIR 56.02 (Local Requirements and Regulations).

return...." *760 CMR 56.02* (Uneconomic); G. L. c. 40B, Â§ 20. If the developer proves that the decision makes the project uneconomic, the burden then shifts to the Board to prove that there is a valid local concern which supports such conditions and that such local concern outweighs the regional need for affordable housing. *760 CMR 56.07(1)(c)(2)*; 56.07(2)(b)(3).

A. Appellant's Presentation

1. Challenged Conditions and Requirements

The Board's decision does not indicate the number of units it permitted; instead, it states that the application for a comprehensive permit is granted subject to the conditions contained in, and the waivers granted by, the decision. Exh. 2, p. 11. Simon Hill argues that the decision's conditions and unwaived local regulations, in the aggregate, effectively reduce the number of units that could actually be constructed.

The decision limits the length of the main road, Road A, to 1,100 feet. Exh. 2, Condition 35(a). Mr. McKenzie, Simon Hill's engineering consultant, testified that this limit requires a dramatic reduction in the number of units from 80 to 28, a 65% reduction. **[*15]** Exh. 53, P 14; see Exh. 23, Â§ 7B. The reduction in the length of Road A prohibits construction of any units in the Simon Hill section of the site. Simon Hill also cites the minimum 25-foot no-build buffer zone to wetland resources as reducing the available space for the construction of units in the Prospect Street section. Mr. McKenzie testified that the wetland setback requirement of Condition 41 will reduce the number of permitted units in the development to 28. Exhs. 2, Condition 41; 53, 16. The developer's principal, Mi. Sullivan, indicated on the proposed plans which units would be eliminated based upon the wetland setback restriction. Exh. 52(B).

Mr. Sullivan testified that the number, breadth and complexity of the conditions imposed prevent the project from being constructed in a cost effective and efficient manner and will contribute to delay and increased costs because the conditions would require "a complete redesign and a *de novo* review of the project plans by the Board." He stated that the permit also requires the developer to appear before the Board for post-permit reviews and approvals, which will add incalculable economic costs to the project as a result of uncertainty, **[*16]** confusion and delay, particularly since many will require further public hearings before the Board. Exh. 52, PP 14-25. See Tr. II, 194. He testified that the requirement that Simon Hill fund an additional construction monitor is overly burdensome and that the required $ 30,000 deposit for post-permit peer review of revised plans and a further $ 10,000 for review of regulatory documents are unreasonable. Exh. 52, PP 12-13.

Finally, Simon Hill argues that the number, repetitiveness and conflicting nature of the conditions, in the aggregate, impose a significant administrative burden on the developer. Simon Hill argues, citing *Norwell Washington, LLC v. Norwell*, No. 06-07 (Mass. Housing Appeals Committee Mar. 13, 2007 Enforcement Order), that the sheer number of conditions, particularly those that require redundant submissions to various town boards and personnel, render the project *per se* uneconomic because the risk and uncertainty associated with the conditions could lead to work stoppages and delay that will cause incalculable damage to the project's finances. It argues that the conditions must be viewed in the aggregate, because otherwise "a town could block any project by **[*17]** imposing a laundry list of relatively inexpensive conditions, none of which alone would make the project uneconomic." *Walega v. Acushnet, supra*, No. 87-17, slip op. at 7-8.

2. Projected Return on Total Costs

Based on Mr. McKenzie's testimony that the conditions would cause a reduction in the project to 28 units, Mi. Sullivan prepared a *pro forma* financial statement summarizing the projected costs and expenses associated with such a project. He also prepared a marked up plan to identify which of the proposed units would be eliminated from the Prospect Street section of the site to show his concept of the 28-unit development that could be built on the site. Exh. 52(B).

The *pro forma* applied the Committee's historical methodology -- the Return on Total Costs (ROTC) analysis (total sales less total development costs, or when calculated as a percentage, total return divided by total development costs). See, e.g., *Rising Tide Development, LLC v. Sherborn*, No. 03-24, slip op. at 4 (Mass. Housing Appeals

Committee Mar. 27, 2006); *Rising Tide Development, LLC v. Lexington*, No. 03-05, slip op. at 11 (Mass. Housing Appeals Committee June 14, 2005).

Mr. Sullivan testified **[*18]** that he has extensive experience in permitting, financing and constructing residential real estate developments in Massachusetts. Exhs. 52, PP 2-3; 52(A). To prepare the *pro forma*, he relied on the decision, and assumptions of costs and revenues based on his own development experience as well as information provided by others, using current MassHousing cost certification guidelines. He assumed a 28-unit project located in the Prospect Street section including 8 affordable units. He based the site acquisition cost of $ 2,500,000 on the appraisal conducted in connection with MassHousing's project eligibility review. He estimated other costs based on his own development experience. He estimated revenues based on market conditions and comparable home sales, although he assigned sales prices he considered higher than the current market. Exhs. 4; 52, PP 4-11; 52(B). He projected total development costs to be $ 14,095,000, and total revenue to be $ 12,240,000, resulting in a loss of $ 1,855,000, or a return of -13.2%. Exhs. 52(B); 52, P 10.

B. Board's Criticisms

The Board contends that Simon Hill has failed to meet its initial burden to show that the decision makes the building or **[*19]** operation of the project uneconomic because: 1) the developer did not quantify the economic impact of the various conditions challenged as rendering the project uneconomic; 2) the developer is not a financial expert, and hired no financial expert to prepare a *pro forma* financial statement; and 3) the developer has submitted no *pro forma* to show that the project as proposed was economic. For these reasons, it argues that the appeal must be dismissed.

The Board argues that Mr. Sullivan provided insufficient basis to demonstrate the project would be limited to 28 units. Specifically the Board cites Mr. Sullivan's stated reliance on the opinion of Mr. McKenzie that the permit will only allow for the construction of 28 units, and his modification of the Prospect Street section of the site by eliminating units that encroached within the 25-foot buffer zone. Because on cross-examination, Mr. McKenzie stated that he did not participate in the preparation of the *pro forma* or the proposed re-design of the project, the Board suggests, incorrectly, that Mr. McKenzie did not contribute to the economic analysis. See Tr. I, 119-121. However, his opinion of the consequent reduction in **[*20]** the project size is credible. The Board also criticizes Mr. Sullivan's hand-sketched plan showing the configuration of the 28 units because he admitted he did not ask Mr. McKenzie to identify ways to increase the number of units in the project by reconfiguring it to conform to the decision, and he was not able to explain how much useful area would be available given the reduction in size of the detention basins and soil absorption system. Â [5] Tr. II, 76, 77, 85, 87.

The Board's witness, Mr. Houston, acknowledged the decision's conditions and unwaived local regulations effectively reduce the number of units that could actually be constructed, but he said he was unable to give a figure below 80 that the permit would allow, or even to give an opinion regarding whether the project could include as many as 70 units. Tr. III, 29-31.

The Board also criticizes Mr. Sullivan's support of his *pro forma*. It points out that Mr. Sullivan stated he had no specific figures for the infrastructure costs for his modified **[*21]** project, and that he had not consulted RS Means or other similar data in connection with his estimate. Tr. II, 79-80. Based on this testimony, the Board argues that the evidence of the *pro forma* is at best speculative and inherently unreliable, and possibly untrue. Mr. Sullivan admitted that he has not acted as the expert witness on the financial aspects of other projects in which he was the developer. Tr. II, 78. The Board also argues that the developer never provided a *pro forma* demonstrating that an 84 or 80 unit project was economically feasible.

Finally, the Board criticizes the sufficiency of Mr. Sullivan's evidence concerning the economic effect of individual conditions on the proposed project, such as the buffer zone, for which he testified that he "hadn't looked at" whether that condition, in and of itself rendered the project uneconomic. Tr. II, 88. See Tr. II, 109,113,122-123, 125-128,

---

[5] Simon Hill acknowledges that the proposed plan is only a sketch, but argues that it would be prohibitively expensive to conduct a formal redesign of the project at this point.

137. Mr. Sullivan emphasized, however, that although very few of these conditions on their own would render the project uneconomic, "when you take them in total you look at the way the conditions are regulated, lam really concerned about the impact of needless delay." Tr. II, 100, **[*22]** 122-123, 137.

Therefore the Board argues that the Committee cannot rely on the *pro forma* analysis submitted by Mr. Sullivan, or his contentions that the proposed conditions render the project uneconomic, since Mr. Sullivan has not properly evaluated them and could not explain individually or in the aggregate the cost to comply with the conditions he stated rendered the project uneconomic.

C. Conclusion Regarding Economics

Since under Chapter 40B and 760 CMR 56.00, the conditions need only render the project uneconomic in the aggregate, the Committee does not require each condition individually to render a project uneconomic to shift the burden to the Board; rather, if a condition has some economic effect, it contributes to the aggregate economic impact, which is then evaluated for its impact on the developer's profit. *White Barn Lane, LLC v. Norwell*, No. 08-05, slip op. at 14 (Mass. Housing Appeals Committee July 18, 2011); *Haskins Way, LLC v. Middleborough, supra*, No. 09-08, slip op. at 14 n.15.

1. Reduction in Project Size

With regard to the economic impact of the Board's decision, the Board has focused more on the trees than the forest. **[*23]** The opinion of Mr. McKenzie that the project size will be dramatically reduced by the Board's decision is credible. The primary factor affecting the economics of the project, as presented by the developer, is the limitation on the length of Road A, precluding development beyond the neck in the Simon Hill section of the site. The project plans, Exhibit 6, depict 52 units in this area. This factor alone eliminated 52 units proposed to be constructed in that area, leaving the 28 units originally proposed in the Prospect Street section.

The evidence shows that the wetland setback requirement also precludes the construction of all of the 28 units as sited in the Prospect Street section in their original configuration. Even if more units could fit in this area due to the reduction in size of the wastewater treatment system and stormwater basins, the loss of space from the encroachment of the 25-foot buffer has a countervailing impact. Therefore the evidence submitted suggests that at most only a few more units would likely fit within the Prospect Street section. This is consistent with the testimony of Mr. McKenzie and Mr. Sullivan that the final project as conditioned would be 28. Although **[*24]** Mr. Sullivan has not demonstrated the engineering expertise necessary to determine definitively that the buffer zone condition limits the Prospect Street area to exactly 28 units, Mr. McKenzie's opinion supports this conclusion, and the expertise of an engineer is not necessary to find that Board's conditions would limit the project to a size in the range of 28 units in this context.

Moreover, the Committee does not assess the economics of a decision reducing project size simply based on how many units could theoretically fit into a site, since a developer is not required to show the densest project possible based on a board's decision. See *White Barn Lane, LLC, supra*, No. 08-05, slip op. at 15. While a different layout of the Prospect Street section of the site might allow Simon Hill to construct more units, the developer presented a reasonable proposal similar to its original proposal to address the conditions, and the Board has not rebutted Simon Hill's case. Therefore, we find that the project as conditioned is likely to be limited to 28 units. Â [6]

2. *Pro Forma* Presentation

Under Committee precedent, a return on total development costs of 15% is considered the minimum for finding that a project is economic for a limited dividend organization. See *Autumnwood, LLC v. Sandwich*, No. 05-06, slip op. at 3 and n.2 (Mass. Housing Appeals Committee Mar. 8, 2010); Exh. 51. Simon Hill argues that since Mr. Sullivan

---

[6] The final determination of the total number of units to be constructed will be determined from the final plot plan. That plan will indicate a total number of units, approximately 28 as projected by the developer's witnesses.

testified that the return on total development costs for the project as conditioned is a loss, the project has been shown to be uneconomic as conditioned.

Although the Board argues that Mr. Sullivan's opinion is entitled to no weight, we conclude that Simon Hill's initial burden to prove the decision rendered the project uneconomic was satisfied by the evidence that the project was reduced to 28 units with the limitation on Road A and the wetland setback and that the *pro forma* projected a loss. Mr. Sullivan is an experienced developer of comprehensive permit projects under Chapter 40B, with some financial expertise, although he is not an accountant. Exit 52, 2-3; 52(A). He stated he chose to act as his own financial expert for this proceeding. Tr. II, 79. His evidence of the basis for his opinion **[*26]** of projected costs of construction and projected revenues is acknowledged to be sparse. However, on this record, Mr. Sullivan's stated experience and knowledge of the financing of these projects are sufficient to support an opinion on the costs and revenues for his project. Although conclusory, his pre-filed testimony and attached exhibits are sufficient to demonstrate that the conditions and requirements of the decision render the project uneconomic.

Moreover, since the Board has provided no opposing economic testimony, we find the *pro forma* evidence credible, in this situation in which the impact of the reduced number of units on the sizes of the drainage area and soil absorption system would not alter the economics of the project, and therefore the less precise evaluation made is not material. Mr. Sullivan acknowledged that "[w]hen I developed that plan, because of… all the issues, the wetlands and all of the work that had been done in that area, I just left the roadway the way it was. It worked for me." Tr. II, 77. He stated he "adjusted the cost of infrastructure to reflect less roadway and less pipe" by means of an estimate. Tr. II, 79. However, Mr. Sullivan's *pro forma* **[*27]** indicates the following hard costs that are relevant:

Site infrastructure, landscape & lighting	$ 939,000
Irrigation, septic & water fees	$ 506,000
	$ 1,445,000
PROFIT (LOSS)	($ 1,855,000)

Exh. 52(B). As shown above, even if the foregoing costs were removed entirely, which would not be the case, they would not bring the return on total costs to a break-even point.

Finally, the Board suggests that the developer has not met its burden because it failed to demonstrate that the project was economic as proposed. Although in most cases it is logical to assume, and historically the Committee's review has assumed, that a developer would not propose an uneconomic development, the Committee has noted previously that under some unusual circumstances, a developer may choose to go forward with an uneconomic development. See *Rising Tide Development, LLC v. Sherborn, supra*, No. 03-24, slip op. at 16, n.16. However, although the Board raised the issue, the Pre-Hearing Order agreed to by the parties identified this issue as the responsibility of the Board, not Simon Hill. Pre-Hearing Order, Â§ IV, II 6. Therefore, under the circumstances, the developer did not fail to meet its burden **[*28]** by submitting evidence only concerning the economics of the project as conditioned. See *White Barn, supra*, No. 08-05, slip op. at 16.

3. Uneconomic Presumption

Simon Hill argues that under the Department of Housing and Community Development Comprehensive Permit Guidelines (DHCD Guidelines) issued pursuant to 760 CMR 56.00, a 5% reduction in the number of units raises a presumption that a board's conditions render a project uneconomic. Exh. 50. In this case, Mr. McKenzie testified that the reduction from 80 to 28 units is a 65% reduction, which far exceeds the triggering 5%. Exhs. 50; 53, P 14. The DHCD Guidelines state:

> Reasonable Return -- means, with respect to building or operating a Project, profits and distributions actually realized by the Developer that are not less than the limitations set forth in Part IV.C. A condition imposed by the Board to decrease the number of units in a Project by 5% or more shall create a rebuttable presumption that the Developer will not be able to achieve a reasonable return. While rebuttable, this presumption shifts both the burden of producing evidence and the ultimate burden of persuasion from the Developer **[*29]** to the Board on both the "reasonable return" and "uneconomic" issues.

Exh. 50. We find that Simon Hill's evidence of a reduction in project size to 28 units established a presumption that the conditions render the project uneconomic *and* shifted the burden of proof on the issue to the Board. The Board did not meet its burden to demonstrate that the project as conditioned is economic. Therefore, for this reason as well, the developer prevails on the question of whether the Board's decision renders the project uneconomic.

4. Aggregate Economic Impact

The Board argues that since Mr. Sullivan stated he had not evaluated or did not know the economic effect of all of the particular conditions challenged, Simon Hill has failed to show that these conditions render the project uneconomic. However, it has not argued or introduced evidence to show that the conditions in question categorically have no economic impact at all. Â [7] Under the DHCD Guidelines, the Board has failed to meet its burden of proof **[*30]** on this issue. Even assuming that Simon Hill has the burden, it is not necessary that the developer demonstrate for each condition or requirement the precise predicted value of the adverse impact, as long as the aggregate impact is shown to make the building or operation of the project uneconomic. *760 CMR 56.07(1)(c)(1)*; 56.07(2)(a)(3) Also see *Walega v. Acushnet, supra*, No. 89-17, slip op. at 8.

The conditions that constrain the post permit process particularly those that require Simon Hill to return to the Board for further approvals, have the potential to cause delay, and concomitant extra costs. Those conditions therefore have an adverse impact.

Based on the record, we find that generally with respect to remaining conditions and refusals to waive local requirements challenged on economic grounds, except where specifically indicated, those requirements, even though most do not have a specific adverse numeric economic value assigned to them in the record, would, also have at least some adverse economic impact on the proposal. Beyond that, the more significant task before the Committee is to determine the magnitude of the impact of all of the conditions **[*31]** in aggregate. *Haskins Way, LLC v. Middleborough, supra*, No. 09-08, slip op. at 14 n.15. See *Zoning Board of Appeals of Brookline v. Housing Appeals Committee, 79 Mass. App. Ct. 1129 (2011)* (Rule 1:28 opinion). Therefore, the Board's motion for directed decision and motion to dismiss are denied.

V. LOCAL CONCERNS

Since the developer has sustained its initial burden on economic issues, the burden shifts to the Board to prove, with respect to those conditions and requirements challenged on economic grounds, that there is a valid health, safety, environmental, design, open space or other local concern that supports each of the conditions and requirements imposed, and that such concern outweighs the regional need for tow and moderate income housing. Â [8] *760 CMR 56.07(1)(f)(2)*. 56.07(2)(b)(3). The burden on the Board is significant: The fact that Norwell does not meet the statutory minima regarding affordable housing establishes **[*32]** a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this instance. Pre-Hearing Order, Â§ II, P 2. G.L. c. 40B, Â§ 20; *760 CMR 56.07(3)(a)*; Hanover v. Housing Appeals Committee, 363 Mass. 339, 365, 367 (1973) (failure to meet statutory minimum housing obligations "will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal").

A. Single Access Design and Safety

1. Background

---

[7] On cross examination, Mr. Sullivan acknowledged he had not investigated the cost and expense of complying with each of the individual conditions he claimed rendered the project uneconomic, other than the cost of developing a 28-unit project. See, e.g., Tr. II, 88-145. However, he did express the opinion that the challenged conditions would cause costly delay.

[8] The Board suggests that the developer failed to establish that the project complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, etc. Board brief p. 15, D.13. However, this standard of proof is applicable to denials of comprehensive permits, not approvals with conditions. ***760 CMR 56.07(2)***.

This case presents an issue that has arisen infrequently, hut raises important safety considerations: the developer is proposing a long (roughly 2120 foot) single access internal roadway, which the Board contends is unsafe because of the lack of secondary access. EA. 69, P 6. Both parties have addressed the Committee's previous decisions concerning single access roadways. Although the Committee has stated that "[e]ach design must be considered on its own merits," *Cirsan Realty Trust v. Woburn*, No. 01-22, slip op. at 8 (Mass. Housing Appeals Committee June 11, 2003), *aff'd* No. 05-P-219 (Mass. App. Ct. May 31, 2006), these decisions provide **[*33]** a frame of reference.

In our most recent decision on this issue, *Burley Street, LLC v. Wenham*, No. 09-12, slip op. at 8 (Mass. Housing Appeals Committee Sept 27, 2010), we stated: "It is a foregone conclusion that a long dead-end road presents safety concerns. Similarly, it is a matter of simple logic that a longer, narrower toad is more susceptible to blockages from fallen trees, car crashes, or other sources than a shorter, wider road." In *Wenham*, we found the board had not demonstrated that the 1,000-foot single access roadway serving 20 units presented a local concern that outweighed the need for affordable housing.

The Committee's analysis considers several parameters including the length, width and overall design of the roadway, the number of dwelling units that could become isolated from emergency services, as well as other factors specific to the site that are important. *Wenham, supra*, No. 09-12, slip op. at 6; *Lexington Woods, LLC. v. Waltham*, No. 02-36, slip op. at 19 (Mass. Housing Appeals Committee Feb. 1, 2005). Two cases in which we rejected the plan submitted by the developer, *Waltham, supra*, and *O.I.B. Corp. v. Braintree*, No. 03-15, slip op. **[*34]** 9, 11, n.14 (Mass. Housing Appeals Committee Mar. 27, 2006), *aff'd* No. 2006-1704 (Suffolk Super. Ct. July 16, 2007), are most pertinent here. In *Braintree*, 119 condominium units were on a 1,500-foot roadway. In *Waltham*, the proposed 36-unit condominium project was on a 1,000 foot "steep, winding, and narrow" roadway. *Lexington Woods, LLC. v. Waltham, supra*, No. 02-36, slip op. at 19, 8-20. In both of these cases, the projects were characterized by special features that increased the risk of blockage, and we upheld the boards' denials of the comprehensive permits because the roadways, which exceeded the length permitted by local requirements, represented a local concern that outweighed the need for affordable housing.

2. Project Design

Simon Hill's proposed project includes three internal roadways. The main internal roadway, Road A, is approximately 2120 feet in length from the entrance on Prospect Street through the neck to the rear portion of the parcel, ending in a cul-de-sac at the opposite end. Road A would serve all of the proposed units in the project. Within the development, two additional roadways, Roads C and D, intersect Road A. Road C, approximately **[*35]** 700 feet in length, serves 28 units. It intersects Road A at approximately 600 feet from Prospect Street and ends in a hammer-head turn at its end point. Road D intersects Road between 1600 and 1700 feet from the entrance and serves 4 units and the tennis court and pool which Simon Hill added in its notice of project change. It has a half hammer-head turn around. Exhs. 6, Sheets 9-13; 6F-A; 68, P 12; 69, P 6.

The neck of the parcel, which connects the two portions of the project site, is a narrow stretch of land abutted by neighboring properties. The neck begins at 978 feet. It varies in width from 32 feet at the west end to 48 feet at the east. Road A is 22 feet wide before and beyond the neck and 24 feet wide within the neck. The upper portion of the road beyond the neck begins at approximately 1200 feet from Prospect Street. Just beyond the neck, Road A also increases to a 6% grade and curves to the left. Immediately beyond the neck, 15 perpendicular driveways for individual units in the Simon Hill section intersect Road A on both sides of the roadway up to the intersection with Road D, with virtually no open areas. These driveways provide stacked parking with interior garage parking **[*36]** behind the exterior parking space. The only parking available in the Simon Hill section other than within these driveways is located on Road D, where approximately 10 parking spaces are planned. Exhs. 6, Sheets 9-13; 20; 61, PP 36-41; 68, P 9. See Exhs. 8, 9.

The private roads in the project will be lined by Cape Cod berms. Exh. 6, Sheet 20. Since this area is within the Aquifer Protection District, Norwell regulations prohibit stockpiling salt on the site, but do not prevent use of salt or other de-icing material to treat the roadway in winter. Tr. III, 89-90; Exh. 18, Â§ 4360(e). The maximum grade planned for Road A, 6% just beyond the neck, is the maximum grade permitted by Norwell subdivision standards.

Simon Hill proposes to install sprinkler systems in all of the proposed units. Exhs. 6; Sheets 9-13; 23, p. 39, Â§ 7A.13; 54, P 7; 68, P 11; 69, P 7; 70, P 5.

The Prospect Street entrance to Road A is the only means of access and egress to the proposed development. Prospect Street, a public way, has a width varying from 18 to 22 feet. Exhs 6, Sheets 9-13; 53, P 15.

3. Board's Concerns

Norwell Planning Board regulations provide that as of right, "No dead-end street shall exceed **[*37]** 550 feet in length." Exh. 23, p. 41, Â§ 7B.1. The Open Space Residential Development provisions of the Zoning Bylaw allow subdivision dead end roads with a maximum length of up to 1000 feet by special permit. Exh. 18, p. 82, Â§ 4850(6)(d)(2). In its decision, the Board waived the Planning Board requirement, granting Simon Hill permission to build internal roadways to a length of 1,100 feet, thus limiting construction of the road only to the neck. It cited the 6% grade beyond 1,100 linear feet, the sharp curve after the neck, the density of the development in this area without a second means of egress, the proximity of proposed buildings 10, 11 and 22 to the neck, the design of the roadway within the neck, including the sidewalk planned to be below the grade of the roadway, the restriction on the use of road salt, the shading of the road by trees on abutting property, the proximity of proposed snow storage areas to the neck, the unavailability of soft shoulders and the existence of guardrails restricting emergency access off any paved surface. Exh. 2, Condition 35(a). The Board contends that these elements all increase the risk of a road blockage, endangering the health and safety of **[*38]** the residents.

Mr. Houston testified that he is concerned with the number of persons potentially isolated in case of blockage of the dead end road, which "is enhanced by its overall length and by the steepness and curved alignment of the segment of the drive" beginning 1,100 feet from the site entrance, and further enhanced "by the short dead end unit driveways and stacked parking configuration in front of each unit which requires excessive maneuvering." Exh. 61, P 36. He testified that the effect of the 6% slope, shading of the road from trees on abutting properties in combination with road salt restrictions due to aquifer protection requirements, the sharp horizontal curve and excessive maneuvering and vehicle conflicts caused by the closely spaced perpendicular drives with stacked parking "cumulatively results in an unsafe and hazardous condition." Exh. 61, PP 38-39.

The former town planner, Mr. Thomas, also testified that he believed there to be "a substantial risk that emergency access to the [Simon Hill section] of the site could be impacted or inhibited by the design deficiencies" and stated that emergency equipment would be unable to pass or access around a problem on the **[*39]** roadway because of the retaining walls with guardrails and the height differential between the roadway and the sidewalk in the neck portion of Road A. Exh. 60, 6(c).

The Norwell Fire Chief agreed that the Board's limit on the length of Road A "is critically important to emergency access … and … essential to protect the health, safety and [well-being] of the residents, their guests and also town personnel, including my own, who may have need to access the site." Exh. 59, P 12. He testified that he has grave reservations since there is only a single point of access and egress for so many residents, guests and town personnel. The specific concerns he cited included the narrow neck, the 6% slope at the rear portion of the neck, the fact that the roadway curves sharply as it rises in elevation to the north almost immediately after the neck, the roughly 15 driveways immediately above this area along the rise, and the lack of soft shoulders to drive on in the event of a blockage in this area. He also stated that during winter months, snow and ice can never be removed quickly enough, and snow and ice would impede and impact access in this area, creating a "substantial risk of injury or **[*40]** worse for the residents and to my Department's staff who will be trying to respond to an emergency services call which typically includes the response of a Fire Truck equipped with advanced life saving equipment, an Ambulance and customarily the police." Exh. 59, P 12-13.

4. Appellant's Response

The developer's engineer, Mr. McKenzie, testified that the length of Road A alone does not create a safety hazard, and there is no universally recognized design standard for the length of dead end roads; rather each road design must be reviewed based on its own characteristics. Exh. 68, P 10. He also noted that Norwell's subdivision regulations allow a 6% grade for both straight and curved roadways. Exhs. 68, P 9; 53, P 14; 23, Â§Â§ 7A.13,

7A.16. He also testified that Simon Hill proposed 11-foot travel lanes through most of the site and 12-foot travel lanes through the neck of Road A, and that it is not possible to increase the width of the lanes to 13 feet through the neck given the property lines. He stated that the roadway width should not be a concern since Prospect Street, which is a main collector road, varies in width from 18 to 22 feet, with travel lanes with widths varying from **[*41]** 10 to 11 feet wide. Exhs. 53, P 15; 68, P 9; Exhs. 8, 9.

Mr. McKenzie also testified that the proposed driveways for the buildings closest to the neck -- Buildings 10, 11 and 22 -- have lengths ranging from 25 to 38 feet, with the majority of driveways at 35 feet, and most units will be able to accommodate two cars in the garage with at least an additional two in the driveway, "so that no off-street visitor parking of vehicles parked close in proximity to the roadway should occur that would preclude access for emergency vehicles." Exh. 68, P 9. He also stated that the turnarounds for Roads C and D were designed to accommodate fire apparatus, and that the project has sufficient area for designated snow storage and a snow removal plan can be implemented to maintain proper access for emergency vehicles in the winter. He stated that nothing in the design suggests safe access cannot be maintained under all weather conditions. He also stated that, as with any single access roadway network, there is always a risk of a catastrophic incident that may interfere with access, but there is nothing inherently risky about this design to exacerbate the risk. Exh. 68, P P 12-13.

The developer's traffic **[*42]** expert, Mr. Ham, also testified that guidelines established by the American Association of State Highway and Transportation Officials (AASHTO) indicate that a maximum grade of 7 or 8 percent is acceptable for a design speed of 30 miles per hour, appropriate for Road A, and that a 6% grade is within its generally recognized design standard. Exh. 54, P 7.

Simon Hill proposes to mitigate the effects of the Road A length by redesigning the roadway into a "double-barrel" boulevard-style road for the first 800 feet up to Building 9. Exhs. 74; 70, P 6. The proposed boulevard roadway would consist of two roadways 16 feet wide, for entering and exiting traffic, separated by a 6-foot median. Mr. Ham testified that the double-barrel road to the neck effectively cuts the dead end length of Road A from 2,120 feet to approximately 1,270 feet, within the range of the 1,100 feet permitted by the Board. He also stated that median-separated roadways are an acceptable engineering practice to reduce effective cul-de-sac lengths and to reduce the chance of a potential temporary blockage. He noted further that the developer could easily install traffic and parking control measures to control the speed **[*43]** of traffic to further mitigate concerns about the road's length. Exh. 69, PP 4-7. See Exhs. 68, P 10, 68(A).

The Board's engineer testified that the boulevard style modification does not increase the safety of the roadway, and in his opinion, likely worsened it because engineering practice would require a minimum width of 18 feet to allow a vehicle to pass by a broken down vehicle, and because, since there are no breaks in the median, the Prospect Street section residents would have to enter Road A, turn right, and drive further into the development to turn around and exit to Prospect Street. Tr. III, 5-8. The testimony of the Board's witness is more credible than that of the developer on the benefit of the boulevard modification.

5. Conclusion Regarding Single Access Road

Norwell regulations limit the length of dead end roads to 550 feet and only allow roadways to 1000 feet by special permit. The risk of loss of emergency access when homes may become isolated from the Town's street network because of a single point of entry to the development is a valid local concern. It is a concern that increases not only with the length of the roadway, but also with the number of homes that **[*44]** are located at a distance from the street network.

Unlike *Wenham*, and more like *Braintree* and *Waltham*, the sole access to the rear 52 units is the long roadway, complicated by the narrow neck, crowded layout of perpendicular driveways beyond the neck, limited additional roadway parking, snow and ice accumulation and other issues. In *Braintree, supra*, No. 03-15, slip op. at 11, n.13, the Committee noted that emergency access is less of an issue with boulevards. However, the increased safety with boulevards is less applicable here, since the divided roadway would not extend through the neck. In the neck itself, which is narrow and without shoulders, and beyond the neck, where the driveways are congested alongside the roadway, a downed tree or motor vehicle crash could block the entire access.

The testimony of the fire chief is credible with regard to the safety concerns for vehicle access. The existence of sprinklers may mitigate the concerns with fire safety somewhat, but would not address concerns about medical emergencies should the roadway be blocked. Based upon our evaluation of these facts and of the opinion testimony of the witnesses, we conclude that the concern **[*45]** for emergency access outweighs the regional need for affordable housing. Condition 35(a) is therefore RETAINED. Â [9] However, with respect to Condition 35(b), Internal Road Width, the Board has not demonstrated a valid local concern that outweighs the need for affordable housing. Therefore, it shall be MODIFIED to provide for construction of the roadway consistent with Simon Hill's proposed plans.

B. Wetlands Concerns

1. Wetlands Delineation

The Board argues that the developer did not identify all state and local resource areas and criticizes Simon Hill for not allowing the Norwell Conservation Commission to identify preliminarily the boundaries of all local and state wetlands resource areas on the site or mitigate against impacts which the Commission believes to exist on the site. See Exhs. 56, PP 4-7; 56(C); 38. Based on the Commission's Order of Resource Area Delineation (ORAD) dated January 22, 2009, and a DEP letter dated July 28, 2009 preparatory to the issuance of a Superseding Order of **[*46]** Resource Area Delineation, the site contains Bordering Vegetated Wetlands, an intermittent stream, and isolated vegetated wetlands. Exhs. 56(B); 56(D).

The Town Conservation Agent, Ms. Hardy, also testified that the site contains buffer zones to the Bordering Vegetated Wetlands, including the Norwell 50-foot no build zone, and may contain a Stream, Inland Bank, Land under Water Bodies or Waterways, Riverfront Area and Bordering Land Subject to Flooding. The Board argues that the delineations performed were insufficient to allow it to determine whether to grant waivers from its wetlands protection bylaw and regulations. Exhs. 56, PP 4-6; 2, p. 9. See Exhs. 18, Â§ 4200 (Flood Plain, Watershed and Wetlands Protection District); 38, 39.

The Board also argues that the Simon Hill has not properly delineated the location of the federal FEMA flood plain (100-year flood zone), and disputes the location of the line on the developer's plans. Exhs. 61, PP 14-16; 2, p. 9. Simon Hill contends the FEMA flood line on its plans is based on FEMA maps and current survey information. Its engineer stated that the precise boundary of the floodplain will be derived based on a detailed hydrologic analysis **[*47]** performed when a Notice of Intent is filed. Tr. I, 182-184; II, 68. Exh. 68, P 2.

Ms. Rimmer, the wetlands scientist engaged by Simon Hill, conducted site visits to delineate vegetated wetland resources on the site. She acknowledged that only a portion of the banks to the intermittent stream was delineated for the ORAD, but stated that the remaining resources are interior to the bordering vegetated wetlands whose

---

[9] In the factual overview sections of their briefs, both the Board and Simon Hill briefly address sight distance at the entrance for the project. The Board suggests that the project will not meet AASHTO standards for *intersection* sight distance, rather than *stopping* sight distance. However, in response to peer review comments, Mr. Ham stated that according to the design manual, while "intersection sight distances that exceed stopping sight distances are desirable along the major road," to enhance traffic operations, they are "not a requirement." Exh. 11, p. 2. He compared available sight distances at the project entrance to minimum requirements established by AASHTO and found stopping sight distance north of the proposed driveway to exceed AASHTO standards, and although available stopping sight distance south of the proposed driveway is less than the AASHTO standard, he stated that the removal of existing trees located in the public right-of-way or within property controlled by Simon Hill, will "enable adequate sight lines to and from the driveway to the north and south." Exhs. 10, pp. 8-10; 11, p. 1; 54, P 5.

Regarding sight distance south of the project entrance, Mr. Thomas, Norwell's former planner, testified that the clearing required includes land not under the developer's control "on Prospect Street which is a scenic roadway." Exh. 60, P 6(d). See Exhs. 10, 11. Condition 30(m) requires the project condominium association to maintain intersection sight triangles to be free of obstructions "to the extent permitted by the Town authorities having jurisdiction." Exh. 2. Neither party raised the issue in argument or requested specific relief in its brief. However, even if the developer cannot obtain Town agreement to clear the right of way, the Board has granted a permit for the project. Condition 99 and any other condition regarding sight distances shall be MODIFIED to conform to this decision.

boundaries were approved as part of the ORAD and by the DEP under a Superseding Order of Resource Area Delineation. She stated further that no work is proposed that would alter the banks to the stream in areas where the bank was not delineated, and the delineation of the interior banks would not affect the buffer zone depicted on the site plans.

Ms. Rimmer also testified that the site does not contain Land under Water Resource. While she acknowledged that Bordering Land Subject to Flooding was not delineated, she noted that the hydrologic study to delineate the resource would be conducted as part of the developer's Notice of Intent filing. Finally, Ms. Rimmer noted that the DEP disagreed with the Commission regarding the flagging of the B-series isolated vegetated wetlands **[*48]** and determined the F-series wetlands to be bordering, rather than isolated. She stated that the developer incorporated these changes into its site plans. She also stated, based on her site visits and DEP Mass GIS data, that she did not expect the site contains characteristics necessary to support vernal pools. Exh. 71, pp. 2-5; Tr. II, 36.

Despite the Board's argument that Simon Hill failed to delineate wetlands sufficiently before the Commission ahead of proceeding before the Board, a developer is not required to submit plans for approval of local conditions to the Conservation Commission, rather than the Board. It is the Board, assuming the role of local Boards, including the Commission, which is charged with acting on local wetlands issues in its hearing on the application. G.L. c. 40B, Â§ 21; *White Barn Lane, LLC v. Norwell, supra*, No. 08-05, slip op. at 19-20. Â [10]

Since the appeal before the Housing Appeals Committee is *de novo*, "the Board must provide evidence sufficient to persuade **[*49]** the Committee that it is more likely than not that the waiver of a local requirement would be in contradiction to a valid local concern and that the resulting harm would outweigh the regional housing need. It was incumbent on the Board to present affirmative evidence addressing the local wetlands issue." *Weston Development Group v. Hopkinton*, No. 00-05, slip op. at 19 (Mass. Housing Appeals Committee May 26, 2004). "Testimony indicating that additional studies should be performed to determine the total impact, if any, on the site is not the kind of evidence required to establish that the proposed development impinges upon a specific valid local concern." *Id*.

The testimony of Ms. Rimmer, an experienced wetland scientist who examined the site, is credible, and more credible than that of Ms. Hardy. We accept her determination of wetlands on the project site. Her testimony regarding the developer's commitment to complying with state requirements for these resource areas is also credible. The Board has not demonstrated a local concern that outweighs the need for affordable housing with regard to further delineation of local wetland resources for this project. Accordingly, Conditions **[*50]** 40 through 45, and other conditions regarding local resource protection shall be MODIFIED to conform to this decision. Â [11]

2. Stormwater Effects on Wetlands

The Interveners argue that Simon Hill failed to provide the location and layout of required compensatory flood storage areas. They cite testimony of the Board's engineer, Mr. Houston, that the embankment for stormwater basin P-P1.1 encroaches on the 100-year floodplain and will displace water and require the provision of compensatory flood storage under both DEP stormwater management regulations and the Norwell Wetlands Rules and

---

[10] The Board incorrectly suggested that Simon Hill was required to obtain a preliminary determination of locally jurisdictional wetlands from the Commission. Under Chapter 40B, the Board assumes the role of local boards, including the Commission, with respect to local, rather that state, requirements. Therefore it should make the preliminary determination of local jurisdictional wetlands, when appropriate. A developer's refusal to provide the information for such a determination should be treated by a board as a conservation commission would treat a similar refusal in its forum.

> Although Simon Hill could have chosen to proceed with the state wetlands process through filing a Notice of Intent in advance of filing its comprehensive permit application with the Board, it was not required, since Simon Hill will have to comply with those requirements in any event. In cases involving complex wetlands determinations affecting project design, developers may be well advised to obtain all wetlands determinations and even orders of conditions before applying the zoning boards for comprehensive permits, but Chapter 40B does not require this.

[11] In light of all of Mr. Sullivan's testimony, we are not persuaded by the Board's argument that Mr. Sullivan statements on cross-examination constituted a waiver of these conditions. See Exhs. 52, 70; Tr. II, 88-145.

Regulations, Â§ 8.3.0. Norwell's regulations allow the Conservation Commission to require a compensatory flood storage volume greater than the 1 to 1 ratio required by state regulations. Mr. Houston suggests that the extent of compensatory flood storage required is dependent on the accurate delineation of the 100-year flood elevations, which the developer did not provide. Exhs 26, Â§ 83.0; 61, PP 15-16.

Simon Hill's **[*51]** engineer stated that "even if the hydrologic analysis reveals that the 100-year floodplain encroaches [on the particular] proposed stormwater management facility ..., there is ample site area to redesign this facility to achieve the equivalent volume of lost flood storage." Exh. 68, P 2. He also stated that any area within the floodplain that extends from the bank of a waterway, waterbody or bordering vegetated wetland is classified as a bordering land subject to flooding under the Wetlands Protection Act (WPA) regulations, and required to meet DEP performance standards. Exh. 68, P 2. Ms. Rimmer also stated that the developer will mitigate the impacts to bordering vegetated wetlands and banks as required by DEP regulations, and will comply with any DEP regulations regarding filling within bordering land subject to flooding, including providing compensatory flood storage. Exh. 71, p. 5.

Simon Hill argues that the Board has not demonstrated a local concern regarding stormwater management. Since Simon Hill will be required to submit a Notice of Intent to DEP to demonstrate compliance with its stormwater management requirements, as is our practice, we will reiterate this requirement by **[*52]** condition. With respect to the imposition of local compensatory flood storage requirements, or other local stormwater management requirements, the Board has not demonstrated a valid local concern that outweighs the need for low or moderate income housing. Accordingly, Condition 62 shall be MODIFIED to state, "The final plans shall be in compliance with DEP stormwater management regulations and best management practices." Condition 63 and any other condition requiring Simon Hill to provide greater protection than required by DEP shall be STRUCK.

3. Norwell 50-Foot No-Build Zone

The Norwell Wetlands Protection Bylaw and implementing regulations are more stringent than the WPA and require a 50-foot no-disturb buffer zone, an area between the edge of any state or local wetland and proposed site disturbance. Exhs 26, Â§ 3.00, p. 140; 25, Â§ 2.B. The Board partially waived this requirement, reducing the buffer strip to 25 feet around all wetland resources on the site, and exempting wetland crossings and the looping of water mains. Exh. 2, Conditions 40-45. The conservation agent identified the aspects of the project which the Commission believed would unduly disturb the buffer zone: part **[*53]** of Road A, several stormwater basins (P1.1, P3.5 and P4.2), Buildings 4 and 5, snow storage locations between Buildings 4 and 5 as well as south of Building 17, and parking and snow storage areas associated with Road C. Â [12] Exh. 56, P 11. In partially waiving the no-build requirement, the Board argues that it balanced the competing requests of the Conservation Commission and the developer's desire to build affordable housing.

The Board and its engineering consultant, Mr. Houston, also criticized Simon Hill for not submitting an operations and maintenance plan to show how it would protect the wetlands from the effects of the proposed development so the Board could evaluate the requests for waivers from local wetland buffer requirements. Â [13] Exhs. 61, P 19; 25, Â§ 2.B. As noted above, this argument does not establish **[*54]** the Board's case of a local concern.

Norwell's designation of a local no-disturb zone surrounding wetland resources as a resource itself is not unusual. See, e.g., *Hopkinton, supra*, No. 00-05, slip op. at 18; *Rising Tide Development, LLC v. Sherborn, supra*, No. 03-24, slip op. at 25. The importance of buffers generally is described in the WPA regulations, *310 CMR 10.00*. Indeed, the Town conservation agent, Ms. Hardy, is correct that the necessity of a buffer zone to protect wetlands is widely accepted among the scientific community. See Exh. 56, P 10. Under the WPA regulations, a Notice of Intent is required for certain activities within 100 feet of certain designated resource areas, including bordering vegetated

---

[12] The Board also complains of disturbance in the DEP 100-foot buffer zone to the bordering vegetated wetlands, but as discussed above, the question of the project's impact on state resources will be addressed outside this proceeding.

[13] The Board also argues that the developer failed to fulfill representations to MassHousing to fully comply with applicable environmental regulations, including the buffer requirements. Exh. 1, p. 4, P 6.

wetlands. *310 CMR 10.02(1)*. As support for the more stringent local buffer requirement, Ms. Hardy cited a study finding that "the removal of 20% of the forest cover on lands within … 1000 [meters] of a wetland appears to have approximately the same impact on herptile and mammal species richness as the loss of 50% of the wetland proper." Exh. 56, P 10. She stated it was her opinion and that of the Commission that **[*55]** the placement of structures and impervious features close to the wetlands increases the volume of stormwater runoff and pollution to the wetlands, threatening the interests protected under the WPA and the interests of water quality, wildlife, sedimentation control, rare plant and animal species, fish/shellfish habitat and erosion control specifically protected by the Norwell wetland protection bylaw. She and the Commission had recommended that the Board not waive the 50-foot buffer in the bylaw requirement. Exh. 56, PP 12-13; Exh. 39. However, Ms. Hardy's testimony assumed the developer had the burden of demonstrating no adverse impact on the wetland, whereas the burden is on the Board in this proceeding. See Exh. 56, P 10.

Mr. McInnis, Superintendent of the Norwell Water Department, also stated generally that any project "in environmentally sensitive areas which contribute to the public water supply" should comply with the local regulations of the Aquifer Protection District because any ground or surface water contamination resulting from the project would eventually impact the quality of water in Zone II, a primary recharge area for the Bowker Street well. Exh. 62, P 6. However, **[*56]** his testimony noted that the project is located in Zone III to the municipal water supply on Bowker Street, and he did not indicate the size of the well, its proximity to the project, or which aspects of the regulations were important specifically to the site. See Exh. 62, P 5.

Mr. McKenzie, the developer's consulting engineer, stated that "[i]t is common practice to construct stormwater management facilities in close proximity to wetlands pursuant to [an] Order of Conditions that describes construction techniques and requirements necessary to ensure the protection of wetland resource areas." Exh. 68, P 15. Simon Hill complains that the Board did not distinguish between the different types of disturbances possible from the project (such as foundations, deck footings, stormwater management facilities or other infrastructure). It argues that the proximity of wetlands to building foundations does not raise soil stability issues regarding foundation construction and that this issue would be addressed during construction. See Exh. 53, P 12.

Although most of the Board's criticisms were general, the Board's engineering consultant raised several specific concerns with the location of stormwater **[*57]** management basins at the edge of wetlands. First, Mr. Houston suggested that the excavation would cause direct alteration of the bordering vegetated wetlands. He stated that "major construction activity, such as construction of buildings, roads, and stormwater basins at the edge of wetland resource areas without any minimum separation would likely result in damage to wetland resources." Exh. 61, P 42. He also noted that since the property is in the Norwell Aquifer Protection District, the wetlands are critical to protecting the quantity and quality of the Town public water supply. Exh. 61, P 42.

However, his opinion was based on an unsupported assumption that "it is likely that structurally unsuitable wetland soils extend under many of the embankments required for the on-site [stormwater] basins." Exh. 61, P 45. "Conjecture, even when offered by a credible expert witness, does not provide the type or measure of evidence necessary to persuade the Committee that the project as proposed would result in an adverse impact on the wetland resources intended to be protected by the bylaw." *Weston Development Group v. Hopkinton, supra*, No. 00-05, slip op. at 20. Mr. Houston's conclusion **[*58]** is not credible on the record presented.

Simon Hill's engineer agreed with Mr. Houston that construction of the stormwater basins close to the wetlands will necessitate dewatering, but stated that a construction phase best management practices operations and maintenance plan developed prior to construction will address the issue, in accordance with industry practice. Exh. 68, P 18.

Mr. Houston also raised a concern that the water surface elevation of basin P3.2 would exceed the elevation of the nearby on-site roadways, and the developer has not shown suitable replication for its proposed and approved wetlands crossing. Exh. 61, PP 47-48. With regard to Basin P3.2, Mr. McKenzie pointed out that Mr. Houston erroneously identified catch basins that are not designed to discharge into that basin, and stated it will not overtop Road A as Mr. Houston suggested. Exh. 68, P 20. He also stated that the details of the wetlands replication area

are not yet necessary because there is sufficient area west of the proposed wetlands crossing to accommodate a bordering vegetated wetland replication area. Exh. 68, P 19.

The Board argues that Simon Hill offered no evidence of mitigation measures to address **[*59]** the impacts to the buffer area. However, Simon Hill's engineer, Mr. McKenzie, indicated that detailed construction plans developed pursuant to the Order of Conditions would address wetlands impacts. Exh. 68, P 15.

Mr. McKenzie testified that the developer would not object to a general condition that no building foundation be built within 20 feet of any wetland, but would not agree to such a condition regarding stormwater basins. Exh. 68, P 15. Since Simon Hill has offered to restrict foundations closer than 20 feet from bordering vegetated wetlands, we will require such a 20-foot buffer by condition for building foundations. However, on this record, the Board has not demonstrated, with respect to the very specific circumstances of this proposal, that the local concerns it cites for its 25-foot buffer zone, rather than the buffer proposed by the developer, outweigh the need for affordable housing.

Accordingly, any conditions regarding the 25-foot buffer requirement shall be MODIFIED to provide that no building foundation shall be built within 20 feet of any wetland resource and otherwise modified to conform to this decision. Furthermore, Simon Hill will be required to file a Notice **[*60]** of Intent under the WPA.

C. Groundwater Mounding

In Condition 70 of its decision, the Board requires that "the increase in groundwater elevation due to mounding caused by the Soil Absorption System (SAS) shall be limited to one foot at the property line, which is good engineering practice and necessary to address any impact to abutting residences." Exh. 2. The Board argues that "mounded groundwater emanating from the leaching system [or] soil absorption system, and/or stormwater basins facilities which are designed to infiltrate water must be limited in order to preclude any detrimental impact to abutting property owners and their septic systems and that imposition of such a condition was a legitimate local concern." Board brief, p. 38, citing Exhs. 66; 61, PP 57-63. The Board's argument focuses, however, on the requirements of the DEP, which the developer has acknowledged it will be bound to follow.

The Interveners join this argument, claiming that the planned wastewater and stormwater systems will cause groundwater mounding on their properties, rendering their own septic systems noncompliant with Title 5 and flooding their basements. They also argue that the wastewater system **[*61]** will cause effluent breakout on to the ground surface or into their systems resulting in "associated hydraulic and public health impacts to the Interveners' basements and septic systems." Interveners brief, pp. 13-14.

Neither the Board nor the Interveners identify a local bylaw, regulation or rule imposing a limit on the height of groundwater mounding at the property line or any increase attributable to the project. As the parties are aware, the DEP will conduct its review of Simon Hill's wastewater and stormwater management systems pursuant to DEP requirements. According to Mr. Houston, the state review is too limited: Although the DEP groundwater discharge permit process requires a groundwater mounding analysis, it focuses on the maximum height of mounded groundwater under the soil absorption system. It is not intended to address the lateral impact of the groundwater mounding beneath stormwater recharge basins or abutting properties. Exh. 61, P 57.

Simon Hill's compliance with state law with regard to these issues is not within the Committee's jurisdiction. G.L. c. 40B, Â§ 23. Therefore the Interveners' lengthy arguments regarding whether the developer complies with the state DEP **[*62]** standards for a groundwater discharge permit are inapposite in this proceeding. Â [14]

Similarly, the Interveners' reliance on Mr. Houston's assertion that the construction of a soil absorption system for the proposed flow of this project was not reasonably foreseeable to Town regulators is unpersuasive, as his testimony is not credible on this point. In the absence of exceptional circumstances, the Board should not be

---

[14] The Interveners also argue that the developer has not provided the data and analyses necessary to determine whether a treatment facility compliant with Title 5 can be built. However, the developer will have to demonstrate it meets the DEP requirements for a groundwater discharge permit.

permitted to place additional restrictions on affordable housing with regard to a matter that has not been regulated locally previously. *9 North Walker Street Development, Inc. v. Rehoboth*, No. 99-03, slip op. at 9-10 (Mass. Housing Appeals Committee June 1, 2003), *remanded on other grounds*, No. CV2003-0767 (Bristol Super. Ct. Dec. 28, 2004). *See Lever Development, LLC v. West Boylston*, No. 04-10, slip op. at 10 (Mass. Housing Appeals Committee Dec. 10, 2007); *Hamlet Development Corp. v. Hopedale*, No. 90-03, slip op. at 8-15 (Mass. Housing Appeals Committee Jan. 23, 1992); **[*63]** *Walega v. Acushnet, supra*, No. 89-17, slip op. at 5-7.

1. Wastewater Effects on Groundwater Mounding

Simon Hill also argues that the testimony on which the Interveners and the Board rely to argue that the wastewater system will result in excessive groundwater mounding is speculative and should be disregarded. Mr. Price, the Interveners' witness, a hydrogeologist, stated that the proposed soil SAS for the project's wastewater treatment facility is roughly 210 feet from Ms. Leman's basement and 325 feet from Mr. Graefe's basement. He presented an estimate of groundwater mounding in the area of the Interveners' homes and septic systems, based on assumptions of the saturated thickness and the hydraulic characteristics of the soil, and the proposed effluent discharge rate for the project. He gave as resulting estimates groundwater mound heights of approximately 12 feet beneath the proposed SAS, 11.6 feet at the property boundary, 9.7 feet at the foundation of the nearest existing house, and roughly between 9.7 to 11.6 feet at the septic systems of Ms. Leman and Mr. Graefe. Based upon this, he stated the proposed SAS will likely be unable to perform pursuant to state regulations, **[*64]** and "will likely, to a reasonable degree of scientific certainty, result in system failure with effluent breakout onto the ground surface or into the system resulting in associated potential hydraulic and public health impacts to the basements and septic systems of the interveners." Exh. 66, PP 3, 5, 8-9.

The developer's engineer, Mr. McKenzie, noted that Mr. Price's assumption regarding "the hydraulic characteristics of the soil (e.g. saturated thickness, hydraulic conductivity) and other assumptions used to derive the initial estimate of the groundwater mound could result in grossly over estimating the impacts of groundwater mounding" on the Interveners' properties. Exh. 67, P 6. Indeed, on cross examination, Mr. Price admitted that his estimate was hypothetical and an illustrative example based on assumptions, rather than evidence. Tr. III, 104-105. Therefore, on the record before us his opinion is not credible.

The Board and Interveners have not demonstrated a local concern that outweighs the need for affordable housing with regard to this issue.

Simon Hill argues generally that the Board has not demonstrated a local concern regarding wastewater disposal. The Board did not demonstrate **[*65]** local concerns with respect to other wastewater management conditions. Therefore any conditions regarding wastewater standards shall be MODIFIED to be consistent with the developer's proposed plans.

2. Stormwater Effects on Groundwater Mounding

The Interveners also argue that the mounding from the stormwater management system will contribute to the mounding resulting from the wastewater system. Mr. Houston testified regarding his concerns that mounding from stormwater recharge from Basin P4.2 will act cumulatively to further increase the elevation of groundwater on these abutting properties. Exh. 61, P 61.

Mr. McKenzie noted that DEP stormwater management regulations do not require designers to take mounding caused by an SAS into consideration. He also stated that since Basin P4.2 is 550 feet from the SAS, any mound from the SAS would not affect the groundwater elevation below this basin, and Mr. Houston's concern about the effect of the SAS on Basin P4.2 is overstated. He did note that if mounding analysis warrants, stormwater basins will be raised to comply with the 2-foot separation requirement after accounting for any groundwater mound. Exh. 68, P 26. Mr. McKenzie also disputed **[*66]** Mr. Houston's claims regarding groundwater mounding, based on his independent experience on another project in Norwell with similar site characteristics. Tr. I, 139. The Board's and Interveners' evidence on this issue is less credible than that of the developer, and on this record they have not demonstrated a valid local concern that outweighs the need for affordable housing.

3. Conclusion Regarding Groundwater Mounding

Simon Hill states that the foregoing claims, which address issues that will be considered in the DEP review process, are premature. Mr. McKenzie testified that "if the hydrogeologic study reveals that groundwater mounding will impact structures and septic systems on adjacent properties, the project plans will be altered to address the effects of groundwater mounding to the extent required [and] such modifications are not appropriate at this preliminary stage." Exh. 67, P 5; see Exh. 68, P 26. Therefore, since the developer has offered this assurance, we will require the hydrogeologic study and any required alteration of plans to address the effects of increased groundwater mounding. Condition 70 shall be MODIFIED to provide this requirement, and any conditions **[*67]** relating to groundwater mounding shall be MODIFIED to be consistent with this decision.

D. Wastewater Treatment System in Aquifer Protection District

The Interveners argue that the siting of the wastewater treatment facility within the Town's Aquifer Protection District renders the project noncompliant with the Massachusetts Environmental Policy Act (MEPA), G.L. c. 30, Â§Â§ 61-62I. They argue that the Board's decision improperly included a waiver of Zoning Bylaw Â§ 4300 which, they contend, prohibits use of a wastewater disposal system within the Aquifer Protection District. Exh. 18, Â§ 4300. Pursuant to MEPA, the Secretary of Energy and Environmental Affairs issued a certificate, which stated that the project "should comply with all the restrictions and conditions of development within the APD, established to protect and preserve current and future drinking water resources of the Town of Norwell. The proponent should consult the Town of Norwell's Water Department to address and resolve the issues raised in their comment letter." Exh. 14, p. 5.

The Interveners' argument is misplaced for several reasons. First, they suggest that the MEPA certificate has transformed the local zoning **[*68]** requirements of the Aquifer Protection District into state law requirements. Even assuming that the Interveners would be correct with this interpretation, since the Committee does not resolve state law issues outside Chapter 40B, any recourse concerning the enforcement of a state order embodied in the certificate would be with the agency that issued it, not the Committee. Â [15] The Committee's review of the Board's decision with regard to the wastewater disposal system is limited to the local concerns, not any question of state law.

Second, the Interveners point out that the certificate was issued after the Board issued its decision, and therefore argue that the Board was not privy to the requirements contained in the letter. However, to the extent that the Board should comply with the suggestion in the MEPA certificate, it has already acted for the Water Department for the purpose of the comprehensive permit hearing; thus the necessary consultation has taken place. Even though the Board was not aware **[*69]** of the language of the certificate, its decision discusses the APD and reaches a resolution. Moreover, the language of the certificate appears not to constitute a mandate to the developer to comply with the APD regulations, but rather seems to encourage the type of consultation and review that has taken place to resolve the issue.

Finally, the Interveners' suggestion that the wastewater disposal system proposed by the developer is the type prohibited within the APD is not supported by the language of the bylaw or the facts. The Interveners argue that Zoning Bylaw Â§ 4360's prohibition of "[n]on-sanitary treatment or disposal works that are subject to 314 CMR 4.00 and 5.00 ..." in the APD applies to the proposed wastewater treatment. Exh. 18, Â§ 4360(r). However, under Â§ 4390 of the bylaw governing the APD, the term "non-sanitary treatment or disposal works" is defined as "Wastewater discharge from industrial and commercial facilities containing wastes from any activity other than the collection of sanitary sewage, including but not limited to, activities specified in the Standard Industrial Classified Codes set forth in 310 CMR 15. **[*70]** 004(6)." Exh. 18, Â§ 4390. See Exh. 68, P 16.

Based on the record, we find that the proposed wastewater disposal system is not a commercial system within the definition of Â§ 4390. Therefore, the Interveners' arguments that the developer is proposing a prohibited system are

---

[15] If the Interveners were correct in their argument that an applicable local prohibition has been transformed into a state requirement, the developer would remain obligated to comply with it, as with all applicable state and federal requirements.

without merit. Indeed, the Board's partial waiver of Â§ 4300 in its decision evidences an assumption that this system would qualify by special permit, as the Board noted that under *760 CMR 56.05(7)*, waivers were not required from special permit requirements, but it nevertheless waived the special permit requirements "as is necessary to allow operation of the proposed on-site wastewater treatment plant." Exhs. 2(B), p. 6; 18, Â§ 4300 (Aquifer Protection District).

Accordingly, we find that the Interveners have demonstrated no valid local concern with regard to the placement of the wastewater disposal system within the APD.

E. Water Quality and Safety

1. Monitoring of Water Quality

At the request of the Board of Water Commissioners and Water Department, the Board conditioned the project on the installation of water quality monitoring wells along the property line downgradient of the **[*71]** project in the area of Well 9, requiring the developer to meet local, state and federal drinking water standards at the proposed property line pursuant to Zoning Bylaw Â§ 4354(b). Exh. 18, Â§ 4354(b). See Exh. 2, Conditions 61, 68, 69.

As reason for the requirement, Norwell's Water Superintendent, Mr. McInnis, testified that the property is located in Zone III to the public water supply on Bowker Street and is also within the Aquifer Protection District. Exh. 62, PP 5-6. The Board argues that in the absence of any evidence that this requirement would render the project uneconomic, the condition reflecting a legitimate local concern should be upheld by the Committee. However, the Board's focus on economics does not prove its case that there is a valid local concern with regard to this specific site that supports the condition. Therefore, the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with respect to this issue and this requirement is STRUCK. The developer is, of course required to comply with federal and state drinking water requirements.

2. Looped Water Distribution System

In its decision, the Board required Simon Hill to establish **[*72]** a water main loop via a second connection to one of the Town's water mains. Exh. 2, Condition 58. See Exh. 42. Norwell's Water Superintendent testified that a second connection to the Town water main is consistent with DEP 2008 guidelines for public water suppliers, affords redundancy, improves pressure to significantly improve fire protection and also provides superior water quality to a dead-end system. Exh. 62, P 8. However, he acknowledged on cross-examination that hydrant flow tests revealed that the pressure at Prospect Street is sufficient to comply with National Fire Protection Agency and Insurance Service Office standards. Tr. IV, 25-26. He also testified that Norwell flushes its water system, which is intended to benefit water quality in the system, and that the developer proposes to install cement-lined ductile iron piping for the water service. Tr. IV, 34-35.

The Board notes that the Committee has stated that looping of water systems is a best 'practice that should be provided wherever possible, citing *dicta* in *Lexington Woods, LLC v. Waltham, supra*, No. 02-36, slip op. at 19, 27-28. Again, it argues only that in the absence of any evidence that this requirement **[*73]** would render the project uneconomic, the condition should be upheld by the Committee.

As above, the Board's focus on economics does not prove its case. On the record before us, the Board has not adequately demonstrated a legitimate local concern with regard to the need for a looped water main system for this project that outweighs the need for affordable housing. See *Groton Housing Authority v. Groton*, No. 91-07, slip op. at 10 (Mass. Housing Appeals Committee Sept. 19, 1991) (Board failed to sustain its burden of proving that an unlooped water supply system will cause a health, safety, environmental, or other hazard). Cf. *Lexington Woods, supra*, No. 02-36, slip op at 19. The requirement for a looped water main shall be STRUCK.

F. Archaeological Concerns

During the Board's proceeding, the Norwell Historical Commission reported to the Board that a Native American artifact was found during the site walk, and stated that the site had a high to moderate archaeological sensitivity to

contain Native American sites. Exhs. 2(A), p. 4; 13; 57, P 7. The Board argues that following the Historical Commission's submission of this information to the Massachusetts Historical Commission **[*74]** (MHC), that Commission issued a written recommendation to the Secretary of Environmental Affairs. It recommended that an "intensive (locational) archaeological survey (950 CMR 70) be conducted for the project." Exh. 49. The Board notes in its brief that the recommended survey had not been conducted by Simon Hill as of the hearing before the presiding officer.

Simon Hill argues that since Norwell does not have a local historic preservation bylaw and the project site was not claimed as historically significant until after the developer had applied for its comprehensive permit, Protection of archeological resources cannot qualify as a local concern. See *Lever Development, LLC v. West Boylston, supra*, No. 04-10, slip op. at 12. Simon Hill also states that, although it objects to the MHC's notice of adverse effect, questions its jurisdiction over the project, and believes its role is advisory, rather than compulsory, it will cooperate in MHC review to the extent required under G.L. c. 9, Â§Â§ 26-27C and 950 CMR 71.00. It also argues that it has satisfied *950 CMR 71.07(1)* by submitting the ENF required under **[*75]** MEPA, and that the project site is not listed in the Inventory of Historic and Archaeological Assets of the Commonwealth maintained by MHC or the State Registry of Historical Places. Exh. 14.

Since the MHC action is a matter of state, rather than local law, it is not before the Committee. On this record the Board has not demonstrated a valid local concern, or provided any argument to support imposing a condition concerning archaeological resources. Accordingly, Condition 3 is STRUCK in its entirety, although of course, the developer must comply with state law. Any other conditions pertaining to archaeological concerns shall be MODIFIED to conform to this decision.

G. Other Conditions Challenged as Unsupported by Local Concerns

Simon Hill identifies other specific conditions to which it objects on the ground that they regulate matters that are not local concerns or constitute an attempt to regulate matters beyond those allowed under *760 CMR 56.05(8)(b)(2)*. Identified conditions that Simon Hill challenges in its brief may be evaluated. However, conditions that were not addressed in its brief have been waived. Simon Hill cannot revive its challenge by raising **[*76]** those conditions in its comments on the proposed decision. See *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee June 28, 1994), citing *Lobos v. Berlin, 338 Mass. 10, 13-14 (1958)*. Also see *Board of Appeals of Woburn v. Housing Appeals Committee, 451 Mass. 581, 595 n.25 (2008)*; *Cameron v. Carelli, 39 Mass. App. Ct. 81, 85 (1995)* and cases cited. Â [16]

Condition 38, regarding U.S. mail delivery. Since the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with regard to this condition, it shall be STRUCK. The developer shall be required to comply with all applicable federal law requirements.

Condition 49 regarding signs for fire lanes, which re only applicable to commercial developments. Since the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with regard to this condition, **[*77]** this condition shall be STRUCK.

Condition 50 regarding sidewalks. Since the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with regard to this condition, it shall be MODIFIED to provide for sidewalks in the locations which the developer's principal indicated were acceptable on cross-examination.

---

[16] In addition, even though raising issues the Pre-Hearing Order is necessary to identify the issues joined for hearing, failure to pursue those issues in the post-hearing brief constitutes a waiver of them. Thus, Simon Hill's lengthy and detailed list of requested changes to the numerous conditions imposed by the Board should have been submitted with its brief, rather than only in response to the proposed decision. In cases in which a board's decision is lengthy and detailed, as is the case here, the parties are required to specifically identify the relief sought with respect to challenged conditions or other issues raised.

Condition 72, regarding the definition of bedrooms. Since the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with regard to this condition, the first sentence is RETAINED and the condition shall be otherwise STRUCK, except for a provision defining bedrooms consistent with Title 5.

Condition 77, requiring tree marking as part of a tree protection plan. Since the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with regard to this condition, it shall be MODIFIED to state:

> The Applicant shall be required to submit Prior to the beginning of any site work a final landscape plan that is consistent with the design review guidelines issued by the Commonwealth of Massachusetts for comprehensive permit projects.

Condition 78, regarding Planning **[*78]** Board approval under the scenic road bylaw, Since the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with regard to this condition, it shall be MODIFIED to state:

> For work within the Prospect Street right of way, the local scenic road regulations are waived. However, any work shall be subject to the Scenic Road Act, if applicable.

Condition 79, regarding plant material guarantees shall be RETAINED as Simon Hill's objection was waived. Â [17]

Condition 80, regarding native plant materials, shall be RETAINED, as the developer has not demonstrated that this condition will contribute an adverse economic impact. On cross-examination, Mr. McKenzie acknowledged he did not know whether it would cost more or less to limit the landscape plan to native plants. Tr. II, 125-126.

Condition 81 to the extent it is inconsistent with the landscape plans identified as Exhibit 6. Since the Board has not demonstrated a valid local concern that outweighs **[*79]** the need for affordable housing with regard to this condition, it shall be MODIFIED to be consistent with Exhibit 6.

Condition 86 regarding limit of work fences and signs. Since the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with regard to this condition, it shall be MODIFIED to provide only for fencing and signs consistent with Simon Hill's proposed plans.

Conditions 87-88 to the extent they grant unlimited discretion to the police and fire departments. These conditions are overly vague and are therefore STRUCK.

Condition 90, a conservation restriction. Since the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with regard to this condition, it shall be MODIFIED to provide:

> A conservation restriction pursuant to G.L. c. 184, Â§ 31, in a form acceptable to town counsel, shall be recorded after the project is completed.

Condition 113 regarding Board's approval of earth stockpiling. Since the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with regard to this condition, it shall be STRUCK.

Condition 125, required documents **[*80]** . Since the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with regard to this condition, it shall be STRUCK.

VI. CONDITIONS CHALLENGED AS OUTSIDE BOARD'S AUTHORITY

Since the Board's power under Chapter 40B derives from, and is generally no greater than, that collectively possessed by other local boards, conditions relating to programmatic issues, such as project finding, regulatory and financial documents and sale of affordable units, as well as certain other requirements, may be reviewed by this Committee to determine whether they are beyond the power of a board to impose or otherwise intrude impermissibly into areas of direct programmatic concern to state or federal finding and regulatory authorities. The

---

[17] Mr. Sullivan's testimony, on the whole, indicates he waived this provision. Tr. II, 97.

Committee has the authority to strike or modify conditions that fall outside G.L. c. 40B, Â§ 21. Â [18] *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee, 457 Mass. 748, 762 (2010)*.

Simon Hill has designated **[*81]** numerous conditions as unlawfully extending beyond the Board's authority and otherwise violating Chapter 40B, Â§Â§ 20-23 and 760 CMR 56.00. Those challenges fall into several areas, discussed separately below.

A. Matters within Authority of Subsidizing Agency

Simon Hill argues that the Board has imposed improper conditions that purport to regulate matters within the sole responsibility of the subsidizing agency for the project. Specifically, it identifies Conditions 15 through 26 and 33. Pre-Hearing Order, Â§ IV, PP, 4. Simon Hill brief, p. 36. The Board did not address this issue in its brief. In Amesbury, the Court stated:

> ...although the board's condition-setting power under Â§ 21 is not expressly confined to the four or five examples specifically mentioned in the section, that power is circumscribed in substance by those examples, and conditions imposed by the board must fit within the same kind or class of local concern or issue that the examples address. Accordingly, insofar as the … conditions included requirements that went to matters such as, inter alia, project funding, regulatory documents, financial documents, and the timing of sale of affordable **[*82]** units in relation to market rate units, they were subject to challenge as ultra vires of the board's authority under Â§ 21.

Id. at 757-758. Pursuant to the court's direction in *Amesbury*, the Committee examines conditions that address matters within the province of the subsidizing agency carefully. However well-intentioned the conditions are, or however closely they may appear to follow the current requirements of the subsidizing agency, such conditions improperly encroach on the responsibility of the subsidizing agency and are therefore impermissible.

For the most part, the identified conditions, even if generally consistent with subsidizing agency requirements, are beyond the authority of the Board. Since these issues will be handled by documents required by the subsidizing agency, the Board's effort to control the procedure and substantive requirements interferes with the areas of direct programmatic concern to the subsidizing agency. *Amesbury, supra, 457 Mass. 748, 755-758, 764-765*.

Condition 15, Income Eligibility Requirements impermissibly intrudes on the subsidizing agency's authority and is hereby STRUCK in its entirety.

Condition **[*83]** *16, Unit Size and Condition 17, Proportionality*, which pertain to the comparability of affordable to market units with respect to living space, parking and bedrooms, improperly intrude into the area of programmatic concern specifically left to the subsidizing agency, which addresses these issues in detail. Therefore, these conditions are STRUCK in their entirety.

Condition 18, Units Interspersed, which requires all affordable units to be indistinguishable on the exterior from the market rate -units, and requires units to be interspersed throughout the project site, also improperly intrudes into the area of programmatic concern specifically left to the subsidizing agency which addresses these issues in detail. Therefore, this condition is STRUCK in its entirety.

Condition 19, Location, which sets requirements for the location of affordable units, and sets requirements for the Regulatory and Monitoring Agreements, also improperly intrudes into the area of programmatic concern specifically left to the subsidizing agency, which addresses these issues in detail. Therefore this condition is STRUCK in its entirety.

---

[18] The rulings addressing the Board's authority are independent of the Appellant's proof of its case with regard to economies. *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee, 457 Mass. 748 (2010)*. See *White Barn Lane, LLC v. Norwell, supra*, No. 08-05, slip op. at 2.

Conditions 20-22, Lottery Preference, Lottery Costs and Accommodation **[*84]** of Disability, all improperly intrude into the area of programmatic concern specifically left to the subsidizing agency, which addresses these issues in detail. Therefore, these conditions are STRUCK in their entirety.

Condition 23, which sets out requirements for the regulatory and monitoring agreements and require Board and town counsel review and approval, improperly intrudes into the area of programmatic concern specifically left to the subsidizing agency, which addresses these issues in detail. Therefore, this condition is STRUCK in its entirety.

Condition 24, Construction and Occupancy, imposes requirements for the timing of construction and certificates of occupancy of housing units. This condition improperly intrudes into the area of programmatic concern specifically left to the subsidizing agency, which addresses these issues in detail. Therefore, this condition is STRUCK in its entirety.

Condition 25 Affordable Unit restrictions and lien priority, which sets requirements for the occupancy and transfer of affordable units improperly intrudes into the area of programmatic concern specifically left to the subsidizing agency, which addresses these issues in detail. **[*85]** Therefore, this condition is STRUCK in its entirety.

Condition 26, Profits, which sets out the obligation of the applicant to comply with current DHCD regulations and guidelines regarding the posting of financial surety pending certification of the project profits, improperly intrudes into the area of programmatic concern specifically left to the subsidizing agency, which addresses these issues in detail. Therefore, this condition is STRUCK in its entirety.

Condition 33, Affordable Housing, which sets requirements for the Homeowners Association with respect to affordable housing also improperly intrudes into the area of programmatic concern specifically left to the subsidizing agency, which addresses these issues in detail. Therefore, this condition is STRUCK in its entirety.

To the extent that other conditions in the Board's comprehensive permit conflict with requirements of the subsidizing agency, they shall be MODIFIED to conform to such requirements.

B. Conditions Subsequent Relating to Post-Permit Review

Simon Hill challenges the Board's conditions related to post-permit review as violating Chapter 40B and unsupported by local concerns. In particular, it objects to **[*86]** conditions that require or encourage Board involvement in the review and approval of final plans. Â [19] Simon Hill brief, p. 33.

Under Chapter 40B, the Board is to conduct a comprehensive hearing on the permit application. The statute does not permit the Board to conduct subsequent proceedings once the permit has been issued. The comprehensive permit is based upon preliminary plans; the final plans are subject to review and approval for consistency with the comprehensive permit by the person or entity that normally is responsible for conducting such a review for non-subsidized housing. *760 CMR 56.05(10)(b)* states:

> A Comprehensive Permit … shall be a master permit which shall subsume all local permits and approvals normally issued by Local Boards. Upon presentation of the Comprehensive Permit, subsequent more detailed plans (to the extent reasonably required relative to the local permit in question), and final approval from the Subsidizing Agency … all Local Boards **[*87]** shall take all actions necessary, including but not limited to issuing all necessary permits, approvals, waivers, consents, and affirmative actions such as plan endorsements and requests for waivers from regional entities, after reviewing such plans only to insure that

---

[19] In the Pre-Hearing Order, Simon. Hill identified additional conditions, but did not raise them in its brief and they are waived. Argument raised for the first time in comments on a proposed decision is untimely. See *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee June 28, 1994), citing *Lobos v. Berlin, 338 Mass. 10, 13-14 (1958)*. Also see *Board of Appeals of Woburn v. Housing Appeals Committee, 451 Mass. 581, 595 n.25 (2008)*; *Cameron v. Carelli, 39 Mass. App. Ct. 81, 85 (1995)* and cases cited.

they are consistent with the Comprehensive Permit (including any Waivers), the final approval of the Subsidizing Agency, and applicable state and federal codes.

During the hearing, Ms. Barbour, Chair of the Board testified that the Board's practice is to delegate the approval of the final plans to a peer reviewer or construction monitor and that this individual would get "everything." Tr. III, 147, 153. The Board suggests this is consistent with the Committee's expectation for other Boards, citing *LeBlanc v. Amesbury*, No. 06-08, slip op. at 22 (Mass. Housing Appeals Committee May 12, 2008). Although the Board's chair testified that language it its decision providing that state review shall be conducted by the Board may be interpreted to mean review is to be performed by the Board's agent or designee, the language of the permit expressly provides for the Board itself to conduct review and approval. Moreover, on **[*88]** the record it is clear that Board action will require public meetings under open meeting law requirements, which would add to the cost and delay of the project. Tr. II, 194-195; III, 36-38.

In its brief, Simon Hill specifically challenges conditions that "require and/or encourage constant Board involvement in review and approval of final plans," citing as examples, Conditions 4, 89 and 91. Simon Hill brief, p. 34. Specifically it objects to "[a]ny condition that requires the submission of Definitive Site Development Plans" to the Board for review and approval during public hearings." Simon Hill brief, p. 37. Simon Hill argues that requiring such a submission to be approved by the Board would require it to undergo one or more public hearings, which would constitute improper post-permit subsequent proceedings. The developer argues that instead, plans should be submitted to the building inspector to ensure consistency with the comprehensive permit decision, and if that individual does not have the technical expertise to ensure consistency of the site plans and to monitor site construction, it would not object to the building inspector engaging an outside engineer.

As written, the challenged **[*89]** provisions contain an improper condition subsequent, and expansion of the Board's single comprehensive permit role inconsistent with Â§ 56.05(10)(b). These requirements are inconsistent with the purpose of Chapter 40B that the Board issue one comprehensive permit and are thus beyond the Board's authority. See *Attitash Views, LLC v. Amesbury*, No. 06-17, slip op. at 11-12 (Mass. Housing Appeals Committee Oct. 15, 2007), *aff'd*, *457 Mass. 748 (2010)*, and cases cited. Also see *Paragon Residential Properties, LLC v. Brookline, supra*, No. 04-16, slip op. at 50-53. Those requirements for active Board participation and oversight beyond its role as a route of appeal in future disputes between the developer and a local board are also improper. Therefore all provisions in the Board's permit that require the developer to obtain review or approval from the Board shall be MODIFIED to provide for review and approval by the appropriate town entity, staff or consultant in compliance with *760 CMR 56.05(10)(b)* and town practice as is customary with regard to similar unsubsidized housing.

In addition, the comprehensive permit shall be MODIFIED **[*90]** in the following respects:

Condominium Documents. Simon Hill challenges "[a]ny condition that requires review and approval of condominium documents for the development, other than by town counsel only to ensure consistency with the comprehensive permit as it may be modified by the Committee." Simon Hill brief, p. 37. To the extent that such a condition requires review and approval by the Board, the condition shall be MODIFIED to provide for review and approval by the appropriate town entity, staff or consultant in compliance with *760 CMR 56.05(10)(b)* and town practice as is customary with regard to similar unsubsidized housing. See Tr. II, 91-95.

Documentation Requirements. Simon Hill also objects to requirements that the Board "receive and process every document associated with permitting and construction" of the project. It argues that the Board "should only be involved where a question of consistency arises on a major design issue and then only as a last resort." Simon Hill brief, pp. 35-35. Such provisions constitute an improper condition subsequent and expansion of the Board's role, inconsistent with Chapter 40B. Therefore, any condition that **[*91]** requires the submission of any document to the Board, shall be MODIFIED to provide that such document shall be provided to the appropriate town entity, staff or consultant in compliance with *760 CMR 56.05(10)(b)* and town practice as is customary with regard to similar unsubsidized housing.

Conditions 4, 89 and 92, providing for continuing jurisdiction by the Board, and setting out requirements for submission to and review and approval by the Board, shall be MODIFIED to remove the continuing Board jurisdiction and to provide for review and approval by the appropriate town entity, staff or consultant in compliance with *760 CMR 56.05(10)(b)* and town practice as is customary with regard to similar unsubsidized housing.

Conditions 6, 7 and 91, relating to plan changes after issuance of the comprehensive permit mischaracterize the requirements of *760 CMR 56.05(11)* regarding changes after issuance of a permit, and are therefore in violation of the regulation. The conditions are STRUCK. Â [20]

Condition 96, requiring the developer to obtain a Notice to Proceed from the Board, shall be MODIFIED to provide that such Notice shall be obtained from the appropriate town entity, staff or consultant in compliance with *760 CMR 56.05(10)(b)* and town practice as is customary with regard to similar unsubsidized housing.

Conditions 104, 106, 124, 126-129, regarding surety, construction sequencing, building and occupancy permits, shall be MODIFIED to provide for review and approval by the appropriate town entity, staff or consultant in compliance with *760 CMR 56.05(10)(b)* and town practice as is customary with regard to similar unsubsidized housing, as is required generally for the comprehensive permit. Â [21]

VII. PEER REVIEW FEES

Simon Hill argues that the Board's peer review fees are excessive and in violation of a scope of services agreement. It states that the Board entered into an agreement with Professional Services **[*93]** Corporation (PSC) to provide peer review services pursuant to a "scope of services" negotiated with the developer. However, Simon Hill asserts that PSC performed independent studies for the Board as well as other services beyond the agreed scope of services, including formatting conditions of approval and preparing a supplemental memorandum on waiver requests and unresolved issues, as well as conducting independent studies of soil stability and construction methods. See Exh. 3. The Board did not address this issue in its brief.

Specifically, Simon Hill raises the following objections to charges for fees:

Charges for formatting conditions of approval totaling $ 7,342, which it alleges ultimately formed part of the Board's decision. Exh. 48(G); Tr. III, 47-53.

Charges for site visits and work Simon Hill contends was unauthorized, including site visits to witness test pits, totaling $ 2,424. Tr. III, 47-53; Exh. 48(G). The developer alleges that Town Board of Health personnel were trained to witness the test pits and PSC's services were not needed for the task and were prohibited by *760 CMR 56.05(5)(b)*. See Exh. 48(A).

Charges for the independent **[*94]** study by McKown Associates, LLC on soil stability issues, for a total of $ 2,543.56. Exh. 48(K). The developer argues this work was inappropriate because Simon Hill did not submit any technical information on soil stability or construction methods. Exhs. 2(A), File Inventory, pp. 1-10; 53, P 12. It also argues that this study was beyond the scope of preliminary planning.

Charges for PSC's services for general representation as a Chapter 40B consultant, which Simon Hill argues was an attempt to "end-run" the Committee's regulations prohibiting a Board from charging applicants for legal fees, and violated G.L. c. 44, Â§ 53G. See *760 CMR 56.05(5)(a)*. Simon Hill argues that the PSC invoice should be adjusted down to $ 6,400, the amount quoted for two iterations of review of all technical aspects of Simon Hill's design. Exh.

---

[20] Although Simon Hill did not cite all of these conditions specifically as objectionable in the Pre-Hearing Order, we have the authority to strike conditions unlawfully in conflict with our regulations. See *Amesbury, supra.*

[21] Simon Hill did not specifically cite these conditions as objectionable in the Pre-Hearing Order, which provides notice to the parties of the issues for hearing. Therefore, even though it briefly identifies them as of concern in its brief, they have been waived.

16. Simon Hill argues that any work performed beyond this amount was excessive, contrasting the $ 33,513.96 bill with the original $ 6,400 contract. Exhs. 15, 16, 48(K).

Under the Committee's regulations, fees may not be charged for independent studies on behalf of a board or for general representation, as the fees assessed are for review, **[*95]** not for advocacy. *760 CMR 56.05(5)(a)* and (b). Consequently the charges for formatting conditions of approval, which appear to be a total of $ 1,840, see Exh. 48(G), and the charges of $ 2,543.56 for the McKown study, see Exhs. 48(11), 48(K), are disallowed. See *Lever Development, LLC v. West Boylston, supra*, No. 04-10, slip op. at 38 (Committee determined developer was not obligated to pay fees for "independent studies on behalf of Board," beyond scope agreed to by Board, or for legal services).

Simon Hill has not demonstrated that the charges for the site visits to witness test pits were improper peer review services. See Exh. 48(A) (letter dated February 4, 2009). They are therefore allowed. Similarly, the developer has not indicated which charges, other than for formatting changes, were for improper general representation. Accordingly, the charges shall be reduced by the aforementioned amounts. *760 CMR 56.05(5)*.

Finally, Simon Hill requests that the Committee set a reasonable limit on post-permit escrow requirements. It argues that although the permit does not specify the amount of additional escrow the Board will require **[*96]** for post-permit review, it expects that the Board will request an additional $ 30,000 based on Article J(7)(a)(1) of the Board's regulations and previous escrow requirements. Exhs. 2, Condition 94; 19, p. 34, Â§ 7(A); 52, P 12; 70 PP 8-9. Although Ms. Barbour stated that the Board will not seek this amount, Exh. 63, P 5, Simon Hill argues that the Board's regulations suggest otherwise, and requests a protective order limiting these fee requirements.

Pursuant to *760 CMR 56.05(5)(b)(9)*, Simon Hill may be assessed construction monitoring fees not to exceed the "amount which might be appropriated from town … funds to review a project of similar type and scale in the town..." or fees that could be assessed to a non-affordable housing subdivision or a project of a type and scale similar to the proposed housing, and it may be required to place such fees in escrow to the extent consistent with construction of such similar unsubsidized housing. Condition 94 shall be MODIFIED to conform to these standards.

VIII. CONCLUSION AND ORDER

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms **[*97]** the granting of a comprehensive permit but concludes that certain of the conditions imposed in the Board's decision exceed the Board's authority or render the project uneconomic and are not consistent with local needs. The Board is directed to issue an amended comprehensive permit as provided in the text of this decision and the conditions below.

1. The amended comprehensive permit issued by the Board shall conform to the application submitted to the Board, as modified by Simon Hill during the Board's proceeding and the Board's original decision, as modified in this decision.

(a) The Board shall not include new, additional conditions, but shall MODIFY any condition in its decision that is inconsistent with, or otherwise conflicts in any way with, the Committee's decision or the requirements of 760 CMR 56.00.

(b) The developer is required to comply with all applicable local requirements that have not been waived.

(c) The Board shall take whatever steps are necessary to ensure that building permits and other permits are issued, without undue delay, upon presentation of construction plans, pursuant to *760 CMR 56.05(10)(b)*, that **[*98]** conform to the comprehensive permit and the Massachusetts Uniform Building Code.

(d) All Norwell town staff, officials, and boards shall promptly take whatever steps are necessary to permit construction of the proposed housing in conformity with the standard permitting practices applied to unsubsidized housing in Norwell.

(e) Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, Â§ 23 and *760 CMR 56.07(6)(a)*, this decision shall for all purposes be deemed the action of the Board.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development shall be constructed substantially as shown on plans entitled "Comprehensive Permit Plans, Simon Hill Village, Norwell, Massachusetts," dated February 18, 2009 by McKenzie Engineering Group, Inc. (Exhibits 6, Sheets 1 through 28) and 6F-A, and shall be subject to those conditions imposed in the Board's decision filed with the Norwell Town Clerk on June 29, 2009 (Exhibit 2), as modified by this decision, including, the prohibition of construction on the Simon Hill section of the site.

(b) The developer shall submit final construction plans for **[*99]** all buildings, roadways, stormwater management system, and other infrastructure to Norwell town entities, staff or officials for final comprehensive permit review and approval pursuant to *760 CMR 56.05(10)(b)*.

3. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those expressly waived by this decision or in prior proceedings in this case, or required to be waived to be consistent with this decision.

(b) The subsidizing agency or project administrator may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency **[*100]** shall control.

(d) Design and construction shall be in compliance with the state Department of Environmental Protection stormwater management requirements.

(e) Construction and marketing in all particulars shall be in accordance with all presently applicable state and federal requirements, including, without limitation, fair housing requirements.

(f) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(g) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and DHCD Guidelines issued pursuant thereto.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, Â§ 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Issued: October 13, 2011

MA Housing Appeals Committee

End of Document

EXHIBIT D

2010 MA Housing App. LEXIS 9

Commonwealth of Massachusetts Housing Appeals Committee

September 27, 2010

No. 09-12

MA Housing Appeals Committee

Reporter
2010 MA Housing App. LEXIS 9 *

BURLEY STREET, LLC, AppellantÂ ; v.Â ; WENHAM ZONING BOARD OF APPEALS, Appellee

Core Terms

roadway, foot, slip opinion, street, width, was, sheet, curve, housing unit, turnaround, secondary, has, sidewalk, traffic, site, feet wide, crosswalk, dead-end, truck, safe, condominium unit, burden of proof

Panel: Werner Lobe, Chairman; Joseph P. Henefield; Theodore M. Hess-Mahan; Marion V. McEttrick; James G. Stockard, Jr.

Opinion

DECISION

I. PROCEDURAL HISTORY

In a decision filed with the Wenham Town Clerk on July 7, 2004, the Wenham Zoning Board of Appeals granted a comprehensive permit pursuant to G.L. c. 40B, Â§Â§ 20-21 to Burley Street, LLC to construct 20 units of affordable condominium housing on 7.2 acres at 70 Burley Street in Wenham. Exh. 2. Construction of the housing was to be financed under the Housing Starts Program of Massachusetts Housing Finance Agency (MassHousing). On July 2, 2009, the developer filed a request with the Board for modification of the approved project because of difficulties encountered in providing for secondary, emergency access to the site. See Exh. 7. By decision filed with the Town Clerk on September 23, 2009, the Board denied that request, and on October 2, 2009, the developer appealed to this Committee. See Exh. 9. The presiding officer convened a Pre-Hearing Conference, and pursuant to *760 CMR 56.06(7)(d)(3)* the parties negotiated a Pre-Hearing Order, which was issued January 5, 2010. A *de novo* hearing was then conducted, **[*2]** including prefiled testimony from four witnesses, a site visit, a one-day evidentiary session to permit cross-examination of witnesses, and filing of post-hearing briefs.

II. FACTUAL OVERVIEW

The proposed housing consists of ten duplex condominium buildings. The 7.2-acre site is a back lot, surrounded by other housing and lots. A more or less triangular panhandle portion of the property has frontage on Burley Street. Exh. 4, sheet 3. The developer proposes to provide vehicular access through this panhandle, constructing a 1,160-

foot-long roadway following an existing roadway that was partially constructed by a previous owner under an Order of Conditions issued a number of years ago by the Wenham Conservation Commission. See Exh. 4, sheets 2 and 3; Exh. 2, p. 3, P 2; Tr. 22; Board's Brief, p. 9. There is to be a four-foot-wide sidewalk on one side of the roadway. Ex. 12, p. 2; Tr. 26-28. The roadway, both as originally approved by the Board and as currently proposed by the developer, is generally 24 feet wide, with an additional one-foot-wide bituminous "Cape Cod berm" on each side. Exh. 4, sheet 6; 12, p. 2; Tr. 76-77.

Where the proposed roadway begins at the eastern edge of **[*3]** the site at Burley Street, the panhandle is over 200 feet wide. Exh. 4, sheet 3. Slightly more than 200 feet into the property, the panhandle narrows to about 50 feet, and, in addition, the roadway is pinched between wetlands on either side. Exh. 4, sheet 3. In that area, beginning about 100 feet from Burley Street, and continuing past the pinched area, that is, for about 300 feet, the roadway narrows to 20 feet (not including the berms). Â [1], Â Â [2] Exh. 4, sheet 3. It has retaining walls on both sides. Exh. 4, sheet 6.

The first housing units, that is, those proposed closest to Burley Street, are about 500 feet from Burley Street. Exh. 4, sheet 3. The roadway then continues for more than 600 feet, ending in a *cul de sac* with a circular turnaround to accommodate the turning of emergency vehicles. Exh. 4, sheet 3.

During the local hearing before the Board, town officials raised concerns about the adequacy of the vehicular access for a dead-end roadway of this length, and a plan was developed for additional, secondary, emergency access from Lester Road, an existing subdivision **[*4]** road behind--that is, to the west of--the site. See Exh. 2, p. 2. The emergency access route would have intersected the main roadway of the development about 700 feet from Burley Street, with the result that there would have been two means of access to fourteen of the housing units, although the six units at the end of the roadway would have remained isolated. See Exh. 4, sheet 2. This design was acceptable to town officials, and the comprehensive permit was granted, based upon the understanding that the emergency access would be constructed and that "details relating to [it be] left to the sole discretion of the Fire Department for final approval." Exh. 2, p. 3, P 3.

In 2009, as the result of litigation that has little relevance to the current appeal, it became clear that because of a conservation restriction on a small parcel of land that separates the development site from Lester Road, it is not possible to provide emergency access as anticipated by both the developer and the Board. Exh. 7, p. 2; Exh. 3; 15, P 9; Board's Brief, p. 2. The developer then requested that it be permitted to change its proposal so that the development could proceed without secondary access. **[*5]** Â [3] Exh. 7, p. 2. The Board denied that request citing safety concerns. Exh. 8, 9.

III. ECONOMIC EFFECT OF DENIAL OF MODIFICATION OF THE PERMIT

---

[1] Marked on the plans for design purposes are "stations" at 100-foot intervals along the roadway. See Tr. 22, 60. The roadway narrows to 20 feet at about station 11-0, which is 100 feet along the roadway from Burley Street. Exh. 4, sheet 3. It remains at that width almost until station 14-00, which is 400 feet from Burley Street, that is for about 300 feet. Exh. 4, sheet 3, cf. Exh. 15, P 12(b).

[2] Because of concerns about wetlands adjacent to the roadway, it appears that the developer may be legally, or at least practically barred from widening the roadway beyond 20 feet. See Tr. 79; also see Tr. 97-103. In any case, as is its right, the developer has chosen to present a design with a 20-foot roadway to the Board and this Committee.

[3] Procedures concerning changes proposed after issuance of a comprehensive permit are found at ***760 CMR 56.05(11)(c)***. Also see *511 Washington Street, LLC v. Hanover*, No. 06-05, slip op. at 9 (Mass. Housing Appeals Committee Jan. 22, 2008), *aff'd* No. 381349 (land Ct. Apr. 2, 2009); *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at 8 (Mass. Housing Appeals Committee Sep. 18, 2007); *Drumlin Development, LLC v. Sudbury*, No 01-03, slip op. at 3 (Mass. Housing Appeals Committee Sep. 27, 2001; *Shamrock Constr. and Development Corp. v. Whitman*, No. 96-02, slip op. at 2-3 (Mass. Housing Appeals Committee Sep 26, 1996); *Cooperative Alliance of Mass. v. Taunton*, No.90-05, slip op. at 7 and n. 11 (Mass. Housing Appeals Committee Apr. 2, 1993). Though the Pre-Hearing Order drafted by the parties in this case articulates the burden in a more complicated manner, in their briefs, both parties concede that the simpler, traditional formulation of the burdens of proof is the proper one. Developer's Brief, p. 19 (filed Jun. 8, 2010); Board's Brief, p. 3 (filed Jun. 24, 2010).

When a the Board denies a request for a change in an approved comprehensive permit project, that decision may be appealed to this Committee. See *760 CMR 56.05(11)(c)*. Though the ultimate question before the Committee is whether the action of the Board is inconsistent with local needs, the initial burden is upon the developer to prove that the denial makes construction or operation of the housing uneconomic; if the developer sustains that burden, the burden shifts to the Board to prove that there is a valid local concern that supports the denial of the change, and that this concerns outweighs the regional need for housing. Â [4] If the developer alleges that because of the denial of the requested change, construction or operation of the housing is impossible, then it has the burden of proving that, and if it does so, construction or operation of the housing is uneconomic *per se. See Peppercorn Village Realty Trust v. Hopkinton* **[*6]** , No. 02-02, slip op. at 8 (Mass. Housing Appeals Committee Jan. 26, 2004). In this case, the parties agree that construction of the emergency access desired by the Board is impossible, and that therefore the denial of the change renders the proposal uneconomic *per se*. Developer's Brief, p. 5 (filed Jun. 8, 2010); Board's Brief, p. 3 (filed Jun. 24, 2010).

IV. LOCAL CONCERNS

The central concern about the proposed roadway (since no secondary access is provided) is that because of its length, it is more likely to become obstructed than a shorter road, with the result that emergency vehicles would be unable to reach any of the homes in the development. Board's Brief, pp. 4-12. The Board also raises a number of subsidiary issues, which relate to the central concern to greater or lesser degrees: the roadway width (Board's Brief, pp. 4-7), the turnaround radius (Board's Brief, pp. 7-9), the reverse curve (Board's Brief, p. 12), and the sidewalk crossing (Board's Brief, p. 11).

A. Emergency Access to the Proposed Dead-End Roadway

All of the presentations during the hearing with regard to the safety of the proposed dead-end roadway focused primarily on its width. The developer's **[*7]** traffic engineer and its civil engineer both testified that the roadway is safe. Tr. 21, 76. Â [5] "[T]he roadway width, at its minimum, exceeds accepted minimum width standards [of 18 feet] for low volume roadways." Â Â [6] Exh. 12, p.3. "[T]he roadway of 1,160 feet in length and a minimum of 20 feet in

---

[4] ***760 CMR 56.05(11)(c)***; *511 Washington Street, LLC v. Hanover*, No. 06-05, slip op. at 9 (Mass. Housing Appeals Committee Jan. 22, 2008), *aff'd* No. 381349 (land Ct. Apr. 2, 2009); *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at 8 (Mass. Housing Appeals Committee Sep. 18, 2007); *Drumlin Development, LLC v. Sudbury*, No 01-03, slip op. at 3 (Mass. Housing Appeals Committee Sep. 27, 2001; *Shamrock Constr. and Development Corp. v. Whitman*, No. 96-02, slip op. at 2-3 (Mass. Housing Appeals Committee Sep 26, 1996); *Cooperative Alliance of Mass. v. Taunton*, No.90-05, slip op. at 7 and n.11 (Mass. Housing Appeals Committee Apr. 2, 1993). Though the Pre-Hearing Order drafted by the parties in this case articulates the burden in a more complicated manner, in their briefs both parties concede that the simpler, traditional formulation of the burdens of proof is the proper one. Developer's Brief, p. 19 (filed Jun. 8, 2010); Board's Brief, p. 3 (filed Jun. 24, 2010).

[5] In addition to prefiled testimony, the witnesses testified under cross-examination as follows:

> Q: "And you believe that the plan, as shown,… [is] a safe plan?"
>
> Kenneth Cram: "Yes."

Tr. 21.

> Q: "...this road does not have to be 24 feet wide for safe…
>
> Peter Ogren: "That's correct."

Tr. 76.

[6] The standards referred to by Mr. Cram in this prefiled testimony are *Guidelines for Geometric Design of Very Low Volume Local Roads (ADT <=400)*, American Association of State Highway and Transportation Officials (Washington, D.C. 2001) and *Residential Streets*, Urban Land Institute, National Association of Home Builders, American Society of Civil Engineers, and Institute of Transportation Engineers (3rd ed., Washington, D.C. 2001). Mr. Ogren referred to the standard for minimum width of 18 feet found in the state Board of Fire Prevention regulations, 527 CMR 10.03(10)(a).

width … is sufficient to provide safe vehicular access to the proposed 20 residential units without alternative access...." Exh. 13, p. 5. Neither discussed the length of the roadway nor number of housing units in great detail.

The Board and its witnesses focused to an even greater extent than the developer on the width of the proposed roadway. The Wenham fire chief testified that "a single-access road of the proposed length with a width of 20 feet is inadequate to meet the necessary fire safety requirements." Exh. 14, P 12. This opinion is based upon the National Fire Prevention Association Fire Code 1141, Â§ 5.3.6 standard that two-way fire lanes be a minimum of 24 feet wide. Exh. 14, P 12. The Board's traffic expert testified that because of the "potential for vehicle/pedestrian, vehicle/bicyclist, **[*8]** vehicle/vehicle, and vehicle/fixed object conflicts, as well as other barriers to vehicle flow (e.g., sidewalk curbing, snow bank, parked and idling vehicles)" a "roadway width of 26 feet is required," and he "recommend[ed] that the roadway be 26 feet wide...." Exh. 15, p. 5, 12(b); Exh. 15, p. 9. He also acknowledged, however, that a 20-foot roadway design meets minimum state and national standards. Exh. 15, p. 5, P 12(b).

The parties have also drawn our attention to a number of decisions of this Committee concerning emergency access. It is important to note at the outset that these are of limited precedential value, since "[e]ach design must be considered on its own merits." *Cirsan Realty Trust v. Woburn*, No. 01-22, slip op. at 8 (Mass. Housing Appeals Comm. Jun. 11, 2003), *aff'd* No. 05-P-219, (Mass. App. Ct. May 31, 2006). But they do provide a frame of reference.

Particularly helpful are the only two cases in which we have rejected the plan submitted by the developer. In *Braintree* the road was wide-in fact, we noted that it was over designed-but it was long and served many units. *O.I.B. Corp. v. Braintree*, No. 03-15, slip op. 9, 11, n.14 (Mass. Housing Appeals **[*9]** Committee Mar. 27, 2006), *aff'd* No. 2006-1704 (Suffolk Super. Ct. Jul. 16, 2007)(119 condominium units on a 1,500-foot roadway). In *Waltham*, the roadway was narrow--20 feet wide, as here--but other factors were more important. It had a relatively large number of units on a fairly long roadway, but most critical was that the roadway was "steep, winding, and narrow." *Lexington Woods, LLC. v. Waltham*, No. 02-36, slip op. at 19, 8-20 (Mass. Housing Appeals Committee Feb. 1, 2005)(36 condominium units on a 1,000-foot roadway). And in both *Braintree* and *Waltham*, although the roadways were roughly equivalent in length to that in the present case, the development included more housing units, which increased the risk. It is noteworthy that width was not the determining feature in either of these cases. While it is common for the parties to focus on road width, as they have in the present case--perhaps because that is the design parameter that is addressed most specifically in many municipal regulations and also the parameter that is often most easily altered-it is rarely the most important factor. More typically it is the number of units isolated on the single--access roadway **[*10]** and the length of the roadway, as well as unusual factors specific to the site that are most important. Â 7[1]

---

[7] In the majority of our decisions we have *approved* the roadway proposed by the developer. But these cases are also sufficiently distinct that we view none of them as precedent that would require us to approve the roadway in the present case.

> Most similar to the case at hand is *Norwell*, in which a 1,100-foot roadway of unspecified width with "no insurmountable design problems" was approved as access for 36 condominium units. *Norwell, Tiffany Hill, Inc. v.*, No. 04-15, slip op. at 26 (Mass. Housing Appeals Committee Sep. 18, 2007). *Peabody* involved a 1,100-foot roadway, also of unspecified width, with four times as many units as in the current case (88 units), which a town official conceded was safe. *Litchfield Heights, LLC v. Peabody*, No. 04-20, slip o. at 13 (Mass. Housing Appeals Committee Jan. 23, 2006). Also see *Methuen Housing Auth. v. Methuen*, No. 84-02, slip op. at 5, 8-10, 12-14, 19 (Mass. Housing Appeals Committee July 22, 1985)(42 rental units on a 820-foot, 24-foot-wide roadway); *Capital Site Management Assoc. Ltd. Partnership v. Wellesley*, No. 89-15, slip op. at 25, 29 (Mass. Housing Appeals Committee Sep. 24, 1992), *aff'd* No. 96-P-1839 (Mass. App. Ct. Feb. 18, 1998)(33 condominium units of a 200-foot, 24-foot-wide roadway); *Delphic Assoc. LLC v. Middleborough*, No. 00-13, slip op. 12-14 (Mass. Housing Appeals Committee Jul. 17, 2002), *aff'd*, *449 Mass. 514 (2007)*(10 single-family homes on a short, 20-foot wide roadway); *Atwater Investors, Inc. v. Ludlow*, No. 01-09, slip op. 13-16 (Mass. Housing Appeals Committee Jan. 26, 2004)(241 condominium units on a 1,600-foot roadway with two 15-foot travel lanes separated by a 5-foot wide median); *Cirsan Realty Trust v. Woburn*, No. 01-22, slip op. at 8-11 (Mass. Housing Appeals Comm. Jun. 11, 2003), *aff'd* No. 05-P-219, (Mass. App. Ct. May 31, 2006)(168 rental units, 28-foot-wide roadway, and sub-optimal, but adequate secondary access).

Thus, we turn to the facts as presented during the hearing. As we have already noted, the Board's evidence focused nearly entirely on the width of the proposed roadway, and we conclude that it is not sufficient to establish justification for disallowing the construction of the housing development. First, the experts disagree, and were the width of the roadway the only factor here, we would find the developer's witnesses slightly more credible. But, as noted above, what is equally if not more significant is that width is *not* the only factor to be considered. Rather, three parameters must be taken into account--the width and the length of the roadway, and the number of dwelling units that could become isolated from emergency services. See *Lexington Woods, LLC. v. Waltham*, No. 02-36, slip op. at 19 (Mass. Housing Appeals Committee Feb. 1, 2005)("safety… cannot be assessed solely on the basis of… width, but be evaluated in light of all of [a roadway's] characteristics"). And in fact, our view that width is generally the least **[*11]** significant of the three factors is reflected in Wenham's own subdivision rules and regulations. These regulations do not directly associate width with dead-end streets, but rather limit their length and the number of housing units. That is, the regulations state that dead-end streets shall not be longer than 500 feet "unless in the opinion of the [planning] board a greater length is necessitated by topography or other local conditions," and if they are, shall not serve more than six housing units. Â [8] Exh. 6, Â§ 4.1.6.2, 4.1.6.3.

Neither side in this case presented useful evidence or argument about the interplay between the length of the roadway and the size of the development, or about the risk associated with them. For instance, although the Board's traffic expert provided a great deal of testimony with regard to how he would prefer to see the roadway designed, he addressed the issue of blockage of access in but a single sentence. Â [9]

It is a foregone conclusion that a long dead-end road presents safety concerns. Similarly, it is a matter of simple logic that a longer, narrower road is more **[*12]** susceptible to blockages from fallen trees, car crashes, or other sources than a shorter, wider road. But the burden of proof in this case rests upon the Board, and it has given us insufficient data with which to assess the *degree* of risk that this development presents. Therefore, on the record presented, we must rule that the Board has failed to meet its burden of proof.

B. The Roadway Turnaround

The Wenham fire chief also testified that the size of the 100-foot-diameter turnaround at the end of the roadway should be increased. Exh. 14, P 14. This opinion is also based upon the National Fire Prevention Association Fire Code standard which states that a diameter of 120 feet should be considered the minimum. Exh. 14, P 13.

There are several flaws in the Board's position. First, the 100-foot-diameter turnaround was approved as part of the original comprehensive permit when there was to be secondary access to part of the development. Admittedly, after fighting a fire at one of the 14 units closest to Burley Street, a fire truck would have been able to exit using the secondary access without turning around, which would have been more convenient than using the circular turnaround. **[*13]** But the logical inference to be drawn from the fact that a 100-foot-diameter turn around was required and approved at the end of the roadway is that that size was sufficient to permit turning by any fire trucks that might have to go beyond the secondary access--that is, that such trucks would not have to back out, but rather could successfully use the turnaround. Thus, we must conclude that while the design before us now may be less convenient when there is a fire close to Burley Street, the turnaround will provide the ability to turn around that the Board required. See *L.A. Assoc., Inc. v. Tewksbury*, No. 03-01, slip op. at 6, (Mass. Housing Appeals Committee Feb. 1, 2005)(design requiring fire trucks to back out a short distance is a matter of inconvenience, and not sufficient to support denial of a permit), *aff'd*, No. 05-00680-L2 (Middlesex Super. Ct. Feb. 26, 2007); also see *Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 02-21, slip op. at 20 (Mass. Housing Appeals Committee Dec. 12, 2006), *aff'd* No. 08-P-1240 (Mass. App. Ct. Sep. 16, 2009).

---

[8] In addition, "[d]epending upon the proposed roadway use, the Planning Board may require the construction of a divided roadway...." Exh. 6, Â§ 4.1.6.4.

[9] Due to its proposed narrow width (20 feet), an accident on the project roadway would likely prevent use of the Burley Street connection by project traffic." Exh. 15, p. 6, P 11(e). Also see Exh. 15, p. 7, P 13(f).

Second, for minor dead-end streets in Wenham--admittedly streets that presumably have fewer housing units than here--the **[*14]** turnaround diameter required under Wenham's subdivision rules and regulations is only 100 feet. Exh. 6, Â§ 4.1.6.6. This also implies that this size is considered safe for the fire trucks in use in Wenham.

Finally, the fire chief testified explicitly that his largest truck requires an inside roadway radius of forty feet and that it would be able to turn in the circle as designed. Tr. 86, 88.

The Board has not proven a legitimate local concern with regard to the diameter of the roadway turnaround.

C. The Reverse Curve

Just before the first housing units are reached, there is a reverse curve (or "S" curve) in the roadway. These are not particularly dramatic--each is about 100 feet long, for a total of about 200 feet. Exh. 4, sheet 3.

The Board's position might be challenged on legal grounds since Wenham has chosen not to regulate reverse curves on local or minor streets such as this. That is, reverse curves are regulated in the town's subdivision rules and regulations only on arterial and collector streets. Exh. 6, Â§ 4.1.3.3.

Factually, the Board's expert presented no detailed evidence with regard to the length of the curves or, especially, their radii. See Exh. 15, p. 5, P 12(c). **[*15]** Without such detailed information, it is useless to attempt to evaluate the risk associated with these curves. In fact, such curves are very site-specific and difficult to evaluate in any case. Traditional, mid-twentieth-century traffic engineering principles would suggest that this roadway would be safest if it were wide, straight, and obstacle-free, but more contemporary principles based upon "traffic calming" suggest that drivers will drive more safely if it were curved, narrow, with obstacles placed near the right of way. See Tr. 31-32.

Finally, the Board's expert noted that "[i]f allowed, [the curve] should have properly selected and placed warnings and speed zone signs." Exh. 15, p. 5, P 12(c). This equivocation is a clear indication that any danger associated with the curve is not sufficient to outweigh the regional need for affordable housing.

D. The Crosswalk

The Board quite reasonably required that a sidewalk be provided for the entire length of the roadway. As designed, however, it crosses the roadway from the south side to the north via a perpendicular crosswalk just as the reverse curve ends, that is, about 100 feet before the first housing units. Exh. 4, sheet 3. **[*16]** This is not ideal.

The developer's expert testified that the sidewalk could be placed entirely on one side of the roadway. Tr. 28. In fact, there are at least three options: it could be located entirely on the north side, entirely on the south side, or half on each side. See Exh. 4, sheet 3. These are similar in that in any of the scenarios, a walker would have to cross on the roadway pavement behind several perpendicular visitor parking spaces--which is of no particular concern on a low-volume roadway such as this. Placing the sidewalk on the north side might cause design difficulties where the roadway narrows near the entrance, but it would also be less convenient for residents of the six housing units on the *cul de sac*. Actually, the best option is to move the crosswalk a little over 200 feet to the west. This would place it in the middle of the cluster of 14 housing units, which would have two traffic calming advantages. First, because of the buildings, parked cars, and activity in that area, people are already likely to drive slowly in that area, making it a good place for pedestrians to cross. Second, the very existence of the crosswalk will remind drivers to slow down in **[*17]** this area, where they are more likely to encounter pedestrians or children playing in the street.

We suggest that the parties--or their engineers--negotiate an acceptable location for the sidewalk and crosswalk. If they are unable to reach agreement, we will require, by condition, that the crosswalk be placed in the middle of the cluster of 14 housing units. See Â§ V, below.

V. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee rules that the decision of the Wenham Zoning Board of Appeals filed with the town clerk on September 23, 2009 is not consistent with local needs. The Board is directed to permit the requested change in the

comprehensive permit proposal so that it can be built without secondary access from Lester Road. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, 23 and *760 CMR 56.07(6)(a)*, this decision shall for all purposes be deemed the action of the Board.

This decision is subject to the following condition:

Unless the parties agree otherwise, the developer shall construct a sidewalk as shown on the Site Development **[*18]** Permit Plan, sheet 3 (prepared by Eastern Land Survey Associates, Inc.; Aug. 27, 2002, rev'd Jun. 3, 2004)(Exh. 4), except that the crosswalk shall be moved approximately 200 feet to the west so that it is located centrally among the cluster of seven buildings in that area.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, Â§ 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Date: September 27, 2010

MA Housing Appeals Committee

End of Document

EXHIBIT E

2009 MA Housing App. LEXIS 1

January 12, 2009

No. 06-16

MA Housing Appeals Committee

Reporter
2009 MA Housing App. LEXIS 1 *

GREEN VIEW REALTY LLC, AppellantÂ ; v.Â ; ZONING BOARD OF APPEALS OF HOLLISTON, Appellee

Core Terms

wetland, site, has, slip opinion, zone, was, bylaw, basin, landfill, stormwater, groundwater, street, distance, section, local concern, roadway, sight, foot, open space, consolidate, fundability, subsidize, pond, prima facie, intersection, hazardous, eligibility, entrance, delineate, traffic

Panel: Werner Lohe, Chairman; Marion V. McEttrick; James G. Stockard, Jr.

Opinion

DECISION

I. PROCEDURAL HISTORY

On January 19, 2005, Green View Realty, LLC submitted an application to the Holliston Zoning Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, Â§Â§ 20-23 to build 200 affordable, mixed-income, condominium housing units known as Cedar Ridge Estates on a nearly 53-acre site at the southwest corner of Marshall and Prentice Streets in Holliston. The housing is to be financed either under the Housing Starts Program of the Massachusetts Housing Finance Agency (MassHousing) or the New England Fund of the Federal Home Loan Bank of Boston. Exh. 4, fifth section, p. 1.

On September 11, 2006, the Board denied the comprehensive permit. Exh. 1. On September 29, the developer appealed to this Committee. Thereafter, in order to structure the Committee's *de novo* hearing and narrow the issues presented, the parties negotiated a Pre-Hearing Order, which was issued by the presiding officer pursuant to the Committee's regulations. Â [1] Prefiled testimony was received from fifteen witnesses, a site visit and three days of hearings to permit cross-examination of witnesses were conducted, and posthearing briefs were filed.

---

[1] Preliminary hearing procedures are described in 760 CMR 30.09(4) and ***760 CMR 56.06(7)(d)***. That is, our regulations, which originally appeared at 760 CMR 30.00 and 31.00, have been amended and recodified effective February 22, 2008 as 760 CMR 56.00. Our hearing technically began under the old regulations with the initial Conference of Counsel in 2006, and did not terminate until briefs were filed September 22, 2008. Under longstanding practice, however, we consider the date of our hearing to be the date on which the Pre-Hearing Order was issued, in this case, April 7, 2008, which is after the effective date of the new

II. FACTUAL OVERVIEW

This case involves a large, 52.55-acre, irregularly shaped site in an area of Holliston zoned "Agricultural-Residential A," which permits residences on 80,000 square foot lots. Exh. 1, P 1; 7; 8; 32, Â§ IV-B. The immediate vicinity is sparsely developed, though residential housing subdivisions are scattered through the general area of town in which the site is located. Exh. 7, 8. The 200 units of condominium housing are primarily in quadraplex buildings, with a few triplex and duplex buildings. The proposal includes two entrance roadways from Marshall Street, and an additional emergency access roadway from Marshall Street. Exh. 10.

The site is currently wooded, rising to a small hill at its center. Exh. 48, p. 9. In the northeastern corner, near where the site abuts the intersection of Prentice and Marshall Streets, there is a manmade pond with bordering wetlands. Exh. 7; 48, P 24. The western third of the site consists of a much larger, forested wetlands **[*3]** area. Exh. 7; 48, p. 9. The total of wetlands area on the site is 16 acres. Exh. 71, P 102.

The site is what is commonly known as a "brownfields" site. That is, a previous owner, beginning in the 1960s, allowed illegal, unsupervised dumping on the site. In the mid-1980s, both the U.S. Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection (DEP) investigated and assessed the site. Exh. 45, p. 1; 71, PP 63, 65. As a result, more than three hundred drums containing tar and other contaminants, two hundred thousand tires, construction debris, other solid waste, and seventy tons of contaminated soil have been removed from the site. Exh. 71, PP 61-64. In conjunction with construction of the housing, the developer will complete remediation of the site by transporting hazardous and recyclable materials off site, monitoring and treating groundwater as necessary, and consolidating non-hazardous waste and existing fill into a smaller sealed and capped disposal area on the western portion of the site where no housing will be built. Exh. 71, PP 85-87; also see Exh. 12 (Supplemental Investigation & Revised Conceptual Remedial Plan with Associated Cost **[*4]** Estimates).

III. PRELIMINARY ISSUES

Prior to the evidentiary portion of the hearing, the Board moved twice to dismiss the appeal, and also filed a motion to clarify which environmental issues were local issues properly before the Committee under the Comprehensive Permit Law and which were state and federal issues beyond its jurisdiction. The presiding officers Â [2] denied the motions to dismiss, and clarified the treatment of the environmental issues. We will revisit those issues briefly. Â [3]

A. Title Issues and Site Control

The arguments initially raised by the Board were addressed fully in the presiding officer's February 20, 2007 Ruling on Board's Motion to Dismiss. That is, consistent with a number of our past precedents, when the number of housing units changes during the local hearing process, and the Board has the **[*5]** opportunity to review those changes, the developer is not required to obtain a new project eligibility determination from the subsidizing agency in order to maintain fundability. Second, as also explained in detail in the February 20, 2007 ruling, the record

---

regulations. Further, the new regulations themselves indicate that they are generally to be applied to matters pending before us. ***760 CMR 56.08(3)***. In addition, since many provisions of the new regulations are identical to those in the previous version, few issues of fairness with regard to retroactive application are raised in any case. Therefore, we will generally apply the new regulations, and rely on the old regulations when principles of basic fairness so require. See *Cozy Heath Community Corp. v. Edgartown*, No. 06-09, slip op. at 3-4 (Mass. Housing Appeals Committee Apr. 14, 2008), *appeal docketed* No. 08-00021 (Dukes Super. Ct. May 19, 2008).

[2] A little more than half way through the two-year hearing process Committee Chairman Werner Lohe replaced Hearing Officer Shelagh A. Ellman-Pearl as the presiding officer.

[3] As is common, the presiding officer's rulings were interlocutory and were not published on the Committee's website. They are, of course, part of the record in this case, and are hereby ratified by the full Committee. But to the extent that there are inconsistencies between them and this decision, this decision controls. Further, unpublished rulings, as preliminary statements of the law by the presiding officer alone, though they may occasionally provide useful guidance, generally should not be considered precedent in other cases.

shows colorable title to the 2.55-acre parcel challenged by the Board Â [4] and also sufficient rights with regard to an easement over a bridle path to establish site control. Also see Exh. 71, PP 24-28; 72, PP; 6-15; 89, P 36; cf. Exh. 77, P 57; 78, P 8(a).

B. The DEP Liens and Site Control

In the second, February 20, 2008 ruling, the presiding officer addressed a new argument concerning site control. The Board asserted that because of Massachusetts Department of Environmental Protection (DEP) liens, the developer did not have control of the proposed site as required by 760 CMR 31.01. Specifically, between 1984 and 1989, when the owners of the development site allegedly failed to respond to Notices of Response Action from **[*6]** DEP under G.L. c. 21E (Mass. Oil and Hazardous Material Release Prevention and Response Act), state and local authorities took action on their own, and incurred response action costs. Exh. 71, PP 63-64, 71; 78, P 8(k). Ultimately, DEP perfected liens on the property to secure payment of the response action costs in the amount of $ 1.75 million. Exh. 70, third "whereas" clause and P 6. In 2002, DEP and the town issued a request for proposals to attract a developer to purchase and develop the site and pay off the indebtedness. Exh 71, P 73.

On January 3, 2005, the current developer, Green View Realty, LLC, entered into a purchase and sale agreement for the site with the owners, the C&R and R&C Trusts. In addition to the standard recitations, the agreement states that the sellers will convey marketable title to the property, free from all encumbrances, "subject, however, to the following: … (v) … the lien … by the Massachusetts Department of Environmental Protection attached hereto as Exhibit H...." Exh. 14, P XI-A(v). It goes on to provide that the seller is obligated to convey title "subject to the following conditions precedent on the closing date:… (iii) the DEP lien on the **[*7]** Property shall be paid and discharged or subject to written agreement with DEP...." Exh. 14, P XII-B(iii). Thus, the purchase and sale agreement clearly contemplates the DEP liens, and is not invalidated by their existence. There is no question that a valid purchase and sale agreement is sufficient to establish site control. *760 CMR 56.04(4)(g)*, 31.01(3). "The statute does not explicitly state the requisite property interest necessary to qualify as an applicant for a comprehensive permit… [But it] does not require the applicant… to establish… a present title in the proposed site." See *Hanover v. Housing Appeals Committee, 363 Mass. 339, 377-78 (1973)*; also see *Autumnwood, LLC v. Sandwich*, No. 05-06, slip op. at 3 (Mass. Housing Appeals Committee Nov. 4, 2005 Ruling on Motion to Dismiss); *Paragon Residential Properties v. Brookline*, No. 04-16, slip op. at 6 (Mass. Appeals Committee Dec. 1, 2004 Ruling on Pre-hearing Motions). Thus, the presiding officer's ruling in February 2008 was correct. Further, three months after the ruling on this question, the developer entered into an agreement with DEP, which established **[*8]** that in return for a payment of $ 1,750,000, DEP will issue a recordable release of the liens at the time of the closing on the sale of the site by the trusts to the developer. Exh. 70, PP 6, 9. Thus, it is clear that the liens will not stand in the way of the developer's ability to control the site in order to proceed with the development.

C. Fundability

Finally, the Board argued that the amount of the liens was sufficiently large to render the proposed project no longer fundable. The Board has renewed this argument in its post-hearing brief, specifically claiming that because of "an uncharacteristically low profit margin," the development is not financially feasible, and therefore not fundable under our regulations. We conclude that the Board has not rebutted the presumption of fundability established under our regulations.

Financial feasibility is an essential part of fundability, which, in turn, is a component of the determination of project eligibility that is made by a subsidizing agency to initiate the entire permitting process under the Comprehensive Permit Law. Â [5] The determination of project eligibility was made with regard to this development pursuant to 760

---

[4] The site includes three parcels. The first two are adjacent parcels which total 50 acres and are located at 708 Prentice Street; the third parcel is a 2.55-acre tract of land located southeast of a parcel referred to as "Parcel 7319."

[5] The Board refers to fundability as a "jurisdictional requirement." Board's Brief, pp. 5-6. In fact it is more properly viewed as a substantive aspect of the developer's *prima facie* case for entitlement for a comprehensive permit, or as it is referred to in our

CMR 31.01(1)(b) and 31.01(2)(b)(4), the regulations in effect at that time. That is, on August 24, 2004, MassHousing issued a project eligibility determination. Exh. 4, fifth section. On July 19, 2006 and July 31, 2006, MassHousing reviewed that determination, and concluded that "there is no need to modify our original project eligibility letter. ...we will review all changes in this project when an application for Final Approval is submitted when and if a comprehensive permit is granted." Exh. 2; Exh. 3, third para. These letters established a presumption of fundability. 760 CMR 31.01(2)(f), 31.07(1)(a). To reemphasize the nature of the presumption, the regulations in effect at that time provided that this Committee generally was not to hear evidence concerning financial feasibility or fundability other than evidence "as to the status of the project before the subsidizing agency." 760 CMR 31.07(4)(a), 31.07(4)(d). That is, as elaborated in several of our decisions, although it would be appropriate **[*10]** for us to hear evidence that the subsidizing agency had withdrawn its determination, because fundability is a technical administrative matter within the expertise of the subsidizing agency, it is inappropriate for us to go further and look behind the subsidizing agency's determination and make our own determination. See *Farmview Affordable Homes, LLC v. Sandwich*, No. 02-32, slip op. at 4-5 (Mass. Housing Appeals Committee May 21, 2004 Ruling on Motion… to Quash Subpoenas...); *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7-9 (Mass. Housing Appeals Committee Jun. 25, 1992). Similarly, we might have considered a finding that the fundability requirement had not been met if there had been evidence that the subsidizing agency had conducted its review improperly. Â [6] See *Bay Watch Realty Tr. v. Marion*, No. 02-28, slip op. at 2-3 (Mass. Housing Appeals Committee Order Concerning Jurisdiction Nov. 22, 2004)(site plans not reviewed in making project eligibility determination), *aff'd sub nom. Board* **[*11]** *of Appeals of Marion v. Housing Appeals Committee*, No. 07-P-1372 (Mass. App. Ct. Oct. 7, 2008). These regulations and precedents are consistent with the ruling of the Appeals Court that the appropriate avenue for challenging the validity of a project eligibility determination is during an appeal to this Committee, with subsequent review by the courts pursuant to G. L. c. 30A. *Town of Marion v. Mass. Housing Finance Agency, 68 Mass.App.Ct. 208, 211 (2007)*. That is, the court did not indicate that this Committee is to substitute its judgment for that of the subsidizing agency, but rather noted that it must be borne in mind that "the funding eligibility determination is merely an interim step in the administrative process." *Id. at 211, 471*; also see *Town of Amesbury Zoning Board of Appeals v. Housing Appeals Committee*, Misc. No. 07-PS-351321, slip op. at 19, *16 L.C.R. 332, 337 (Mass. Land Court May 16, 2008)* ("...there is no requirement that a project eligibility letter must be *maintained* while an appeal is pending. Clearly this is a matter which will be overseen by the Project Administrator **[*12]** as the project proceeds."), *appeal docketed*, No. 2008-P-1240 (Mass. App. Ct. Jul. 24, 2008).

The Board's argument here asks us to engage in a financial analysis that would allegedly show that because of the size of the DEP liens and changing development costs the proposal is no longer financially feasible. Board's Brief, p. 4. But this is the sort of technical analysis of fundability that should be reserved for MassHousing, and not this Committee. Thus, we conclude that the Board has not rebutted the presumption of fundability.

Finally, if fundability were to be reviewed under our new regulations, there would be even less basis for us to reconsider financial feasibility and fundability. The regulations now provide that the subsidizing agency's determination is "conclusive," and any subsequent allegation of failure to fulfill one of the requirements may only be made on the grounds that the proposal itself has changed, and in that case the question of continuing fundability is to be determined by the subsidizing agency. *760 CMR 56.04(1)*, 56.04(4)(d), and 56.04(6).

D. Clarification of the Scope of Environmental Issues

As discussed in detail in the **[*13]** presiding officer's ruling of February 20, 2008, the Board argued that "as a matter of law, there is no limitation of the scope of environmental issues that may be considered in a ZBA or Committee proceeding." Appellee's Motion to Clarify Scope of Environmental Matters..., p. 3, n.1 (filed Aug. 17,

---

new regulations, a "project eligibility requirement." *Town of Middleborough v. Housing Appeals Committee, 449 Mass. 514, 521 (2007)*; ***760 CMR 56.04(1)***.

[6] It appears that the subsidizing agency did not specifically consider the liens when it issued its project eligibility determination in 2004 since they had not yet been perfected. But it was well aware of the need for and possible costs of remediation on the site since it included a condition that required the developer to obtain "cost-cap and third-party liability protection insurance… providing as much as $ 3,000,000 in insurance coverage to protect the Town of Holliston, MassHousing, and other parties...." Exh. 4, fifth section, p. 3, P 6; also see Exh. 3.

2007). We disagree. But often there is not a bright line between matters that are local concerns that we must consider and those that are state or federal questions beyond our jurisdiction. For that reason, prior to the actual presentation of evidence in this case, the presiding officer issued a ruling attempting to clarify the scope of the issues to be considered. This, in turn was followed in the normal course by a Pre-Hearing Order prepared with the participation of the parties. The overall case was organized into six occasionally overlapping issues: wetlands protection, stormwater management, groundwater protection, landfill consolidation/creation and design, open space, and traffic. Pre-Hearing Order, Â§ IV-5. Two of these issues--groundwater protection and landfill consolidation--were particularly problematic, and the presiding officer did not rule definitively in the February 2008 **[*14]** ruling as to whether they were proper issues for the Committee to consider. With regard to those issues, he ruled that the Board should identify any portions of the Holliston Zoning Bylaws which contain standards more stringent than state law and that the Board "is advised to present evidence" on those issues. Ruling on...Motion to Clarify..., pp. 10-11 (Feb. 20, 2008). That is, a final determination as to whether the Committee has jurisdiction on those matters was left for this final decision. They are addressed in section III-D(1), immediately below. The other four issues are more straightforward, and are addressed in section III-D(2), below. Â [7]

1. Consolidation of the Onsite Landfill, Remediation, and Related Issues of Groundwater Protection Are Not Regulated Under the Holliston Zoning Bylaw and Therefore Are Not Properly Before the Committee.

Prime real estate is rarely available for affordable housing, and therefore over the years, we have reviewed a number of plans for developments on the sites **[*15]** of abandoned landfills. Â [8] The case before us is unusual, however, since the town has asserted that it has regulated remediation of such sites under its zoning bylaw, and that its zoning requirements prohibit the construction of this affordable housing development. Because both the remediation process and its relationship to the Comprehensive Permit Law are complex, the questions of what facts must be proved in a case like this and how the law should be applied are similarly complicated. We have considered them particularly carefully since public policy supports the development of affordable housing on brownfields sites, Â [9] and it is therefore important both in this case and in future cases that the law not be applied in such a way as to create unnecessary barriers to the permitting of affordable housing.

The fundamental structure **[*16]** of the Comprehensive Permit Law as applied in our hearings is that the developer must establish a *prima facie* case that its proposal complies with generally recognized design standards, which may include state and federal standards, and if it does so, the burden then shifts to the Board to prove that there are

---

[7] At the time of the presiding officer's February ruling, it appeared that the issues of open space and traffic had been waived. The presiding officer, however, permitted them to be raised again in the Pre-Hearing Order, and in that sense the later order supersedes the ruling.

> We note that both the ruling and the order are merely attempts to frame the issues in this case in a preliminary manner. The presiding officer cannot bind the full Committee with regard to what issues are properly before it, and therefore to the extent that parts of the ruling or order may be inconsistent with this decision, this decision controls. Also see n. 3, above.

[8] In 1974, we considered a site that had "in the past been used for refuse dumping purposes. ...[T]here was concern… [about] the … release of subterranean gas...." We found that the danger was minimal, and noted that "to assure the best approach"… the Board and the developer had agreed to work cooperatively. *Planning Office for Urban Affairs, Inc. v. Beverly*, No. 73-04, slip op. at 9 (Mass. Housing Appeals Committee May 10, 1974).

> In later cases, housing was also approved with relatively little conflict with regard to hazardous waste issues. See *Shorebrook Trust v. Yarmouth*, No. 88-11, slip op. at 2 (Mass. Housing Appeals Committee May 3, 1989)(site found acceptable despite "the presence of environmentally undesirable material due to its previous use as the Town Dump"); *Woodland Heights Partnership v. Bourne*, No. 91-06, slip op. at 14, (Mass Housing Appeals Committee, Jun. 14, 1993)("the town… will actually benefit" because "[t]he developer's proposal is that all hazardous materials and solid waste be removed from the site"); *Northern Middlesex Housing Associates v. Billerica*, No 89-48, slip op. at 4 (Mass. Housing Appeals Committee Memorandum on Remand, Oct. 12, 1993)(condition requiring Board oversight of remediation stricken because "ensuring that remediation is performed 'in accordance with applicable federal and state hazardous waste regulations' is not within [the] jurisdiction [of the local Board or the Housing Appeals Committee]").

[9] See, e.g., G.L. c. 21E, Â§ 3A(j)(3)(a)(i)(b).

local concerns which support the denial of the comprehensive permit and that those local concerns outweigh the regional need for housing. *760 CMR 56.07(2)(a)(2)*, 56.07(2)(b)(2); see *Board of Appeals of Woburn v. Housing Appeals Committee, 451 Mass. 581, 583-584 (2008)*. But our focus is on local concerns, and nothing in Chapter 40B suggests that we should consider environmental issues raised under state and federal law. On the contrary, the Committee has no the authority to hear a dispute as to whether a developer is adhering to state or federal law. See *O.I.B. Corporation v. Braintree*, No. 03-15, slip op. at 6-7 (Mass. Housing Appeals Committee Mar. 27, 2006)(holding that it is not "the role of either the Board or this Committee to adjudicate compliance with state standards"), *aff'd* No. 2006-1704 (Suffolk **[*17]** Super. Ct. Jul. 16, 2007. Further, as we have noted recently,

> The Board ordinarily should not be permitted to inquire into an issue or place restrictions on affordable housing if the Town has not previously regulated the matter in question. See *9 North Walker Street Development, Inc. v. Rehoboth*, No. 99-03, slip op. at 4-5 (Mass. Housing Appeals Committee Nov. 6, 2006 Decision of the Committee on Remand) (Remand Decision), citing *Walega v. Acushnet*, No. 89-17, slip op. at 6, n.4 (Mass. Housing Appeals Committee Nov. 14, 1990); *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. 4, n.3 (Mass. Housing Appeals Committee Jan. 16, 1991). While under certain circumstances it may be appropriate for the Committee to review important health and safety issues that are not specifically governed by local regulation, those situations arise when exceptional circumstances exist that could not have been anticipated by the Town, and when review of the issue [under state or federal law] may not take place outside the context of this appeal. See *Hamlet Development Corp. v. Hopedale*, No. 90-03, slip op. at 8-15 (Mass. Housing Appeals Committee Jan. 23, 1992); *Walega, supra* **[*18]** at 5-7.

Lever Dev., LLC v. West Boylston, No. 04-10, slip op. at 10 (Mass Housing Appeals Committee Dec. 10, 2007). Also see *Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 02-21, slip op. at 14 (Mass. Housing Appeals Committee Dec. 12, 2006)(holding review of innovative wastewater technology is inappropriate when there is no local regulation and a state DEP permit is required), *appeal docketed*, No. 2008-P-1240 (Mass. App. Ct. Jul. 24, 2008); *Attitash Views, LLC v. Amesbury*, No. 06-17, slip op. at 12, n.7 (Mass. Housing Appeals Committee summary decision Oct. 15, 2007)(attempt to enforce uncodified requirements with regard to outdoor design "may well also run afoul of the statutory provision that all requirements be applied 'as equally as possible to subsidized and unsubsidized housing.' G.L. c. 40B, Â§ 20"). *aff'd*, No. 2007-5046 (Suffolk Super. Ct. Jan. 7, 2009). If, however, the municipality has distinct regulations that are more strict than the parallel state law, issues raised under the local requirements are considered local concerns under the Comprehensive Permit Law. *LeBlanc v. Amesbury*, No 06-08, slip op. at 9 (Mass. Housing Appeals Committee, **[*19]** May 12, 2008), *appeal docketed*, No. 2008-2631D (Suffolk Super. Ct. Jun. 12, 2008); *Princeton Development, Inc. v. Bedford*, No. 01-19, slip op. at 11 (Mass. Housing Appeals Committee Sep. 20, 2005); *Oxford Housing Auth. v. Oxford*, No. 90-12, slip op. at 12 (Mass. Housing Appeals Committee, Nov. 18, 1991).

In this case, both the developer and the Board introduced extensive expert testimony concerning consolidation of the on-site landfill, remediation, and groundwater protection. The evidence describes the past, present, and future of the site in great detail. Thorough assessments of the site itself and of the hazardous materials on the site have been done in the past. Exh. 73, P 7; 74, PP 7, 11. Further assessments have been done fairly recently (Phase I and II Environmental Site Assessments), and a conceptual remedial plan (Supplemental Investigation & Revised Conceptual Remedial Plan with Associated Cost Estimates) has been prepared by a licensed site professional (LSP). Exh. 74, PP 13-15; Exh. 12; Exh. 44. Still further assessment and remediation can and will be done in order to achieve a "permanent solution" which presents no significant risk to the public. **[*20]** Â [10] Exh. 74, PP 13-14, 22, 24, 32-63, 156; Exh. 41, pp. 6, 12. This specifically includes remediation of groundwater prior to development of the site. Exh. 74, P 64, 65-87.

---

[10] See ***310 CMR 40.1000***, *et seq*. "Permanent Solution means a measure or combination of measures which will, when implemented, ensure attainment of a level of control of each identified substance of concern at a disposal site or in the surrounding environment such that no substance of concern will present a significant risk of damage to health, safety, public welfare, or the environment during any foreseeable period of time." ***310 CMR 40.0006***.

The Board argues that because considerable further assessment and design remains to be done, the developer has not established a *prima facie* case. Board's Brief, pp. 19-21. More specifically, it argues that the proposal has not been described in sufficient detail to enable the Board to have "a fair opportunity to challenge it." Board's Brief, p. 21; also see *Tetiquet River Village, Inc. v. Raynham*, No. 88-31, slip op. at 11 (Mass. Housing Appeals Committee Mar. 20, 1991). But our review of the evidence concerning the detailed work already done concerning this site, particularly the conceptual remedial plan, leads us toward the opposite conclusion--that the plans and the evidence of future compliance with state law would be sufficient to establish a *prima facie* case. See *Canton Property Holding, LLC v. Canton*, No. 03-17, slip op. at **[*21]** 22 (Mass Housing Appeals Committee Sep. 20, 2005 (expert testimony that design will comply with state stormwater management standards is sufficient to establish *prima facie* case); also see Exh. 12. In fact, however, despite all of the evidence introduced, we need not consider the substance of these issues--either whether the developer proved its *prima facie* case or whether the Board has established counterbalancing local concerns in response--because, as discussed below, we conclude that the Holliston Zoning Bylaws do not regulate the remedial activity proposed here.

To consider what the Holliston Zoning Bylaws regulate and do not regulate, we must examine in more detail how the issues have been framed in this case, and what bylaw provisions might be applied to them. In the Pre-Hearing Order, the question of whether consolidation of the landfill creates a dangerous situation is raised in two places. First, under "Groundwater Protection," the Board's position is stated as "[c]onsolidation/creation of a landfill will pollute the groundwater." Pre-Hearing Order, Â§ IV-5(c)(ii). The Holliston requirements cited in the Pre-Hearing Order to show that groundwater is protected are two **[*22]** very general sections of the bylaw:

> In any district, no use will be permitted which will produce a nuisance or hazard… Neither shall there be permitted any use which discharges into the air, soil, or water any industrial, commercial, or other kinds of wastes… unless the same are… treated…

Exh. 32, Â§ I-D(1).

> No discharge… into… the ground, of any materials… as can contaminate… water supply… shall be permitted except in accordance with applicable federal, state, and local … laws and regulations.

Exh. 32, Â§ V-N(2). Â [11]

Second, under "Landfill Consolidation/Creation and Design," the Board's position is stated as "[c]onsolidation/creation of a landfill will endanger the public safety." Pre-Hearing Order, Â§ IV-5(d)(i). The Holliston requirement cited to show that the consolidation of waste on the site is regulated locally is the "Basic Requirements" section of the Holliston Zoning Bylaws, which states that "[a]ny use not specifically enumerated in a district herein shall **[*23]** be deemed prohibited." Exh. 32, Â§ I-B. Â [12] In its brief, the Board cites, in addition, the two very general bylaw sections above. Exh. 32, Â§Â§ I-D(1), V-N(2); also see Board's Brief, pp. 14, 23.

With regard to both of these issues, there is an additional provision in the bylaw which might have been cited by the Board except that under the specific facts presented here, it does not apply. That is, the "prohibited uses" section of the Groundwater Protection District special regulation prohibits landfills in Zone II groundwater protection areas. Exh. 32, Â§ V-L(4)(B)(2)(c). In this case, however, the area of landfill consolidation is not in the Zone II. Â [13] That is, only a small area at the eastern edge of the northern part of the site, near the intersection of Marshall and Prentice Streets, is within the Zone II delineated **[*24]** by the section V-L of the Holliston Zoning Bylaw. Exh. 73, P 47; Exh. 48, p. 12; Exh. 57, p.1 and fig. 2. The landfill consolidation area is a two-acre area in a west-central portion of the site, outside of the Zone II. Exh. 48, pp. 11-13; Exh. 74, P 43.

---

[11] Bylaw section V-I (Wetlands and Flood Plain Protection Zone) is also referred to in the Pre-Hearing Order, but is not relied on by the Board.

[12] A typographical error in the Pre-Hearing Order mistakenly refers to this section as section VB. See Pre-Hearing Order, Â§ IV-5(d). Exhibit 32 is the "Town of Holliston Zoning Bylaws, adopted October 1962… with amendments through October 2006."

[13] Further, there is a question as to whether this consolidation of landfill materials under DEP supervision, as opposed to an operating landfill, falls within the definition in the bylaw. See Exh. 32, Â§ V-L(4)(B)(2)(c) and ***310 CMR 19.006***.

On the most fundamental level, the attempt by the Board to interpret these bylaw provisions as prohibiting the landfill consolidation is belied by the fact that at least one other landfill *has* been permitted in Holliston--a town-owned landfill on the opposite side of Marshall Street just south of the site, which was closed and capped in 1983. Â [14] Exh. Exh 57, pp. 1-2, fig. 2.

But more significantly, we find that none of the above bylaw provisions can fairly be read to regulate the landfill consolidation here. If a new landfill were proposed, that might be a use regulated under Holliston Zoning Bylaw. But here there is an existing hazardous waste site. There is no indication in any of the bylaw provisions that they are intended to regulate remediation; **[*25]** instead, the language, particularly the references to "discharges," clearly refers to active uses that pollute the environment rather than to remediation efforts on existing hazardous waste sites. Â [15]

Further support for this position is found in the fact that landfills *are* mentioned specifically with regard to Zone II areas in the Groundwater Protection District section of the bylaw, but only there. This supports our conclusion that the other, very general language in the bylaw--where landfills are not specifically mentioned--does not, under the Comprehensive Permit Law, constitute local regulation of the placement and design of landfills, much less of activities to remediate an existing problem. Since these matters have not been regulated locally, they are not local concerns that this Committee will consider.

Finally, in addition to the allegations related to landfill consolidation, the Board asserts a similar claim with regard to groundwater protection and the proposed wastewater treatment facility. **[*26]** It contends that the proposed on-site wastewater treatment facility may affect a town well that is about two miles downgradient. Exh. 73, P 62. Though the facility (which will require approval and permitting by DEP) has not yet been fully designed, it is clear that it will

---

[14] A small part of this town-owned landfill appears to actually be within the Zone II groundwater protection area. Exh. 57, fig. 2.

[15] Since we find that Holliston has not in fact regulated the remediation of hazardous waste sites, we need not reach the difficult question of whether such local regulation is preempted under home rule principles articulated by the Supreme Judicial Court. That is, "municipalities can pass zoning ordinances or bylaws as an exercise of their independent police powers, but these powers cannot be exercised in a manner which frustrates the purposes or implementation of a general or special law enacted by the Legislature...." *Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339, 360 (1973)*. We have found no ruling from the courts that indicates whether the Legislature, in adopting Chapter 21E, may in fact have intended to preempt local regulation of hazardous waste site remediation. But we do note that "in some circumstances we can infer that the Legislature intended to preempt the field because legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose." *Boston Gas Co. v. Somerville, 420 Mass. 702, 704 (1995)*, cited with approval in *Boston Edison Co. v. Bedford, 444 Mass. 775, 781 (2005)*. On the other hand, invalidation of local requirements may well require a "sharp conflict" between them and the state legislation, which "appears when either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local by-law." *School Comm. of Boston v. Boston, 383 Mass. 693, 701 (1981)*, quoting *Grace v. Brookline, 379 Mass. 43, 54 (1979)*. Thus, for example, local wetlands protection bylaws containing more stringent controls than the state Wetlands Protection Act have been upheld. See *Lovequist v. Conservation Commission of Dennis, 379 Mass. 7 (1979)*. Cf. *Fafard v. Conservation Commission of Barnstable, 432 Mass. 194, 204 (2000)*(local wetlands bylaw upheld under the rationale that "the Legislature provided only general principles to be used in regulating construction [of piers] on Commonwealth tidelands.").

> It is not clear how remediation of a hazardous waste site should be viewed under these precedents. We note, however, that remediation is governed by a very comprehensive state statutory scheme, the Massachusetts Oil and Hazardous Material Release Prevention Act, G. L. c. 21E. "Simply put, G. L. c. 21E was drafted in a comprehensive fashion to compel the prompt and efficient cleanup of hazardous material and to ensure that costs and damages are borne by the appropriate responsible parties. To that end, the department has promulgated extensive regulations, known collectively as the Massachusetts Contingency Plan (MCP), for purposes of implementing, administering, and enforcing G. L. c. 21E. See G. L. c. 21E, Â§ 3; 310 Code Mass. Regs. Â§Â§ 40.0000 (1999)." *Taygeta Corp. v. Varian Assoc. Inc., 436 Mass. 217, 223, (2002)*. Similarly, the operation and management of active sold waste facilities are also extensively and strictly regulated under state law. See 310 CMR 19.000.

discharge 65,000 gallons per day into the groundwater. Â [16] Exh. 71, P108-113; Exh. 73, PP 45, 48. The Board argues that "[i]t is entirely possible that some of the proposed wastewater discharge will pass through the [existing town-owned] landfill [which is across Marshall Street from the site]..., generating additional contaminants to groundwater from [that] landfill." Board's Brief, p. 36. This, in turn, could "degrade the water quality at [Town Well # 4]." Â [17] Board's Brief, p. 37; also see Pre-Hearing Order, Â§ IV-5(c)(i). The developer points out **[*27]** that detailed hydrogeological and other studies will be prepared before the facility is permitted by the state DEP, and argues that in any case there will be no adverse effect on the town landfill or well. See Exh. 73, PP 47, 50, 53, 54, 58. The Holliston requirements cited in the Pre-Hearing Order to show that this issue is regulated are the general sections referred to above. See Exh. 32, Â§Â§ I-D(1), V-N(2), and V-I (Wetlands and Flood Plain Protection Zone). But, as indicated above, Â§ I-D(1) prohibits discharges "unless [they] are… treated," which the effluent will be in this case, and Â§ V-N(2) permits discharges "in accordance with the applicable federal, state, and local health and water pollution control laws and regulations," which will also be true. Section V-I protects features on the surface of the earth--wetlands and flood plains--rather than the groundwater, and the Board has pointed to no specific part of the section that it alleges will be violated. See Board's Brief, pp. 39-41. Thus, as with the previous issues, we find that these bylaw provisions cannot fairly be read to regulate or prohibit the wastewater discharge here. There is no indication in any of the bylaw **[*28]** provisions that they are intended to regulate discharges from a large wastewater treatment facility that is fully subject to state law.

Consolidation of the onsite landfill, remediation, and the related issues of groundwater protection are not regulated under the Holliston Zoning Bylaw, and therefore are not properly before this Committee. Further, since these issues will be fully reviewed by state environmental authorities, there is no need for us to consider making an exception to our general rule of not considering unregulated matters. Cf. *Walega v. Acushnet*, No. 89-17, slip op. at 6 n.4 (Mass. Housing Appeals Committee Nov. 14, 1990).

2. Issues Properly Before the Committee

Four additional environmental and planning matters were put into issue by the Pre-Hearing Order in this case. With regard to some of these, the developer continues to challenge the presiding officer's ruling that they are legitimate matters of local concern. As mentioned above, there is not always a bright line between local concerns and matters regulated by the state. It is a line that must be drawn on a case by case basis after considering not only the design feature being challenged by the Board, **[*29]** but, equally important, the unique circumstances of the municipality--that is, its specific, written regulations and requirements and past regulatory practices. In this case, we find that each of the four other matters enumerated in the Pre-Hearing Order have been regulated sufficiently so that we will consider them on the merits. They are summarized as follows.

Issues concerning **wetlands protection** are regulated by the Holliston Wetlands Bylaw Â§ 3, and Holliston Wetlands Regulations, Â§ 6. See Exh. 33; 34.

Issues concerning **stormwater management** are regulated by the Holliston Board of Health Stormwater and Runoff Regulations and the Holliston Site Plan Review Regulations. See Exh. 35; 36.

Issues concerning **open space** have been regulated by Holliston under various provisions in its zoning bylaw. For instance, in section V-H, Special Permit for Cluster Development, the town has expressed a policy of permitting increased density when increased open space is provided. Similarly, under section V-G, open space is regulated in apartment districts. Thus, by analogy, it is legitimate for the Board to raise open space concerns with regard to the proposed development. Stated in other **[*30]** terms, we will address open space on the merits since we find that the issue has been regulated under sections V-H(2)(a)(4), V-H(2)(h-j), V-G(2)(c)(4), V-G(4)(r), V-G(5)(a)(6)(d), and V-G(5)(d)(3) of the bylaw. See Exh. 32.

---

[16] The effluent will have been treated, and thus its discharge directly into groundwater does not violate the law. Exh. 73, PP 75-77.

[17] The developer's position is that detailed hydrogeological and other studies will be prepared before the facility is permitted by the state DEP, and that there will be no adverse effect on the town landfill or well. See Exh. 73, PP 47, 50, 53, 54, 58.

Issues concerning **traffic** have also been regulated by Holliston both explicitly and under longstanding land use approval practices. See, e.g., Site Plan Review and Special Permit Regulations, Exh. 35, Â§ 7.3.4. Â [18] Therefore, we will also address the local traffic concerns raised in this case--adequacy of sight distance at the entrances and of emergency access.

IV. LOCAL CONCERNS

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a *prima facie* case by showing that its proposal complies with state or federal requirements or other generally recognized design standards. **[*31]** Â [19] 760 CMR 31.06(2), *760 CMR 56.07(2)(a)(2)*. The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that the concern outweighs the regional need for housing. 760 CMR 31.06(6); *760 CMR 56.07(2)(b)(2)*; also see *Hanover v. Housing Appeals Committee, 363 Mass. 339, 365 (1973)*; *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

A. Wetlands Protection

With regard to wetlands, the developer introduced testimony from two experts, a specialist in wetlands and wetland delineation and a professional civil engineer. Exh. 76, P 1; 87, P 2; 73, P 1. The Board presented testimony from an expert who is both a professional civil engineer and a professional planner. Exh. 77, P 1; 77-A.

There are five wetlands areas on **[*32]** the site. They were identified in a single Abbreviated Notice of Resource Area Delineation (ANRAD) that the developer filed with the Holliston Conservation Commission in June 2003 under both the Holliston Wetlands Bylaw and the state Wetlands Protections Act (WPA), G.L. c. 131, Â§ 40. Exh. 53. Â [20] These wetlands are regulated locally by the Holliston Wetlands Bylaw Â§ 3, and Holliston Wetlands Regulations, Â§ 6. See Exh. 33; 34. The Board has focused on two particular provisions of the bylaw and regulations that are stricter than state law: first, the provisions that define the 100-foot buffer zones around each wetland area as actual resource areas and largely prohibit disturbance of the land in such zones, and second, a provision that specifically

---

[18] Roadway design is in all likelihood regulated by subdivision regulations as well, but they were not introduced into evidence.

[19] [A] *prima facie* case may be established with a minimum of evidence." *100 Burrill Street, LLC v. Swampscott*, No. 05-21, slip op. at 7 (Mass. Housing Appeals Committee Jun. 9, 2008), quoting *Canton Housing Authority v. Canton*, No. 91-12, slip op. at 8 (Mass. Housing Appeals Committee Jul. 28, 1993). For example, "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Tetiquet River Village, Inc. v. Raynham*, No. 88-31, slip. op. 9 (Mass. Housing Appeals Committee Mar. 20, 1991).

[20] Only excerpts from the ANRAD (Exhibit 53) were admitted in to evidence; the exhibit does not include the maps or plans that show the actual delineation. Subsequent to the filing of this document with the Conservation Commission in 2003, a site visit was conducted which included the town conservation agent, a member of the Commission, a consultant employed by the Commission, and the developer's expert. Exh. 76, PP 27-28; also see 87, PP 5-10. With regard to one area--the pond (Area E)--"minor adjustments" were made in the field to the wetlands delineation. Exh. 54, p. 2; 76, P 31; also see 87, PP 5-10. In addition, the consultant suggested that the wetlands boundary be moved up (away from the pond) by one two-foot contour. Exh. 54, p. 2; 76 P 31. In the other four areas, no changes were suggested other than the addition of one "intermediate flag." Exh. 54, pp. 2-3; 76, PP 32-34; also see 87, PP 5-10. The consultant recommended that these slightly modified delineations be approved by the Conservation Commission. Exh. 54, p. 3. The Commission apparently never acted upon that recommendation, and in 2004, as a technical matter, the developer withdrew the notice. Exh. 55. The Board now argues that in the context of the comprehensive permit application, the wetlands have not been delineated sufficiently to permit the wetlands issues to be fully addressed. See, e.g., Exh. 77, P 16. We disagree. Under the Comprehensive Permit Law, either the Board or, on appeal, this Committee has "the same power to issue permits or approvals" as the Conservation Commission, that is, to determine the proper wetlands delineation under the local wetlands bylaw. G.L. c. 40B, Â§ 21. We find, based upon the documentary evidence before us, particularly Exhibit 54, and the testimony of the witnesses, that with regard to the local bylaw, the 2003 wetlands delineation made by the developer's expert, as modified by the suggestions of the Conservation Commission's consultant, is accurate. Exh. 87, P 10. An approximate depiction of this delineation appears on the overall site plans. See Exh. 6, sheets 7 and 13 ("Existing Conditions Plan, Plan 5" and "Grading and Drainage Plan, Sheet 5").

classifies the first 50 feet of the buffer zone as a "no disturbance area." Board's Brief, pp. 44, 49; Exh. 34, Â§Â§ 3.4, 6.3.1.

As will be seen below, the developer's wetlands expert described, with reasonable specificity, the design elements that may affect **[*33]** the five wetlands areas. See Exh. 76, PP 45-64, 68-78; 87, PP 11-27. That description, the clear intention to comply with the state Wetlands Protections Act, and the expert's testimony that the development "will result in no significant adverse impacts to wetland resource areas both under the WPA and the Town of Holliston Bylaw" are sufficient to establish a *prima facie* case pursuant to *760 CMR 56.07(2)(a)(2)*. Exh. 78, P 78. To determine whether the Board has met its burden in response, we will address the wetlands areas individually, examining the design proposed by the developer and the local concerns raised by the Board. Neither party, however, introduced a great deal of scientific evidence with regard to impacts on these resource areas. Â [21] Nevertheless, there is sufficient information so that by comparing the evidence presented by each side we are able to identify legitimate local concerns, and we conclude that the Board has not met its burden of establishing that **[*34]** those concerns outweigh the regional need for affordable housing so as to justify denial of the comprehensive permit. In one instance, however, a significant enough concern has been raised so that we will impose a condition to ensure that local concerns are protected when the development is constructed.

The Pond (Area E) -- At the northeastern end of the site is a triangular, man-made pond, with a narrow peripheral wetlands area along its banks (labeled Area E). See Exh. 6, sheet 9; Exh. 10. Because it is slightly larger than a quarter of an acre, it is protected under both state and local law. Exh. 76, PP 24-25. Much of the area surrounding the pond was disturbed in the past; gravel mining operations led to topsoil removal, soil compaction, and piles of spoil. Exh. 76, PP 57, 59; 87, PP 14, 16. Its buffer zone, including the 50-foot no-disturbance area, although degraded, is a wetlands resource area under the local bylaw. The developer proposes to re-grade all of this area in order to construct a large stormwater detention basin--Basin 4P--which will surround the pond on two of its three sides. Exh. 76, PP 57, 59; 6, sheet 9. The existing wetlands at the edge of the pond will **[*35]** not be disturbed, and the bottom of the basin, which will be at an elevation similar to that of the pond, will consist of hydric soils and "will be revegetated with indigenous hydric species, ...increas[ing] the overall wetland area of the site, and enhanc[ing]… surface water management and wildlife habitat." Exh. 76, P 60; 87, PP 17, 18. That is, a considerable portion of this area, when completed, will not just be a buffer zone, but will itself become an actual wetland, with improved stormwater management capabilities and increased "functionality… in terms of shade, hiding cover, and forage opportunities" for wildlife. See Exh. 87, P 18; 89, P 49. Nearby buildings are well clear of the no-disturbance area and impinge on the 100-foot buffer by at most about ten feet. Exh. 6, sheet 9; Exh. 77, P 63.

The Board's expert raised a number of concerns. First, he asserted that the pond is a vernal pool. Exh. 77, PP 18, 19. It clearly is not. A vernal pool, which rarely resembles a pond, is a "confined basin or depression..., which, at least in most years, holds water for a minimum of one month during the spring… [and] is free of adult predatory fish populations, [thus] providing essential **[*36]** breeding and rearing habitat functions for amphibian… species...." Exh. 34, p. 5 (Holliston wetlands regulations). On-site observations have shown that there *is* a vernal pool in the

---

[21] For instance, the Board's expert testified that there will be "extensive construction of dwelling units and stormwater management facilities within 25 to 35 feet" of wetlands, and yet his more detailed testimony focused on stormwater management facilities and not the location of buildings. Exh. 77, P 15. For that reason, we can only address the stormwater facilities, and any local concerns about building locations, roadway locations, or the like are deemed waived.

> We should note that the Board's failing in this regard is a common one in the cases presented to us. Frequently, Boards' witnesses fail to develop their testimony beyond how a proposed development falls short of local requirements. This is not sufficient. The Board must also demonstrate why the stricter local requirement must be applied to protect a local concern. A board should provide evidence of how the proposed development would have a more detrimental impact if certain local requirements are waived than if it is built to state standards, and show that that impact is sufficiently great to outweigh the regional need for housing. Ordinarily, this would require the Board to work closely with the Conservation Commission and to hire a wetlands scientist to evaluate the physical characteristics of the site in great detail. Not only should the expert be familiar with the site, but ideally, he or she should also be sufficiently familiar with the bylaw and the overall characteristics of the town so that he or she understands the scientific basis for specifying particular bylaw provisions that are stricter than state law.

small body of open water in the large wetlands area (Area A/D) on the western portion of the site. Exh. 76, P 37-39; Exh 54, p.3. But in the pond at the northeastern part of the site, the developer's wetlands specialist observed three different species of predatory fish and various unidentified minnows, which led him to the conclusion, with which we agree, that the pond is not a vernal pool. Exh. 76, PP 24, 40; 87, P 12.

A more legitimate concern raised by the Board's expert is that the bottom of the stormwater basin will be a foot below the existing wetlands surrounding the pond, "which is likely to lower groundwater and dewater the wetland...." Exh. 77, P 18. The developer's expert did not respond, which adds credibility to this assertion. See Exh. 87. This, however, is easily addressed by a condition requiring that the floor of the basin be raised at least one foot, unless a hydrogeologic or other study shows that there is no risk of dewatering nearby wetlands or that the risk can be addressed **[*37]** by other means. Â [22] See Â§ VI-2(c), below.

Beyond this, the Board's expert testified in general terms that the no-disturbance zone will be altered, and that the developer "has not demonstrated… that it can address these [unspecified] issues without adversely impacting this resource area...." Exh. 77, P 20. But the burden of proof is on the Board, and we find it has not proven specific damage within the no-disturbance area in order to meet that burden.

We conclude that although the nature and quantity of the work proposed here is unusual, when viewed in the context of the remediation of an extensively disturbed site, the Board has proven no local concern that outweighs the regional need for housing.

The Large Wetlands Areas (Areas A/D) -- At the opposite end of the site are the two largest wetlands areas (labeled Areas A and D), which are part of an extensive forested swamp that extends well beyond the site itself; they adjoin one another, separated by an existing roadway. Exh. 76, PP 14-16, 20; **[*38]** also see Exh. 4, sheet 13; 48, p. 9. These areas constitute roughly the western third of the site, and as noted above, one of them contains within it a vernal pool. See Exh. 48, p. 9; Exh. 76, P 37-39; Exh 54, p.3. They are protected under both state and local wetlands regulations. The 100-foot buffer zone currently "is largely a denuded former landfill slope transitioning to an old disturbed field and shrub habitat." Exh. 76, P 22. The forested wetland areas themselves will remain undisturbed, but a very large stormwater detention basin--Basin 7P--will be constructed close to them. Exh. 76, P 46-47. A portion of it will be located within both the 100-foot buffer zone and the 50-foot no-disturbance area. Exh. 6, sheet 13; 76, P 48. In a manner similar to Area E, the developer proposes to completely re-engineer and re-grade the area in which the stormwater basin will be located. Construction debris will be removed, and the area will be excavated to increase flood storage capacity. Exh. 76, P 49. The entire basin will "be re-vegetated with indigenous [plant] species," and become a wetland. Exh. 76, PP 51, 74; 89, P 49. And, a "significant area of the buffer zone along the eastern edge **[*39]** of the Wetland A/D… will also be fully restored. Exh. 87, P 22. The developer's expert's opinion is that the stormwater basin "will revitalize this degraded area… It will enhance this area through soil stability and shade… It may provide habitat for a variety of wildlife species, including amphibians such as spotted salamanders that may breed in the… vernal pool located in this area...." Exh. 87, P 23-24.

The Board's expert provided no testimony that specifically addressed the possible impact of Basin 7P on Areas A/D. See Exh. 77, PP 13-23. General comments that the on-site stormwater management system will negatively affect wetlands and buffer zones are insufficient to satisfy the Board's burden of proof. See Exh. 77, P 17.

The Small Isolated Wetlands Areas (Area B and C) -- Near Areas A/D are two much smaller depressions, labeled Areas B and C. They are separated from the larger areas by the existing roadway in one case, and by an earthen berm in the other. Exh. 76, P 19-20. These are isolated wetlands protected under local regulations, but not under the WPA. Exh. 73, P 21. The first small isolated wetlands area, Area C, is also described as "degraded" due to historic **[*40]** gravel mining practices and dumping. Exh. 76, PP 47, 68, 73. It "was a dump site for old stumps,

---

[22] Raising the floor is not in itself a significant change in the design of the development. If, however, as is likely, this change requires other changes in design, whether or not they are substantial can be determined pursuant to ***760 CMR 56.05(11)***. The developer's engineer also suggested the possibility of placing an impervious barrier between the pond and the basin to "prevent groundwater migration to the … basin." Exh. 89, P 50. Depending on what the ramifications of such a barrier are, this, too, could possibly be a substantial change.

as evidenced by the rotting remains of the root systems." Exh. 76, P 20. This area is within proposed stormwater Basin 7P, and thus, as described above, the developer proposes to completely re-engineer and re-grade the area, including this entire small wetlands area. Exh. 76, P 47; Exh. 6, sheet 13. As noted, construction debris will be removed, and the area will be excavated to increase flood storage capacity. Exh. 76, P 49. The entire basin will "be re-vegetated with indigenous [plant] species," which will "restore the function of the degraded [wetland] both in terms of surface water management and as wildlife habitat." Exh. 76, PP 51, 74; 87, P 23; 89, P 49. The developer's expert's opinion is that the stormwater basin "will be an enhancement of the small pocket wetland...." Exh. 87, P 26.

The Board's expert provided little in the way of concrete objections to these design plans. In a single paragraph, he simply described the work, characterized it as "complete destruction" of the wetland, and stated, "It is imperative that the standards that apply to these locally and state regulated **[*41]** areas be thoroughly evaluated [to determine] whether the stormwater system can be constructed without adversely affecting the interests protected under the local bylaw." Exh. 77, P 22. We find that this, too, is insufficient to prove the existence of a local concern that outweighs the regional need for housing.

The second isolated area, Area B, is across the existing road to the west of Area C. It is outside of the area in which Basin 7P will be constructed, and will not be disturbed. Exh. 6, sheet 13; also see Exh. 76, P 47. The Board's expert expressed no concerns with regard to it. See Exh. 76, PP 13-23.

Review of Final Plans - Lastly, we note that while the broad outlines of the developer's proposal for wetlands restoration are clear, the Board's expert is correct that detailed specifications have yet to be provided. See, e.g., Exh. 77, PP 19, 20. In some cases such as this--where the wetlands issues are fairly complex--developers might have chosen to present more detailed plans, even though only preliminary plans are required. See *760 CMR 56.05(2)(a)*, (2)(f). Since that was not the case here, lest there be any confusion, the parties should be aware **[*42]** that while we hereby approve the overall preliminary wetlands plan under the local bylaw, specific designs must be reviewed by the Holliston conservation agent under the wetlands bylaw prior to construction, and the developer must appear before the Conservation Commission under the state WPA. See *760 CMR 56.05(10)(b)*.

B. Stormwater Management

Stormwater management is regulated by the Holliston Board of Health Stormwater and Runoff Regulations and the Holliston Site Plan Review Regulations. See Exh. 35; 36. The town uses these regulations in its "discretionary permit process" that applies in both wetlands and upland areas. Exh. 78, P 9; 36, Â§ 7.3.3(a), (d). The most significant way in which the local requirements exceed state requirements appears to be that not only must post-development peak discharge rates not exceed pre-development rates, but in addition, post-development discharge volume must be held constant or reduced. Exh. 78, P 9; Exh. 35. Also, slopes in stormwater basins are not permitted to be steeper than four to one, as compared to the state limit of three to one. Exh. 35. There may also be enhanced water quality standards, though these **[*43]** were not specified by the Board. See Exh. 78, P 9.

The parties focused largely on the proposal's primary stormwater management features: the detention basins, described above, which are "constructed wetland areas." See Exh. 89, P 49. The developer's expert civil engineer testified that the plans admitted into evidence are preliminary plans that comply with the 1997 state Stormwater Management Guidelines, and will be redesigned to comply with 2008 revisions in state requirements. Exh. 73, PP 90-93; 111(b); 89, P 46. He testified about various specific aspects of the design, and indicated that in several respects the preliminary plans will need modification. Â [23] Exh. 73, PP 94-106.

---

[23] The preliminary nature of the plans created some confusion. For instance, the Board's expert was concerned that a fence was not provided around the stormwater basin and that drywells had not been designed to capture roof water. Exh. 77, P28, 29. But developer's expert testified on rebuttal that fences, though not required, "could be provided if needed," and that "[l]ocalized infiltration of roof top runoff will be provided at each of the proposed buildings." Exh. 89, PP 45, 48. Similarly, though further field work will be required, the preliminary design calculations are based not only on USGS Soil Survey information, but also "preliminary onsite test pit data." Exh. 89, P 44; cf. Exh. 77, P 26.

All of the Board's arguments are based on the testimony of its expert professional engineer and planner, Thomas Houston. Â [24] See Board's Brief, **[*44]** pp. 50-63. This testimony and the arguments articulated by the Board in its brief focus almost entirely on whether the stormwater system will function as designed. See, e.g., Board's Brief, p. 51, P 21; p. 53, P 25; Exh. 77, PP 25-42. The testimony attempts to show either that the design does not comply with state standards or that compliance with state standards is not feasible. See, e.g., Exh. 77, PP 31, 33, 35. It provides considerable detail, particularly with regard to the elevation of various design features and the separation of those features and the basins themselves from groundwater. See, e.g., Exh. 77, PP 25, 26, 31-35, 38-40. In contrast, the developer's expert, James Hall, by and large chose not to respond to the specific allegations, but simply elaborated briefly on the developer's commitment to complying with state standards. Exh. 87, PP 43-52.

The testimony does not provide an explicit and unambiguous explanation of the difference of opinion between these two qualified experts, but the reason for the disagreement is clear by implication. The Board's expert based his testimony on the assumption that the basins are upland basins requiring two feet of separation between **[*45]** their bottoms and groundwater. See Exh. 77, P 25. But the basins will not be in an upland area since the developer's expert designed them as "constructed wetland areas," which will be at or near groundwater, and in his opinion are approvable under state standards. Exh. 89, P 49. A more explicit indication of the misunderstanding appears in the testimony concerning wetlands protection, discussed above. Alteration of a small, isolated wetland would not be permissible if it were to be replaced by an upland detention basin, but here the existing wetland is being incorporated into a much large constructed wetland. And, as the developer's wetlands expert pointed out, the Board's expert "fail[ed] to understand that no wetlands will be destroyed...." Exh. 87, P 26.

Having reviewed the testimony of both stormwater experts, we find that the developer has proven that the proposed development will comply with state stormwater standards. Â [25] This proof of compliance with state standards is sufficient to establish **[*46]** the developer's *prima facie* case. *760 CMR 56.07(2)(a)(2)*; *Canton Property Holding, LLC v. Canton*, No. 03-17, slip op. at 21-24 (Mass. Housing Appeals Committee Sep. 20, 2005) (*prima facie* case established even though "depth, sizing, location and configuration of the detention basins might require revision").

As noted above, little if any of the Board's testimony attempted to meet its burden of proof by establishing damage to local concerns that might outweigh the regional need for affordable housing. For instance, even though there was no clear testimony with regard to the volume of stormwater runoff, we can infer that the design will not meet the strict local requirement that the volume as well as rate of runoff be limited. That is, the developer's expert testified only that the design will ensure that "post-development peak discharge rates do not exceed pre-development peak discharge rates." Exh. 73, P 95. But, assuming that the volume of runoff does not meet the local standard, there is no indication that this will do any harm. In fact, any significant harm appears unlikely since the site is immediately adjacent to a very large existing wetland. **[*47]**

The only area in which there was any testimony about non-compliance with local requirements was with regard to the slope of the sides of the stormwater basins and their depth. But the Board's expert testified only that the design calls for a three-to-one slope (which is permissible under state standards), that they are deeper than the local standard of three feet, and that therefore they "do not comply" with local reculations. Exh. 77, PP 36, 41. There is no evidence of harm which might outweigh the regional need for affordable housing.

We conclude that the Board has not met its burden of proof with regard to the design of the development's stormwater management system.

C. Open Space

At least 15 acres of the site, or nearly 30% of it, will be open and undeveloped. Exh. 71, P 15; cf. Exh. 73, P 43. Much of this will be wooded wetlands, although there are some upland wooded areas and a two-and-one-half-acre

---

[24] The town planner testified only as to the applicability of town requirements, not as an expert on stormwater. Exh. 78, P 9.

[25] Although the final design must comply with state law is required in any case, so that there will be no confusion, we include a condition to that effect, and this will ensure that if the Board's expert is correct in any of his specific critiques, those problems will be rectified. See Â§ VI-2(d), below.

open area suitable for playing fields which is located in the southeast corner of the site above the wastewater leaching field. Exh. 6; 10; 71, P 15; 89, PP 19-20. There will also be recreation facilities, including two tennis courts, **[*48]** Â [26] at least two playgrounds, two gazebos, and paths for walking and bicycling. Â [27] Exh. 10; 71, P 15; 73, PP 36-43. The developer's civil engineer testified not only that this open space meets generally recognized standards, but also that it meets the requirements of the Holliston Zoning Bylaw. Exh. 89, P 3. We find that it is unnecessary to determine definitively whether the design complies with the bylaw, but in any case, rule that this expert's testimony in full is sufficient to establish a *prima facie* case pursuant to *760 CMR 56.07(2)(a)(2)*.

First, we have previously noted that "[t]hough the purpose of the Comprehensive Permit law is to permit waiver of unnecessarily restrictive local requirements, it is nevertheless instructive to consider the requirements" that the town has put in place for other developments **[*49]** similar to the one proposed. See *L.A. Associates, Inc. v. Tewksbury*, No. 03-01, slip op. at 13-14, (Mass. Housing Appeals Committee Feb. 1, 2005). The Holliston Zoning Bylaw suggests that the total open space in a cluster development should in no case be "less than 15% of the total land area of the tract...." Â [28] Exh. 32, Â§ V-H(2)(j). The Holliston town planner argued that this 15% figure is not a fair benchmark since the bylaw provides an alternate way of calculating required open space. That alternative, however, is entirely unrealistic for affordable housing. It assumes individual homes built on nearly one-acre lots. That is, as the town planner acknowledged, it would require that each housing unit be placed on a 40,000 square foot lot and "to achieve 200 [housing] units… with the minimum required open space, over 210 acres would be required." Exh. 78, P 8(1). In summary, since nearly 30% of this development is open space, the bylaw itself suggests that the amount of open space is adequate. **[*50]**

More important is the testimony introduced by the Board from a well qualified professional planner. See Exh. 79, PP 15-17; Tr. III, 58-82. Based upon an estimate of between 567 and 612 residents living in the development, she prepared a chart of recommended recreational facilities. See Exh. 79, P 16. As seen in Table 1, it is remarkably similar to what is being proposed:

Table 1

Proposed	Recommended by the Board's Expert
Â 2 playgrounds	1 tot lot & 1 playground
Â open area (2 1/2 a.)	common space with amenities (3-5 a.)
Â 2 gazebos	--
Â 2 tennis courts	1 or 2 tennis courts
Â --	basketball court
Â walking trails (> 1/2 mile)	walking trails (minimum: 1/2 mile)

As seen in the table, both parties suggested two play areas. The developer's plans show only one such area, and therefore need to be revised to add a playground for elementary school children to conform to the actual proposal. See Exh. 10 In addition, the play area that *is* shown on the plans, which appears to be a small tot lot, is poorly located. The developer, in consultation with the Holliston town planner, should give serious consideration to enlarging the tot lot and placing it in a safer location--one in which children **[*51]** playing are visible from the rear windows of homes. (A triangular open space located 400 feet due west of the current location would appear to be ideal.)

---

[26] The developer originally proposed either tennis courts or a putting green.

[27] The latest plans, prepared May 22, 2006, (Exhibit 10), show tennis courts rather than a putting green, one playground, two gazebos, and paths. The remaining playground(s) will be added to the plans as per the testimony of the developer's principal.

[28] We have little doubt that this is intended to include wetlands. The Apartment District section of the bylaw refers to "open space *including* wooded and wetland areas." Exh. 32, Â§ V-G(2)(c)(4) (emphasis added).

The large open area proposed by the developer is slightly smaller than that suggested by the Board's expert, but that is more than compensated for by the two gazebos proposed for other parts of the site.

The proposal lacks a basketball court, but that can easily be added in the vicinity of the open area or, better, in some other location on the site. We will so require by condition. See Â§ VI-2(e), below.

We conclude that the proposal provides adequate open space.

D. Traffic

The Board raised two issues with regard to traffic--that vehicular sight distance at the entrances will be inadequate, and that the configuration of the internal roadways is inadequate for emergency access. Â [29] Pre-Hearing Order, Â§ IV-5(f). The developer's engineering design firm conducted a traffic study, and two of its expert witnesses--its civil engineer and its traffic **[*52]** engineer--testified that under standards issued by the American Association of State Highway and Transportation Officials (AASHTO) the sight distances at the entrances will be adequate and that emergency vehicles will have access throughout the site. Exh. 46, pp. 18, 28; Exh. 73, P 25-27; 75, P 145. This is sufficient to establish the developer's *prima facie* case. *760 CMR 56.07(2)(a)(2)*.

Sight Distance -- The Board argues that under AASHTO standards the recommended intersection sight distances are not met at either of the two entrances to the development. Exh. 77, PP 47-49. Specifically, the Board's expert notes that at the northern entrance, looking north, the intersection sight distance should be 467 feet, but that only 410 feet of sight distance is available. Exh. 77, P 47. At the southern entrance, looking south, the intersection stopping distance should be 467 feet, but only 400 feet of sight distance is available. Exh. 77, P 48.

The developer's expert was in substantial agreement with the Board's expert with regard to the measured conditions, finding that sight distance at both entrances was 400 feet. **[*53]** Â [30] Exh. 75, PP 69,70; Exh. 46, p. 16. But he delved into the question of sight distance in considerably more detail. See Exh. 75, PP 57-87. He noted that two separate sight distance criteria are used to evaluate intersections--intersection sight distance and stopping sight distance. Exh. 75, P 58. Specifically, AASTHO *recommended intersection* sight distances "are based upon not inconveniencing traffic," while *minimum stopping* sight distances provide for safe stopping by vehicles on Marshall Street. Exh. 75, PP 130-131; 86, PP 19, 22. He agrees that the recommended intersection sight distance is 467 feet. Exh. 46, p. 18; 75, P 80; 86, PP 19, 22. But he concludes that because the sight distances exceed the minimum stopping standard of 327 feet, they "are adequate to provide safe intersections." Exh. 46, p. 18; 75, PP 83, 131; 86, PP 20, 23; also see Exh. 47, p. 4, P 10.

We credit the testimony of the developer's witnesses, and conclude that because stopping sight distances will be adequate, the entrances to the **[*54]** development will be safe.

Emergency Access -- The Board and its experts argue that there is not adequate emergency access to all parts of the development because of dead-end streets that "exceed the local safety standard of 500 feet and 12 dwelling units per dead-end road." Board's Brief, pp. 64, 69-70; Exh 77, P 53.

The development roadways are a combination of loops and dead ends. There are three access points on Marshall Street--two entrances and an emergency access roadway. Exh. 73, P 20-21; Exh. 10. Although the majority of housing units are not on dead-end streets, two fairly long roadway segments do have dead ends. Each of these--one near the center of the site serving 30 housing units and the other at the northern end of the site with 32 units--is

---

[29] There was testimony on broader questions concerning the volume of traffic and levels of service on local roads and intersections and concerning the existing conditions with regard to sight distance at the intersection of Prentice and Marshall Streets. See, e.g., Exh. 77, PP 43-46, 50-52. We will not consider these, however, since they were not raised in the Pre-Hearing Order. See Pre-Hearing Order, Â§ IV-2 (issues raised in the Pre-Hearing Order "are the sole issues in dispute...").

[30] At a later point, the witness testified that the sight distance at the northern entrance was 410 feet. Exh. 75, P 81. We assume that the lower figure is correct.

between 600 and 700 feet long. Â 31[1] Exh. 10 (by scaling). There is little evidence with regard to topography or other features of these roadways.

We agree with the Holliston fire chief that "[a]s a general rule,… long, singleaccess roadways should **[*55]** be avoided due to the potential for blockages" due to fallen trees, automobile crashes, or other unusual circumstances which may results in delays in emergency personnel reaching homes isolated at the end of the street." See Exh. 80, PP 4-6. Among the three leading cases of this sort that we have considered, we have twice found the dead-end roadways to be sufficiently hazardous to justify denial of a comprehensive permit. See *O.I.B. Corp. v. Braintree*, No. 03-15, slip op. at 8-11 (Mass. Housing Appeals Committee Mar. 27, 2006) (1500-foot single-access roadway to 100 units of housing found inadequate); *Lexington Woods, LLC v. Waltham*, No. 02-36, slip op. at 8-20 (Mass. Housing Appeals Committee Feb. 1, 2005) (steep, winding, 1000-foot single-access roadway to 36-unit development found inadequate); cf. *Capital Site Management Associates Ltd. Partnership v. Wellesley*, No. 89-15, slip op. at 28-35 (Mass. Housing Appeals Committee Sep. 24, 1992) (steep, 200-foot roadway to 33-unit development approved).

But the dead-end streets in this case are difficult to evaluate. In general terms, neither is the length of the streets and the number of houses located on them so great as **[*56]** to unquestionably create a hazardous situation, nor are they so short and sparsely developed so as to be of no concern. Further, we have little specific information to rely on. Few details concerning topography or other design criteria were explored in the testimony, nor did either party present evidence concerning the scientific or statistical aspects of the risk involved. Thus, in our judgment, the Board has not presented sufficient evidence to meet its burden of proving that the risk presented by these dead-end streets outweighs the regional need for affordable housing. Â [32]

The Board and the fire chief also argue that school-bus stops are inconveniently located, and that as a result parents may drive their children to the bus stops and block emergency vehicles with their parked cars. Board's Brief, pp. 68, 70; Exh. 80, P 8. Though this argument appears unconvincing on its face, we need not analyze it since the developer has agreed to locate bus stops in more central locations. Exh. 89, P42; also **[*57]** see Â§ VI-2(f), below. Â [33]

V. ATTORNEYS FEES

The developer has filed a motion for reimbursement of attorney's fees. The Board's rules provide that "[t]he Board may hire outside consultants for review and analysis of any application when the board determines it appropriate," and the cost is to be borne by the developer. Â [34] At the first hearing before the Board, in March 2005, counsel for the Board informed the developer that an escrow account would need to be established to pay consultant fees. Exh. 71, P 118. Norton Affidavit, Attach. 2 (filed Jul. 17, 2007). The developer agreed to pay between $ 10,000 and $

---

[31] Exhibit 10, a site plan prepared by the developer's engineer, has a notation that says. "Length of Dead End = 1,613'." This is incorrect.

[32] It would be a simple matter to reconfigure the dead-end streets to create safer, looped roadways. See Exh. 10. That is, the turn-around loop at the end of the dead-end street in the center of the site is near the turn-around loop at the end of a similar, but much shorter street. By eliminating the turn-around loops and adding a new segment of roadway about 500 feet long, these two streets could be joined, creating a large continuous loop. At the northernmost part of the site, the turn-around loop at the end of the second long dead end could simply be replaced by an additional emergency access road intersecting with Marshall Street, which is only about 100 feet away. Further, it appears that the long emergency access road at the southern end serves no purpose; if it were eliminated, the only housing units that would not still be accessible by two alternate routes are the six units that are actually located on it. Overall, the site design shows little creativity, and though it meets minimum standards, there are a number of ways in which the configuration of roadways and housing units could be improved. Any such changes that the developer may propose are subject to the procedures in ***760 CMR 56.05(11)***.

[33] A similar argument--that vehicles maneuvering out of tandem parking spaces might block emergency vehicles--was made by the Board's expert. Exh. 77, P 54. It was not briefed, and therefore is waived. See *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994), citing *Lolos v. Berlin, 338 Mass. 10, 13-14 (1958)*.

[34] The rules are entitled "Rules for the Issuance of a Comprehensive permit, G.L. c. 40B," and "are authorized by G.L. c. 40B, sec. 21; G.L. c. 44, sec. 53G; and 760 CMR 31.02(3)."

15,000 into an escrow account to pay consultants, including the Board's counsel. Exh. 71, PP 121, 122. The developer alleges that at that time expenses to be paid to counsel were "presumed to be limited to **[*58]** approximately $ 5,000 based upon [counsel's] representation." Exh. 71, PP 123. The minutes of the meeting indicate only that "[the developer] agreed to fund attorney's fees." Members of the Board and town officials who were present state that the Board did not "make any representation to the applicant that the initial escrow account would be sufficient to cover expenses associated with technical assistance, including legal assistance. In fact, the account was established 'subject to replenishment.'" Affidavits of Carey, Dellicker, Donovan, and Sherman, PP 6-9 (Board's Opposition to Motion for Reimbursement, Attach. B, C, D, E (filed Jul. 27, 2007)). Although it is unlikely that the Board could have required payment of most of the attorney's fees, the Comprehensive Permit Law does not prohibit the developer from voluntarily agreeing to pay such fees. See *Attitash Views, LLC v. Amesbury*, No. 06-17, slip op. at 14 (Mass. Housing Appeals Committee Summary Decision Oct. 15, 2007), *aff'd*, No. 2007-5046 (Suffolk Super. Ct. Jan. 7, 2009), and cases cited. Based upon the minutes, and supporting affidavits, we find that there was no explicit limitation placed upon the amount of those **[*59]** fees that the developer agreed could be reimbursed. The motion for reimbursement is therefore denied.

VI. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Holliston Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development, consisting of 200 total units, shall be constructed substantially as shown on site plans by Coler & Colantonio, Inc. (Cedar Ridge Estates, January 19, 2005, rev'd May 22, 2006)(Exhibit 6, as revised by Exhibit 10), landscape plans by Coler & Colantonio, Inc. (8/2/06)(Exhibit 13), architectural plans by Egnatz Associates, Inc. (Exhibit 13), and as described in this decision.

(b) Prior to beginning construction, the developer shall, as described more fully in the February 20, **[*60]** 2007 Ruling on Board's Motion to Dismiss in this matter, establish ownership of the 2.55-acre parcel within the site and that easement rights to a bridle path are consistent with the development plans.

(c) The floor of stormwater Basin 4P shall be raised at least one foot, unless a hydrogeologic or other study shows that there is no risk of dewatering nearby wetlands or that the risk can be addressed by other means.

(d) All design features shall comply with the state Wetlands Protection Act, including all DEP Stormwater Management Guidelines, subject to review by the Holliston Conservation Commission and the Massachusetts Department of Environmental Protection.

(e) Recreational facilities shall be provided as proposed and further described or modified in section IV-C, above.

(f) Unless notified by the Board that the current locations of the two proposed bus stops are acceptable, the bus stops shall be relocated to central locations on looped roadways.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, Â§ 23 and *760 CMR 56.07(6)(a)*, this decision shall for all purposes be deemed the action of the Board.

4. **[*61]** Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency or project administrator may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) Construction and marketing in all particulars shall be in accordance with all presently applicable state and federal requirements, including, without limitation, fair housing requirements.

(e) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56. **[*62]** 00 and DHCD guidelines issued pursuant thereto.

(f) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(g) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, Â§ 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Date: January 12, 2009

MA Housing Appeals Committee

End of Document

EXHIBIT F

2009 MA Housing App. LEXIS 1

January 12, 2009

No. 06-16

MA Housing Appeals Committee

Reporter
2009 MA Housing App. LEXIS 1 *

GREEN VIEW REALTY LLC, AppellantÂ ; v.Â ; ZONING BOARD OF APPEALS OF HOLLISTON, Appellee

Core Terms

wetland, site, has, slip opinion, zone, was, bylaw, basin, landfill, stormwater, groundwater, street, distance, section, local concern, roadway, sight, foot, open space, consolidate, fundability, subsidize, pond, prima facie, intersection, hazardous, eligibility, entrance, delineate, traffic

Panel: Werner Lohe, Chairman; Marion V. McEttrick; James G. Stockard, Jr.

Opinion

DECISION

I. PROCEDURAL HISTORY

On January 19, 2005, Green View Realty, LLC submitted an application to the Holliston Zoning Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, Â§Â§ 20-23 to build 200 affordable, mixed-income, condominium housing units known as Cedar Ridge Estates on a nearly 53-acre site at the southwest corner of Marshall and Prentice Streets in Holliston. The housing is to be financed either under the Housing Starts Program of the Massachusetts Housing Finance Agency (MassHousing) or the New England Fund of the Federal Home Loan Bank of Boston. Exh. 4, fifth section, p. 1.

On September 11, 2006, the Board denied the comprehensive permit. Exh. 1. On September 29, the developer appealed to this Committee. Thereafter, in order to structure the Committee's *de novo* hearing and narrow the issues presented, the parties negotiated a Pre-Hearing Order, which was issued by the presiding officer pursuant to the Committee's regulations. Â [1] Prefiled testimony was received from fifteen witnesses, a site visit and three days of hearings to permit cross-examination of witnesses were conducted, and posthearing briefs were filed.

---

[1] Preliminary hearing procedures are described in 760 CMR 30.09(4) and ***760 CMR 56.06(7)(d)***. That is, our regulations, which originally appeared at 760 CMR 30.00 and 31.00, have been amended and recodified effective February 22, 2008 as 760 CMR 56.00. Our hearing technically began under the old regulations with the initial Conference of Counsel in 2006, and did not terminate until briefs were filed September 22, 2008. Under longstanding practice, however, we consider the date of our hearing to be the date on which the Pre-Hearing Order was issued, in this case, April 7, 2008, which is after the effective date of the new

II. FACTUAL OVERVIEW

This case involves a large, 52.55-acre, irregularly shaped site in an area of Holliston zoned "Agricultural-Residential A," which permits residences on 80,000 square foot lots. Exh. 1, P 1; 7; 8; 32, Â§ IV-B. The immediate vicinity is sparsely developed, though residential housing subdivisions are scattered through the general area of town in which the site is located. Exh. 7, 8. The 200 units of condominium housing are primarily in quadraplex buildings, with a few triplex and duplex buildings. The proposal includes two entrance roadways from Marshall Street, and an additional emergency access roadway from Marshall Street. Exh. 10.

The site is currently wooded, rising to a small hill at its center. Exh. 48, p. 9. In the northeastern corner, near where the site abuts the intersection of Prentice and Marshall Streets, there is a manmade pond with bordering wetlands. Exh. 7; 48, P 24. The western third of the site consists of a much larger, forested wetlands **[*3]** area. Exh. 7; 48, p. 9. The total of wetlands area on the site is 16 acres. Exh. 71, P 102.

The site is what is commonly known as a "brownfields" site. That is, a previous owner, beginning in the 1960s, allowed illegal, unsupervised dumping on the site. In the mid-1980s, both the U.S. Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection (DEP) investigated and assessed the site. Exh. 45, p. 1; 71, PP 63, 65. As a result, more than three hundred drums containing tar and other contaminants, two hundred thousand tires, construction debris, other solid waste, and seventy tons of contaminated soil have been removed from the site. Exh. 71, PP 61-64. In conjunction with construction of the housing, the developer will complete remediation of the site by transporting hazardous and recyclable materials off site, monitoring and treating groundwater as necessary, and consolidating non-hazardous waste and existing fill into a smaller sealed and capped disposal area on the western portion of the site where no housing will be built. Exh. 71, PP 85-87; also see Exh. 12 (Supplemental Investigation & Revised Conceptual Remedial Plan with Associated Cost **[*4]** Estimates).

III. PRELIMINARY ISSUES

Prior to the evidentiary portion of the hearing, the Board moved twice to dismiss the appeal, and also filed a motion to clarify which environmental issues were local issues properly before the Committee under the Comprehensive Permit Law and which were state and federal issues beyond its jurisdiction. The presiding officers Â [2] denied the motions to dismiss, and clarified the treatment of the environmental issues. We will revisit those issues briefly. Â [3]

A. Title Issues and Site Control

The arguments initially raised by the Board were addressed fully in the presiding officer's February 20, 2007 Ruling on Board's Motion to Dismiss. That is, consistent with a number of our past precedents, when the number of housing units changes during the local hearing process, and the Board has the **[*5]** opportunity to review those changes, the developer is not required to obtain a new project eligibility determination from the subsidizing agency in order to maintain fundability. Second, as also explained in detail in the February 20, 2007 ruling, the record

---

regulations. Further, the new regulations themselves indicate that they are generally to be applied to matters pending before us. ***760 CMR 56.08(3)***. In addition, since many provisions of the new regulations are identical to those in the previous version, few issues of fairness with regard to retroactive application are raised in any case. Therefore, we will generally apply the new regulations, and rely on the old regulations when principles of basic fairness so require. See *Cozy Heath Community Corp. v. Edgartown*, No. 06-09, slip op. at 3-4 (Mass. Housing Appeals Committee Apr. 14, 2008), *appeal docketed* No. 08-00021 (Dukes Super. Ct. May 19, 2008).

[2] A little more than half way through the two-year hearing process Committee Chairman Werner Lohe replaced Hearing Officer Shelagh A. Ellman-Pearl as the presiding officer.

[3] As is common, the presiding officer's rulings were interlocutory and were not published on the Committee's website. They are, of course, part of the record in this case, and are hereby ratified by the full Committee. But to the extent that there are inconsistencies between them and this decision, this decision controls. Further, unpublished rulings, as preliminary statements of the law by the presiding officer alone, though they may occasionally provide useful guidance, generally should not be considered precedent in other cases.

shows colorable title to the 2.55-acre parcel challenged by the Board Â [4] and also sufficient rights with regard to an easement over a bridle path to establish site control. Also see Exh. 71, PP 24-28; 72, PP; 6-15; 89, P 36; cf. Exh. 77, P 57; 78, P 8(a).

B. The DEP Liens and Site Control

In the second, February 20, 2008 ruling, the presiding officer addressed a new argument concerning site control. The Board asserted that because of Massachusetts Department of Environmental Protection (DEP) liens, the developer did not have control of the proposed site as required by 760 CMR 31.01. Specifically, between 1984 and 1989, when the owners of the development site allegedly failed to respond to Notices of Response Action from **[*6]** DEP under G.L. c. 21E (Mass. Oil and Hazardous Material Release Prevention and Response Act), state and local authorities took action on their own, and incurred response action costs. Exh. 71, PP 63-64, 71; 78, P 8(k). Ultimately, DEP perfected liens on the property to secure payment of the response action costs in the amount of $ 1.75 million. Exh. 70, third "whereas" clause and P 6. In 2002, DEP and the town issued a request for proposals to attract a developer to purchase and develop the site and pay off the indebtedness. Exh 71, P 73.

On January 3, 2005, the current developer, Green View Realty, LLC, entered into a purchase and sale agreement for the site with the owners, the C&R and R&C Trusts. In addition to the standard recitations, the agreement states that the sellers will convey marketable title to the property, free from all encumbrances, "subject, however, to the following: … (v) … the lien … by the Massachusetts Department of Environmental Protection attached hereto as Exhibit H...." Exh. 14, P XI-A(v). It goes on to provide that the seller is obligated to convey title "subject to the following conditions precedent on the closing date:… (iii) the DEP lien on the **[*7]** Property shall be paid and discharged or subject to written agreement with DEP...." Exh. 14, P XII-B(iii). Thus, the purchase and sale agreement clearly contemplates the DEP liens, and is not invalidated by their existence. There is no question that a valid purchase and sale agreement is sufficient to establish site control. *760 CMR 56.04(4)(g)*, 31.01(3). "The statute does not explicitly state the requisite property interest necessary to qualify as an applicant for a comprehensive permit… [But it] does not require the applicant… to establish… a present title in the proposed site." See *Hanover v. Housing Appeals Committee, 363 Mass. 339, 377-78 (1973)*; also see *Autumnwood, LLC v. Sandwich*, No. 05-06, slip op. at 3 (Mass. Housing Appeals Committee Nov. 4, 2005 Ruling on Motion to Dismiss); *Paragon Residential Properties v. Brookline*, No. 04-16, slip op. at 6 (Mass. Appeals Committee Dec. 1, 2004 Ruling on Pre-hearing Motions). Thus, the presiding officer's ruling in February 2008 was correct. Further, three months after the ruling on this question, the developer entered into an agreement with DEP, which established **[*8]** that in return for a payment of $ 1,750,000, DEP will issue a recordable release of the liens at the time of the closing on the sale of the site by the trusts to the developer. Exh. 70, PP 6, 9. Thus, it is clear that the liens will not stand in the way of the developer's ability to control the site in order to proceed with the development.

C. Fundability

Finally, the Board argued that the amount of the liens was sufficiently large to render the proposed project no longer fundable. The Board has renewed this argument in its post-hearing brief, specifically claiming that because of "an uncharacteristically low profit margin," the development is not financially feasible, and therefore not fundable under our regulations. We conclude that the Board has not rebutted the presumption of fundability established under our regulations.

Financial feasibility is an essential part of fundability, which, in turn, is a component of the determination of project eligibility that is made by a subsidizing agency to initiate the entire permitting process under the Comprehensive Permit Law. Â [5] The determination of project eligibility was made with regard to this development pursuant to 760

---

[4] The site includes three parcels. The first two are adjacent parcels which total 50 acres and are located at 708 Prentice Street; the third parcel is a 2.55-acre tract of land located southeast of a parcel referred to as "Parcel 7319."

[5] The Board refers to fundability as a "jurisdictional requirement." Board's Brief, pp. 5-6. In fact it is more properly viewed as a substantive aspect of the developer's *prima facie* case for entitlement for a comprehensive permit, or as it is referred to in our

CMR 31.01(1)(b) and 31.01(2)(b)(4), the regulations in effect at that time. That is, on August 24, 2004, MassHousing issued a project eligibility determination. Exh. 4, fifth section. On July 19, 2006 and July 31, 2006, MassHousing reviewed that determination, and concluded that "there is no need to modify our original project eligibility letter. ...we will review all changes in this project when an application for Final Approval is submitted when and if a comprehensive permit is granted." Exh. 2; Exh. 3, third para. These letters established a presumption of fundability. 760 CMR 31.01(2)(f), 31.07(1)(a). To reemphasize the nature of the presumption, the regulations in effect at that time provided that this Committee generally was not to hear evidence concerning financial feasibility or fundability other than evidence "as to the status of the project before the subsidizing agency." 760 CMR 31.07(4)(a), 31.07(4)(d). That is, as elaborated in several of our decisions, although it would be appropriate **[*10]** for us to hear evidence that the subsidizing agency had withdrawn its determination, because fundability is a technical administrative matter within the expertise of the subsidizing agency, it is inappropriate for us to go further and look behind the subsidizing agency's determination and make our own determination. See *Farmview Affordable Homes, LLC v. Sandwich*, No. 02-32, slip op. at 4-5 (Mass. Housing Appeals Committee May 21, 2004 Ruling on Motion… to Quash Subpoenas...); *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7-9 (Mass. Housing Appeals Committee Jun. 25, 1992). Similarly, we might have considered a finding that the fundability requirement had not been met if there had been evidence that the subsidizing agency had conducted its review improperly. Â [6] See *Bay Watch Realty Tr. v. Marion*, No. 02-28, slip op. at 2-3 (Mass. Housing Appeals Committee Order Concerning Jurisdiction Nov. 22, 2004)(site plans not reviewed in making project eligibility determination), *aff'd sub nom. Board* **[*11]** *of Appeals of Marion v. Housing Appeals Committee*, No. 07-P-1372 (Mass. App. Ct. Oct. 7, 2008). These regulations and precedents are consistent with the ruling of the Appeals Court that the appropriate avenue for challenging the validity of a project eligibility determination is during an appeal to this Committee, with subsequent review by the courts pursuant to G. L. c. 30A. *Town of Marion v. Mass. Housing Finance Agency, 68 Mass.App.Ct. 208, 211 (2007)*. That is, the court did not indicate that this Committee is to substitute its judgment for that of the subsidizing agency, but rather noted that it must be borne in mind that "the funding eligibility determination is merely an interim step in the administrative process." *Id. at 211, 471*; also see *Town of Amesbury Zoning Board of Appeals v. Housing Appeals Committee*, Misc. No. 07-PS-351321, slip op. at 19, *16 L.C.R. 332, 337 (Mass. Land Court May 16, 2008)* ("...there is no requirement that a project eligibility letter must be *maintained* while an appeal is pending. Clearly this is a matter which will be overseen by the Project Administrator **[*12]** as the project proceeds."), *appeal docketed*, No. 2008-P-1240 (Mass. App. Ct. Jul. 24, 2008).

The Board's argument here asks us to engage in a financial analysis that would allegedly show that because of the size of the DEP liens and changing development costs the proposal is no longer financially feasible. Board's Brief, p. 4. But this is the sort of technical analysis of fundability that should be reserved for MassHousing, and not this Committee. Thus, we conclude that the Board has not rebutted the presumption of fundability.

Finally, if fundability were to be reviewed under our new regulations, there would be even less basis for us to reconsider financial feasibility and fundability. The regulations now provide that the subsidizing agency's determination is "conclusive," and any subsequent allegation of failure to fulfill one of the requirements may only be made on the grounds that the proposal itself has changed, and in that case the question of continuing fundability is to be determined by the subsidizing agency. *760 CMR 56.04(1)*, 56.04(4)(d), and 56.04(6).

D. Clarification of the Scope of Environmental Issues

As discussed in detail in the **[*13]** presiding officer's ruling of February 20, 2008, the Board argued that "as a matter of law, there is no limitation of the scope of environmental issues that may be considered in a ZBA or Committee proceeding." Appellee's Motion to Clarify Scope of Environmental Matters..., p. 3, n.1 (filed Aug. 17,

---

new regulations, a "project eligibility requirement." *Town of Middleborough v. Housing Appeals Committee, 449 Mass. 514, 521 (2007)*; ***760 CMR 56.04(1)***.

[6] It appears that the subsidizing agency did not specifically consider the liens when it issued its project eligibility determination in 2004 since they had not yet been perfected. But it was well aware of the need for and possible costs of remediation on the site since it included a condition that required the developer to obtain "cost-cap and third-party liability protection insurance… providing as much as $ 3,000,000 in insurance coverage to protect the Town of Holliston, MassHousing, and other parties...." Exh. 4, fifth section, p. 3, P 6; also see Exh. 3.

2007). We disagree. But often there is not a bright line between matters that are local concerns that we must consider and those that are state or federal questions beyond our jurisdiction. For that reason, prior to the actual presentation of evidence in this case, the presiding officer issued a ruling attempting to clarify the scope of the issues to be considered. This, in turn was followed in the normal course by a Pre-Hearing Order prepared with the participation of the parties. The overall case was organized into six occasionally overlapping issues: wetlands protection, stormwater management, groundwater protection, landfill consolidation/creation and design, open space, and traffic. Pre-Hearing Order, Â§ IV-5. Two of these issues--groundwater protection and landfill consolidation--were particularly problematic, and the presiding officer did not rule definitively in the February 2008 **[*14]** ruling as to whether they were proper issues for the Committee to consider. With regard to those issues, he ruled that the Board should identify any portions of the Holliston Zoning Bylaws which contain standards more stringent than state law and that the Board "is advised to present evidence" on those issues. Ruling on...Motion to Clarify..., pp. 10-11 (Feb. 20, 2008). That is, a final determination as to whether the Committee has jurisdiction on those matters was left for this final decision. They are addressed in section III-D(1), immediately below. The other four issues are more straightforward, and are addressed in section III-D(2), below. Â [7]

1. Consolidation of the Onsite Landfill, Remediation, and Related Issues of Groundwater Protection Are Not Regulated Under the Holliston Zoning Bylaw and Therefore Are Not Properly Before the Committee.

Prime real estate is rarely available for affordable housing, and therefore over the years, we have reviewed a number of plans for developments on the sites **[*15]** of abandoned landfills. Â [8] The case before us is unusual, however, since the town has asserted that it has regulated remediation of such sites under its zoning bylaw, and that its zoning requirements prohibit the construction of this affordable housing development. Because both the remediation process and its relationship to the Comprehensive Permit Law are complex, the questions of what facts must be proved in a case like this and how the law should be applied are similarly complicated. We have considered them particularly carefully since public policy supports the development of affordable housing on brownfields sites, Â [9] and it is therefore important both in this case and in future cases that the law not be applied in such a way as to create unnecessary barriers to the permitting of affordable housing.

The fundamental structure **[*16]** of the Comprehensive Permit Law as applied in our hearings is that the developer must establish a *prima facie* case that its proposal complies with generally recognized design standards, which may include state and federal standards, and if it does so, the burden then shifts to the Board to prove that there are

---

[7] At the time of the presiding officer's February ruling, it appeared that the issues of open space and traffic had been waived. The presiding officer, however, permitted them to be raised again in the Pre-Hearing Order, and in that sense the later order supersedes the ruling.

> We note that both the ruling and the order are merely attempts to frame the issues in this case in a preliminary manner. The presiding officer cannot bind the full Committee with regard to what issues are properly before it, and therefore to the extent that parts of the ruling or order may be inconsistent with this decision, this decision controls. Also see n. 3, above.

[8] In 1974, we considered a site that had "in the past been used for refuse dumping purposes. ...[T]here was concern… [about] the … release of subterranean gas...." We found that the danger was minimal, and noted that "to assure the best approach"… the Board and the developer had agreed to work cooperatively. *Planning Office for Urban Affairs, Inc. v. Beverly*, No. 73-04, slip op. at 9 (Mass. Housing Appeals Committee May 10, 1974).

> In later cases, housing was also approved with relatively little conflict with regard to hazardous waste issues. See *Shorebrook Trust v. Yarmouth*, No. 88-11, slip op. at 2 (Mass. Housing Appeals Committee May 3, 1989)(site found acceptable despite "the presence of environmentally undesirable material due to its previous use as the Town Dump"); *Woodland Heights Partnership v. Bourne*, No. 91-06, slip op. at 14, (Mass Housing Appeals Committee, Jun. 14, 1993)("the town… will actually benefit" because "[t]he developer's proposal is that all hazardous materials and solid waste be removed from the site"); *Northern Middlesex Housing Associates v. Billerica*, No 89-48, slip op. at 4 (Mass. Housing Appeals Committee Memorandum on Remand, Oct. 12, 1993)(condition requiring Board oversight of remediation stricken because "ensuring that remediation is performed 'in accordance with applicable federal and state hazardous waste regulations' is not within [the] jurisdiction [of the local Board or the Housing Appeals Committee]").

[9] See, e.g., G.L. c. 21E, Â§ 3A(j)(3)(a)(i)(b).

local concerns which support the denial of the comprehensive permit and that those local concerns outweigh the regional need for housing. *760 CMR 56.07(2)(a)(2)*, 56.07(2)(b)(2); see *Board of Appeals of Woburn v. Housing Appeals Committee, 451 Mass. 581, 583-584 (2008)*. But our focus is on local concerns, and nothing in Chapter 40B suggests that we should consider environmental issues raised under state and federal law. On the contrary, the Committee has no the authority to hear a dispute as to whether a developer is adhering to state or federal law. See *O.I.B. Corporation v. Braintree*, No. 03-15, slip op. at 6-7 (Mass. Housing Appeals Committee Mar. 27, 2006)(holding that it is not "the role of either the Board or this Committee to adjudicate compliance with state standards"), *aff'd* No. 2006-1704 (Suffolk **[*17]** Super. Ct. Jul. 16, 2007. Further, as we have noted recently,

> The Board ordinarily should not be permitted to inquire into an issue or place restrictions on affordable housing if the Town has not previously regulated the matter in question. See *9 North Walker Street Development, Inc. v. Rehoboth*, No. 99-03, slip op. at 4-5 (Mass. Housing Appeals Committee Nov. 6, 2006 Decision of the Committee on Remand) (Remand Decision), citing *Walega v. Acushnet*, No. 89-17, slip op. at 6, n.4 (Mass. Housing Appeals Committee Nov. 14, 1990); *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. 4, n.3 (Mass. Housing Appeals Committee Jan. 16, 1991). While under certain circumstances it may be appropriate for the Committee to review important health and safety issues that are not specifically governed by local regulation, those situations arise when exceptional circumstances exist that could not have been anticipated by the Town, and when review of the issue [under state or federal law] may not take place outside the context of this appeal. See *Hamlet Development Corp. v. Hopedale*, No. 90-03, slip op. at 8-15 (Mass. Housing Appeals Committee Jan. 23, 1992); *Walega, supra* **[*18]** at 5-7.

Lever Dev., LLC v. West Boylston, No. 04-10, slip op. at 10 (Mass Housing Appeals Committee Dec. 10, 2007). Also see *Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 02-21, slip op. at 14 (Mass. Housing Appeals Committee Dec. 12, 2006)(holding review of innovative wastewater technology is inappropriate when there is no local regulation and a state DEP permit is required), *appeal docketed*, No. 2008-P-1240 (Mass. App. Ct. Jul. 24, 2008); *Attitash Views, LLC v. Amesbury*, No. 06-17, slip op. at 12, n.7 (Mass. Housing Appeals Committee summary decision Oct. 15, 2007)(attempt to enforce uncodified requirements with regard to outdoor design "may well also run afoul of the statutory provision that all requirements be applied 'as equally as possible to subsidized and unsubsidized housing.' G.L. c. 40B, Â§ 20"). *aff'd*, No. 2007-5046 (Suffolk Super. Ct. Jan. 7, 2009). If, however, the municipality has distinct regulations that are more strict than the parallel state law, issues raised under the local requirements are considered local concerns under the Comprehensive Permit Law. *LeBlanc v. Amesbury*, No 06-08, slip op. at 9 (Mass. Housing Appeals Committee, **[*19]** May 12, 2008), *appeal docketed*, No. 2008-2631D (Suffolk Super. Ct. Jun. 12, 2008); *Princeton Development, Inc. v. Bedford*, No. 01-19, slip op. at 11 (Mass. Housing Appeals Committee Sep. 20, 2005); *Oxford Housing Auth. v. Oxford*, No. 90-12, slip op. at 12 (Mass. Housing Appeals Committee, Nov. 18, 1991).

In this case, both the developer and the Board introduced extensive expert testimony concerning consolidation of the on-site landfill, remediation, and groundwater protection. The evidence describes the past, present, and future of the site in great detail. Thorough assessments of the site itself and of the hazardous materials on the site have been done in the past. Exh. 73, P 7; 74, PP 7, 11. Further assessments have been done fairly recently (Phase I and II Environmental Site Assessments), and a conceptual remedial plan (Supplemental Investigation & Revised Conceptual Remedial Plan with Associated Cost Estimates) has been prepared by a licensed site professional (LSP). Exh. 74, PP 13-15; Exh. 12; Exh. 44. Still further assessment and remediation can and will be done in order to achieve a "permanent solution" which presents no significant risk to the public. **[*20]** Â [10] Exh. 74, PP 13-14, 22, 24, 32-63, 156; Exh. 41, pp. 6, 12. This specifically includes remediation of groundwater prior to development of the site. Exh. 74, P 64, 65-87.

---

[10] See ***310 CMR 40.1000***, *et seq*. "Permanent Solution means a measure or combination of measures which will, when implemented, ensure attainment of a level of control of each identified substance of concern at a disposal site or in the surrounding environment such that no substance of concern will present a significant risk of damage to health, safety, public welfare, or the environment during any foreseeable period of time." ***310 CMR 40.0006***.

The Board argues that because considerable further assessment and design remains to be done, the developer has not established a *prima facie* case. Board's Brief, pp. 19-21. More specifically, it argues that the proposal has not been described in sufficient detail to enable the Board to have "a fair opportunity to challenge it." Board's Brief, p. 21; also see *Tetiquet River Village, Inc. v. Raynham*, No. 88-31, slip op. at 11 (Mass. Housing Appeals Committee Mar. 20, 1991). But our review of the evidence concerning the detailed work already done concerning this site, particularly the conceptual remedial plan, leads us toward the opposite conclusion--that the plans and the evidence of future compliance with state law would be sufficient to establish a *prima facie* case. See *Canton Property Holding, LLC v. Canton*, No. 03-17, slip op. at **[*21]** 22 (Mass Housing Appeals Committee Sep. 20, 2005 (expert testimony that design will comply with state stormwater management standards is sufficient to establish *prima facie* case); also see Exh. 12. In fact, however, despite all of the evidence introduced, we need not consider the substance of these issues--either whether the developer proved its *prima facie* case or whether the Board has established counterbalancing local concerns in response--because, as discussed below, we conclude that the Holliston Zoning Bylaws do not regulate the remedial activity proposed here.

To consider what the Holliston Zoning Bylaws regulate and do not regulate, we must examine in more detail how the issues have been framed in this case, and what bylaw provisions might be applied to them. In the Pre-Hearing Order, the question of whether consolidation of the landfill creates a dangerous situation is raised in two places. First, under "Groundwater Protection," the Board's position is stated as "[c]onsolidation/creation of a landfill will pollute the groundwater." Pre-Hearing Order, Â§ IV-5(c)(ii). The Holliston requirements cited in the Pre-Hearing Order to show that groundwater is protected are two **[*22]** very general sections of the bylaw:

> In any district, no use will be permitted which will produce a nuisance or hazard… Neither shall there be permitted any use which discharges into the air, soil, or water any industrial, commercial, or other kinds of wastes… unless the same are… treated…

Exh. 32, Â§ I-D(1).

> No discharge… into… the ground, of any materials… as can contaminate… water supply… shall be permitted except in accordance with applicable federal, state, and local … laws and regulations.

Exh. 32, Â§ V-N(2). Â [11]

Second, under "Landfill Consolidation/Creation and Design," the Board's position is stated as "[c]onsolidation/creation of a landfill will endanger the public safety." Pre-Hearing Order, Â§ IV-5(d)(i). The Holliston requirement cited to show that the consolidation of waste on the site is regulated locally is the "Basic Requirements" section of the Holliston Zoning Bylaws, which states that "[a]ny use not specifically enumerated in a district herein shall **[*23]** be deemed prohibited." Exh. 32, Â§ I-B. Â [12] In its brief, the Board cites, in addition, the two very general bylaw sections above. Exh. 32, Â§Â§ I-D(1), V-N(2); also see Board's Brief, pp. 14, 23.

With regard to both of these issues, there is an additional provision in the bylaw which might have been cited by the Board except that under the specific facts presented here, it does not apply. That is, the "prohibited uses" section of the Groundwater Protection District special regulation prohibits landfills in Zone II groundwater protection areas. Exh. 32, Â§ V-L(4)(B)(2)(c). In this case, however, the area of landfill consolidation is not in the Zone II. Â [13] That is, only a small area at the eastern edge of the northern part of the site, near the intersection of Marshall and Prentice Streets, is within the Zone II delineated **[*24]** by the section V-L of the Holliston Zoning Bylaw. Exh. 73, P 47; Exh. 48, p. 12; Exh. 57, p.1 and fig. 2. The landfill consolidation area is a two-acre area in a west-central portion of the site, outside of the Zone II. Exh. 48, pp. 11-13; Exh. 74, P 43.

---

[11] Bylaw section V-I (Wetlands and Flood Plain Protection Zone) is also referred to in the Pre-Hearing Order, but is not relied on by the Board.

[12] A typographical error in the Pre-Hearing Order mistakenly refers to this section as section VB. See Pre-Hearing Order, Â§ IV-5(d). Exhibit 32 is the "Town of Holliston Zoning Bylaws, adopted October 1962… with amendments through October 2006."

[13] Further, there is a question as to whether this consolidation of landfill materials under DEP supervision, as opposed to an operating landfill, falls within the definition in the bylaw. See Exh. 32, Â§ V-L(4)(B)(2)(c) and ***310 CMR 19.006***.

On the most fundamental level, the attempt by the Board to interpret these bylaw provisions as prohibiting the landfill consolidation is belied by the fact that at least one other landfill *has* been permitted in Holliston--a town-owned landfill on the opposite side of Marshall Street just south of the site, which was closed and capped in 1983. Â [14] Exh. Exh 57, pp. 1-2, fig. 2.

But more significantly, we find that none of the above bylaw provisions can fairly be read to regulate the landfill consolidation here. If a new landfill were proposed, that might be a use regulated under Holliston Zoning Bylaw. But here there is an existing hazardous waste site. There is no indication in any of the bylaw provisions that they are intended to regulate remediation; **[*25]** instead, the language, particularly the references to "discharges," clearly refers to active uses that pollute the environment rather than to remediation efforts on existing hazardous waste sites. Â [15]

Further support for this position is found in the fact that landfills *are* mentioned specifically with regard to Zone II areas in the Groundwater Protection District section of the bylaw, but only there. This supports our conclusion that the other, very general language in the bylaw--where landfills are not specifically mentioned--does not, under the Comprehensive Permit Law, constitute local regulation of the placement and design of landfills, much less of activities to remediate an existing problem. Since these matters have not been regulated locally, they are not local concerns that this Committee will consider.

Finally, in addition to the allegations related to landfill consolidation, the Board asserts a similar claim with regard to groundwater protection and the proposed wastewater treatment facility. **[*26]** It contends that the proposed on-site wastewater treatment facility may affect a town well that is about two miles downgradient. Exh. 73, P 62. Though the facility (which will require approval and permitting by DEP) has not yet been fully designed, it is clear that it will

---

[14] A small part of this town-owned landfill appears to actually be within the Zone II groundwater protection area. Exh. 57, fig. 2.

[15] Since we find that Holliston has not in fact regulated the remediation of hazardous waste sites, we need not reach the difficult question of whether such local regulation is preempted under home rule principles articulated by the Supreme Judicial Court. That is, "municipalities can pass zoning ordinances or bylaws as an exercise of their independent police powers, but these powers cannot be exercised in a manner which frustrates the purposes or implementation of a general or special law enacted by the Legislature...." *Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339, 360 (1973)*. We have found no ruling from the courts that indicates whether the Legislature, in adopting Chapter 21E, may in fact have intended to preempt local regulation of hazardous waste site remediation. But we do note that "in some circumstances we can infer that the Legislature intended to preempt the field because legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose." *Boston Gas Co. v. Somerville, 420 Mass. 702, 704 (1995)*, cited with approval in *Boston Edison Co. v. Bedford, 444 Mass. 775, 781 (2005)*. On the other hand, invalidation of local requirements may well require a "sharp conflict" between them and the state legislation, which "appears when either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local by-law." *School Comm. of Boston v. Boston, 383 Mass. 693, 701 (1981)*, quoting *Grace v. Brookline, 379 Mass. 43, 54 (1979)*. Thus, for example, local wetlands protection bylaws containing more stringent controls than the state Wetlands Protection Act have been upheld. See *Lovequist v. Conservation Commission of Dennis, 379 Mass. 7 (1979)*. Cf. *Fafard v. Conservation Commission of Barnstable, 432 Mass. 194, 204 (2000)*(local wetlands bylaw upheld under the rationale that "the Legislature provided only general principles to be used in regulating construction [of piers] on Commonwealth tidelands.").

> It is not clear how remediation of a hazardous waste site should be viewed under these precedents. We note, however, that remediation is governed by a very comprehensive state statutory scheme, the Massachusetts Oil and Hazardous Material Release Prevention Act, G. L. c. 21E. "Simply put, G. L. c. 21E was drafted in a comprehensive fashion to compel the prompt and efficient cleanup of hazardous material and to ensure that costs and damages are borne by the appropriate responsible parties. To that end, the department has promulgated extensive regulations, known collectively as the Massachusetts Contingency Plan (MCP), for purposes of implementing, administering, and enforcing G. L. c. 21E. See G. L. c. 21E, Â§ 3; 310 Code Mass. Regs. Â§Â§ 40.0000 (1999)." *Taygeta Corp. v. Varian Assoc. Inc., 436 Mass. 217, 223, (2002)*. Similarly, the operation and management of active sold waste facilities are also extensively and strictly regulated under state law. See 310 CMR 19.000.

discharge 65,000 gallons per day into the groundwater. Â [16] Exh. 71, P108-113; Exh. 73, PP 45, 48. The Board argues that "[i]t is entirely possible that some of the proposed wastewater discharge will pass through the [existing town-owned] landfill [which is across Marshall Street from the site]..., generating additional contaminants to groundwater from [that] landfill." Board's Brief, p. 36. This, in turn, could "degrade the water quality at [Town Well # 4]." Â [17] Board's Brief, p. 37; also see Pre-Hearing Order, Â§ IV-5(c)(i). The developer points out **[*27]** that detailed hydrogeological and other studies will be prepared before the facility is permitted by the state DEP, and argues that in any case there will be no adverse effect on the town landfill or well. See Exh. 73, PP 47, 50, 53, 54, 58. The Holliston requirements cited in the Pre-Hearing Order to show that this issue is regulated are the general sections referred to above. See Exh. 32, Â§Â§ I-D(1), V-N(2), and V-I (Wetlands and Flood Plain Protection Zone). But, as indicated above, Â§ I-D(1) prohibits discharges "unless [they] are… treated," which the effluent will be in this case, and Â§ V-N(2) permits discharges "in accordance with the applicable federal, state, and local health and water pollution control laws and regulations," which will also be true. Section V-I protects features on the surface of the earth--wetlands and flood plains--rather than the groundwater, and the Board has pointed to no specific part of the section that it alleges will be violated. See Board's Brief, pp. 39-41. Thus, as with the previous issues, we find that these bylaw provisions cannot fairly be read to regulate or prohibit the wastewater discharge here. There is no indication in any of the bylaw **[*28]** provisions that they are intended to regulate discharges from a large wastewater treatment facility that is fully subject to state law.

Consolidation of the onsite landfill, remediation, and the related issues of groundwater protection are not regulated under the Holliston Zoning Bylaw, and therefore are not properly before this Committee. Further, since these issues will be fully reviewed by state environmental authorities, there is no need for us to consider making an exception to our general rule of not considering unregulated matters. Cf. *Walega v. Acushnet*, No. 89-17, slip op. at 6 n.4 (Mass. Housing Appeals Committee Nov. 14, 1990).

2. Issues Properly Before the Committee

Four additional environmental and planning matters were put into issue by the Pre-Hearing Order in this case. With regard to some of these, the developer continues to challenge the presiding officer's ruling that they are legitimate matters of local concern. As mentioned above, there is not always a bright line between local concerns and matters regulated by the state. It is a line that must be drawn on a case by case basis after considering not only the design feature being challenged by the Board, **[*29]** but, equally important, the unique circumstances of the municipality--that is, its specific, written regulations and requirements and past regulatory practices. In this case, we find that each of the four other matters enumerated in the Pre-Hearing Order have been regulated sufficiently so that we will consider them on the merits. They are summarized as follows.

Issues concerning **wetlands protection** are regulated by the Holliston Wetlands Bylaw Â§ 3, and Holliston Wetlands Regulations, Â§ 6. See Exh. 33; 34.

Issues concerning **stormwater management** are regulated by the Holliston Board of Health Stormwater and Runoff Regulations and the Holliston Site Plan Review Regulations. See Exh. 35; 36.

Issues concerning **open space** have been regulated by Holliston under various provisions in its zoning bylaw. For instance, in section V-H, Special Permit for Cluster Development, the town has expressed a policy of permitting increased density when increased open space is provided. Similarly, under section V-G, open space is regulated in apartment districts. Thus, by analogy, it is legitimate for the Board to raise open space concerns with regard to the proposed development. Stated in other **[*30]** terms, we will address open space on the merits since we find that the issue has been regulated under sections V-H(2)(a)(4), V-H(2)(h-j), V-G(2)(c)(4), V-G(4)(r), V-G(5)(a)(6)(d), and V-G(5)(d)(3) of the bylaw. See Exh. 32.

---

[16] The effluent will have been treated, and thus its discharge directly into groundwater does not violate the law. Exh. 73, PP 75-77.

[17] The developer's position is that detailed hydrogeological and other studies will be prepared before the facility is permitted by the state DEP, and that there will be no adverse effect on the town landfill or well. See Exh. 73, PP 47, 50, 53, 54, 58.

Issues concerning **traffic** have also been regulated by Holliston both explicitly and under longstanding land use approval practices. See, e.g., Site Plan Review and Special Permit Regulations, Exh. 35, Â§ 7.3.4. Â [18] Therefore, we will also address the local traffic concerns raised in this case--adequacy of sight distance at the entrances and of emergency access.

IV. LOCAL CONCERNS

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a *prima facie* case by showing that its proposal complies with state or federal requirements or other generally recognized design standards. **[*31]** Â [19] 760 CMR 31.06(2), *760 CMR 56.07(2)(a)(2)*. The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that the concern outweighs the regional need for housing. 760 CMR 31.06(6); *760 CMR 56.07(2)(b)(2)*; also see *Hanover v. Housing Appeals Committee, 363 Mass. 339, 365 (1973)*; *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

A. Wetlands Protection

With regard to wetlands, the developer introduced testimony from two experts, a specialist in wetlands and wetland delineation and a professional civil engineer. Exh. 76, P 1; 87, P 2; 73, P 1. The Board presented testimony from an expert who is both a professional civil engineer and a professional planner. Exh. 77, P 1; 77-A.

There are five wetlands areas on **[*32]** the site. They were identified in a single Abbreviated Notice of Resource Area Delineation (ANRAD) that the developer filed with the Holliston Conservation Commission in June 2003 under both the Holliston Wetlands Bylaw and the state Wetlands Protections Act (WPA), G.L. c. 131, Â§ 40. Exh. 53. Â [20] These wetlands are regulated locally by the Holliston Wetlands Bylaw Â§ 3, and Holliston Wetlands Regulations, Â§ 6. See Exh. 33; 34. The Board has focused on two particular provisions of the bylaw and regulations that are stricter than state law: first, the provisions that define the 100-foot buffer zones around each wetland area as actual resource areas and largely prohibit disturbance of the land in such zones, and second, a provision that specifically

---

[18] Roadway design is in all likelihood regulated by subdivision regulations as well, but they were not introduced into evidence.

[19] [A] *prima facie* case may be established with a minimum of evidence." *100 Burrill Street, LLC v. Swampscott*, No. 05-21, slip op. at 7 (Mass. Housing Appeals Committee Jun. 9, 2008), quoting *Canton Housing Authority v. Canton*, No. 91-12, slip op. at 8 (Mass. Housing Appeals Committee Jul. 28, 1993). For example, "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Tetiquet River Village, Inc. v. Raynham*, No. 88-31, slip. op. 9 (Mass. Housing Appeals Committee Mar. 20, 1991).

[20] Only excerpts from the ANRAD (Exhibit 53) were admitted in to evidence; the exhibit does not include the maps or plans that show the actual delineation. Subsequent to the filing of this document with the Conservation Commission in 2003, a site visit was conducted which included the town conservation agent, a member of the Commission, a consultant employed by the Commission, and the developer's expert. Exh. 76, PP 27-28; also see 87, PP 5-10. With regard to one area--the pond (Area E)--"minor adjustments" were made in the field to the wetlands delineation. Exh. 54, p. 2; 76, P 31; also see 87, PP 5-10. In addition, the consultant suggested that the wetlands boundary be moved up (away from the pond) by one two-foot contour. Exh. 54, p. 2; 76 P 31. In the other four areas, no changes were suggested other than the addition of one "intermediate flag." Exh. 54, pp. 2-3; 76, PP 32-34; also see 87, PP 5-10. The consultant recommended that these slightly modified delineations be approved by the Conservation Commission. Exh. 54, p. 3. The Commission apparently never acted upon that recommendation, and in 2004, as a technical matter, the developer withdrew the notice. Exh. 55. The Board now argues that in the context of the comprehensive permit application, the wetlands have not been delineated sufficiently to permit the wetlands issues to be fully addressed. See, e.g., Exh. 77, P 16. We disagree. Under the Comprehensive Permit Law, either the Board or, on appeal, this Committee has "the same power to issue permits or approvals" as the Conservation Commission, that is, to determine the proper wetlands delineation under the local wetlands bylaw. G.L. c. 40B, Â§ 21. We find, based upon the documentary evidence before us, particularly Exhibit 54, and the testimony of the witnesses, that with regard to the local bylaw, the 2003 wetlands delineation made by the developer's expert, as modified by the suggestions of the Conservation Commission's consultant, is accurate. Exh. 87, P 10. An approximate depiction of this delineation appears on the overall site plans. See Exh. 6, sheets 7 and 13 ("Existing Conditions Plan, Plan 5" and "Grading and Drainage Plan, Sheet 5").

classifies the first 50 feet of the buffer zone as a "no disturbance area." Board's Brief, pp. 44, 49; Exh. 34, Â§Â§ 3.4, 6.3.1.

As will be seen below, the developer's wetlands expert described, with reasonable specificity, the design elements that may affect **[*33]** the five wetlands areas. See Exh. 76, PP 45-64, 68-78; 87, PP 11-27. That description, the clear intention to comply with the state Wetlands Protections Act, and the expert's testimony that the development "will result in no significant adverse impacts to wetland resource areas both under the WPA and the Town of Holliston Bylaw" are sufficient to establish a *prima facie* case pursuant to *760 CMR 56.07(2)(a)(2)*. Exh. 78, P 78. To determine whether the Board has met its burden in response, we will address the wetlands areas individually, examining the design proposed by the developer and the local concerns raised by the Board. Neither party, however, introduced a great deal of scientific evidence with regard to impacts on these resource areas. Â [21] Nevertheless, there is sufficient information so that by comparing the evidence presented by each side we are able to identify legitimate local concerns, and we conclude that the Board has not met its burden of establishing that **[*34]** those concerns outweigh the regional need for affordable housing so as to justify denial of the comprehensive permit. In one instance, however, a significant enough concern has been raised so that we will impose a condition to ensure that local concerns are protected when the development is constructed.

The Pond (Area E) -- At the northeastern end of the site is a triangular, man-made pond, with a narrow peripheral wetlands area along its banks (labeled Area E). See Exh. 6, sheet 9; Exh. 10. Because it is slightly larger than a quarter of an acre, it is protected under both state and local law. Exh. 76, PP 24-25. Much of the area surrounding the pond was disturbed in the past; gravel mining operations led to topsoil removal, soil compaction, and piles of spoil. Exh. 76, PP 57, 59; 87, PP 14, 16. Its buffer zone, including the 50-foot no-disturbance area, although degraded, is a wetlands resource area under the local bylaw. The developer proposes to re-grade all of this area in order to construct a large stormwater detention basin--Basin 4P--which will surround the pond on two of its three sides. Exh. 76, PP 57, 59; 6, sheet 9. The existing wetlands at the edge of the pond will **[*35]** not be disturbed, and the bottom of the basin, which will be at an elevation similar to that of the pond, will consist of hydric soils and "will be revegetated with indigenous hydric species, ...increas[ing] the overall wetland area of the site, and enhanc[ing]… surface water management and wildlife habitat." Exh. 76, P 60; 87, PP 17, 18. That is, a considerable portion of this area, when completed, will not just be a buffer zone, but will itself become an actual wetland, with improved stormwater management capabilities and increased "functionality… in terms of shade, hiding cover, and forage opportunities" for wildlife. See Exh. 87, P 18; 89, P 49. Nearby buildings are well clear of the no-disturbance area and impinge on the 100-foot buffer by at most about ten feet. Exh. 6, sheet 9; Exh. 77, P 63.

The Board's expert raised a number of concerns. First, he asserted that the pond is a vernal pool. Exh. 77, PP 18, 19. It clearly is not. A vernal pool, which rarely resembles a pond, is a "confined basin or depression..., which, at least in most years, holds water for a minimum of one month during the spring… [and] is free of adult predatory fish populations, [thus] providing essential **[*36]** breeding and rearing habitat functions for amphibian… species...." Exh. 34, p. 5 (Holliston wetlands regulations). On-site observations have shown that there *is* a vernal pool in the

---

[21] For instance, the Board's expert testified that there will be "extensive construction of dwelling units and stormwater management facilities within 25 to 35 feet" of wetlands, and yet his more detailed testimony focused on stormwater management facilities and not the location of buildings. Exh. 77, P 15. For that reason, we can only address the stormwater facilities, and any local concerns about building locations, roadway locations, or the like are deemed waived.

> We should note that the Board's failing in this regard is a common one in the cases presented to us. Frequently, Boards' witnesses fail to develop their testimony beyond how a proposed development falls short of local requirements. This is not sufficient. The Board must also demonstrate why the stricter local requirement must be applied to protect a local concern. A board should provide evidence of how the proposed development would have a more detrimental impact if certain local requirements are waived than if it is built to state standards, and show that that impact is sufficiently great to outweigh the regional need for housing. Ordinarily, this would require the Board to work closely with the Conservation Commission and to hire a wetlands scientist to evaluate the physical characteristics of the site in great detail. Not only should the expert be familiar with the site, but ideally, he or she should also be sufficiently familiar with the bylaw and the overall characteristics of the town so that he or she understands the scientific basis for specifying particular bylaw provisions that are stricter than state law.

small body of open water in the large wetlands area (Area A/D) on the western portion of the site. Exh. 76, P 37-39; Exh 54, p.3. But in the pond at the northeastern part of the site, the developer's wetlands specialist observed three different species of predatory fish and various unidentified minnows, which led him to the conclusion, with which we agree, that the pond is not a vernal pool. Exh. 76, PP 24, 40; 87, P 12.

A more legitimate concern raised by the Board's expert is that the bottom of the stormwater basin will be a foot below the existing wetlands surrounding the pond, "which is likely to lower groundwater and dewater the wetland...." Exh. 77, P 18. The developer's expert did not respond, which adds credibility to this assertion. See Exh. 87. This, however, is easily addressed by a condition requiring that the floor of the basin be raised at least one foot, unless a hydrogeologic or other study shows that there is no risk of dewatering nearby wetlands or that the risk can be addressed **[*37]** by other means. Â [22] See Â§ VI-2(c), below.

Beyond this, the Board's expert testified in general terms that the no-disturbance zone will be altered, and that the developer "has not demonstrated… that it can address these [unspecified] issues without adversely impacting this resource area...." Exh. 77, P 20. But the burden of proof is on the Board, and we find it has not proven specific damage within the no-disturbance area in order to meet that burden.

We conclude that although the nature and quantity of the work proposed here is unusual, when viewed in the context of the remediation of an extensively disturbed site, the Board has proven no local concern that outweighs the regional need for housing.

The Large Wetlands Areas (Areas A/D) -- At the opposite end of the site are the two largest wetlands areas (labeled Areas A and D), which are part of an extensive forested swamp that extends well beyond the site itself; they adjoin one another, separated by an existing roadway. Exh. 76, PP 14-16, 20; **[*38]** also see Exh. 4, sheet 13; 48, p. 9. These areas constitute roughly the western third of the site, and as noted above, one of them contains within it a vernal pool. See Exh. 48, p. 9; Exh. 76, P 37-39; Exh 54, p.3. They are protected under both state and local wetlands regulations. The 100-foot buffer zone currently "is largely a denuded former landfill slope transitioning to an old disturbed field and shrub habitat." Exh. 76, P 22. The forested wetland areas themselves will remain undisturbed, but a very large stormwater detention basin--Basin 7P--will be constructed close to them. Exh. 76, P 46-47. A portion of it will be located within both the 100-foot buffer zone and the 50-foot no-disturbance area. Exh. 6, sheet 13; 76, P 48. In a manner similar to Area E, the developer proposes to completely re-engineer and re-grade the area in which the stormwater basin will be located. Construction debris will be removed, and the area will be excavated to increase flood storage capacity. Exh. 76, P 49. The entire basin will "be re-vegetated with indigenous [plant] species," and become a wetland. Exh. 76, PP 51, 74; 89, P 49. And, a "significant area of the buffer zone along the eastern edge **[*39]** of the Wetland A/D… will also be fully restored. Exh. 87, P 22. The developer's expert's opinion is that the stormwater basin "will revitalize this degraded area… It will enhance this area through soil stability and shade… It may provide habitat for a variety of wildlife species, including amphibians such as spotted salamanders that may breed in the… vernal pool located in this area...." Exh. 87, P 23-24.

The Board's expert provided no testimony that specifically addressed the possible impact of Basin 7P on Areas A/D. See Exh. 77, PP 13-23. General comments that the on-site stormwater management system will negatively affect wetlands and buffer zones are insufficient to satisfy the Board's burden of proof. See Exh. 77, P 17.

The Small Isolated Wetlands Areas (Area B and C) -- Near Areas A/D are two much smaller depressions, labeled Areas B and C. They are separated from the larger areas by the existing roadway in one case, and by an earthen berm in the other. Exh. 76, P 19-20. These are isolated wetlands protected under local regulations, but not under the WPA. Exh. 73, P 21. The first small isolated wetlands area, Area C, is also described as "degraded" due to historic **[*40]** gravel mining practices and dumping. Exh. 76, PP 47, 68, 73. It "was a dump site for old stumps,

---

[22] Raising the floor is not in itself a significant change in the design of the development. If, however, as is likely, this change requires other changes in design, whether or not they are substantial can be determined pursuant to ***760 CMR 56.05(11)***. The developer's engineer also suggested the possibility of placing an impervious barrier between the pond and the basin to "prevent groundwater migration to the … basin." Exh. 89, P 50. Depending on what the ramifications of such a barrier are, this, too, could possibly be a substantial change.

as evidenced by the rotting remains of the root systems." Exh. 76, P 20. This area is within proposed stormwater Basin 7P, and thus, as described above, the developer proposes to completely re-engineer and re-grade the area, including this entire small wetlands area. Exh. 76, P 47; Exh. 6, sheet 13. As noted, construction debris will be removed, and the area will be excavated to increase flood storage capacity. Exh. 76, P 49. The entire basin will "be re-vegetated with indigenous [plant] species," which will "restore the function of the degraded [wetland] both in terms of surface water management and as wildlife habitat." Exh. 76, PP 51, 74; 87, P 23; 89, P 49. The developer's expert's opinion is that the stormwater basin "will be an enhancement of the small pocket wetland...." Exh. 87, P 26.

The Board's expert provided little in the way of concrete objections to these design plans. In a single paragraph, he simply described the work, characterized it as "complete destruction" of the wetland, and stated, "It is imperative that the standards that apply to these locally and state regulated **[*41]** areas be thoroughly evaluated [to determine] whether the stormwater system can be constructed without adversely affecting the interests protected under the local bylaw." Exh. 77, P 22. We find that this, too, is insufficient to prove the existence of a local concern that outweighs the regional need for housing.

The second isolated area, Area B, is across the existing road to the west of Area C. It is outside of the area in which Basin 7P will be constructed, and will not be disturbed. Exh. 6, sheet 13; also see Exh. 76, P 47. The Board's expert expressed no concerns with regard to it. See Exh. 76, PP 13-23.

Review of Final Plans - Lastly, we note that while the broad outlines of the developer's proposal for wetlands restoration are clear, the Board's expert is correct that detailed specifications have yet to be provided. See, e.g., Exh. 77, PP 19, 20. In some cases such as this--where the wetlands issues are fairly complex--developers might have chosen to present more detailed plans, even though only preliminary plans are required. See *760 CMR 56.05(2)(a)*, (2)(f). Since that was not the case here, lest there be any confusion, the parties should be aware **[*42]** that while we hereby approve the overall preliminary wetlands plan under the local bylaw, specific designs must be reviewed by the Holliston conservation agent under the wetlands bylaw prior to construction, and the developer must appear before the Conservation Commission under the state WPA. See *760 CMR 56.05(10)(b)*.

B. Stormwater Management

Stormwater management is regulated by the Holliston Board of Health Stormwater and Runoff Regulations and the Holliston Site Plan Review Regulations. See Exh. 35; 36. The town uses these regulations in its "discretionary permit process" that applies in both wetlands and upland areas. Exh. 78, P 9; 36, Â§ 7.3.3(a), (d). The most significant way in which the local requirements exceed state requirements appears to be that not only must post-development peak discharge rates not exceed pre-development rates, but in addition, post-development discharge volume must be held constant or reduced. Exh. 78, P 9; Exh. 35. Also, slopes in stormwater basins are not permitted to be steeper than four to one, as compared to the state limit of three to one. Exh. 35. There may also be enhanced water quality standards, though these **[*43]** were not specified by the Board. See Exh. 78, P 9.

The parties focused largely on the proposal's primary stormwater management features: the detention basins, described above, which are "constructed wetland areas." See Exh. 89, P 49. The developer's expert civil engineer testified that the plans admitted into evidence are preliminary plans that comply with the 1997 state Stormwater Management Guidelines, and will be redesigned to comply with 2008 revisions in state requirements. Exh. 73, PP 90-93; 111(b); 89, P 46. He testified about various specific aspects of the design, and indicated that in several respects the preliminary plans will need modification. Â [23] Exh. 73, PP 94-106.

---

[23] The preliminary nature of the plans created some confusion. For instance, the Board's expert was concerned that a fence was not provided around the stormwater basin and that drywells had not been designed to capture roof water. Exh. 77, P28, 29. But developer's expert testified on rebuttal that fences, though not required, "could be provided if needed," and that "[l]ocalized infiltration of roof top runoff will be provided at each of the proposed buildings." Exh. 89, PP 45, 48. Similarly, though further field work will be required, the preliminary design calculations are based not only on USGS Soil Survey information, but also "preliminary onsite test pit data." Exh. 89, P 44; cf. Exh. 77, P 26.

All of the Board's arguments are based on the testimony of its expert professional engineer and planner, Thomas Houston. Â [24] See Board's Brief, **[*44]** pp. 50-63. This testimony and the arguments articulated by the Board in its brief focus almost entirely on whether the stormwater system will function as designed. See, e.g., Board's Brief, p. 51, P 21; p. 53, P 25; Exh. 77, PP 25-42. The testimony attempts to show either that the design does not comply with state standards or that compliance with state standards is not feasible. See, e.g., Exh. 77, PP 31, 33, 35. It provides considerable detail, particularly with regard to the elevation of various design features and the separation of those features and the basins themselves from groundwater. See, e.g., Exh. 77, PP 25, 26, 31-35, 38-40. In contrast, the developer's expert, James Hall, by and large chose not to respond to the specific allegations, but simply elaborated briefly on the developer's commitment to complying with state standards. Exh. 87, PP 43-52.

The testimony does not provide an explicit and unambiguous explanation of the difference of opinion between these two qualified experts, but the reason for the disagreement is clear by implication. The Board's expert based his testimony on the assumption that the basins are upland basins requiring two feet of separation between **[*45]** their bottoms and groundwater. See Exh. 77, P 25. But the basins will not be in an upland area since the developer's expert designed them as "constructed wetland areas," which will be at or near groundwater, and in his opinion are approvable under state standards. Exh. 89, P 49. A more explicit indication of the misunderstanding appears in the testimony concerning wetlands protection, discussed above. Alteration of a small, isolated wetland would not be permissible if it were to be replaced by an upland detention basin, but here the existing wetland is being incorporated into a much large constructed wetland. And, as the developer's wetlands expert pointed out, the Board's expert "fail[ed] to understand that no wetlands will be destroyed...." Exh. 87, P 26.

Having reviewed the testimony of both stormwater experts, we find that the developer has proven that the proposed development will comply with state stormwater standards. Â [25] This proof of compliance with state standards is sufficient to establish **[*46]** the developer's *prima facie* case. *760 CMR 56.07(2)(a)(2)*; *Canton Property Holding, LLC v. Canton*, No. 03-17, slip op. at 21-24 (Mass. Housing Appeals Committee Sep. 20, 2005) (*prima facie* case established even though "depth, sizing, location and configuration of the detention basins might require revision").

As noted above, little if any of the Board's testimony attempted to meet its burden of proof by establishing damage to local concerns that might outweigh the regional need for affordable housing. For instance, even though there was no clear testimony with regard to the volume of stormwater runoff, we can infer that the design will not meet the strict local requirement that the volume as well as rate of runoff be limited. That is, the developer's expert testified only that the design will ensure that "post-development peak discharge rates do not exceed pre-development peak discharge rates." Exh. 73, P 95. But, assuming that the volume of runoff does not meet the local standard, there is no indication that this will do any harm. In fact, any significant harm appears unlikely since the site is immediately adjacent to a very large existing wetland. **[*47]**

The only area in which there was any testimony about non-compliance with local requirements was with regard to the slope of the sides of the stormwater basins and their depth. But the Board's expert testified only that the design calls for a three-to-one slope (which is permissible under state standards), that they are deeper than the local standard of three feet, and that therefore they "do not comply" with local reculations. Exh. 77, PP 36, 41. There is no evidence of harm which might outweigh the regional need for affordable housing.

We conclude that the Board has not met its burden of proof with regard to the design of the development's stormwater management system.

C. Open Space

At least 15 acres of the site, or nearly 30% of it, will be open and undeveloped. Exh. 71, P 15; cf. Exh. 73, P 43. Much of this will be wooded wetlands, although there are some upland wooded areas and a two-and-one-half-acre

---

[24] The town planner testified only as to the applicability of town requirements, not as an expert on stormwater. Exh. 78, P 9.

[25] Although the final design must comply with state law is required in any case, so that there will be no confusion, we include a condition to that effect, and this will ensure that if the Board's expert is correct in any of his specific critiques, those problems will be rectified. See Â§ VI-2(d), below.

open area suitable for playing fields which is located in the southeast corner of the site above the wastewater leaching field. Exh. 6; 10; 71, P 15; 89, PP 19-20. There will also be recreation facilities, including two tennis courts, **[*48]** Â [26] at least two playgrounds, two gazebos, and paths for walking and bicycling. Â [27] Exh. 10; 71, P 15; 73, PP 36-43. The developer's civil engineer testified not only that this open space meets generally recognized standards, but also that it meets the requirements of the Holliston Zoning Bylaw. Exh. 89, P 3. We find that it is unnecessary to determine definitively whether the design complies with the bylaw, but in any case, rule that this expert's testimony in full is sufficient to establish a *prima facie* case pursuant to *760 CMR 56.07(2)(a)(2)*.

First, we have previously noted that "[t]hough the purpose of the Comprehensive Permit law is to permit waiver of unnecessarily restrictive local requirements, it is nevertheless instructive to consider the requirements" that the town has put in place for other developments **[*49]** similar to the one proposed. See *L.A. Associates, Inc. v. Tewksbury*, No. 03-01, slip op. at 13-14, (Mass. Housing Appeals Committee Feb. 1, 2005). The Holliston Zoning Bylaw suggests that the total open space in a cluster development should in no case be "less than 15% of the total land area of the tract...." Â [28] Exh. 32, Â§ V-H(2)(j). The Holliston town planner argued that this 15% figure is not a fair benchmark since the bylaw provides an alternate way of calculating required open space. That alternative, however, is entirely unrealistic for affordable housing. It assumes individual homes built on nearly one-acre lots. That is, as the town planner acknowledged, it would require that each housing unit be placed on a 40,000 square foot lot and "to achieve 200 [housing] units… with the minimum required open space, over 210 acres would be required." Exh. 78, P 8(1). In summary, since nearly 30% of this development is open space, the bylaw itself suggests that the amount of open space is adequate. **[*50]**

More important is the testimony introduced by the Board from a well qualified professional planner. See Exh. 79, PP 15-17; Tr. III, 58-82. Based upon an estimate of between 567 and 612 residents living in the development, she prepared a chart of recommended recreational facilities. See Exh. 79, P 16. As seen in Table 1, it is remarkably similar to what is being proposed:

Table 1

Proposed	Recommended by the Board's Expert
Â 2 playgrounds	1 tot lot & 1 playground
Â open area (2 1/2 a.)	common space with amenities (3-5 a.)
Â 2 gazebos	--
Â 2 tennis courts	1 or 2 tennis courts
Â --	basketball court
Â walking trails (> 1/2 mile)	walking trails (minimum: 1/2 mile)

As seen in the table, both parties suggested two play areas. The developer's plans show only one such area, and therefore need to be revised to add a playground for elementary school children to conform to the actual proposal. See Exh. 10 In addition, the play area that *is* shown on the plans, which appears to be a small tot lot, is poorly located. The developer, in consultation with the Holliston town planner, should give serious consideration to enlarging the tot lot and placing it in a safer location--one in which children **[*51]** playing are visible from the rear windows of homes. (A triangular open space located 400 feet due west of the current location would appear to be ideal.)

---

[26] The developer originally proposed either tennis courts or a putting green.

[27] The latest plans, prepared May 22, 2006, (Exhibit 10), show tennis courts rather than a putting green, one playground, two gazebos, and paths. The remaining playground(s) will be added to the plans as per the testimony of the developer's principal.

[28] We have little doubt that this is intended to include wetlands. The Apartment District section of the bylaw refers to "open space *including* wooded and wetland areas." Exh. 32, Â§ V-G(2)(c)(4) (emphasis added).

The large open area proposed by the developer is slightly smaller than that suggested by the Board's expert, but that is more than compensated for by the two gazebos proposed for other parts of the site.

The proposal lacks a basketball court, but that can easily be added in the vicinity of the open area or, better, in some other location on the site. We will so require by condition. See Â§ VI-2(e), below.

We conclude that the proposal provides adequate open space.

D. Traffic

The Board raised two issues with regard to traffic--that vehicular sight distance at the entrances will be inadequate, and that the configuration of the internal roadways is inadequate for emergency access. Â [29] Pre-Hearing Order, Â§ IV-5(f). The developer's engineering design firm conducted a traffic study, and two of its expert witnesses--its civil engineer and its traffic **[*52]** engineer--testified that under standards issued by the American Association of State Highway and Transportation Officials (AASHTO) the sight distances at the entrances will be adequate and that emergency vehicles will have access throughout the site. Exh. 46, pp. 18, 28; Exh. 73, P 25-27; 75, P 145. This is sufficient to establish the developer's *prima facie* case. *760 CMR 56.07(2)(a)(2)*.

Sight Distance -- The Board argues that under AASHTO standards the recommended intersection sight distances are not met at either of the two entrances to the development. Exh. 77, PP 47-49. Specifically, the Board's expert notes that at the northern entrance, looking north, the intersection sight distance should be 467 feet, but that only 410 feet of sight distance is available. Exh. 77, P 47. At the southern entrance, looking south, the intersection stopping distance should be 467 feet, but only 400 feet of sight distance is available. Exh. 77, P 48.

The developer's expert was in substantial agreement with the Board's expert with regard to the measured conditions, finding that sight distance at both entrances was 400 feet. **[*53]** Â [30] Exh. 75, PP 69,70; Exh. 46, p. 16. But he delved into the question of sight distance in considerably more detail. See Exh. 75, PP 57-87. He noted that two separate sight distance criteria are used to evaluate intersections--intersection sight distance and stopping sight distance. Exh. 75, P 58. Specifically, AASTHO *recommended intersection* sight distances "are based upon not inconveniencing traffic," while *minimum stopping* sight distances provide for safe stopping by vehicles on Marshall Street. Exh. 75, PP 130-131; 86, PP 19, 22. He agrees that the recommended intersection sight distance is 467 feet. Exh. 46, p. 18; 75, P 80; 86, PP 19, 22. But he concludes that because the sight distances exceed the minimum stopping standard of 327 feet, they "are adequate to provide safe intersections." Exh. 46, p. 18; 75, PP 83, 131; 86, PP 20, 23; also see Exh. 47, p. 4, P 10.

We credit the testimony of the developer's witnesses, and conclude that because stopping sight distances will be adequate, the entrances to the **[*54]** development will be safe.

Emergency Access -- The Board and its experts argue that there is not adequate emergency access to all parts of the development because of dead-end streets that "exceed the local safety standard of 500 feet and 12 dwelling units per dead-end road." Board's Brief, pp. 64, 69-70; Exh 77, P 53.

The development roadways are a combination of loops and dead ends. There are three access points on Marshall Street--two entrances and an emergency access roadway. Exh. 73, P 20-21; Exh. 10. Although the majority of housing units are not on dead-end streets, two fairly long roadway segments do have dead ends. Each of these--one near the center of the site serving 30 housing units and the other at the northern end of the site with 32 units--is

---

[29] There was testimony on broader questions concerning the volume of traffic and levels of service on local roads and intersections and concerning the existing conditions with regard to sight distance at the intersection of Prentice and Marshall Streets. See, e.g., Exh. 77, PP 43-46, 50-52. We will not consider these, however, since they were not raised in the Pre-Hearing Order. See Pre-Hearing Order, Â§ IV-2 (issues raised in the Pre-Hearing Order "are the sole issues in dispute...").

[30] At a later point, the witness testified that the sight distance at the northern entrance was 410 feet. Exh. 75, P 81. We assume that the lower figure is correct.

between 600 and 700 feet long. Â 31[1] Exh. 10 (by scaling). There is little evidence with regard to topography or other features of these roadways.

We agree with the Holliston fire chief that "[a]s a general rule,… long, singleaccess roadways should **[*55]** be avoided due to the potential for blockages" due to fallen trees, automobile crashes, or other unusual circumstances which may results in delays in emergency personnel reaching homes isolated at the end of the street." See Exh. 80, PP 4-6. Among the three leading cases of this sort that we have considered, we have twice found the dead-end roadways to be sufficiently hazardous to justify denial of a comprehensive permit. See *O.I.B. Corp. v. Braintree*, No. 03-15, slip op. at 8-11 (Mass. Housing Appeals Committee Mar. 27, 2006) (1500-foot single-access roadway to 100 units of housing found inadequate); *Lexington Woods, LLC v. Waltham*, No. 02-36, slip op. at 8-20 (Mass. Housing Appeals Committee Feb. 1, 2005) (steep, winding, 1000-foot single-access roadway to 36-unit development found inadequate); cf. *Capital Site Management Associates Ltd. Partnership v. Wellesley*, No. 89-15, slip op. at 28-35 (Mass. Housing Appeals Committee Sep. 24, 1992) (steep, 200-foot roadway to 33-unit development approved).

But the dead-end streets in this case are difficult to evaluate. In general terms, neither is the length of the streets and the number of houses located on them so great as **[*56]** to unquestionably create a hazardous situation, nor are they so short and sparsely developed so as to be of no concern. Further, we have little specific information to rely on. Few details concerning topography or other design criteria were explored in the testimony, nor did either party present evidence concerning the scientific or statistical aspects of the risk involved. Thus, in our judgment, the Board has not presented sufficient evidence to meet its burden of proving that the risk presented by these dead-end streets outweighs the regional need for affordable housing. Â [32]

The Board and the fire chief also argue that school-bus stops are inconveniently located, and that as a result parents may drive their children to the bus stops and block emergency vehicles with their parked cars. Board's Brief, pp. 68, 70; Exh. 80, P 8. Though this argument appears unconvincing on its face, we need not analyze it since the developer has agreed to locate bus stops in more central locations. Exh. 89, P42; also **[*57]** see Â§ VI-2(f), below. Â [33]

V. ATTORNEYS FEES

The developer has filed a motion for reimbursement of attorney's fees. The Board's rules provide that "[t]he Board may hire outside consultants for review and analysis of any application when the board determines it appropriate," and the cost is to be borne by the developer. Â [34] At the first hearing before the Board, in March 2005, counsel for the Board informed the developer that an escrow account would need to be established to pay consultant fees. Exh. 71, P 118. Norton Affidavit, Attach. 2 (filed Jul. 17, 2007). The developer agreed to pay between $ 10,000 and $

---

[31] Exhibit 10, a site plan prepared by the developer's engineer, has a notation that says. "Length of Dead End = 1,613'." This is incorrect.

[32] It would be a simple matter to reconfigure the dead-end streets to create safer, looped roadways. See Exh. 10. That is, the turn-around loop at the end of the dead-end street in the center of the site is near the turn-around loop at the end of a similar, but much shorter street. By eliminating the turn-around loops and adding a new segment of roadway about 500 feet long, these two streets could be joined, creating a large continuous loop. At the northernmost part of the site, the turn-around loop at the end of the second long dead end could simply be replaced by an additional emergency access road intersecting with Marshall Street, which is only about 100 feet away. Further, it appears that the long emergency access road at the southern end serves no purpose; if it were eliminated, the only housing units that would not still be accessible by two alternate routes are the six units that are actually located on it. Overall, the site design shows little creativity, and though it meets minimum standards, there are a number of ways in which the configuration of roadways and housing units could be improved. Any such changes that the developer may propose are subject to the procedures in ***760 CMR 56.05(11)***.

[33] A similar argument--that vehicles maneuvering out of tandem parking spaces might block emergency vehicles--was made by the Board's expert. Exh. 77, P 54. It was not briefed, and therefore is waived. See *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994), citing *Lolos v. Berlin, 338 Mass. 10, 13-14 (1958)*.

[34] The rules are entitled "Rules for the Issuance of a Comprehensive permit, G.L. c. 40B," and "are authorized by G.L. c. 40B, sec. 21; G.L. c. 44, sec. 53G; and 760 CMR 31.02(3)."

15,000 into an escrow account to pay consultants, including the Board's counsel. Exh. 71, PP 121, 122. The developer alleges that at that time expenses to be paid to counsel were "presumed to be limited to **[*58]** approximately $ 5,000 based upon [counsel's] representation." Exh. 71, PP 123. The minutes of the meeting indicate only that "[the developer] agreed to fund attorney's fees." Members of the Board and town officials who were present state that the Board did not "make any representation to the applicant that the initial escrow account would be sufficient to cover expenses associated with technical assistance, including legal assistance. In fact, the account was established 'subject to replenishment.'" Affidavits of Carey, Dellicker, Donovan, and Sherman, PP 6-9 (Board's Opposition to Motion for Reimbursement, Attach. B, C, D, E (filed Jul. 27, 2007)). Although it is unlikely that the Board could have required payment of most of the attorney's fees, the Comprehensive Permit Law does not prohibit the developer from voluntarily agreeing to pay such fees. See *Attitash Views, LLC v. Amesbury*, No. 06-17, slip op. at 14 (Mass. Housing Appeals Committee Summary Decision Oct. 15, 2007), *aff'd*, No. 2007-5046 (Suffolk Super. Ct. Jan. 7, 2009), and cases cited. Based upon the minutes, and supporting affidavits, we find that there was no explicit limitation placed upon the amount of those **[*59]** fees that the developer agreed could be reimbursed. The motion for reimbursement is therefore denied.

VI. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Holliston Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development, consisting of 200 total units, shall be constructed substantially as shown on site plans by Coler & Colantonio, Inc. (Cedar Ridge Estates, January 19, 2005, rev'd May 22, 2006)(Exhibit 6, as revised by Exhibit 10), landscape plans by Coler & Colantonio, Inc. (8/2/06)(Exhibit 13), architectural plans by Egnatz Associates, Inc. (Exhibit 13), and as described in this decision.

(b) Prior to beginning construction, the developer shall, as described more fully in the February 20, **[*60]** 2007 Ruling on Board's Motion to Dismiss in this matter, establish ownership of the 2.55-acre parcel within the site and that easement rights to a bridle path are consistent with the development plans.

(c) The floor of stormwater Basin 4P shall be raised at least one foot, unless a hydrogeologic or other study shows that there is no risk of dewatering nearby wetlands or that the risk can be addressed by other means.

(d) All design features shall comply with the state Wetlands Protection Act, including all DEP Stormwater Management Guidelines, subject to review by the Holliston Conservation Commission and the Massachusetts Department of Environmental Protection.

(e) Recreational facilities shall be provided as proposed and further described or modified in section IV-C, above.

(f) Unless notified by the Board that the current locations of the two proposed bus stops are acceptable, the bus stops shall be relocated to central locations on looped roadways.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, Â§ 23 and *760 CMR 56.07(6)(a)*, this decision shall for all purposes be deemed the action of the Board.

4. **[*61]** Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency or project administrator may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) Construction and marketing in all particulars shall be in accordance with all presently applicable state and federal requirements, including, without limitation, fair housing requirements.

(e) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56. **[*62]** 00 and DHCD guidelines issued pursuant thereto.

(f) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(g) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, Â§ 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Date: January 12, 2009

MA Housing Appeals Committee

End of Document